

NAVAJO NATION CODE ANNOTATED

**Title 5A**

**Navajo Uniform Commercial Code**

**Note.** The numbering of Navajo Uniform Commercial Code sections remains as close to the original Uniform Commercial Code as possible to maintain the principle of uniformity.

**Description of Articles**

**Article 1**

Article 1 of the UCC is a general article which defines terms which are used throughout the UCC. (This section of the Navajo UCC has been substantially unchanged with the exception of the addition of § 1-110 which excludes certain types of barter transactions from the Navajo UCC.)

**Article 2**

Article 2 of the UCC governs the sale of personal property ("goods"). Goods means all things which are moveable at the time of their identification in the contract of sale. Goods do not include: (i) intangibles, such as patent rights; (ii) real property, such as houses and land; or (iii) services such as legal or accounting work.

Article 2 codifies contract law as applied to the sales of personal property. It deals with the four basic questions of contract law: (1) Is there sufficient agreement to be a contract?; (2) What are the terms of the contract?; (3) Have the parties properly performed their duties under the contract?; and (4) What are the remedies for breach of those duties? Although Article 2 establishes some rules which apply to all sales contracts, for the most part the rules in Articles 2 apply only where the parties themselves have not made their intentions clear. For example, one rule which applies to all contracts under Article 2 is that contracts for goods valued at more than five hundred dollars (\$500.00) must be in writing to be enforceable (the Navajo UCC exempts certain barter transactions from this requirement under § 1-110).

Article 2 governs the formation of the contract, such as when an offer to sell or purchase has been made, how to change such an offer and how to accept it. For example, if a business makes an offer by mail to sell shoes and does not specify how the offer can be accepted, the offer can be accepted by any "reasonable means". Thus, the offer could be accepted by mail, telegram or even a telephone call if those methods were found to be reasonable.

Article 2 governs certain of the terms in a contract if the parties have not agreed on that term or have failed to provide for a situation. These terms

include price, time of delivery, the point at which the risk of loss passes, warranties concerning the goods and remedies for failure to perform. For example, if the parties fail to agree upon or forget to include the place and time of delivery for the goods, the UCC states that the goods will be delivered at the seller's place of business and the time allowed for delivery will be "a reasonable time" as determined by prior dealings between the parties and industry custom.

Article 2 also governs the performance of the obligations under the contract. The questions which arise in this area concern the seller's obligation to deliver "conforming" goods, the buyer's obligation to accept "conforming" goods, the buyer's right to inspect the goods and the buyer's obligation to pay for the goods. For example, unless the parties agree otherwise, the buyer is obligated to pay for the goods at the time and place the goods are received.

Finally, Article 2 sets out the remedies for either party upon the failure of the other party to adequately perform its obligations. The remedies must deal with situations, for the seller, in which the buyer refuses to accept delivery, cancels the order, refuses to pay or becomes insolvent. For the buyer, these situations include those in which the seller has failed to deliver, has delivered "non-conforming" goods, or has delivered goods which causes an injury. For example, unless otherwise agreed by the parties, if during the course of several shipments the buyer refuses to make a payment when due: (i) the seller may withhold future delivery; (ii) may resell the remaining goods and sue to recover damages; or (iii) may sue to recover the full purchase price.

### **Article 3**

Article 3 of the UCC deals with negotiable instruments, which include drafts, business and personal checks, certificates of deposits and promissory notes. Article 3 does not apply to money, documents of title or investment securities such as stocks and bonds. Commercial paper is frequently used as a cash substitute. Thus, a check could be used as a medium of payment instead of cash or a note maybe used as a deferred methods of payment.

Article 3 sets out the obligations and liabilities of the persons who issue negotiable instruments and those who are involved in their transfer. In the case of a check, they would include the person who writes the check, his bank, the banks who process the check, the bank which finally accepts the check and the person or company to whom the check is written. The type of situations for which Article 3 sets out rules include those in which the check is drawn on insufficient funds or the signature is forged.

### **Article 9**

Article 9 of the UCC governs the creation and enforcement of security interests. A security interest is an interest of a creditor in specific property ("collateral") owned by a debtor. A security interest permits the secured creditor after default to sell particular collateral and to apply the proceeds of its sales to the payment of his secured debt. In contrast to a secured creditor, an "unsecured" creditor (i.e., a creditor without a security interest) has only general rights against the property of the debtor after the

secured creditors have been paid, and an unsecured creditor has no rights against any particular property of a debtor. The most common examples of a security interest arise from the purchase of a vehicle such as a car or tractor by an individual. However, security interests are very important for business in financing the acquisition of capital equipment, such as machines, as well as the purchasing of inventory and selling goods on credit.

Article 9 facilitates the purchase of goods by improving the chances of a creditor's being repaid and thus encouraging him to sell goods on credit or, in the case of a bank, to lend money. It represents a comprehensive scheme of regulation of security interests in personal property. Article 9 does not regulate transactions in land or improvements. The Article establishes a central filing system so that creditors can determine the extent of the obligations of a debtor to other creditors and establishes procedures for a creditor to enforce a security interest in the case of a debtor's failure to pay. (The enactment of this article does not affect Navajo repossession law.)

A large part of Article 9 is concerned with establishing the priority of secured parties against each other or other creditors of the debtor. For example, if two creditors are depending on the same "collateral" of the debtor to "secure" their loans, then, generally, the first creditor to "file" a notice of his interest will have the right to have his loan repaid first from the sale of the collateral. However, Article 9 establishes special priority rules for secured parties who loan the money to "purchase" the collateral. This rule encourages the purchase of capital equipment by giving priority protection to loans or credit extended for the initial purchase of goods.

#### **History**

CJA-1-86 January 29, 1986.

**Note.** A "Background and Executive Summary of the Proposed NUCC" which included "The NUCC Development Process" and "The Purpose of the NUCC" was incorporated in CJA-1-86. However, for codification purposes, only the "Description of Articles 1, 2, 3 and 9" has been provided.

#### **Article 1. General Provisions**

##### **Part 1. Short Title, Construction, Application, and Subject Matter of the Code**

##### **§ 1-101. Short title**

This Navajo Uniform Commercial Code (5A N.N.C. § 1-101 *et seq.*) shall be known and may be cited as the "Navajo Uniform Commercial Code".

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** The Code makes no substantive change to this section except deleting

references to Articles not adopted by the Navajo Nation.

**Commentary.** Each Article of the Code (except this article) may also be cited by its own short title. See §§ 2-101, 3-101 and 9-101.

#### **Special Plain Language Comment**

This provision provides a method of naming parts of the Navajo Uniform Commercial Code (the "Code").

#### **§ 1-102. Purposes; rules of construction; variation by agreement**

A. The Code shall be liberally construed and applied to promote its underlying purposes and policies.

B. Underlying purposes and policies of the Code are:

1. To simplify, clarify and modernize the law governing commercial transactions;

2. To permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and

3. To make uniform the law of commercial transactions throughout the Navajo Nation.

C. The effect of provisions of this Code may be varied by agreement, except as otherwise provided in this Code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Code may not be disclaimed by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

D. The presence in certain provisions of this Code of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (C).

E. In this Code unless the context otherwise requires:

1. Words in the singular number include the plural, and in the plural include the singular; and

2. Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

F. The "Official Comments" and the "Special Plain Language Comments" are informational only and not binding on the courts, since they do not purport to be comprehensive statements of the meaning and effect of the statute to which they refer.

#### **History**

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** The Code adds a new section, "Special Plain Language Comments", to facilitate use of the Code, but new Subsection (F) makes clear that such comments and the Official Comments are not the law.

**Commentary.** 1. Subsections (A) and (B) are intended to make it clear that:

This Code is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Code to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Code requires that its interpretation and application be limited to its reason.

The Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as well as of the Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

2. Subsection (C) states affirmatively at the outset that freedom of contract is a principle of the Code: "the effect" of its provisions may be varied by "agreement". The meaning of the statute itself must be found in its text, including its definitions, and in appropriate extrinsic aids; it cannot be varied by agreement. But the Code seeks to avoid the type of interference with evolutionary growth found in *Manhattan Co. v. Morgan*, 242 N.Y. 38, 150 N.E. 594 (1926). Thus, private parties cannot make an instrument negotiable within the meaning of Article 3 except as provided in § 3-104; nor can they change the meaning of such terms as "bona fide purchaser", "holder in due course", or "due negotiation", as used in this Code. But an agreement can change the legal consequences which would otherwise flow from the provisions of the Code. "Agreement" here includes the effect given to course of dealing, usage of trade and course of performance by §§ 1-201, 1-205 and 2-208; the effect of an agreement on the rights of third parties is left to specific provisions of this Code and to supplementary principles applicable under the next section. The rights of third parties under § 9-301 when a security interest is unperfected, for example, cannot be destroyed by a clause in the security agreement.

This principle of freedom of contract is subject to specific exceptions found elsewhere in the Code and to the general exception stated here. The specific exceptions vary in explicitness: the Statute of Frauds found in § 2-201, for example, does not explicitly include oral waiver of the requirement of a writing, but a fair reading denies enforcement to such a waiver as part of the "contract" made unenforceable; § 9-501(C), on the other hand, is quite explicit. Under the exception for "the obligations of good faith, diligence, reasonableness and care prescribed by this Code", provisions of the Code prescribing such obligations are not to be disclaimed. However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the

agreement controls. In this connection, § 1-205 incorporating into the agreement prior course of dealing and usages of trade is of particular importance.

3. Subsection (D) is intended to make it clear that, as a matter of drafting, words such as "unless otherwise agreed" have been used to avoid controversy as to whether the subject matter of a particular Section does or does not fall within the exceptions to Subsection (C), but absence of such words contains no negative implications since under Subsection (C) the general and residual rule is that the effect of all provisions of the Code may be varied by agreement, subject to the prior comments.

4. Subsection (F) is intended to clarify the status of the "Special Plain Language Comments". These comments are only to assist the lay reader and are not to be used by parties to interpret the Code. The Official Comments have been adapted from the "Official Comments" of the Commissioners On Uniform State Laws to the corresponding sections of the Uniform Commercial Code as adopted by the States. The Official Comments to this Code do not attempt to describe the respects in which they depart from those other "Official Comments".

#### **Special Plain Language Comment**

This section describes the basic principles of the Code and how it relates to other laws. The section also describes generally the extent to which the Code may be varied by agreement by the parties to a contract.

#### **Cross References**

N.U.C.C. § 1-110.

#### **§ 1-103. Supplementary general principles of law applicable**

Unless displaced by the particular provisions of this Code or other applicable Navajo law, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions. The adoption of the Code does not preempt the consumer protection laws of the states which continue to apply to appropriate transactions pursuant to 7 N.N.C. § 204 to the extent that such laws would be applicable.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** Except as stated in this paragraph, this section is intended to have the same meaning and effect as § 1-103 of the Uniform Commercial Code as adopted by the states. In addition, since the Uniform Sales Code was never adopted by the Navajo Nation, the Navajo Nation has adopted certain statutory provisions regarding capacity to contract. The final sentence has been added to clarify the status of consumer protection laws after the adoption of the Code.

**Commentary.** 1. This section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Code.

2. The general law of capacity will be limited by any Navajo statute or ordinance which limits the capacity of a non-complying person to sue. These limits are equally applicable to contracts of sale to which such person is a party.

3. The listing given in this section is merely illustrative; no listing could be exhaustive. Nor is the fact that in some sections particular circumstances have led to express reference to other fields of law intended at any time to suggest the negation of the general application of the principles of this section.

4. Except as provided in § 1-110, the Code does not preempt the consumer protection laws of the states which apply to a transaction pursuant to 7 N.N.C § 204. However, the application of such state laws to transactions governed by this Code may be varied or preempted by subsequent Navajo legislation.

#### **Special Plain Language Comment**

The Code does not settle all questions in commercial law. A person or a court must depend on other bodies of law to aid in the interpretation of its provisions.

#### **§ 1-104. Construction against implicit repeal**

This Code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-104 of the Uniform Commercial Code as adopted by the states.

**Commentary.** This section is intended to express the policy that no Code which bears evidence of carefully considered permanent regulative intention should lightly be regarded as impliedly repealed by subsequent legislation. This Code, carefully integrated and intended as a uniform codification of permanent character covering an entire "field" of law, is to be regarded as particularly resistant to implied repeal.

#### **Special Plain Language Comment**

The Code should not be considered repealed by later laws unless no other interpretation is possible.

**§ 1-105. Territorial application of the Code: parties' power to choose applicable law**

A. Except as provided hereafter in this section, when a transaction bears a reasonable relation to the Navajo Nation and also to another state or nation, the parties may agree that the law either of the Navajo Nation or of such state or nation shall govern their rights and duties. Failing such agreement, this Code applies to transactions bearing an appropriate relation to the Navajo Nation.

B. Where one of the following provisions of this Code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified: Rights of creditors against sold goods. Section 2-402. Perfection provisions of the Article on Secured Transactions. Section 9-103.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-105 of the Uniform Commercial Code as adopted by the states, except that deletions were made to conform the Code to the legal status of the Navajo Nation.

**Commentary.** 1. Subsection (A) states affirmatively the right of the parties to a multi-jurisdiction transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the sections listed in Subsection (B), and is limited to jurisdictions to which the transaction bears a "reasonable relation". In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily, the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a short-hand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Code is applicable to any transaction having an "appropriate" relation to the Navajo Nation. Of course, the Code applies to any transaction which takes place in its entirety in the Navajo Nation. But the mere fact that suit is brought in the Navajo Nation does not make it appropriate to apply the substantive law of the Navajo Nation. Cases where a relation to the Navajo Nation is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with the Navajo Nation and also with other jurisdictions, the question what relation is "appropriate" is left

to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus, a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-jurisdiction transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends Navajo Nation, state and even national boundaries. (Compare *Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir. 1956).) In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

4. Choice of law decisions often appropriately rest on policies of giving effect to agreements and of uniformity of result, regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (B) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9, parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filing.

6. Section 9-103 should be consulted as to the rules for perfection of security interests and the effects of perfection and non-perfection.

#### **Special Plain Language Comment**

Persons who make a commercial agreement may choose the law of either the Navajo Nation or another state or nation if their agreement has sufficient connection to the place they choose. Where the parties do not choose which law to use, the Code will apply if the transaction has enough contacts with the Navajo Nation.

What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105(1), 63 A.L.R.3d 341 (1975).

#### **§ 1-106. Remedies to be liberally administered**

A. The remedies provided by this Code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential nor special nor penal damages may be had except as specifically provided in this Code or by other rule of law.

B. Any right or obligation declared by this Code is enforceable by action unless the provision declaring it specifies a different and limited effect.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-106 of the Uniform Commercial Code as adopted by the states.

**Commentary.** Subsection (A) is intended to effect three things:

1. First, to negate the unduly narrow or technical interpretation of some remedial provisions of prior commercial statutes in other States by providing that the remedies in this Code are to be liberally administered to the end stated in the section. Second, to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages; and the Code elsewhere makes it clear that damages must be minimized. Cf. §§ 1-203, 2-706(A), and 2-217(B). The third purpose of Subsection (A) is to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more. Cf. § 2-204(C).

2. Under Subsection (B) any right or obligation described in this Code is enforceable by court action, even though no remedy may be expressly provided, unless a particular provision specifies a different and limited effect. Whether specific performance or other equitable relief is available is determined not by this section but by specific provisions and by supplementary principles. Cf. §§ 1-103, 2-716.

3. "Consequential" or "special" damages and "penal" damages are not defined terms in the Code, but are used in the sense given them by the leading cases on the subject.

#### **Cross References**

5A N.N.C. §§ 1-103, 1-203, 2-204(C), 2-701, 2-706(A), 2-712(B), and 2-716.

#### **Definitional Cross References**

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

#### **Special Plain Language Comment**

Remedies for breaking an agreement or failing to perform a promise under the Code should be applied in a way which puts both parties, as much as possible, in the same position as they would have been if the agreement had not been

breached. The Code also limits the ability to recover damages greater than the loss.

#### **§ 1-107. Waiver or renunciation of claim or right after breach**

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-107 of the Uniform Commercial Code as adopted by the states.

**Commentary.** This section makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party. Its provisions, however, must be read in conjunction with the section imposing an obligation of good faith (§ 1-203). There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to Statute of Frauds provisions and to the section of Article 2 on Sales dealing with the modification of signed writings (§ 2-209). As is made express in the latter Section, this Code fully recognizes the effectiveness of waiver and estoppel.

#### **Cross References**

5A N.N.C. §§ 1-203, 2-201 and 2-209. And see 5A N.N.C. § 2-719.

#### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Rights". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

#### **§ 1-108. Severability**

If any provision or clause of this Code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

#### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-108 of the Uniform Commercial Code adopted by the states.

**Commentary.** This is the model severability section recommended by the National Conference of Commissioners on Uniform State Laws for inclusion in all acts of extensive scope.

### **Definitional Cross References**

"Person". Section 1-201

#### **§ 1-109. Section captions**

Section captions are parts of the Code.

#### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-109 of the Uniform Commercial Code adopted by the states.

**Commentary.** To make explicit in all jurisdictions that section captions are a part of the text of this Code and not mere surplusage.

#### **§ 1-110. Special limitations on application of Code**

Notwithstanding any other provision of this Code to the contrary, this Code shall not apply to any exclusively barter transaction in which the aggregate market value of all the goods and services involved in the transaction does not exceed ten thousand dollars (\$10,000) at the time of the transaction. Such transactions shall be governed by the customs and usages of the Navajo Nation.

#### **History**

CJA-1-86 January 29, 1986.

### **Official Comment**

**Changes.** This section does not appear in the Uniform Commercial Code as adopted by the states. It has been added in order to prevent the Code from interfering in the types of transactions found in the traditional Navajo economy. This section preempts state law, including state consumer protection statutes, for these transactions which will be governed solely by the customs and usages of the Navajo Nation. See § 1-103, Comment 4.

### **Special Plain Language Comment**

This section exempts certain transactions in the traditional Navajo economy from the Code.

**§ 1-111. Administration of the NUCC; regulations**

A. The Department of Commerce within the Division of Economic Development, or its designated successor, shall be charged with the administration of this Code. Said Department is authorized to employ such personnel as may be necessary for the administration of this Code.

B. The Department of Commerce within the Division of Economic Development, or its designated successor, is authorized to promulgate, upon the review and approval of the Attorney General and the Economic Development Committee of the Navajo Nation Council, regulations regarding those matters designated to be set by regulation herein. Provided, the Department shall set forth in such regulations the specific section herein to which they relate.

**History**

CD-61-86, December 11, 1986.

**Note.** Slightly reworded for purposes of statutory form.

**Part 2. General Definitions and Principles of Interpretation**

**§ 1-201. General definitions**

Subject to additional definitions contained in the subsequent Articles of this Code which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Code:

A. "Action" in the sense of a judicial proceeding including recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

B. "Aggrieved party" means a party entitled to resort to a remedy.

C. "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Code (§§ 1-205 and 2-208). Whether an agreement has legal consequences is determined by the provisions of this Code, if applicable; otherwise by the law of contracts (§ 1-103). (Compare "Contract".)

D. "Bank" means any person engaged in the business of banking.

E. "Barter" means to exchange goods without exchanging money.

F. "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

G. "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or

forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air way bill.

H. "Branch" includes a separately incorporated foreign branch of a bank.

I. "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.

J. "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind, but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale, but does not include a transfer in bulk or as security for, or in total or partial satisfaction of a money debt.

K. "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

L. "Contract" means the total legal obligation which results from the parties' agreement as affected by this Code and any other applicable rules of law. (Compare "Agreement".)

M. "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

N. "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

O. "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

P. "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

Q. "Fault" means wrongful act, omission or breach.

R. "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this Code to the extent that under a particular agreement or document unlike units are treated as equivalents.

S. "Genuine" means free of forgery or counterfeiting.

T. "Good faith" means honesty in fact in the conduct or transaction concerned.

U. "Holder" means a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or his order or to bearer or in blank.

V. To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

W. "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

X. A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

Y. "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

Z. "Navajo Indian Country" means the territory defined in 7 N.N.C. § 254. Certain communities within the exterior boundaries of "Navajo Indian Country" are excepted from the definition of "Navajo Indian Country" if they are predominantly non-Indian in character. 7 N.N.C. § 254(D).

AA. A person has "notice" of a fact when:

1. He has actual knowledge of it; or
2. He has received a notice or notification of it; or
3. From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this Code.

BB. A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person

"receives" a notice or notification when:

1. It comes to his attention; or
2. It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

CC. Notice, knowledge or a notice of notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

DD. "Organization" includes a corporation, government or governmental subdivision, agency or tribal enterprise, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

EE. "Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this Code.

FF. "Person" includes an individual or an organization (see § 1-102).

GG. "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

HH. "Purchase" includes taking by sale, barter, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

II. "Purchaser" means a person who takes by purchase.

JJ. "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

KK. "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

LL. "Rights" includes remedies.

MM. "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of

accounts or chattel paper which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under § 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (§ 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (1) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (2) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

NN. "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

OO. "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

PP. "Surety" includes guarantor.

QQ. "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

RR. "Term" means that portion of an agreement which relates to a particular matter.

SS. "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes forgery.

TT. "Value". Except as otherwise provided with respect to negotiable instruments (§ 3-303), a person gives "value" for rights if he acquires them:

1. In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

2. As security for or in total or partial satisfaction of a pre-existing claim: or

3. By accepting delivery pursuant to a pre-existing contract for purchase; or

4. Generally, in return for any consideration sufficient to support a simple contract.

UU. "Warehouse receipt" means a receipt issued by a person engaged in the

business of storing goods for hire.

VV. "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** Except as stated in this paragraph, this section is intended to have the same meaning and effect as § 1-201 of the Uniform Commercial Code as adopted by the states. The phrase "tribal enterprise" has been added to the definition of "Organization". The word "barter" has been added to the definition of "Purchase". The definitions of the words "Barter" and "Navajo Indian Country" have been added.

**Commentary.** A-B. [Omitted]

C. "Agreement". As used in this Code the word is intended to include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provisions of the Code to displace a stated rule of law.

D-I. [Omitted]

J. "Buyer in ordinary course of business". The definition clarifies the type of person protected. Its major significance lies in § 2-403 and in the Articles on Secured Transactions (Article 9).

The reference to minerals and the like makes clear that a buyer in ordinary course buying minerals under the circumstances described takes free of a prior mortgage created by the sellers. See Comment to § 9-103.

A pawnbroker cannot be a buyer in ordinary course of business because the person from whom he buys goods (or acquires ownership after foreclosing an initial pledge) is typically an ordinary user and not a person engaged in selling goods of that kind.

K. "Conspicuous". This is intended to indicate some of the methods of making a term attention-calling. But the test is whether attention can reasonably be expected to be called to it.

L-N. [Omitted]

O. "Delivery" refers to physical possession.

P. "Document of title". By making it explicit that the obligation of designation of a third party as "bailee" is essential to a document of title, this definition clearly rejects any such result which treats a conditional sales contract as a document of title. Also the definition is left open so that new types of documents may be included. It is unforeseeable what documents may one (1) day serve the essential purpose now filled by warehouse

receipts and bills of lading. Truck transport has already opened up problems which do not fit the patterns of practice resting upon the assumption that a draft can move through banking channels faster than the goods themselves can reach their destination. There lie ahead air transport and such probabilities as teletype transmission of what may some day be regarded commercially as "Documents of Title". The definition is stated in terms of the function of the documents with the intention that any document which gains commercial recognition as accomplishing the desired result shall be included within its scope. Fungible goods are adequately identified within the language of the definition by identification of the mass of which they are a part.

The goods must be "described", but the description may be by marks or labels and may be qualified in such a way as to disclaim personal knowledge of the issuer regarding contents or condition. However, baggage and parcel checks and similar "tokens" of storage which identify stored goods only as those received in exchange for the token are not covered by this article.

The definition is broad enough to include an airway bill.

Q. [Omitted]

R. "Fungible". Fungibility of goods "by agreement" has been added for clarity and accuracy.

S. [Omitted]

T. "Good faith". "Good faith", whenever it is used in the Code, means at least what is here stated. In certain Articles, by specific provision, additional requirements are made applicable. See, e.g., § 2-103(A)(2). To illustrate, in the Article on Sales, § 2-103, good faith is expressly defined as including in the case of a merchant observance of reasonable commercial standards of fair dealing in the trade, so that throughout that Article wherever a merchant appears in the case an inquiry into his observance of such standards is necessary to determine his good faith.

U-W. [Omitted]

X. "Insolvent". The three tests of insolvency—"ceased to pay his debts in the ordinary course of business", "cannot pay his debts as they become due", and "insolvent within the meaning of the federal bankruptcy law"—are expressly set up as alternative tests and must be approached from a commercial standpoint.

Y. "Money". The test adopted is that of sanction of government, whether by authorization before issue or adoption afterward, which recognizes the circulating medium as a part of the official currency of that government. The narrow view that money is limited to legal tender is rejected.

Z. "Navajo Indian Country". This definition was added to clarify the scope of the Code.

AA. "Notice". Under the definition a person has notice when he has received a notification of the fact in question. But by the last sentence the Code leaves open the time and circumstances under which notice or notification may cease to be effective. Therefore, such cases as *Graham v. White-Phillips Co.*, 296 U.S.

27, 56 S.Ct. 21, 80 LEd. 20 (1935), are not overruled.

BB. "Notifies". This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare "Send". When the essential fact is the other party's receipt of the notice, that is stated. The second sentence states when a notification is received.

CC. This makes clear that reason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department P only from the time when it was or should have been communicated to the individual conducting that transaction.

DD. "Organization". This is the definition of every type of entity or association, excluding an individual, acting as such. The definition of "organization" given here includes a number of entities or associations not specifically mentioned in prior definition of "person", namely, government, governmental subdivision (including tribal enterprise) or agency, business trust, trust and estate.

EE. "Party". Mention of a party includes, of course, a person acting through an agent. However, where an agent comes into opposition or contrast to his principal, particular account is taken of that situation.

FF. "Person". See Comment to definition of "Organization". The reference to § 1-102 is to Subsection (E) of that section.

GG. [Omitted]

HH. "Purchase" includes acquisition of property by barter. Barter transfers of property within the "traditional economy" of the Navajo People are purchases under this Code. See also § 1-110.

II. [Omitted]

JJ. "Remedy". The purpose is to make it clear that both remedy and rights (as defined) include those remedial rights of "self help" which are among the most important bodies of rights under this Code, remedial rights being those to which an aggrieved party can resort on his own motion.

KK. [Omitted]

LL. "Rights". See Comment to "Remedy".

MM. "Security Interest". The present definition is elaborated, in view especially of the complete coverage of the subject in Article 9. Notice that in view of the Article the term includes the interest of certain outright buyers of certain kinds of property. The last two sentences give guidance on the question whether reservation of title under a particular lease of personal property is or is not a security interest.

NN. "Send". Compare "notifies".

OO. "Signed". The inclusion of authentication in the definition of "signed" is

to make clear that as the term is used in this Code a complete signature is not necessary. Authentication maybe printed, stamped or written; it maybe by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. The question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing.

PP-RR. [Omitted]

SS. "Value". Commercial usage has tended to define value as any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (A), (B) and (D) in substance continue the definitions of "value" in such commercial usage. Subsection (C) makes explicit that "value" is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingency into a fixed obligation.

This definition is not applicable to Article 3. A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is "immediately available" within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved.

TT. "Warehouse receipt". Receipts issued by a field warehouse are included, provided the warehouseman and the depositor of the goods are different persons.

#### **Special Plain Language Comment**

When reading any sections in this Code, it is very important to check to see if any of the terms are defined and to read the definitions of those terms. Unless one reads the definitions, the full meaning of a statute may not be understood.

#### **§ 1-202. Prima facie evidence by third party documents**

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-202 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by participants in commercial dealings.

2. This section is concerned only with documents which have been given a preferred status by the parties themselves, who have required their procurement in the agreement, and for this reason the applicability of the section is limited to actions arising out of the contract which authorized or required the document. The documents listed are intended to be illustrative and not all inclusive.

3. The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation.

#### **Definitional Cross References**

"Bill of lading". Section 1-201.

"Contract". Section 1-201.

"Genuine". Section 1-201.

#### **Special Plain Language Comment**

Certain types of documents have special meaning and are presumed to be what they look like. Reliance on such documents is generally presumed to be reasonable.

#### **§ 1-203. Obligation of good faith**

Every contract or duty within this Code imposes an obligation of good faith in its performance or enforcement.

#### **History**

CJA-1-86 January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-203 of the Uniform Commercial Code as adopted by the states.

**Commentary.** This section sets forth a basic principle running throughout this Code. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties. Particular applications of this general principle appear in specific provisions of the Code such as the option to accelerate at will (§ 1-208), the right to cure a defective delivery of goods (§ 2-508), the duty of a merchant buyer who

has rejected goods to effect salvage operations (§ 2-603), substituted performance (§ 2-614), and failure of presupposed conditions (§ 2-615). The concept, however, is broader than any of these illustrations and applies generally, as stated in this section, to the performance or enforcement of every contract or duty within this Code. It is further implemented by § 1-205 on course of dealing and usage of trade.

It is to be noted that under the Sales Article definition of good faith (§ 2-103), contracts made by a merchant have incorporated in them the explicit standard not only of honesty in fact (§ 1-201), but also of observance by the merchant of reasonable commercial standards of fair dealing in the trade.

#### **Cross References**

Sections 1-201, 1-205, 1-208, 2-103, 2-508, 2-603, 2-614, and 2-615.

#### **Definitional Cross References**

"Contract". Section 1-201.

"Good faith". Section 1-201; 2-103.

#### **§ 1-204. Time; reasonable time; "seasonably"**

A. Whenever this Code requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable maybe fixed by agreement.

B. What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

C. An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-204 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Subsection (A) recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract. The parties are not required to fix the most reasonable time but may fix any time which is not obviously unfair as judged by the time of contracting.

2. Under the section, the agreement which fixes the time need not be part of the main agreement, but may occur separately. Notice also that under the definition of "agreement" (§ 1-201) the circumstances of the transaction, including course of dealing or usages of trade or course of performance may be

material. On the question what is a reasonable time these matters will often be important.

#### **Definitional Cross References**

"Agreement". Section 1-201.

#### **§ 1-205. Course of dealing and usage of trade**

A. A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

B. A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing, the interpretation of the writing is for the court.

C. A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

D. The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other, but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

E. An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

F. Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-205 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. This Code rejects both the "lay-dictionary" and the "conveyancer's" reading of a commercial agreement. Instead, the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation

are set by the commercial context, which may explain and supplement even the language of a formal or final writing.

2. Course of dealing under Subsection (A) is restricted, literally, to a sequence of conduct between the parties previous to the agreement. However, the provisions of the Code on course of performance make it clear that a sequence of conduct after or under the agreement may have equivalent meaning (§ 2-208).

3. "Course of dealing" may enter the agreement either by explicit provisions of the agreement or by tacit recognition.

4. This Code deals with "usage of trade" as a factor in reading the commercial meaning of the agreement which the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term "usage of trade" this Code expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law". A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

5. A usage of trade under Subsection (B) must have the "regularity of observance" specified. The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial", "universal" or the like. Under the requirement of Subsection (B), full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes.

6. The policy of this Code controlling explicit unconscionable contracts and clauses (§§ 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable". However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

7. Subsection (C), giving the prescribed effect to usages of which the parties "are or should be aware", reinforces the provision of Subsection (B) requiring not universality but only the described "regularity of observance" of the practice or method. This Subsection also reinforces the point of Subsection

(B) that such usages may be either general to trade or particular to a special branch of trade.

8. Although the terms in which this Code defines "agreement" include the elements of course of dealing and usage of trade, the fact that express reference is made in some sections to those elements is not to be construed as carrying a contrary intent or implication elsewhere. Compare § 1-102(D).

9. In cases of a well established line of usage varying from the general rules of this Code where the precise amount of the variation has not been worked out into a single standard, the party relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established. In case a dominant pattern has been fairly evidenced, the party relying on the usage is entitled under this section to go to the trier of fact on the question of whether such dominant pattern has been incorporated into the agreement.

10. Subsection (F) is intended to insure that this Code's liberal recognition of the needs of commerce in regard to usage of trade shall not be made into an instrument of abuse.

#### **Cross References**

Point 1: Sections 1-203, 2-104 and 2-202.

Point 2: Section 2-208.

Point 4: Section 2-201 and Part 3 of Article 2.

Point 6: Sections 1-203 and 2-302.

Point 8: Sections 1-102 and 1-201.

Point 9: Section 2-204(C).

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section recognizes that words in a contract acquire meaning from the way the parties have acted toward each other as well as by how people in that type of situation usually deal with each other.

#### **§ 1-206. Statute of Frauds for kinds of personal property not otherwise covered**

A. Except in the cases described in Subsection (B) of this section, a

contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

B. Subsection (A) of this section does not apply to contracts for the sale of goods (§ 2-201) nor to security agreements (§ 9-203).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-206 of the Uniform Commercial Code as adopted by the states.

**Commentary.** To fill the gap left by the Statute of Frauds provisions for goods (§ 2-201) and security interests (§ 9-203). The principal gap relates to sale of the "general intangibles" defined in Article 9 (§ 9-106) and to transactions excluded from Article 9 by § 9-104. Typical are the sale of bilateral contracts, royalty rights or the like. The informality normal to such transactions is recognized by lifting the limit for oral transactions to five thousand dollars (\$5,000). In such transactions there is often no standard of practice by which to judge, and values can rise or drop without warning; troubling abuses are avoided when the dollar limit is exceeded by requiring that the subject matter be reasonably identified in a signed writing which indicates that a contract for sale has been made at a defined or stated price.

#### **Definitional Cross References**

"Action". Section 1-201.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Sale". Section 2-106.

"Signed". Section 1-201.

"Writing". Section 1-201.

#### **§ 1-207. Performance or acceptance under reservation of rights**

A party who with explicit reservation of rights performs or promises

performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-207 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice", "under protest", "under reserve", "with reservation of all our rights", and the like. All of these phrases completely reserve all rights within the meaning of this section. The section therefore contemplates that limited as well as general reservations and acceptance by a party may be made "subject to satisfaction of our purchaser", "subject to acceptance by our customers", or the like.

2. This section does not add any new requirement of language of reservation where not already required by law, but merely provides a specific measure on which a party can rely as he makes or concurs in any interim adjustment in the course of performance. It does not affect or impair the provisions of this Code such as those under which the buyer's remedies for defect survive acceptance without being expressly claimed if notice of the defects is given within a reasonable time. Nor does it disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.

The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted.

### **Cross References**

Section 2-607.

### **Definitional Cross References**

"Party". Section 1-201.

"Rights". Section 1-201.

### **Special Plain Language Comment**

If there is a dispute about a deal, the person who wants to object will not lose the right to do so, if he states that he makes payment or otherwise performs "without prejudice" or "under protest".

## **§ 1-208. Option to accelerate at will**

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-208 of the Uniform Commercial Code as adopted by the states.

**Commentary.** The increased use of acceleration clauses either in the case of sales on credit or in time paper or in security transactions has led to some confusion in the cases as to the effect to be given to a clause which seemingly grants the power of an acceleration at the whim and caprice of the party. This section is intended to make clear that despite language which can be so construed and which further might be held to make the agreement void as against public policy or to make the contract illusory or too indefinite for enforcement, the clause means that the option is to be exercised only in the good faith belief that the prospect of payment or performance is impaired.

Obviously, this section has no application to demand instruments or obligations whose very nature permits call at any time with or without reason. This section applies only to an agreement or to paper which in the first instance is payable at a future date.

### **Definitional Cross References**

"Burden of establishing". Section 1-201.

"Good faith". Section 1-201.

"Party". Section 1-201.

"Term". Section 1-201.

### **Special Plain Language Comment**

Some contract forms provide that one party has the power to demand that the other act or pay quicker than normally contemplated, relying upon words like those used in the statute. This section somewhat limits that right to avoid abuse of that power.

## **§ 1-209. Subordinated obligations**

An obligation may be issued as subordinated to payment of another

obligation of the person obligated, or a creditor may subordinate his right to payment of an obligation by agreement with either the person obligated or another creditor of the person obligated. Such a subordination does not create a security interest as against either the common debtor or a subordinated creditor. This section shall be construed as declaring the law as it existed prior to the enactment of this section and not as modifying it.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 1-209 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Billions of dollars of subordinated debt are held by the public and by institutional investors. Commonly, the subordinated debt is subordinated on issue or acquisition and is evidenced by an investment security or by a negotiable or non-negotiable note. Debt is also sometimes subordinated after it arises, either by agreement between the subordinating creditor and the debtor, by agreement between two creditors of the same debtor, or by agreement of all three parties. The subordinated creditor may be a stockholder or other "insider" interested in the common debtor; the subordinated debt may consist of accounts or other rights to payment not evidenced by any instrument. All such cases are included in the terms "subordinated obligation", "subordination", and "subordinated creditor".

2. Subordination agreements are enforceable between the parties as contracts; and in the bankruptcy of the common debtor dividends otherwise payable to the subordinated creditor are turned over to the superior creditor. This "turn-over" practice has on occasion been explained in terms of "equitable lien", "equitable assignment", or "constructive trust", but whatever the label the practice is essentially an equitable remedy and does not mean that there is a transaction "intended to create a security interest", a "sale of accounts, contract rights or chattel paper", or a "security interest credit by contract", within the meaning of § 9-102. On the other hand, nothing in this section prevents one creditor from assigning his rights to another creditor of the same debtor in such a way as to create a security interest within Article 9, where the parties so intend.

3. The last sentence of this section is intended to negate any implication that the section changes the law. It is intended to be declaratory of pre-existing law. Both the history and the text of Article 9 make it clear that it was not intended to cover subordination agreements. The provisions of § 9-203 for signature by the "debtor" would be entirely unworkable if read to require signature by public holders of subordinated investment securities. The priorities, filing provisions and remedies on default provided by Article 9 would also be largely inappropriate in many situations. The precautionary language § 9-316 preserving subordination of priority by agreement between secured parties points to the conclusion that similar arrangements among unsecured lenders are not covered unless otherwise within the scope of the Article.

4. The enforcement of subordination agreements is largely left to supplementary principles under § 1-103. If the fact of subordination is noted on a negotiable instrument, a holder under §§ 3-302 and 3-306 is subject to the term because notice precludes him from taking free of the subordination. Section 3-302(C)(1) and 3-306 severely limit the rights of levying creditors of a subordinated creditor in such cases.

#### **Definitional Cross References**

"Agreement". Sections 1-201.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section recognizes that two or more creditors may agree among themselves who should be paid first, who has first rights to collateral, and who should have the greatest risk of loss, if the debtor is unable to pay all of them. Such agreements are not subject to regulation under Article 9 as security interests.

### **Article 2. Sales**

#### **Part 1. Short Title, General Construction, and Subject Matter**

##### **§ 2-101. Short title**

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Sales.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-101 of the Uniform Commercial Code adopted by the states.

**Commentary.** The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men and women turn upon the location of an intangible

something, the passing of which no man or woman can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

**§ 2-102. Scope; certain security and other transactions excluded from this article**

Unless the context otherwise requires, this article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-102 of the Uniform Commercial Code adopted by the states. Certain federal and Navajo statutes regulating trade with Indians should be reviewed to determine their applicability. Transactions with Indians or Indian tribes may also require approval under certain federal and tribal statutes. See 25 U.S.C. §§ 81, 196, 261, 396 *et seq.* (1976); 25 C.F.R. § 162 (1984); 7 N.N.C. § 204; and titles 3, 5, 18, and 24 of the Navajo Nation Code. "Security transaction" is used in the same sense as in the Article on Secured Transactions (Article 9).

**Cross References**

NUCC, Article 9.

**Definitional Cross References**

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Present sale". Section 2-106.

"Sale". Section 2-106.

**Special Plain Language Comment**

This section limits the scope of this article to transactions in "goods" (see § 2-105 for the definition of "goods") and distinguishes it from Article 9 which governs "secured transactions" or contracts for services. It also clearly states that special statutes relating to consumers and other groups are not repealed by the Code although the Code may effect such transactions governed by such statutes in areas not regulated by specific statutes.

**§ 2-103. Definitions and index of definitions**

A. In this article unless the context otherwise requires:

1. "Buyer" means a person who buys or contracts to buy goods.

2. "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

3. "Receipt" of goods means taking physical possession of them.

4. "Seller" means a person who sells or contracts to sell goods.

5. "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.

6. "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.

B. Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:

"Acceptance". Section 2-606.

"Banker's credit". Section 2-325.

"Between merchants". Section 2-104.

"Cancellation". Section 2-106(D).

"Commercial unit". Section 2-105.

"Confirmed credit". Section 2-325.

"Conforming to contract". Section 2-106.

"Contract for sale". Section 2-106.

"Cover". Section 2-712.

"Entrusting". Section 2-403.

"Financing agency". Section 2-104.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Identification". Section 2-501.

"Installment contract". Section 2-612.

"Letter of Credit". Section 2-325.

"Lot". Section 2-105.

"Merchant". Section 2-104.

"Overseas". Section 2-323.

"Person in position of seller". Section 2-707.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Termination". Section 2-106.

C. The following definitions in other Articles apply to this article:

"Check". Section 3-104.

"Consumer goods". Section 9-109.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

D. In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** The Definitions of "consignee" and "consignor" have been added to the definitions in this section since they are used in Article 2, but normally defined in Article 7 of the Uniform Commercial Code which has not been adopted by the Navajo Nation.

**Commentary.** 1. The phrase "any legal successor in interest of such person" is not included in the definition of buyer and seller since § 2-210 of this article, which limits some types of delegation of performance on assignment of a sales contract, makes it clear that not every such successor can be safely included in the definition. In every ordinary case, however, such successors are as of course included.

2. "Receipt" must be distinguished from delivery particularly in regard to the problems arising out of shipment of goods, whether or not the contract calls for making delivery by way of documents of title, since the seller may frequently fulfill his obligations to "deliver" even though the buyer may never "receive" the goods. Delivery with respect to documents of title is defined in

Article 1 and requires transfer of physical delivery. Otherwise the many divergent incidents of delivery are handled incident by incident.

#### **Cross References**

Point 1: See Section 2-210 and Comment thereon.

Point 2: Section 1-201.

#### **Definitional Cross References**

"Person". Section 1-201.

#### **§ 2-104. Definitions: "merchant"; "between merchants"; "financing agency"**

A. "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill maybe attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. The definition of merchant shall not include individual artists.

B. "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (§ 2-707).

C. "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-104 of the Uniform Commercial Code adopted by the states except that individual artists are not considered merchants. The official comments establish standards for determining whether a farmer or rancher is a merchant.

**Commentary.** 1. This article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. It thus adopts a policy of expressly stating rules applicable "between merchants" and "as against a merchant", wherever they are needed instead of making them depend upon the circumstances of each case as in the statutes cited above. This section lays the foundation of this Policy by defining those who are to be regarded as professionals or "merchants" and by stating when a transaction is deemed to be "between merchants".

2. The term "merchant" as defined here roots in the "law merchant" concept of a professional in business. The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.

The special provisions as to merchants appear only in this article and they are of three kinds. Sections 2-201(B), 2-205, 2-207 and 2-209 dealing with the Statute of Frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. For purposes of these sections almost every person in business would, therefore, be deemed to be a "merchant" under the language, "who ... by his occupation holds himself out as having knowledge or skill peculiar to the practices ... involved in the transaction ... ", since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be "merchants". But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not a merchant.

On the other hand, in § 2-314 on the warranty of merchantability, such warranty is implied only "if the seller is a merchant with respect to goods of that kind". Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods. Similarly in § 2-312(C) the warranty that the goods are delivered free of any rightful claim of a third party is limited to those who are dealing in the goods of that kind. The exception in § 2-402(B) for retention of possession by a merchant-seller falls in the same class; as does § 2-403(B) on entrusting of possession to a merchant "who deals in goods of that kind".

A third group of sections includes § 2-103(A)(2), which provides that in the case of a merchant, "good faith" includes observance of reasonable commercial standards of fair dealing in the trade; §§ 2-327(A)(3), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller's instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the "practices" or the "goods" aspect of the definition of merchant.

3. Individual artists generally do not have the familiarity with business customs such as firm offer (§ 2-205) and confirmatory memorandum (§ 2-207) which is assumed by § 2-104(A). Accordingly, individual artists are not considered merchants.

The determination of whether a farmer (or a rancher) is a merchant under the Code should consider the following factors: quantity and dollar amount of the transactions, the frequency and length of time which the farmer (or rancher) had engaged in selling the crops (or livestock) in the transaction, whether it was his principal crop (or type of livestock), and the farmer's (or rancher's) familiarity with the market in which the crop (or livestock) is sold. A farmer (or rancher) shall not be considered a merchant under the Code if the transaction involves the isolated sale of his own crops (or livestock). See

*Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. 1972).

4. The "or to whom such knowledge or skill may be attributed by his employment of an agent or broker ... " clause of the definition of merchant means that even persons such as universities, for example, can come within the definition of merchant if they have regular purchasing departments or business personnel who are familiar with business practices and who are equipped to take any action required.

#### **Cross References**

Point 1: See Sections 1-102 and 1-203.

Point 2: See Sections 2-314, 2-315 and 2-320 to 2-325, of this article, and Article 9.

#### **Definitional Cross References**

"Bank". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section defines merchants as those who are either: (i) familiar with general business practices; or (ii) familiar with a particular good because they deal in it regularly. Merchants are generally held to higher standards of conduct. A person's status as a merchant depends on the type of transaction and the goods involved.

**§ 2-105. Definitions: "transferability"; "goods"; "future goods"; "lot"; "commercial unit"**

A. "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 2-107).

B. Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

C. There may be a sale of a part interest in existing identified goods.

D. An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

E. "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

F. "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit maybe a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-105 of the Uniform Commercial Code adopted by the states. In certain circumstances goods attached to the land may be considered trust property and thus subject to certain trusteeship obligations of the federal government.

**Commentary.** 1. The definition of "goods" is based on the concept of movability. It is not intended to deal with things which are not fairly identifiable as moveables before the contract is performed.

Growing crops are included within the definition of goods since they are frequently intended for sale. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section of identification can apply as in the case of crops to be planted. The reason for this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this article.

The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

As to contracts to sell timber, minerals, or structures to be removed from the land § 2-107(A) controls.

The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition become "goods" upon the making of the contract for sale. "Things attached to realty" may be considered, in some instances, trust property and thus subject to certain limitations on transfer by the federal government. See 25 U.S.C. §§ 81, 196, 261, 396, 406, 407, 635, 2101 (1984) See also F. Cohen, Handbook of federal Indian Law (1982).

"Investment securities" are expressly excluded from the coverage of this article. It is not intended by this exclusion, however, to prevent the application of a particular section of this article by analogy to securities when the reason of that section makes such application sensible and the situation is not governed by Article 8 of the Uniform Commercial Code (Article 8 of the Uniform Commercial Code has not been adopted by the Navajo Nation); the rights of parties which would be governed under Article 8 are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. References to the fact that a contract for sale can extend to future or contingent goods and that ownership in common follows the sale of apart interest have been omitted here as obvious without need for expression; hence no inference to negate these principles should be drawn from their omission.

3. Subsection (D) does not touch the question of how far an appropriation of a bulk of fungible goods may or may not satisfy the contract for sale.

4. Subsections (E) and (F) on "lot" and "commercial unit" are introduced to aid in the phrasing of later Sections.

5. The question of when an identification of goods takes place is determined by the provisions of § 2-501 and all that this section says is what kinds of goods may be the subject of a sale.

#### **Cross References**

Point 1: Section 2-107, 2-201 and 2-501.

Point 5: Section 2-501.

See also Section 1-201.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fungible". Section 1-201.

"Money". Section 1-201.

"Present sale". Section 2-106.

"Sale". Section 2-106.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section defines "goods", which are the subject of Article 2. The definition is based on the "movability" of the goods. The Code distinguishes between goods presently in existence and identifiable and those either not presently in existence or not identifiable; the latter, "future" goods, are not insurable and may not be claimed by the buyer upon the seller's insolvency.

**§ 2-106. Definitions: "contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "conforming to contract"; "termination"; "cancellation"**

A. In this article, unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (§ 2-401). A "present sale" means a sale which is accomplished by the making of the contract.

B. Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

C. "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

D. "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of termination except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-106 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A): "Contract for sale" is used as a general concept throughout this article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell

unless the Article expressly so provides. See § 2-501.

2. Subsection (B): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of § 2-508 on seller's cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeway in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (C) and (D): These Subsections are intended to make clear the distinction carried forward throughout this article between termination and cancellation.

#### **Cross References**

Point 2: Sections 1-203, 1-205, 2-208 and 2-508.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

The definition of agreement and contract limit the application of Article 2 to contracts involving goods, rather than all contracts. The next definition, "conforming goods", expresses the rule that sellers must provide the goods exactly as ordered (although certain exceptions are later found in the Code).

#### **§ 2-107. Goods to be severed from realty: recording**

A. A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance, a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

B. A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in Subsection (A) or of timber to be cut is a contract for the sale of goods within this article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

C. The provisions of this section are subject to the trust responsibilities of the federal government. The provisions of this section are also subject to any third party rights provided by the law relating to realty records. The contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-107 of the Uniform Commercial Code adopted by the states. Contracts relating to this type of goods may require approval by the federal government as part its trust responsibilities.

**Commentary.** 1. Notice that Subsection (A) applies only if the minerals or structures "are to be severed by the seller". If the buyer is to sever, such transactions are considered contracts affecting land and all problems of the Statute of Frauds and of land rights apply to them. Therefore, the Statute of Frauds section of this article does not apply to such contracts though they must conform to the Statute of Frauds affecting the transfer of interests in land.

2. "Things attached" to the realty which can be severed without material harm are goods within this article regardless of who is to effect the severance. The word "fixtures" has been avoided because of the diverse definitions of this term, the test of "severance without material harm" being substituted. In some cases fixtures may be considered trust property and, thus, subject to the trust obligation and regulations of the federal government. The federal government may have to approve certain contracts relating to such goods. (For minerals see 25 U.S.C. §§ 396-400a, 635 and 2101 *et seq.*, and 18 N.N.C. § 1 *et seq.*; for timber see 25 U.S.C. §§ 196, 406 and 407) See generally 25 U.S.C. §§ 81, 261 (1976) See also § 9-313 and F. Cohen, *Handbook of federal Indian Law* (1982).

The provision in Subsection (C) for recording such contracts is within the purview of this article since it is a means of preserving the buyer's rights under the contract of sale.

3. The security phases of things attached to or to become attached to realty are dealt with in the Article on Secured Transactions (Article 9) and it is to be noted that the definition of goods in that Article differs from the definition of goods in this article. However, both Articles treat as goods

growing crops and also timber to be cut under a contract of severance.

#### **Cross References**

Point 1: Section 2-201.

Point 2: Section 2-105.

Point 3: Articles 9 and 9-105.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Present sale". Section 2-106.

"Rights". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section provides that only minerals severed by the seller are subject to this article, but that timber and growing crops are subject to this article whether severed by the seller or buyer.

### **Part 2. Form, Formation and Readjustment of Contract**

#### **§ 2-201. Formal requirements; Statute of Frauds**

A. Except as otherwise provided in this section a contract for sale of goods for the price of five hundred dollars (\$500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

B. Between merchants if within reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (A) against such party unless written notice of objection to its contents is given within 10 days after it is received ..

C. A contract which does not satisfy the requirements of Subsection (A) but which is valid in other respects is enforceable:

1. If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

2. If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

3. With respect to goods for which payment has been made and accepted or which have been received and accepted (§ 2-606).

D. This section does not apply to certain types of transactions involving solely barter (see § 1-110).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-201 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term even where the parties have contracted on the basis of a published price list. In many valid contracts for sale the parties do not mention the price in express terms, the buyer being bound to pay and the seller to accept a reasonable price which the trier of fact may well be trusted to determine. Again, frequently the price is not mentioned since the parties have based their agreement on a price list or catalogue known to both of them and this list serves as an efficient safeguard against perjury. Finally, "market" prices and valuations that are current in the vicinity constitute a similar check. Thus if the price is not stated in the memorandum it can normally be supplied without danger of fraud. Of course if the "price" consists of goods rather than money the quantity of goods must be stated.

Only three definite and invariable requirements as to the memorandum are made by this Subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies that party to be charged; and third, it must specify a quantity.

2. "Partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists. If the court can make a just apportionment, therefore, the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods. The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.

Part performance by the buyer requires the delivery of something by him that is accepted by the seller as such performance. Thus, part payment may be made by money or check, accepted by the seller. If the agreed price consists of goods or services, then they must also have been delivered and accepted.

3. Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under Subsection (B) and is sufficient against both parties under Subsection (A). The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under § 2-207.

4. Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract. For example, a buyer who takes possession of goods as provided in an oral contract which the seller has not meanwhile repudiated is not a trespasser. Nor would the Statute of Frauds provisions of this section be a defense to a third person who wrongfully induces a party to refuse to perform an oral contract, even though the injured party cannot maintain an action for damages against the party so refusing to perform.

5. The requirement of "signing" is discussed in the comment to § 1-201.

6. It is not necessary that the writing be delivered to anybody. It need not be signed or authenticated by both parties but it is, of course, not sufficient against one who has not signed it. Prior to a dispute no one can determine which party's signing of the memorandum may be necessary but from the time of contracting each party should be aware that to him it is signing by the other which is important.

7. If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no

longer possible to admit the contract in court and still treat the statute as a defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all.

8. Most transactions within the traditional Navajo culture are based on oral agreements. To maintain this tradition, certain barter transactions are exempted from the Code.

#### **Cross References**

See Sections 1-201, 2-202, 2-207, 2-209 and 2-304.

#### **Definitional Cross References**

"Action". Section 1-201.

"Between merchants". Section 2-104.

"Buyer ". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Sale". Section 2-106.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section is meant to reduce disputes over the existence of oral agreements by requiring that certain types of agreements be in writing to be enforceable in court. All contracts for the sale of goods with a price greater than five hundred dollars (\$500.00) must have three characteristics to be enforceable in court: (1) they must be in writing, (2) they must be signed by the party against whom enforcement is sought, and (3) they must include the quantity of goods sold. The section also sets up a special rule to confirm transactions between merchants and two exceptions to the requirement of writing: (1) where there is partial performance of the contract and, (2) where goods have been "specially manufactured". Because of the oral traditions of the Navajo Nation, transactions involving only barter are not subject to this restriction.

**§ 2-202. Final written expression: parol or extrinsic evidence**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

A. By course of dealing or usage of trade (§ 1-205) or by course of performance (§ 2-208); and

B. By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-202 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section definitely rejects:

A. Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

B. The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

C. The requirement that a condition precedent to the admissibility of the type of evidence specified in Subsection (A) is an original determination by the court that the language used is ambiguous.

2. Subsection (A) makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached. Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

3. Under Subsection (B), consistent additional terms not reduced to writing may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

### **Cross References**

Point 3: Sections 1-205, 2-207, 2-302 and 2-316.

#### **Definitional Cross References**

"Agreed" and "agreement". Section 1-201.

"Course of dealing". Section 1-205.

"Parties". Section 1-201.

"Term". Section 1-201.

"Usage of trade". Section 1-205.

"Written" and "writing". Section 1-201.

#### **Special Plain Language Comment**

A written agreement which is agreed to be "final" will supersede any evidence of simultaneous oral agreements. This section also provides that written contracts will be interpreted in light of the customs or practices of the particular industry.

#### **§ 2-203. Seals inoperative**

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

#### **History**

CJA-1-86, January 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-203 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section makes it clear that every effect of the seal which relates to "sealed instruments" as such is wiped out insofar as contracts for sale are concerned. However, the substantial effects of a seal, except extension of the period of limitations, may be had by appropriate drafting as in the case of firm offers (see § 2-205).

2. This section leaves untouched any aspects of a seal which relate merely to signatures or to authentication of execution and the like. Thus, a statute providing that a purported signature gives prima facie evidence of its own authenticity or that a signature gives prima facie evidence of consideration is still applicable to sales transactions even though a seal may be held to be a signature within the meaning of such a statute. Similarly, the authorized affixing of a corporate seal bearing the corporate name to a contractual writing purporting to be made by the corporation may have effect as a signature without any reference to the law of sealed instrument.

## **Cross References**

Point 1: Section 2-205.

## **Definitional Cross References**

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Writing". Section 1-201.

## **§ 2-204. Formation in general**

A. A contract for sale of goods maybe made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

B. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

C. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is reasonably certain basis for giving an appropriate remedy.

## **History**

CJA-1-86, January 29, 1986.

## **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-204 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. The legal effect of such an agreement is, of course, qualified by other provisions of this article.

2. Under Subsection (A) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (B) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken.

3. Subsection (C) states the principle as to "open terms" underlying later Sections of the Article. If the parties intend to enter into a binding agreement, this Subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough in itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are

intended to be applied, this Code making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

4. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

#### **Cross References**

Subsection (A): Sections 1-103, 2-201 and 2-302.

Subsection (B): Sections 2-205 through 2-209.

Subsection (C): See Part 3.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for Sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section emphasizes that two parties may demonstrate an agreement in a variety of ways and that once an "agreement" is found to have been made the Code will attempt to resolve any unclear terms.

#### **§ 2-205. Firm offers**

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-205 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is intended to modify the former rule which required that "firm offers" be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant's signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. "Signed" here also includes authentication but the reasonableness of the authentication wherein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this article since authentication by a writing is the essence of this section.

3. This section is intended to apply to current "firm" offers and not to long term options, and an outside time limit of three months during which such offers remain irrevocable has been set. The three-month period during which firm offers remain irrevocable under this section need not be stated by days or by date. If the offer states that it is "guaranteed" or "firm" until the happening of a contingency which will occur within the three-month period, it will remain irrevocable until that event. A promise made for a longer period will operate under this section to bind the offeror only for the first three months of the period but may of course be renewed. If supported by consideration it may continue for as long as the parties specify. This section deals only with the offer which is not supported by consideration.

4. Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror's attention and he separately authenticates it, he will be bound; § 2-302 may operate, however, to prevent an unconscionable result which otherwise would flow from other terms appearing in the form.

5. Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake.

#### **Cross References**

Point 1: Section 1-102.

Point 2: Section 1-102.

Point 3: Section 2-201.

Point 5: Section 2-302.

#### **Definitional Cross References**

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Signed". Section 1-201.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

Normally an offer may be revoked prior to acceptance unless something of value is received to keep the offer open. Merchants, however, are held to a higher standard of conduct and must keep their promise to keep an offer open even without consideration, if the offer is in writing and signed by the merchant. The section protects merchants making such offers by limiting the duration that the operation will remain open to a "reasonable period" but not more than three months.

#### **§ 2-206. Offer and acceptance in formation of contract**

A. Unless otherwise unambiguously indicated by the language or circumstances:

1. An offer or make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

2. An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

B. Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-206 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite dear that it will not be acceptable. Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be "in any manner and by any medium reasonable under the circumstances", is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present-day media come into general use.

2. Either shipment or a prompt promise to ship is made a proper means of acceptance of an offer looking to current shipment. In accordance with ordinary commercial understanding the section interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship and rejects the artificial theory that only a single mode of acceptance is normally envisaged by an offer. This is true even though the language of the offer happens to be "ship at once" or the like. "Shipment" is here used in the same sense as in § 2-504; it does not include the beginning of delivery by the seller's own truck or by messenger. But loading on the seller's own truck might be a beginning of performance under Subsection (B).

3. The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance

4. Subsection (A)(2) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. However, the seller by stating that the shipment is non-conforming and is offered only as an accommodation to the buyer keeps the shipment or notification from operating as an acceptance.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

### **Special Plain Language Comment**

To ensure maximum flexibility an offer may be accepted in any "reasonable" way unless the offer requires a specific method of acceptance. An order for goods maybe accepted by shipping or promising to ship the goods. If the goods requested are not available, the shipper may deliver other "non-conforming" goods as a substitute although no agreement is formed by such shipment and the person ordering goods may accept or reject the "non-conforming" goods. Where an offer invites acceptance by beginning performance, the person accepting the offer must notify the offeror of his acceptance by beginning the performance or the offeror will not be bound (offers which require completion of a certain performance are not governed by this rule and are only accepted upon completion of the performance).

#### **§ 2-207. Additional terms in acceptance or confirmation**

A. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

B. The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

1. The offer expressly limits acceptance to the terms of the offer;
2. They materially alter it; or
3. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

C. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Code.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-207 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and

acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday", "rush", "ship draft against bill of lading inspection allowed", or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction.

2. Under this article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within Subsection (B) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (B). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of ninety percent (90%) or one hundred percent (100%) deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

5. Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see §§ 2-718 and 2-719).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties

conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result, the requirement that there be notice of objection which is found in Subsection (B) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Code, including Subsection (B). The written confirmation is also subject to § 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement.

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See § 2-204. The only question is what terms are included in the contract, and Subsection (C) furnishes the governing rule.

#### **Cross References**

See generally Section 2-302.

Point 5: Sections 2-513, 2-602, 2-607, 2-609, 2-612, 2-614, 2-615, 2-616, 2-718 and 2-719.

Point 6: Sections 1-102 and 2-104.

#### **Definitional Cross References**

"Between merchants". Sections 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Send". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

#### **§ 2-208. Course of performance or practical construction**

A. Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

B. The express terms of the agreement and any such course of performance,

as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (§ 1-205).

C. Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

### **History**

CJA-1-86, January 19, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-208 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this article carries no contrary implication when there is a failure to refer to it in other Sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see § 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see §§ 2-605 and 2-607).

### **Cross References**

Point 1: Section 1-201.

Point 2: Section 2-202.

Point 3: Sections 2-209, 2-601 and 2-607.

Point 4: Sections 2-605 and 2-607.

**§ 2-209. Modification, rescission and waiver**

A. An agreement modifying a contract within this article needs no consideration to be binding.

B. A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

C. The requirements of the Statute of Frauds section of this article (§ 2-201) must be satisfied if the contract as modified is within its provisions.

D. Although an attempt at modification or rescission does not satisfy the requirements of Subsection (B) or (C) it can operate as a waiver.

E. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-209 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to technicalities.

2. Subsection (A) provides that an agreement modifying a sales contract needs no consideration to be binding.

However, modifications made thereunder must meet the test of good faith imposed by this Code. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (§ 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under §§ 2-615 and 2-616.

3. Subsections (B) and (C) are intended to protect against false allegations of oral modifications. "Modification or rescission" includes abandonment or other change by mutual consent, it does not include unilateral "termination" or

"cancellation" as defined in § 2-106.

The Statute of Frauds provisions of this article are expressly applied to modifications by Subsection (C). Under those provisions the "delivery and acceptance" test is limited to the goods which have been accepted, that is, to the past. "Modification" for the future cannot therefore be conjured up by oral testimony if the price involved is five hundred dollars (\$500.00) or more since such modification must be shown at least by an authenticated memo. And since a memo is limited in its effect to the quantity of goods set forth in it, there is safeguard against oral evidence.

Subsection (B) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by signed writing. But note that if a consumer is to be held to such a clause on a form supplied by a merchant it must be separately signed.

4. Subsection (D) is intended, despite the provisions of Subsections (B) and (C), to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. The effect of such conduct as a waiver is further regulated in Subsection (E).

#### **Cross References**

Point 1: Section 1-203.

Point 2: Sections 1-201, 1-203, 2-615 and 2-616.

Point 3: Sections 2-106, 2-201 and 2-202.

Point 4: Sections 2-202 and 2-208.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

#### **§ 2-210. Delegation of performance: assignment of rights**

A. A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No

delegation of performance relieves the party of delegating of any duty to perform or any liability for breach.

B. Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

C. Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

D. An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

E. The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (§ 2-609).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and, effect as § 2-210 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Generally, this section recognizes both delegation of performance and assignability as normal and permissible incidents of a contract for the sale of goods.

2. Delegation of performance, either in conjunction with an assignment or otherwise, is provided for by Subsection (A) where no substantial reason can be shown as to why the delegated performance will not be as satisfactory as personal performance.

3. Under Subsection (B) rights which are no longer executory such as a right to damages for breach or a right to payment of an "account" as defined in the Article on Secured Transactions (Article 9) may be assigned although the agreement prohibits assignment. In such cases no question of delegation of any performance is involved. The assignment of a "contract right" as defined in the Article on Secured Transactions (Article 9) is not covered by this Subsection.

4. The nature of the contract or the circumstances of the case, however, may

bar assignment of the contract even where delegation of performance is not involved. This article and this section are intended to clarify this problem, particularly in cases dealing with output requirement and exclusive dealing contracts. In the first, place the section on requirement and exclusive dealing removes from the construction of the original contract most of the "personal discretion" element by substituting the reasonably objective standard of good faith operation of the plant or business to be supplied. Secondly, the section on insecurity and assurances, which is specifically referred to in Subsection (E) of this section, frees the other party from the doubts and uncertainty which may afflict him under an assignment of the character in question by permitting him to demand adequate assurance of due performance without which he may suspend his own performance. Subsection (E) is not in any way intended to limit the effect of the section on insecurity and assurances and the word "performance" includes the giving of orders under a requirements contract. Of course, in any case where a material personal discretion is sought to be transferred, effective assignment is barred by Subsection (B).

5. Subsection (D) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a financing assignment in which only the assignor's rights are transferred.

This article takes no position on the possibility of extending some recognition or power to the original parties to work out normal commercial readjustments of the contract in the case of financing assignments even after the original obligor has been notified of the assignment. This question is dealt with in the Article on Secured Transactions (Article 9).

6. Subsection (E) recognizes that the non-assigning original party has a stake in the reliability of the person with whom he has closed the original contract, and is, therefore, entitled to due assurance that any delegated performance will be properly forthcoming.

7. This section is not intended as a complete statement of the law of delegation and assignment but is limited to clarifying a few points. Particularly, neither this section nor this article touches directly on such questions as the need or effect of notice of the assignment, the rights of successive assignees or any question of the form of an assignment, either as between the parties or as against any third parties. Some of these questions are dealt with in Article 9.

#### **Cross References**

Point 3: Article 9.

Point 4: Sections 2-306 and 2-609.

Point 5: Article 9, §§ 9-317 and 9-318.

Point 7: Article 9.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

### **Part 3. General Obligation and Readjustment of Contract**

#### **§ 2-301. General obligation of parties**

The obligation of the Seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-301 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section uses the term "obligation" in contrast to the term "duty" in order to provide for the "condition" aspects of delivery and payment insofar as they are not modified by other sections of this article such as those on cure of tender and replaces the general provisions of that Code on the effect of conditions. In order to determine what is "in accordance with the contract" under this article, usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties.

#### **Cross References**

Sections 1-106.

See also §§ 1-205, 2-208, 2-209, 2-508 and 2-612.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

### **§ 2-302. Unconscionable contractor clause**

A. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

B. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-302 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (B) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (*Cf. Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in Subsection (B) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

#### **Definitional Cross References**

"Contract". Section 1-201.

### **Special Plain Language Comment**

This section provides an exception to the general principle of freedom of contract under the Code. It recognizes that in some cases the lack of bargaining power of one party compared to that of the other party will result in an oppressive contract. In the past courts had refused to enforce such contracts or provisions by manipulating legal rules about contracts-this section allows courts to do openly what they had previously done under cover. Although "unconscionability" is not defined because of the variety of the behavior which can be unconscionable, provisions or contracts which are found to be unconscionable fall into certain categories: (1) the agreement of one party was obtained due to his ignorance or carelessness which was known to the other party; (2) the agreement was difficult to read or deceptively arranged, (3) parts of the agreement nullify the core duty of the contract; (4) the price is excessively high by several times the value of the goods; or (5) the seller has unduly enlarged or unduly restricted the remedies of the buyer. Unconscionability is determined at the time the contract was made-it does not apply to situations where the value of the goods has changed over time. A court has considerable freedom to act to rectify an unconscionable contract-it may refuse to enforce the whole contract, a part of the contract, cancel further payments or demand refund of certain payments. Although the scope of unconscionability is broad, it should not be seen as a way of avoiding contractual duties-it is used only to adjust the most oppressive and unjust contracts.

### **Annotations**

#### **1. Unconscionable arbitration clause**

"Considering all of these principles together, the Court holds that the specific arbitration clause in the financing contract is unenforceable. Though arbitration generally is encouraged, clauses that mandate arbitration are not immune from scrutiny for unconscionability or consistency with Fundamental Law." *Green Tree Servicing, LLC v. Duncan*, No. SC-CV-46-05, slip op. at 12 (Nav. Sup. Ct. August 18, 2008).

#### **§ 2-303. Allocation or division of risks**

Where this article allocates a risk or a burden as between the parties "unless otherwise agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-303 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is intended to make it dear that the parties may modify or allocate "unless otherwise agreed" risks or burdens imposed by this article as they desire, always subject, of course, to the provisions on unconscionability. Compare § 1-102(D).

2. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, since under the definition of "agreement" in this Code, the circumstances surrounding the transaction, as well as the express language used by the parties enter into the meaning and substance of the agreement.

#### **Cross References**

Point 1: Sections 1-102 and 2-302.

Point 2: Section 1-201.

#### **Definitional Cross References**

"Party". Section 1-201.

"Agreement". Section 1-201.

#### **Special Plain Language Comment**

The Code divides risks between the parties but the parties can alter this division of risks in the agreement in any manner they wish. However, the parties may not in their agreement change certain duties under the Code. Those duties include those of good faith, diligence, reasonableness and care, nor may the parties waive the application of the doctrine of unconscionability to their agreement.

#### **§ 2-304. Price payable in money, goods, realty, or otherwise**

A. The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

B. Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this article, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-304 of the Uniform Commercial Code adopted by the states. The transfer of real property on the Navajo Indian Country may be affected by the federal government's trust responsibilities.

**Commentary.** 1. Under Subsection (A) the provisions of this article are applicable to transactions where the "price" of goods is payable in something other than money. This does not mean, however, that this whole Article applies automatically and in its entirety simply because an agreed transfer of title to goods is not a gift. The basic purposes and reasons of the Article must always be considered in determining the applicability of any of its provisions.

2. Subsection (B) lays down the general principle that when goods are to be exchanged for realty, the provisions of this article apply only to those aspects of the transaction which concern the transfer of title to goods but do not affect the transfer of the realty since the detailed regulation of various particular contracts which fall outside the scope of this article is left to the courts and other legislation. However, the complexities of these situations may be such that each must be analyzed in the light of the underlying reasons in order to determine the applicable principles. Transactions involving real property on the Navajo Nation are affected by the trust responsibility of the federal government. See § 2-107. Navajo statutes dealing with realty are not to be lightly disregarded or altered by language of this article. In contrast, this article declares definite policies in regard to certain matters legitimately within its scope though concerned with real property situations, and in those instances the provisions of this article control.

#### **Cross References**

Point 2: Sections 1-102, 1-103, 1-104 and 2-107.

#### **Definitional Cross References**

"Goods". Section 2-105.

"Money". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

Article 2 governs not only the most common type of sale, goods exchanged for cash, but also goods exchanged for goods, goods exchanged for services and even goods exchanged for realty. In barter transactions a person may be both a buyer and seller; a "buyer" of the goods he or she obtains and a "seller" of the goods he or she exchanges. The status of a person as a "seller" is important for the purposes of warranties. See §§ 2-312 to 2-315.

#### **§ 2-305. Open price term**

A. The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

1. Nothing is said as to price; or

2. The price is left to be agreed by the parties and they fail to agree; or

3. The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

B. A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

C. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

D. Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed, there is no contract. In such a case the buyer must return any goods already received or if unable to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-305 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section applies when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement. This article rejects in these instances the formula that "an agreement to agree is unenforceable" if the case falls within Subsection (A) of this section, and rejects also defeating such agreements on the ground of "indefiniteness". Instead this article recognizes the dominant intention of the parties to have the deal continue to be binding upon both. As to future performance, since this article recognizes remedies such as cover (§ 2-712), re-sale (§ 2-706) and specific performance (§ 2-716) which go beyond any mere arithmetic as between contract price and market price, there is usually a "reasonably certain basis for granting an appropriate remedy for breach" so that the contract need not fail for indefiniteness.

2. Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of Subsection (A) ("*The parties if they so intend*") and in Subsection (D). Whether or not this is so is, in most cases, a question to be determined by the trier of fact.

3. Subsection (B), dealing with the situation where the price is to be fixed by one party, rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (§ 2-103). But in the normal case a "posted

price", or a future seller's or buyer's "given price", "price in effect", "market price", or the like satisfies the good faith requirement.

4. The section recognizes that there may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all. For example, the case where a known and trusted expert is to "value" a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.

5. Under Subsection (C), wrongful interference by one party with any agreed machinery for price fixing in the contract may be treated by the other party as a repudiation justifying cancellation, or merely as a failure to take cooperative action thus shifting to the aggrieved party the reasonable leeway in fixing the price.

6. Throughout the entire Section, the purpose is to give effect to the agreement which has been made. That effect, however, is always conditioned by the requirement of good faith action which is made an inherent part of all contracts within the Code. (§ 1-203).

#### **Cross References**

Point 1: Section 2-204(C), 2-706, 2-712 and 2-716.

Point 3: Section 2-103.

Point 5: Sections 2-311 and 2-610.

Point 6: Section 1-203.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section, along with 2-306, 2-309 and 2-310, fills in terms left undecided in the agreement by the two parties. This section provides a method of determining the price of goods if not specified in the agreement. The section protects parties to which price is a crucial term since it does not apply to situations where the parties did not intend to be bound by an agreement if the price was not fixed (§ 2-305(D)).

#### **§ 2-306. Output, requirements and exclusive dealings**

A. A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

B. A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-306 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) of this section, in regard to output and requirements, applies to this specific problem the general approach of this Code which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement. It applies to such contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.

2. Under this article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements win approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even

when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price had risen greatly in a case in which the requirements contract contained a fixed price. This article takes no position as to whether a requirements contract is a provable claim in bankruptcy.

3. If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur.

4. When an enterprise is sold, the question may arise whether the buyer is bound by an existing output or requirements contract. That question is outside the scope of this article, and is to be determined on other principles of law. Assuming that the contract continues, the output or requirements in the hands of the new owner continue to be measured by the actual good faith output or requirements under the normal operation of the enterprise prior to sale. The sale itself is not grounds for sudden expansion or decrease.

5. Subsection (B), on exclusive dealing, makes explicit the commercial rule embodied in this Code under which the parties to such contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance of the contract. Under such contracts the exclusive agent is required, although no express commitment has been made, to use reasonable effort and due diligence in the expansion of the market or the promotion of the product, as the case may be. The principal is expected under such a contract to refrain from supplying any other dealer or agent within the exclusive territory. An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems of Subsection (A). It also raises questions of insecurity and right to adequate assurance under this article.

#### **Cross References**

Point 4: Section 2-210

Point 5: Sections 1-203 and 2-609.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Term". Section 1-201.

"Seller". Section 2-103.

### **§ 2-307. Delivery in single lot or several lots**

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender, but where the circumstances give either party the right to make or demand delivery in lots the price, if it can be apportioned, may be demanded for each lot.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-307 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section applies where the parties have not specifically agreed whether delivery and payment are to be by lots.

2. Where the actual agreement or the circumstances do not indicate otherwise, delivery in lots is not permitted under this section and the buyer is properly entitled to reject for a deficiency in the tender, subject to any privilege in the seller to cure the tender.

3. The "but" clause of this section goes to the case in which it is not commercially feasible to deliver or to receive the goods in a single lot as for example, where a contract calls for the shipment of ten carloads of coal and only three cars are available at a given time. Similarly, in a contract involving brick necessary to build a building the buyer's storage space may be limited so that it would be impossible to receive the entire amount of brick at once, or it may be necessary to assemble the goods as in the case of cattle on the range, or to mine them.

In such cases, a partial delivery is not subject to rejection for the defect in quantity alone, if the circumstances do not indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his performance because of insecurity under the provisions of § 2-609. However, in such cases the undelivered balance of goods under the contract must be forthcoming within a reasonable time and in a reasonable manner according to the policy of § on manner of tender of delivery. This is reinforced by the express provisions of § 2-608 that if a lot has been accepted on the reasonable assumption that its nonconformity will be cured, the acceptance may be revoked if the cure does not seasonably occur. The section approves the result in *Lynn M. Ranger, Inc. v. Gildersleeve*, 106 Conn. 372, 138 A. 142 (1927) in which a contract was made for six carloads of coal then rolling from the mines and consigned to the seller but the seller agreed to

divert the carloads to the buyer as soon as the car numbers became known to him. He arranged a diversion of two cars and then notified the buyer who then repudiated the contract. The seller was held to be entitled to his full remedy for the two cars diverted because simultaneous delivery of all the cars was not contemplated by either party.

4. Where the circumstances indicate that a party has a right to delivery in lots, the price may be demanded for each lot if it is apportionable.

#### **Cross References**

Point 1: Section 1-201.

Point 2: Sections 2-508 and 2-601.

Point 3: Sections 2-503, 2-608 and 2-609.

#### **Definitional Cross References**

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

#### **§ 2-308. Absence of specified place for delivery**

Unless otherwise agreed:

A. The place for delivery of goods is the seller's place of business or if he has none his residence; but

B. In a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

C. Documents of title maybe delivered through customary banking channels.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-308 of the Uniform Commercial Code adopted by the states. Since the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code at this time, the obligations of banks relating to drafts and letters of credit which would be governed under such Articles will be governed by Navajo law under 7 N.N.C. § 204.

**Commentary.** 1. Subsections (A) and (B) provide for those non-commercial sales and for those occasional commercial sales where no place or means of delivery has been agreed upon by the parties. Where delivery by carrier is "required or authorized by the agreement", the seller's duties as to delivery of the goods are governed not by this section but by § 2-504.

2. Under Subsection (B) when the identified goods contracted for are known to both parties to be in some location other than the seller's place of business or residence, the parties are presumed to have intended that place to be the place of delivery. This Subsection also applies (unless, as would be normal, the circumstances show that delivery by way of documents is intended) to a bulk of goods in the possession of a bailee. In such a case, however, the seller has the additional obligation to procure the acknowledgment by the bailee of the buyer's right to possession.

3. Where "customary banking channels" call only for due notification by the banker that the documents are on hand, leaving the buyer himself to see to the physical receipt of the goods, tender at the buyer's address is not required under Subsection (C). But that paragraph merely eliminates the possibility of a default by the seller if "customary banking Channels" have been properly used in giving notice to the buyer. Since the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code relating to Bank Deposits and Collections, and Letters of Credit, the obligations of banks relating to such documents which would be governed under such Articles will be governed by Navajo law pursuant to 7 N.N.C. § 204.

4. The rules of this section apply only "unless otherwise agreed". The surrounding circumstances, usage of trade, course of dealing and course of performance, as well as the express language of the parties, may constitute an "otherwise agreement".

#### **Cross References**

Point 1: Sections 2-504 and 2-505.

Point 2: Section 2-503.

Point 3: Section 2-512.

#### **Definitional Cross References**

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Seller". Section 2-103.

### **Special Plain Language Comment**

Most commercial sales involve shipment of goods, in which payment is governed by §§ 2-503, 2-504 and 2-505. This section is employed only if the parties have not agreed in the contract on a place of delivery and the place of delivery is not established through previous transactions nor through the common practices in the industry.

#### **§ 2-309. Absence of specific time provisions; notice of termination**

A. The time shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

B. Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

C. Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-309 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) requires that all actions taken under a sales contract must be taken within a reasonable time where no time has been agreed upon. The reasonable time under this provision turns on the criteria as to "reasonable time" and on good faith and commercial standards set forth in §§ 1-203, 1-204 and 2-103. It thus depends upon what constitutes acceptable commercial conduct in view of the nature, purpose and circumstances of the action to be taken. Agreement as to a definite time, however, may be found in a term implied from the contractual circumstances, usage of trade or course of dealing or performance as well as in an express term. Such cases fall outside of this Subsection since in them the time for action is "agreed" by usage.

2. The time for payment, where not agreed upon is related to the time for delivery; the particular problems which arise in connection with determining the appropriate time of payment and the time for any inspection before payment which is both allowed by law and demanded by the buyer are covered in § 2-513.

3. The facts in regard to shipment and delivery differ so widely as to make detailed provision for them in the text of this article impracticable. The applicable principles, however, make it clear that surprise is to be avoided, good faith judgment is to be protected, and notice or negotiation to reduce the uncertainty to certainty is to be favored.

4. When the time for delivery is left open, unreasonably early offers of or

demands for delivery are intended to be read under this article as expressions of desire or intention, requesting the assent or acquiescence of the other party, not as final positions which may amount without more to breach or to create breach by the other side. See §§ 2-207 and 2-609.

5. The obligation of good faith under this Code requires reasonable notification before a contract may be treated as breached because a reasonable time for delivery or demand has expired. This operates both in the case of a contract originally indefinite as to time and of one subsequently made indefinite by waiver.

When both parties let an originally reasonable time go by in silence, the course of conduct under the contract may be viewed as enlarging the reasonable time for tender or demand of performance. The contract may be terminated by abandonment.

6. Parties to a contract are not required in giving reasonable notification to fix, at peril of breach, a time which is in fact reasonable in the unforeseeable judgment of a later trier of fact. Effective communication of a proposed time limit calls for a response, so that figure to reply will make out acquiescence. Where objection is made, however, or if the demand is merely for information as to when goods will be delivered or will be ordered out, demand for assurances on the ground of insecurity maybe made under this article pending further negotiations. Only when a party insists on undue delay or on rejection of the other party's reasonable proposal is there a question of flat breach under the present section.

7. Subsection (B) applies a commercially reasonable view to resolve the conflict which has arisen in the cases as to contracts of indefinite duration. The "reasonable time" of duration appropriate to a given arrangement is limited by the circumstances. When the arrangement has been carried on by the parties over the years, the "reasonable time" can continue indefinitely and the contract will not terminate until notice.

8. Subsection (C) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this Subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

9. Justifiable cancellation for breach is a remedy for breach and is not the kind of termination covered by the present Subsection.

10. The requirement of notification is dispensed with where the contract provides for termination on the happening of an "agreed event". "Event" is a term chosen here to contrast with "option" or the like.

#### **Cross References**

Point 1: Sections 1-203, 1-204 and 2-103.

Point 2: Sections 2-320, 2-321, 2-504 and 2-511 through 2-514.

Point 5: Section 1-203.

Point 6: Section 2-609.

Point 7: Section 2-204.

Point 8: Sections 2-106, 2-318, 2-610 and 2-703.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Termination". Section 2-106.

#### **§ 2-310. Open time for payment or running of credit; authority to ship under reservation**

Unless otherwise agreed:

A. Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

B. If the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (§ 2-513); and

C. If delivery is authorized and made by way of documents of title otherwise than by Subsection (B) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

D. Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-310 of the Uniform Commercial code adopted by the states. Since the Navajo

Nation has not adopted Article 4 of the Uniform Commercial Code, the obligations of banks relating to drafts which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. This section is drawn to reflect modern business methods of dealing at a distance rather than face to face. Subsection (A) provides that payment is due at the time and place "the buyer is to receive the goods" rather than at the point of delivery except in documentary shipment cases (Subsection (C)). This grants an opportunity for the exercise by the buyer of his preliminary right to inspection before paying, even though under the delivery term the risk of loss may have previously passed to him or the running of the credit period has already started.

2. Subsection (B), while providing for inspection by the buyer before he pays, protects the seller. He is not required to give up possession of the goods until he has received payment, where no credit has been contemplated by the parties. The seller may collect through a bank by a sight draft against an order bill of lading "hold until arrival; inspection allowed". Since the Navajo Nation has not adopted Article 4 of the Uniform Commercial Code relating to Banker's Deposits and Collections, the obligations of banks which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204. In the absence of a credit term, the seller is permitted to ship under reservation and if he does payment is then due where and when the buyer is to receive the documents.

3. Unless otherwise agreed, the place for the receipt of the documents and payment is the buyer's city but the time for payment is only after arrival of the goods, since under Subsection (B), and §§ 2-512 and 2-513 the buyer is under no duty to pay prior to inspection.

4. Where the mode of shipment is such that goods must be unloaded immediately upon arrival, too rapidly to permit adequate inspection before receipt, the seller must be guided by the provisions of this article on inspection which provide that if the seller wishes to demand payment before inspection, he must put an appropriate term into the contract. Even requiring payment against documents will not of itself have this desired result if the documents are to be held until the arrival of the goods. But under Subsections (B) and (C) if the terms are C.I.F., C.O.D., or cash against documents, payment may be due before inspection.

5. Subsection (D) states the common commercial understanding that an agreed credit period runs from the time of shipment or from the dating of the invoice which is commonly recognized as a representation of the time of shipment. The provision concerning any delay in sending forth the invoice is included because such conduct results in depriving the buyer of his fifth notice and warning as to when he must be prepared to pay.

#### **Cross References**

Point 1: Section 2-509.

Point 2: Section 2-505, 2-511, 2-512, and 2-513.

Point 3: Sections 2-308(B), 2-512, and 2-513.

Point 4: Section 2-513(C) (2).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

#### **§ 2-311. Options and cooperation respecting performance**

A. An agreement for sale which is otherwise sufficiently definite (§ 2-204(C)) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

B. Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in Subsections (A) (3) and (C) of § 2-319 specifications or arrangements relating to shipment are at the seller's option.

C. Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies:

1. Is excused for any resulting delay in his own performance; and

2. May also either proceed to perform in any reasonable manner or after the time for a material part if his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-311 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) permits the parties to leave certain detailed particulars of performance to be filled in by either of them without running the risk of having the contract invalidated for indefiniteness. The party to whom the agreement gives power to specify the missing details is required to exercise good faith and to act in accordance with commercial standards so that there is no surprise and the range of permissible variation is limited by what is commercially reasonable. The "agreement" which permits one party so to specify may be found as well in a course of dealing, usage of trade, or implication from circumstances as in explicit language used by the parties.

2. Options as to assortment of goods or shipping arrangements are specifically reserved to the buyer and seller respectively under Subsection (B) where no other arrangement has been made. This section rejects the test which mechanically and without regard to usage or the purpose of the option gave the option to the party "first under a duty to move" and applies instead a standard commercial interpretation to these circumstances. The "unless otherwise agreed" provision of this Subsection covers not only express terms but the background and circumstances which enter into the agreement.

3. Subsection (C) applies when the exercise of an option or cooperation by one party is necessary to or materially affects the other party's performance, but it is not seasonably forthcoming; the Subsection relieves the other party from the necessity for performance or excuses his delay in performance as the case may be. The contract-keeping party may at his option under this Subsection proceed to perform in any commercially reasonable manner rather than wait. In addition to the special remedies provided, this Subsection also reserves "all other remedies". The remedy of particular importance in this connection is that provided for insecurity. Request may also be made pursuant to the obligation of good faith for a reasonable indication of the time and manner of performance for which a party is to hold himself ready.

4. The remedy provided in Subsection (C) is one which does not operate in the situation which falls within the scope of § 2-614 on substituted performance. Where the failure to cooperate results from circumstances set forth in that section, the other party is under a duty to proffer or demand (as the case may be) substitute performance as a condition to claiming rights against the non-cooperating party.

#### **Cross References**

Point 1: Sections 1-201, 2-204 and 1-203.

Point 3: Sections 1-203 and 2-609.

Point 4: Section 2-614.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

**§ 2-312. Warranty of title and against infringement; buyer's obligation against infringement**

A. Subject to Subsection (B) there is in a contract for sale a warranty by the seller that:

1. The title conveyed shall be good, and its transfer rightful; and

2. The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

B. A warranty under Subsection (A) will be excluded or modified only by specific language or by circumstances which give the buyer reasons to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

C. Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-312 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

The warranty extends to a buyer whether or not the seller was in possession of goods at the time the sale or contract to sell was made.

The warranty of quiet possession is abolished. Disturbance of quiet

possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established.

The "knowledge" referred to in Subsection (A)(2) is actual knowledge as distinct from notice.

2. The provisions of this article requiring notification to the seller within a reasonable time after the buyer's discovery of a breach apply to notice of a breach of the warranty of title, where the seller's breach was innocent. However, if the seller's breach was in bad faith he cannot be permitted to claim that he has been misled or prejudiced by the delay in giving notice. In such case the "reasonable" time for notice should receive a very liberal interpretation. Whether the breach by the seller is in good or bad faith § 2-725 provides that the cause of action accrues when the breach occurs. Under the provisions of that section the breach of the warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to "future performance of the goods".

3. When the goods are part of the seller's normal stock and are sold in his normal course of business, it is his duty to see that no claim of infringement of a patent or trademark by a third party will mar the buyer's title. A sale by a person other than a dealer, however, raises no implication in its circumstances of such a warranty. Nor is there such an implication when the buyer orders goods to be assembled, prepared or manufactured on his own specifications. If, in such a case, the resulting product infringes a patent or trademark, the liability will run from buyer to seller. There is, under such circumstances, a tacit representation on the part of the buyer that the seller will be safe in manufacturing according to the specifications, and the buyer is under an obligation in good faith to indemnify him for any loss suffered.

4. This section rejects the cases which recognize the principle that infringements violate the warranty of title but deny the buyer a remedy unless he has been expressly prevented from using the goods. Under this article "eviction" is not a necessary condition to the buyer's remedy since the buyer's remedy arises immediately upon receipt of notice of infringement; it is merely one way of establishing the fact of breach.

5. Subsection (B) recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This Subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner.

6. The warranty of Subsection (A) is not designated as an "implied" warranty, and hence is not subject to § 2-316(C). Disclaimer of the warranty of title is governed instead by Subsection (B), which requires either specific language or the described circumstances.

#### **Cross References**

Point 1: Section 2-403.

Point 2: Sections 2-607 and 2-725.

Point 3: Section 1-203.

Point 4: Sections 2-609 and 2-725.

Point 6: Section 2-316.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Person". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section implements the policy that a buyer should normally obtain clear ownership rights, "title" to goods he buys. Such rights should allow him to hold the goods he receives without concern about substantial claims attacking those rights. The seller promises in each sale of goods that the buyer will receive "title", free of any substantial claims by third parties that they own the property. This promise also includes other types of claims which could limit a buyer's right to use the goods, such as security interests (see Article 9). The seller may avoid these obligations in only two ways: (1) specifically denying them in the contract or (2) in circumstances which give the buyer reason to know about the limited rights being transferred. Such circumstances would include a sheriff's sale or foreclosure sale where it is clear to the buyer that the seller may not have good title.

#### **§ 2-313. Express warranties by affirmation, promise, description, sample**

A. Express warranties by the seller are created as follows:

1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

2. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

3. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

B. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-313 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer denying such warranty in a form agreement are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated. This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

The warranties under this section are also effected for consumer transactions by a federal statute, the Magnuson-Moss Warranty Act-Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 et seq. (1976).

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of § 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of the Code may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse, except in unusual circumstances, to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under § 2-316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Subsection (A)(2) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from the existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language

or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (§ 2-209).

8. Concerning affirmations of value or a seller's opinion or commendation under Subsection (B), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of Subsection (B) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

#### **Cross References**

Point 1: Section 2-316.

Point 2: Sections 1-102(C) and 2-318.

Point 3: Section 2-316(B) (2)

Point 4: Section 2-316.

Point 5: Sections 1-205(D) and 2-314.

Point 6: Section 2-316.

Point 7: Section 2-209.

Point 8: Section 1-103.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

If the seller makes specific promises about the goods to the buyer and the buyer bought the goods on account of such promises, the seller must live up to those promises since they form an "express warranty". However, certain types of promises, such as those that are only opinions or general positive comments, do not give rise to an express warranty. Unlike the implied warranties in §§ 2-314 or 2-315, express warranties can not be excluded or modified in the agreement. However, a buyer might not be able to enforce oral promises which

conflict with the written terms of the contract due to the limitation on proof regarding oral evidence. (See §§ 2-202 and 2-316). In commercial transactions the buyer must give notice of the breach of warranties to the seller to preserve his rights (see § 2-607).

**§ 2-314. Implied warranty: merchantability, usage of trade**

A. Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

B. Goods to be merchantable must be at least such as:

1. Pass without objection in the trade under the contract description; and

2. In the case of fungible goods, are of fair average quality within the description; and

3. Are fit for the ordinary purposes for which such goods are used; and

4. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

5. Are adequately contained, packaged, and labeled as the agreement may require; and

6. Conform to the promises or affirmations of fact made on the container or label if any.

C. Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-314 of the Uniform Commercial Code adopted by the states. However, the limits on the definition of merchants in § 2-104 may limit the scope of this section.

**Commentary.** 1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (§ 2-316(B)). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under

an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section, and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of the fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of Subsection (A) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in Subsections (A) and (B)(3) of this section.

6. Subsection (B) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as ... " and the intention is to leave open other possible attributes of merchantability.

7. Subsection (B)(1) and (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection". Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (3). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the

normal course of business because they are what they purport to be.

9. Paragraph (4) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (5) applies only where the nature of the goods and of the transaction require a certain type of container, package or label. Paragraph (6) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labeling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That Section must be read with particular reference to its Subsection (D) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (C) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under § 2-316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

#### **Cross References**

Point 1: Section 2-316.

Point 3: Sections 1-203 and 2-104.

Point 5: Section 2-315.

Point 11: Section 2-316.

Point 12: Sections 1-201, 1-205 and 2-316.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section requires that goods sold by a "merchant" (someone who deals regularly in goods of that kind, for example a garage mechanic would probably be a merchant for the sale of automobile parts, but not for the sale of his furniture) must be of average quality. In other words the goods should be fit for normally expected uses. The warranty also extends to the packages in which goods are shipped, so for example this section would apply to soda bottles which explode. This warranty is limited to "sales" by merchants (although courts have used it to analogize to leasing and other transactions). Merchants may limit and deny the warranty in the agreement but the limitation must be in writing and conspicuous, (see § 2-316(A)).

#### **§ 2-315. Implied warranty: fitness for particular purpose**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-315 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance on the seller's skill and judgment if the circumstances are

such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, or course, must actually be relying on the seller.

2. A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

A contract may of course include both a warranty of merchantability and one of fitness for a particular purpose.

The provisions of this article on the cumulation and conflict of express and implied warranties must be considered on the question of inconsistency between or among warranties. In such a case any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for particular purpose as against all other warranties except where the buyer has taken upon himself the responsibility of furnishing the technical specifications.

3. In connection with the warranty of fitness for a particular purpose the provisions of this article on the allocation or division of risks are particularly applicable in any transaction in which the purpose for which the goods are to be used combines requirements both as to the quality of the goods themselves and compliance with certain laws or regulations. How the risks are divided is a question of fact to be determined, where not expressly contained in the agreement, from the circumstances of contracting, usage of trade, course of performance and the like, matters which may constitute the "otherwise agreement" of the parties by which they may divide the risk or burden.

4. Although normally the warranty will arise only where the seller is a merchant with the appropriate "skill or judgment", it can arise as to non-merchants where this is justified by the particular circumstances.

5. Under this section the existence of a patent or other trade name and the designation of the article by that name, or indeed in any other definite manner, is only one of the facts to be considered on the question of whether the buyer actually relied on the seller, but it is not of itself decisive of the issue. If the buyer himself is insisting on a particular brand he is not relying on the seller's skill and judgment and so no warranty results. But the mere fact that the article purchased has a particular patent or trade name is not sufficient to indicate non-reliance if the article has been recommended by the seller as adequate for the buyer's purposes.

6. The specific reference forward in the present section to the following section on exclusion or modification of warranties is to call attention to the possibility of eliminating the warranty in any given case. However it must be noted that under the following section the warranty of fitness for a particular purpose must be excluded or modified by a conspicuous writing.

#### **Cross References**

Point 2: Sections 2-314 and 2-317.

Point 3: Section 2-303.

Point 6: Section 2-316.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section provides that if the seller is aware of the special needs of buyer and the buyer's reliance upon the seller's judgment to meet those needs, the seller warrants or guarantees that the goods will meet these needs. This warranty may in some cases be broader than that of the warranty of merchantability in § 2-314, although it may overlap with that warranty. It is not limited to merchants and it may extend to uses of the goods which are not "ordinary". For example, if a buyer tells a seller that he needs a wrench which will not cause sparks because he is working in an explosive atmosphere, in selling the buyer a wrench the seller guarantees that the wrench he sells the buyer will not cause sparks. Since the requirement of "sparkless" operation goes beyond the ordinary use standard of "merchantability", the implied warranty of fitness for a particular use is broader than the warranty of merchantability. This warranty may also be limited or denied in accordance with § 2-316, but any such limitation must be in writing and conspicuous.

#### **§ 2-316. Exclusion or modification of warranties**

A. Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (§ 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable. Any oral waiver or creation of an express warranty must be in language comprehensible to the purchaser.

B. Subject to Subsection (C), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof".

C. Notwithstanding Subsection (B):

1. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults", or other language which in common understanding calls the buyer's

attention to the exclusion of warranties and makes plain that there is no implied warranty; and

2. When the buyer, before entering into the contract, has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

3. An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade;

4. With respect to the sale of cattle, goats, sheep, pigs, turkeys, horses, or poultry, there shall be no implied warranty that the animals are free from disease or sickness. This exemption shall not apply when the seller knowingly sells animals which are diseased or sick.

D. Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§ 2-718 and 2-719).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-316 of the Uniform Commercial Code adopted by the states, except that Subsection (A) has been modified to clarify that any oral creation or negation of an express warranty must be comprehensible to the purchaser and Subsection (C)(4) has been added to delete the implied warranty relating to the health of animals in a sale unless the seller knowingly sells diseased animals.

**Commentary.** 1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied". It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise. The effect of this section on warranties in consumer transactions has been modified by a federal statute, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. 15 U.S.C. § 2301 *et seq.* (1976).

2. The seller is protected under this article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under Subsection (D) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under Subsection (B), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (B) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in Subsection (C)(1)-(3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Subsection (C)(1) deals with general terms such as "as is", "as they stand", "with all faults", and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (1) are in fact merely a particularization of paragraph (3) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under Subsection (C)(2) warranties may be excluded or modified by the circumstances where they buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See §§ 2-314 and 2-715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in paragraph (2), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this article. Thus, if the offer of examination is accompanied bywords as to their merchantability or specific attributes and the buyer

indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by Subsection (A) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine that defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a non-professional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (3) of that section in case of such an inconsistency, the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

#### **Cross References**

Point 2: Sections 2-202, 2-718 and 2-719.

Point 7: Sections 1-205 and 2-208.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Course of dealing". Section 1-205.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Usage of trade". Section 1-205.

### **Special Plain Language Comment**

Once the seller makes an "express" warranty (see § 2-312) he may not deny that warranty. However, if the express warranty was made orally and not included in the written contract, the buyer may not be able to prove that the oral warranty was made because of the rule against oral testimony where a "final" written document exists (see § 2-202). Before relying on any permits to purchase the buyer should have the promise put into writing as part of the agreement. This section also seeks to limit the denial ("disclaimer") of the "implied warranties" of merchantability and fitness for a particular purpose. Such denials must generally be in writing and conspicuous. However, other circumstances may prove effective to deny such warranties such as an opportunity by the buyer to examine the goods before sale or words which will make clear to the buyer the risks he or she is assuming. Even if a warranty exists the seller may limit the remedies of a buyer to recover under such warranty, (see §§ 2-718 and 2-719).

### **§ 2-317. Cumulation and conflict of warranties express or implied**

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

A. Exact or technical specifications displace an inconsistent sample or model or general language of description.

B. A sample from an existing bulk displaces inconsistent general language of description.

C. Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-317 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The present section rests on the basic policy of this article that no warranty is created except by some conduct (either affirmative action or failure to disclose) on the part of the seller. Therefore, all warranties are made cumulative unless this construction of the contract is impossible or unreasonable.

2. The rules of this section are designed to aid in determining the intention of the parties as to which of inconsistent warranties which have arisen from the circumstances of their transaction shall prevail. These rules of intention are to be applied only where factors making for an equitable estoppel of the seller do not exist and where he has in perfect good faith made warranties

which later turn out to be inconsistent. To the extent that the seller has led the buyer to believe that all of the warranties can be performed, he is estopped from setting up any essential inconsistency as a defense.

3. The rules in Subsections (A), (B) and (C) are designed to ascertain the intention of the parties by reference to the factor which probably claimed the attention of the parties in the first instance. These rules are not absolute but may be changed by evidence showing that the conditions which existed at the time of contracting make the construction called for by the section inconsistent or unreasonable.

#### **Cross References**

Point 1: Section 2-315

#### **Definitional Cross References**

"Party". Section 1-201.

#### **§ 2-318. Third party beneficiaries of warranties express or implied**

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-318 of the Uniform Commercial Code adopted by the states. The Navajo Nation has adopted Alternative C of those provided by the Official Text of the Uniform Commercial Code.

**Commentary.** 1. The last sentence of this section does not mean that a seller is precluded from excluding or disclaiming a warranty which might otherwise arise in connection with the sale provided such exclusion or modification is permitted by § 2-316. Nor does that sentence preclude the seller from limiting the remedies of his own buyer and of any beneficiaries, in any manner provided in §§ 2-718 or 2-719. To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties which he has made to his buyer would extend under this section.

2. The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity". It seeks to accomplish this purpose without any derogation of any right or remedy

resting on negligence. It rests primarily upon the merchant-seller's warranty under this article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action or breach of warranty against the seller whose warranty extends to him.

3. This alternative, the third of those presented in the Official Code text goes further, following the trend of modern decisions as indicated by the Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965), in extending the rule beyond injuries to the person. This rule eliminates horizontal and vertical privity and extends the right to sue on warranty claims to corporations as well as natural persons.

#### **Cross References**

Point 1: Sections 2-316, 2-718 and 2-719.

Point 2: Section 2-314.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section eliminates certain technical requirements of "privity" - a specific type of direct contractual commitment between two parties-to allow a lawsuit based on warranty claims. Persons or corporations who are injured by goods may now sue not only the retailer, but the manufacturer as well, even though no direct contract was ever made between the manufacturer and the injured person or corporation.

#### **§ 2-319. F.O.B. and F.A.S. terms**

A. Unless otherwise agreed the term a F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:

1. When the term is a F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article (§ 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

2. When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this article (§ 2-503);

3. When under either (1) or (2) the term is also F.O.B. vessel, car

or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this article on the form of bill of lading (§ 2-323).

B. Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must:

1. At his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

2. Obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

C. Unless otherwise agreed in any case falling within Subsection (A)(1) or (3) or Subsection (B), the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B., the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this article (§ 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

D. Under the term F.O.B. vessel or F.A.S. unless otherwise agreed, the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-319 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The section is intended to negate the uncommercial line of decision which treats an "F.O.B." term as "merely a price term". The distinctions taken in Subsection (A) handle most of the issues which have on occasion led to the unfortunate judicial language just referred to. Other matters which have led to sound results being based on unhappy language in regard to F.O.B. clauses are dealt with in this Code by § 2-311(B) (seller's option regarding arrangements relating to shipment) and §§ 2-614 and 615 (substituted performance and seller's excuse).

2. Subsection (A)(3) not only specifies the duties of a seller who engages to deliver "F.O.B vessel", or the like, but ought to make clear that no agreement is soundly drawn when it looks to reshipment from San Francisco or New York, but speaks merely of "F.O.B." the place.

3. The buyer's obligations stated in Subsection (A)(3) and Subsection (C) are as shown in the text, obligations of cooperation. The last sentence of

Subsection (C) expressly, though perhaps unnecessarily, authorizes the seller, pending instructions, to go ahead with such preparatory moves as shipment from the interior to the named point of delivery. The sentence presupposes the usual case in which instructions "fail"; a prior repudiation by the buyer, giving notice that breach was intended, would remove the reason for the sentence, and would normally bring into play, instead, the second sentence of § 2-704, which duly calls for lessening damages.

4. The treatment of "F.O.B. vessel" in conjunction with F.A.S. fits, in regard to the need for payment against documents, with standard practice and case law; but "F.O.B. vessel" is a term which by its very language makes express the need for an "on board" document. In this respect, that term is stricter than the ordinary overseas "shipment" contract (C.I.F., etc., § 2-320).

#### **Cross References**

Sections 2-311(C), 2-323, 2-503 and 2-504.

#### **Definitional Cross References**

"Agreed". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **Special Plain Language Comment**

Sections 2-319 to 2-322 concern standard methods of shipment. The sections determine when the risk of loss in the goods will pass from one party to the other and other rights of the parties. These other rights can be quite important: for example shipment under C.I.F. and C. & F. terms, the buyer must pay upon the delivery of the appropriate documents and may not inspect the goods prior to the payment.

#### **§ 2-320. C.I.F. and C. & F. terms**

A. The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named estimation. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

B. Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:

1. Put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

2. Load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

3. Obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

4. Prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

5. Forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

C. Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligation and risks as a C.I.F. term except the obligation as to insurance.

D. Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-320 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". Delivery of possession of the goods is accomplished by delivery of the bill of lading, and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer. The buyer has no right of inspection prior to payment or acceptance of the documents.

2. The seller's obligations remain the same even though the C.I.F. term is "used only in connection with the stated price and destination".

3. The insurance stipulated by the C.I.F. term is for the buyer's benefit, to protect him against the risk of loss or damage to the goods in transit. A clause in a C.I.F. contract "insurance-for the account of sellers" should be viewed in its ordinary mercantile meaning that the sellers must pay for the insurance and not that it is intended to run to the seller's benefit.

4. A bill of lading covering the entire transportation from the port of shipment is explicitly required but the provision on this point must be read in the light of its reason to assure the buyer of as full protection as the conditions of shipment reasonably permit, remembering always that this type of contract is designed to move the goods in the channels commercially available. To enable the buyer to deal with the goods while they are afloat the bill of lading must be one that covers only the quantity of goods called for by the contract. The buyer is not required to accept his part of the goods without a bill of lading because the latter covers a larger quantity, nor is he required to accept a bill of lading for the whole quantity under a stipulation to hold the excess for the owner. Although the buyer is not compelled to accept either goods or documents under such circumstances he may of course claim his rights in any goods which have been identified to his contract.

5. The seller is given the option of paying or providing for the payment of freight. He has no option to ship "freight collect" unless the agreement so provides. The rule of the common law that the buyer need not pay the freight if the goods do not arrive is preserved.

Unless the shipment has been sent "freight collect" the buyer is entitled to receive documentary evidence that he is not obligated to pay the freight; the seller is therefore required to obtain a receipt "showing that the freight has been paid or provided for". The usual notation in the appropriate space on the bill of lading that the freight has been prepaid is a sufficient receipt, as at common law. The phrase "provided for" is intended to cover the frequent situation in which the carrier extends credit to a shipper for the freight on successive shipments and receives periodical payments of the accrued freight charges from him.

6. The requirement that unless otherwise agreed the seller must procure insurance "of a kind and on terms then current at the port for shipment in the usual amount, in the currency of the contract, sufficiently shown to cover the same goods covered by the bill of lading" applies to both marine and war risk insurance. As applied to marine insurance, it means such insurance as is usual or customary at the port for shipment with reference to the particular kind of goods involved, the character and equipment of the vessel, the route of the voyage, the port of destination and any other considerations that affect the risk. It is the substantial equivalent of the ordinary insurance in the particular trade and on the particular voyage and is subject to agreed specifications of type or extent of coverage. The language does not mean that the insurance must be adequate to cover all risks to which the goods may be subject in transit. There are some types of loss or damage that are not covered by the usual marine insurance and are excepted in bills of lading or in applicable statutes from the causes of loss or damage for which the carrier or the vessel is liable. Such risks must be borne by the buyer under this article. Insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination.

7. An additional obligation is imposed upon the seller in requiring him to procure customary war risk insurance at the buyer's expense. This changes the common law on the point. The seller is not required to assume the risk of including in the C.I.F. price the cost of such insurance, since it often fluctuates rapidly, but is required to treat it simply as a necessary for the buyer's account. What war risk insurance is "current" or usual turns on the standard forms of policy or rider in common use.

8. The C.I.F. contract calls for insurance covering the value of the goods at the time and place of shipment and does not include any increase in market value during transit or any anticipated profit to the buyer on a sale by him.

The contract contemplates that before the goods arrive at their destination they maybe sold again and again on C.I.F. terms and that the original policy of insurance and bill of lading will run with the interest in the goods by being transferred to each successive buyer. A buyer who becomes the seller in such an intermediate contract for sale does not thereby, if his sub-buyer knows the circumstances, undertake to insure the goods again at an increased price fixed in the new contract or to cover the increase in price by additional insurance, and his buyer may not reject the documents on the ground that the original policy does not cover such higher price. If such a sub-buyer desires additional insurance he must procure it for himself

Where the seller exercise an option to ship "freight collect" and to credit the buyer with the freight against the C.I.F. price, the insurance need not cover the freight since the freight is not at the buyer's risk. On the other hand, where the seller prepays the freight upon shipping under a bill of lading requiring prepayment and providing that the freight shall be deemed earned and shall be retained by the carrier "ship and/or cargo lost or not lost", or using words of similar import, he must procure insurance that will cover the freight, because notwithstanding that the goods are lost in transit the buyer is bound to pay the freight as part of the C.I.F. price and will be unable to recover it back from the carrier.

9. Insurance "for the account of whom it may concern" is usual and sufficient. However, for a valid tender the policy of insurance must be one which can be disposed of together with the bill of lading and so must be "sufficiently shown to cover the same goods covered by the bill of lading". It must cover separately the quantity of goods called for by the buyer's contract and not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section. By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term "certificate of insurance", however, does not of itself include certificates or "cover notes" issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. The present section rejects the rule that not only brokers' certificates and "cover notes" but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract.

The seller's failure to tender a proper insurance document is waived if the

buyer refuses to make payment on other and untenable grounds at a time when proper insurance could have been obtained and tendered by the seller if timely objection had been made. Even a failure to insure on shipment may be cured by seasonable tender of a policy retroactive in effect; e.g., one insuring the goods "lost or not lost". The provisions of this article on cure of improper tender and on waiver of buyer's objections by silence are applicable to insurance tenders under a C.I.F. term. Where there is no waiver by the buyer as described above, however, the fact that the goods arrive safely does not cure the seller's breach of his obligations to insure them and tender to the buyer a proper insurance document.

10. The seller's invoice of the goods shipped under a C.I.F. contract is regarded as a usual and necessary document upon which reliance may properly be placed. It is the document which evidences points as of description, quality and the like which do not readily appear in other documents. This article rejects those statements to the effect that the invoice is a usual but not a necessary document under a C.I.F. term.

11. The buyer needs all of the documents required under a C.I.F. contract, in due form and with necessary endorsements, so that before the goods arrive he may deal with them by negotiating the documents or may obtain prompt possession of the goods after their arrival. If the goods are lost or damaged in transit the documents are necessary to enable him promptly to assert his remedy against the carrier or insurer. The seller is therefore obligated to do what is mercantilely reasonable in the circumstances and should make every reasonable exertion to send forward the documents as soon as possible after the shipment. The requirement that the documents be forwarded with "commercial promptness" expresses a more urgent need for action than that suggested by the phrase "reasonable time".

12. Under a C.I.F. contract the buyer, as under the common law, must pay the price upon tender of the required documents without first inspecting the goods, but his payment in these circumstances does not constitute an acceptance of the goods nor does it impair his right of subsequent inspection or his options and remedies in the case of improper delivery. All remedies and rights for the seller's breach are reserved to him. The buyer must pay before inspection and assert his remedy against the seller afterward unless the non-conformity of the goods amounts to a real failure of consideration, since the purpose of choosing this form of contract is to give the seller protection against the buyer's unjustifiable rejection of the goods at a distant port of destination which would necessitate taking possession of the goods and suing the buyer there.

13. A valid C.I.F. contract may be made which requires part of the transportation to be made on land and part on the sea, as where the goods are to be brought by rail from an inland point to a seaport and thence transported by vessel to the named destination under a "through" or combination bill of lading issued by the railroad company. In such a case shipment by rail from the inland point within the contract period is a timely shipment notwithstanding that the loading of the goods on the vessel is delayed by causes beyond the seller's control.

14. Although Subsection (B) stating the legal effects of the C.I.F. term is an "unless otherwise agreed" provision, the express language used in an agreement is frequently a precautionary, fuller statement of the normal C.I.F. terms and

hence not intended as a departure or variation from them. Moreover, the dominant outlines of the C.I.F. term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines rather than as destroying the whole meaning of a term which essentially indicates a contract for proper shipment rather than one for delivery at destination. Particularly careful consideration is necessary before a printed form or clause is construed to mean agreement otherwise and where a C.I.F. contract is prepared on a printed form designed for some other type of contract, the C.I.F. terms must prevail over printed clauses repugnant to them.

15. Under Subsection (D) the fact that the seller knows at the time of the tender of the documents that the goods have been lost in transit does not affect his rights if he has performed his contractual obligations. Similarly, the seller cannot perform under a C.I.F. term by purchasing and tendering landed goods.

16. Under the C. & F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C. & F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer's agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an "open" or "floating" policy covering all shipments made by him or to him, in either of which events the C. & F. term is adequate without mention of insurance.

17. It is to be remembered that in a French contract the term "C.A.F." does not mean "Cost and Freight" but has exactly the same meaning as the term "C.I.F." since it is merely the French equivalent of that term. The "A" does not stand for "and", but for "assurance" which means insurance.

#### **Cross References**

Point 4: Section 2-323.

Point 6: Section 2-509(A) (1).

Point 9: Sections 2-508 and 2-605(A) (1).

Point 12: Sections 2-321(C), 2-512 and 2-513(C).

#### **Definitional Cross References**

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

**§ 2-321. C.I.F. or C. & F.: "net landed weights"; "payment on arrival"; warranty of condition on arrival**

Under a contract containing a term C.I.F. or C. & F:

A. Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

B. An agreement described in Subsection (A) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

C. Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-321 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section deals with two variations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basic C.I.F. pattern. Subsections (A) and (B), which provide for a shift to the seller of the risk of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C. & F. term as to the passing of marine risks to the buyer at the point of shipment. Subsection (C) provides that where under the contract documents are to be presented for payment after arrival of the goods, this amounts merely to a postponement of the payment under the C.I.F. contract and is not to be confused with the "no arrival, no sale" contract. If the goods are lost, delivery of the documents and payment against them are due when the goods should have arrived. The clause for payment on or after arrival is not to be construed as such a condition precedent to payment that if the goods are lost in transit the buyer need never pay and the seller must bear the loss.

#### **Cross References**

Section 2-324.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **§ 2-322. Delivery "ex-ship"**

A. Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

B. Under such a term unless otherwise agreed:

1. The seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

2. The risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-322 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The delivery term, "ex-ship", as between seller and buyer, is the reverse of the F.A.S. term covered.

2. Delivery need not be made from any particular vessel under a clause calling for delivery "ex-ship", even though a vessel on which shipment is to be made originally is named in the contract, unless the agreement by appropriate language restricts the clause to delivery from a named vessel.

3. The appropriate place and manner of unloading at the port of destination depend upon the nature of the goods and the facilities and usages of the port.

4. A contract fixing a price "ex-ship" with payment "cash against documents"

calls only for such documents as are appropriate to the contract. Tender of a delivery order and of a receipt for the freight after the arrival of the carrying vessel is adequate. The seller is not required to tender a bill of lading as a document of title nor is he required to insure the goods for the buyer's benefit, as the goods are not at the buyer's risk during the voyage.

#### **Cross References**

Point 1: Section 2-319(B).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **§ 2-323. Form of bill of lading required in overseas shipment: "overseas"**

A. Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

B. Where in a case within Subsection (A) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set:

1. Due tender of a single part is acceptable within the provisions of this article on cure of improper delivery (§ 2-508(A)); and

2. Even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

C. A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-323 of the Uniform Commercial Code adopted by the states. Article 5 of the

Uniform Commercial Code relating to "Letters of Credit" has not been adopted by the Navajo Nation. The rights of parties which would be governed under Article 5 are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. Subsection (A) follows the "American" rule that a regular bill of lading indicating delivery of the goods at the dock for shipment is sufficient, except under a term "F.O.B. vessel". See § 2-319 and comment thereto.

2. Subsection (B) deals with the problems of bills of lading covering deep water shipments, issued not as a single bill of lading but in a set of parts, each part referring to the other parts and the entire set constituting in commercial practice and at law a single bill of lading. Commercial practice in international commerce is to accept and pay against presentation of the first part of a set if the part is sent from overseas even though the contract of the buyer requires presentation of a full set of bills of lading provided adequate indemnity for the missing parts is forthcoming.

This Subsection codifies that practice as between buyer and seller. Article 5 of the Uniform Commercial Code which has not been adopted by the Navajo Nation and the rules concerning banks' presentations of drafts under letters of credit which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204. This Subsection means that the buyer must accept and act on drafts by banks issued under letters of credit to give indemnities against missing parts if he in good faith deems them adequate. But neither this Subsection nor Article 5 decides whether a bank which has issued a letter of credit is similarly bound. The issuing bank's obligation under a letter of credit is independent and depends on its own terms.

#### **Cross References**

Section 2-508(B).

#### **Definitional Cross References**

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Person". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". § 1-201.

**§ 2-324. "No arrival, no sale" term**

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

A. The seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and

B. Where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (§ 2-613).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-324 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The "no arrival, no sale" term in a "destination" overseas contract leaves risk of loss on the seller but gives him an exemption from liability for non-delivery. Both the nature of the case and the duty of good faith require that the seller must not interfere with the arrival of the goods in any way. If the circumstances impose upon him the responsibility for making or arranging the shipment, he must have a shipment made despite the exemption clause. Further, the shipment made must be a conforming one, for the exemption under a "no arrival, no sale" term applies only to the hazards of transportation and the goods must be proper in all other respects.

The reason of this section is that where the seller is reselling goods bought by him as shipped by another and this fact is known to the buyer, so that the seller is not under any obligation to make the shipment himself, the seller is entitled under the "no arrival, no sale" clause to exemption from payment of damages for non-delivery if the goods do not arrive or if the goods which actually arrive are non-conforming. This does not extend to sellers who arrange shipment by their own agents, in which case the clause is limited to casualty due to marine hazards. But sellers who make known that they are contracting only with respect to what will be delivered to them by parties over whom they assume no control are entitled to the full quantum of the exemption.

2. The provisions of this article on identification must be read together with the present section in order to bring the exemption into application. Until there is some designation of the goods in a particular shipment or on a particular ship as being those to which the contract refers there can be no application of an exemption for their non-arrival.

3. The seller's duty to tender the agreed or declared goods if they do arrive is not impaired because of their delay in arrival or by their arrival after transshipment.

4. The phrase "to arrive" is often employed in the same sense as "no arrival,

no sale" and may then be given the same effect. But a "to arrive" term, added to a C.I.F. or C. & F. contract, does not have the full meaning given by this section to "no arrival, no sale". Such a "to arrive" term is usually intended to operate only to the extent that the risks are not covered by the agreed insurance and the loss or casualty is due to such uncovered hazards. In some instances the "to arrive" term maybe regarded as a time of payment term, or, in the case of the reselling seller discussed in Point I above, as negating responsibility for conformity of the goods, if they arrive, to any description which was based on his good faith belief of the quality. Whether this is the intention of the parties is a question of fact based on all the circumstances surrounding the resale and in case of ambiguity the rules of §§ 2-316 and 2-317 apply to preclude dishonor.

5. Subsection (B) applies where goods arrive impaired by damage or partial loss during transportation and makes the policy of this article on casualty to identified goods applicable to such a situation. For the term cannot be regarded as intending to give the seller an unforeseen profit through casualty, it is intended only to protect him from loss due to causes beyond his control.

#### **Cross References**

Point 1: Section 1-203.

Point 2: Section 2-501(1) and (3)

Point 5: Section 2-613.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **§ 2-325. "Letter of credit" term; "confirmed credit"**

A. Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

B. The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly from him.

C. Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-325 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (B) follows the general policy of this article and Article 3 (§ 3-802) on conditional payment, under which payment by check or other short-term instrument is not ordinarily final as between the parties if the recipient duly presents the instrument and honor is refused. Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's, but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.

2. Subsection (C) requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer. It is not necessary, unless otherwise agreed, that the credit be a negotiation credit; the seller can finance himself by an assignment of the proceeds.

3. The definition of "confirmed credit" is drawn on the supposition that the credit is issued by a bank which is not doing direct business in the seller's financial market; there is no intention to require the obligation of two banks both local to the seller.

#### **Cross References**

Sections 2-403, 2-511(C) and 3-802.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Notifies". Section 1-201.

"Overseas". Section 2-323.

"Purchaser". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Term". Section 1-201.

**§ 2-326. Sale on approval and sale or return: consignment sales and rights of creditors**

A. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

1. A "sale on approval" if the goods are delivered primarily for use; and

2. A "sale or return" if the goods are delivered primarily for resale.

B. Except as provided in Subsection (C), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

C. Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this Subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this Subsection is not applicable if the person making delivery:

1. Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

2. Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or

3. Complies with the filing provisions of the Article on Secured Transactions (Article 9).

4. Is delivering a work of art pursuant to Subsection (D).

D. Where goods are works of art delivered to an art dealer by an artist for the purpose of exhibition or sale, and the artist's share of the proceeds from the sale of the work by the dealer, whether to the dealer on his own account or to a third person, shall create a priority in favor of the artist over the claims, liens or security interests of the creditors of the art dealer, notwithstanding any provision of the Code. For the purposes of this Subsection:

1. "Art" includes, but is not limited to paintings, sculptures, drawings, works of graphic art, pottery, weaving, batik, sand paintings,

kachina dolls, bead work, baskets, jewelry, macramés or quilts containing the artist's original handwritten signature or the artist's distinctive mark on the work of art;

2. "Artist" means the creator of a work of art, or, if he or she is deceased, the artist's heirs or personal representative;

3. "Art dealer" means a person primarily engaged in the business of selling works of art;

4. "Creditor" means a "creditor" as defined in § 1-201 of the Code; and

5. "Person" means an individual, partnership, corporation or association.

E. Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the Statute of Frauds section of this article (§ 2-201) and as contradicting the sale aspect of the contract within the provisions of this article on parol or extrinsic evidence (§ 2-202).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-326 of the Uniform Commercial Code adopted by the states. Subsections (C)(4) and (D) were added to protect the rights of artists against the claims of creditors of art dealers or their consignees.

**Commentary.** 1. A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have frequently been confused. The type of "sale on approval", "on trial" or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell. The type of "sale or return" involved herein is a sale to a merchant whose unwillingness to buy is overcome by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold. These two transactions are so strongly delineated in practice and in general understanding that every presumption runs against a delivery to a consumer being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval".

The right to return the goods for failure to conform to the contract does not make the transaction a "sale on approval" or "sale or return" and has nothing to do with this and the following section. The present section is not concerned with remedies for breach of contract. It deals instead with a power given by the contract to turn back the goods even though they are wholly as

warranted.

The section nevertheless presupposes that a contract for sale is contemplated by the parties although that contract may be of the peculiar character here described.

Where the buyer's obligation as a buyer is conditioned not on his personal approval but on the article's passing a described objective test, the risk of loss by casualty pending the test is properly the seller's and proper return is at his expense. On the point of "satisfaction" as meaning "reasonable satisfaction" where an industrial machine is involved, this article takes no position.

2. Pursuant to the general policies of this Code which require good faith not only between the parties to the sales contract, but as against interested third parties, Subsection (C) resolves all reasonable doubts as to the nature of the transaction in favor of the general creditors of buyer. As against such creditors words such as "on consignment" or "on memorandum", with or without words of reservation of title in the seller, are disregarded when the buyer has a place of business at which he deals in goods of the kind involved. A necessary exception is made where the buyer is known to be engaged primarily in selling the goods of others or is selling under a relevant sign law, or the seller complies with the filing provisions of Article 9 as if his interest were a security interest. However, there is no intent in this section to narrow the protection afforded to third parties in any jurisdiction which has a selling Factors Act. The purpose of the exception is merely to limit the effect of the present Subsection itself, in the absence of any such Factors Act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation.

3. Subsections (C)(4) and (D) protect the rights of artists against the interests of the creditors of the art dealers.

4. Subsection (E) resolves a conflict in the preexisting case law by recognition that an "or return" provision is so definitely at odds with any ordinary contract for sale of goods that where written agreements are involved it must be contained in a written memorandum. The "or return" aspect of a sales contract must be treated as a separate contract under the Statute of Frauds section and as contradicting the sale insofar as questions of parol or extrinsic evidence are concerned.

#### **Cross References**

Point 2: Article 9.

Point 4: Sections 2-201 and 2-202.

#### **Definitional Cross References**

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Goods". Section 2-105.

"Sale". Section 2-106.

"Seller". Section 2-103.

**§ 2-327. Special incidents of sale on approval and sale or return**

A. Under a sale on approval unless otherwise agreed:

1. Although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

2. Use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

3. After due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

B. Under a sale or return unless otherwise agreed:

1. The option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and

2. The return is at the buyer's risk and expense.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-327 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. If all of the goods involved in a sale on approval conform to the contract, the buyer's acceptance of part of the goods constitutes acceptance of the whole. Acceptance of part falls outside the normal intent of the parties in the "on approval" situation and the policy of this article allowing partial acceptance of a defective delivery has no application here. A case where a buyer takes home two dresses to select one commonly involves two distinct contracts; if not, it is covered by the words "unless otherwise agreed".

2. In the case of a sale or return, the return of any unsold unit merely

because it is unsold is the normal intent of the "sale or return" provision, and therefore the right to return for this reason alone is independent of any other action under the contract which would turn on wholly different considerations. On the other hand, where the return of goods is for breach, including return of items resold by the buyer and returned by the ultimate purchasers because of defects, the return procedure is governed not by the present section but by the provisions on the effects and revocation of acceptance.

3. In the case of a sale on approval the risk rests on the seller until acceptance of the goods by the buyer, while in a sale or return the risk remains throughout on the buyer.

4. Notice of election to return given by the buyer in a sale on approval is sufficient to relieve him of any further liability. Actual return by the buyer to the seller is required in the case of a sale or return contract. What constitutes due "giving" of notice, as required in "on approval" sales, is governed by the provisions on good faith and notice. "Seasonable" is used here as defined in § 1-204. Nevertheless, the provisions of both this article and of the contract on this point must be read with commercial reason and with full attention to good faith.

#### **Cross References**

Point 1: Sections 2-501, 2-601 and 2-603.

Point 2: Sections 2-607 and 2-608.

Point 4: Sections 1-201 and 1-204.

#### **Definitional Cross References**

"Agreed". Section 1-201.

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Notification". Section 1-201.

"Sale on approval". Section 2-326.

"Sale or return". Section 2-326.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

### **§ 2-328. Sale by auction**

A. In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

B. A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

C. Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

D. If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This Subsection shall not apply to any bid at a forced sale.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-328 of the Uniform Commercial code adopted by the states.

**Commentary.** 1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.

2. An auction "with reserve" is the normal procedure. The crucial point, however, for determining the nature of an auction is the "putting up" of the goods. This article accepts the view that the goods may be withdrawn before they are actually "put up", regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present. This is subject to any peculiar facts which might bring the case within the "firm offer" principle of this article, but an offer

to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the "putting up" of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve; and the rule is made explicit that the retraction of a bid does not revive a prior bid.

#### **Cross References**

Point 2: Section 2-205.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Good Faith". Section 1-201.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notice". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

#### **Part 4. Title, Creditors and Good Faith Purchasers**

##### **§ 2-401. Passing of title; reservation for security; limited application of this section**

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material, the following rules apply:

A. Title to goods cannot pass under a contract for sale prior to their identification to the contract (§ 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

B. Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different

time or place; and in particular and despite any reservation of a security interest by the bill of lading:

1. If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

2. If the contract requires delivery at destination, title passes on tender there.

C. Unless otherwise explicitly agreed where delivery is to be made without moving goods:

1. If the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

2. If the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

D. A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversioning occurs by operation of law and is not a "sale".

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-401 of the Uniform Commercial code adopted by the states.

**Commentary.** 1. This article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not "title" to the goods has passed. That the rules of this section in no way alter the rights of either the buyer, seller or third parties declared elsewhere in the Article is made clear by the preamble of this section. This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public" regulation depends upon a "sale" or upon location of "title" without further definition. The basic policy of this article that known purpose and reason should govern interpretation cannot extend beyond the scope of its own provisions. It is therefore necessary to state what a "sale" is and when title passes under this article in case the courts deem any public regulation to incorporate the defined term of the "private" law. Examples of this type of "public" law include tax law which employs transfer of "title" to determine when taxes are due and criminal law which employs the transfer of title to determine potential liability for theft.

2. "Future" goods cannot be the subject of a present sale. Before title can pass the goods must be identified in the manner set forth in § 2-501. The

parties, however, have full liberty to arrange by specific terms for the passing of title to goods which are existing.

3. The "special property" of the buyer in goods identified to the contract is excluded from the definition of "security interest"; its incidents are defined in provisions of this article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency, and on the buyer's right to specific performance or replevin.

4. The factual situations in Subsections (B) and (C) upon which passage of title turn actually base the test upon the time when the seller has finally committed himself in regard to specific goods. Thus in a "shipment" contract he commits himself by the act of making the shipment. If shipment is not contemplated Subsection (C) turns on the seller's final commitment, i.e., the delivery of documents or the making of the contract.

#### **Cross References**

Point 2: Sections 2-102, 2-501 and 2-502.

Point 3: Sections 1-201, 2-402, 2-403, 2-502 and 2-716.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

#### **Special Plain Language Comment**

In most cases the transfer of title (or ownership) under the Code does not determine changes in the rights of the parties. Such rights are determined by concepts in the Code such as acceptance. However, in some "residual" cases not covered by the Code, the time of transfer of title will be important to determine the rights of the parties. For these "residual" cases and other statutes such as tax and criminal statutes this section gives guidance on the issue of when title passes. Title may only pass after "identification" (a term defined in § 2-501) of the goods, when the goods covered by the agreement have been designated in some way so that they can be separated from other goods. Unless otherwise agreed by the parties, title passes upon the seller's completion of any actions necessary to "deliver" the goods. For example, if the agreement provides for shipment, but not delivery of the goods, then title passes upon such shipment, i.e., in such a contract the title passes to the buyer when the seller places the goods on a truck for delivery, not at the time the shipper delivers the goods to their destination. Ownership in the goods returns to the seller if the goods are rejected by buyer, but such a transfer is not defined as a "sale" since the goods are being returned and many Code provisions relating to sales would be inappropriate.

#### **§ 2-402. Rights of seller's creditors against sold goods**

A. Except as provided in Subsections (B) and (C), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this article (§§ 2-502 and 2-716).

B. A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

C. Nothing in this article shall be deemed to impair the rights of creditors of the seller:

1. Under the provisions of the Article on Secured Transactions (Article 9); or

2. Where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a pre-existing claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from the doctrine of fraudulent retention in this section 2-402(A) and 2-402(B) constitute the transaction a

fraudulent transfer or voidable preference.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-402 of the Uniform Commercial Code adopted by the states. The reference to this "Article" in § 2-402(C)(2) is clarified by referring specifically to the Doctrine of Fraudulent Retention.

**Commentary.** 1. Local law on questions of hindrance of creditors by the seller's retention of possession of the goods are outside the scope of this article, but retention of possession in the current course of trade is legitimate. Transactions which fall within the law's policy against improper preferences are reserved from the protection of this article.

2. The retention of possession of the goods by a merchant seller for a commercially reasonable time after a sale or identification in current course is exempted from attack as fraudulent. Similarly, the provisions of Subsection (C) have no application to identification or delivery made in the current course of trade, as measured against general commercial understanding of what a "current" transaction is.

### **Definitional Cross References**

"Contract for sale". Section 2-106.

"Creditor". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Money". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

### **Special Plain Language Comment**

This section deals with the problem of the conflict of rights between the seller's creditors and the buyer for goods which have been sold to the buyer but are still held by the seller. The retention of goods by the seller which have already been sold can mislead the creditors of the seller concerning his

financial position—the seller will appear to have more "assets" than he actually owns. The creditors of the seller may void the "sale" of the goods to the buyer, unless the seller is a "merchant" and only retains the goods for a "reasonable time". Moreover, even if the goods are delivered to the buyer a seller may still claim rights to them through a security interest (see Article 9) or the doctrine of fraudulent conveyance under Navajo law.

**§ 2-403. Power to transfer; good faith purchase of goods; "entrusting"**

A. A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of this interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:

1. The transferor was deceived as to the identity of the purchaser;  
or
2. The delivery was in exchange for a check which is later dishonored; or
3. It was agreed that the transaction was to be a "cash sale"; or
4. The delivery was procured through fraud punishable as larcenous under the criminal law.

B. Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to, transfer all rights of the entruster to a buyer in ordinary course of business.

C. "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

D. The rights of other purchasers of goods and of lien creditors are governed by the Article on Secured Transactions (Article 9), and the Articles on Bulk Transfers and Documents of Title as established Navajo law pursuant to 7 N.N.C. § 204.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-403 of the Uniform commercial Code adopted by the states. References to Articles 6 and 7 of the Uniform Commercial Code have been omitted because the Navajo Nation has not adopted these Articles.

**Commentary.** 1. This section states a unified and simplified policy on good

faith purchase of goods. The basic policy of our law allowing transfer of such title as the transferor has is generally continued and expanded under Subsection (A). In this respect the provisions of the section are applicable to a person taking by any form of "purchase" as defined by the Code. Moreover the policy of the Code expressly providing for the application of supplementary general principles of law to sales transactions wherever appropriate joins with the present section to continue unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles.

On the other hand, the contract of purchase is of course limited by its own terms as in a case of pledge for a limited amount or of sale of a fractional interest in goods. The Code in § 2-403(A)(1) rejects the distinction between deception carried on face-to-face and deception carried on by mail or wire. This rejection is based upon the policy of shifting the focus of the inquiry from the intention of the initial transferor to the good faith of the ultimate purchaser.

2. The many particular situations in which a buyer in ordinary course of business from a dealer has been protected against reservation of property or other hidden interest are gathered by subsections (B)-(D) into a single principle protecting persons who buy in ordinary course out of inventory. Consignors have no reason to complain, nor have lenders who hold a security interest in the inventory, since the very purpose of goods in inventory is to be turned into cash by sale.

The principle is extended in Subsection (C) to fit with the abolition of the old law of "cash sale" by Subsection (A)(3). It is also freed from any technicalities depending on the extended law of larceny; such extension of the concept of theft to include trick, particular types of fraud, and the like is for the purpose of helping conviction of the offender; it has no proper application to the long-standing policy of civil protection of buyers from persons guilty of such trick or fraud. Finally, the policy is extended, in the interest of simplicity and sense, to any entrusting by a bailor; this is in consonance with the explicit provisions of § 7-205 on the powers of a warehouseman who is also in the business of buying and selling fungible goods of the kind he warehouses. Article 7 has not been adopted by the Navajo Nation and the powers of the warehouseman which would be governed under § 7-205 are governed by Navajo law pursuant to 7 N.N.C. § 204. As to entrusting by a secured party, Subsection (B) is limited by the more specific provisions of § 9-307(A), which deny protection to a person buying farm products from a person engaged in farming operations.

3. The definition of "buyer in ordinary course of business" (§ 1-201) is effective here and preserves the essence of the healthy limitations developed by the case law on the older statutes. The older loose concept of good faith and wide definition of value combined to create apparent good faith purchasers in many situations in which the result outraged common sense; the court's solution was to protect the original title especially by use of "cash sale" or of over-technical construction of the enabling clauses of pre-Uniform Commercial Code statutes. But such rulings then turned into limitations on the proper protection of buyers in the ordinary market. Section 1-201(1) cuts down the category of buyer in ordinary course in such fashion as to take care of the results of the cases, but with no price either in confusion or in injustice to

proper dealings in the normal market.

4. Except as provided in Subsection (A), the rights of purchasers other than buyers in ordinary course are left to the Articles on Secured Transactions, Documents of Title, and Bulk Sales. The Navajo Nation has not adopted Articles 6 and 7 (Bulk Sales and Documents of Title) of the Uniform Commercial Code; thus the rights of purchasers which would be governed under these Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

#### **Cross References**

Point 1: Sections 1-103 and 1-201.

Point 2: Sections 1-201, 2-402 and 9-307(A).

Points 3 and 4: Sections 1-102, 1-201, 2-104, 2-707 and Article 9.

#### **Definitional Cross References**

"Buyer in ordinary course of business" § 1-20 1.

"Good faith". Sections 1-201 and 2-103.

"Goods". Section 2-105.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Signed". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

This section is based on the presumption that for markets to operate efficiently a buyer must be confident that he is receiving "good title" (ownership) of the goods. This section deals with situations in which two sales of the goods have taken place, the owner has sold to a first buyer who has in turn sold to a second or "ultimate" buyer. In such circumstances, what are the rights of the owner against the ultimate buyer if the first buyer is a wrongdoer? For example, if the check of "first buyer" bounces or the first buyer fails to pay the cash he promised. Thus a business which purchases a truck and pays for it by a check which bounces, does not have "good title" to the truck. The original owner may demand the return of the truck. However, if the company buying the truck in turn sells it to a new purchaser who buys it "in good faith" (i.e., honestly, without an intent to defraud the original owner) and for "value", the original owner has no rights to demand the truck from the "new purchaser". The rights of the original owner have been "cut off" by the sale of the truck to a "good faith purchaser for value". The same result comes about if the first buyer obtained the truck by fraud or by misidentifying himself. However, the original owner could obtain the truck

back from the "new purchaser" if the first buyer stole the truck.

The second part of this section deals with situations in which the owner voluntarily gives possession of goods to a "merchant" who normally deals in such goods and agrees to let such a merchant retain the goods. A common example is bringing a watch to a jeweler for repair. If the "merchant" sells the goods to an innocent buyer the owner cannot recover the goods from such an innocent buyer. Once again the section follows the policy of assuring buyers that they are getting "good title" to the goods they buy in the marketplace.

## **Part 5. Performance**

### **§ 2-501. Insurable interest in goods; manner of identification of goods**

A. The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs:

1. When the contract is made if it is for the sale of goods already existing and identified;

2. If the contract is for the sale of future goods other than those described in paragraph (3), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

3. When the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting whichever is longer.

B. The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone, he may, until default or insolvency or notification to the buyer that the identification is final, substitute other goods for those identified.

C. Nothing in this section impairs any insurable interest recognized under any statute or rule of law.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-501 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The present section deals with the manner of identifying goods

to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue. Generally speaking, identification may be made in any manner "explicitly agreed to" by the parties. The rules of paragraphs (1), (2) and (3) apply only in the absence of such "explicit agreement".

2. In the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this article, the general policy is to resolve all doubts in favor of identification.

3. The uncertainty concerning the effect of presumptions in paragraphs (1), (2) and (3) is reduced to a minimum under this section by requiring "explicit agreement" of the parties before the rules of these paragraphs are displaced—as they would be by a term giving the buyer power to select the goods. An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where usage of the trade had previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

4. In view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification the risk of loss remains on the seller under the risk of loss provisions until completion of his duties as to the goods and all of his remedies remain dependent upon his not defaulting under the contract.

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under paragraph (1) to effect an identification if there is no explicit agreement otherwise. The seller's duty, however, to segregate and deliver according to the contract is not affected by such an identification but is controlled by other provisions of this article.

6. Identification of crops under paragraph (3) is made upon planting only if they are to be harvested within the year or within the next normal harvest season. The phrase "next normal harvest season" fairly includes nursery stock raised for normally quick "harvest", but plainly excludes a "timber" crop to which the concept of a harvest "season" is inapplicable.

Paragraph (3) is also applicable to a crop of wool or the young of animals to be born within twelve (12) months after contracting. The product of a lumbering, mining or fishing operation, though seasonal, is not within the concept of "growing". Identification under a contract for all or part of the output of such an operation can be effected early in the operation.

#### **Cross References**

Point 1: Section 2-502.

Point 4: Sections 2-509, 2-510 and 2-703.

Point 5: Sections 2-105, 2-308, 2-503 and 2-509.

Point 6: Sections 2-105(A), 2-107(A) and 2-402.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Future goods". Section 2-105.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-502. Buyer's right to goods on seller's insolvency**

A. Subject to Subsection (B) and even though the goods have not been shipped a buyer, who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section, may on making and keeping good a tender of any unpaid portion of their price recover them from the Seller if the seller's insolvency occurs 10 days prior to or 10 days after the receipt of any installment on their price. This remedy is not available if the buyer had actual knowledge of seller's insolvency prior to payment of the installment.

B. If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section has been amended to increase the circumstances under which a buyer may recover such goods. Under the Official Text of the Uniform Commercial Code the buyer may only exercise this right if the seller becomes insolvent within 10 days after the payment of buyer's installment. To avoid

the difficult factual issue of when a seller became insolvent, the Code provides that this remedy is available if the seller becomes insolvent either 10 days before or after the payment of any, not just the first, installment. However, the buyer will not be able to employ this extraordinary remedy if his payment was made with actual knowledge of the seller's insolvency since he was aware of the risks he undertook.

**Commentary.** 1. This section gives an additional right to the buyer as a result of identification of the goods to the contract in the manner provided in § 2-501. The buyer is given a right to the goods on the seller's insolvency occurring 10 days before or after he receives the installment on their price.

2. The question of whether the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the 10-day period provided in this section depends upon compliance with the provisions of the Article on Secured Transactions (Article 9).

3. Subsection (B) is included to preclude the possibility of unjust enrichment which exists if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale.

#### **Cross References**

Point 1: Section 1-201.

Point 2: Article 9.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Right". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-503. Manner of seller's tender of delivery**

A. Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this article, and in particular:

1. Tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

2. Unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

B. Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

C. Where the seller is required to deliver at a particular destination, tender requires that he comply with Subsection (A) and also in any appropriate case tender documents as described in Subsections (D) and (E) of this section.

D. Where goods are in the possession of a bailee and are to be delivered without being moved:

1. Tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

2. Tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

E. Where the contract requires the seller to deliver documents

1. He must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (§ 2-323(B)); and

2. Tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-503 of the Uniform Commercial Code adopted by the states. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation and the rights of a buyer in transactions involving documents of title which would be governed by such Article are governed by Navajo laws pursuant to 7 N.N.C. § 204.

**Commentary.** 1. The major general rules governing the manner of proper or due tender of delivery are gathered in this section. The term "tender" is used in this article in two different senses. In one sense it refers to "due tender"

which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. Unless the context unmistakably indicates otherwise this is the meaning of "tender" in this article and the occasional addition of the word "due" is only for clarity and emphasis. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation. Used in either sense, however, "tender" connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner.

2. The seller's general duty to tender and deliver is laid down in § 2-301 and more particularly in § 2-507. The seller's right to a receipt if he demands one and receipts are customary is governed by § 1-205. Subsection (A) of the present section proceeds to set forth two primary requirements of tender: first, that the seller "put and hold conforming goods at the buyer's disposition", and second, that he "give the buyer any notice reasonably necessary to enable him to take delivery."

In cases in which payment is due and demanded upon delivery the "buyer's disposition" is qualified by the seller's right to retain control of the goods until payment by the provision of this article on delivery on condition. However, where the seller is demanding payment on delivery he must first allow the buyer to inspect the goods in order to avoid impairing his tender unless the contract for sale is on C.I.F., C.O.D., cash against documents or similar terms negating the privilege of inspection before payment.

In the case of contracts involving documents the seller can "put and hold conforming goods at the buyer's disposition" under Subsection (A) by tendering documents which give the buyer complete control of the goods under the provisions of Article 7 of the Uniform Commercial Code on due negotiation. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation, but the rights of buyers which would be governed under such Article 7 will be governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Under Subsection (A)(1) usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available.

4. The buyer must furnish reasonable facilities for the receipt of the goods tendered by the seller under Subsection (A)(2). This obligation of the buyer is no part of the seller's tender.

5. For the purposes of Subsections (B) and (C), there is omitted from this article the rule that a term requiring the seller to pay the freight or cost of transportation to the buyer is equivalent to an agreement by the seller to deliver to the buyer or at an agreed destination. This omission is with the specific intention of negating the rule, for under this article the "shipment" contract is regarded as the normal one and the "destination" contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery.

6. Subsection (D)(2) adopts the rule that between the buyer and the seller the risk of loss remains on the seller during a period reasonable for securing acknowledgment of the transfer from the bailee, while as against an other parties the buyer's rights are fixed as of the time the bailee receives notice of the transfer.

7. Under Subsection (E) documents are never "required" except where there is an express contract term or it is plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents may, of course, be "authorized" although not required, but such cases are not within the scope of this Subsection. When documents are required, there are three main requirements of this Subsection: (1) "All": each required document is essential to a proper tender; (2) "Such": the documents must be the ones actually required by the contract in terms of source and substance; (3) "Correct form": all documents must be in correct form.

When a prescribed document cannot be procured, a question of fact arises under the provision of this article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable.

#### **Cross References**

Point 2: Sections 1-205, 2-301, 2-310, 2-507 and 2-513.

Point 5: Sections 2-308, 2-3 10 and 2-509.

Point 7: Section 2-614(A).

Specific matters involving tender are covered in many additional sections of this article. See §§ 1-205, 2-301, 2-306 to 2-319, 2-321(C), 2-504, 2-507(B), 2-511(A), 2-513, 2-612 and 2-614.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 1-106.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Dishonor". Section 3-508.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Receipt of goods". Section 2-103.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Written". Section 1-201.

### **Special Plain Language Comment**

This section describes the seller's basic obligation under the Code to "tender" delivery of conforming goods (§ 2-301). "Tender" is defined specifically in Comment 1, but generally means the offer of goods to the buyer with the ability to deliver them upon the buyer's request. The seller must have the goods ready to deliver to the buyer and must give the buyer proper notice of such readiness. The tender must be done at a reasonable time and the buyer must furnish facilities appropriate to receive the goods. Finally, where the transaction is based on documents (such as bills of lading which stand in for the actual goods themselves) the seller must deliver the proper document in "correct" form. Because such documents are considered to be the "goods" for legal purposes, they must be completed in precisely the correct manner.

### **§ 2-504. Shipment by seller**

A. Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must:

1. Put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
2. Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
3. Promptly notify the buyer of the shipment.

B. Failure to notify the buyer under paragraph (3) or to make a proper contract under paragraph (1) is a ground for rejection only if material delay or loss ensues.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-504 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The section is limited to "shipment" contracts as contrasted with "destination" contracts or contracts for delivery at the place where the goods are located. The general principles embodied in this section cover the special cases of F.O.B. point of shipment contracts and C.I.F. and C. & F. contracts. Under the preceding section on manner of tender of delivery, due tender by the seller requires that he comply with the requirements of this section in appropriate cases.

2. The contract to be made with the carrier under paragraph (1) must conform to all express terms of the agreement, subject to any substitution necessary because of failure of agreed facilities as provided in the later provision on substituted performance. However, under the policies of this article on good faith and commercial standards and on buyer's rights on improper delivery, the requirements of explicit provisions must be read in terms of their commercial and not their literal meaning. This policy is made express with respect to bills of lading in a set in the provision of this article on form of bills of lading required in overseas shipment.

3. In the absence of agreement, the provision of this article on options and cooperation respecting performance gives the seller the choice of any reasonable carrier, routing and other arrangements. Whether or not the shipment is at the buyer's expense the seller must see to any arrangements, reasonable in the circumstances, such as refrigeration, watering of livestock, protection against cold, the sending along of any necessary help, selection of specialized cars and the like for paragraph (1) is intended to cover all necessary arrangements whether made by contract with the carrier or otherwise. There is, however, a proper relaxation of such requirements if the buyer is himself in a position to make the appropriate arrangements and the seller gives him reasonable notice of the need to do so. It is an improper contract under paragraph (1) for the seller to agree with the carrier to a limited valuation below the true value and thus cut off the buyer's opportunity to recover from the carrier in the event of loss, when the risk of shipment is placed on the buyer by his contract with the seller.

4. Both the language of paragraph (2) and the nature of the situation it concerns indicate that the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller such as those covered in paragraph (1). In this connection, in the case of pool car shipments, a delivery order furnished by the seller on the pool car consignee, or on the carrier for delivery out of a larger quantity, satisfies the requirements of paragraph (2) unless the contract requires some other form of document.

5. This article makes it the seller's duty to notify the buyer of shipment in all cases. The consequences of his failure to do so, however, are limited in that the buyer may reject on this ground only where material delay or loss ensues.

A standard and acceptable manner of notification in open credit shipments is

the sending of an invoice and in the case of documentary contracts is the prompt forwarding of the documents as under paragraph (2) of this section. It is also usual to send on a straight bill of lading but this is not necessary to the required notification. However, should such a document prove necessary or convenient to the buyer, as in the case of loss and claim against the carrier, good faith would require the seller to send it on request.

Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of paragraph (3) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller's duties, such a term should be part of the "dickered" terms written in any "form", or should otherwise be called seasonably and sharply to the seller's attention.

6. Generally, under the final sentence of the section, rejection by the buyer is justified only when the seller's dereliction as to any of the requirements of this section in fact is followed by material delay or damage. It rests on the seller, so far as concerns matters not within the peculiar knowledge of the buyer, to establish that his error has not been followed by events which justify rejection.

#### **Cross References**

Point 1: Sections 2-319, 2-320 and 2-503(B).

Point 2: Sections 1-203, 2-323(B), 2-601 and 2-614(A).

Point 3: Section 2-311(B).

Point 5: Section 1-203.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Usage of trade". Section 1-205.

#### **§ 2-505. Sellers shipment under reservation**

A. Where the seller has identified goods to the contract by or before

shipment:

1. His procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

2. A non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (§ 2-507(B)) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

B. When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-505 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Article 7 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. The security interest reserved to the seller under Subsection (A) is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties. Under this article, the provision as to the passing of interest expressly applies "despite any reservation of security title" and also provides that the "rights, obligations and remedies" of the parties are not altered by the incidence of title generally. The security interest, therefore, must be regarded as a means given to the seller to enforce his rights against the buyer which is unaffected by and in turn does not effect the location of title generally. The rules set forth in Subsection (A) are not to be altered by any apparent "contrary intent" of the parties as to passing of title, since the rights and remedies of the parties to the contract of sale, as defined in this article, rest on the contract and its performance or breach and not on stereotyped presumptions as to the location of title.

This article does not attempt to regulate local procedure in regard to the effective maintenance of the seller's security interest when the action is in replevin by the buyer against the carrier.

2. Every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller under Subsection (A)(1). It is frequently convenient for the seller to make the bill of lading to the order of

a nominee such as his agency at destination, the financing agency to which he expects to negotiate the document, or the bank issuing a credit to him. In many instances, also, the buyer is made the order party. This article does not deal directly with the question as to whether a bill of lading made out by the seller to the order of a nominee gives the carrier notice of any rights which the nominee may have so as to limit its freedom or obligation to honor the bill of lading in the hands of the seller as the original shipper if the expected negotiation fails. This circumstance is dealt with in the Article on Documents of Title (Article 7). The Navajo Nation has not adopted Article 7 of the Uniform Commercial Code and rights which would be governed under Article 7 are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. A non-negotiable bill of lading taken to a party other than the buyer under Subsection (A)(2) reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them.

4. In the case of a shipment by non-negotiable bill of lading taken to a buyer, the seller, under Subsection (A) retains no security interest or possession as against the buyer and by the shipment he de facto loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to payment against delivery, the seller, by making an immediate demand for payment, can show that his delivery is conditional, but this does not prevent the buyer's power to transfer full title to a sub-buyer in ordinary course or other purchaser under § 2-403.

5. Under Subsection (B) an improper reservation by the seller which would constitute a breach in no way impairs such of the buyer's rights as result from identification of the goods. The security title reserved by the seller under Subsection (A) does not protect his holding of the document or the goods for the purpose of exacting more than is due him under the contract.

#### **Cross References**

Point 1: Section 1-201.

Point 3: Sections 2-501(B) and 2-504.

Point 4: Sections 2-403, 2-507(B) and 2-705.

Point 5: Sections 2-310, 2-319(D), 2-320(D), 2-501 and 2-502.

#### **Definitional Cross References**

"Bill of lading". Section 1-201.

"Buyer". Section 2-103.

"Consignee". Section 7-102.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Delivery". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Holder". Section 1-201.

"Person". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

### **§ 2-506. Rights of financing agency**

A. A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

B. The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

### **History**

CJA-1-86 January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-506 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4, 5 and 7 of the Uniform Commercial Code. The rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. "Financing agency" is broadly defined in this article to cover every normal instance in which a party aids or intervenes in the financing of a sales transaction. The term as used in Subsection (A) is not in any sense intended as a limitation and covers any other appropriate situation which may arise outside the scope of the definition.

2. "Paying" as used in Subsection (A) is typified by the letter of credit, or "authority to pay" situation in which a banker, by arrangement with the buyer or other consignee, pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft "paid" in the first instance by acceptance or whether the payment is viewed as absolute or conditional. All of these cases constitute "payment" under this Subsection. Similarly, "purchasing for value" is used to indicate the whole area of

financing by the seller's banker and the principle of Subsection (A) is applicable without any niceties of distinction between "purchase", "discount", "advance against collection" or the like. But it is important to notice that the only right to have the draft honored that is acquired is that against the buyer, if any right against any one else is claimed it will have to be under some separate obligation of that other person. A letter of credit does not necessarily protect purchasers of drafts. The Navajo Nation has not adopted Articles 4 and 5 and the rights of the parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Subsection (A) is made applicable to payments or advances against a draft which "relates to" a shipment of goods and this has been chosen as a term of maximum breadth. In particular the term is intended to cover the case of a draft against an invoice or against a delivery order. Further, it is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of this Subsection.

4. After shipment, "the rights of the shipper in the goods" are merely security rights and are subject to the buyer's right to force delivery upon tender of the price. The rights acquired by the financing agency are similarly limited and, moreover, if the agency fails to procure any outstanding negotiable document of title, it may find its exercise of these rights hampered or even defeated by the seller's disposition of the document to a third party. This section does not attempt to create any new rights in the financing agency against the carrier which would force the latter to honor a stop order from the agency, a stranger to the shipment, or any new rights against a holder to whom a document of title has been duly negotiated under Article 7. Article 7 of the Uniform Commercial Code has not been adopted by the Navajo Nation and the rights of parties which would be governed under Article 7 are governed by the Navajo law pursuant to 7 N.N.C. § 204.

#### **Cross References**

Point 1: Section 2-104(B).

Point 4: Sections 2-501 and 2-502(A).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Document of title". Section 1-201.

"Draft". Section 3-104.

"Financing agency". Section 2-104.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Honor". Section 1-201.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Value". Section 1-201.

**§ 2-507. Effect of seller's tender: delivery on condition**

A. Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

B. Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-507 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. Under this article the same rules in these matters are applied to present sales and to contracts for sale. But the provisions of this Subsection must be read within the framework of the other sections of this article which bear upon the question of delivery and payment.

2. The "unless otherwise agreed" provision of Subsection (A) is directed primarily to cases in which payment in advance has been promised or a letter of credit term has been included. Payment "according to the contract" contemplates immediate payment, payment at the end of an agreed credit term, payment by a time acceptance or the like. Under the Code, "contract" means the total obligation in law which results from the parties' agreement including the effect of this article. In this context, therefore, there must be considered the effect in law of such provisions as those on means and manner of payment and on failure of agreed means and manner of payment.

3. Subsection (B) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this article for a 10-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

**Cross References**

Point 1: Sections 2-310, 2-503, 2-511, 2-601 and 2-711 to 2-713.

Point 2: Sections 1-201, 2-511 and 2-614.

Point 3: Sections 2-401, 2-403, and 2-702(A) (2).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-508. Cure by seller of improper tender of delivery; replacement**

A. Where any tender of delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

B. Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-508 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) permits a seller who has made a non-conforming tender in any case to make a conforming delivery within the contract time upon seasonable notification to the buyer. It applies even where the seller has taken back the non-conforming goods and refunded the purchase price. He may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller's part in notifying of his intention to cure, if such notification is to be "seasonable" under this Subsection.

The rule of this Subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the

seller his need for shipment early in the month and the seller ships accordingly, the "contract time" has been cut down by the supervening modification and the time for cure offender must be referred to this modified time term.

2. Subsection (B) seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer. However, the seller is not protected unless he had "reasonable grounds to believe" that the tender would be acceptable. Such reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict; conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention maybe sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

3. The words "a further reasonable time to substitute a conforming tender" are intended as words of limitation to protect the buyer. What is a "reasonable time" depends upon the attending circumstances. Compare § 2-511 on the comparable case of a seller's surprise demand for legal tender.

4. Existing trade usages permitting variations without rejection but with price allowance enter into the agreement itself as contractual limitations of remedy and are not covered by this section.

#### **Cross References**

Point 2: Section 2-302.

Point 3: Section 2-511.

Point 4: Sections 1-205 an 2-721.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Money". Section 1-201.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

**§ 2-509. Risk of loss in the absence of breach**

A. Where the contract requires or authorizes the seller to ship the goods by carrier:

1. If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (§ 2-505); but

2. If it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

B. Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

1. On his receipt of a negotiable document of title covering the goods; or

2. On acknowledgment by the bailee of the buyer's right to possession of the goods; or

3. After his receipt of a non-negotiable document of title or other written direction to deliver, as provided in § 2-503(D)(2).

C. In any case not within Subsection (A) or (B), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

D. The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (§ 2-327) and on effect of breach on risk of loss (§ 2-510).

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-509 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The underlying theory of these sections on risk of loss is the adoption of the contractual approach rather than an arbitrary shifting of the risk with the "property" in the goods. The scope of the present section, therefore, is limited strictly to those cases where there has been no breach by the seller. Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply and the situation is governed

by the provisions on effect of breach on risk of loss.

2. The provisions of Subsection (A) apply where the contract "requires or authorizes" shipment of the goods. This language is intended to be construed parallel to comparable language in the section on shipment by seller. In order that the goods be "duly delivered to the carrier" under paragraph (1), a contract must be entered into with the carrier which will satisfy the requirements of the section on shipment by the seller and the delivery must be made under circumstances which will enable the seller to take any further steps necessary to a due tender. The underlying reason of this Subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk is enough that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

3. Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. Protection is afforded him, in the event of breach by the buyer, under the next section.

The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.

4. Where the agreement provides for delivery of the goods as between the buyer and seller without removal from the physical possession of a bailee, the provisions on manner of tender of delivery apply on the point of transfer of risk. Due delivery of a negotiable document of title covering the goods or acknowledgment by the bailee that he holds for the buyer completes the "delivery" and passes the risk.

5. The provisions of this section are made subject by Subsection (D) to the "contrary agreement" of the parties. This language is intended as the equivalent of the phrase "unless otherwise agreed" used more frequently throughout this Code. "Contrary" is in no way used as a word of limitation and the buyer and seller are left free to readjust their rights and risks as declared by this section in any manner agreeable to them. Contrary agreement can also be found in the circumstances of the case, a trade usage or practice, or a course of dealing or performance.

#### **Cross References**

Point 1: Section 2-510(A),

Point 2: Sections 2-503 and 2-504.

Point 3: Sections 2-104, 2-503 and 2-510.

Point 4: Section 2-503(D).

Point 5: Section 1-201.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Delivery". Section 1-201.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Party". Section 1-201.

"Receipt of goods". Section 2-103.

"Sale on approval". Section 2-326.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section governs when the risk of loss or damage to the goods shifts from the seller to the buyer. This section is a "gap filler" which applies only when parties themselves do not determine in their agreement when the risk of loss will pass. The section sets up four categories: contracts where goods are shipped; contracts where the goods are delivered without being moved; consignment contracts and all other types of contracts.

A. Where the contract either authorizes or requires shipment by a third party (i.e., not in the seller's own trucks) the time when the risk of loss will shift from the seller to the buyer depends on whether the transportation obligations require only delivery to a carrier ("shipment contract") or delivery to a particular location ("delivery contract"). The parties may also choose to use the rules set out in the standard mercantile terms defined in §§ 2-319 to 2-324. In a shipment contract the risk of loss shifts to the buyer upon the delivery of the goods to the carrier. In a delivery contract the risk of loss shifts to the buyer upon the proper "tender" to the buyer at the required destination (see § 2-503 regarding proper "tender").

B. If the goods are delivered without movement the risk of loss shifts to the buyer upon receipt by the buyer of the proper documents.

C. If the goods are on consignment, the risk of loss is governed by § 2-327.

D. And in all other cases the shift of the risk of loss will depend on the status of the buyer. If the buyer is a nonmerchant the risk of loss shifts when he takes possession of the goods. If the buyer is a merchant the risk of loss shifts when the seller tenders delivery (see § 2-503).

#### **History**

CJA-1-86, January 29, 1986.

#### **§ 2-510. Effect of breach on risk of loss**

A. Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

B. Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

C. Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-510 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under Subsection (A) the seller by his individual action cannot shift the risk of loss to the buyer unless his action conforms with all the conditions resting on him under the contract.

2. The "cure" of defective tenders contemplated by Subsection (A) applies only to those situations in which the seller makes changes in goods already tendered, such as repair, partial substitution, sorting out from an improper mixture and the like since "cure" by repossession and new tender has on effect on the risk of loss of the goods originally tendered. The seller's privilege of cure does not shift the risk, however, until the cure is completed.

Where defective documents are involved a cure of the defect by the seller or a waiver of the defects by the buyer will operate to shift the risk under this section. However, if the goods have been destroyed prior to the cure or the buyer is unaware of their destruction at the time he waives the defect in the documents, the risk of the loss must still be borne by the seller, for the risk shifts only at the time of cure, waiver of documentary defects or acceptance of the goods.

3. In cases where there has been a breach of the contract, if the one in

control of the goods is the aggrieved party, whatever loss or damage may prove to be uncovered by his insurance falls upon the contract breaker under Subsections (B) and (C) rather than upon him. The word "effective" as applied to insurance coverage in those Subsections is used to meet the case of supervening insolvency of the insurer. The "deficiency" referred to in the text means such deficiency in the insurance coverage as exists without subrogation. This section merely distributes the risk of loss as stated and is not intended to be disturbed by any subrogation of an insurer.

#### **Cross References**

Section 2-509.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Seller". Section 2-103.

#### **§ 2-511. Tender of payment by buyer; payment by check**

A. Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

B. Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

C. Subject to the provisions of the Code on the effect of an instrument on an obligation (§ 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-511 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The requirement of payment against delivery in Subsection (A) is applicable to non-commercial sales generally and to ordinary sales at retail although it has no application to the great body of commercial contracts which carry credit terms. Subsection (A) applies also to documentary contracts in general and to contracts which look to shipment by the seller but contain no term on time and manner of payment, in which situations the payment may, in

proper case, be demanded against delivery of appropriate documents.

In the case of specific transactions such as C.O.D. sales or agreement providing for payment against documents, the provisions of this Subsection must be considered in conjunction with the special sections of the article dealing with such terms. The provision that tender of payment is a condition to the seller's duty to tender and complete "any delivery" integrates this section with the language and policy of the section on delivery in several lots which call for separate payment. Finally, attention should be directed to the provision on right to adequate assurance of performance which recognizes, even before the time for tender, an obligation on the buyer not to impair the seller's expectation of receiving payment in due course.

2. Unless there is agreement otherwise the concurrence of the conditions as to tender of payment and tender of delivery requires their performance at a single place or time. This article determines that place and time by determining in various other sections the place and time for tender of delivery under various circumstances and in particular types of transactions. The sections dealing with time and place of delivery together with the section on right to inspection of goods answer the subsidiary question as to when payment may be demanded before inspection by the buyer.

3. The essence of the principle involved in Subsection (B) is avoidance of commercial surprise at the time of performance. The section on substituted performance covers the peculiar case in which legal tender is not available to the commercial community.

4. Subsection (C) is concerned with the rights and obligations as between the parties to a sales transaction when payment is made by check. This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. The conditional character of the payment under this section refers only to the effect of the transaction "as between the parties" thereto and does not purport to cut into the law of "absolute" and "conditional" payment as applied to such other problems as the discharge of sureties or the responsibilities of a drawee bank which is at the same time an agent for collection.

The phrase "by check" includes not only the buyer's own but any check which does not effect a discharge under Article 3 (§ 3-802). Similarly the reason of this Subsection should apply and the same result should be reached where the buyer "pays" by sight draft on a commercial firm which is financing him.

5. Under Subsection (C) payment by check is defeated if it is not honored upon due presentment. This corresponds to the provisions of Article on Commercial Paper (§ 3-802). But if the seller procures certification of the check instead of cashing it, the buyer is discharged (§ 3-411).

6. Where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check post-dated by even one (1) day, the seller's acceptance of the instrument insofar as third parties are concerned, amounts to a delivery on credit and his remedies are set forth in the section on buyer's insolvency. As between the buyer and the seller, however, the matter turns on the present Subsection and the section on conditional delivery

and subsequent dishonor of the instrument gives the seller rights on it as well as for breach of the contract for sale.

#### **Cross References**

Point 1: Sections 2-307, 2-310, 2-320, 2-325, 2-503, 2-513 and 2-609.

Point 2: Sections 2-307, 2-310, 2-319, 2-322, 2-503, 2-504 and 2-513.

Point 3: Section 2-614.

Point 5: Article 3, esp. §§ 3-802 and 3-411.

Point 6: Sections 2-507, 2-702, and Article 3.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Check". Section 3-104,

"Dishonor". Section 3-508.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

#### **§ 2-512. Payment by buyer before inspection**

A. Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless:

1. The non-conformity appears without inspection; or

2. Despite tender of the required documents the circumstances would justify injunction against honor under the provisions of the Code.

B. Payment pursuant to Subsection (A) does not constitute an acceptance of goods or impair the buyers right to inspect or any of his remedies.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-512 of the Uniform Commercial Code adopted by the states. The reference in Subsection (B) has been revised to reflect that the Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and that the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. Subsection (A) of the present section recognizes that the essence of a contract providing for payment before inspection is the intention of the parties to shift to the buyer the risks which would usually rest upon the seller. The basic nature of the transaction is thus preserved and the buyer is in most cases required to pay first and litigate as to any defects later.

2. "Inspection" under this section is an inspection in a manner reasonable for detecting defects in goods whose surface appearance is satisfactory.

3. Paragraph (1) of this Subsection states an exception to the general rule based on common sense and normal commercial practice. The apparent non-conformity referred to is one which is evident in the mere process of taking delivery.

4. Paragraph (2) is concerned with contracts for payment against documents and incorporates the general clarification and modification of the case law contained in the section on excuse of a financing agency. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

5. Subsection (B) makes explicit the general policy that the payment required before the inspection in no way impairs the buyer's remedies or rights in the event of a default by the seller. The remedies preserved to the buyer are all of his remedies, which include as a matter of reason the remedy for total non-delivery after payment in advance.

The provision of performance or acceptance under reservation of rights does not apply to the situations contemplated here in which payment is made in due course under the contract and the buyer need not pay "under protest" or the like in order to preserve his rights as to defects discovered upon inspection.

6. This section applies to cases in which the contract requires payment before inspection either by the express agreement of the parties or by reason of the effect in law of that contract. The present section must therefore be considered in conjunction with the provision on right to inspection of goods which sets forth the instances in which the buyer is not entitled to inspection before payment.

#### **Cross References**

Point 5: Section 1-207.

Point 6: Section 2-513(C).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Financing agency". Section 2-104.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

### **§ 2-513. Buyer's right to inspection of goods**

A. Unless otherwise agreed and subject to Subsection (C), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable time and place and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

B. Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

C. Unless otherwise agreed and subject to the provisions of this article on C.I.F. contracts (§ 2-321(C)), the buyer is not entitled to inspect the goods before payment of the price when the contract provides:

1. For delivery "C.O.D." or on other like terms; or
2. For payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

D. A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-513 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The buyer is entitled to inspect goods as provided in Subsection (A) unless it has been otherwise agreed by the parties. The phrase "unless otherwise agreed" is intended principally to cover such situations as those outlined in Subsections (C) and (D) and those in which the agreement of the parties negates inspection before tender of delivery. However, no agreement by the parties can displace the entire right of inspection except where the contract is simply for the sale of "this thing". Even in a sale of boxed goods "as is" inspection is a right of the buyer, since if the boxes

prove to contain some other merchandise altogether the price can be recovered back; nor do the limitations of the provision on effect of acceptance apply in such a case.

2. The buyer's right of inspection is available to him upon tender, delivery or appropriation of the goods with notice to him. Since inspection is available to him on tender, where payment is due against delivery he may, unless otherwise agreed, make his inspection before payment of the price. It is also available to him after receipt of the goods and so may be postponed after receipt for a reasonable time. Failure to inspect before payment does not impair the right to inspect after receipt of the goods unless the case falls within Subsection (D) on agreed and exclusive inspection provisions. The right to inspect goods which have been appropriated with notice to the buyer hold whether or not the sale was by sample.

3. The buyer may exercise his right of inspection at any reasonable time or place and in any reasonable manner. It is not necessary that he select the most appropriate time, place or manner to inspect or that his selection be the customary one in the trade or locality. Any reasonable time, place or manner is available to him and the reasonableness will be determined by trade usages, past practices between the parties and the other circumstances of the case.

The last sentence of Subsection (A) makes it clear that the place of arrival of shipped goods is a reasonable place for their inspection.

4. Expenses of an inspection made to satisfy the buyer of the seller's performance must be assumed by the buyer in the first instance. Since the rule provides merely for an allocation of expense there is no policy to prevent the parties from providing otherwise in the agreement. Where the buyer would normally bear the expenses of the inspection but the goods are rightly rejected because of what the inspection reveals, demonstrable and reasonable costs of the inspection are part of his incidental damage caused by the seller's breach.

5. In the case of payment against documents, Subsection (C) requires payment before inspection, since shipping documents against which payment is to be made will commonly arrive and be tendered while the goods are still in transit. This article recognizes no exception in any peculiar case in which the goods happen to arrive before the documents. However, whereby the agreement payment is to await the arrival of the goods, inspection before payment becomes proper since the goods are then "available for inspection".

Whereby the agreement the documents are to be held until arrival the buyer is entitled to inspect before payment since the goods are then "available for inspection". Proof of usage is not necessary to establish this right, but if inspection before payment is disputed the contrary must be established by usage or by an explicit contract term to that effect.

For the same reason, that the goods are available for inspection, a term calling for payment against storage documents or a delivery order does not normally bar the buyer's right to inspection before payment under Subsection (C) (2). This result is reinforced by the buyer's right under Subsection (A) to inspect goods which have been appropriated with notice to him.

6. Under Subsection (D) an agreed place or method of inspection is generally

held to be intended as exclusive. However, where compliance with such an agreed inspection term becomes impossible, the question is basically one of intention. If the parties clearly intend that the method of inspection named is to be a necessary condition without which the entire deal is to fail, the contract is at an end if that method becomes impossible. On the other hand, if the parties merely seek to indicate a convenient and reliable method but do not intend to give up the deal in the event of its failure, any reasonable method of inspection may be substituted under this article.

Since the purpose of an agreed place of inspection is only to make sure at that point whether or not the goods will be thrown back, the "exclusive" feature of the named place is satisfied under this article if the buyer's failure to inspect there is held to be an acceptance with the knowledge of such defects as inspection would have revealed within the section on waiver of buyer's objections by failure to particularize. Revocation of the acceptance is limited to the situations stated in the section pertaining to that subject. The reasonable time within which to give notice of defects within the section on notice of breach begins to run from the point of the "acceptance".

7. Clauses on time of inspection are commonly clauses which limit the time in which the buyer must inspect and give notice of defects. Such clauses are therefore governed by the section of this article which requires that such a time limitation must be reasonable.

8. Inspection under this article is not to be regarded as a "condition precedent to the passing of title" so that risk until inspection remains on the seller. Under Subsection (D) such an approach cannot be sustained. Issues between the buyer and seller are settled in this article almost wholly by special provisions and not by the technical determination of the focus of the title. Thus "inspection as a condition to the passing of title" becomes a concept almost without meaning. However, in peculiar circumstances inspection may still have some of the consequences hitherto sought and obtained under that concept.

9. "Inspection" under this section has to do with the buyer's check-up on whether the seller's performance is in accordance with a contract previously made and is not to be confused with the "examination" of the goods or of a sample or model of them at the time of contracting which may affect the warranties involved in the contract.

#### **Cross References**

Generally: Sections 2-310(2), 2-321(C) and 2-606(A)(2).

Point 1: Section 2-607.

Point 2: Sections 2-501 and 2-502.

Point 4: Section 2-715.

Point 5: Section 2-321(C).

Point 6: Sections 2-606 to 2-608.

Point 7: Section 1-204.

Point 8: Comment to § 2-401.

Point 9: Section 2-316(C) (2).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

"Term". Section 1-201.

#### **§ 2-514. When documents deliverable on acceptance; when on payment**

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-514 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under such Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. This section covers any document against which a draft may be drawn, whatever maybe the form of the document, and applies to interpret the

action of a seller or consignor insofar as it may affect the rights and duties of any buyer, consignee or financing agency concerned with the paper. Supplementary or corresponding provisions are found in Articles 4 and 5 of the Uniform Commercial Code. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code and the rights of parties which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. An "arrival" draft is a sight draft within the purpose of this section.

#### **Cross References**

Point 1: See §§ 2-502, 2-505(B), 2-507(B), 2-512, 2-513 and 2-607.

#### **Definitional Cross References**

"Delivery". Section 1-201.

"Draft". Section 3-104.

#### **§ 2-515. Preserving evidence of goods in dispute**

In furtherance of the adjustment of any claim or dispute

A. Either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as maybe in the possession or control of the other; and

B. The parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-515 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section meets certain serious problems which arise when there is a dispute as to the quality of the goods and thereby aids the parties in reaching a settlement, and furthers the use of devices which will promote certainty as to the condition of the goods, or at least aid in preserving evidence of their conditions.

2. Subsection (A) affords either party an opportunity for preserving evidence, whether or not agreement has been reached, and thereby reduces uncertainty in any litigation and, in turn perhaps, promotes agreement. Subsection (B) does not conflict with the provisions on the seller's right to resell rejected goods or the buyer's similar right. Apparent conflict between these provisions which will be suggested in certain circumstances is to be resolved by requiring prompt action by the parties. Nor does Subsection (A) impair the effect of a

term for payment before inspection. Short of such defects as amount to fraud or substantial failure of consideration, non-conformity is neither an excuse nor a defense to an action for non-acceptance of documents. Normally, therefore until the buyer has made payment, inspected and rejected the goods, there is no occasion or use for the rights under Subsection (A).

3. Subsection (B) provides for third party inspection upon the agreement of the parties, thereby opening the door to amicable adjustments based upon the findings of such third parties. The use of the phrase "conformity or condition" makes it clear that the parties' agreement may range from a complete settlement of all aspects of the dispute by a third party to the use of a third party merely to determine and record the condition of the goods so that they can be resold or used to reduce the stake in controversy. "Conformity", at one end of the scale of possible issues, includes the whole question of interpretation of the agreement and its legal effect, the state of the goods in regard to quality and condition, whether any defects are due to factors which operate at the risk of the buyer, and the degree of non-conformity where that may be material. "Condition", at the other end of the scale, includes nothing but the degree of damage or deterioration which the goods show. Subsection (B) is intended to reach any point in the gamut which the parties may agree upon.

The principle of the section on reservation of rights reinforces this paragraph in simplifying such adjustments as the parties wish to make in partial settlement while reserving their rights as to any further points. Subsection (B) also suggests the use of arbitration, where desired, of any points left open, but nothing in this section is intended to repeal or amend any statute governing arbitration. Where any question arises as to the extent of the parties' agreement under the paragraph, the presumption should be that it was meant to extend only to the relation between the contract description and the goods as delivered, since that is what a craftsman in the trade would normally be expected to report upon. Finally, a written and authenticated report of inspection or tests by a third party, whether or not sampling has been practicable, is entitled to be admitted as evidence under the Code, for it is a third party document.

#### **Cross References**

Point 2: Sections 2-513(C), 2-706 and 2-711(B).

Point 3: Sections 1-202 and 1-207.

#### **Definitional Cross References**

"Conform". Section 2-106.

"Goods". Section 2-105.

"Notification". Section 1-201.

"Party". Section 1-201.

### **Part 6. Breach, Repudiation and Excuse**

## **§ 2-601. Buyers rights on improper delivery**

Subject to the provisions of this article on breach in installment contracts (§ 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (§§ 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

- A. Reject the whole; or
- B. Accept the whole; or
- C. Accept any commercial unit or units and reject the rest.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-601 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in Subsection (C). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole, or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

### **Cross References**

Sections 2-602(B) (1), 2-612, 2-718 and 2-719.

### **Definitional Cross References**

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Installment contract". Section 2-612.

"Rights". Section 1-201.

### **Special Plain Language Comment**

This section provides that the buyer may accept or reject the entire delivery or "commercial units" of the delivery of goods if the goods or the "tender" (manner of delivery) does not conform to the contract. It is critical to recognize that in this context, contract includes not only the written agreement of the parties, but also the "usages" or customs of the industry, the prior behavior of the parties in other transactions and the prior behavior of the parties in this transaction.

#### **§ 2-602. Manner and effect of rightful rejection**

A. Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

B. Subject to the provisions of the two following sections on rejected goods (§§ 2-603 and 2-604):

1. After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

2. If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (§ 2-711(C)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

3. The buyer has no further obligations with regard to goods rightfully rejected.

C. The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on Seller's remedies in general (§ 2-703).

### **History**

CJA-1-86 January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 2-602 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. Under Subsection (A), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such reasonable notification his rejection is ineffective. The sections of this article dealing with inspection of goods must be read in connection with the buyers reasonable time for action under this Subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in § 1-201.

2. Subsection (B) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the seller's disposition, this section generally relieves the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (C) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

### Cross References

Point 1: Sections 1-201, 1-204(A) and (C), 2-512(B), 2-513(A) and 2-606(A) (2).

Point 2: Section 2-603(A).

Point 3: Section 2-703.

### Definitional Cross References

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Security interest". Section 1-201.

"Seller". Section 2-103.

### **§ 2-603. Merchant buyer's duties as to rightfully rejected goods**

A. Subject to any security interest in the buyer (§ 2-711(C)), when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

B. When the buyer sells goods under Subsection (A), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent (10%) on the gross proceeds.

C. In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

### **History**

CJA-1-86 January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-603 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code. The rights of parties which would be governed under these Articles concerning the discharge of a buyer's obligation to resell the goods under Subsection (B) are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. This section recognizes the duty imposed upon the merchant buyer by good faith and commercial practice to follow any reasonable instructions of the seller as to reshipping, storing, delivery to a third party, reselling or the like. Subsection (A) goes further and extends the duty to include the making of reasonable efforts to effect a salvage sale where the value of the goods is threatened and the seller's instructions do not arrive in

time to prevent serious loss.

2. The limitations on the buyer's duty to resell under Subsection (A) are to be liberally construed. The buyer's duty to resell under this section arises from commercial necessity and thus is present only when the seller has "no agent or place of business at the market of rejection". A financing agency which is acting on behalf of the seller in handling the documents rejected by the buyer is sufficiently the seller's agent to lift the burden of salvage resale from the buyer. (See provisions of Articles 4 and 5 of the Uniform Commercial Code; the Navajo Nation has not adopted Articles 4 and 5 of the Uniform Commercial Code. The rights of parties which would be governed under those Articles is governed by Navajo law pursuant to 7 N.N.C. § 204). The buyer's duty to resell is extended only to goods in his "possession or control", but these are intended as words of wide, rather than narrow, import. In effect, the measure of the buyer's "control" is whether he can practicably effect control without undue commercial burden.

3. The explicit provisions for reimbursement and compensation to the buyer in Subsection (B) are applicable and necessary only where he is not acting under instructions from the seller. As provided in Subsection (A) the seller's instructions to be "reasonable" must on demand of the buyer include indemnity for expenses. If, however, the buyer is actually under the instructions of the seller and he fails to request reimbursement, the buyer is still entitled to reimbursement under Subsection (B).

4. Since this section makes the resale of perishable goods an affirmative duty in contrast to a mere right to sell as under the case law, Subsection (C) makes it clear that the buyer is liable only for the exercise of good faith in determining whether the value of the goods is sufficiently threatened to justify a quick resale or whether he has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is.

5. A buyer who fails to make a salvage sale when his duty to do so under this section has arisen is subject to damages pursuant to the section on liberal administration of remedies.

#### **Cross References**

Point 5: Section 1-106. Compare generally § 2-706.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Security interest". Section 1-201.

"Seller". Section 2-103.

## **§ 2-604. Buyer's options as to salvage of rightfully rejected goods**

Subject to the provisions of the immediately preceding section on perishables, if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-604 of the Uniform Commercial Code adopted by the states.

**Commentary.** The basic purpose of this section is twofold: on the one hand it aims at reducing the stake in dispute and on the other at avoiding the pinning of a technical "acceptance" on a buyer who has taken steps towards realization on or preservation of the goods in good faith. This section is essentially a salvage Section and the buyer's right to act under it is conditioned upon: (1) non-conformity of the goods; (2) due notification of rejection to the seller under the section on manner of rejection; and (3) the absence of any instructions from the seller which the merchant-buyer has a duty to follow under the preceding section.

This section is designed to accord all reasonable leeway to a rightfully rejecting buyer acting in good faith. The listing of what the buyer may do in the absence of instructions from the seller is intended to be not exhaustive but merely illustrative. This is not a "merchant's" Section and the options are pure options given to merchant and non-merchant buyers alike. The merchant-buyer, however, may in some instances be under a duty rather than an option to resell under the provisions of the preceding section.

### **Cross References**

Sections 2-602(A), and 2-603(A) and 2-706.

### **Definitional Cross References**

"Buyer". Section 2-103.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

## **§ 2-605. Waiver of buyer's objections by failure to particularize**

A. The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from

relying on the unstated defect to justify rejection or to establish breach:

1. Where the seller could have cured it if stated seasonably; or
2. Between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

B. Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-605 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The present section rests upon a policy of permitting the buyer to give a quick and informal notice of defects in a tender without penalizing him for omissions in his statement, while at the same time protecting a seller who is reasonably misled by the buyer's failure to state curable defects.

2. Where the defect in a tender is one which could have been cured by the seller, a buyer who merely rejects the delivery without stating his objections to it is probably acting in commercial bad faith and seeking to get out of a deal which has become unprofitable. Subsection (A)(1), following the general policy of this article which looks to preserving the deal wherever possible, therefore insists that the seller's right to correct his tender in such circumstances be protected.

3. When the time for cure is past, Subsection (A)(2) makes it plain that a seller is entitled upon request to a final statement of objections upon which he can rely. What is needed is that he make clear to the buyer exactly what is being sought. A formal demand under paragraph (2) will be sufficient in the case of a merchant-buyer.

4. Subsection (B) applies to the particular case of documents the same principle which the section on effects of acceptance applies to the case of goods. The matter is dealt with in this section in terms of "waiver" of objections rather than of right to revoke acceptance, partly to avoid any confusion with the problems of acceptance of goods and partly because defects in documents which are not taken as grounds for rejection are generally minor ones. The only defects concerned in the present subsection are defects in the documents which are apparent on their face. Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. Where the documents are delivered without requiring such contemporary action as payment from the buyer, the reason of the next section on what constitutes acceptance of goods, applies. Their acceptance by

non-objection is therefore postponed until after a reasonable time for their inspection. In either situation, however, the buyer "waives" only what is apparent on the face of the documents.

#### **Cross References**

Point 2: Section 2-508.

Point 4: Sections 2-512(B), 2-606(A)(2), and 2-607(B).

#### **Definitional Cross References**

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

"Writing" and "written". Section 1-201.

#### **§ 2-606. What constitutes acceptance of goods**

A. Acceptance of goods occurs when the buyer:

1. After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

2. Fails to make an effective rejection (§ 2-602(A)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

3. Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

B. Acceptance of a part of any commercial unit is acceptance of that entire unit.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-606 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under this article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to

speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this article to the detailed rights and duties of the parties. (See § 2-401). The refinements of the older law between acceptance of goods and of tide become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether tide has or has not passed to the buyer before breach.

3. Under paragraph (1), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (3), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (3) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (3) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under paragraph (3), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (1). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (1) does not operate in favor of the buyer unless the seller has retendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to § 2-601.

5. Subsection (B) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

#### **Cross References**

Point 2: Sections 2-401, 2-509, 2-510, 2-607, 2-608 and Part 7.

Point 4: Sections 2-601 through 2-604.

Point 5: Section 2-601.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Goods". Section 2-105.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section defines "acceptance" by the buyer. This concept is very important since many of the rights and obligations of buyers and sellers differ after the buyer's acceptance; for example, the buyer's right to reject defective goods are much more limited after his "acceptance" of the goods.

#### **§ 2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over**

A. The buyer must pay the contract rate for any goods accepted.

B. Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this article for non-conformity.

C. Where a tender has been accepted:

1. The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

2. If the claim is one for infringement or the like (§ 2-312(C)) and the buyer is sued as a result of such a breach, he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy for liability established by the litigation.

D. The burden is on the buyer to establish any breach with respect to the goods accepted.

E. Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over;

1. He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

2. If the claim is one for infringement or the like (§ 2-312(C)) the original seller may demand in writing that his buyer turn over to him

control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.

F. The provision of Subsections (C), (D) and (E) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (§ 2-312(C)).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-607 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under Subsection (A), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in *quantum valebant* cases, to be determined in terms of "the contract rate", which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this article have been brought to bear.

2. Under Subsection (B) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under Subsection (B). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objects that will be relied on by the buyer, as under the section covering statements of defects upon rejection (§ 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (D) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under Subsection (C). For Subsection (B) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (C)(2) and (E)(2) give a warrantor against infringement an opportunity to defend or compromise third party claims or be relieved of his liability. Subsection (E)(1) codifies for all warranties the practice of voucher to defend. Compare § 3-803. Subsection (F) makes these provisions applicable to the buyer's liability for infringement under § 2-312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

#### **Cross References**

Point 1: Section 1-201.

Point 2: Section 2-608.

Point 4: Sections 1-204 and 2-605.

Point 5: Section 2-318.

Point 6: Section 2-717.

Point 7: Sections 2-312 and 3-803.

Point 8: Section 1-207.

#### **Definitional Cross References**

"Burden of establishing". Section 1-201.

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Remedy". Section 1-201.

"Seasonably". Section 1-204.

#### **§ 2-608. Revocation of acceptance in whole or in part**

A. The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

1. On the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

2. Without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

B. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

C. A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-608 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The buyer is not required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him. The non-alternative character of the two remedies is stressed by the terms used in this section. The section no longer speaks of "rescission", a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

2. Revocation of acceptance is possible only where the non-conformity

substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under paragraph (2) of Subsection (A) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (2). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this article is available to the buyer under the section on remedies for fraud.

4. Subsection (B) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under Subsection (B) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under Subsection (B) the policy is one of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

#### **Cross References**

Point 3: Section 2-721.

Point 4: Sections 1-204, 2-602 and 2-607.

Point 5: Sections 2-605 and 2-607.

Point 7: Section 2-601.

### **Definitional Cross References**

"Buyer". Section 2-103.

"Commercial unit". Section 2-105.

"Conform". Section 2-106.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Reasonable time". Section 1-204.

"Rights". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

### **Special Plain Language Comment**

This section provides that a buyer can reject the goods even after formal acceptance if defects in the goods: (1) substantially impair the value of the goods; *and* (2) he accepted the goods based on the assumption that the defects would be cured or the defects were too difficult to detect initially. However to exercise this right the buyer must "revoke" his acceptance within a "reasonable" time of discovering the defects and must formally notify the seller of his intention to revoke his acceptance.

#### **§ 2-609. Right to adequate assurance of performance**

A. A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may, if commercially reasonable, suspend any performance for which he has not already received the agreed return.

B. Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

C. Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

D. After receipt of a justified demand, failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

## History

CJA-1-86 January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 2-609 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance. Similarly, a buyer who believes that the seller's deliveries have become uncertain cannot safely wait for the due date of performance when he has been buying to assure himself of materials for his current manufacturing or to replenish his stock of merchandise.

2. Three measures have been adopted to meet the needs of commercial men in such situations. First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been clarified. "Suspend performance" under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform.

Secondly, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared upon within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. This section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

3. Subsection (B) of the present section requires that "reasonable" grounds and "adequate" assurance as used in Subsection (A) be defined by commercial rather

than legal standards. The express reference to commercial standards carries no connotation that the obligation of good faith is not equally applicable here.

Under commercial standards and in accord with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question. The law as to "dependence" or "independence" of promises within a single contract does not control the application of the present section.

Thus a buyer who falls behind in "his account" with the seller, even though the items involved have to do with separate and legally distinct contracts, impairs the seller's expectation of due performance. Again, under the same test, a buyer who requires precision parts which he intends to use immediately upon delivery, may have reasonable grounds for insecurity if he discovers that his seller is making defective deliveries of such parts to other buyers with similar needs. Thus, too, in a situation such as arose in *Jay Dreher Corporation v. Delco Appliance Corporation*, 93 F.2d 275 (C.C.A. 2, 1937), where a manufacturer gave a dealer an exclusive franchise for the sale of his product but on two or three occasions breached the exclusive dealing clause. Although there was no default in orders, deliveries or payments under the separate sales contract between the parties, the aggrieved dealer would be entitled to suspend his performance of the contract for sale under the present section and demand assurance that the exclusive dealing contract be lived up to. There is no need for an explicit clause tying the exclusive franchise into the contract for the sale of goods since the situation itself ties the agreements together.

The nature of the sales contract enters also into the question of reasonableness. For example, a report from an apparently trustworthy source that the seller had shipped defective goods or was planning to ship them would normally give the buyer reasonable grounds for insecurity. But when the buyer has assumed the risk of payment before inspection of the goods, as in a sales contract on C.I.F. or similar cash against documents terms, that risk is not to be evaded by a demand for assurance. Therefore no ground for insecurity would exist under this section unless the report went to a ground which would excuse payment by the buyer.

4. What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure. A fact situation such as arose in *Corn Products Refining Co. v. Fasola*, 94 N.J.L. 181, 109 A. 505 (1920) offers illustration both of reasonable grounds for insecurity and "adequate" assurance. In that case a contract for the sale of oils on 30 days credit, two percent (2%) off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the habit of taking advantage of the discount but at the same time that he failed to make his customary 10-day payment, the seller heard rumors, in fact false, that the

buyer's financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker, expressed willingness to make payments when due on the 30-day terms and insisted on further deliveries under the contract. Under this article the rumors, although false, were enough to make the buyer's financial condition "unsatisfactory" to the seller under the contract clause. Moreover, the buyer's practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller's demand for security, or his "reasonable grounds for insecurity".

The adequacy of the assurance given is not measured as in the type of "satisfaction" situation affected with intangibles, such as in personal service cases, cases involving a third party's judgment as final, or cases in which the whole contract is dependent on one party's satisfaction, as in a sale on approval. Here, the seller must exercise good faith and observe commercial standards. This article thus approves the statement of the court in *James B. Berry's Sons Co. Illinois v. Monark Gasoline & Oil Co., Inc.*, 32 F.2d 74 (C.C.A. 8, 1929), that the seller's satisfaction under such a clause must be based upon reason and must not be arbitrary or capricious; and rejects the purely personal "good faith" test of the *Corn Products Refining Co.* case, which held that in the seller's sole judgment, if for any reason he was dissatisfied, he was entitled to revoke the credit. In the absence of the buyer's failure to take the two percent (2%) discount as was his custom, the banker's report given in that case would have been "adequate" assurance under this Code, regardless of the language of the "satisfaction" clause. However, the seller is reasonably entitled to feel insecure at a sudden expansion of the buyer's use of a credit term, and should be entitled either to security or to a satisfactory explanation.

The entire foregoing discussion as to adequacy of assurance by way of explanation is subject to qualification when repeated occasions for the application of this section arise. This Code recognizes that repeated delinquencies must be viewed as cumulative. On the other hand, commercial sense also requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

5. A failure to provide adequate assurance of performance and thereby to re-establish the security of expectation, results in a breach only "by repudiation" under Subsection (D). Therefore, the possibility is continued of retraction of the repudiation under the section dealing with that problem, unless the aggrieved party has acted on the breach in some manner. The 30-day limit on the time to provide assurance is laid down to free the question of reasonable time from uncertainty in later litigation.

6. Clauses seeking to give the protected party exceedingly wide powers to cancel or readjust the contract when ground for insecurity arises must be read against the fact that good faith is a part of the obligation of the contract and not subject to modification by agreement and includes, in the case of a merchant, the reasonable observance of commercial standards of fair dealing in the trade. Such clauses can thus be effective to enlarge the protection given by the present section to a certain extent, to fix the reasonable time within which requested assurance must be given, or to define adequacy of the assurance in any commercially reasonable fashion. But any clause seeking to set up

arbitrary standards for action is ineffective under this article. Acceleration clauses are treated similarly in the Articles on Commercial Paper and Secured Transactions.

#### **Cross References**

Point 3: Section 1-203.

Point 5: Section 2-611.

Point 6: Sections 1-203 and 1-208 and Articles 3 and 9.

#### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Rights", Section 1-201.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

This section embodies the philosophy of the Code to encourage performance of the contract. It permits a method of reassurance to a party to the contract who becomes concerned about the ability of the second party to complete the second party's obligations. The first party can demand in writing some assurance that the second party will complete its performance and while waiting for the answer, suspend certain part of the first party's performance. If the second party fails to reply to this request for assurance within 30 days of receiving it, the contract can be considered repudiated.

#### **§ 2-610. Anticipatory repudiation**

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

A. For a commercially reasonable time, await performance by the repudiating party; or

B. Resort to any remedy for breach (§ 2-703 or § 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

C. In either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (§ 2-704).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-610 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. With the problem of insecurity taken care of by the preceding section and with provision being made in this article as to the effect of a defective delivery under an installment contract, anticipatory repudiation centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance.

Under the present section when such a repudiation substantially impairs the value of the contract, the aggrieved party may at any time resort to his remedies for breach, or he may suspend his own performance while he negotiates with, or awaits performance by, the other party. But if he awaits performance beyond a commercially reasonable time he cannot recover resulting damages which he should have avoided.

2. It is not necessary for repudiation that performance be made literally and utterly impossible. Repudiation can result from action which reasonably indicates a rejection of the continuing obligation. And, a repudiation automatically results under the preceding section on insecurity when a party fails to provide adequate assurance of due future performance within 30 days after a justifiable demand therefor has been made. Under the language of this section, a demand by one or both parties for more than the contract calls for in the way of counter-performance is not in itself a repudiation nor does it invalidate a plain expression of desire for future performance. However, when under a fair reading it amounts to a statement of intention not to perform except on conditions which go beyond the contract, it becomes a repudiation.

3. The test chosen to justify an aggrieved party's action under this section is the same as that in the section on breach in installment contracts—namely the substantial value of the contract. The most useful test of substantial value is to determine whether materials inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated.

4. After repudiation, the aggrieved party may immediately resort to any remedy he chooses provided he moves in good faith (see § 1-203). Inaction and silence by the aggrieved party may leave the matter open but it cannot be regarded as misleading the repudiating party. Therefore the aggrieved party is left free to proceed at any time with his options under this section, unless he has taken some positive action which in good faith requires notification to the other party before the remedy is pursued.

### **Cross References**

Point 1: Sections 2-609 and 2-612.

Point 2: Section 2-609.

Point 3: Section 2-612.

Point 4: Section 1-203.

### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Contract". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

### **§ 2-611. Retraction of anticipatory repudiation**

A. Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

B. Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this article (§ 2-609).

C. Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-611 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The repudiating party's right to reinstate the contract is entirely dependent upon the action taken by the aggrieved party. If the latter has cancelled the contract or materially changed his position at any time after the repudiation, there can be no retraction under this section.

2. Under Subsection (B) an effective retraction must be accompanied by any assurances demanded under the section dealing with right to adequate assurance. A repudiation is of course sufficient to give reasonable ground for insecurity and to warrant a request for assurance as an essential condition of the

retraction. However, after a timely and unambiguous expression of retraction, a reasonable time for the assurance to be worked out should be allowed by the aggrieved party before cancellation.

#### **Cross References**

Point 2: Section 2-609.

#### **Definitional Cross References**

"Aggrieved party". Section 1-20 1.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Party". Section 1-201.

"Rights". Section 1-201.

#### **§ 2-612. "Installment contract"; breach**

A. An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

B. The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within Subsection (C) and the seller gives adequate assurance of its cure the buyer must accept that installment.

C. Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-612 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The definition of an installment contract is phrased more broadly in this article so as to cover installment deliveries tacitly authorized by the circumstances or by the option of either party.

2. In regard to the apportionment of the price for separate payment this

article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment. A provision for separate payment for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an "installment contract". If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this article.

3. This article rejects any approach which gives clauses such as "each delivery is a separate contract" their legalistically literal effect. Such contracts nonetheless call for installment deliveries. Even where a clause speaks of "a separate contract for all purposes", a commercial reading of the language under the section on good faith and commercial standards requires that the singleness of the document and the negotiation, together with the sense of the situation, prevail over any uncommercial and legalistic interpretation.

4. One of the requirements for rejection under Subsection (B) is non-conformity substantially impairing the value of the installment in question. However, an installment agreement may require accurate conformity in quality as a condition to the right to acceptance if the need for such conformity is made clear either by express provision or by the circumstances. In such a case the effect of the agreement is to define explicitly what amounts to substantial impairment of value impossible to cure. A clause requiring accurate compliance as condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction.

Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract. The defect in required documents refers to such matters as the absence of insurance documents under a C.I.F. contract, falsity of a bill of lading, or one failing to show shipment within the contract period or to the contract destination. Even in such cases, however, the provisions on cure of tender apply if appropriate documents are readily procurable.

5. Under Subsection (B) an installment delivery must be accepted if the nonconformity is curable and the seller gives adequate assurance of cure. Cure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by a further delivery or a partial rejection. This article requires reasonable action by a buyer in regard to discrepant delivery and good faith requires that the buyer make any reasonable minor outlay of time or money necessary to cure an overshipment by severing out an acceptable percentage thereof. The seller must take over a cure which involves any material burden; the buyer's obligation reaches only to cooperation. Adequate assurance for purposes of Subsection (B) is measured by the same standards as under the section on right to adequate assurance of performance.

6. Subsection (C) is designed to further the continuance of the contract in the absence of an overt cancellation. The question arising when an action is brought as to a single installment only is resolved by making such action waive

the right of cancellation. This involves merely a defect in one or more installments, as contrasted with the situation where there is a true repudiation within the section on anticipatory repudiation. Whether the nonconformity in any given installment justifies cancellation as to the future depends, not on whether such nonconformity indicates an intent or likelihood that the future deliveries will also be defective, but whether the nonconformity substantially impairs the value of the whole contract. If only the seller's security in regard to future installments is impaired, he has the right to demand adequate assurances of proper future performance but has not an immediate right to cancel the entire contract. It is clear under this article, however, that defects in prior installments are cumulative in effect so that acceptance does not wash out the defect "waived". The rule as to buyer's default is put on the same footing as that in regard to seller's default.

7. Under the requirement of reasonable notification of cancellation under Subsection (C), a buyer who accepts a non-conforming installment which substantially impairs the value of the entire contract should properly be permitted to withhold his decision as to whether or not to cancel pending a response from the seller as to his claim for cure or adjustment. Similarly, a seller may withhold a delivery pending payment for prior ones, at the same time delaying his decision as to cancellation. A reasonable time for notifying of cancellation, judged by commercial standards under the section on good faith extends of course to include the time covered by any reasonable negotiation in good faith. However, during this period the defaulting party is entitled, on request, to know whether the contract is still in effect, before he can be required to perform further.

#### **Cross References**

Point 2: Sections 2-307 and 2-607.

Point 3: Section 1-203.

Point 5: Sections 2-208 and 2-609.

Point 6: Section 2-610.

#### **Definitional Cross References**

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Lot". Section 2-105.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

### **§ 2-613. Casualty to identified goods**

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§ 2-324) then:

A. If the loss is total the contract is avoided; and

B. If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-613 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Where goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation but may at his option take the surviving goods at a fair adjustment. "Fault" is intended to include negligence and not merely wilful wrong. The buyer is expressly given the right to inspect the goods in order to determine whether he wishes to avoid the contract entirely or to take the goods with a price adjustment.

2. The section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer. Where under the agreement, including of course usage of trade, the risk has passed to the buyer before the casualty, the section has no application. Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery.

3. The section on the term "no arrival, no sale" makes clear that delay in arrival, quite as much as physical change in the goods gives the buyer the options set forth in this section.

#### **Cross References**

Point 3: Section 2-324.

### Definitional Cross References

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Contract". Section 1-201.

"Fault". Section 1-201.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Seller". Section 2-103.

### § 2-614. Substituted performance

A. Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

B. If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

### History

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 2-614 of the Uniform Commercial Code adopted by the states. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and rights of the parties governed under the Article is governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. Subsection (A) requires the tender of a commercially reasonable substituted performance where agreed to facilities have failed or become commercially impracticable. Under this article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing.

This section appears between § 2-613 on casualty to identified goods and the next section on excuse by failure of presupposed conditions, both of which deal

with excuse and complete avoidance of the contract where the occurrence or non-occurrence of a contingency which was a basic assumption of the contract makes the expected performance impossible. The distinction between the present section and those sections lies in whether the failure or impossibility of performance arises in connection with an incidental matter or goes to the very heart of the agreement. The differing fines of solution are contrasted in a comparison of *International Paper Co. v. Rockefeller*, 161 App. Div. 180, 146 N.Y.S. 371 (1914) and *Meyer v. Sullivan*, 40 Cal. App. 723, 181 P. 847 (1919). In the former case a contract for the sale of spruce to be cut from a particular tract of land was involved. When a fire destroyed the trees growing on that tract the seller was held excused since performance was impossible. In the latter case the contract called for delivery of wheat "F.O.B. Kosmos Steamer at Seattle". The war led to cancellation of that line's sailing schedule after space had been duly engaged and the buyer was held entitled to demand substituted delivery at the warehouse on the line's loading dock. Under this article, of course, the seller would also be entitled, had the market gone the other way to make a substituted tender in that manner.

There must, however, be a true commercial impracticability to excuse the agreed to performance and justify a substituted performance. When this is the case a reasonable substituted performance tendered by either party should excuse him from strict compliance with contract terms which do not go to the essence of the agreement.

2. The substitution provided in this section as between buyer and seller does not carry over into the obligation of a financing agency under a letter of credit, since such an agency is entitled to performance which is plainly adequate on its face and without need to look into commercial evidence outside of the documents. See Article 5. The Navajo Nation has not adopted Article 5 of the Uniform Commercial Code and the rights of parties which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

3. Under Subsection (B) where the contract is still executory on both sides, the seller is permitted to withdraw unless the buyer can provide him with a commercially equivalent return despite the governmental regulation. Where, however, only the debt for the office remains, a larger leeway is permitted. The buyer may pay in the manner provided by the regulation even though this may not be commercially equivalent provided that the regulation is not "discriminatory, oppressive or predatory".

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Fault". Section 1-201.

"Party". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-615. Excuse by failure of presupposed conditions**

Except so far as a seller may have assumed a greater obligation and

subject to the preceding section on substituted performance:

A. Delay in delivery or non-delivery in whole or in part by a seller who complies with Subsections (B) and (C) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

B. Where the causes mentioned in Subsection (A) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

C. The seller must notify the buyer seasonably that there will be delay or non-delivery and when allocation is required under Subsection (B), of the estimated quota thus made available for the buyer.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-615 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section excuses a seller from timely delivery of goods contracted for where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. The destruction of specific goods and the problem of the use of substituted performance on points other than delay or quantity, treated elsewhere in this article, must be distinguished from the matter covered by this section.

2. The present section deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose.

3. The first test for excuse under this article in terms of basic assumption is a familiar one. The additional test of commercial impracticability (as contrasted with "impossibility", "frustration of performance" or "frustration of the venture") has been adopted in order to call attention to the commercial character of the criterion chosen by this article.

4. Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Other factors such as the express terms of the contract, the contract's purpose, and custom, usage of the trade or prior dealings are considered. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of

raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

5. Where a particular source of supply is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting.

There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that this source will not fail.

In the case of failure of production by an agreed source for causes beyond the seller's control, the seller should, if possible, be excused since production by an agreed source is without more a basic assumption of the contract. Such excuse should not result in relieving the defaulting supplier from liability nor in dropping into the seller's lap an unearned bonus of damages over. The flexible adjustment machinery of this article provides the solution under the provision on the obligation of good faith. A condition to his making good the claim of excuse is the turning over to the buyer of his rights against the defaulting source of supply to the extent of the buyer's contract in relation to which excuse is being claimed.

6. In situations in which neither sense nor justice are served by either answer when the issue is posed in flat terms of "excuse" or "no excuse", adjustment under the various provisions of this article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Code to use equitable principles in furtherance of commercial standards and good faith.

7. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. However, good faith and the reason of the present section and of the preceding one may properly be held to justify and even to require any needed delay involved in a good faith inquiry seeking a readjustment of the contract terms to meet the new conditions.

8. The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. Thus the exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances. The exemption otherwise present through usage of trade under the present section may also be expressly negated by the language of the agreement. Generally, express agreements as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and

reasonable interpretation and provides a minimum beyond which agreement may not go.

Agreement can also be made in regard to the consequences of exemption as laid down in Subsections (B) and (C) and the next section on procedure on notice claiming excuse.

9. The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract. Exemption of the buyer in the case of a "requirements" contract presents a special situation which is covered by the "Output and Requirements" section both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

10. Following its basic policy of using commercial practicability as a test for excuse, this section recognizes as of equal significance either a foreign or domestic regulation and disregards any technical distinctions between "law", "regulation", "order" and the like. Nor does it make the present action of the seller depend upon the eventual judicial determination of the legality of the particular governmental action. The seller's good faith belief in the validity of the regulation is the test under this article and the best evidence of his good faith is the general commercial acceptance of the regulation. However, governmental interference cannot excuse unless it truly "supervenes" in such a manner as to be beyond the seller's or buyer's assumption of risk. And any action by the party claiming excuse which causes or colludes in inducing the governmental action preventing his performance would be in breach of good faith and would destroy his exemption.

11. An excused seller must fulfill his obligations under the contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (A) and (B), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirement. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since

any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocations, and in case of doubt his contract customers should be favored and supplies prorated evenly among them regardless of price. Save for the extra care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller.

#### **Cross References**

Point 1: Sections 2-613 and 2-614.

Point 2: Section 1-102.

Point 5: Sections 1-203 and 2-613.

Point 6: Sections 1-102, 1-203 and 2-609.

Point 7: Section 2-614.

Point 8: Sections 1-201, 2-302 and 2-616.

Point 9: Sections 1-102, 2-306 and 2-613.

#### **Definitional Cross References**

"Between merchants". Section 2-104.

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 1-201.

"Merchant". Section 2-104.

"Notifies". Section 1-201.

"Seasonably". Section 1-204.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

In certain rare instances a party may be excused of its performance under a contract without "breaching" the contract because a change in the underlying circumstances has made his performance "commercially impracticable".

#### **§ 2-616. Procedure on notice claiming excuse**

A. Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the

prospective deficiency substantially impairs the value of the whole contract under the provisions of this article relating to breach of installment contracts (§ 2-612), then also as to the whole:

1. Terminate and thereby discharge any unexecuted portion of the contract; or

2. Modify the contract by agreeing to take his available quota in substitution.

B. If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.

C. The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-616 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section seeks to establish simple and workable machinery for providing certainty as to when a supervening and excusing contingency "excuses" the delay, "discharges" the contract, or may result in a waiver of the delay by the buyer. When the seller notifies, in accordance with the preceding section, claiming excuse, the buyer may acquiesce, in which case the contract is so modified. No consideration is necessary in a case of this kind to support such a modification. If the buyer does not elect so to modify the contract, he may terminate it and under Subsection (B) his silence after receiving the seller's claim of excuse operates as such a termination. Subsection (C) denies effect to any contract clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances.

#### **Cross References**

Point 1: Sections 2-209 and 2-615.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Installment contract". Section 2-612.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seller". Section 2-103.

"Termination". Section 2-106.

"Written". Section 1-201.

#### **Special Plain Language Comment**

This section deals with a buyer's options if a seller has acted properly under § 2-615 and notified the buyer of the seller's inability to perform. The buyer may treat the contract as an installment contract if the original contract involved more than a single item and where only part of the original contract's performance was excused pursuant to § 2-615. If the seller's action substantially impairs the value of the original contract the buyer can cause the rest of the original contract to be terminated by remaining silent for 30 days after the receipt of notice from the seller. If the buyer wishes to accept the contract modified by the seller's actions pursuant to § 2-615 he must indicate his willingness within that 30-day period of receiving notice from the seller.

#### **Part 7. Remedies**

##### **§ 2-701. Remedies for breach of collateral contracts not impaired**

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this article.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-701 of the Uniform Commercial Code adopted by the states.

**Commentary.** Whether a claim for breach of an obligation collateral to the contract for sale requires separate trial to avoid confusion of issues is beyond the scope of this article; but contractual arrangements which as a business matter enter vitally into the contract should be considered a part thereof in so far as cross-claims or defenses are concerned.

#### **Definitional Cross References**

"Contract for sale". Section 2-106.

"Remedy". Section 1-201.

##### **§ 2-702. Seller's remedies on discovery of buyer's insolvency**

A. Where the seller discovers the buyer to be insolvent he may refuse

delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery, under this article (§ 2-705).

B. Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the 10-day limitation does not apply. Except as provided in this Subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

C. The seller's right to reclaim under Subsection (B) is subject to the rights of a buyer in ordinary course of business or other good faith purchaser under this article (§ 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-702 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The seller's right to withhold the goods or to stop delivery except for cash when he discovers the buyer's insolvency is made explicit in Subsection (A) regardless of the passage of title, and the concept of stoppage has been extended to include goods in the possession of any bailee who has not yet attorned to the buyer.

2. Subsection (B) takes as its base-line the proposition that any receipt of goods on credit by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is fraudulent as against the particular seller. This article makes discovery of the buyer's insolvency and demand within a 30-day period a condition of the right to reclaim goods on the ground. The 30-day limitation period operates from the time of receipt of the goods.

An exception to this time limitation is made when a written misrepresentation of solvency has been made to the particular seller within three months prior to the delivery. To fall within the exception the statement of solvency must be in writing, addressed to the particular seller and dated within three months of the delivery.

3. Because the right of the seller to reclaim goods under this section constitutes preferential treatment as against the buyer's other creditors, Subsection (C) provides that such reclamation bars all his other remedies as to the goods involved.

### **Cross References**

Point 1: Sections 2-401 and 2-705.

Compare § 2-502.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Buyer in ordinary course of business". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Receipt of goods". Section 2-103.

"Remedy ". Section 1-201.

"Rights". Section 2-103.

"Seller". Section 2-103.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

The seller on credit is given a special preference over other creditors on discovery of the insolvency of the buyer. Insolvency is defined in § 1-201 (W). The seller may demand payment in cash for future deliveries of goods. If the goods have already been delivered to the buyer the seller may reclaim the goods but he must make his claim to the goods within 10 days of their receipt by the buyer. However, this 10-day limit does not apply to situations where the buyer has recently (within three months) given the seller a written representation that the buyer is solvent. However, this right to reclaim may be lost if the buyer sells the goods to certain types of third parties.

#### **§ 2-703. Seller's remedies in general**

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (§ 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

A. Withhold delivery of such goods;

B. Stop delivery by any bailee as hereafter provided (§ 2-705);

C. Proceed under the next section respecting goods still unidentified to the contract;

D. Resell and recover damages as hereafter provided (§ 2-706);

E. Recover damages for non-acceptance (§ 2-708) or in a proper case the price (§ 2-709);

F. Cancel.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-703 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is an index Section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

2. The buyer's breach which occasions the use of the remedies under this section may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract. The right of the seller to pursue a remedy as to all the goods when the breach is as to only one or more lots is covered by the section on breach in installment contracts. The present section deals only with the remedies available after the goods involved in the breach have been determined by that section.

3. In addition to the typical case of refusal to pay or default in payment, the language in the preamble, "fails to make a payment due", is intended to cover the dishonor of a check on due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of credit.

4. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is unenforceable by action unless a different effect is specifically prescribed (§ 1-106).

### **Cross References**

Point 2: Section 2-612.

Point 3: Section 2-325.

Point 4: Section 1-106.

### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

**§ 2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods**

A. An aggrieved seller under the preceding section may:

1. Identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

2. Treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

B. Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-704 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section gives an aggrieved seller the right at the time of breach to identify to the contract any conforming finished goods, regardless of the resalability, and to use reasonable judgment as to completing unfinished goods. It thus makes the goods available for resale under the resale Section, the seller's primary remedy, and in the special case in which resale is not practicable, allows the action for the price which would then be necessary to give the seller the value of his contract.

2. Under this article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in

damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture.

#### **Cross References**

Sections 2-703 and 2-706.

#### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Rights". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-705. Seller's stoppage of delivery in transit or otherwise**

A. The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (§ 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

B. As against such buyer the seller may stop delivery until:

1. Receipt of the goods by the buyer; or
2. Acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
3. Such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
4. Negotiation to the buyer of any negotiable document of title covering the goods.

C. 1. To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

2. After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

3. If a negotiable document of title has been issued for goods the bailee is not obligated to obey a notification to stop until surrender of the document.

4. A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-705 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) applies the stoppage principle to other bailees as well as carriers.

It also expands the remedy to cover the situations, in addition to buyer's insolvency, specified in the Subsection. But since stoppage is a burden in any case to carriers, and might be a very heavy burden to them if it covered all small shipments in all these situations, the right to stop for reasons other than insolvency is limited to carload, truckload, planeload or larger shipments. The seller shipping to a buyer of doubtful credit can protect himself by shipping C.O.D.

Where stoppage occurs for insecurity it is merely a suspension of performance, and if assurances are duly forthcoming from the buyer the seller is not entitled to resell or divert.

Improper stoppage is a breach by the seller if it effectively interferes with the buyer's right to due tender under the section on manner of tender of delivery. However, if the bailee obeys an unjustified order to stop he may also be liable to the buyer. The measure of his obligation is dependent on the provisions of the Documents of Title article of Article 7 of the Uniform Commercial Code. This article has not been adopted by the Navajo Nation and the rights of the parties which would be governed under that Article are governed by Navajo law. 7 N.N.C. § 204. Subsection (C)(2) therefore gives him a right of indemnity as against the seller in such a case.

2. "Receipt by the buyer" includes receipt by the buyer's designated representative, the sub-purchaser, when shipment is made direct to him and the buyer himself never receives the goods. It is entirely proper under this article that the seller, by making such direct shipment to the sub-purchaser, be regarded as acquiescing in the latter's purchase and as thus barred from stoppage of the goods as against him.

As between the buyer and the seller, the latter's right to stop the goods at any time until they reach the place of final delivery is recognized by this section.

Under Subsections (C)(3) and (4), the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier's contract. But the seller's right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the buyer cannot complain merely because of that circumstance; and the

seller becomes obligated under Subsection (C) (2) to pay the carrier any ensuing damages or charges.

3. A diversion of a shipment is not a "reshipment" under Subsection (B) (3) when it is merely an incident to the original contract of transportation. Nor is the procurement of "exchange bills" of lading which change only the name of the consignee to that of the buyer's local agent but do not alter the destination of a reshipment.

Acknowledgment by the carrier as a "warehouseman" within the meaning of this article requires a contract of a truly different character from the original shipment, a contract not in extension of transit but as a warehouseman.

4. Subsection (C) (3) makes the bailee's obedience of a notification to stop conditional upon the surrender of any outstanding negotiable document.

5. Any charges or losses incurred by the carrier in following the seller's orders, whether or not he was obligated to do so, fall to the seller's charge.

6. After an effective stoppage under this section the seller's rights in the goods are the same as if he had never made a delivery.

#### **Cross References**

Sections 2-702 and 2-703.

Point 1: Sections 2-503 and 2-609.

Point 2: Section 2-103.

#### **Definitional Cross References**

"Buyer". Section 2-103

"Contract for sale". Section 2-106.

"Document of title". Section 1-201.

"Goods". Section 2-105.

"Insolvent". Section 1-201.

"Notification". Section 1-201.

"Receipt of goods". Section 2-103.

"Rights". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-706. Seller's resale including contract for resale**

A. Under the conditions stated in § 2-703 on Seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof.

Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (§ 2-710), but less expenses saved in consequence of the buyer's breach.

B. Except as otherwise provided in Subsection (C) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

C. Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

D. Where the resale is at public sale:

1. Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

2. It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

3. If the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

4. The seller may buy.

E. A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

F. The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§ 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (§ 2-711(C)).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-706 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The only condition precedent to the seller's right of resale under Subsection (A) is a breach by the buyer within the section on the seller's remedies in general or insolvency. Under this section the seller may resell the goods after any breach by the buyer. Thus, an anticipatory repudiation by the buyer gives rise to any of the seller's remedies for breach, and to the right of resale. This principle is supplemented by Subsection (B) which authorizes a resale of goods which are not in existence or were not identified to the contract before the breach.

2. In order to recover the damages prescribed in Subsection (A) the seller must act "in good faith and in a commercially reasonable manner" in making the resale. Failure to act properly under this section deprives the seller of the measure of damages here provided and relegates him to that provided in § 2-708.

Under this article the seller resells by authority of law, in his own behalf, for his own benefit and for the purpose of fixing his damages. The theory of a seller's agency is thus rejected.

3. If the seller complies with the prescribed standard of duty in making the resale, he may recover from the buyer the damages provided for in Subsection (A). Evidence of market of current prices at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale.

The distinction drawn by some courts between cases where the title had not passed to the buyer and the seller had resold as owner, and cases where the title had passed and the seller had resold by virtue of his lien on the goods, is rejected.

4. Subsection (B) frees the remedy of resale from legalistic restrictions and enables the seller to resell in accordance with reasonable commercial practices so as to realize as high a price as possible in the circumstances. By "public" sale is meant a sale by auction. A "private" sale may be effected by solicitation and negotiations conducted either directly or through a broker. In choosing between a public and private sale the character of the goods must be considered and relevant trade practices and usages must be observed.

5. Subsection (B) merely clarifies the common law rule that the time for resale is a reasonable time after the buyer's breach, by using the language "commercially reasonable". What is such a reasonable time depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees. Where a seller contemplating resale receives a demand from the buyer for inspection under the section of preserving evidence of goods in dispute, the time for resale may be appropriately lengthened.

On the question of the place for resale, Subsection (B) goes to the ultimate test, the commercial reasonableness of the seller's choice as to the place for an advantageous resale. This article rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases.

6. The purpose of Subsection (B) being to enable the seller to dispose of the

goods to the best advantage, he is permitted in making the resale to depart from the terms and conditions of the original contract for sale to any extent "commercially reasonable" in the circumstances.

7. The provision of Subsection (B) that the goods need not be in existence to be resold applies when the buyer is guilty of anticipatory repudiation of a contract for future goods, before the goods or some of them have come into existence. In such a case the seller may exercise the right of resale and fix his damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation. The companion provision of Subsection (B) that resale maybe made although the goods were not identified to the contract prior to the buyer's breach, likewise contemplates an anticipatory repudiation by the buyer but occurring after the goods are in existence. If the goods so identified conform to the contract, their resale will fix the seller's damages quite as satisfactorily as if they had been identified before the breach.

8. Where the resale is to be by private sale, Subsection (C) requires that reasonable notification of the seller's intention to resell must be given to the buyer. The length of notification of a private sale depends upon the urgency of the matter. Notification of the time and place of this type of sale is not required.

Subsection (D) (2) requires that the seller give the buyer reasonable notice of the time and place of a public resale so that he may have an opportunity to bid or to secure the attendance of other bidders. An exception is made in the case of goods "which are perishable or threaten to decline speedily in value".

9. Since there would be no reasonable prospect of competitive bidding elsewhere, Subsection (D) requires that a public resale "must be made at a usual place or market for public sale if one is reasonably available;" i.e., a place or market which prospective bidders may reasonably be expected to attend. Such a market may still be "reasonably available" under this Subsection, though at a considerable distance from the place where the goods are located. In such a case the expense of transporting the goods for resale is recoverable from the buyer as part of the seller's incidental damages under Subsection (A). However, the question of availability is one of commercial reasonableness in the circumstances and if such "usual" place or market is not reasonably available, a duly advertised public resale may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for goods of the kind.

Subsection (D) (1) qualifies the last sentence of Subsection (B) with respect to resales of unidentified and future goods at public sale. If conforming goods are in existence the seller may identify them to the contract after the buyer's breach and then resell them at public sale. If the goods have not been identified, however, he may resell them at public sale only as "future" goods and only where there is a recognized market for public sale of futures in goods of the kind.

The provisions of of Subsection (D) (3) are intended to permit intelligent bidding.

The provisions of Subsection (D)(4) permitting the seller to bid and, of course, to become the purchaser, benefits the original buyer by tending to increase the resale price and thus decreasing the damages he will have to pay.

10. This article in Subsection (E) permits a good faith purchaser at resale to take a good title as against the buyer even though the seller fails to comply with the requirements of this section.

11. Under Subsection (F), the seller retains profit, if any, without distinction based on whether or not he had a lien since this article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise. On the other hand, where "a person in the position of a seller" or a buyer acting under the section on buyer's remedies exercises his right of resale under the present section he does so only for the limited purpose of obtaining cash, for his "security interest" in the goods. Once that purpose has been accomplished any excess in the resale price belongs to the seller to whom an accounting must be made as provided in the last sentence of Subsection (F).

#### **Cross References**

Point 1: Sections 2-610, 2-702 and 2-703.

Point 2: Section 1-201.

Point 3: Sections 2-708 and 2-710.

Point 4: Section 2-328.

Point 8: Section 2-104.

Point 9: Section 2-710.

Point 11: Sections 2-401, 2-707 and 2-711(C).

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Contract for sale". Section 2-106.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Merchant". Section 2-104.

"Notification". Section 1-201.

"Person in position of seller". Section 2-707.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Sale". Section 2-106.

"Security interest". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This right of resale is the most common remedy for sellers in the case of repudiation or breach of the contract by the buyer. Generally a seller does not wish to retain the rejected or withheld goods and he will resell them. The seller is permitted to recover the difference between the resale price and the contract price plus incidental damages (as defined in § 2-710) less any expenses saved because of the breach by buyer (for example further packaging or transportation costs). The measure of damages in §§ 2-706 and 2-708 are essentially the same, but the remedy of § 2-706 is generally more advantageous for the seller than the remedy in § 2-708 because of the burden of proof: in § 2-706 the resale price is conclusive proof of the value of the goods whereas in § 2-708 the seller has the burden of establishing the market price in order to obtain the advantages of § 2-708. The resale must be: (1) in good faith; and (2) commercially reasonable. The satisfaction of these two tests will vary depending on the situation, but generally the resale must be performed in a fashion which takes into account the type of goods and the custom of the trade in such goods. The section also sets out specific requirements depending on whether the resale is public or private.

#### **§ 2-707. "Person in the position of a seller"**

A. A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

B. A person in the position of a seller may as provided in this article withhold or stop delivery (§ 2-705) and resell (§ 2-706) and recover incidental damages (§ 2-710).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-707 of the Uniform Commercial Code adopted by the states.

**Commentary.** In addition to following in general the prior law the case of a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller has been included in the term "a person in the position of a seller".

## **Cross References**

Section 2-506.

## **Definitional Cross References**

"Consignee". Section 2-103.

"Consignor". Section 2-103.

"Goods". Section 2-105.

"Security interest". Section 1-201.

"Seller". Section 2-103.

## **§ 2-708. Seller's damages for non-acceptance or repudiation**

A. Subject to Subsection (B) and to the provisions of this article with respect to proof of market price (§ 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this article (§ 2-710), but less expenses saved in consequences of the buyer's breach.

B. If the measure of damages provided in Subsection (A) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (§ 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

## **History**

CJA-1-86, January 29, 1986.

## **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-708 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The current market price at the time and place for tender is set as the standard by which damages for non-acceptance are to be determined. The time and place of tender is determined by reference to the section on manner of tender of delivery, and to the sections on the effect of such terms as F.O.B., F.A.S., C.I.F., C & F, Ex Ship and No Arrival, No Sale.

In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under the section on determination and proof of market price. Furthermore, the section on the admissibility of market quotations is intended to ease materially the problem of providing competent evidence.

2. The provision of this section permitting recovery of expected profit

including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

3. In all cases the seller may recover incidental damages.

#### **Cross References**

Point 1: Sections 2-319 through 2-324, 2-503, 2-723 and 2-724.

Point 2: Section 2-709.

Point 3: Section 2-710.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-709. Action for the price**

A. When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price:

1. Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

2. Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

B. Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

C. After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (§ 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

## History

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 2-709 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Neither the passing of title to the goods nor the appointment of a day certain for payment is now material to a price action.

2. The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer.

3. This section uses an objective test concerning the "resalability" of the goods. An action for the price under Subsection (A)(2) can be sustained only after a "reasonable effort to resell" the goods "at reasonable price" has actually been made or where the circumstances "reasonably indicate" that such an effort will be unavailing.

4. If a buyer is in default not with respect to the price, but on an obligation to make an advance, the seller should recover not under this section for the price as such, but for the default in the collateral (though coincident) obligation to finance the seller. If the agreement between the parties contemplates that the buyer will acquire, on making the advance, a security interest in the goods, the buyer on making the advance has such an interest as soon as the seller has rights in the agreed collateral. See § 9-204.

5. "Goods accepted" by the buyer under Subsection (A)(1) include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default by the seller which bars his rights under this section. "Goods lost or damaged" are covered by the section on risk of loss. "Goods identified to the contract" under Subsection (A)(2) are covered by the section on identification and the section on identification notwithstanding breach.

6. This section is intended to be exhaustive in its enumeration of cases where an action for the price lies.

7. If the action for the price fails, the seller may nonetheless have proved a case entitling him to damages for non-acceptance. In such a situation, Subsection (C) permits recovery of those damages in the same action.

## Cross References

Point 4: Section 1-106.

Point 5: Sections 2-501, 2-509, 2-510 and 2-704.

Point 7: Section 2-708

### **Definitional Cross References**

"Action". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201

"Goods". Section 2-105.

"Seller". Section 2-103.

### **§ 2-710. Seller's incidental damages**

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-710 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section authorizes reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercially reasonable expenditure made by the seller.

### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Seller". Section 2-103.

### **§ 2-711. Buyer's remedies in general; buyer's security interest in rejected goods**

A. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance with respect to any goods involved, and with respect to the whole if the breach goes to the whole

contract (§ 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

1. "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

2. Recover damages for non-delivery as provided in this article (§ 2-713).

B. Where the seller fails to deliver or repudiates the buyer may also:

1. If the goods have been identified recover them as provided in this article (§ 2-502); or

2. In a proper case obtain specific performance or replevy the goods as provided in this article (§ 2-716).

C. On a rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (§ 2-706).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-711 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is an index to the buyer's remedies, Subsection (A) covering those remedies permitting the recovery of money damages, and Subsection (B) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. Subsection (C) makes clear that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only

the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in Subsection (C), and the buyer is not permitted to retain such funds as he might believe adequate for his damages. The buyer's right to cover, or to have damages for non-delivery, is not impaired by his exercise of his right of resale.

3. It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (§ 1-106).

#### **Cross References**

Point 1: Sections 2-508, 2-601(C), 2-608, 2-612 and 2-714.

Point 2: Section 2-706.

Point 3: Section 1-106.

#### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Buyer". Section 2-103.

"Cancellation". Section 2-106.

"Contract". Section 1-201.

"Cover". Section 2-712.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Receipt" of goods". Section 2-103.

"Remedy". Section 1-201.

"Security interest". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-712. "Cover"; buyer's procurement of substitute goods**

A. After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

B. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 2-715), but less expenses saved in consequence of the seller's breach.

C. Failure of the buyer to effect cover within this section does not bar him from any other remedy.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-712 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section provides the buyer with a remedy aimed at enabling him to obtain the goods he needs thus meeting his essential need. This remedy is the buyer's equivalent of the seller's right to resell.

2. The definition of "cover" under Subsection (A) envisages a series of contracts or sales, as well as a single contract or sale; goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case; and contracts on credit or delivery terms differing from the contract in breach, but again reasonable under the circumstances. The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

The requirement that the buyer must cover "without unreasonable delay" is not intended to limit the time necessary for him to look around and decide as to how he may best effect cover. The test here is similar to that generally used in this article as to reasonable time and seasonable action.

3. Subsection (C) expresses the policy that cover is not a mandatory remedy for the buyer. The buyer is always free to choose between cover and damages for non-delivery under the next section.

However, this Subsection must be read in conjunction with the section which limits the recovery of consequential damages to such as could not have been obviated by cover. Moreover, the operation of the section on specific performance of contracts for "unique" goods must be considered in this connection for availability of the goods to the particular buyer, for his particular needs is the test for that remedy and inability to cover is made an express condition to the right of the buyer to replevy the goods.

4. This section does not limit cover to merchants, in the first instance. It is the vital and important remedy for the consumer buyer as well. Both are free to use cover: the domestic or non-merchant consumer is required only to act in normal good faith while the merchant buyer must also observe all reasonable commercial standards of fair dealing in the trade, since this falls within the definition of good faith on his part.

### **Cross References**

Point 1: Section 2-706.

Point 2: Section 1-204.

Point 3: Sections 2-713, 2-715 and 2-716.

Point 4: Section 1-203.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Good faith". Section 2-103.

"Goods". Section 2-105.

"Purchase". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

The most common remedy for buyers, similar to resale for sellers, is "cover" (the purchase of substitute goods) because the buyer generally needs to acquire the goods he sought to purchase. If the buyer "covers" within a "reasonable time" he may then obtain as damages the difference between the price he paid to cover and the contract price plus any incidental or consequential damages; but less expenses saved due to seller's breach. Just as in the seller's remedies under §§ 2-706 and 2-708 the two remedies, §§ 2-712 and 2-713, have the same measure of damages, but the burden of proof differs: in § 2-712 the cover price is conclusive evidence of the cost of the goods and in § 2-713 the market price must be proved by the buyer. The buyer, unlike the seller, may receive consequential damages (§ 2-715). Consequential damages are difficult to define but are generally those which arise outside the scope of the immediate buyer-seller transactions and are losses by the buyer due to the breach by the seller and which were reasonably foreseeable to the seller at the time of contracting. For example, if a dealer knows that a farmer is purchasing a tractor in order to harvest his crop and yet he fails to deliver the tractor on time, knowing that no other tractors are available for rental, the dealer would be liable for the loss of the farmer's crop as consequential damages of his failure to deliver the tractor.

However, if the goods are "unique" or not otherwise available the buyer may demand that the seller perform the contract "specific performance" (§ 2-716).

#### **§ 2-713. Buyer's damages for non-delivery or repudiation**

A. Subject to the provisions of this article with respect to proof of market price (§ 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental

and consequential damages-provided in this article (§ 2-715), but less expenses saved in consequence of the seller's breach.

B. Market price is to be determined as of the place for tender or, in cases of rejection after arrival of acceptance, as of the place of arrival.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-713 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The general baseline adopted in this section uses as a yardstick the market in which the buyer would have obtained cover had he sought that relief. So the place for measuring damages is the place of tender (or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination) and the crucial time is the time at which the buyer learns of the breach.

2. The market or current price to be used in comparison with the contract price under this section is the price for goods of the same kind and in the same branch of trade.

3. When the current market price under this section is difficult to prove the section on determination and proof of market price is available to permit a showing of a comparable market price or, where no market price is available, evidence of spot sale prices is proper. Where the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case is normally made for specific performance under this article. Such scarcity conditions, moreover, indicate that the price has risen and under the section providing for liberal administration of remedies, opinion evidence as to the value of the goods would be admissible in the absence of a market price and a liberal construction of allowable consequential damages should also result.

4. This section carries forward the standard rule that the buyer must deduct from his damages any expenses saved as a result of the breach.

5. The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

#### **Cross References**

Point 3: Sections 1-106, 2-716 and 2-723.

Point 5: Section 2-712.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Seller". Section 2-103.

**§ 2-714. Buyer's damages for breach in regard to accepted goods**

A. Where the buyer has accepted goods and given notification (§ 2-607(C)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

B. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

C. In a proper case any incidental and consequential damages under the next section may also be recovered.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-714 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by. This section lays down an explicit provision as to the time and place for determining the loss.

The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.

2. The "non-conformity" referred to in Subsection (A) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable".

3. Subsection (B) describes the usual, standard and reasonable methods of ascertaining damages in the case of breach of warranty, but it is not intended as an exclusive measure. It departs from the measure of damages for non-delivery in utilizing the place of acceptance rather than the place of tender. In some cases the two may coincide, as where the buyer signifies his acceptance upon the tender. If, however, the nonconformity is such as would justify revocation of acceptance, the time and place of acceptance under this section is determined as of the buyer's decision not to revoke.

4. The incidental and consequential damages referred to in Subsection (C),

which will usually accompany an action, brought under this section, are discussed in detail in the comment on the next section.

#### **Cross References**

Point 1: Compare Sections 2-711, 2-607 and 2-717.

Point 2: Section 2-106.

Point 3: Sections 2-608 and 2-713.

Point 4: Section 2-715.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Conform". Section 2-106.

"Goods". Section 1-201.

"Notification". Section 1-201.

"Seller". Section 2-103.

#### **§ 2-715. Buyer's incidental and consequential damages**

A. Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

B. Consequential damages resulting from the seller's breach include:

1. Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

2. Injury to person or property proximately resulting from any breach of warranty.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-715 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) is intended to provide reimbursement of the buyer who incurs reasonable expenses in connection with the handling of rightfully rejected goods or goods whose acceptance may be justifiably revoked,

or in connection with effecting cover where the breach of the contract has in non-conformity or non-delivery of the goods. The incidental damages listed are not intended to be exhaustive but are merely illustrative of the typical kinds of incidental damages.

2. Subsection (B) operates to allow the buyer, in an appropriate case, any consequential damages which are the result of the seller's breach. The "tacit agreement" test for the recovery of consequential damages is rejected. Although the older rule at common law which made the seller liable for all consequential damages of which he had "reason to know" in advance is followed, the liberality of that rule is modified by refusing to permit recovery unless the buyer could not reasonably have prevented the loss by cover or otherwise. Paragraph (2) modifies the former rule concerning consequential damages resulting from breach of warranty by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise.

3. In the absence of excuse under the section on merchant's excuse by failure of presupposed conditions, the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting. It is not necessary that there be a conscious acceptance of an insurer's liability on the seller's part, nor is his obligation for consequential damages limited to cases in which he fails to use due effort in good faith.

Particular needs of the buyer must generally be made known to the seller while general needs must rarely be made known to charge the seller with knowledge.

Any seller who does not wish to take the risk of consequential damages has available the section on contractual limitation of remedy.

4. The burden of proving the extent of loss incurred by way of consequential damages is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.

5. Subsection (B)(2) states the usual rule as to breach of warranty, allowing recovery for injuries "proximately" resulting from the breach. Where the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty.

6. In the case of sale of wares to one in the business of reselling them, resale is one of the requirements of which the seller has reason to know within the meaning of Subsection (13)(1).

#### **Cross References**

Point 1: Section 2-608.

Point 3: Sections 1-203, 2-615 and 2-719.

Point 4: Section 1-106.

#### **Definitional Cross References**

"Cover". Section 2-712.

"Goods". Section 1-201.

"Person". Section 1-201.

"Receipt of goods". Section 2-103.

"Seller". Section 2-103.

#### **§ 2-716. Buyer's right to specific performance or replevin**

A. Specific performance may be decreed where the goods are unique or in other proper circumstances.

B. The decree for specific performance may include such terms and conditions and to payment of the price, damages, or other relief as the court may deem just.

C. The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-716 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the

older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of "other proper circumstances".

3. The legal remedy of replevin is given the buyer in cases in which cover is reasonably unavailable and goods have been identified to the contract. This is in addition to the buyer's right to recover identified goods on the seller's insolvency (§ 2-502).

4. This section is intended to give the buyer rights to the goods comparable to the seller's rights to the price.

5. If a negotiable document of title is outstanding, the buyer's right of replevin relates of course to the document not directly to the goods.

#### **Cross References**

Point 3: Section 2-502.

Point 4: Section 2-709.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Goods". Section 1-201.

"Rights". Section 1-201.

#### **§ 2-717. Deduction of damages from the price**

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-717 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section permits the buyer to deduct from the price damages resulting from any breach by the seller and does not limit the relief to cases of breach of warranty as did the prior law. To bring this provision into application the breach involved must be of the same contract under which the price in question is claimed to have been earned.

2. The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes to avoid a default within the meaning of the section on insecurity and right to assurances. In conformity with the general policies of this article, no formality of notice is required and any language

which reasonably indicates the buyer's reason for holding up his payment is sufficient.

#### **Cross References**

Point 2: Section 2-609.

#### **Definitional Cross References**

"Buyer". Section 2-103.

"Notifies". Section 1-201.

#### **§ 2-718. Liquidation or limitation of damages: deposits**

A. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

B. Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds:

1. The amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with Subsection (A); or

2. In the absence of such terms, twenty percent (20%) of the value of the total performance for which the buyer is obligated under the contract or five hundred dollars (\$500.00), whichever is smaller.

C. The buyer's right to restitution under Subsection (B) is subject to offset to the extent that the seller establishes:

1. A right to recover damages under the provisions of this article other than Subsection (A); and

2. The amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

D. Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of Subsection (B); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this article on resale by an aggrieved seller (§ 2-706).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-718 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under Subsection (A) liquidated damages clauses are allowed where the amount involved is reasonable in the light of the circumstances of the case. The Subsection sets forth explicitly the elements to be considered in determining the reasonableness of a liquidated damages clause. A term fixing unreasonably large liquidated damages is expressly made void as a penalty. An unreasonably small amount would be subject to similar criticism and might be stricken under the section on unconscionable contracts or clauses.

2. Subsection (B) refuses to recognize a forfeiture unless the amount of the payment so forfeited represents a reasonable liquidation of damages as determined under Subsection (A). A special exception is made in the case of small amounts (twenty percent (20%) of the price or five hundred dollars (\$500.00), whichever is smaller) deposited as security. No distinction is made between cases in which the payment is to be applied on the price and those in which it is intended as security for performance. Subsection (B) is applicable to any deposit or down or part payment. In the case of a deposit or turn in of goods resold before the breach, the amount actually received on the resale is to be viewed as the deposit rather than the amount allowed the buyer for the trade in. However, if the seller knows of the breach prior to the resale of the goods turned in, he must make reasonable efforts to realize their true value, and this is assured by requiring him to comply with the conditions laid down in the section on resale by an aggrieved seller.

#### **Cross References**

Point 1: Section 2-302.

Point 2: Section 2-706.

#### **Definitional Cross References**

"Aggrieved party". Section 1-201.

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Goods". Section 2-105.

"Notice". Section 1-201.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Seller". Section 2-103.

"Term". Section 1-201.

#### **Special Plain Language Comment**

Where damages due to breach of contract are difficult to prove and other remedies are not feasible the parties may agree to an estimated amount of damages, "liquidated damages". Such liquidated damages must be reasonable as compared to actual damages—liquidated damages which are too high will be declared void and unenforceable. Liquidated damages must meet three tests to be permitted: (1) reasonable amount as compared to actual damages; (2) actual damages difficult to prove; and (3) other remedies are not feasible.

#### **§ 2-719. Contractual modification or limitation of remedy**

A. Subject to the provisions of Subsections (B) and (C) of this section and of the preceding section on liquidation and limitation of damages:

1. The agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or the repair and replacement of non-conforming goods or parts; and

2. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

B. Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

C. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-719 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus, any clause purporting to modify or limit the remedial provisions of this article in an unconscionable manner is subject to deletion and in that event the remedies made available by this article are applicable as if the stricken cause had never existed. Similarly, under Subsection (B), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy

provisions of this article.

2. Subsection (A)(2) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (C) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or indeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in § 2-316.

#### **Cross References**

Point 1: Section 2-302.

Point 3: Section 2-316.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Buyer". Section 2-103.

"Conforming". Section 2-106.

"Contract". Section 1-201.

"Goods". Section 2-105.

"Remedy". Section 1-201.

"Seller". Section 2-103.

#### **Special Plain Language Comment**

This section permits the parties to limit the remedies available. For example, they could agree that monetary damages are limited to a certain maximum or that monetary damages are not available at all, the only remedy available is the right to have the goods repaired or replaced. The Code imposes two restrictions on such limitations of remedies: the remedy must not be so limited as to "fail of its essential purpose" nor may the exclusion of consequential damages be "unconscionable". Failure of essential purpose is a difficult concept, but it embodies the traditional principle of contract interpretation that the interpretation of a provision must take into account the purpose of that provision. For example, a contract for the sale of a television set might limit remedies to the repair or replacement of defective components. If a defective picture tube caused the television set to catch on fire and be destroyed, such a limitation on remedies would "fail in its essential purpose" because no television set would be available to be repaired. The buyer could then turn to other remedies under the Code. The second restriction on the limitation of remedies deals with the limitation or exclusion of consequential damages. Because of the potential importance of such a limitation, the Code has specifically restricted the ability of parties

to agree to such limitations, particularly for personal injuries involving consumer goods. For example, if defective wiring in a space heater results in third degree burns, the seller's attempt to limit the amount of consequential damages to the price of the space heater will not be successful.

**§ 2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach**

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-720 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as "cancellation", "rescission", or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is "without reservation of rights", or the like, it cannot be considered to be a renunciation under this section.

**Cross References**

Section 1-107.

**Definitional Cross References**

"Cancellation". Section 2-106.

"Contract". Section 1-201.

**§ 2-721. Remedies for fraud**

Remedies for material misrepresentation or fraud include all remedies available under this article for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-721 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section was drafted to correct the situation by which remedies for fraud have been more circumscribed than the more modern and mercantile remedies for breach of warranty. Thus the remedies for fraud are extended by this section to coincide in scope with those for non-fraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.

#### **Definitional Cross References**

"Contract for sale". Section 2-106.

"Goods". Section 1-201.

"Remedy". Section 1-201.

#### **§ 2-722. Who can sue third parties for injury to goods**

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract:

A. A right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

B. If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

C. Either party may with the consent of the other sue for the benefit of whom it may concern.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-722 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section adopts and extends somewhat the principle of the statutes which provide for suit by the real party in interest. The provisions of this section apply only after identification of the goods. Prior to that time only the seller has a right of action. During the period between

identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final acceptance both parties may have the right of action if the seller retains possession or otherwise retains an interest.

#### **Definitional Cross References**

"Action". Section 1-201.

"Buyer". Section 2-103.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

#### **§ 2-723. Proof of market price: time and place**

A. If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (§ 2-708 or § 2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

B. If evidence of a price prevailing at the times or places described in this article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

C. Evidence of a relevant price prevailing at a time or place other than the one described in this article offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-723 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section eliminates the most obvious difficulties arising in connection with the determination of market price, when that is stipulated as a measure of damages by some provision of this article. Where the appropriate market price is not readily available the court is here granted reasonable

leeway in receiving evidence of prices current in other comparable markets or at other times comparable to the one in question. In accordance with the general principle of this article against surprise, however a party intending to offer evidence of such a substitute price must give suitable notice to the other party.

This section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary.

#### **Definitional Cross References**

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Goods". Section 2-105.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Reasonable time". Section 1-204.

"Usage of trade". Section 1-205.

#### **§ 2-724. Admissibility of market quotations**

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-724 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section makes market quotations admissible in evidence while providing for a challenge of the material by showing the circumstances of its preparation.

No explicit provisions as to the weight to be given to market quotations is contained in this section, but such quotations, in the absence of compelling challenge, offer an adequate basis for a verdict.

Market quotations are made admissible when the price or value of goods traded "in any established market" is in issue. The reason of the section does not

require that the market be closely organized in the manner of a produce exchange. It is sufficient if transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate.

This section does not in any way intend to limit or negate the application of similar rules of admissibility to other material, whether by action of the courts or by statute. The purpose of the present section is to assure a minimum of mercantile administration in this important situation and not to limit any liberalizing trend in modern law.

#### **Definitional Cross References**

"Goods". Section 2-105.

#### **§ 2-725. Statute of limitations in contracts for sale**

A. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

B. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

C. Where an action commenced within the time limited by Subsection (A) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

D. This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act became effective.

#### **History**

CJA-1-86, January 29, 1986.

**Note.** At Subsection (D), "becomes" changed to "became".

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 2-725 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section introduces a uniform statute of limitations for sale contracts, thus eliminating the jurisdictional variations and providing needed

relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four-year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.

Subsection (A) permits the parties to reduce the period of limitation. The minimum period is set at one (1) year. The parties may not, however, extend the statutory period.

Subsection (B), providing that the cause of action accrues when the breach occurs, states an exception where the warranty extends to future performance.

Subsection (C) states the saving provision included in many state statutes and permits an additional short period for bringing new actions, where suits begun within the four-year period have been terminated so as to leave a remedy still available for the same breach.

Subsection (D) makes it clear that this article does not purport to alter or modify in any respect the law on tolling of the statute of limitations as it now prevails in the various jurisdictions.

#### **Definitional Cross References**

"Action". Section 1-201.

"Aggrieved party". Section 1-201.

"Agreement". Section 1-261.

"Contract for sale". Section 2-106.

"Goods". Section 2-105.

"Party". Section 1-201.

"Remedy". Section 1-201.

"Term". Section 1-201.

"Termination". Section 2-106.

### **Article 3. Commercial Paper**

#### **Part 1. Short Title, Form and Interpretation**

##### **§ 3-101. Short title**

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Commercial Paper.

#### **History**

CJA-1-86, January 29, 1986.

**§ 3-102. Definitions and index of definitions**

A. In this article unless the context otherwise requires:

1. "Issue" means the first delivery of an instrument to a holder or a remitter.

2. An "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession.

3. A "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation.

4. "Secondary party" means a drawer or endorser.

5. "Instrument" means a negotiable instrument.

B. Other definitions to this article and the sections in which they appear are:

"Acceptance". Section 3-410.

"Accommodation party". Section 3-415.

"Alteration". Section 3-407.

"Certificate of deposit". Section 3-104.

"Certification". Section 3-411.

"Check". Section 3-104.

"Definite time". Section 3-109.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder in due course". Section 3-302.

"Negotiation". Section 3-202.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"On demand". Section 3-108.

"Presentation". Section 3-504.

"Protest". Section 3-509.

"Restrictive Indorsement". Section 3-205.

"Signature". Section 3-401.

C. In this article, unless the context otherwise requires:

1. "Account" means any account with a bank and includes a checking, time, interest or savings account;

2. "Banking day" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions;

3. "Clearing house" means any association of banks or other payors regularly clearing items;

4. "Collecting bank" means any bank handling the item for collection except the payor bank;

5. "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;

6. "Depository bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

7. "Documentary draft" means any negotiable or non-negotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;

8. "Intermediary bank" means any bank to which an item is transferred in course of collection except the depository or payor bank;

9. "Item" means any instrument for the payment of money even though it is not negotiable but does not include money;

10. "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;

11. "Payor bank" means a bank by which an item is payable as drawn or accepted;

D. In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** Subsection (C) has been modified to adopt certain definitions found in Article 4 of the Uniform Commercial Code which the Navajo Nation has not adopted.

**Commentary.** 1. The definition in Subsection (A)(1) of this section provides that the delivery may be to a holder or to a remitter.

2. The definitions of "order" (Subsection (A)(2)) and "promise" (Subsection (A)(3)) state principles clearly recognized by the courts. In the case of orders the dividing line between "a direction to pay" and "an authorization or request" may not be self-evident in the occasional unusual, and therefore non-commercial, case. The prefixing of words of courtesy to the direction—as "please pay" or "kindly pay" should not lead to a holding that the direction has degenerated into a mere request. On the other hand informal language—such as "I wish you would pay"—would not qualify as an order and such an instrument would be non-negotiable. The definition of "promise" is intended to make it clear that a mere I.O.U. is not a negotiable instrument, and that such phrases as "Due Currier & Baker seventeen dollars fourteen cents (\$17.14), value received" and statements as "I borrowed from P. Shemonia the sum of five hundred dollars (\$500.00) with four percent (4%) interest; the borrowed money ought to be paid within four months from the above date" were promises sufficient to make the instruments into notes.

3. The last sentence of Subsection (A)(2) ("order") permits the order to be addressed to one or more persons (as drawees) in the alternative, recognizing the practice of corporations issuing dividend checks and of other drawers who for commercial convenience name a number of drawees, usually in different parts of the country. The section on presentment provides that presentment may be made to any one of such drawees. Drawees in succession are not permitted because the holder should not be required to make more than one presentment, and upon the first dishonor should have his recourse against the drawer and endorsers.

4. Comments on the definitions indexed follow the sections in which the definitions are contained. The Navajo Nation has not adopted all Articles of the Uniform Commercial Code. The definitions indexed in Subsection (B) incorporate certain definitions normally found in Article 4.

5. "Banking Day". Under this definition that part of a business day when a bank is open only for limited functions, e.g., on Saturday evenings to receive deposits and cash checks, but with loan, bookkeeping and other departments closed, is not part of a banking day.

6. "Clearing House". Occasionally express companies, governmental agencies and other non-banks deal directly with a clearing house; hence the definition does not limit the term to an association of banks.

7. "Customer". It is to be noted that this term includes a bank carrying an account with another bank as well as the more typical non-bank customer or depositor.

8. The word "item" is chosen because it is "banking language" and includes non-negotiable as well as negotiable paper calling for money and also similar

paper governed by the Article on Investment Securities (Article (C) (which has not been adopted by the Navajo Nation—rights which would be governed under this article are governed by Navajo law pursuant to 7 N.N.C. § 204)) as well as that governed by this article.

9. "Midnight Deadline". The use of this phrase is an example of the more mechanical approach used in this article. Midnight is selected as a termination point or time limit to obtain greater uniformity and definiteness than would be possible from other possible termination points, such as the close of the banking day or business day.

10. The definitions relating to banks in general exclude a bank to which an item is issued, as such bank does not take by transfer except in the particular case covered where the item is issued to a payee for collection, as where a corporation is transferring balances from one account to another. Thus, the definition of "depository bank" does not include the bank to which a check is made payable where a check is given in payment of a mortgage. Such a bank has the status of a payee under this article and not that of a collecting bank.

11. The term "payor bank" includes a drawee bank and also a bank at which an item is payable if the item constitutes an order on the bank to pay, for it is then "payable by" the bank. If the "at" item is not an order in the particular state (see § 3-121), then the bank is not a payor, but will be a presenting or collecting bank.

12. Items are sometimes drawn or accepted "payable through" a particular bank. Under this section and 9-120, the "payable through" bank (if it in fact handles the item) will be a collecting (and often a presenting) bank; it is not a "payor bank".

13. The term intermediary bank includes the last bank in the collection process where the payor is not a bar. Usually the last bank is also a presenting bank.

#### **Cross References**

Point 3: Section 3-504(C) (1).

#### **Definitional Cross References**

"Bank". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Money". Section 1-201.

"Person". Section 1-201.

#### **Special Plain Language Comment**

This article relies heavily upon the use of technical legal terms which are defined in this section and in Article 1.

### **§ 3-103. Limitation on scope of Article**

A. This article does not apply to money documents of title or investment securities.

B. The provisions of this article are subject to the provisions of the Article on Secured Transactions (Article 9) and, to the extent provided in 7 N.N.C. § 204, the Article on Bank Deposits and collections (Article 4) adopted by the States in which the bank is located.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-103 of the Uniform Commercial Code adopted by the states except that Articles 7 and 8 of the Uniform Commercial Code have not been adopted by the Navajo Nation.

**Commentary.** 1. This article is restricted to commercial paper—that is to say, to drafts, checks, certificates of deposit and notes as defined in § 3-104(B). Subsection (A) expressly excludes any money, as defined in this Code (§ 1-201), even though the money may be in the form of a bank note which meets all the requirements of § 3-104(A). Money is, of course, negotiable at common law or under separate statutes, but no provision of this article is applicable to it. Subsection (A) also expressly excludes documents of title and investment securities.

2. Instruments which fall within the scope of this article may also be subject to other Articles of the Code. In the case of a negotiable instrument which is subject to Article 9 because it is used as collateral, the provisions of this article continue to be applicable except insofar as there may be conflicting provisions in the Secured Transactions Article. An instrument which qualifies as "negotiable" under this article may also qualify as a "security". The Code does not apply to investment securities as such. An instrument shall be treated as negotiable if it qualified as such unless, without reference to the Code, the law of a state covering the securities shall apply to it.

3. The Navajo Nation has not yet adopted Articles 7 and 8 of the Uniform Commercial Code. Rights which would be governed by these Articles will be governed by Navajo law pursuant to 7 N.N.C. § 204.

#### **Cross References**

Point 1: Sections 1-201, 3-104(A) and (B), and 3-107.

Point 2: Article 9 and Section 3-104.

#### **Definitional Cross References**

"Document of title". Section 1-201.

"Money" Section 1-201.

**§ 3-104. Form of negotiable instruments: "draft"; "check"; "certificate of deposit"; "note"**

A. Any writing to be a negotiable instrument within this article must:

1. Be signed by the maker or drawer; and
2. Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and
3. Be payable on demand or at a definite time; and
4. Be payable to order or to bearer.

B. A writing which complies with the requirements of this section is:

1. A "draft" ("bill of exchange") if it is an order;
2. A "check" if it is a draft drawn on a bank and payable on demand;
3. A "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
4. A "note" if it is a promise other than a certificate of deposit.

C. As used in other Articles of this Code, and as the context may require, the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this article as well as to instruments which are so negotiable.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-104 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under Subsection (A)(2) any writing, to be a negotiable instrument within this article, must be payable in money. "Within this article" in Subsection (A) leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision. The same is true as to any new type of paper which commercial practice may develop in the future.

2. While a writing cannot be made a negotiable instrument within this article by contract or by conduct, nothing in this section is intended to mean that in a particular case a court may not arrive at a result similar to that of negotiability by finding that the obligor is estopped by his conduct from asserting a defense against a bona fide purchaser. Such an estoppel rests upon

ordinary principles of the law of simple contract; it does not depend upon negotiability, and it does not make the writing negotiable for any other purpose. But a contract to build a house or to employ a workman, or equally a security agreement does not become a negotiable instrument by the mere insertion of a clause agreeing that it shall be one.

3. Section 3-112 permits an instrument to carry certain limited obligations or powers in addition to the simple promise or order to pay money. Subsection (A) of this section is intended to say that it cannot carry others.

4. Any writing which meets the requirements of Subsection (A) and is not excluded under § 3-103 is a negotiable instrument, and all sections of this article apply to it, even though it may contain additional language beyond that contemplated by this section. Such an instrument is a draft, a check, a certificate of deposit or a note as defined in Subsection (B). Traveler's checks in the usual form, for instance, are negotiable instruments under this article when they have been completed by the identifying signature.

5. This article requires that the instrument must follow the language of this section, or that a clear equivalent must be found, and that in doubtful cases the decision should be against negotiability.

6. Subsection (C) is intended to make clear the same policy expressed in § 3-805.

#### **Cross References**

Sections 3-105 through 3-112, 3-401, 3-402 and 3-403.

Point 1: Section 3-107.

Point 3: Section 3-112.

Point 4: Sections 3-103 and 3-805.

Point 6: Section 3-805.

#### **Definitional Cross References**

"Bank". Section 1-201.

"Bearer". Section 1-201.

"Definite time". Section 3-109.

"Money". Section 1-201.

"On demand". Section 3-108.

"Promise". Section 3-102.

"Signed". Section 1-201.

"Term". Section 1-201.

"Writing". Section 1-201.

### **Special Plain Language Comment**

Article Three covers two types of written documents; notes, which record a promise of one person to pay another, and drafts, which are an order from one person to another to pay a third person. A check is a draft addressed to a bank. Drafts and notes can be used to pay for transactions, and that use is encouraged by the concept of "negotiability". A negotiable note or draft may be transferred in such a way that the recipient takes it without being bound by any of the claims or defenses which might be used against prior holders of the note or draft.

#### **§ 3-105. When promise or order unconditional**

A. A promise or order otherwise unconditional is not made conditional by the fact that the instrument:

1. Is subject to implied or constructive conditions; or
2. States its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or
3. Refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to repayment or acceleration; or
4. States that it is drawn under a letter of credit; or
5. States that it is secured, whether by mortgage, reservation of title or otherwise; or
6. Indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or
7. Is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or
8. Is limited to payment out of the entire assets or a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

B. A promise or order is not unconditional if the instrument:

1. States that it is subject to or governed by any other agreement; or
2. States that is to be paid only out of a particular fund or source except as provided in this section.

## History

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 3-105 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section is intended to make it clear that, so far as negotiability is affected, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself, and to permit certain specific limitations upon the terms of payment.

1. Subsection (A)(1) rejects the theory of decisions which have held that a recital in an instrument that is given in return for an executory promise gives rise to an implied condition that the instrument is not to be paid if the promise is not performed, and that this condition destroys negotiability. Nothing in the section is intended to imply that language may not be fairly construed to mean what it says, but implications, whether of law or fact, are not to be considered in determining negotiability.

2. The final clause of Subsection (A)(2) is intended to resolve a conflict in the decisions over the effect of such language as, "This note is given for payment as per contract for the purchase of goods of even date, maturity being in conformity with the terms of such contract". It adopts the general commercial understanding that such language is intended as a mere recital of the origin of the instrument and a reference to the transaction for information, but is not meant to condition payment according to the terms of any other agreement.

3. Subsection (A)(3) likewise is intended to resolve a conflict, and to reject cases in which a reference to a separate agreement was held to mean that payment of the instrument must be limited in accordance with the terms of the agreement, and hence was conditioned by it. Such a reference normally is inserted for the purpose of making a record or giving information to anyone who may be interested, and in the absence of any express statement to that effect is not intended to limit the terms of payment. Inasmuch as rights as to prepayment or acceleration has to do with a "speed-up" in payment and since notes frequently refer to separate agreements for a statement of these rights, such reference does not destroy negotiability even though it has mild aspects of incorporation by reference. The general reasoning with respect to subparagraph (3) also applies to a draft which on its face states that it is drawn under a letter of credit (subparagraph (4)). Paragraphs (3) and (4) therefore adopt the position that negotiability is not affected. If the reference goes further and provides that payment must be made according to the terms of the agreement, it falls under Subsection (B)(1).

4. Subsection (A)(5) is intended to settle another conflict in the decisions, over the effect of "title security notes" and other instruments which recite the security given. It rejects cases which have held that the mere statement that the instrument is secured, by reservation of title or otherwise, carries the implied condition that payment is to be made only if the security agreement is fully performed. Again such a recital normally is included only for the

purpose of making a record or giving information, and is not intended to condition payment in any way.

5. Subsection (A)(7) is intended to permit municipal governments, municipal corporations, tribal government corporations or other governments or governmental agencies to draw checks or to issue other short-term commercial paper in which payment is limited to a particular fund or to the proceeds of particular taxes or other sources of revenue. The provision will permit some tribal warrants to be negotiable if they are in proper form. Normally such warrants lack the words "order" or "bearer", or are marked "Not Negotiable", or are payable only in serial order, which make them conditional.

6. Subsection (A)(8) adopts the policy of decisions holding that an instrument issued by an unincorporated association is negotiable although its payment is expressly limited to the assets of the association, excluding the liability of individual members; and recognizing as negotiable an instrument issued by a trust estate without personal liability of the trustee. The policy is extended to a partnership and to any estate. The provision affects only the negotiability of the instrument, and is not intended to change the law of any jurisdiction as to the liability of a partner, trustee, executor, administrator, or any other person on such an instrument.

7. Subsection (B)(1) retains the generally accepted rule that where an instrument contains such language as "subject to terms of contract between maker and payee of this date", its payment is conditioned according to the terms of the agreement and the instrument is not negotiable. The distinction is between a mere recital of the existence of the separate agreement or a reference to it for information, which under Subsection (A)(3) will not affect negotiability, and any language which, fairly construed, requires the holder to look to the other agreement for the terms of payment. The intent of the provision is that an instrument is not negotiable unless the holder can ascertain all of its essential terms from its face. In the specific instance of rights as to prepayment or acceleration, however, there may be a reference to a separate agreement without destroying negotiability.

8. Subsection (B)(2) restates the last sentence of § 3 of the original act. As noted above, exceptions are made by paragraphs (7) and (8) of Subsection (A) in favor of instruments issued by governments or governmental agencies, or by a partnership, unincorporated association, trust or estate.

#### **Cross References**

Section 3-104.

#### **Definitional Cross References**

"Account". Section 3-102.

"Agreement". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Order". Section 3-102.

"Promise". Section 3-102.

#### **Special Plain Language Comment**

If a commercial paper is subject to or governed by another agreement, the promise that it carries is conditional and, therefore, the paper is not "negotiable". Mere references to another agreement do not affect negotiability. See § 3-104.

#### **§ 3-106. Sum certain**

A. The sum payable is a sum certain even though it is to be paid:

1. With stated interest or by stated installments; or
2. With stated different rates of interest before and after default or a specified date; or
3. With a stated discount or addition if paid before or after the date fixed for payment; or
4. With exchange or less exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee or both upon default.

B. Nothing in this section shall validate any term which is otherwise illegal.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-106 of the Uniform Commercial Code adopted by the states.

**Commentary.** The language clarifies the effect of references to interest, discounts or additions, exchange, costs and attorney's fees, and acceleration or extension.

1. The section rejects decisions which have denied negotiability to a note with a term providing for discount for early payment on the ground that at the time of issue the amount payable was not certain. It is sufficient that at anytime of payment the holder is able to determine the amount then payable from the instrument itself with any necessary computation. Thus, a demand note bearing interest at six per cent is negotiable. A stated discount or addition for early or late payment does not affect the certainty of the sum as long as the computation can be made, nor do different rates of interest before and after default or a specified date. The computation must be one which can be made

from the instrument itself without reference to any outside source, and this section does not make negotiable a note payable with interest "at the current rate".

2. Paragraph (4) recognizes the occasional practice of making the instrument payable with exchange deducted rather than added.

3. In paragraph (5) "upon default" is substituted for the language of the original Subsection (A)(5) in order to include any default in payment of interest or installments.

4. The section contains no specific language relating to the effect of acceleration clauses on the certainty of the sum payable. This article (§ 3-109, Definite Time) broadly validates acceleration clauses; it is not necessary to state the matter in this section as well.

5. Subsection (B) is intended to make it clear that this section is concerned only with the effect of usurious interest or other illegal obligations upon negotiability, and is not meant to change the law of the Navajo Nation as to the validity of the term itself.

#### **Cross References**

Section 3-104.

Point 4: Section 3-109.

#### **Definitional Cross References**

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section describes when an instrument evidences an obligation for a "sum certain" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

#### **§ 3-107. Money**

A. An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" or "immediately available funds" is payable in money.

B. A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the date of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

#### **History**

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 3-107 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section makes clear when an instrument is payable in money and states rules applicable to instruments drawn payable in a foreign currency.

1. The term "money" is defined in § 1-201 as a "a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency". That definition rejects the narrow view that "money" is limited to legal tender. Legal tender acts do no more than designate a particular kind of money which the obligee will be required to accept in discharge of an obligation. It rejects also the contention sometimes advanced that "money" includes any medium of exchange current and accepted in the particular community, whether it be gold dust, beaver pelts, or cigarettes in occupied Germany. Such unusual "currency" is necessarily of uncertain and fluctuating value, and an instrument intended to pass generally in commerce as negotiable may not be made payable therein.

The test adopted is that of the sanction of government, which recognizes the circulating medium as a part of the official currency of that government. In particular, the provision adopts the position that an instrument expressing the amount to be paid in sterling, francs, lire or other recognized currency of a foreign government is negotiable even though payable in the United States.

2. The provision on "currency" or "current funds" or "immediately available funds" accepts the view that "currency" or "current funds" or "immediately available funds" means that the instrument is payable in money.

3. Either the amount to be paid or the medium of payment may be expressed in terms of a particular kind of money. A draft passing between Toronto and Buffalo may, according to the desire and convenience of the parties, call for payment of 100 United States dollars or of 100 Canadian dollars; and it may require either sum to be paid in either currency. Under this section an instrument in any of these forms is negotiable, whether payable in Toronto or in Buffalo.

4. As stated in the preceding paragraph the intention of the parties in making an instrument payable in a foreign currency may be that the medium of payment shall be either dollars measured by the foreign currency or the foreign currency in which the instrument is drawn. Under Subsection (B) the presumption is, unless the instrument otherwise specifies, that the obligation may be satisfied by payment in dollars in an amount determined by the buying sight rate for the foreign currency on the day the instrument becomes payable. Inasmuch as the buying sight rate will fluctuate from day to day, it might be argued that an instrument expressed in a foreign currency but actually payable in dollars is not for a "sum certain". Subsection (B) makes it clear that for the purposes of negotiability under this article such an instrument, despite exchange fluctuations is for a sum certain.

### Cross References

Section 3-104.

Point 1: Section 1-201.

Point 4: Section 3-109.

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Money". Section 1-201.

"Order". Section 3-102.

"Promise". Section 3-102.

"Purchase". Section 1-201.

#### **§ 3-108. Payable on demand**

Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-108 of the Uniform Commercial Code adopted by the states.

**Commentary.** The need for certainty in determining the value of an instrument requires that the time when payment can be compelled be determinable from its face. Likewise, the time when the statute of limitations starts to run must be clear. This section makes certain instruments payable on demand, although they do not expressly so state.

#### **Cross References**

Sections 3-104, 3-302 and 3-501(D).

#### **Definitional Cross References**

"Instrument". Section 3-102.

#### **§ 3-109. Definite time**

A. An instrument is payable at a definite time if by its terms it is payable:

1. On or before a stated date or at a fixed period after a stated date; or

2. At a fixed period after sight; or
3. At a definite time subject to any acceleration; or
4. At a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

B. An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-109 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The time of payment is definite if it can be determined from the face of the instrument.

2. An undated instrument payable "thirty days after date" is not payable at a definite time, since the time of payment cannot be determined on its face. It is, however, an incomplete instrument within the provisions of § 3-115 dealing with such instruments and maybe completed by dating it. It is then payable at a definite time.

3. Subsection (A)(3) makes clear that, as far as certainty of time of payment is concerned, a note payable at a definite time but subject to acceleration is no less certain than a note payable on demand, whose negotiability never has been questioned. It is in fact more certain, since it at least states a definite time beyond which the instrument cannot run. Objections to the acceleration clause must be based rather on the possibility of abuse by the holder, which has nothing to do with negotiability and is not limited to negotiable instruments. That problem is now covered by § 1-208.

Subsection (A)(3) is intended to mean that the certainty of time of payment or the negotiability of the instrument is not affected by any acceleration clause, whether acceleration be at the option of the maker or the holder, or automatic upon the occurrence of some event, and whether it be conditional or unrestricted. If the acceleration term it self is uncertain it may fail on ordinary contract principles, but the instrument then remains negotiable and is payable at a definite time.

The effect of acceleration clauses upon a holder in due course is covered by the definition of the holder in due course (§ 3-302 and by the section on notice to purchaser § 3-304(C)). If the purchaser is not aware of any acceleration, his delay in making presentment may be excused under the section dealing with excused presentment (§ 3-511(A)).

4. Subsection (A)(4) adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability since the holder is given only a right which he would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain, and the instrument is not negotiable. Where such a limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.

The construction and effect of extension clauses is covered by § 3-118(F) on ambiguous terms and rules of construction, to which reference should be made.

#### **Cross References**

Section 3-104.

Point 2: Section 3-115.

Point 3: Section 1-208, 3-118(F), 3-304(C) and 3-511(A).

Point 4: Section 3-118(F).

#### **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section describes when an instrument is payable at a "definite time" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

#### **§ 3-110. Payable to order**

A. An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It maybe payable to the order of:

1. The maker or drawer; or
2. The drawee; or
3. A payee who is not maker, drawer or drawee; or
4. Two or more payees together or in the alternative; or
5. An estate, trust or fund, in which case it is payable to the

order of the representative of such estate, trust or fund or his successors; or

6. An office, or an officer by his title as such, in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or

7. A partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

B. An instrument not payable to order is not made so payable by such words as "payable upon return of this instrument properly indorsed".

C. An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-110 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A)(4) is intended to eliminate the word "jointly", which has carried a possible implication of a right of survivorship. Normally, an instrument payable to "A and B" is intended to be payable to the two parties as tenants in common, and there is no survivorship in the absence of express language to that effect. The instrument may be payable to "A and B", in which case it is payable to either A or B individually. It may be made payable to "A and/or B", in which case it is payable either to A or to B singly, or to the two together. The negotiation, enforcement and discharge of the instrument in all such cases are covered by the section on instruments payable to two or more persons (§ 3-116).

2. Subsection (A)(5) is intended to change the result of decisions which have held that an instrument payable to the order of the estate of a decedent was payable to bearer, on the ground that the name of the payee did not purport to be that of any person. The intent in such case is obviously not to make the instrument payable to bearer, but to the order of the representative of the estate. The provision extends the same principle to an instrument payable to the order of "Tilden Trust", or "Community Fund". So long as the payee can be identified it is not necessary that it be a legal entity, and in each case the instrument is treated as payable to the order of the appropriate representative or his successor.

3. Under Subsection (A)(6) an instrument may be made payable to the office itself ("Swedish Consulate") or to the officer by his title as such ("Treasurer of the City Club"). In either case it runs to the incumbent of the office and his successors. The effect of instruments in such a form is covered by the section on instruments payable with words of description (§ 3-117).

4. Instruments made payable to associations are order paper payable as designed and not bearer paper (Subsection (A)(7)). As in the case of incorporated associations, any person having authority from the partnership or association to whose order the instrument is payable may indorse or otherwise deal with the instrument.

5. Subsection (B) is intended to change the result of cases holding that "payable upon return of this certificate properly indorsed" indicated an intention to make the instrument payable to any indorsee and so must be construed as the equivalent of "Pay to order". Ordinarily, the purpose of such language is only to insure return of the instrument with indorsement in lieu of a receipt, and the word "order" is omitted with the intention that the instrument shall not be negotiable.

6. Subsection (C) is directed at occasional instruments reading "Pay to the order of John Doe or bearer". Such language usually is found only where the drawer has filled in the name of the payee on a printed form, without intending the ambiguity or noticing the word "bearer". Under such circumstances the name of the specified payee indicates an intent that the order words shall control. If the word "bearer" is handwritten or typewritten, there is sufficient indication of an intent that the instrument shall be payable to bearer. Instruments payable to "order of bearer" are covered not by this section but by the following § 3-111.

#### **Cross References**

Sections 3-104 and 3-111.

Point 1: Section 3-116.

Points 2, 3 and 4: Section 3-117.

#### **Definitional Cross References**

"Bearer". Section 1-201.

"Conspicuous". Section 1-201.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section describes when an instrument is payable "to order" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

#### **§ 3-111. Payable to bearer**

An instrument is payable to bearer when by its terms it is payable to:

A. Bearer or the order of bearer; or

B. A specified person or bearer; or

C. "Cash" or the order of "cash", or any other indication which does not purport to designate a specific payee.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-111 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Language such as "order of bearer" usually results when a printed form is used and the word "bearer" is filled in. Subsection (A) rejects the view that the instrument is payable to order, and adopts the position that "bearer" is the unusual word and should control. Compare Comment 6 to § 3-110.

2. Subsection (C) is reworded to remove any possible implication that "Pay to the order of \_\_\_\_\_" makes the instrument payable to bearer. It is an incomplete order instrument, and falls under § 3-115. Likewise "Pay Treasurer of X Corporation" does not mean pay bearer, even though there may be no such officer. Instruments payable to the order of an estate, trust, fund, partnership, unincorporated association or office are covered by the preceding section. This Subsection applies only to such language as "Pay Cash", "Pay to the order of cash", "Pay bills payable", "Pay to the order of one keg of nails", or other words which do not purport to designate any specific payee.

3. It should be noted that § 3-204 on special indorsement permits bearer paper to be made payable to order, by allowing the special indorsement to control.

#### **Cross References**

Sections 3-104, 3-405 and 3-204.

Point 2: Sections 3-110(A)(1) and (6) and 3-115.

Point 3: Section 3-204.

#### **Definitional Cross References**

"Bearer". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Term". Section 1-201.

### **Special Plain Language Comment**

This section describes when an instrument is payable "to bearer" and thus satisfies one requirement for the instrument to be "negotiable". See § 3-104.

#### **§ 3-112. Terms and omissions not affecting negotiability**

A. The negotiability of an instrument is not affected by:

1. The omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

2. A statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in case of default on those obligations the holder may realize on or dispose of the collateral; or

3. A promise or power to maintain or protect collateral or to give additional collateral; or

4. A term authorizing a confession of judgment on the instrument if it is not paid when due; or

5. A term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or

6. A term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

7. A statement in a draft drawn in a set of parts (§ 3-801) to the effect that the order is effective only if no other part has been honored.

B. Nothing in this section shall validate any term which is otherwise illegal.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-112 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section permits the insertion of certain obligations and powers in addition to the simple promise or order to pay money. Under § 3-104, dealing with form of negotiable instruments, the instrument may not contain any other promise, order, obligation or power.

1. Subsection (A)(2) permits a clause authorizing the sale or disposition of collateral given to secure obligations either on the instrument or otherwise of an obligor on the instrument upon any default in those obligations, including a

default in payment of an installment or of interest. It is not limited to default at maturity. The reference to obligations of an obligor on the instrument is intended to recognize so-called cross collateral provisions that appear in collateral note forms used by banks and others throughout the United States and to permit the use of these provisions without destroying negotiability. Paragraph (3) permits a clause containing a promise or power to maintain or protect collateral or to give additional collateral, whether on demand or on some other condition. Such terms frequently are accompanied by a provision for acceleration if the collateral is not given, which is permitted by the section on what constitutes a definite time. Section 1-208 should be consulted as to the construction to be given such clauses under this Code.

2. Paragraph (4) is intended to mean that a confession of judgment may be authorized only if the instrument is not paid when due, and that otherwise negotiability is affected. Subsection (B) is intended to say that any such local rule remains unchanged, and that the clause itself may be invalid, although the negotiability of the instrument is not affected.

3. Paragraph (5) applies not only to any waiver of the benefits of this article, such as presentment, notice of dishonor or protest, but also to a waiver of the benefits of any other law, such as a homestead exemption. Again Subsection (B) is intended to mean that any rule which invalidates the waiver itself is not changed, and that while negotiability is not affected, a waiver of the statute of limitations contained in an instrument may be invalid.

This paragraph is to be read together with § 3-104(A) on form of negotiable instruments. A waiver cannot make the instrument negotiable within this article where it does not comply with the requirements of that section.

#### **Cross References**

Sections 3-104 and 3-105.

Point 1: Sections 1-208 and 3-109(A) (3).

Point 3: Section 3-104.

#### **Definitional Cross References**

"Draft". Section 3-104.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Promise". Section 3-102.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section describes the provisions which can be added or omitted from an instrument without affecting its "negotiability". See § 3-104.

### **§ 3-113. Seal**

An instrument otherwise negotiable is within this article even though it is under a seal.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-113 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section is intended to place sealed instruments on the same footing as any other instruments so far as all sections of this article are concerned. It does not affect any other statutes or rules of law relating to sealed instruments except insofar as, in the case of negotiable instruments, they are inconsistent with this article. Thus, a sealed instrument which is within this article may still be subject to a longer statute of limitations than negotiable instruments not under seal, or to such local rules of procedures as that it may be enforced by an action of special assumpsit.

#### **Cross References**

Section 3-104.

#### **Definitional Cross References**

"Instrument". Section 3-102.

### **§ 3-114. Date, antedating, postdating**

A. The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

B. Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

C. Where the instrument or any signature thereon is dated, the date is presumed to be correct.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-114 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Any fraud or illegality connected with the date of an instrument does not affect its negotiability, but is merely a defense under §§

3-306 and 3-307 to the same extent as any other fraud or illegality.

2. An undated instrument payable "thirty days after date" is uncertain as to time of payment, and does not fall within § 3-109(A)(1) on definite time. It is, however, an incomplete instrument, and the date may be inserted as provided in the section dealing with such instruments (§ 3-115). When the instrument has been dated, this Subsection follows decisions providing that the time of payment is to be determined from the stated date, even though the instrument is antedated or postdated. An antedated instrument may thus be due before it is issued. As to the liability of indorsers in such a case, see § 3-501(D), on indorsement after maturity.

3. As to the meaning of "presumed", see § 1-201.

#### **Cross References**

Point 1: Sections 3-306 and 3-307.

Point 2: Sections 3-109(A)(1), 3-115 and 3-501(D).

Point 3: Section 1-201.

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Issue". Section 3-102.

"On demand". Section 3-108.

"Presumed". Section 1-201.

"Signature". Section 3-401.

#### **§ 3-115. Incomplete instruments**

A. When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect, it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

B. If the completion is unauthorized, the rules as to material alteration apply (§ 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-115 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The language "signed while still incomplete in any necessary respect" in Subsection (A) makes it entirely clear that a complete writing which lacks an essential element of an instrument and contains no blanks or spaces or anything else to indicate that what is missing is to be supplied, does not fall within the section. "Necessary" means necessary to a complete instrument. It will always include the promise or order, the designation of the payee, and the amount payable. It may include the time of payment where a blank is left for that time to be filled in; but where it is clear that no time is intended to be stated the instrument is complete, and is payable on demand under § 3-108. It does not include the date of issue, which under § 3-114(A) is not essential, unless the instrument is made payable at a fixed period after that date.

2. The omission of any reference to signature of a blank paper is not intended, however, to mean that any person may not be authorized to write in an instrument over a signature either before or after delivery.

3. Subsection (B) states the rule generally recognized by the courts, that any unauthorized completion is an alteration of the instrument which stands on the same footing as any other alteration. Reference is therefore made to § 3-407 where the effect of alteration is stated. Subsection (C) of that section provides that a subsequent holder in due course may in all cases enforce the instrument as completed.

4. Under this article (§ 3-305 and 3-407) neither non-delivery nor unauthorized completion is a defense against a holder in due course, and it would be illogical that the two together should invalidate the instrument in his hands. A holder in due course sees and takes the same paper, whether it was complete when stolen or completed afterward by the thief, and in each case he relies in good faith on the maker's signature. The loss should fall upon the party whose conduct in signing blank paper has made the fraud possible, rather than upon the innocent purchaser. The result is consistent with the theory of decisions holding the drawer of a check stolen and afterwards filled in to be estopped from setting up the non-delivery against an innocent party.

5. The language on burden of establishing unauthorized completion follows the generally accepted rule that the full burden of proof by a preponderance of the evidence is upon the party attacking the completed instrument. "Burden of establishing" is defined in § 1-201.

#### **Cross References**

Point 1: Sections 3-108 and 3-114(A)

Point 3: Section 3-407.

Point 4: Sections 3-305(B), 3-407(C) and 4-401.

Point 5: Section 1-201.

#### **Definitional Cross References**

"Alteration". Section 3-407.

"Burden of establishing". Section 1-201.

"Delivery". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Signed". Section 1-201.

### **§ 3-116. Instruments payable to two or more persons**

An instrument payable to the order of two or more persons:

A. If in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;

B. If not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-116 of the Uniform Commercial Code adopted by the states.

**Commentary.** There is a clear distinction between an instrument payable to "A or B" and one payable to "A and B". The first names either A or B as payee, so that either of them who is in possession becomes a holder as that term is defined in § 1-201 and may negotiate, enforce or discharge the instrument. The second is payable only to A and B together, and both must indorse in order to negotiate the instrument, although one may of course be authorized to sign for the other. Likewise both must join in any action to enforce the instrument, and the rights of one are not discharged without his consent by the act of the other.

If the instrument is payable to "A and/or B", it is payable in the alternative to A, or to B, or to A and B together, and it may be negotiated, enforced or discharged accordingly.

#### **Cross References**

Section 1-201.

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Person". Section 1-201.

### **§ 3-117. Instruments payable with words of description**

An instrument made payable to a named person with the addition of words describing him:

A. As agent or officer of a specified person is payable to that person's principal, but the agent or officer may act as if he was the holder;

B. As any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

C. In any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-117 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The intent is to include all such descriptions as "John Doe, Treasurer of Town of Framingham", "John Doe, President Home Telephone Co.", "John Doe, Secretary of City Club", or "John Doe, agent of Richard Roe". In all such cases it is commercial understanding that the description is not added for mere identification, but for the purpose of making the instrument payable to the principal, and that the agent or officer is named as payee only for convenience in cashing the check.

2. Subsection (B) covers such description as "John Doe, Trustee of Smithers Trust", "John Doe, Administrator of the Estate of Richard Roe", or "John Doe, Executor under Will of Richard Roe". In such cases the instrument is payable to the individual named, who may negotiate it, enforce it or discharge it, but he or she remains subject to any liability for breach of his obligation as a fiduciary. Any subsequent holder of the instrument is put on notice of the fiduciary position, and under the section on notice to purchaser (§ 3-304) is not a holder in due course if he takes with notice that John Doe has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit, or otherwise in breach of duty.

3. Any other words of description, such as "John Doe, 1121 Main Street", "John Doe, Attorney", or "Jane Doe, unremarried widow", are to be treated as mere identification, and not in any respect as a condition of payment. The same is true of any description of the payee as "Treasurer", "President", "Agent", "Trustee", "Executor", or "Administrator", which does not name the principal or beneficiary. In all such cases the person named may negotiate, enforce or discharge the instrument if he or she is otherwise identified, even though he or she does not meet the description. Any subsequent party dealing with the instrument may disregard the description and treat the paper as payable unconditionally to the individual, and is fully protected in the absence of independent notice of other facts sufficient to affect his position.

## **Cross References**

Point 2: Section 3-304(B).

## **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

## **§ 3-118. Ambiguous terms and rules of construction**

The following rules apply to every instrument:

A. Where there is doubt whether the instrument is a draft or a note, the holder may treat it as either. A draft drawn on the drawer is effective as a note.

B. Handwritten terms control typewritten and printed terms, and typewritten control printed.

C. Words control figures except that, if the words are ambiguous, figures control.

D. Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

E. Unless the instrument otherwise specifies, two or more persons who sign as maker, acceptor or drawer or endorser and as a part of the same transaction are jointly and severally liable even through the instrument contains such words as "I promise to pay".

F. Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with § 3-604 tenders full payment when the instrument is due.

## **History**

CJA-1-86, January 29, 1986.

## **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-118 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The purpose of this section is to protect holders and to

encourage the free circulation of negotiable paper by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument. Except as to such reformation, these rules cannot be varied by any proof that any party intended the contrary.

2. Subsection (A): The provision is not limited to ambiguities of phrasing, but extends to any case where the form of the instrument leaves its character as a draft or a note in doubt.

3. Subsection (B): This provision covers typewriting because of its frequent use in instruments, particularly in promissory notes.

4. Subsection (C) This position is intended to make it clear that figures control only where the words are ambiguous and the figures are not.

5. Subsection (D): This provision is intended to make it clear that where the instrument provides for payment "with interest" without specifying the rate, the judgment rate of interest of the place of payment is to be taken as intended.

6. Subsection (E): This rule applies to any two or more persons who sign in the same capacity, whether as makers, drawers, acceptors or indorsers. It applies only where such parties sign as a part of the same transaction; successive indorsers are, of course, liable severally but not jointly.

7. Subsection (F): This provision has reference to such clauses as, "The makers and indorsers of this note consent that it may be extended without notice to them". Such terms usually are inserted to obtain the consent of the indorsers and any accommodation maker to extension which might otherwise discharge them under § 3-606 dealing with impairment of recourse or collateral. An extension in accord with these terms binds secondary parties. The holder may not force an extension on a maker or acceptor who makes due tender; the holder is not free to refuse payment and keep interest running on a good note or other instrument by extending it over the objection of a maker or acceptor or other party who in accordance with § 3-604 tenders full payment when the instrument is due. Where consent to extension has been given, the Subsection provides that unless otherwise specified the consent is to be construed as authorizing only one extension for not longer than the original period of the note.

#### **Cross References**

Sections 3-109, 3-114, 3-402 and 3-606.

Point 7: Sections 3-604 and 3-606.

#### **Definitional Cross References**

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Note". Section 3-104.

"Person". Section 1-201.

"Promise". Section 3-102.

"Signed". Section 1-201.

"Term". Section 1-201.

### **§ 3-119. Other writings affecting instrument**

A. As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by another written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

B. A separate agreement does not affect the negotiability of an instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-119 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section is intended to resolve conflicts as to the effect of a separate writing upon a negotiable instrument.

1. This article does not attempt to state general rules as to when an instrument may be varied or affected by parol evidence, except to the extent indicated by the comment to the preceding section. This section is limited to the effect of a separate written agreement executed as a part of the same transaction. The separate writing is most commonly an agreement creating or providing for a security interest such as a mortgage, chattel mortgage, conditional sale or pledge. It may, however, be any type of contract, including an agreement that upon certain conditions the instrument shall be discharged or is not to be paid, or even an agreement that it is a sham and not to be enforced at all. Nothing in this section is intended to validate any such agreement which is fraudulent or void as against public policy, as in the case of a note given to deceive a bank examiner.

2. Other parties, such as an accommodation indorser, are not affected by the separate writing unless they were also parties to it as a part of the transaction by which they became bound on the instrument.

3. The section applies to negotiable instruments the ordinary rule that

writings executed as a part of the same transaction are to be read together as a single agreement. As between the immediate parties a negotiable instrument is merely a contract, and is no exception to the principle that the courts will look to the entire contract in writing. Accordingly, a note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant term in the separate writing. "May be modified or affected" does not mean that the separate agreement must necessarily be given effect. There is still room for construction of the writing as not intended to affect the instrument at all, or as intended to affect it only for a limited purpose such as foreclosure or other realization of collateral. If there is outright contradiction between the two, as where the note is for one thousand dollars (\$1,000) but the accompanying mortgage recites that it is for two thousand dollars (\$2,000), the note may be held to stand on its own feet and not to be affected by the contradiction.

4. Under this article a purchaser of the instrument may become a holder in due course although he takes it with knowledge that it was accompanied by a separate agreement, if he has no notice of any defense or claim arising from the terms of the agreement. If any limitation in the separate writing in itself amounts to a defense or claim, as in the case of an agreement that the note is a sham and cannot be indorsed, a purchaser with notice of it cannot be a holder in due course. The section also covers limitations which do not in themselves give notice of any present defense or claim, such as conditions providing that under certain conditions the note shall be extended for one year. A purchaser with notice of such limitations may be a holder in due course, but he takes the instrument subject to the limitation. If he is without such notice, he is not affected by such a limiting clause in the separate writing.

5. Subsection (B) rejects decisions which have carried the rule that contemporaneous writings must be read together to the length of holding that a clause in a mortgage affecting a note destroyed the negotiability of the note. The negotiability of an instrument is always to be determined by what appears on the face of the instrument alone, and if it is negotiable in itself a purchaser without notice of a separate writing is in no way affected by it. If the instrument itself states that it is subject to or governed by any other agreement, it is not negotiable under this article; but if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable.

#### **Cross References**

Point 1: Section 3-119.

Point 4: Section 3-304(D) (2).

Point 5: Section 3-105(B) (1) and (A) (3).

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Rights". Section 1-201.

"Terms". Section 1-201.

"Written" and "writing". Section 1-201.

### **§ 3-120. Instruments "payable through" bank**

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-120 of the Uniform Commercial Code adopted by the states.

**Commentary.** Insurance, dividend or payroll checks, and occasionally other types of instruments, are sometimes made payable "through" a particular bank. This section states the commercial understanding as to the effect of such language. The bank is not named as drawee, and it is not ordered or even authorized to pay the instrument out of the drawer's account or any other funds of the drawer in its hands. Neither is it required to take the instrument for collection in the absence of special agreement to that effect. It is merely designated as a collecting bank through which presentment is properly made to the drawee.

#### **Definitional Cross References**

"Bank". Section 1-201.

"Collecting bank". Section 4-105 of the appropriate state commercial code.

"Instrument". Section 3-102.

"Presentment". Section 3-504.

### **§ 3-121. Instruments payable at bank**

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

#### **History**

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 3-121 of the Uniform Commercial Code adopted by the states.

**Commentary.** In most western states, a note or an acceptance which is payable at a bank is not treated as a draft on the bank, and the bank is not obligated to make payment from the account of the maker or acceptor.

## Cross References

Section 3-502.

## Definitional Cross References

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Order". Section 3-102.

## § 3-122. Accrual of cause of action

A. A cause of action against a maker or an acceptor accrues:

1. In the case of a time instrument on the day after maturity;
2. In the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

B. A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.

C. A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

D. Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment:

1. In the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;
2. In all other cases from the date of accrual of the cause of action.

## History

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-122 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. It follows the generally accepted rule that action may be brought on a demand note immediately upon issue, without demand, since presentment is not required to charge the maker under this article. An exception is made in the case of certificates of deposit for the reason that banking custom and expectation is that demand will be made before any liability is incurred by the bank, and the additional reason that such certificates are issued with the understanding that they will be held for a considerable length of time, which in many instances exceeds the period of the statute of limitations. As to makers and acceptors of time instruments generally, the cause of action accrues on the day after maturity. As to drawers of drafts (including checks) and all indorsers, the cause of action accrues, in conformity with their underlying contract on the instrument (§§ 3-413 and 3-414), only upon demand made, typically in the form of a notice of dishonor, after the instrument has been presented to and dishonored by the person designated on the instrument to pay it.

2. Closely related to the accrual of a cause of action is the question of when interest begins to run where the instrument is blank on the point. A term in the instrument providing for interest controls. (See § 3-118(D) for the construction of a term which provides for interest but does not specify the rate or the time from which it runs.) In the absence of such a term and except in the case of a maker, acceptor or other primary obligor of a demand instrument, Subsection (D) states the rule that interest at the judgment rate runs from the date the cause of action accrues. In the case of a primary obligor of a demand instrument, interest runs from the date of demand although the cause of action (Subsection (A)(1)) accrues on the stated date of the instrument or on issue. Subsection (D) adopts the position of the majority of the courts that on a demand note interest runs only from demand. This same rule is applied to acceptors and other primary obligors on a demand instrument.

#### **Cross References**

Point 1: Sections 3-501, 3-413 and 3-414.

Point 2: Section 3-118(D).

#### **Definitional Cross References**

"Action". Section 1-201.

"Certificate of deposit". Section 3-102.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"On demand". Section 3-108.

#### **Special Plain Language Comment**

This section describes when the holder of an instrument has a present right to sue (i.e., a "cause of action") under that instrument. Interest will begin to accrue from that date unless otherwise stated in the instrument.

### **Part 2. Transfer and Negotiation**

#### **§ 3-201. Transfer: right to indorsement**

A. Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

B. A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

C. Unless otherwise agreed, any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made, and until that time there is no presumption that the transferee is the owner.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-201 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The section applies to any transfer, whether by a holder or not. Any person who transfers an instrument transfers what ever rights he had in it. The transferee acquires those rights even though they do not amount to "title".

2. The transfer of rights is not limited to transfers for value. An instrument may be transferred as a gift, and the donee acquires whatever rights the donor had.

3. A holder in due course may transfer his rights as such. The rule of this section is that any one may transfer what he has. Its policy is to assure the

holder in due course a free maker for the paper. The provision is not intended and should not be used to permit any holder who has himself been a party to any fraud or illegality affecting the instrument, or who has received notice of any defense or claim against it, to wash the paper clean by passing it into the hands of a holder in due course and then repurchasing it. The operation of the provision is illustrated by the following examples.

A. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. After the instrument is overdue B give it to C, who has notice of the fraud. C succeeds to B's rights as a holder in due course, cutting off the defense.

B. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes as a holder in due course. A then repurchases the instrument from B. A does not succeed to B's rights as a holder in due course, and remains subject to the defense of fraud.

C. A induces M by fraud to make an instrument payable to A, A negotiates it to B, who takes with notice of the fraud. B negotiates it to C, a holder in due course, and then repurchases the instrument from C. B does not succeed to C's rights as a holder in due course, and remains subject to the defense of fraud.

D. The same facts as (C), except that B had no notice of the fraud when he first acquired the instrument, but learned of it while he was a holder and with such knowledge negotiated to C. B does not succeed to C's rights as a holder in due course, and his position is not improved by the negotiation and repurchase.

4. The rights of a transferee with respect to collateral for the instrument are determined by Article 9 (Secured Transactions).

5. Subsection (B) is intended to make it clear that a transfer of a limited interest in the instrument passes the rights of the transferor to the extent of the interest given. Thus, a transferee for security acquires all such rights subject of course to the provisions of Article 9 (Secured Transactions).

6. Subsection (C) applies only to the transfer for value of an instrument payable to order or specially indorsed. It has no application to a gift, or to an instrument payable or indorsed to bearer or indorsed in blank. The transferee acquires, in the absence of any agreement to the contrary, the right to have the indorsement of the transferor. This right is now made enforceable by an action for specific performance. Unless otherwise agreed, it is a right to the general indorsement of the transferor with full liability as indorser, rather than to an indorsement without recourse. The question commonly arises where the purchaser had paid in advance and the indorsement is omitted fraudulently or through oversight; a transferor who is willing to indorse only without recourse or unwilling to indorse at all should make his intentions clear. The agreement for the transferee to take less than an unqualified indorsement need not be an express one, and the understanding may be implied from conduct, from past practice, or from the circumstances of the transaction.

7. Subsection (C) provides that there is no effective negotiation until the indorsement is made. Until that time the purchaser does not become a holder, and if he receives earlier notice of defense against or claim to the instrument he does not qualify a holder in due course under § 3-302(A) (3).

8. The final clause of Subsection (C), which is new, is intended to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in § 3-307(B). The terms of the obligation do not run to him, and he must account for his possession of the unindorsed paper by proving the transaction through which he acquired it. Proof of a transfer to him by a holder is proof that he has acquired the rights of a holder and that he is entitled to the presumption.

#### **Cross References**

Sections 3-202 and 3-416.

Point 5: Article 9.

Point 7: Section 3-302(A)(3).

Point 8: Section 3-307(B)

#### **Definitional Cross References**

"Bearer". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party" § 1-201.

"Presumption". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

One of the purposes of this article 3 is to encourage the transfer of commercial paper by allowing a person who receives commercial paper to get payment regardless of whether the person who promised to pay has a defense against an earlier party (such as the store where goods were bought on credit) who was involved with the paper. The policy is limited to persons who have no knowledge of prior defenses when they get the paper. This section sets out the rules that: (1) a person who legally acquired commercial paper also acquires the rights of the former holder, unless he takes with knowledge of a defense; (2) a person who transfers for value is legally required to indorse it (e.g., to sign it over); and (3) unless commercial paper is payable to bearer (such a

check payable "to cash"), the person who holds it is not legally presumed to be entitled to payment unless paper is indorsed (e.g., signed over) to that person.

### **§ 3-202. Negotiation**

A. Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order, it is negotiated by delivery with any necessary indorsement; if payable to bearer, it is negotiated by delivery.

B. An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

C. An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less, it operates only as a partial assignment.

D. Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-202 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Negotiation is merely a special form of transfer, the importance of which lies entirely in the fact that it makes the transferee a holder as defined in § 1-201. Any negotiation carries a transfer of rights as provided in the section on transfer (§ 3-201(A) and (B)).

2. Any instrument which has been specially indorsed can be negotiated only with the indorsement of the special indorsee as provided in § 3-204 on special indorsement. An instrument indorsed in blank may be negotiated by delivery alone, provided that it bears the indorsement of all prior special indorsees.

3. Subsection (B) follows decisions holding that a purported indorsement on a mortgage or other separate paper pinned or dipped to an instrument is not sufficient for negotiation. The indorsement must be on the instrument itself or on a paper intended for the purpose which is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

4. The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either "Pay A one-half", or "Pay A two-thirds and B one-third", and neither A nor B becomes a holder. On the other hand an indorsement reading merely "Pay A and B" is effective, since

it transfers the entire cause of action to A and B as tenants in common.

The partial indorsement does, however, operate as a partial assignment of the cause of action. The provision makes no attempt to state the legal effect of such an assignment, which is left to other applicable law. In a jurisdiction in which a partial assignee has any rights, either at law or in equity, the partial indorsee has such rights; and in any jurisdiction where a partial assignee has no rights, the partial indorsee has none.

5. Subsection (D) is intended to reject decisions holding that the addition of such words as "I hereby assign all my right, title and interest in the within note" prevents the signature from operating as an indorsement. Such words usually are added by laymen out of an excess of caution and a desire to indicate formally that the instrument is conveyed, rather than with any intent to limit the effect of the signature.

6. Subsection (D) is also intended to reject decisions which have held that the addition of "I guarantee payment" indicates an intention not to indorse but merely to guarantee. Any signature with such added words is an indorsement, and, if it is made by a holder, is effective for negotiation; but the liability of the indorser may be affected by the words of guarantee as provided in the section on the contract of a guarantor (§ 3-416).

#### **Cross References**

Section 3-417.

Point 1: Sections 1-201 and 3-201(A) and (B).

Point 2: Section 3-204.

Point 6: Section 3-416.

#### **Definitional Cross References**

"Bearer". Section 1-201.

"Delivery". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Written". Section 1-201.

#### **Special Plain Language Comment**

Negotiation is the process through which one person transfers commercial paper to another in a way which gives the second person rights in regard to the paper. A thief gets no rights in the paper unless the paper is payable to bearer. All other types of paper require indorsement in order to be negotiated.

**§ 3-203. Wrong or misspelled name**

Where an instrument is made payable to a person under a misspelled name or one other than his own, he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-203 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A party whose name is wrongly designated or misspelled may make an indorsement effective for negotiation by signing in his true name only. This is not commercially satisfactory, since any subsequent purchaser may be left in doubt as to the state of the title; but, whether it is done intentionally or through oversight, the party transfers his rights and is liable on his indorsement, and there is a negotiation if identity exists.

2. He may make an effective indorsement in the wrongly designated or misspelled name only. This again is not commercially satisfactory, since his liability as an indorser may require proof of identity.

3. He may indorse in both names. This is the proper and desirable form of indorsement, and any person called upon to pay an instrument or under contract to purchase it may protect his interest by demanding indorsement in both names, and is not in default if such demand is refused.

### **Cross References**

Section 3-401(B).

### **Definitional Cross References**

"Instrument". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

### **Special Plain Language Comment**

This section recognizes that a person to whom commercial paper is transferred will normally expect the instrument to be signed over to him in both the name of the person to whom the instrument is payable and in that person's real name. For example, if a check is payable to "John Doe", but his real name is "John Does", the check is best transferred by signatures in both names. However, the signature of John Doe in either name does transfer his interest in the instrument.

**§ 3-204. Special indorsement; blank indorsement**

A. A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.

B. An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and maybe negotiated by delivery alone until specially indorsed.

C. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-204 of the Uniform Commercial Code adopted by the states.

**Commentary.** The principle here adopted is that the special indorser, as the owner even of a bearer instrument, has the right to direct the payment and to require the indorsement of his indorsee as evidence of the satisfaction of his own obligation. The special indorsee may, of course, make it payable to bearer again by himself indorsing in blank.

### **Cross References**

Section 3-202.

### **Definitional Cross References**

"Bearer". Section 1-201.

"Delivery". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

### **§ 3-205. Restrictive indorsement**

An indorsement is restrictive which either:

A. Is conditional; or

B. Purports to prohibit further transfer of the instrument; or

C. Includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or

D. Otherwise states that it is for the benefit or use of the indorser or of another person.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-205 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section with its separate mention of conditional indorsements, those prohibiting transfer, indorsement in the bank deposit or collection process, and other indorsements to a fiduciary, permits separate treatment in subsequent sections where policy so requires.

2. The purpose of this section is generally to require a taker or payor under restrictive indorsement to apply or pay value given consistently with the indorsement, but to provide certain exceptions applying to banks in the collection process (other than depository banks), and to some other takers and payors.

### **Cross References**

Sections 3-102, 3-202(B), 3-205, 3-206, 3-304, 3-419, and 3-603.

### **Definitional Cross References**

"Instrument". Section 3-102.

"Person". Section 1-201.

### **§ 3-206. Effect of restrictive indorsement**

A. No restrictive indorsement prevents further transfer or negotiation of the instrument.

B. An intermediary bank, or a payor bank which is not the depository bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.

C. Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection", "for deposit", "pay any bank", or like terms (§ 3-205(A) and (C)) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement, and, to the extent that he does so, he becomes a holder for value. In addition, such transferee is a holder in due course if he otherwise complies with the requirements of § 3-302 on what constitutes a holder in due course.

D. The first taker under an indorsement for the benefit of the indorser or another person (§ 3-205(D)) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement, and, to the extent that he does so, he becomes a holder for value. In addition, such taker is a holder in due course if he otherwise complies with the requirements of § 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (§ 3-304(B)).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-206 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsections (A) and (B) apply to all four classes of restrictive indorsements defined in § 3-205. Conditional indorsements and indorsements for deposit or collection, defined in § 3-205(A) and (C), are also subject to Subsection (C); and trust indorsement as defined in § 3-205(D) are subject to Subsection (D). This section negates any implication that under a restrictive indorsement neither the indorsee nor any subsequent taker from him could become a holder in due course. This article also avoids any implication that a discharge is effective against a holder in due course. See § 3-602.

2. Under Subsection (A) an indorsement reading "Pay A only", or any other indorsement purporting to prohibit further transfer, is without effect for that purpose. Such indorsements have rarely appeared in reported American cases. Ordinarily, further negotiation will be contemplated by the indorser, if only for bank collection. The indorsee becomes a holder, and the indorsement does not of itself give notice to subsequent parties of any defense or claim of the indorser. Hence this section gives such an indorsement the same effect as an unrestricted indorsement.

3. Subsection (B) permits an intermediary bank (§§ 3-102(C) and 4-105) or a payor bank which is not a depository bank (§ 3-102(C)) to disregard any restrictive indorsement except that of the bank's immediate transferor. Such banks ordinarily handle instruments, especially checks, in bulk and have no practicable opportunity to consider the effect of restrictive indorsements. Subsection (B) does not affect the rights of the restrictive indorser against parties outside the bank collection process or against the first bank in the collection process; such rights are governed by Subsections (C) and (D) and § 3-603.

4. Conditional indorsements are treated by this section like indorsements for deposit or collection. Under Subsection (C) any transferee under such an indorsement except an intermediary bank becomes a holder for value to the extent that he acts consistently with the indorsement in paying or applying any value given by him for or on the security of the instrument. Subsection (C) permits a transferee under a conditional indorsement to become a holder in due

course free of the conditional indorser's claim.

5. Of the indorsements covered by this section those "for collection", "for deposit" and "pay any bank" are overwhelmingly the most frequent. Indorsements "for collection" or "for deposit" may be either special or blank, indorsements "pay any bank" are almost invariably destined to be lodged in a bank for collection. Subsection (C) requires any transferee other than an intermediary bank to act consistently with the purpose of collection, and § 3-603 lays down a similar rule for payors not covered by Subsection (B).

6. Subsection (D), applying to trust indorsements other than those for deposit or collection (§ 3-205(D)) is similar to Subsection (C); but in Subsection (D) the, duty to act consistently with the indorsement is limited to the first taker under it. If an instrument is indorsed "Pay T in trust for B" or "Pay T for B" or "Pay T for account of B" or "Pay T as agent for B", whether B is the indorser or a third person, T is of course subject to liability for any breach of his obligation as fiduciary. But trustees commonly and legitimately sell trust assets in transactions entirely outside the bank collection process; the trustee therefore has power to negotiate the instrument and make his transferee a holder in due course. Whether transferees from T have notice of breach of trust such as to deny them the status of holders in due course is governed by the section on notice to purchasers (§ 3-304); the trust indorsement does not of itself give such notice. Payors are immunized either by Subsection (B) of this section or by § 3-603: payment to the trustee or to a purchaser from the trustee is "consistent with the terms" of the trust indorsement under § 3-603(A) (2).

7. Sections 3-306 and 3-419 are explicitly made subject to the rules stated in this section.

#### **Cross References**

Point 1: Sections 3-205 and 3-602.

Point 2: Section 3-205(B).

Point 3: Sections 3-102(C), 3-419(D) and 3-603.

Point 4: Section 3-205(A).

Point 5: Sections 3-205, 3-603.

Point 6: Sections 3-205, 3-304 and 3-603.

Point 7: Sections 3-306, 3-419.

#### **Definitional Cross References**

"Bank". Section 1-201.

"Depository bank". Section 3-102(C).

"Holder in due course". Section 3-302.

"Intermediary bank". Section 3-102(C).

"Negotiation". Sections 3-102(B) and 3-202.

"Payor bank". Section 3-102(C).

"Restrictive indorsement". Section 3-205.

"Transfer". Section 3-201.

#### **Special Plain Language Comment**

This section and § 3-205 address the effect on the rights of the parties when the holder of an instrument transfers it with a "restrictive indorsement", such as "for deposit only in account No. 10".

#### **§ 3-207. Negotiation effective although it maybe rescinded**

A. Negotiation is effective to transfer the instrument although the negotiation is:

1. Made by an infant, a corporation exceeding its powers, or any other person without capacity; or
2. Obtained by fraud, duress or mistake of any kind; or
3. Part of an illegal transaction; or
4. Made in breach of duty.

B. Except as against a subsequent holder in due course, such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-207 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This provision applies to negotiation which may be rescinded even though the party's lack of capacity, or the illegality, is of a character which goes to the essence of the transaction and makes it entirely void, and even though the party negotiating has incurred no liability and is entitled to recover the instrument and have his indorsement canceled.

2. It is inherent in the character of negotiable paper that any person in possession of an instrument which by its terms runs to him is a holder, and that anyone may deal with him as a holder. The principle finds its most extreme application in the well settled rule that a holder in due course may take the paper even from a thief and be protected against the claim of the

rightful owner. Where there is actual negotiation, even in an entirely void transaction, it is no less effective. The policy of this provision is that any person to whom an instrument is negotiated is a holder until the instrument has been recovered from his possession; and that any person who negotiates an instrument thereby parts with all his rights in it until such recovery. The remedy of any such claimant is to recover the paper by replevin or otherwise; to impound it or to enjoin its enforcement, collection or negotiation; to recover its proceeds from the holder; or to intervene in any action brought by the holder against the obligor. As provided in the section on the rights of one not a holder in due course (§ 3-306) his claim is not a defense to the obligor unless he himself defends the action.

3. Negotiation under this article always includes delivery (§ 3-202, and see § 1-201(N)). Acquisition of possession by a thief can therefore never be negotiation under this section. But delivery by the thief to another person may be.

4. Nothing in this section is intended to impose any liability on the party negotiating. He may assert any defense available to him under §§ 3-305 to 3-307.

5. A holder in due course takes the instrument free from all claims to it on the part of any person (§ 3-305(A)). Against him there can be no rescission or other remedy, even though the prior negotiation may have been fraudulent or illegal in its essence and entirely void. As against any other party the claimant may have any remedy permitted by law. This section is not intended to specify what that remedy may be, or to prevent any court from imposing conditions or limitations such as prompt action or return of the consideration received. All such questions are left to the law of the particular jurisdiction. Section 3-207(B) gives no right where it would not otherwise exist. The section is intended to mean that any remedies afforded by the applicable law are cut off only by a holder in due course, and that other parties, such as a *bona fide* purchaser with notice that the instrument is overdue, take it subject to the claim as provided in Subsection (A) of the section on the rights of one not a holder in due course (§ 3-306).

#### **Cross References**

Point 2: Sections 1-201 and 3-306(D).

Point 3: Sections 1-201 and 3-202.

Point 4: Sections 3-305, 3-306 and 3-307.

Point 5: Sections 3-305(A) and 3-306(A).

#### **Definitional Cross References**

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Negotiation". Section 3-202.

"Person". Section 1-201.

"Remedy". Section 1-201.

### **Special Plain Language Comment**

This section addresses the rights of a person to whom an instrument has been transferred by "negotiation" even though the transfer is for various reasons voidable.

### **§ 3-208. Reacquisition**

Where an instrument is returned to or reacquired by a prior party, he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course, and, if indorsement has been canceled, is discharged as against subsequent holders in due course as well.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-208 of the Uniform Commercial Code adopted by the states.

**Commentary.** The phrase "returned to or required by" is employed in order to make it clear that the section is applied to a return by an indorsee who does not himself indorse. "Discharged" is intended to make it clear that the discharge of the intervening party is included within the rule of the section on effect of discharge against a holder in due course (§ 3-602) and is not effective against a subsequent holder in due course who takes without notice of it.

The reacquirer may keep the instrument himself or he may further negotiate it. On further negotiation he may or may not cancel intervening indorsements. In any case intervening indorsers are discharged as to the reacquirer, since if he attempted to enforce it against them they would have an action back against him. Where the reacquirer negotiates without canceling the intervening indorsements, the section provides that such indorsers are discharged except against subsequent holders in due course. The intervening indorser whose indorsement is stricken is, in conformity with § 3-605, discharged even as against subsequent holders in due course.

### **Cross References**

Sections 3-602, 3-603(B) and 3-605.

### **Definitional Cross References**

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

#### **Special Plain Language Comment**

This section addresses the rights of a holder who transfers an instrument and later reacquires it.

### **Part 3. Rights of a Holder**

#### **§ 3-301. Rights of a holder**

The holder of an instrument, whether or not he is the owner, may transfer or negotiate it and, except as otherwise provided in § 3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-301 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section states in one provision all the rights of a holder, and to make it clear that every holder has such rights. The only limitations are those found in § 3-603 on payment or satisfaction. That Section provides (with stated exceptions) that payment to a holder discharges the liability of the party paying even though made with knowledge of a claim of another person to the instrument, unless the adverse claimant posts indemnity or procures the issuance of appropriate legal process restraining the payment. Thus, payment to a holder in an adverse claim situation would not give discharge if the adverse claimant had followed either of the procedures provided for in the "unless" clause of § 3-603; nor would a discharge result from payment in two other specific situations described in § 3-603.

#### **Cross References**

Sections 1-201, 3-307 and 3-603(A).

#### **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Rights". Section 1-201.

#### **Special Plain Language Comment**

This section describes the rights which a person has whenever he possesses an

instrument as a "holder". Because these rights are very broad, owners of instruments should be very careful who they allow to hold their instruments. See §§ 3-302 and 3-306.

### **§ 3-302. Holder in due course**

A. A holder in due course is a holder who takes the instrument:

1. For value; and

2. In good faith; and

3. Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

B. A payee may be a holder in due course.

C. A holder does not become a holder in due course of an instrument:

1. By purchase of it at judicial sale or by taking it under legal process; or

2. By acquiring it in taking over an estate; or

3. By purchasing it as part of a bulk transaction not in regular course of business of the transferor.

D. A purchase of a limited interest can be a holder in due course only to the extent of the interest purchased.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-302 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The language "without notice that it is overdue" is *intended* to make it clear that the purchaser of an instrument which is in fact overdue may be a holder in due course if he takes it without notice that it is overdue. Such notice is covered by the section on notice to purchaser (§ 3-304).

2. Subsection (B) is intended to settle the long continued conflict over the status of the payee as a holder in due course. The position here taken is that the payee may become a holder in due course to the same extent and under the same circumstances as any other holder. This is true whether he takes the instrument by purchase from a third person or directly from the obligor. All that is necessary is that the payee meet the requirements of this section. In the following cases, among others, the payee is a holder in due course:

A. A remitter, purchasing goods from P, obtains a bank draft payable to P and forwards it to P, who takes it for value, in good faith and without notice as

required by this section.

B. The remitter buys the bank draft payable to P, but it is forwarded by the bank directly to P, who takes it in good faith and without notice in payment of the remitter's obligation to him.

C. A and B sign a note as co-makers. A induces B to sign by fraud, and without authority from B delivers the note to P, who takes it for value, in good faith and without notice.

D. A defrauds the maker into signing an instrument payable to P. P pays A for it in good faith and without notice, and the maker delivers the instrument directly to P.

E. D draws a check payable to P and gives it to his agent to be delivered to P in payment of D's debt. The agent delivers it to P, who takes it in good faith and without notice in payment of the agent's debt to P. But as to this case see § 3-304(B), which may apply.

F. D draws a check payable to P but blank as to the amount, and gives it to his agent to be delivered to P. The agent fills in the check with an excessive amount, and P takes it for value, in good faith and without notice.

G. D draws a check blank as to the name of the payee, and gives it to his agent to be filled in with the name of A and delivered to A. The agent fills in the name of P, and P takes the check in good faith, for value and without notice.

3. Subsection (C) is intended to state existing case law. It covers a few situations in which the purchaser takes the instrument under unusual circumstances which indicate that he is merely a successor in interest to the prior holder and can acquire no better rights. (If such prior holder was himself a holder in due course, the purchaser succeeds to that status under § 3-201 on Transfer.) The provision applies to a purchaser at an execution sale, a sale in bankruptcy or a sale by a state bank commissioner of the assets of an insolvent bank. It applies equally to an attaching creditor or any other person who acquires the instrument by legal process, even under an antecedent claim; and equally to a representative, such as an executor, administrator, receiver or assignee for the benefit of creditors, who takes over the instrument as part of an estate, even though he is representing antecedent creditors. Subsection (C)(3) applies to bulk purchases lying outside of the ordinary course of business of the seller. It applies, for example, when a new partnership takes over for value all of the assets of an old one after a new member has entered the firm, or to a reorganized or consolidated corporation taking over in bulk the assets of a predecessor. It has particular application to the purchase by one bank of a substantial part of the paper held by another bank which is threatened with insolvency and seeking to liquidate its assets.

4. A purchaser of a limited interest—as a pledgee in a security transaction—may become a holder in due course, but he may enforce the instrument over defenses only to the extent of his interest, and defenses good against the pledgor remain available insofar as the pledgor retains an equity in the instrument. This is merely a special application of the general rule (§ 1-201) that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.

### **Cross References**

Sections 1-201, 3-303, 3-305 and 3-306.

Point 1: Section 3-304(E).

Point 3: Section 3-201.

Point 4: Section 1-201.

### **Definitional Cross References**

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Notice of dishonor". Section 3-508.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Value". Section 3-303.

### **Special Plain Language Comment**

This section defines the key term "holder in due course". Such a person has the rights of a "holder" as described in § 3-301 plus additional rights stated in § 3-305.

#### **§ 3-303. Taking for value**

A holder takes the instrument for value:

A. To the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

B. When he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

C. When he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

### **History**

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 3-303 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A holder who does not himself give value cannot qualify as a holder in due course in his own right merely because value has previously been given for the instrument.

2. In this article value is divorced from consideration (§ 3-408). The latter is important only on the question of whether the obligation of a party can be enforced against him; while value is important only on the question of whether the holder who has acquired that obligation qualifies as a particular kind of holder.

3. Subsection (A) requires that the agreed consideration shall actually have been given. An executory promise to give value is not itself value, except as provided in Subsection (C). The underlying reason of this policy is that when the purchaser learns of a defense against the instrument or a defect in the title he is not required to enforce the instrument, but is free to rescind the transaction for breach of the transferor's warranty (§ 3-417). There is thus not the same necessity for giving him the status of a holder in due course, cutting off claims and defenses, as where he has actually paid value. A common illustration is the bank credit not drawn upon, which can be and is revoked when a claim or defense appears.

4. Subsection (A) limits the language of the original Section 27, eliminating the attaching creditor or any other person who acquires a lien by legal process. Any such lienor has been uniformly held not to be a holder in due course.

5. Subsection (B) adopts the generally accepted rule that the holder takes for value when he takes the instrument as security for an antecedent debt, even though there is no extension of time or other concession, and whether or not the debt is due. The provision extends the same rule to any claim against any person; there is no requirement that the claim arise out of contract. In particular the provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return.

6. Subsection (C) states generally recognized exceptions to the rule that an executory promise is not value. A negotiable instrument is value because it carries the possibility of negotiation to a holder in due course, after which the party who gives it cannot refuse to pay. The same reasoning applies to any irrevocable commitment to a third person, such as a letter of credit issue when an instrument is taken.

### Cross References

Sections 3-302 and 3-415.

Point 1: Section 3-415.

Point 2: Section 3-408.

Point 3: Section 3-417.

#### **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section describes when a "holder" of an instrument gives "value" and thus satisfies one of the requirements for being a "holder in due course" under § 3-302.

#### **§ 3-304. Notice to purchaser**

A. The purchaser has notice of a claim or defense if:

1. The instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

2. The purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

B. The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

C. The purchaser has notice that an instrument is overdue if he has reason to know:

1. That any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

2. That acceleration of the instrument has been made; or

3. That he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty (30) days.

D. Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim:

1. That the instrument is antedated or postdated;
2. That it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;
3. That any party has signed for accommodation;
4. That an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;
5. That any person negotiating the instrument is or was a fiduciary;
6. That there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.

E. The filing or recording of a document does not of itself constitute notice within the provisions of this article to a person who would otherwise be a holder in due course.

F. To be effective, notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-304 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. "Notice" is defined in § 1-201.

2. An instrument may be blank as to some unnecessary particular, may contain minor erasures, or even have an obvious change in the date, as where "January 2, 1948" is changed to "January 2, 1949", without even exciting suspicion. Irregularity is properly a question of notice to the purchaser of something wrong, and is so treated here.

3. "Voidable" obligation in Subsection (A)(2) is intended to limit the provision to notice of defense which will permit any party to avoid his original obligation on the instrument, as distinguished from a set-off or counterclaim.

4. Notice that one party has been discharged is not notice to the purchaser of an infirmity in the obligation of other parties who remain liable on the instrument. A purchaser with notice that an indorser is discharged takes subject to that discharge as provided in the section on effect of discharge against a holder in due course (§ 3-602) but is not prevented from taking the obligation of the maker in due course. If he has notice that all parties are

discharged he cannot be a holder in due course.

5. Subsection (B) specifies the same elements as notice of improper conduct of a fiduciary. Under Subsection (D)(5) mere notice of the existence of the fiduciary relation is not enough in itself to prevent the holder from taking in due course, and he is free to take the instrument on the assumption that the fiduciary is acting properly. The purchaser may pay cash into the hands of the fiduciary without notice of any breach of the obligation. Section 3-206 should be consulted for the effect of a restrictive indorsement.

6. Subsection (C) provides that reason to know of an overdue installment or other part of the principal amount is notice that the instrument is overdue and thus prevents the purchaser from taking in due course. On the other hand Subsection (D)(6) makes notice that interest is overdue insufficient, on the basis of banking and commercial practice, the decisions under the original Act, and the frequency with which interest payments are in fact delayed. Notice of default in payment of any other instrument, except an uncured default in another instrument of the same series, is likewise insufficient.

7. Subsection (C) provides that the purchaser may take accelerated paper, or a demand instrument on which demand has in fact been made, as a holder in due course if he takes without notice of the acceleration or demand. The presumption that any negotiation has taken place before the instrument was in fact overdue is of importance only in aid of a holder in due course. Under this section it is not conclusive that the instrument was in fact overdue when it was negotiated, if the holder takes without notice of that fact.

The "reasonable time after issue" is retained, but paragraph (3) adds a presumption, as that term is defined in that Act (§ 1-201), that a domestic check is stale after 30 days.

8. Subsection (D)(1) rejects decisions holding that an instrument known to be antedated or postdated is not "regular". Such knowledge does not prevent a holder from taking in due course.

9. Subsection (D)(2) is to be read together with the provisions of this article as to when a promise or order is unconditional and as to other writings affecting the instrument (§§ 3-105 and 3-119). Mere notice of the existence of any executory promise or a separate agreement does not prevent the holder from taking in due course, and such notice may even appear in the instrument itself. If the purchaser has notice of any default in the promise or agreement which gives rise to a defense or claim against the instrument, he is on notice to the same extent as in the case of any other information as to the existence of a defense or claim.

10. Subsection (D)(4) follows the policy under which any person in possession of an instrument has prima facie authority to fill blanks. It is intended to mean that the holder may take in due course even though a blank is filled in his presence, if he is without notice that the filling is improper. Section 3-407 on alteration should be consulted as to the rights of subsequent holders following such an alteration.

11. Subsection (E) removes any uncertainty as to the effect of "constructive notice" through public filing or recording.

12. Subsection (F) means that notice must be received with a sufficient margin of time to afford a reasonable opportunity to act on it, and that a notice received by the president of a bank one minute before the bank's teller cashes a check is not effective to prevent the bank from becoming a holder in due course. See in this connection the provision on notice to an organization, § 1-201(AA).

#### **Cross References**

Sections 3-201 and 3-302.

Point 1: Section 1-201.

Point 4: Section 3-602.

Point 5: Section 3-206.

Point 7: Section 1-201.

Point 9: Sections 3-105(A) (2) and (3) and 3-119.

Point 10: Section 3-407.

Point 12: Section 1-201.

#### **Definitional Cross References**

"Accommodation party". Section 3-415.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Negotiation". Section 3-202.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Promise". Section 3-102.

"Purchaser". Section 1-201.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

"Term". Section 1-201.

### **Special Plain Language Comment**

If a person has notice of a defense or a claim on a check, note or other piece of commercial paper, he cannot become a holder in due course. Therefore, defining "notice" is very important in order to determine when a purchaser of commercial paper can enforce it free of such claims or defenses. This section describes the basic situations in which a purchaser has notice.

### **§ 3-305. Rights of a holder in due course**

To the extent that a holder is a holder in due course he takes the instrument free from:

A. All claims to it on the part of any person; and

B. All defenses of any party to the instrument with whom the holder has not dealt except:

1. Infancy, to the extent that it is a defense to a simple contract; and

2. Such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

3. Such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

4. Discharge in insolvency proceedings; and

5. Any other discharge of which the holder has notice when he takes the instrument.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-305 of the Uniform Commercial code as adopted by the states.

**Commentary.** 1. This section applies to any person who is himself a holder in due course, and equally to any transferee who acquires the rights of one (§ 3-

201). "Takes" is used because a holder in due course may still be subject to any claims or defenses which arise against him after he has taken the instrument.

2. The language "all claims to it on the part of any person" is to make it clear that the holder in due course takes the instrument free not only from any claim of legal title but also from all liens, equities or claims of any other kind. This includes any claim for rescission of a prior negotiation, in accordance with the provisions of the section on reacquisition (§ 3-208).

3. "All defenses" includes non-delivery, conditional delivery or delivery for a special purpose. Under this article such non-delivery or qualified delivery is a defense (§§ 3-306 and 3-307), and the defendant has the full burden of establishing it.

The effect of this section, together with the sections dealing with incomplete instruments (§ 3-115) and alteration (§ 3-407) is to cut off the defense of non-delivery of an incomplete instrument against a holder in due course.

4. Under Subsection (B)(1) the defense of infancy may be asserted against a holder in due course, even though its effect is to render the instrument voidable but not void. The policy is one of protection of the infant against those who take advantage of him, even at the expense of occasional loss to an innocent purchaser. No attempt is made to state when infancy is available as a defense or the conditions under which it maybe asserted. In some jurisdictions it is held that an infant cannot rescind the transaction or set up the defense unless he restores the holder to his former position, which in the case of a holder in due course is normally impossible. In other states an infant who has misrepresented his age may be estopped to assert his infancy. Such questions are left to Navajo law, as an integral part of the policy of the tribe as to the protection of infants.

5. Subsection (B)(2) covers mental incompetence, guardianship, ultra vires acts or lack of corporate capacity to do business, any remaining incapacity of married women, or any other incapacity apart from infancy. Such incapacity is largely statutory. Its existence and effect is left to Navajo law. If under Navajo law the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the obligor, the defense is cut-off.

6. Duress is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of a holder in due course. One signed under threat to prosecute the son of the maker for theft may be merely voidable so that the defense is cut-off. Illegality is most frequently a matter of gambling or usury, but may arise in many other forms under various statutes. All such matters are left to Navajo law. If under that law the effect of the duress or the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut-off.

7. Subsection (B)(3) recognizes the defense of "real" or "essential" fraud, sometimes called fraud in the essence or fraud in the factum, as effective against a holder in due course. The common illustration is that of the maker who is tricked into signing a note in the belief that it is merely a receipt of

some other document. The theory of the defense is that his signature on the instrument is ineffective because he did not intend to sign such an instrument at all. Under this provision the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms.

The test of the defense here stated is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education and business experience; his ability to read or to understand English, the representations made to him and his reason to rely on them or to have confidence in the person making them; the presence or absence of any third person who might read or explain the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of it, for acting without delay.

Unless the misrepresentation meets this test, the defense is cut off by a holder in due course.

8. Paragraph (4) is inserted to make it clear that any discharge in bankruptcy or other insolvency proceedings, as defined in this article, is not cut-off when the instrument is purchased by a holder in due course.

9. Under Subsection (B)(5) notice of any discharge which leaves other parties liable on this instrument does not prevent the purchaser from becoming a holder in due course. The obvious case is that of the cancellation of an indorsement, which leaves the maker and prior indorsers liable. As to such parties the purchaser may be a holder in due course, but he takes the instrument subject to the discharge of which he has notice. If he is without such notice, the discharge is not effective against him (§ 3-602).

#### **Cross References**

Point 1: Section 3-201(A).

Point 2: Section 3-208.

Point 3: Sections 3-115(B), 3-306(C), 3-307(B) and 3-407(A)(3).

Point 9: Sections 3-304(A)(2) and 3-602.

#### **Definitional Cross References**

"Contract". Section 1-201.

"Holder in due course". Section 3-302.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Person". Section 1-201.

"Term". Section 1-201.

#### **Special Plain Language Comment**

A person who signs a negotiable instrument can rescind the obligation if he or she was too young, was defrauded into signing, has been discharged in bankruptcy or, if the holder has knowledge of any other discharge (reason for being let off). However, other defenses which may exist in favor of the person obligated on the instrument will not be effective against persons to whom the original payee may transfer the instrument and who are "holders in due course". See § 3-306.

#### **§ 3-306. Rights of one not a holder in due course**

Unless he has the rights of a holder in due course any person takes the instrument subject to:

A. All valid claims to it on the part of any person; and

B. All defenses of any party which would be available in an action on a simple contract; and

C. The defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (§ 3-408); and

D. The defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-306 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Any transferee who acquires the rights of a holder in due course under the transfer section of this article (§ 3-201) is included within the provisions of the preceding § 3-305. This section covers any person who neither qualifies in his own right as a holder in due course nor has acquired the rights of one by transfer. In particular, the section applies to a bona fide purchaser with notice that the instrument is overdue.

2. "All valid claims to it on the part of any person" includes not only claims of legal title, but all liens, equities, or other claims of right against the instrument or its proceeds. It includes claims to rescind a prior negotiation and to recover the instrument or its proceeds.

3. Subsection (C) mentions want or failure of consideration in order to make it clear that either is a defense which the defendant has the burden of establishing under the following section of this article. The following section, which places the full burden of establishing the defense of non-delivery, conditional delivery or delivery for a special purpose upon the defendant, makes any presumption unnecessary.

4. Subsection (D) is a detailed and explicit statement of the policy that the contract of the obligor is to pay the holder of the instrument, and the claims of other persons against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for that of the holder. The claimant who has lost possession of an instrument so payable or indorsed that another may become a holder has lost his rights on the instrument, which by its terms no longer runs to him. The provision includes all claims for rescission of a negotiation, whether based in incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason. It includes claims based on conditional delivery or delivery for a special purpose. It includes claims of legal title, lien, constructive trust or other equity against the instrument or its proceeds. The exception made in the case of theft is based on the policy which refuses to aid a proved thief to recover, and refuses to aid him indirectly by permitting his transferee to recover unless the transferee is a holder in due course. The exception concerning restrictive indorsements is intended to achieve consistency with § 3-603 and related sections.

Nothing in this section is intended to prevented the claimant from intervening in the holder's action against the obligor or defending the action for the latter and asserting his claim in the course of such intervention or defense. Nothing here stated is intended to prevent any interpleader, deposit in court or other available procedure under which the defendant may bring the claimant into court or be discharged without himself litigating the claim as a defense. Compare § 3-803 on vouching in other parties alleged to be liable.

#### **Cross References**

Section 3-302.

Point 1: Sections 3-201(A) and 3-305.

Point 2: Section 3-207.

Point 3: Sections 3-305 and 3-307(B)

Point 4: Section 3-803.

#### **Definitional Cross References**

"Action". Section 1-201.  
"Contract". Section 1-201.  
"Delivery". Section 1-201.  
"Holder in due course". Section 3-302.  
"Instrument". Section 3-102.  
"Party". Section 1-201.  
"Person". Section 1-201.  
"Rights". Section 1-201.

#### **Special Plain Language Comment**

This section explains the defenses which may be asserted with respect to an instrument against a holder of the instrument who does not qualify as a "holder in due course". See § 3-302.

#### **§ 3-307. Burden of establishing signatures, defenses and due course**

A. Unless specifically denied in the pleadings, each signature on an instrument is admitted. When the effectiveness of a signature is put in issue:

1. The burden of establishing it is on the party claiming under the signature; but

2. The signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

B. When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

C. After it is shown that a defense exists, a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-307 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The purpose in Subsection (A) of requiring a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him

an opportunity to investigate and obtain evidence. Where local rules of pleading permit, the denial may be on information and belief, or it may be a denial of knowledge or information sufficient to form a belief. It need not be under oath unless the local statutes or rules require verification. In the absence of such specific denial the signature stands admitted, and is not in issue. Nothing in this section is intended, however, to prevent amendment of the pleading in a proper case.

The question of the burden of establishing the signature arises only when it has been put in issue by specific denial. "Burden of establishing" is defined in the definitions section of this Code (§ 1-201). The burden is on the party claiming under the signature, but he is aided by the presumption that it is genuine or authorized [as] stated in paragraph (2). "Presumption" is also defined in this Code (§ 1-201). It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic. The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of the defendant or more accessible to him. He is therefore required to make some sufficient showing of the grounds for his denial before the plaintiff is put to his proof. His evidence need not be sufficient to require a directed verdict in his favor, but it must be enough to support his denial by permitting a finding in his favor. Until he introduces such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.

Under paragraph (2) this presumption does not arise where the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. "Action" of course includes a claim asserted against the estate of a deceased or an incompetent.

2. Subsection (B) states that once signatures are proved or admitted, a holder makes out his case by mere production of the instrument, and is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any and all defenses, but by a preponderance of the total evidence. The provision applies only to a holder, as defined in this Code (§ 1-201). Any other person in possession of an instrument must prove his right to it and account for the absence of any necessary indorsement. If he establishes a transfer which gives him the rights of a holder (§ 3-201), this provision becomes applicable, and he is then entitled to recover unless the defendant establishes a defense.

3. Subsection (C) concerns the doctrine that until it is shown that a defense exists, the issue as to whether the holder is a holder in due course does not arise. In the absence of a defense any holder is entitled to recover, and there is no occasion to say that he is deemed prima facie to be a holder in due course. When it is shown that a defense exists, the plaintiff may, if he so elects, seek to cut off the defense by establishing that he is himself a holder in due course, or that he has acquired the rights of a prior holder in due course (§ 3-201). On this issue he has the full burden of proof by a preponderance of the total evidence. "In all respects" means that he must sustain this burden by affirmative proof that the instrument was taken for

value, that it was taken in good faith, and that it was taken without notice (§ 3-302).

Nothing in this section is intended to say that the plaintiff must necessarily prove that he is a holder in due course. He may elect to introduce no further evidence, in which case a verdict may be directed for the plaintiff or the defendant, or the issue of the defense may be left to the jury, according to the weight and sufficiency of the defendant's evidence. He may elect to rebut the defense itself by proof to the contrary, in which case again a verdict may be directed for either party or the issue may be for the jury. This Subsection means only that if the plaintiff claims the rights of a holder in due course against the defense he has the burden of proof upon that issue.

#### **Cross References**

Sections 3-305, 3-306, 3-401, 3-403 and 3-404.

Point 1: Section 1-201.

Point 2: Sections 1-201 and 3-201(A).

Point 3: Sections 3-201(A) and 3-302.

#### **Definitional Cross References**

"Action". Section 1-201.

"Burden of establishing". Section 1-201.

"Defendant". Section 1-201.

"Genuine". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

#### **Special Plain Language Comment**

If the parties to an instrument have a dispute about their respective rights and obligations, the Court follows various rules for resolving the dispute, including those specified in this section to determine who has the burden of

convincing the Court on certain common issues.

#### **Part 4. Liability of Parties**

##### **§ 3-401. Signature**

A. No person is liable on an instrument unless his signature appears thereon.

B. A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

##### **History**

CJA-1-86, January 29, 1986.

##### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-401 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. No one is liable on an instrument unless and until he has signed it. The chief application of the rule has been in cases holding that a principal whose name does not appear on an instrument signed by his agent is not liable on the instrument even though the payee knew when it was issued that it was intended to be the obligation of one who did not sign. An allonge is part of the instrument to which it is affixed. Section 3-202(B).

Nothing in this section is intended to prevent any liability arising apart from the instrument itself. The party who does not sign may still be liable on the original obligation for which the instrument was given, or for the breach of any agreement to sign, or in tort for misrepresentation, or even on an oral guaranty of payment where the Statute of Frauds is satisfied. He may of course be liable under any separate writing. The provision is not intended to prevent an estoppel to deny that the party has signed, as where the instrument is purchased in good faith reliance upon his assurance that a forged signature is genuine.

2. A signature may be handwritten, typed, printed or made in any other manner. It need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John Doe, promise to pay ... " without any other signature. It may be made by mark or even by thumbprint. It may be made in any name, including any trade name or assumed name, however false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the signer, and when he is identified the signature is effective.

This section is not intended to affect any Navajo statute or rule of law requiring a signature by mark to be witnessed, or any signature to be otherwise authenticated or requiring any form of proof. It is to be read together with the provision under which a person paying or giving value for the instrument may require indorsement in both the right name and the wrong one; and with the provision that the absence of an indorsement in the right name may make an

instrument so irregular as to call its ownership into question and put a purchaser upon notice which will prevent his taking as a holder in due course.

#### **Cross References**

Sections 3-202(B), 3-402 through 3-406.

Point 1: Section 3-410.

Point 2: Section 3-203.

#### **Definitional Cross References**

"Person". Section 1-201.

"Instrument". Section 3-102.

"Signed". Section 1-201.

"Written". Section 1-201.

#### **§ 3-402. Signature in ambiguous capacity**

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-402 of the Uniform Commercial Code adopted by the states.

**Commentary.** The review language is intended to say that any ambiguity as to the capacity in which a signature is made must be resolved by a rule of law that it is an indorsement. Parol evidence is not admissible to show any other capacity, except for the purpose of reformation of the instrument as it may be permitted under the rules of the particular jurisdiction. The question is to be determined from the face of the instrument alone, and unless the instrument itself makes it clear that he has signed in some other capacity the signer must be treated as an indorser.

The indication that the signature is made in another capacity must be clear without reference to anything but the instrument. It maybe found in the language used. Thus, if John Doe signs after "I, John Doe, promise to pay", he is clearly a maker; and "John Doe, witness" is not liable at all. The capacity may be found in any clearly evidenced purpose of the signature, as where a drawee signing in an unusual place on the paper has no visible reason to sign at all unless he is an acceptor. It may be found in usage or custom. Thus, by long established practice, judicially noticed or otherwise established, a signature in the lower right hand corner of an instrument indicates an intent to sign as the maker of a note or the drawer of a draft.

Any similar clear indication of an intent to sign in some other capacity may be enough to remove the signature from the application of this section.

#### **Cross References**

Section 3-401.

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Signature". Section 3-401.

#### **§ 3-403. Signature by authorized representative**

A. A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases or representation. No particular form of appointment is necessary to establish such authority.

B. An authorized representative who signs his own name to an instrument:

1. Is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

2. Except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

C. Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-403 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The definition of "representative" in this Code (§ 1-201) includes an officer of a corporation or association, a trustee, an executor or administrator of an estate, or any person empowered to act for another. It is not intended to mean that a trust or an estate is necessarily a legal entity with the capacity to issue negotiable instruments, but merely that if it can issue them they may be signed by the representative.

The power to sign for another may be an express authority, or it may be implied in law or in fact, or it may rest merely upon apparent authority. It may be established as in other cases of representation, and when relevant parol

evidence is admissible to prove or to deny it.

2. Subsection (B) applies only to the signature of a representative whose authority to sign for another is established. If he is not authorized his signature has the effect of an unauthorized signature (§ 3-404). Even though he is authorized the principal is not liable on the instrument, under the provisions (§ 3-401) relating to signatures, unless the instrument names him and clearly shows that the signature is made on his behalf.

3. Assuming that Peter Pringle is a principal and Arthur Adams is his agent, an instrument might, for example, bear the following signatures affixed by the agent:

- A. "Peter Pringle", or
- B. "Arthur Adams", or
- C. "Peter Pringle by Arthur Adams, Agent", or
- D. "Arthur Adams, Agent", or
- E. "Peter Pringle Arthur Adams".

<BULLET> signature in form (A) does not bind Adams if authorized (§§ 3-401 and 3-404).

<BULLET> signature as in (B) personally obligates the agent and parol evidence is inadmissible under Subsection (B)(1) to disestablish his obligation.

The unambiguous way to make the representation clear is to sign as in Subsection (C). Any other definite indication is sufficient, as where the instrument reads "Peter Pringle promises to pay" and it is signed "Arthur Adams, Agent". Adams is not bound if he is authorized (§ 3-404).

Section (B)(2) admits parol evidence in litigation between the immediate parties to prove signature by the agent in his representative capacity.

#### **Cross References**

Point 1: Section 1-201.

Point 2: Sections 3-401(A), 3-404 and 3-405.

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Person". Section 1-201.

"Representative". Section 1-201.

"Signature". Section 3-401.

**§ 3-404. Unauthorized signatures**

A. Any unauthorized signature is wholly inoperative as that person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signed in favor of any person who in good faith pays the instrument or takes it for value.

B. Any unauthorized signature may be ratified for all purposes of this article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-404 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. "Unauthorized signature" is a defined term (§ 1-201). It includes both a forgery and a signature made by an agent exceeding his actual or apparent authority.

2. The final clause of Subsection (B) states that generally accepted rule that the unauthorized signature, while it is wholly inoperative as that of the person whose name is signed, is effective to impose liability upon the actual signer or to transfer any rights that he may have in the instrument. His liability is not in damages for breach of a warranty of his authority, but is full liability on the instrument in the capacity in which he has signed. It is, however, limited to parties who take or pay the instrument in good faith; and one who knows that the signature is unauthorized cannot recover from the signer on the instrument.

3. Subsection (B) settles the conflict which has existed in the decisions as to whether a forgery may be ratified. A forged signature may at least be adopted; and the word "ratified" is used in order to make it clear that the adoption is retroactive and that it may be found from conduct as well as from express statements. Thus, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature; and although the forger is not an agent, the ratification is governed by the same rules and principles as if he were.

This provision makes ratification effective only for the purposes of this article. The unauthorized signature becomes valid so far as its effect as a signature is concerned. The ratification relieves the actual signer from liability on the signature. It does not of itself relieve him from liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law requires that the person whose name is forged shall not assume liability to others on the instrument; but he cannot affect the rights of the government. While the ratification may be taken into account with other relevant facts in determining punishment, it does not relieve the signer of criminal liability.

4. The words "or is precluded from denying it" in Subsection (A) recognize the

possibility of an estoppel against the person whose name is signed, as where he expressly or tacitly represents to an innocent purchaser that the signature is genuine; and to recognize the negligence which precludes a denial of the signature.

#### **Cross References**

Sections 3-307, 3-401, 3-403 and 3-405.

Point 1: Section 1-201.

Point 4: Section 3-406.

#### **Definitional Cross References**

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Unauthorized signature". Section 1-201.

"Value". Section 3-303.

#### **§ 3-405. Imposters; signature in name of payee**

A. An indorsement by any person in the name of a named payee is effective if:

1. An impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

2. A person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

3. An agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

B. Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-405 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section recognizes as effective indorsement of the types of paper covered no matter by whom made. This solution is thought preferable to making such instruments bearer paper; on the face of things they are payable to order and a subsequent taker should require what purports to be a regular chain of indorsements. On the other hand, it is unduly restrictive to require that the actual indorsement be made by the impostor or other fraudulent actor. In most cases the person whose fraud procured the instrument to be issued will himself indorse; when some other third person indorses it will most probably be a case of theft or a second independent fraud superimposed upon the original fraud. In neither case does there seem to be sufficient reason to reverse the rule of the section. To recapitulate: the instrument does not become bearer paper, a purportedly regular chain in indorsements is required, but any person - first thief, second impostor or third murderer - can effectively indorse in the name of the payee.

2. Subsection (A)(1) rejects decisions which distinguish between face-to-face imposture and imposture by mail and hold that where the parties deal by mail the dominant intent of the drawer is to deal with the name rather than with the person so that the resulting instrument may be negotiated only by indorsement of the payee whose name has been taken in vain. The result of the distinction has been under some prior law, to throw the loss in the mail imposture forward to a subsequent holder or to the drawee. Since the maker or drawer believes the two to be one and the same, the two intentions cannot be separated, and the "dominant intent" is a fiction. The position here taken is that the loss, regardless of the type of fraud which the particular imposter has committed, should fall upon the maker or drawer. "Impostor" refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement.

3. Subsection (A)(2) is based not on whether the named payee is "fictitious", but whether the signer intends that he shall have no interest in the instrument. The following situations illustrate the application of the Subsection:

A. The drawer of a check, for his own reasons, makes it payable to P knowing that P does not exist.

B. The drawer makes the check payable in the name of P. A person named P exists, but the drawer does not know it.

C. The drawer makes the check payable to P, an existing person whom he knows, intending to receive the money himself and that P shall have no interest in the check.

D. The treasurer of a corporation draws its check payable to P, who to the knowledge of the treasurer does not exist.

E. The treasurer of a corporation draws its check payable to P. P exists but the treasurer has fraudulently added his name to the payroll intending that he

shall not receive the check.

F. The president and the treasurer of a corporation both sign its check payable to P. P does not exist. The treasurer knows it but the president does not.

G. The same facts as F, except that P exists and the treasurer knows it, but intends that P shall have no interest in the check.

In all cases stated an indorsement by any person in the name of P is effective.

4. Subsection (A)(3) includes the padded payroll cases, where the drawer's agent or employee prepares the check for signature or otherwise furnishes the signing officer with the name of the payee. The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or, if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

The provision applies only to the agent or employee of the drawer and only to the agent or employee who supplies him with the name of the payee. The following situations illustrate its application:

A. An employee of a corporation prepares a padded payroll for its treasurer, which includes the name of P. P does not exist, and the employee knows it, but the treasurer does not. The treasurer draws the corporation's check payable to P.

B. The same facts as A, except that P exists and the employee knows it but intends him to have no interest in the check. In both cases an indorsement by any person in the name of P is effective and the loss falls on the corporation.

5. The section is not intended to affect criminal liability for forgery or any other crime, or civil liability to the drawer or to any other person. It is to be read together with the section under which an unauthorized signer is personally liable on the signature to any person who takes the instrument in good faith (3-404(A)).

#### **Cross References**

Sections 3-401, 3-403, 3-404 and 3-406.

Point. 5: Section 3-404(A).

#### **Definitional Cross References**

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Person". Section 1-201.

"Signature". Section 3-401.

### **§ 3-406. Negligence contributing to alteration or unauthorized signature**

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-406 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section adopts the doctrine which held that a drawer who so negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith. It should be noted that the rule as stated in the section requires that the negligence "substantially" contribute to the alteration.

2. The section extends the above principle to the protection of a holder in due course and of payors who may not technically be drawees. It rejects decisions which have held that the maker of a note owes no duty of care to the holder because at the time the instrument is drawn there is no contract between them. By drawing the instrument and "setting it afloat upon a sea of strangers" the maker or drawer voluntarily enters into a relation with later holders which justifies his responsibility. In this respect an instrument so negligently drawn as to facilitate alteration does not differ in principle from an instrument containing a blank which may be filled.

The holder in due course under the rules governing alteration (§ 3-407) may enforce the altered instrument according to its original tenor. Where negligence of the obligor has substantially contributed to the alteration, this section gives the holder the alternative right to enforce the instrument as altered.

3. No attempt is made to define negligence which will contribute to an alteration. The question is left to the court or the jury upon the circumstances of the particular cases. Negligence usually has been found where spaces are left in the body of the instrument in which words or figures maybe inserted. No unusual precautions are required, and the section is not intended to change decisions holding that the drawer of a bill is under no duty to use sensitized paper, indelible ink or a protectograph; or that it is not negligence to leave spaces between the lines or at the end of the instrument in which a provision for interest or the like can be written.

4. The section applies only where the negligence contributes to the alteration. It must afford an opportunity of which advantage is in fact taken. The section

approves decisions which have refused to hold the drawer responsible where he has left spaces in a check but the payee erased all the writing with chemicals and wrote in an entirely new check.

5. This section does not make the negligent party liable in tort for damages resulting from the alteration. Instead it stops him from asserting it against the holder in due course or drawee. The reason is that in the usual case the extent of the loss, which involves the possibility of ultimate recovery from the wrongdoer, cannot be determined at the time of litigation, and the decision would have to be made on the unsatisfactory basis of burden of proof. The holder or drawee is protected by an estoppel, and the task of pursuing the wrongdoer is left to the negligent party. Any amount in fact recovered from the wrongdoer must be held for the benefit of the negligent party under ordinary principles of equity.

6. The section protects parties who act not only in good faith (§ 1-201) but also in observance of the reasonable standards of their business. Thus, any bank which takes or pays an altered check which ordinary banking standards would require it to refuse cannot take advantage of the estoppel.

7. The section applies the same rule to negligence which contributes to a forgery or other unauthorized signature, as defined in this Code (§ 1-201). The most obvious case is that of the drawer who makes use of a signature stamp or other automatic signing device and is negligent in looking after it. The section extends, however, to cases where the party has notice that forgeries of his signature have occurred and is negligent in failing to prevent further forgeries by the same person. It extends to negligence which contributes to a forgery of the signature of another, as in the case where a check is negligently mailed to the wrong person having the same name as the payee. As in the case of alteration, no attempt is made to specify what is negligence, and the question is one for the court or the jury on the facts of the particular case.

#### **Cross References**

Sections 3-401 and 3-404.

Point 2: Section 3-407(C).

Point 6: Section 1-201.

Point 7: Section 1-201.

#### **Definitional Cross References**

"Alteration". Section 3-407.

"Good faith". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Unauthorized signature". Section 1-201.

### **§ 3-407. Alteration**

A. Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in:

1. The number or relations of the parties; or
2. An incomplete instrument, by completing it otherwise than as authorized; or
3. The writing as signed, by adding to it or by removing any part of it.

B. As against any person other than a subsequent holder in due course:

1. Alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;
2. No other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

C. A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-407 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) is a general definition. Any alteration is material only as it may change the contract of a party to the instrument; and the addition or deletion of words which do not in any way affect the contract of any previous signer is not material. But any change in the contract of a party, however slight, is a material alteration; and the addition of one cent to the amount payable, or an advance of one (1) day in the date of payment, will operate as a discharge if it is fraudulent.

Specific mention is made of a change in the number or relations of the parties in order to make it clear that any such change is material only if it changes the contract of one who has signed. The addition of a co-maker or a surety does not change in most jurisdictions the contract of one who has already signed as maker and should not be held material as to him. The addition of the name of an alternative payee is material, since it changes his obligation. Subsection (A)(3) makes special mention of a change in the writing signed in

order to cover occasional cases of addition of sticker clauses, scissoring or perforating instruments where the separation is not authorized.

2. Subsection (A)(2) is to be read together with § 3-115 on incomplete instruments. Where an instrument contains blanks or is otherwise incomplete, it maybe completed in accordance with the authority given and is then valid and effective as completed. If the completion is unauthorized and has the effect of changing the contract of any previous signer, this provision follows the generally accepted rule in treating it as a material alteration which may operate as a discharge.

3. A material alteration does not discharge any party unless it is made by the holder. Spoliation by any meddling stranger does not affect the rights of the holder. It is of course intended that the acts of the holder's authorized agent or employee, or of his confederates, are to be attributed to him.

A material alteration does not discharge any party unless it is made for a fraudulent purpose. There is no discharge where a blank is filled in the honest belief that it is as authorized; or where a change is made with a benevolent motive such as a desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent; but if such an intent is found the alteration may operate as a discharge.

The discharge is a personal defense of the party whose contract is changed by the alteration, and anyone whose contract is not affected cannot assert it. The contract of any party is necessarily affected, however, by the discharge of any party against whom he has a right of recourse on the instrument. Assent to the alteration given before or after it is made will prevent the party from asserting the discharge. "Or is precluded from asserting the defense" is added in Subsection (B)(1) to recognize the possibility of an estoppel or other ground barring the defense which does not rest on assent.

If the alteration is not material or if it is not made for a fraudulent purpose there is no discharge, and the instrument may be enforced according to its original tenor. Where blanks are filled or an incomplete instrument is otherwise completed there is no original tenor, but the instrument may be enforced according to the authority in fact given.

4. Subsection (C) provides that a subsequent holder in due course takes free of the discharge in all cases. The provision is merely one form of the general rule governing the effect of discharge against a holder in due course (§ 3-602). The holder in due course may enforce the instrument according to its original tenor. In this connection reference should be made to the section giving the holder in due course the right, where the maker's or drawer's negligence has substantially contributed to the alteration, to enforce the instrument in its altered form (§ 3-406). Reference should also be made to Article 4 covering a bank's right to charge its customer's account in the case of altered instruments. Article 4 has not been adopted by the Navajo Nation. Rights which would be governed under that Article are governed by Navajo law pursuant to 7 N.N.C. § 204.

Where blanks are filled or an incomplete instrument is otherwise completed, this Subsection places the loss upon the party who left the instrument

incomplete and permitting the holder to enforce it in its completed form. As indicated in the comment to § 3-115 on incomplete instruments, this result is intended even though the instrument was stolen from the maker or drawer and completed after the theft.

There is no inconsistency between Subsection (C) and Subsection (B)(2). The holder in due course may elect to enforce the instrument either as provided in that paragraph or as provided in Subsection (C).

It should be noted that a purchaser who takes the instrument with notice of any material alteration, including the unauthorized completion of an incomplete instrument, takes with notice of a claim or defense and cannot be a holder in due course (§ 3-304).

#### **Cross References**

Sections 3-305, 3-306 and 3-307.

Point 2: Section 3-115.

Point 4: Sections 3-115, 3-304(B) and 3-602.

#### **Definitional Cross References**

"Contract". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Signed". Section 1-201.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

This section describes the effect on the rights of a holder of an instrument which has been altered by adding or deleting words or terms.

#### **§ 3-408. Consideration**

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (§ 3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Code, under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense *pro tanto* whether

or not the failure is in an ascertained or liquidated amount.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-408 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. "Consideration" is distinguished from "value" throughout this article. "Consideration" refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him.

2. The "except" clause is intended to remove the difficulties which have arisen where a note or a draft, or an indorsement of either, is given as payment or as security for a debt already owed by the party giving it, or by a third person. The provision is intended to change the result of decisions holding that where no extension of time or other concession is given by the creditor the new obligation fails for lack of legal consideration. It is intended also to mean that an instrument given for more or less than the amount of a liquidated obligation does not fail by reason of the common law rule that an obligation for a lesser liquidated amount cannot be consideration for the surrender of a greater.

3. With respect to the necessity or sufficiency of consideration other obligations on an instrument are subject to the ordinary rules of contract law relating to contracts not under seal. Promissory estoppel or any other equivalent or substitute for consideration is to be recognized as in other contract cases.

### **Cross References**

Point 1: Section 3-303.

Point 3: Sections 3-306(C) and 3-307(B).

### **Definitional Cross References**

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Person". Section 1-201.

"Rights". Section 1-201.

### **Special Plain Language Comment**

This section explains the extent to which an instrument may not be enforceable when the maker of the instrument neither receives any personal benefit from the transaction nor obtains the benefit of his bargain by having some other party

suffer a detriment at this request (e.g., where the maker gives a note in order to induce a creditor of the maker's relative to forgive a debt owing to that creditor).

### **§ 3-409. Draft not an assignment**

A. A check or other draft does not in itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

B. Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-409 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A check or other draft does not of itself operate as an assignment in law or equity. The assignment may, however, appear from other facts, and particularly from other agreements, express or implied; and when the intent to assign is clear the check may be the means by which the assignment is effected.

2. The drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder. Under state law, payor banks are accountable for the amount of any demand item which they retain beyond midnight of the day on which the item is received. See § 4-302 of the commercial code of the applicable state law pursuant to 7 N.N.C. § 204 for the payor banks liability for later return. Such a bank, if it does not either make prompt settlement or return on an item received by it will become liable to a holder of the item.

3. Subsection (B) is intended to make it clear that this section does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument.

#### **Cross References**

Sections 3-410, 3-411, 3-412 and 3-415.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-104.

### **§ 3-410. Definition and operation of acceptance**

A. Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

B. A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.

C. Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-410 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under § 3-417 a person obtaining acceptance gives a warranty against alteration of the instrument before acceptance.

2. Subsection (A) adopts the rule that acceptance must be written on the draft. Good commercial and banking practice does not sanction acceptance by any separate writing because of the dangers and uncertainties arising when it becomes separated from the draft. The instrument is now forwarded to the drawee for his acceptance upon it, or reliance is placed upon the obligation of the separate writing itself, as in the case of a letter of credit.

Nothing in this section is intended to eliminate any liability of the drawee in contract, tort or otherwise arising from the separate writing or any other obligation or representation, as provided in § 3-409.

Subsection (A) provides for acceptance by delay or refusal to return the instrument but the drawee maybe liable for a conversion of the instrument under § 3-419.

3. Subsection (A) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument; but since the drawee has no reason to sign for any other purpose his signature in any other place, even on the back of the instrument, is sufficient. It need not be accompanied by such words as "Accepted", "Certified", or "Good". It must not,

however, bear any words indicating an intent to refuse to honor the bill; and nothing in this provision is intended to change such decisions as *Norton v. Knapp*, 64 Iowa 112, 19 N.W. 867 (1884), holding that the drawee's signature accompanied by the words "Kiss my foot" is not an acceptance.

4. The final sentence of Subsection (A) expressly states the generally recognized rule, that an acceptance written on the draft takes effect when the drawee notifies the holder or gives notice according to his instructions. Acceptance is thus an exception to the usual rule that no obligation on an instrument is effective until delivery.

5. The purpose of Subsection (C) is to provide a definite date of payment where none appears on the instrument. An undated acceptance of a draft payable "thirty days after sight" is incomplete; and unless the acceptor himself writes in a different date the holder is authorized to complete the acceptance according to the terms of the draft by supplying a date of presentment. Any date which the holder chooses to write in is effective providing his choice of date is made in good faith. Any different agreement not written on the draft is not effective, and parol evidence is not admissible to show it.

#### **Cross References**

Sections 3-411, 3-412 and 3-418.

Point 1: Section 3-417.

Point 2: Sections 3-401(A), 3-409(B) and 3-419.

Point 5: Section 3-412.

#### **Definitional Cross References**

"Delivery". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Good faith". Section 1-201.

"Holder". Section 1-201.

"Honor". Section 1-201.

"Notification". Section 1-201.

"Presentment". Section 3-504.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Written". Section 1-201.

### **§ 3-411. Certification of a check**

A. Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

B. Unless otherwise agreed a bank has no obligation to certify a check.

C. A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-411 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. While certification procured by a holder discharges the drawer and other prior parties, certification procured by the drawer leaves him liable. Any certification procured by a holder discharged the drawer and prior indorsers. Any indorsement made after a certification so procured remains effective; and where it is intended that any indorser shall remain liable notwithstanding certification, he may indorse with the words "after certification" to make his liability clear.

2. Subsection (B) states the generally recognized rule that in the absence of agreement a bank is under no obligation to certify a check, because it is a demand instrument calling for payment rather than acceptance. The bank may be liable for breach of any agreement with the drawer, the holder, or any other person by which it undertakes to certify. Its liability is not on the instrument, since the drawee is not so liable until acceptance (§ 3-409(A)). Any liability is for breach of the separate agreement.

3. Subsection (C) recognizes the banking practice of certifying a check which is returned for proper indorsement in order to protect the drawer against a longer contingent liability. It is consistent with the provision of § 3-410(B) permitting certification although the check has not been signed or is otherwise incomplete.

#### **Cross References**

Sections 3-412, 3-413, 3-417 and 3-418.

Point 2: Section 3-409(A)

Point 3: Section 3-410(B)

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Check". Section 3-104.

"Holder". Section 1-201.

### **§ 3-412. Acceptance varying draft**

A. Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance canceled.

B. The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.

C. Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-412 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section applies to conditional acceptances, acceptances for part of the amount, acceptances to pay at a different time from that required by the draft, or to the acceptance of less than all of the drawees. It applies to any other engagement changing the essential terms of the draft.

2. Where the drawee offers such a varied engagement the holder has an election. He may reject the offer, insist on acceptance of the draft as presented, and treat the refusal to give it as a dishonor. In that event, the drawee is not bound by his engagement, and is entitled to have it canceled. After any necessary notice of dishonor and protest the holder may have his recourse against the drawer and indorsers.

If the holder elects to accept the offer, this section does not invalidate the drawee's varied engagement. It remains his effective obligation, which the holder may enforce against him. By his assent, however, the holder discharges any drawer or indorser who does not also assent which must be affirmatively expressed. Mere failure to object within a reasonable time is not assent which will prevent the discharge.

3. Subsection (B) provides that the terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States unless the acceptance states that the draft is to be paid only at such bank or place. Section 3-504(D) provides that a draft accepted payable at a bank in the United States must be presented at the bank designated.

#### **Cross References**

Sections 3-410 and 3-413.

Point 3: Section 3-504(D).

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

#### **§ 3-413. Contract of maker, drawer and acceptor**

A. The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to § 3-115 on incomplete instruments.

B. The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

C. By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-413 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section should be read in connection with the sections on incomplete instruments (§ 3-115), negligence contributing to alteration or unauthorized signature (§ 3-406), alteration (§ 3-407), acceptances (§ 3-412) and finality of payment or acceptance varying a draft (§ 3-418). Thus a maker who signs an incomplete note engages under this section to pay it according to its tenor at the time he signs it, but by virtue of § 3-115 and 3-407 the note may thereafter be completed and enforced against him. In the same way, if the maker's negligence substantially contributes to alteration of the instrument, he will become liable on his note as altered under § 3-406. When a holder

assents to an acceptance varying a draft (§ 3-412) he can of course hold the acceptor only according to the form of acceptance to which the holder agreed. Section 3-418 applies the rule of *Plice v. Neal* both to acceptance and payment; thus an acceptor may not, after acceptance, assert that the drawer's signature is unauthorized.

Subsection (A) applies to all drafts (including checks) the rule that the acceptance relates to the instrument as it was at the time of its acceptance and not (in case of alteration before acceptance) to its original tenor. It should be noted that under § 3-417 a person who obtains acceptance warrants to the acceptor that the instrument has not been materially altered.

#### **Cross References**

Sections 3-115, 3-406, 3-407, 3-412, 3-417 and 3-418.

#### **Definitional Cross References**

"Contract". Section 1-201.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Protest". Section 3-509.

#### **§ 3-414. Contract of indorser; order of liability**

A. Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

B. Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-

414 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) states the contract of indorsement—that if the instrument is dishonored and any protest or notice of dishonor which may be necessary under § 3-501 is given, the indorser will pay the instrument. The indorser's engagement runs to any holder (whether or not for value) and to any indorser subsequent to him who has taken the instrument up. An indorser may disclaim his liability on the contract of indorsement, but only if the indorsement itself so specifies. Since the disclaimer varies the written contract of indorsement, the disclaimer itself must be written on the instrument and cannot be proved by parol evidence. The customary manner of disclaiming the indorser's liability under this section is to indorse "without recourse". Apart from such a disclaimer all indorsers incur this liability, without regard to whether or not the indorser transferred the instrument for value or received consideration for his indorsement.

2. In addition to his liability on the contract of indorsement, an indorser, if a transferor, gives the warranties stated in § 3-417.

3. As in the case of acceptor's liability (§ 3-413), this section conditions the indorser's liability on the tenor of the instrument at the time of his indorsement. Thus if a person indorses an altered instrument, he assumes liability as indorser on the instrument as altered.

4. Subsection (B) states two presumptions: One is that the indorsers are liable to one another in the order in which they have in fact indorsed. The other is that they have in fact indorsed in the order in which their names appear. Parol evidence is admissible to show that they have indorsed in another order, or that they have otherwise agreed as to their liability to one another.

#### **Cross References**

Point 1: Section 3-501.

Point 2: Section 3-417.

Point 3: Section 3-413.

Point 4: Section 3-118(E).

#### **Definitional Cross References**

"Contract". Section 1-201.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presumed". Section 1-201.

"Protest". Section 3-509.

"Signature". Section 3-401.

### **§ 3-415. Contract of accommodation party**

A. An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

B. When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

C. As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

D. An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

E. An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-415 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) recognizes that an accommodation party is always a surety (which includes a guarantor), and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it. His obligation is therefore determined by the capacity in which he signs. An accommodation maker or acceptor is bound on the instrument without any resort of his principal, while an accommodation indorser may be liable only after presentment, notice of dishonor and protest. The Subsection recognizes the defenses of a surety in accordance with the provisions subjecting one not a holder in due course to all simple contract defenses, as well as his rights against his principal after payment. Under Subsection (C) except as against a holder in due course without notice of the accommodation, parol evidence is admissible to prove that the party has signed for accommodation. In any case, however, under Subsection (D) an indorsement which is not in the chain of title (the irregular or anomalous indorsement) is notice to all subsequent takers of the instrument of the accommodation character of the indorsement.

2. In Subsection (A) the essential characteristic is that the accommodation party is a surety, and not that he has signed gratuitously. He may be a paid

surety, or receive other compensation from the party accommodated. He may even receive it from the payee, as where A and B buy goods and it is understood that A is to pay for all of them and that B is to sign a note only as a surety for A.

3. The obligation of the accommodation party is supported by any consideration for which the instrument is taken before it is due. Subsection (B) is intended to change occasional decisions holding that there is no sufficient consideration where an accommodation party signs a note after it is in the hands of a holder who has given value. The party is liable to the holder in such a case even though there is no extension of time or other concession. This is consistent with the provision as to antecedent obligations as consideration (§ 3-408). The limitation to "before it is due" is one of suretyship law, by which the obligation of the surety is terminated at the time limit unless in the meantime the obligation of the principal has become effective.

4. As a surety the accommodation party is not liable to the party accommodated; but he is otherwise liable on the instrument in the capacity in which he has signed. This general statement of the rule makes unnecessary a detailed list of obligations.

5. Subsection (E) is intended to ensure that under ordinary principles of suretyship the accommodation party who pays is subrogated to the rights of the holder paid, and should have his recourse on the instrument.

#### **Cross References**

Sections 3-305, 3-408, 3-604 and 3-606.

Point 1: Section 3-306.

Point 3: Section 3-408.

#### **Definitional Cross References**

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Signed". Section 1-201.

"Writing". Section 1-201.

#### **§ 3-416. Contract of guarantor**

A. "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay

it according to its tenor without resort by the holder to any other party.

B. "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

C. Words of guaranty which do not otherwise specify guarantee payment.

D. No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

E. When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

F. Any guaranty written on the instrument is enforceable notwithstanding any Statute of Frauds.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-416 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section, states the commercial understanding as to the meaning and effect of words of guaranty added to a signature.

An indorser who guarantees payment waives not only presentment, notice of dishonor and protest, but also all demand upon the maker or drawee. Words of guaranty do not affect the character of the indorsement as an indorsement (§ 3-202(D)); but the liability of the indorser becomes indistinguishable from that of a co-maker. A guaranty of collection likewise waives formal presentment, notice of dishonor and protest, but requires that the holder first proceed against the maker or acceptor by suit and execution, or show that such proceeding would be useless.

Subsection (F) is concerned chiefly with the type of Statute of Frauds which provides that no promise to answer for the debt, default or miscarriage of another is enforceable unless it is evidenced by a writing which states the consideration for the promise. It is unusual to state any consideration when a guaranty is added to a signature on a negotiable instrument, which in itself sufficiently shows the nature of the transaction; and such statutes have commonly been held not to apply to such guaranties.

### **Cross References**

Sections 3-202(D) and 3-415.

### **Definitional Cross References**

"Holder". Section 1-201.

"Insolvent". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presumption". Section 1-201.

"Protest". Section 3-509.

"Signature". Section 3-401.

"Written". Section 1-201.

### **§ 3-417. Warranties of presentment and transfer**

A. Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that:

1. He has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

2. He has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith:

a. To a maker with respect to the maker's own signature; or

b. To a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

c. To an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

3. The instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith:

a. To the maker of a note; or

b. To the drawer of a draft whether or not the drawer is also the drawee; or

c. To the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance proved "payable as originally drawn" or equivalent terms; or

d. To the acceptor of a draft with respect to an alteration made after the acceptance.

B. Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that:

1. He has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

2. All signatures are genuine or authorized; and

3. The instrument has not been materially altered; and

4. No defense of any party is good against him; and

5. He has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

C. By transferring "without recourse" the transferor limits the obligation stated in Subsection (B)(4) to a warranty that he has no knowledge of such a defense.

D. A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-417 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The obligations imposed by this section are stated in terms of warranty. Warranty terms, which are not limited to sale transactions, are used with the intention of bringing in all the usual rules of law applicable to warranties, and in particular the necessity of reliance in good faith and the availability of all remedies for breach of warranty, such as rescission of the transaction or an action for damages. Like other warranties, those stated in this section may be disclaimed by agreement between the immediate parties. In the case of an indorser, disclaimer of his liability as a transferor, to be effective, must appear in the form of the indorsement, and no parol proof of "agreement otherwise" is admissible. For corresponding warranties in the case of items in the bank collection process, Article 4 should be consulted. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204.

2. Subsection (A) is intended to state the undertaking to a party who accepts or pays of one who obtains payment or acceptance of any prior transferor. It is closely connected with the following section on the finality of acceptance or payment (§ 3-418), and should be read together with it.

3. Subsection (A)(1) retains the generally accepted rule that the party who accepts or pays does not "admit" the genuineness of indorsements, and may recover from the person presenting the instrument when they turn out to be forged. The justification for the distinction between forgery of the signature of the drawer and forgery of an indorsement is that the drawee is in a position to verify the drawer's signature by comparison with one in his hands, but has ordinarily no opportunity to verify an indorsement.

4. Subsection (A)(2) recognizes and deals with competing equities of parties accepting or paying instruments bearing unauthorized maker's or drawer's signatures and those obtaining acceptances or receiving payment. The warranties prescribed and exceptions thereto follow closely principles established at common law.

The basic warranty that the person obtaining payment or acceptance and any prior transferor warrants that he does not have knowledge that the signature of the maker or drawer is unauthorized stems from the general principle that one who presents an instrument knowing that the signature of the maker or drawer is forged or unauthorized commits an obvious fraud upon the party to whom presentment is made. However, few cases present this simple fact situation. If the signature of a maker or drawer has been forged, the parties include the dishonest forger himself and usually one or more innocent holders taking from him. Frequently, the state of knowledge of a holder is difficult to determine and sometimes a holder takes such a forged instrument in perfect good faith but subsequently learns of the forgery. Since in different fact situations holders have equities of varying strength, it is necessary to have some exceptions to the basic warranty.

The exceptions apply only in favor of a holder in due course and, within the provisions of § 3-201, to all subsequent transferees from a holder in due course. Since a condition of the status of a holder in due course under § 3-302(A)(1) is that the holder takes the instrument without notice of any defense against it, this condition presupposes that at the time of taking such a holder had no knowledge of the unauthorized signature. Consequently, the warranty of Subsection (A)(2) is pertinent in the case of a holder in due course only in the relatively few cases where he acquires knowledge of the forgery after the taking but before the presentment. In this situation the holder in due course must continue to act in good faith to be exempted from the basic warranty.

The first exemption from the warranty by such a holder, made by Subsection (A)(2)(a), is that the warranty does not run to a maker of a note with respect to the maker's own signature. Since a maker of a note is presumed to know his own signature, if he fails to detect a forgery of his own signature and pays the note, he should not be permitted to recover such payment from a holder in due course acting in good faith. Similarly, under Subsection (A)(2)(b) a drawer of a draft is presumed to know his own signature and if he fails to detect a forgery of his own signature and pays a draft he may not recover that payment from a holder in due course acting in good faith. This rule applies if the drawer pays the instrument as drawer and also if he pays the instrument as

drawee in a case where he is both drawer and drawee.

A drawee of a draft is presumed to know the signature of his customer, the drawer. However, under Subsection (A)(2) and subparagraph (c) of this Subsection this presumption is not strong enough to deprive such a drawee (either in accepting or paying an instrument) of the warranty of no knowledge of the unauthorized drawer's signature, unless the holder in due course took the instrument and became such a holder after the drawee's acceptance; or obtained the acceptance without knowledge that the drawer's signature was unauthorized. In the former case, the holder taking after and thereby presumably in reliance on the acceptance should be protected as against the drawee who accepted without detecting the unauthorized signature. In the latter case the holder, having no knowledge of the unauthorized signature at the time of the drawee's acceptance, would not be charged with this warranty and would be entitled to enforce such acceptance under § 3-418, even if thereafter he acquired knowledge of the unauthorized signature prior to enforcement of the acceptance. Such right of the holder to enforce the acceptance would be valueless if immediately upon enforcing it and obtaining payment the holder became obligated to return the payment by reason of breach of the warranty of no knowledge at the time of payment.

5. Subsection (A)(3) retains the common law rule, which has permitted a party paying a materially altered instrument in good faith to recover, and a party who accepts such an instrument to avoid such acceptance. As in the case of Subsection (A)(2) this warranty is not imposed against a holder in due course acting in good faith in favor of a maker of a note or a drawer of a draft on the ground that such maker or drawer should know the form and amount of the note or draft which he has signed. The exception made by Subsection (A)(3)(c) in the case of a holder in due course of a draft accepted after the alteration is based on the principle that an acceptance is an undertaking relied upon in good faith by an innocent party. The attempt to avoid this result by certifying checks "payable as originally drawn" leaves the subsequent purchaser in uncertainty as to the amount for which the instrument is certified, and so defeats the entire purpose of certification, which is to obtain the definite obligation of the bank to honor a definite instrument. Subsection (A)(3)(c) accordingly provides that such language is not sufficient to impose on the holder in due course the warranty of no material alteration where the holder took the draft after the acceptance and presumably in reliance on it.

Subsection (A)(3)(d) exempts a holder in due course from the warranty of no material alteration to the acceptor of a draft with respect to an alteration made after the acceptance. A drawee accepting a draft has an opportunity of ascertaining the form and particularly the amount of the draft accepted. If, thereafter, the draft is materially altered and is thereupon presented for payment to the acceptor, the acceptor has the necessary information in its records to verify the form and particularly the amount of the draft. If in spite of this available information it pays the draft, there is as much reason to leave the responsibility for such payment upon the acceptor (as against a holder in due course acting in good faith) as there is in the case of a maker or drawer paying a materially altered note or draft.

6. Under § 3-201 parties taking from or holding under a holder in due course, within the limits of that section, will have the same rights under § 3-417(A) as a holder in due course. Of course such parties claiming under a holder in

due course must act in good faith and be free from fraud, illegality and notice as provided in § 3-201.

7. The liabilities imposed by Subsection (B) in favor of the immediate transferee apply to all present who transfer an instrument for consideration whether or not the transfer is accompanied by indorsement. Any consideration sufficient to support a simple contract will support those warranties.

8. Subsection (B) extends the warranties of any indorser beyond the immediate transferee in all cases. Where there is an indorsement the warranty runs with the instrument and the remote holder may sue the indorser-warrantor directly and thus avoid a multiplicity of suits which might be interrupted by the insolvency of an intermediate transferor. The language of Subsection (B)(1) covers the case of the agent who transfers for another.

9. Subsection (B)(4) resolves a conflict in the decisions as to whether the transferor warrants that there are no defenses to the instrument good against him. The position taken is that the buyer does not undertake to buy an instrument incapable of enforcement, and that in the absence of contrary understanding the warranty is implied. Even where the buyer takes as a holder in due course who will cut off the defense, he still does not undertake to buy a lawsuit with the necessity of proving his status. Subsection (C) however provides that an indorsement "without recourse" limits the (B)(4) warranty to one that the indorser has no knowledge of such defenses. With this exception the liabilities of a "without recourse" indorser under this section are the same as those of any other transferor. Under § 3-414 "without recourse" in an indorsement is effective to disclaim the general contract of the indorser stated in that section.

10. The transferor does not warrant against difficulties of collection, apart from defenses, or against impairment of the credit of the obligor or even his insolvency in the commercial sense. The buyer is expected to determine such questions for himself before he takes the obligation. If insolvency proceedings as defined in this Code (§ 1-201) have been instituted against the party who is expected to pay and the transferor knows it, the concealment of that fact amounts to a fraud upon the buyer, and the warranty against knowledge of such proceedings is provided accordingly.

11. Subsection (D) applies only to a selling agent, as distinguished from an agent for collection. It follows the rule generally accepted that an agent who makes the disclosure warrants his good faith and authority and may not by contract assume a lesser warranty.

#### **Cross References**

Sections 3-404, 3-405, 3-406 and 3-414.

Point 2: Section 3-418.

Point 4: Sections 3-201, 3-302 and 3-418.

Point 9: Section 3-414.

Point 10: Section 1-201.

### **Definitional Cross References**

"Acceptance". Section 3-410.  
"Alteration". Section 3-407.  
"Bank". Section 1-201.  
"Draft". Section 3-104.  
"Genuine". Section 1-201.  
"Good faith". Section 1-201.  
"Holder in due course". Section 3-302.  
"Instrument". Section 3-102.  
"Note". Section 3-104.  
"Party". Section 1-201.  
"Person". Section 1-201.  
"Signature". Section 3-401.  
"Term". Section 1-201.

### **§ 3-418. Finality of payment or acceptance**

Except for recovery of bank payments as provided in other applicable law as provided under 7 N.N.C. § 204 and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** The phrase "other applicable law" was substituted for a reference to Uniform Commercial Code Article 4, which has not been adopted by the Navajo Nation. Rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. This section follows the common law rule under which a drawee who accepts or pays an instrument on which the signature of the drawer is forged is bound on his acceptance and cannot recover back his payment. The traditional justification for the result is that the drawee is in a superior position to detect a forgery because he has the maker's signature and is expected to know and compare it; a less fictional rationalization is that it

is highly desirable to end the transaction on an instrument when it is paid rather than reopen and tip set a series of commercial transactions at a later date when the forgery is discovered.

The rule as stated in the section is not limited to drawees, but applies equally to the maker of a note or to any other party who pays an instrument.

2. The section follows the same rule regarding the payment of overdrafts, or any other payment made in error as to the state of the drawer's account. The same argument for finality applies, with the additional reason that the drawee is responsible for knowing the state of the account before he accepts or pays.

3. The section makes payment or acceptance final only in favor of a holder in due course, or a transferee who has the rights of a holder in due course under the shelter principle. If no value has been given for the instrument, the holder loses nothing by the recovery of the payment or the avoidance of the acceptance, and is not entitled to profit at the expense of the drawee; and if he has given only an executory promise or credit he is not compelled to perform it after the forgery or other reason for recovery is discovered. If he has taken the instrument in bad faith or with notice he has no equities as against the drawee.

4. The section rejects decisions permitting recovery on the basis of mere negligence of the holder in taking the instrument. If such negligence amounts to a lack of good faith as defined in this Code (§ 1-201) or to notice under the rules (§ 3-304) relating to notice to a purchaser of an instrument, the holder is not a holder in due course and is not protected; but otherwise the holder's negligence does not affect the finality of the payment or acceptance.

5. This section is to be read together with the preceding section, which states the warranties given by the person obtaining acceptance or payment. It is also limited by any applicable bank collection provisions permitting a payor bank to recover a payment improperly paid if it returns in a timely manner the item or sends notice of dishonor. All states have such a provision arising under Article 4. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under Article 4 are governed by Navajo law pursuant to 7 N.N.C. § 204. The rights of a banker under such provisions are sharply limited in time, and terminate in any case when a bank has made final payment.

#### **Cross References**

Sections 3-302, 3-303 and 3-417.

Point 2: Section 3-201(A).

Point 4: Sections 1-201, 3-302 and 3-304.

Point 5: Section 3-417.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Presentment". Section 3-504.

**§ 3-419. Conversion of instrument: innocent representative**

A. An instrument is converted when:

1. A drawee to whom it is delivered for acceptance refuses to return it on demand; or

2. Any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

3. It is paid on a forged indorsement.

B. In an action against a drawee under Subsection (A) the measure of the drawee's liability is the face amount of the instrument. In any other action under Subsection (A) the measure of liability is presumed to be the face amount of the instrument.

C. Subject to the provisions of this Code concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

D. An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (§§ 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-419 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A negotiable instrument is the property of the holder. It is a mercantile specialty which embodies rights against other parties, and a thing of value. This section adopts the generally recognized rule that a refusal to return it on demand is a conversion. The provision is not limited to drafts presented for acceptance, but extends to any instrument presented for payment, including a note presented to the maker. The action is not on the instrument,

but in tort for its conversion.

The detention of an instrument voluntarily delivered is not wrongful unless and until there is demand for its return. Demand for a return at a particular time may, however, be made at the time of delivery; or it may be implied under the circumstances or understood as a matter of custom. If the holder is to call for the instrument and fails to do so, he is to be regarded as extending the time. "Refuses" is meant to cover any intentional failure to return the instrument, including its intentional destruction. It does not cover a negligent loss or destruction, or any other unintentional failure to return. In such a case the party may be liable in tort for any damage sustained as a result of his negligence, but he is not liable as a converter under this section.

2. Subsection (A)(3) adopts the prevailing view of decisions holding that payment on a forged indorsement is not an acceptance, but that even though made in good faith it is an exercise of dominion and control over the instrument inconsistent with the rights of the owner, and results in liability for conversion.

3. Subsection (B) adopts the rule generally applied to the conversion of negotiable instruments, that the obligation of any party on the instrument is presumed, in the sense that the term is defined in this Code (§ 1-201), to be worth its face value. Evidence is admissible to show that for any reason such as insolvency or the existence of a defense the obligation is in fact worth less, or even that it is without value. In the case of the drawee, however, the presumption is replaced by a rule of absolute liability.

4. Subsection (C) is intended to adopt the rule of decisions which have held that a representative, such as a broker or a depository bank, who deals with a negotiable instrument for his principal in good faith is not liable to the true owner for conversion of the instrument or otherwise, except that he may be compelled to turn over to the true owner the instrument itself or any proceeds of the instrument remaining in his hands. The provisions of Subsection (C) are, however, subject to the provisions of this Code concerning restrictive indorsements (§§ 3-205, 3-206 and related sections).

5. The provisions of this section are not intended to eliminate any liability on warranties of presentment and transfer (§ 3-417). Thus a collecting bank might be liable to a drawee bank which had been subject to liability under this section, even though the collecting bank might not be liable directly to the owner of the instrument.

#### **Cross References**

Sections 3-409, 3-410, 3-411 and 3-603.

Point 3: Section 1-201.

Point 4: Sections 1-201, 3-205 and 3-206.

Point 5: Section 3-417.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Action". Section 1-201.

"Bank". Section 1-201.

"Collecting bank". Section 3-102.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"Intermediary bank". Section 3-102.

"On demand". Section 3-108.

"Person". Section 1-201.

"Presumed". Section 1-201.

"Representative". Section 1-201.

Part 5. Presentment, Notice of Dishonor and Protest

**§ 3-501. When presentment, notice of dishonor and protest necessary or permissible**

A. Unless excused (§ 3-511) presentment is necessary to charge secondary parties as follows:

1. Presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;

2. Presentment for payment is necessary to charge any indorser;

3. In the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in § 3-502(A)(2).

B. Unless excused (§ 3-511):

1. Notice of any dishonor is necessary to charge any indorser;

2. In the case of any drawer, the acceptor of a draft payable at bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in § 3-502(A)(2).

C. Unless excused (§ 3-511) protest of any dishonor is necessary to

charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

D. Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge who has indorsed an instrument after maturity.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-501 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Part 5 assembles in one place all provisions as to when any such proceeding is necessary. It eliminates some of the requirements and simplifies others. The effect of unexcused delay in any such proceeding as a discharge is covered by the next section, and the sections following prescribe the details of the proceedings.

2. The words "necessary to charge" mean that the necessary proceeding is a condition precedent to any right of action against the drawer or indorser. He is not liable and cannot be sued without the proceedings, however long delayed. Under some circumstances delay is excused. If it is not excused it may operate as a discharge under the next section. Under some circumstances the proceeding may be entirely excused and the drawer or indorser is then liable as if the proceeding had been duly taken. Section 3-511 states the circumstances under which delay may be excused or the proceeding entirely excused.

3. The last sentence of the Subsection states the rule of the decisions that the holder may at his option present any time draft for acceptance, and is not required to wait until the due date to know whether the drawee will accept it; but that if he does make presentment and acceptance is refused, he must give notice of dishonor. There is not similar right to present for acceptance a draft payable on demand, since a demand draft entitles the holder to immediate payment but not to acceptance.

4. Drawers of drafts other than checks are not wholly discharged by failure to make due presentment but, like drawers of checks, are discharged only as they may have suffered loss as provided in § 3-502(A)(2). Subsection (A)(3) applies the check rule to such makers and acceptors of domicile paper and the result in the cases referred to in the preceding sentence is reversed. Under this section presentment for payment is not necessary to charge primary parties (makers and acceptors of undomiciled paper).

5. Under Subsection (B) the rules as to necessity of notice of dishonor run parallel with the rules as to necessity of presentment stated in Subsection (A).

6. Subsection (C) eliminates the requirement of protest except upon dishonor of a draft which on its face appears to be either drawn or payable outside of the states, territories, dependencies and possessions of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The requirement is left as to such international drafts because it is generally required by foreign law, which this article cannot affect. The formalities of protest are covered by § 3-509 on protest, and substitutes for protest as proof of dishonor are provided for in § 3-510 on evidence of dishonor and of notice.

This provision retains the rule permitting the holder at his option to make protest of any dishonor of any other instrument. Even where not required protest may have definite convenience where process does not run to another state and the taking of depositions is a slow and expensive matter. Even where the instrument is drawn and payable entirely within a state there maybe convenience in saving the trip of a witness from Buffalo to New York to testify to dishonor, where the substitute evidence of dishonor and notice of dishonor cannot be relied on. Either required or optional protest is presumptive evidence of dishonor (§ 3-510).

7. Subsection (D) provides that as to indorsers after maturity neither presentment nor notice of dishonor nor protest is necessary. Like primary parties therefore they will remain liable on the instrument for the period of the applicable statute of limitations.

#### **Cross References**

Point 1: Sections 3-502 through 3-508.

Point 2: Sections 3-413, 3-414 and 3-511.

Point 3: Sections 3-413, 3-414 and 3-511.

Point 4: Section 3-502.

Point 6: Sections 3-413, 3-414, 3-509, 3-510 and 3-511.

Point 8: Section 3-108.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Certificate of Deposit". Section 3-104.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Secondary party". Section 3-102.

"Signature". Section 3-401.

### **Special Plain Language Comment**

When commercial paper matures, the maker's liability on a note and the acceptor's liability on a draft become final. In order to charge a party who is secondarily liable, such as an indorser or an accommodation party, the paper must be presented for acceptance or payment. In some cases, if after the paper is presented and after it is not paid or accepted by the party primarily obligated to do so, (which is called "dishonor"), the presenting party must provide notice of the dishonor in order to charge indorsers or drawers. Protest is a certificate stating that a dishonor has occurred.

Presentment, notice of dishonor and protest can all be waived by agreement, including an agreement in the note or draft, (see § 3-511).

### **§ 3-502. Unexcused delay; discharge**

A. Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due:

1. Any indorser is discharged; and

2. Any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.

B. Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-

502 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section is the complement of the preceding section.

1. The circumstances under which presentment or notice of dishonor or protest or delay therein are excused are stated in § 3-511. When not excused delay operates as a discharge as provided in this section.

2. Subsection (A)(2) applies to any drawer, as well as to the makers and acceptors of drafts and notes payable at a bank. The rule provides for discharge only where the drawer of a check has sustained loss through the delay. This section expressly limits the rule to loss sustained through insolvency of the drawee or payor.

The purpose of the rule is to avoid hardship upon the holder through complete discharge, and unjust enrichment of the drawer or other party who normally has received goods or other consideration for the issue of the instrument. He is "deprived of funds" in any case where bank failure or other insolvency of the drawee or payor has prevented him from receiving the benefit of funds which would have paid the instrument if it had been duly presented.

Subsection (A)(2) states a right to discharge liability by written assignment to the holder of rights against the drawee or payor as to the funds which cover the particular instrument. The assignment is intended to give the holder an effective right to claim against the drawee or payor.

3. Subsection (B) states that any unexcused delay of a required protest is a complete discharge of all drawers and indorsers.

#### **Cross References**

Point 1: Section 3-511(A).

Point 2: Section 3-501.

Point 3: Section 3-509.

#### **Definitional Cross References**

"Bank". Section 1-201.

"Draft". Section 3-104.

"Holder". Section 201.

"Insolvent". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Notice of dishonor". Section 3-508.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Written". Section 1-201.

**§ 3-503. Time of presentment**

A. Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

1. Where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

2. Where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;

3. Where an instrument shows the date on which it is payable, presentment for payment is due on that date;

4. Where an instrument is accelerated, presentment for payment is due within a reasonable time after the acceleration;

5. With respect to the liability of any secondary party, presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.

B. A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

1. With respect to the liability of the drawer, 30 days after date or issue whichever is later; and

2. With respect to the liability of an indorser, seven days after his indorsement.

C. Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

D. Presentment to be sufficient must be made at a reasonable hour, and if at a bank, during its banking day.

**History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-503 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section states in one place all of the rules applicable to the time of presentment. Excused delay is covered by § 3-511 on waiver and excuse, and the effect of unexcused delay by § 3-502 on discharge.

2. Subsection (A) contains provisions stating the commercial understanding as to the presentment of instruments payable after sight, and of accelerated paper.

3. Subsection (B) provides specific time limits which are presumed, as that term is defined in this Act (§ 1-201), to be reasonable for uncertified checks drawn and payable within the continental limits of the United States. Court decisions which set a time limit of one day after the receipt of the instrument proved to be too short a time for some holders, such as the department store or other large business clearing many checks through their books shortly after the first of the month, as well as the farmer or other individual at a distance from a bank.

The time limit provided differs as to drawer and indorser. The drawer, who has himself issued the check and normally expects to have it paid and charged to this account is reasonably required to stand behind it for a longer period, especially in view of the protection now provided by Federal Deposit Insurance. The 30 days specified coincides with the time after which a purchaser has notice that a check has become stale (§ 3-304(C)(3)). The indorser, who has normally merely received the check and passed it on, and does not expect to have to pay it, is entitled to know more promptly whether it is to be dishonored, in order that he may have recourse against the person with whom he has dealt.

4. Subsection (C) is intended to make allowance for the increasing practice of closing banks or businesses on Saturday or other days of the week. It is not intended to mean that any drawee or obligor can avoid dishonor of instruments by extended closing.

#### **Cross References**

Point 1: Sections 3-501, 3-502, 3-505, 3-506 and 3-511.

Point 3: Sections 1-201 and 3-304(C)(3).

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank" Section 1-201.

"Banking day". Section 3-102.

"Check". Section 3-104.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Presumed". Section 1-201.

"Reasonable time". Section 1-204.

"Secondary party". Section 3-102.

"Usage of trade". Section 1-205.

**§ 3-504. How presentment made**

A. Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

B. Presentment may be made:

1. By mail, in which event the time of presentment is determined by the time of receipt of the mail; or

2. Through a clearing house; or

3. At the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or payor anyone authorized to act for him is present or accessible at such place presentment is excused.

C. It may be made:

1. To any one of two or more makers, acceptors, drawees or other payors; or

2. To any person who has authority to make or refuse the acceptance or payment.

D. A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

E. In the cases described below presentment may be made in the manner and with the result stated below:

1. Unless otherwise instructed, a collecting bank may present an item not payable by, through or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay under § 3-505 by the close of the bank's next banking day after it knows of the requirement.

2. Where presentment is made by notice and neither honor nor request for compliance with a requirement under § 3-505 is received by the close of business on the day after maturity or in the case of demand items, by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any secondary party by sending him notice of facts.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-504 of the Uniform Commercial Code adopted by the states, except that the manner of presentment for banks normally found in § 4-210 of the Official Text of the Uniform Commercial Code has been included in Subsection (E) because the Navajo Nation has not yet adopted Article 4 of the Uniform Commercial Code.

**Commentary.** 1. This section is intended to simplify the rules as to how presentment is made and to make it clear that any demand upon the party to pay is a presentment no matter where or how. Exhibition of the instrument and similar technical requirements are not required unless insisted upon by the party to pay (§ 3-505).

2. Subsection (B)(1) authorizes presentment by mail directly to the obligor. The presentment is sufficient and the instrument is dishonored by non-acceptance or non-payment even though the party making presentment may be liable for improper collection methods. "Through a clearing house" means that presentment is not made when the demand reaches the clearing house, but when it reaches the obligor. Subsection (E) should also be consulted for the methods of presenting which may properly be employed by a collecting bank.

3. Subsection (C)(1) states that the holder is entitled to expect that any one of the named parties will pay or accept, and should not be required to go to the trouble and expense of making separate presentment to a number of them.

4. Section 3-412 provides that an acceptance made payable at a bank in the United States does not vary the draft. Subsection (D) of this section makes it clear that a draft so accepted must be presented at the bank so designated. The same rule is applied to notes made payable at a bank. The rule of the Subsection is in conformity with the provisions of § 3-501 on presentment and § 3-502 on the effect of failure to make presentment with reference to domiciled paper.

5. Codifies a practice extensively followed in presentation of trade acceptances and documentary and other drafts drawn on non-bank payors. It imposes a duty on the payor to respond to the notice of the item if the item is not to be considered dishonored. Notice of such a dishonor charges parties secondarily liable.

6. A drawee not receiving notice is not, of course, liable to the drawer for wrongful dishonor.

7. A bank so presenting an instrument must be sufficiently close to the drawee to be able to exhibit the instrument on the day it is requested to do so or the next business day at the latest.

#### **Cross References**

Point 1: Sections 3-501, 3-502, 3-505 and 3-511.

Point 5: Sections 3-412, 3-502 and 3-502.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Clearing house". Section 3-102.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Note". Section 3-104.

"Party". Section 1-201.

"Person". Section 1-201.

#### **§ 3-505. Rights of party to whom presentment is made**

A. The party to whom presentment is made may without dishonor require:

1. Exhibition of the instrument; and

2. Reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

3. That the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

4. A signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

B. Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-505 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. In the first instance a mere demand for acceptance of payment is sufficient presentment, and if the payment is unqualifiedly refused nothing more is required. The party to whom presentment is made may, however, require exhibition of the instrument, its production at the proper place, identification of the party making presentment, and a signed receipt on the instrument, or its surrender on full payment. Failure to comply with any such requirement invalidates the presentment and means that the instrument is not dishonored. The time for presentment is, however, extended to give the person presenting a reasonable opportunity to comply with the requirements.

2. "Reasonable identification" means identification reasonable under all the circumstances. If the party on whom demand is made knows the person making presentment, no requirement of identification is reasonable, while if the circumstances are suspicious a great deal may be required. The requirement applies whether the instrument presented is payable to order or to bearer.

#### **Cross References**

Point 1: Sections 3-504 and 3-506.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

"Reasonable time". Section 1-204.

"Signed". Section 1-201.

**§ 3-506. Time allowed for acceptance or payment**

A. Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

B. Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-506 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section does not purport to cover drafts presented under a letter of credit.

In the law of the states § 4-301 on deferred posting governs the right of a payor bank to recover tentative settlements made by it on the day an item is received. That right does not survive final payment. Article 4 of the Uniform Commercial Code has not been adopted by the Navajo Nation. Rights of parties which would be governed under Article 4 are governed pursuant to Navajo law 7 N.N.C. § 204.

### **Definitional Cross References**

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Documentary draft". Sections 3-102.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Presentment". Section 3-504.

### **§ 3-507. Dishonor; holder's right of recourse; term allowing representment**

A. An instrument is dishonored when:

1. A necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (§ 3-102); or

2. Presentment is excused and the instrument is not duly accepted or paid.

B. Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.

C. Return of an instrument for lack of proper indorsement is not dishonor.

D. A term in a draft or an indorsement thereof allowing a stated time for representment in the event of any dishonor of the draft by non-acceptance if a time draft or by non-payment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** A definition of the midnight deadline has been included in § 3-102 because Article 4 of the Uniform Commercial Code has not been adopted by the Navajo Nation.

**Commentary.** 1. The language of the section conforms to the provisions of the preceding section as to the time allowed for acceptance or payment.

2. Subsection (C) states the general banking and commercial understanding that the time within which a payor bank must return items, and the methods of returning, under § 3-411(C) a bank may certify an item so returned.

### **Cross References**

Point 1: Sections 3-503, 3-504, 3-505 and 3-508.

Point 2: Section 3-411.

### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Right". Section 1-201.

"Seasonably". Section 1-204.

"Secondary party". Section 3-102.

"Term". Section 1-201.

**§ 3-508. Notice of dishonor**

A. Notice of dishonor maybe given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.

B. Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.

C. Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.

D. Written notice is given when sent although it is not received.

E. Notice to one partner is notice to each although the firm has been dissolved.

F. When any party is in insolvency proceedings instituted after the issue of the instrument notice maybe given either to the party or to the representative of his estate.

G. When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.

H. Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-508 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Notice is normally given by the holder or by an indorser who has himself received notice. Subsection (A) is intended to encourage and facilitate notice of dishonor by permitting any party who may be compelled to pay the instrument to notify any party who maybe liable on it. Thus an indorser may notify another indorser who is not liable to the one who gives notice, even when the latter has not received notice from any other party to the instrument.

2. Except as to collecting banks, as to which Article 4 controls, the time within which necessary notice must be given is extended to three (3) days after dishonor or receipt of notice from another party. The Navajo Nation has not adopted Article 4 of the Uniform Commercial Code. The rights of parties which would be governed under that Article are governed pursuant to Navajo law pursuant to 7 N.N.C. § 204. This period is intended to give the party a margin of time within which to ascertain what is required of him and get out an ordinary business letter.

3. Subsection (C) approves the bank practice of returning the instrument bearing a stamp, ticket or other writing, or a notice of debit of the account, as sufficient notice.

4. Subsection (G) permits notice to be sent to the last known address of a party who is dead or incompetent rather than to his personal representative. The provision is intended to save time, as the name of the personal representative often cannot easily be ascertained, and mail addressed to the original party will reach the representative.

#### **Cross References**

Sections 3-501, 3-507 and 3-511.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Bank". Section 1-201.

"Dishonor". Section 3-507.

"Holder". Section 1-201.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Notifies". Section 1-201.

"Party". Section 1-201.

"Persons". Section 1-201.

"Representatives". Section 1-201.

"Rights". Section 1-201.

"Send". Section 1-201.

"Written" and "writing". Section 1-201.

**§ 3-509. Protest; noting for protest**

A. A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice-consul or a notary public or other person authorized to verify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.

B. The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by non-acceptance or nonpayment.

C. The protest may also certify that notice of dishonor has been given to all parties or to specified parties.

D. Subject to Subsection (E) any necessary protest is due by the time that notice of dishonor is due.

E. If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-509 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Protest is not necessary except on drafts drawn or payable outside of the United States. Section 3-501(C) also permits the holder at his option to make protest on dishonor of any other instrument. This section is intended to simplify either necessary or optional protest when it is made.

2. "Protest" has been used to mean the act of making protest, and sometimes loosely to refer to the entire process of presentment, notice of dishonor and protest. In this article it is given its original, technical meaning, that of the official certificate of dishonor.

3. Protest need not be made at the place of dishonor. Any necessary delay in finding the proper officer to make protest is excused under § 3-511.

4. "Information satisfactory to such person" does away with the requirement

occasionally stated, that the person making protest must certify as of his own knowledge. The requirement has been more honored in the breach than in the observance, and in practice protest has been made upon hearsay which the officer regards as reliable, upon the admission of the person who has dishonored, or at most upon re-presentment, which is only indirect proof of the original dishonor. There is seldom any possible motive for false protest, and the basis on which it is made is never questioned. Subsection (A) leaves to the certifying officer the responsibility for determining whether he has satisfactory information. The provision is not intended to affect any personal liability of the officer for making a false certificate.

5. The protest need not be in any particular form, so long as it certifies the matters stated in Subsection (B). It need not be annexed to the instrument, and may be forwarded separately, but annexation may identify the instrument. If the instrument is lost, destroyed, or wrongfully withheld, protest is still sufficient if it identifies the instrument; but the owner must prove his rights as in any action under this article on a lost, destroyed or stolen instrument (§ 3-804).

6. Subsection (C) recognizes the practice of including in the protest a certification that notice of dishonor has been given to all parties or to specified parties. The next section makes such a certification presumptive evidence that the notice has been given.

7. Protest is normally forwarded with notice of dishonor. Subsection (D) extends the time for making a necessary protest to coincide with the time for giving notice of dishonor. Any delay due to circumstances beyond the holder's control is excused under § 3-511 on waiver or excuse. Any protest which is not necessary but merely optional with the holder may be made at any time before it is used as evidence.

8. Subsection (E) retains from the original Section 155 the provision permitting the officer to note the protest and extend it formally later.

#### **Cross References**

Point 1: Sections 3-501(C) and 3-511.

Point 3: Section 3-511(A).

Point 5: Section 3-804.

Point 6: Section 3-510(A)

Point 7: Sections 3-508(B) and 3-511(A).

#### **Definitional Cross References**

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Person". Section 1-201.

"Presentment". Section 3-504.

### **§ 3-510. Evidence of dishonor and notice of dishonor**

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

A. A document regular in form as provided in the preceding section which purports to be a protest;

B. The purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

C. Any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is not evidence of who made the entry.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-510 of the Uniform commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) states the generally accepted rule that a protest is not only admissible as evidence, but creates a presumption, as that term is defined in this Code (§ 1-201), of the dishonor which it certifies. The rule is extended to include the giving of any notice of dishonor certified by the protest. The provision also relieves the holder of the necessity of proving that a document regular in form which purports to be a protest is authentic, or that the person making it was qualified. Nothing in the provision is intended to prevent the obligor from overthrowing the presumption by evidence that there was in fact no dishonor, that notice was not given, or that the protest is not authentic or not made by a proper officer.

2. Subsection (B) recognizes as the full equivalent of protest the stamp, ticket or other writing of the drawee, payor or presenting bank. The drawee's statement that payment is refused on account of insufficient funds always has been commercially acceptable as full proof of dishonor. It should be satisfactory evidence in any court. It is therefore made admissible, and creates a presumption of dishonor. The provision applies only where the stamp or writing states reasons for refusal which are consistent with dishonor. Thus the following reasons for refusal are not evidence of dishonor, but of justifiable refusal to pay or accept:

— Indorsement missing

- Signature missing
- Signature illegible
- Forgery
- Payee altered
- Date altered
- Post dated
- Not on us

On the other hand the following reasons are satisfactory evidence of dishonor, consistent with due presentment, and are within this provision:

- Not sufficient funds
- Account garnisheed
- No account
- Payment stopped

3. Subsection (C) recognizes as the full equivalent of protest any books or records of the drawee, payor bank or any collecting bank kept in its usual course of business, even though there is not evidence of who made the entries. The provision, as well as that of Subsection (B), rests upon the inherent improbability that bank records or those of the drawee, will show any dishonor which has not in fact occurred, or that the holder will attempt to proceed on the basis of dishonor if he could in fact have obtained payment.

#### **Cross References**

Sections 3-501 and 3-508.

Point 1: Section 1-201.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Presumption". Section 1-201.

"Protest". Section 3-509.

"Writing". Section 1-201.

**§ 3-511. Waived or excused presentment, protest or notice of dishonor or delay therein**

A. Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

B. Presentment or notice or protest as the case may be is entirely excused when:

1. The party to be charged has waived it expressly or by implication either before or after it is due; or

2. Such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

3. By reasonable diligence the presentment or protest cannot be made or the notice given.

C. Presentment is also entirely excused when:

1. The maker, acceptor or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

2. Acceptance or payment is refused but not for want of proper presentment.

D. Where a draft has been dishonored by non-acceptance a later presentment for payment and any notice of dishonor and protest for non-payment are excused unless in the meantime the instrument has been accepted.

E. A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

F. Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-511 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Delay in making presentment either for payment or for acceptance, in giving notice of dishonor or in making protest is excused when the party has acted with reasonable diligence and the delay is not his fault.

This is true where an instrument has been accelerated without his knowledge, or demand has been made by a prior holder immediately before his purchase. It is true under any other circumstance where the delay is beyond his control.

2. The waiver may be express or implied, oral or written, and before or after the proceeding waived is due. It may be, and often is, a term of the instrument when it is issued.

3. A party who has no right to require or reason to expect that the instrument will be honored is not entitled to presentment, notice or protest. This is of course true where he has himself dishonored the instrument or has countermanded payment. It is equally true, for example, where he is an accommodated party and has himself broken the accommodation agreement.

4. The excuse is established only by proof that reasonable diligence has been exercised without success, or that reasonable diligence would in any case have been unsuccessful.

5. Subsection (C)(1) excuses presentment in situations where immediate payment or acceptance is impossible or so unlikely that the holder cannot reasonably be expected to make presentment. He is permitted instead to have his immediate recourse upon the drawer or indorser, and let the latter file any necessary claim in probate or insolvency proceedings. The exception for the documentary draft is to preserve any profit on the resale of goods for the creditors of the drawee if his representative can find the funds to pay.

6. Subsection (C)(2) includes any case where payment or acceptance is definitely refused and the refusal is not on the ground that there has been no proper presentment. The purpose of presentment is to determine whether or not the maker, acceptor or drawee will pay or accept, and when that question is clearly determined the holder is not required to go through a useless ceremony. The provision applies to a definite refusal stating no reasons.

#### **Cross References**

Sections 3-501, 3-502, 3-503, 3-507 and 3-509.

#### **Definitional Cross References**

"Acceptance". Section 3-410.

"Dishonor". Section 3-507.

"Draft". Section 3-104.

"Insolvency proceedings". Section 1-201.

"Instrument". Section 3-102.

"Issue". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Protest". Section 3-509.

"Right". Section 1-201.

Part 6. Discharge

**§ 3-601. Discharge of parties**

A. The extent of the discharge of any party from liability on an instrument is governed by the sections on:

1. Payment or satisfaction (§ 3-603); or
2. Tender of payment (§ 3-604); or
3. Cancellation or renunciation (§ 3-605); or
4. Impairment of right of recourse or of collateral (§ 3-606); or
5. Reacquisition of the instrument by a prior party (§ 3-208); or
6. Fraudulent and material alteration (§ 3-407); or
7. Certification of a check (§ 3-411); or
8. Acceptance varying a draft (§ 3-412); or
9. Unexcused delay in presentment or notice of dishonor or protest (§ 3-502).

B. Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

C. The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument:

1. Reacquires the instrument in his own right; or
2. Is discharged under any provision of this article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (§ 3-606).

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-601 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) contains an index referring to all of the sections of this article which provide for the discharge of any party. The list is exclusive so far as the provisions of this article are concerned, but it is not intended to prevent or affect any discharge arising apart from this Code, as for example a discharge in bankruptcy or a statutory provision for discharge if the instrument is negotiated in a gaming transaction.

2. A negotiable instrument is in itself merely a piece of paper bearing a writing, and strictly speaking is incapable of being discharged. It is the parties who may be discharged from liability on their contracts on the instrument. This section distinguishes between the discharge of a single party and the discharge of all parties.

So far as the discharge of any one party is concerned a negotiable instrument differs from any other contract only in the special rules arising out of its character to which Subsection (A) (1)-(9) are an index, and in the effect of the discharge against a subsequent holder in due course (§ 3-602). Subsection (B) specifically recognizes the possibility of a discharge by agreement.

The discharge of any party is a defense available to that party as provided in sections on rights of those who are and are not holders in due course (§§ 3-305 and 3-306). He has the burden of establishing the defense (§ 3-307).

3. Subsection (C) states a general principle regarding the discharge of all parties from liability on their contracts on the instrument. The principle is that all parties to an instrument are discharged when no party is left with rights against any other party on the paper.

When any party reacquires the instrument in his own right his own liability is discharged; and any intervening party to whom he was liable is also discharged as provided in § 3-208 on reacquisition. When he is left with no right of action against an intervening party and no right of recourse against any prior party, all parties are obviously discharged. The instrument itself is not necessarily extinct, since it may be reissued or renegotiated with a new and further liability; and if it subsequently reaches the hands of a holder in due course without notice of the discharge he may still enforce it as provided in § 3-602 on effect of discharge against a holder in due course.

Under § 3-606 on impairment of recourse or collateral, the discharge of any party discharges those who have a right of recourse against him, except in the case of a release with reservation of rights or a failure to give notice of dishonor. A discharge of one who has himself no right of action or recourse on the instrument may thus discharge all parties. Again the instrument itself is not necessarily extinct, and if it is negotiated to a subsequent holder in due course without notice of the discharge he may enforce it as provided in § 3-602 on effect of discharge against a holder in due course.

4. The language "any party who has himself no right of action or recourse on the instrument" is intended to include accommodation maker or acceptor. Under § 3-415 on accommodation parties, an accommodation maker or acceptor, although he is primarily liable on the instrument in the sense that he is obligated to pay it without recourse upon another, has himself a right of recourse against the accommodated payee; and his reacquisition or discharge leaves the

accommodated party liable to him. The accommodated payee, although he is not primarily liable to others, has no right of action or recourse against the accommodation maker, and his reacquisition or discharge may discharge all parties.

#### **Cross References**

Sections 3-406, 3-411, 3-412, 3-509, 3-603, 3-604 and 3-605.

Point 2: Sections 3-305, 3-306, 3-307 and 3-602.

Point 3: Sections 3-208, 3-602 and 3-606.

Point 4: Section 3-415.

#### **Definitional Cross References**

"Action". Section 1-201.

"Agreement". Section 1-201.

"Alteration". Section 3-407.

"Certification". Section 3-411.

"Check". Section 3-104.

"Contract". Section 1-201.

"Draft". Section 3-104.

"Instrument". Section 3-102.

"Money". Section 1-201.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Presentment". Section 3-504.

"Rights". Section 1-201.

#### **§ 3-602. Effect of discharge against holder in due course**

No discharge of any party provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-602 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section rests on the principle that any discharge of a party provided under any section of this article is a personal defense of the party, which is cut-off when a subsequent holder in due course takes the instrument without notice of the defense. Thus where an instrument is paid without surrender such a subsequent purchase cuts off the defense. This section applies only to discharges arising under the provisions of this article, and it has no application to any discharge arising apart from it, such as a discharge in bankruptcy.

Under § 3-304(A) (2) on notice to purchaser it is possible for a holder to take the instrument in due course even though he has notice that one or more parties have been discharged, so long as any party remains undischarged. Thus he may take with notice that an indorser of a note has been released, and still be a holder in due course as to the liability of the maker. In that event, the holder in due course is subject to the defense of the discharge of which he had notice when he took the instrument.

#### **Cross References**

Sections 3-302, 3-304, 3-305 and 3-601.

#### **Definitional Cross References**

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Notice". Section 1-201.

"Party". Section 1-201.

#### **§ 3-603. Payment or satisfaction**

A. The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This Subsection does not, however, result in the discharge of the liability:

1. Of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

2. Of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

B. Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (§ 3-201).

### History

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 3-603 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. A purchaser with notice of payment at or after maturity cannot be a holder in due course, and therefore is cut off by the section. One who takes without notice of the payment and the maturity should be protected against failure to take up the instrument. The matter is now covered by § 3-602.

2. The practice of payment of a draft "for honor" is obsolete and it is today almost entirely unknown. Therefore, Subsection (B) eliminates any reference to it and provides that any person may pay with the consent of the holder.

3. Payment to the holder discharges the party who makes it from his own liability on the instrument, and a part payment discharges him *pro tanto*. The same is true of any other satisfaction. It adopts as a general principle the position that a payor is not required to obey an order to stop payment received from an indorser. However, this general principle is qualified by the provisions of Subsection (A)(1) and (2) respecting persons who acquire an instrument by theft, or through a restrictive indorsement (§ 3-205). These provisions are thus consistent with § 3-306 covering the rights of one not a holder in due course.

When the party to pay is notified of an adverse claim to the instrument he has normally no means of knowing whether the assertion is true. The "unless" clause of Subsection (B) follows statutes which have been passed in many jurisdictions on adverse claims to bank deposits. The paying party may pay despite notification of the adverse claim unless the adverse claimant supplies indemnity deemed adequate by the paying party or procures the issuance of process restraining payment in an action in which the adverse claimant and the holder of the instrument are both parties. If the paying party chooses to refuse payment and stand suit, even though not indemnified or enjoined, he is free to do so, although, under § 3-306(D) on the rights of one not a holder in due course, except where theft or taking through a restrictive indorsement is alleged the payor must rely on the third party claimant to litigate the issue and may not himself defend on such a ground. His contract is to pay the holder of the instrument, and he performs it by making such payment. Except in cases of theft or restrictive indorsement there is no good reason to put him to inconvenience because of a dispute between two other parties unless he is indemnified or served with appropriate process.

4. Subsection (B) provides that with the consent of the holder payment maybe made by anyone, including a stranger. The same result is reached under § 3-

415(E) on accommodation parties. Upon payment and surrender of the paper the payor succeeds to the rights of the holder, subject to the limitation found in § 3-201 on transfer that one who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

5. Payment discharges the liability of the person making it. It discharges the liability of other parties only as:

A. The discharge of the payor discharges others who have a right of recourse against him under § 3-606; or

B. Reacquisition of the instrument discharges intervening parties under § 3-208 on reacquisition; or

C. The discharge of one who has himself no right of recourse on the instrument discharges all parties under § 3-601 on discharge of parties.

#### **Cross References**

Sections 3-604 and 3-606.

Point 1: Section 3-601(C).

Point 3: Sections 3-205 and 3-306(D).

Point 4: Sections 3-201 and 3-415(E).

Point 5: Sections 3-606, 3-208, and 3-601.

#### **Definitional Cross References**

"Action". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Order". Section 3-102.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

#### **§ 3-604. Tender of payment**

A. Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.

B. The holder's refusal of such tender wholly discharges any party who

has a right of recourse against the party making the tender.

C. Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-604 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Subsection (A) states the generally accepted rule as to the effect of tender.

2. Subsection (B) states that the party discharged is one who has a right of recourse against the party making tender, whether the latter be a prior party or a subsequent one who has been accommodated.

3. Subsection (C) states that if an instrument is payable at any one of two or more specified places, the maker or acceptor must be able and ready to pay at each of them. This Subsection reverses decisions which held that makers and acceptors of notes and drafts payable at a bank were not discharged by failure of a holder to make due presentment of such paper at the designated bank. See § 3-501 on necessity of presentment, § 3-504 on how presentment is made, and § 3-502 on effect of delay in presentment.

#### **Cross References**

Section 3-601.

Point 3: Sections 3-501, 3-502 and 3-504.

#### **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Party". Section 1-201.

"Right". Section 1-201.

#### **§ 3-605. Cancellation and renunciation**

A. The holder of an instrument may even without consideration discharge any party:

1. In any manner apparent on the face of the instrument or the

indorsement, as by intentionally canceling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

2. By renouncing his rights by a writing signed and delivered or by surrender of the instrument of the party to be discharged.

B. Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-605 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Cancellation must be done in such a manner as to be apparent on the face of the instrument, and the methods stated, which are supported by the decisions, are exclusive.

2. Subsection (B) is intended to make it clear that the striking of an indorsement, or any other cancellation or renunciation does not affect the title.

#### **Definitional Cross References**

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Rights". Section 1-201.

"Signature". Section 3-401.

"Signed". Section 1-201.

"Writing". Section 1-201.

#### **§ 3-606. Impairment of recourse or of collateral**

A. The holder discharges any party to the instrument to the extent that without such party's consent the holder:

1. Without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such

person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

2. Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

B. By express reservation of rights against a party with a right of recourse the holder preserves:

1. All his rights against such party as of the time when the instrument was originally due; and

2. The right of the party to pay the instrument as of that time; and

3. All rights of such party to recourse against others.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-605 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. The words "any party to the instrument" provide suretyship defense which are not limited to parties who are "secondarily liable", but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or outside of it, including an accommodation maker or acceptor known to the holder to be so.

2. Consent may be given in advance, and is commonly incorporated in the instrument; or it maybe given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.

3. The words "to the knowledge of the holder" exclude the latent surety, as for example the accommodation maker where there is nothing on the instrument to show that he has signed for accommodation and the holder is ignorant of that fact. In such a case the holder is entitled to proceed according to what is shown by the face of the paper or what he otherwise knows, and does not discharge the surety when he acts in ignorance of the relation.

4. This section retains the right of the holder to release one party, or to postpone his time of payment, while expressly reserving rights against others. Subsection (B) states the generally accepted rule as to the effect of such an express reservation of rights.

5. Subsection (A)(2) has been generally recognized as available to indorsers or accommodation parties. As to when a holder's actions in dealing with collateral may be "unjustifiable", the section on rights and duties with respect to collateral in the possession of a secured party (§ 9-207) should be

consulted.

### **Cross References**

Point 5: Section 9-207.

### **Definitional Cross References**

"Agreement". Section 1-201.

"Holder". Section 1-201.

"Instrument". Section 3-102.

"Notice of dishonor". Section 3-508.

"Party". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

Part 7. Advice of International Sight Draft

### **§ 3-701. Letter of advice of international sight draft**

A. A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.

B. Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest *pro tanto*. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

C. Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer's account.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-701 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Checks drawn by one international bank on the account it carries (in currency foreign to itself) in another international bank are still handled under practices which reflect older conditions, but which have a real, continuing reason in the typical, European rule that a bank paying a check in

good faith and in ordinary course can charge its depositor's account notwithstanding forgery of a necessary indorsement. To decrease the risk that forgery will prove successful, the practice is to send a letter of advice that a draft has been drawn and will be forthcoming. Subsection (C) recognizes that a drawer who sends no such letter forfeits any rights for improper dishonor, while still permitting the drawee to protect his delinquent drawer's credit.

2. Subsection (B) clarifies for American courts, the meaning of another international practice: that of charging the drawer's account on receipt of the letter of advice. This practice involves no conception of trust or the like and the rule of § 3-409(A), (Draft not an assignment) still applies. The debit has to do with the payment of interest only. The section recognizes the fact.

### **Cross References**

Point 2: Section 3-409(A)

### **Definitional Cross References**

"Account". Section 3-102.

"Bank". Section 1-201.

"Draft". Section 3-104.

"Genuine". Section 1-201.

"Holder". Section 1-201.

Part 8. Miscellaneous

### **§ 3-801. Drafts in a set**

A. Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.

B. Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.

C. As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under Subsection (B). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order. The drawee of such a part is subrogated to the rights: (1) of any holder in due course thereof against the drawer or any other holder; (2) of the payee or other holder against the drawer either on the items or under the transaction

out of which it arose; and (3) of the drawer against the payee or any other holder of this part of the draft with respect to the transaction out of which it arose.

D. Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section has been amended to include, in Subsection (C), the rights of subrogation available to the drawer of a draft in parts upon improper acceptance of a subsequently presented part of such a draft which is found on § 4-407 of the Official Text.

**Commentary.** 1. Drafts in a set customarily contain such language as "Pay \_\_\_\_\_ this first of exchange (second unpaid)", with equivalent language in the second part. Today a part also commonly bears conspicuous indication of its number. At least the first factor is necessary to notify the holder of his rights, and is therefore necessary in order to make this section apply. Subsection (A) so provides, thus stating in the statute a matter left previously to a commercial practice long uniform but expensive to establish in court.

2. Payment of the part of the draft subsequently presented is improper and the drawee may not charge it to the account of the drawer, but someone has probably been unjustly enriched in the total transaction, at the expense of the drawee. So the drawee is like a bank which has paid a check over an effective stop payment order, and is subrogated to the same rights as a bank would have in that situation.

3. A statement in a draft drawn in a set of parts to the effect that the order is effective only if no other part has been honored does not render the draft non-negotiable as conditional

See § 3-112(A) (7).

### **Cross References**

Point 3: Section 3-112.

### **Definitional Cross References**

"Acceptance". Section 3-410.

"Check". Section 3-104.

"Draft". Section 3-104.

"Holder". Section 1-201.

"Holder in due course". Section 3-302.

"Honor". Section 1-201.

"Person". Section 1-201.

"Rights". Section 1-201.

**§ 3-802. Effect of instrument on obligation for which it is given**

A. Unless otherwise agreed where an instrument is taken for an underlying obligation:

1. The obligation is *pro tanto* discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

2. In any other case the obligation is suspended *pro tanto* until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

B. The taking in good faith of a check which is not post-dated does not of itself so extend the time on the original obligation as to discharge a surety.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-802 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. This section is intended to settle conflicts as to the effect of an instrument as payment of the obligation for which it is given.

2. Where a holder procures certification of a check, the drawer is discharged under § 3-411 on check certification. Thereafter the original obligation is regarded as paid, and the holder must look to the certifying bank. The circumstances may indicate a similar intent in other transactions, and the question may be one of fact of the jury. Subsection (A)(1) states a rule discharging the obligation *pro tanto* when the instrument taken carries the obligation of a bank as drawer, maker or acceptor and there is no recourse on the instrument against the underlying obligor.

3. It is commonly said that a check or other negotiable instrument is "conditional payment". By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is "revived". Subsection (A)(2) states this result in terms of

suspension of the obligation, which is intended to include suspension of the running of the statute of limitations. On dishonor of the instrument the holder is given his option to sue either on the instrument or on the underlying obligation. If, however, the original obligor has been discharged on the instrument (see § 3-601) he is also discharged on the original obligation.

4. Subsection (B) is intended to remove any implication that a check given in payment of an obligation discharges a surety. The check is taken as a means of immediate payment; the 30-day period for presentment specified in § 3-503 does not affect the surety's liability.

#### **Cross References**

Point 2: Sections 1-201, 3-411 and 3-60 1.

Point 4: Section 3-503.

#### **Definitional Cross References**

"Action". Section 1-201.

"Bank". Section 1-201.

"Check". Section 3-104.

"Dishonor". Section 3-507.

"Good faith". Section 1-201.

"Instrument". Section 3-102.

"On demand". Section 3-108.

"Presentment". Section 3-504.

#### **§ 3-803. Notice to third party**

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this article he may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over to him under this article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will, in any action against him by the person giving the notice, be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend, he is so bound.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-

803 of the Uniform Commercial Code adopted by the states.

**Commentary.** The section conforms to the analogous provision in § 2-607. It extends to such liabilities as those arising from forged indorsements even though not "on the instrument", and is intended to make it clear that the notification is not effective until received. In *Hartford Accident & Indemnity Co. v. First Nat. Bank & Trust Co.*, 281 N.Y. 162, 22 N.E.2d 324, 123 A.L.R. 1149 (1939), the common law doctrine of "vouching in" was held inapplicable where the party notified had no direct liability to the party giving the notice. In that case the drawer of a check, sued by the payee whose indorsement had been forged, gave notice to a collecting bank. In a second action the drawee was held liable to the drawer; but in an action by the drawee for judgment over against the collecting bank the determination of fact in the first action was held not conclusive. This section does not disturb this result; the section is limited to cases where the person notified is "answerable over" to the person giving the notice.

#### **Cross References**

Section 2-607.

#### **Definitional Cross References**

"Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Notifies". Section 1-201.

"Person". Section 1-201.

"Right". Section 1-201.

"Seasonably". Section 1-204.

"Written". Section 1-201.

#### **§ 3-804. Lost, destroyed or stolen instruments**

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-804 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section is intended to provide a method of recovery on instruments which are lost, destroyed or stolen. The plaintiff who claims to be the owner of such an instrument is not a holder as that term is defined in this Code since he is not in possession of the paper, and he does not have the holder's prima facie right to recover under the section on the burden of establishing signatures. He must prove his case. He must establish the terms of the instrument and his ownership, and must account for its absence.

If the claimant testifies falsely, or if the instrument subsequently turns up in the hands of a holder in due course, the obligor may be subjected to double liability. The court is therefore authorized to require security indemnifying the obligor against loss by reason of such possibilities. There may be cases in which so much time has elapsed, or there is so little possible doubt as to the destruction of the instrument and its ownership that there is no good reason to require the security. The requirement is therefore not an absolute one, and the matter is left to the discretion of the court.

#### **Cross References**

Sections 1-201 and 3-307.

#### **Definitional Cross References**

"Action". Section 1-201.

"Defendant". Section 1-201.

"Instrument". Section 3-102.

"Party". Section 1-201.

"Term". Section 1-201.

#### **§ 3-805. Instruments not payable to order or to bearer**

This article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 3-805 of the Uniform Commercial Code adopted by the states.

**Commentary.** This section covers the "non-negotiable instrument". As it has been used by most courts, this term has been a technical one of art. It does

not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this article and to be treated as a simple contract. It refers to a particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer. The typical example is the check reading merely "Pay John Doe".

Such a check is not a negotiable instrument under this article. At the same time it is still a check, a mercantile specialty which differs in many respects from a simple contract. Commercial and banking practice treats it as a check, and a long line of decisions have made it clear that it is subject to the law merchant as distinguished from ordinary contract law. Although the Negotiable Instruments Law was held by its terms not to apply to such "non-negotiable instruments", it has been recognized as a codification and restatement of the law merchant, and has in fact been applied to them by analogy.

Thus the holder of the check reading "Pay A" establishes his case by production of the instrument and proof of signatures; and the burden of proving want of consideration of any other defense is upon the obligor. Such a check passes by indorsement and delivery without words of assignment, and the indorser undertakes greater liabilities than those of an assignor. This section resolves a conflict in the decisions as to the extent of that undertaking by providing in effect that the indorser of such an instrument is not distinguished from any indorser of a negotiable instrument. The indorser is entitled to presentment, notice of dishonor and protest, and the procedure and liabilities in bank collection are the same. The rules as to alteration, the filling of blanks, accommodation parties, the liability of signing agents, discharge, and the like are those applied to negotiable instruments.

In short, the "non-negotiable instrument" is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provision of any section of this article peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of this article.

#### **Cross References**

Section 3-104.

#### **Definitional Cross References**

"Bearer". Section 1-201.

"Holder in due course". Section 3-302.

"Instrument". Section 3-102.

"Term". Section 1-201.

**Article 4. [Reserved]**

**Article 5. [Reserved]**

**Article 6. [Reserved]**

**Article 7. [Reserved]**

**Article 8. [Reserved]**

**Article 9. Secured Transactions; Sales of Accounts and Chattel Paper**

**Part 1. Short Title, Applicability and Definitions**

**§ 9-101. Short title**

This article shall be known and may be cited as the Navajo Uniform Commercial Code—Secured Transactions.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. In many respects this Code is based upon and similar to the Uniform Commercial Code adopted by most of the states in the United States. The Official Comments to this Code describe the reasons for most of the variations from the version proposed in such other states.

**Commentary.** Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. While this article applies generally to security interests in consumer goods, it is not designed to supersede such consumer legislation. See Official Comments to §§ 9-102 and 9-203.

The aim of this article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty. Under this article the traditional distinctions among security devices based largely on form, are not retained. The Article applies to all transactions intended to create security interests in personal property and fixtures, and the single term "security interest" substitutes for the variety of other descriptive terms which had grown up at common law and under a 100-year accretion of statutes in other states. This does not mean that the old forms may not be used, and § 9-102(B) makes it clear that they may be.

This article does not determine whether "title" to collateral is in the secured party or in the debtor and adopts neither a "title theory" nor a "lien theory" of security interests. Rights, obligations and remedies under the Article do not depend on the location of title (§ 9-202). The location of title may become important for other purposes (as, for example, in determining the incidence of taxation), and in such a case the parties are left free to contract as they will. In this connection the use of a form which has

traditionally been regarded as determinative of title (e.g., the conditional sale contract) could reasonably be regarded as evidencing the parties' intention with respect to title to the collateral.

Under the Article distinctions based on form (except as between pledge and non-possessory interests) are no longer controlling. For some purposes there are distinctions based on the type of property which constitutes the collateral (e.g., industrial and commercial equipment, business inventory, farm products, consumer goods, accounts receivable, documents of title and other intangibles), and where appropriate, the Article states special rules applicable to financing transactions involving a particular type of property. The objectives include statutory simplification and a considerable degree of flexibility in financing transactions. The scheme of the Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines.

The Article's flexibility and simplified formalities should make it possible for new forms of secured financing, as they develop, to fit comfortably under its provisions, thus avoiding the necessity (so apparent in the states) of year by year passing new statutes and tinkering with the old ones to allow legitimate business transactions to go forward.

The rules set out in this article are principally concerned with the limits of the secured party's protection against purchasers from and creditors of the debtor. Except for procedures on default and certain other provisions, freedom of contract generally prevails between the immediate parties to the security transaction.

#### **§ 9-102. Policy and subject matter of Article**

A. Except as otherwise provided in § 9-104 on excluded transaction, this Article applies:

1. To any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures, including goods, documents, instruments, general intangibles, chattel paper or accounts; and also

2. To any sale of accounts or chattel paper.

B. This article applies to security interests created by contract, including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This article does not apply to statutory liens except as provided in § 9-310.

C. The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a lien, transaction or interest to which this article does not apply. Security for any obligation is automatically transferred with a transfer of the obligation, subject to the effects of compliance or non-compliance with the requirements for perfection of such security interests or liens under applicable law.

#### **History**

CJA-1-86, January 29, 1986.

#### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-102 of the Uniform Commercial Code adopted by the states. Variations are only for the purpose of clarification or emphasis.

**Commentary.** The main purpose of this section is to bring all consensual security interests in personal property and fixtures under this article, except for certain types of transactions excluded by § 9-104. In addition certain sales of accounts and chattel paper are brought within this article to avoid difficult problems of distinguishing between transactions intended for security and those not so intended. As to security interests in fixtures, see § 9-313(A).

1. Except for sales of accounts and chattel paper, the principal test whether a transaction comes under this article is: is the transaction intended to have effect as security? For example, § 9-104 excludes certain transactions where the security interest (such as a mechanic's or artisan's lien) arises under statute or common law by reason of status, rather than by consent of the parties. Transactions in the form of consignment or leases are subject to this article if the understanding of the parties or the effect of the arrangement shows that a security interest was intended. (As to consignments the provisions of §§ 2-326, 9-114 and 9-408 should be consulted.) When it is found that a security interest as defined in § 1-201(KK) was intended, this article applies regardless of the form of the transaction or the name by which the parties may have characterized it. The list of traditional security devices in § 9-102(B) is illustrative only; other old devices, as well as any new ones which the ingenuity of the parties or lawyers may invent, are included, so long as the requisite intent is found. The controlling definition is that contained in § 9-102(A).

The Article does not abolish existing security devices, but instead specifies new requirements with which all such secured transactions must comply. The conditional sale or bailment-lease, for example, is not prohibited; but even though it is used, the rules of this article govern such transactions.

2. If an obligation is to repay borrowed money and is not part of chattel paper, the obligation is either an instrument or a general intangible. A sale of an instrument or general intangible is not within this article, but a transfer intended to have effect as security for an obligation of the transferor is covered by § 9-102(A)(1). In either case the nature of the transaction is not affected by the fact that collateral is transferred with the instrument or general intangible. Such a transfer is treated as a transfer by operation of law, whether or not it is articulated in the agreement. See Comment 4 below for an illustration. However, the rights and priorities associated with such collateral depend upon compliance with applicable law, including those requiring recording or filing in order to accomplish the perfection of such a security interest or lien or to establish priority over competing security interests or liens.

An assignment of accounts or chattel paper as security for an obligation is

covered by § 9-102(A)(1). Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by § 9-102(B)(2) whether intended for security or not, unless excluded by § 9-104. The buyer then is treated as a secured party, and his interest as a security interest. See §§ 9-105(A)(13), and 1-201(KK). Certain sales which have nothing to do with commercial financing transactions are excluded by § 9-104(F). See also § 9-302(A)(5), exempting from filing casual or isolated assignments, and § 9-302(B), preserving the perfected status of a security interest against the original debtor when a secured party assigns his interest.

3. In general, problems of choice of law in this article as to the validity of security agreements are governed by § 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring reperfecting, are governed by § 9-103.

4. Section 9-102(C) recognizes that one secured transaction can result in further secured transactions. For example, Farmer A may sell 50 sheep to Farmer B in exchange for a promissory note which is secured by a security interest in those sheep. Farmer A may endorse and deliver that secured note to his Bank as security for a loan. Pursuant to § 9-102, since the Bank has a security interest in the note, the Bank also becomes the secured party with respect to the 50 sheep that secure that note. If Farmer B defaults on his note, the Bank may enforce the security interest in the note by proceeding against the 50 sheep for the account of Farmer A and subject to the terms of the security and other agreements between Farmer A and the Bank.

5. While most sections of this article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral. An index of sections where such special rules are stated as follows:

<COL>SECTION<COL> ACCOUNTS

<COL>9-102(A)(2)<COL>Sale of accounts subject to Article

<COL>9-103(A)<COL>When Article applies; conflict of laws rules

<COL>9-104(F)<COL>Certain sales of accounts excluded from Article

<COL>9-106<COL>Definitions

<COL>9-205<COL>Permissible for debtor to make collections

<COL>9-206(A)<COL>Agreement not to assert defenses against assignee

<COL>9-301(A)(4)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-302(A)(5)<COL>What assignments need not be filed

<COL>9-306(E)<COL>Rule when goods whose sale gave rise to an account return to seller's possession

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(B)<COL>Modification of contract after assignment of contract right

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-318(D)<COL>Term prohibiting assignment ineffective

<COL>9-401<COL>Place of filing

<COL>9-502<COL>Collection rights of secured party

<COL>9-504(B)<COL>Rights on default where underlying transaction was sale of accounts or contract rights

<COL><COL>

<COL>SECTION<COL> CHATTEL PAPER

<COL>9-102(A)(2)<COL>Sale subject to Article

<COL>9-104(F)<COL>Certain sales excluded from Article

<COL>9-105(A)(2)<COL>Definition

<COL>9-205<COL>Permissible for debtor to make collections

<COL>9-206(A)<COL>Agreement not to assert defenses against assignee

<COL>9-207(A)<COL>Duty of secured party in possession to preserve rights against prior parties

<COL>9-301(A)(3)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-304(A)<COL>Perfection by filing

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-306(E)<COL>Rule when goods whose sale result in chattel paper return to seller's possession

<COL>9-308<COL>When purchasers of chattel paper have priority over security interest

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-502<COL>Collection rights of secured party

<COL>9-504(B)<COL>Rights on default where underlying transaction was sale

<COL><COL>

<COL>SECTION<COL> DOCUMENTS AND INSTRUMENTS

<COL>9-105(A) (5)<COL>Definition of document (and see § 1-201)

<COL>9-105(A) (7)<COL>Definition of instrument

<COL>9-206(A)<COL>Rule where buyer of goods signs both negotiable instrument and security agreement

<COL>9-207(A)<COL>Duty of secured party in possession of instrument to preserve rights against prior parties

<COL>9-301(A) (3)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-302(A) (2)<COL>What interests need not be filed

<COL>and (6)<COL>

<COL>9-304(A)<COL>How security interest can be perfected

<COL>9-304(B), (C)<COL>Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-304(D), (E)<COL>Perfection of security interest in instruments or negotiable documents without filing or transfer of possession

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-308<COL>When purchasers of instruments have priority over security interest

<COL>9-309<COL>When purchasers of negotiable instruments or negotiable documents have priority over security interest

<COL>9-501(A)<COL>Rights on default where collateral is documents

<COL>9-502<COL>Collection rights of secured party

<COL><COL>

<COL>SECTION<COL> GENERAL INTANGIBLES

<COL>9-103(B)<COL>When Article applies; conflict of laws rules

<COL>9-105<COL>Obligor is "account debtor"

<COL>9-106<COL>Definition

<COL>9-301(A) (4)<COL>Unperfected security interest subordinate to certain transferees

<COL>9-318(A)<COL>Rights of assignee subject to defenses

<COL>9-318(C)<COL>When account debtor may pay assignor

<COL>9-502<COL>Collection rights of secured party

<COL><COL>

<COL>SECTION<COL>                  GOODS

<COL>9-103<COL>When Article applies with regard to goods of a type normally used in more than one jurisdiction; goods covered by certificate of title; conflict of law rules

<COL>9-105(A) (8)<COL>Definition

<COL>9-109<COL>Classification of goods as consumer goods, equipment, farm products, and inventory

<COL>9-203<COL>Formal requisites of security agreement covering certain types of goods (crops or timber)

<COL>9-204<COL>Validity of after-acquired property clause covering certain types of goods (crops, consumer goods)

<COL>9-205<COL>Permissible for debtor to accept returned goods

<COL>9-206(B)<COL>When security agreement can limit or modify warranties on sale

<COL>9-301(A) (3)<COL>Unperfected security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-304(E)<COL>Perfection of security interest in goods in possession of issuer of negotiable document or of other bailee

<COL>9-305<COL>When possession by secured party perfects security interest

<COL>9-306(E)<COL>Rule when goods whose sale gave rise to account or chattel paper return to seller's possession

<COL>9-307<COL>When buyers of goods from debtor take free of security interest

<COL>9-313<COL>Goods which are or become fixtures

<COL>9-314<COL>Goods affixed to other goods

<COL>9-315<COL>Goods commingled in a product

<COL>9-401(A)<COL>Place of filing for fixtures

<COL>9-402<COL>Form of financing statement covering fixtures

<COL>9-504(A)<COL>Sale of goods by secured party after default subject to Article 2 (Sales)

<COL><COL>

<COL>SECTION<COL> CONSUMER GOODS

<COL>9-109(A)<COL>Definition

<COL>9-203(B)<COL>Transaction

<COL>9-204(B)<COL>Validity of after-acquired property clause against an assignee subject to statute or decision which establishes rule for buyers of consumer goods

<COL>9-206(A)<COL>Buyer's agreement not to assert defenses

<COL>9-302(A) (4)<COL>When filing not required

<COL>9-307(B)<COL>When buyers from debtor take free of security interest

<COL>9-401(A) (1)<COL>Place of filing

<COL>9-505(A)<COL>Secured party's duty to dispose of repossessed consumer goods

<COL>9-507(A)<COL>Secured party's liability for improper disposition of consumer goods after default

<COL><COL>

<COL>SECTION<COL> EQUIPMENT

<COL>9-103(B)<COL>When Article applies with regard to certain types of equipment normally used in more than one jurisdiction; conflict of laws rules

<COL>9-109(B)<COL>Definition

<COL>9-302(A) (3)<COL>When filing not required to perfect security interest in certain farm equipment

<COL>9-307(B)<COL>When buyers of certain farm equipment from debtor take free of security interest

<COL>9-401(A)<COL>Place of filing for equipment used in farming operation

<COL>9-503<COL>Secured party's right after default to remove or to render equipment unusable

<COL><COL>

<COL>SECTION<COL> FARM PRODUCTS

<COL>9-109(C)<COL>Definition

<COL>9-203(A) (2)<COL>Formal requisites of security agreement covering crops

<COL>9-307<COL>When a buyer of farm products takes free of security interest

<COL>9-312(B)<COL>Priority of secured party who gives new value to enable debtor to produce crops

<COL>9-401(A)<COL>Place of filing

<COL>9-402(B)<COL>Form of financing statement covering crops

<COL>and (C)<COL>

<COL><COL>

<COL>SECTION<COL> INVENTORY

<COL>9-103(C)<COL>When Article applies with regard to certain types of inventory normally used in more than one jurisdiction; conflict of laws rules

<COL>9-109(D)<COL>Definition

<COL>9-114<COL>Consigned goods

<COL>9-306(E)<COL>Rule where goods whose sale gave rise to account or chattel paper return to seller's possession

<COL>9-307(A)<COL>When buyers from debtor take free of security interest

<COL>9-312(C)<COL>When purchase money security interest takes priority over conflicting security interest

<COL>9-304(E)<COL>

<COL>9-408<COL>Financing statements covering consigned or leased goods

#### **Cross References**

Sections 9-103 and 9-104.

Point 1: Section 2-326.

Point 2: Section 1-105.

#### **Definitional Cross References**

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Security interest". Section 1-201.

### **Special Plain Language Comment**

Most transfers of personal property and fixtures can be classified as one of the following:

1. Unconditional sales, where the parties intend that the buyer keep the property regardless of whether or not he performs any obligation to the seller. For example, if a store sells a loan of seed to a farmer on credit, without intending to reclaim the seed if the farmer fails to pay the purchase price, that is an unconditional sale.
2. True leases, where the parties intend that the owner/lessor will always regain his property at the agreed time and until that time the property can be used by the borrower/lessee. For example, if an equipment rental company rents a tractor to a farmer for a week, that is a true lease transaction; or
3. Secured transactions, where the parties intend that the property be used as collateral to secure an obligation of the debtor/obligor to the creditor/obligee. For example, if an equipment dealer sells a tractor to a farmer on credit and the farmer agrees that his rights to the tractor become exclusive only when he pays the entire purchase price, that conditional sale is a secured transaction subject to this article 9. Similarly, if a farmer borrows money from a bank in order to buy 10 horses and agrees to use those horses as collateral for the loan, that is also a secured transaction subject to this article.

There are many different types of secured transactions. In most cases, besides true leases, a secured transaction will exist when a debt or other obligation exists between two persons and those parties agree that the property owned or held by the debtor/obligor can be used by the creditor/obligee to satisfy the debt or obligation if the debtor/obligor fails to perform as agreed.

Sales of chattel paper and accounts are treated like secured transactions. See § 9-106 for the definition of accounts and § 9-105 for the definition of chattel paper.

Other laws besides Article 9 may create liens upon the property of a person to secure his obligation to another person. Although such liens are similar in function to Article 9 security interests, this article does not apply to those liens, except that § 9-310 states when those liens have priority over Article 9 security interests in the same property.

When person A is obligated to person B, person B can generally use that obligation of person A as collateral to secure a separate debt or other obligation of person B to person C. In such cases person A generally can be required to perform that obligation in favor of person C. That obligation of person A either may be secured by property of person A or may be unsecured. If an obligation is transferred from one person to another, the security for that

obligation is also transferred. Article 9 will apply to obligations and to security for obligations except to the extent they are excluded by § 9-104.

**§ 9-103. Perfection of security interest in multiple state transactions**

A. Documents, instruments and ordinary goods.

1. This Subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in Subsection (B), mobile goods described in Subsection (C), and minerals described in Subsection (E).

2. Except as otherwise provided in this Subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

3. If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until 30 days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the 30-day period.

4. When collateral is brought into and kept on Navajo Indian Country, while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this article to perfect the security interest:

a. If the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into Navajo Indian Country, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;

b. If the action is taken before the expiration of the period specified in paragraph (4)(a), the security interest continues perfected thereafter;

c. For the purpose of priority over a buyer of consumer goods (§ 9-307(B)), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (4)(a) and (b).

B. Certificate of title.

1. This Subsection applies to goods covered by a certificate of title issued under Navajo law or under a statute of another jurisdiction under the law of which indication of a security interest on the

certificate is required as a condition of perfection.

2. Except as otherwise provided in this Subsection (B), perfection and the effect of perfection or non-perfection of the security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

3. Except with respect to the rights of a buyer described in the next paragraph (4), a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into Navajo Indian Country and thereafter covered by a certificate of title issued under Navajo law is subject to the rules stated in Subsection (A) (4).

4. If goods are brought into Navajo Indian Country while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued under Navajo law and the certificate does not show that the goods are subject to the security interest or that they maybe subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.

5. Unless and until the Navajo Nation Council adopts laws creating a system for the issuance of certificates of title for such goods, perfection of security interests in vehicles and other goods registered under the certificate of title laws of a state of the United States or other jurisdiction shall be governed by such laws.

C. Accounts, general intangibles and mobile goods.

1. This Subsection (C) applies to accounts (other than an account described in Subsection (E) on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in Subsection (B).

2. The law (including the conflict of laws rule) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

3. If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for

perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has his major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions, and the Commonwealth of Puerto Rico, including Navajo Indian Country.

4. A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Code of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

5. A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

#### D. Chattel paper.

The rules stated for goods in Subsection (A) apply to a possessory security interest in chattel paper. The rules stated for accounts in Subsection (C) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account-debtor.

#### E. Minerals

Perfection and the effect of perfection or non-perfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

#### F. Uncertificated securities.

The law (including the conflict of laws rules), of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities.

#### G. Deposit Accounts.

This article governs the perfection of security interests in deposit

accounts of any person or entity which are maintained at any office located in Navajo Indian Country of any depository institution or other business authorized to accept deposits in Navajo Indian Country.

### **History**

CJA-1-86, January 26, 1986.

### **Official Comment**

**Changes.** Except as stated in § 9-103(G), this section is intended to have the same meaning and effect as § 9-103 of the Uniform Commercial Code adopted by the states. Other variations are only for the purposes of clarification or emphasis.

An exception exists under § 9-103(B) for motor vehicle and other goods which are registered under certificates of title laws of other jurisdictions in order to conform to existing practice. As to other persons or entities to whom Navajo law might apply, the Navajo Nation is treated like the States of the United States for the purposes of the § 9-103 choice of law rules.

**Commentary.** 1. The general rules on choice of law between the original parties in § 1-105 apply to this article. However, when conflicting claims to collateral arise, the question depends on perfection of security interests, and thus on the effect of perfection or non-perfection. These problems are dealt with in this section 9-103. The general rule (§ 9-103(A)(2)) is that these questions are governed by the law of the jurisdiction where the collateral is located when the last event occurs on which is based the assertion that the security interest is perfected or unperfected. The event will frequently be the filing. If the last event is not filing and perfection is through filing, the filing required is in the jurisdiction where the collateral is located when the last event occurs; prior filing in another jurisdiction is not effective and is not saved by the four-month rule discussed below, which applies only when the security interest was already perfected in the jurisdiction from which the collateral was removed. If the security interest was perfected in one jurisdiction and then removed to another jurisdiction, maintenance of perfection in the latter jurisdiction or failure to do so is the "last event" to which the basic rule refers.

There are, however, exceptions to this basic rule as stated below:

2. If the parties to a transaction creating a purchase money security interest in goods understand when the security interest attaches that the collateral will be kept in another jurisdiction, the law of that jurisdiction governs perfection and the effect of perfection or non-perfection until thirty (30) days after the debtor receives possession of the goods (§ 9-103(A)(3)). A filing in that jurisdiction perfects the security interest even before the goods are removed. The 30-day period is not a period of grace during which filing is unnecessary or has retroactive effect, but merely states the period during which the other jurisdiction is the place of filing. The effect of late filing is governed by other provisions, such as §§ 9-301 and 9-312.

3. If the goods reach that jurisdiction within the thirty (30) days, the effectiveness of the filing in that jurisdiction continues without

interruption. If the collateral is not kept in that jurisdiction before the end of the 30-day period, Subsection (A)(3) ceases to be applicable and thereafter the law of the jurisdiction where the collateral is located controls perfection. A failure of the collateral to reach the intended destination jurisdiction before the expiration of the 30-day period because of a conflicting claim or otherwise may cause disappointment of expectations that the law of the destination jurisdiction will govern continuously, and caution may dictate filing both in that jurisdiction and in the jurisdiction where the security interest attaches.

This section 9-103 uses the concepts that goods are "kept" in or "brought" into a jurisdiction, and related terms. These concepts imply a stopping place of a permanent nature in the jurisdiction, and not merely transit or storage intended to be transitory.

4. A. Where the collateral is an automobile or other goods covered by a certificate of title issued by any state and the security interest is perfected by notation on the certificate of title, perfection is controlled by the certificate of title rather than by the law of the state wherein the security interest attached (§ 9-103(B)).

B. It has long been hoped that "exclusive certificate of title laws" would provide a sure means of controlling property interests in goods like automobiles which because of their nature cannot readily be controlled by local or statewide filing alone. In theory the certificate of title should control the property interests in the vehicle wherever the vehicle maybe. However, two circumstances operate to prevent the perfect operation of the certificate of title device:

First, some jurisdictions have never adopted certificate of title laws. This results in problems in the issuance of a certificate of title when the vehicle moves from a non-certificate to a certificate state, because the certificate-issuing officer is in no position to conduct a complete search to ascertain the condition of the title in a jurisdiction of origin which requires no filing or in which filing could be in any one or more of several localities. It also seems that when a vehicle moves from a certificate to a non-certificate jurisdiction, the officers issuing a new registration for the vehicle are not always meticulous to notify secured parties shown on the certificate to give them a chance to perfect their security interests in the non-certificate jurisdiction when new registration is issued. Moreover, some vehicles like mobile homes are not always issued certificates even in a jurisdiction which may have certificate laws applicable thereto, because the certificate laws may apply only if the mobile homes use the highways. Registration plates of a mobile home having a certificate could be removed and there would be nothing visible to show that a certificate had ever been issued for it.

Second, various fraudulent devices based on allegations of loss of the certificate of title enable a dishonest person to obtain both an original and a duplicate of title; to have a security interest shown on only one certificate; and then to effect a transfer into a new jurisdiction on the basis of the clean certificate, no matter how diligent the officers in the second jurisdiction may be.

Given these practical problems, the choice of applicable rules of law after

interstate removals of vehicles subject to certificate of title laws is most difficult. This article provides the rules set forth below.

C. The security interest perfected by notation on a certificate of title will be recognized without limit as to time; but, of course, perfection by this method ceases if the certificate of title is surrendered (§ 9-103(B)(2)). Since the secured party ordinarily holds the certificate, surrender thereof could not occur without his action in the matter in some respect. If the vehicle is reregistered in another jurisdiction while the secured party still holds the certificate, a danger of deception to third parties arises. The section provides that the certificate ceases to control after four months following removal if reregistration has occurred, but during the four months the secured party has the same protection for cases of interstate removal as is set forth in § 9-103(A)(4) and Comment 7, subject to additional limitation if the reregistration also involves a new "clean" certificate of title in the removal jurisdiction and a non-professional buyer buys while that new certificate is outstanding. See § 9-103(B)(4) and Comment 4(E).

D. If a vehicle: (a) is not covered by a certificate of title; (b) is removed to a jurisdiction issuing certificates; and (c) a certificate is issued for that vehicle in the new jurisdiction, then the holder of security interest has the same four-month protection subject to the provision discussed in the next Subsection (E) of this comment.

E. Where "this jurisdiction" issues a certificate of title on collateral that has come from another jurisdiction subject to a security interest perfected in any manner, problems will arise if this jurisdiction, from whatever cause, fails to show on its certificate the security interest perfected in the other jurisdiction. The Navajo Nation will have every reason nevertheless, to make its certificate of title reliable to the type of person who most needs to rely upon it. Section 9-103(B)(4) therefore provides that the security interest perfected in the other jurisdiction is subordinate to the rights of a limited class of persons buying the goods while there is a dean certificate of title issued by any authorized official, without knowledge of the security interest perfected in the other jurisdiction. The limited class are buyers who are non-professionals, i.e., not dealers and not secured parties (who are ordinarily professionals). This protective rule does not apply if the Navajo Nation Council (or its authorized official or authority) adopts a device used under some certificate of title laws, namely, stating on the certificate of title that the vehicle may be subject to security interests not shown on the certificate, where the collateral came from a non-certificate jurisdiction. In any event, Navajo law defers to the perfection laws of other jurisdictions issuing certificates of title under § 9-103(B)(5) unless and until the Navajo Nation Council (or another authorized official or authority) creates a comparable mechanism for issuing such certificates of title. However, when and if such a Navajo law is created, the security interest perfected in another jurisdiction would become unperfected unless reperfected under Navajo law within the usual four-month period (§ 9-103(B)(4)).

5. The general rules of the section based on location collateral could not be applied to certain types of intangible collateral which have no location in any realistic sense, or to certain moveable chattels which have no permanent location.

A. For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim, whose endorsement or delivery is the one effectual means of transfer. Since the principal question is where certain financing statements shall be filed, two things become clear: *First*: since the purpose of filing is to allow subsequent creditors of the debtor-assignor to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected in ordinary situation. *Second*: the place chosen must be one which can be determined with the least possible risk of error. The place chosen by § 9-103(C) is the debtor's location, which is ordinarily the location of its chief executive office. This concept is discussed below.

B. Another class of collateral for which a special rule is stated in § 9-103(C) is mobile goods of types which are normally moved for use from one jurisdiction to another. Such goods are generally classified as equipment; sometimes they may be classified as inventory, for example, goods leased by a professional lessor. Subsection 9-103(C) provides that a security interest in such equipment or inventory is subject to this article when the debtor's location, i.e., ordinarily its chief executive office, is in Navajo Indian Country.

While automobiles are obviously mobile goods, they will in most cases be covered by § 9-103(B) of this section and therefore excluded from § 9-103(C) by paragraph (1) thereof. If an automobile is not covered by a certificate of title and is classified as equipment or as inventory under lease, it will be subject to § 9-103(C). Automobiles and other mobile goods which are classified as consumer goods are not subject to § 9-103(C).

The rule of § 9-103(C) applies to goods of a type "normally used" in more than one jurisdiction; there is no requirement that particular goods be in fact used out of state. Thus, if an enterprise whose chief executive office is in Navajo Indian Country keeps in State Y goods of the type covered by § 9-103(C), the rule of Subsection (C) requires filing under Navajo law even though the goods never leave State Y.

C. "Chief executive office" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief executive office" is not defined in this section or elsewhere in this article. Doubt may arise as to which is the "chief executive office" of a multi-state enterprise, but it would be rare that there could be more than two possibilities. A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place. The Subsection states a rule which will be simple to apply in most cases, and which makes it possible to dispense with much burdensome and useless filing.

D. If the location of the debtor is moved after a security interest has been perfected in another jurisdiction, the secured party has four months within which to refile, unless the perfection in the original jurisdiction would have expired earlier (§ 9-103(C)(5)).

E. Under § 9-103(C) each jurisdiction other than that of the debtor's location

in effect disclaims jurisdiction over certain accounts and general intangibles which, by common law rules, might be held to be within its jurisdiction; in the same way there is a disclaimer of jurisdiction over mobile chattels, even though they may be physically located within the jurisdiction much of the time. If the jurisdiction whose law controls under this rule is a United States jurisdiction, the law of that jurisdiction will be recognized in the disclaiming jurisdiction as perfecting the security interest. The jurisdiction of the debtor's location may not, however, have such legislation. Consider, for example, the case where mobile equipment is used in Arizona, but the debtor's chief place of business is in a Mexican jurisdiction which will not permit or recognize filing as to property physically located therein. Section 9-103(C)(3) solves this difficulty by permitting perfection through filing in the jurisdiction in the United States in which the debtor has its major executive office in the United States. Where the debtor is not located in the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the secured party may alternatively perfect by notification to account debtors.

F. A sentence in § 9-103(C)(4) provides a special rule for security interests in airplanes owned by a foreign air carrier. Without that sentence Subsection (C) might refer such a case to the law of a foreign nation whose law is difficult or impossible to ascertain. The sentence clears up such doubts by treating as the location of the carrier the office designated for service of process in the United States under the Federal Aviation Code of 1958. To the extent that it is applicable, the Convention on the International Recognition of Rights in Aircraft (Geneva Convention) supersedes state legislation on this subject, as set forth in § 9-302(C), but some nations are not parties to that Convention.

6. Section 9-103(D) deals with chattel paper, a semi-intangible security interest which may be perfected either by possession or by filing (§§ 9-304(A), and 9-305). As to possessory security, § 9-103(D) provides that chattel paper shall be subject to the same rule as goods in § 9-103(A). As to non-possessory security, § 9-103(D) provides that it shall be subject to the same rule as the intangibles under § 9-103(C), except that notification to the account debtor is ruled out as an optional means of perfection under § 9-103(C)(3), since a different alternative, possession, is available for chattel paper.

7. In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this jurisdiction" (i.e., a destination jurisdiction after removal) adds its own rules requiring removal of collateral other than that described in § 9-103(B), (C), and (E). "This jurisdiction" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four (4) months (§ 9-103(A)(4)). After the four-month period or the remaining period of effectiveness; whichever is shorter, the secured party must comply with perfection requirements under Navajo law. Section 9103(A)(4) proceeds on the theory that not only the secured party whose collateral has been removed, but also creditors of and purchasers from the debtor "in this jurisdiction" should be considered.

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refile in this jurisdiction;

thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. Compare the situation arising under § 9-403(B) when a filing lapses. It should be noted that a "purchaser" includes a secured party. Section 1-201(FF) and (GG)). The rights of a purchaser with a security interest against an unperfected security interest are governed by § 9-312.

In case of delay beyond the four-month period, there is no "relation back". This is also true where the security interest is perfected for the first time in this jurisdiction.

If the removal of property occurs within a short period (like two weeks) before the lapse of the filing in the original state, the secured party has only that period, not the full four months, to reperfect in this "jurisdiction". However, ordinarily the secured party would have filed a continuation statement in the original Jurisdiction, and he may do so to avoid lapse and allow himself the full four months if he is searching for the collateral and needs more time.

Section 9-103(A) (4) does not apply to the case of goods removed from one filing district to another within this jurisdiction (see § 9-401(Q)), but only to property brought into this jurisdiction from another jurisdiction.

8. Section 9-103(E) deals with problems relating to the financing of minerals (including oil and gas) as these products come from the ground. In some cases rights in oil and gas in the ground have been split into a large variety of interests. As the oil or gas issues from the ground, it may be encumbered by the group of persons having interests therein. Alternatively, the product may be sold at minehead or wellhead and the resulting accounts assigned. The question arises as to the place of filing. The usual rule of § 9-103(C) would make the place to search for encumbrances on the accounts the locations of the respective assignors might be a number of individuals located throughout the country. To avoid the difficult problems of search thus created, § 9-103(E) provides that the place for filing with respect to security interests in the mineral as they issue from the ground at minehead or wellhead or in the accounts arising out of the sale of the minerals at minehead or wellhead shall be in the jurisdiction where the minehead or wellhead is located. See § 9-401.

The term "at wellhead" is intended to encompass arrangements based on sale of the product as soon as it issues from the ground and is measured, without technical distinctions as to whether title passes at the "Christmas tree" or the far side of a gathering tank or at some other point. The term "at minehead" is a comparable concept.

Nothing in §§ 9-103 or 9-401 should be construed as purporting to permit security interests in any trust property such as land, minerals, crops or timber (See § 2-107, Comment 2) unless properly approved by the United States Government, 25 U.S.C. § 81 (1984).

#### **Cross References**

Sections 1-105, 9-302 and 9-401.

#### **Definitional Cross References**

"Accounts". Section 9-106.  
"Attaches". Section 9-203.  
"Chattel Paper". Section 9-105.  
"Collateral". Section 9-105.  
"Consumer Goods". Section 9-109.  
"Debtor". Section 9-105.  
"Document". Section 9-105.  
"Equipment". Section 9-109.  
"General intangibles". Section 9-106.  
"Goods". Section 9-105.  
"Instrument". Section 9-109.  
"Purchase money security interest". Section 9-107.  
"Purchaser". Section 1-201(GG).  
"Security interest". Section 1-201(KK).

#### **Special Plain Language Comment**

Since the law of different jurisdictions might be applicable to transaction between parties located in different jurisdictions or to property located in different jurisdictions, it is necessary for the parties and other interested persons to know where to perfect security interests in different types of collateral. Section 9-103 states the "choice of law" rules for determining which jurisdiction's law is to be followed in order to "perfect" a security interest in each type of collateral and to evaluate the effects of perfecting or failing to perfect in that manner.

Section 9-103 describes the rules for determining which jurisdiction's law to consult in order to determine the method, effect and place of perfection of security interests and the consequences of nonperfection.

#### **§ 9-104. Transactions excluded from Article**

This article does not apply:

A. To a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to, and third parties affected by, transactions in particular types of property; or

B. To a landlord's lien; or

C. To a lien given by statute or other rule of law for services or materials except as provided in § 9-310 on priority of such liens; or

D. To a transfer of a claim for wages, salary or other compensation of an employee; or

E. To a transfer by a government or governmental subdivision, official or agency except to the extent that such entity has made an effective waiver of its sovereign immunity in accordance with 7 N.N.C. § 621 *et seq.*; or

F. To a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness; or

G. To a transfer of an interest in or claim in or under any policy of insurance as security for any loan made by the insurance company pursuant to the provision of the policy; or

H. To a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

I. To any right of set-off; or

J. Except to the extent that provision is made for fixtures in § 9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder or to any property held in trust (see § 2-107, Comment 2); or

K. To a transfer in whole or in part of any claim arising out of tort; or

L. To a transfer of an interest in any deposit account (§ 9-105(A)), except as provided with respect to proceeds (§ 9-306) and priorities in proceeds (§ 9-312), and except for deposit accounts maintained in offices in Navajo Indian Country of depository institutions and other businesses authorized to accept deposits in Navajo Indian Country.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** The purpose of § 9-104 is to exclude certain security transactions from this article. Except as stated in § 9-104(E), (G) and (L), this section is intended to have the same meaning and effect as § 9-104 of the Uniform Commercial Code adopted by the states. Section 9-104(E) is altered to comply with 7 N.N.C. § 621 *et seq.* and to allow governmental units to elect to be bound by this article. Section 9-104(G) is expanded from the Official Text (following the lead of California and certain other States) in order to permit insured parties to use their policies as security. The official Text of § 9-

104(L) is modified because (like the California version of the Code) Navajo Indian Country deposit accounts are permitted to be collateral under this article.

**Commentary.** 1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this article. The Ship Mortgage Code, 1920, is an example of such a federal act. The present provisions of the Federal Aviation Code of 1958 (49 U.S.C. Section 1403 *et seq.*) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this article (§ 9-302(C)). However, to the extent that the Federal Aviation Code does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this article.

Although the Federal Copyright Act of 1976 contains provisions permitting the recording of any transfer of copyright (17 U.S.C. Section § 201, 204, 205). The prior copyright law was interpreted as not containing sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this article. *Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles*, 197 F.2d 767 (9th Cir. 1952). The status of secured interests in copyrights under the new statute is not clear. Compare also with respect to patents, 35 U.S.C. Section 47, and trademarks. The filing provisions under these Codes, like the filing provisions of the Federal Aviation Code, are recognized as the equivalent to filing under this article. See § 9-302(C) and (D).

Even such a statute as the Ship Mortgage Code is far from a comprehensive regulation of all aspects of ship mortgage financing. That Code contains provisions on formal requisites, on recordation and on foreclosure but not much more. If problems arise under a ship mortgage which are not covered by the Code, the federal admiralty court must decide whether to improvise an answer under "federal law" or to follow the law of some jurisdiction with which the mortgage transaction has appropriate contacts. The exclusionary language in § 9-104(A) is that this article does not apply to such security interest "to the extent" that the federal statute governs the rights of the parties. Thus, if the federal statute contained no relevant provision, this article could be looked to for an answer.

2. Except for fixtures (§ 9-313), the Article applies only to security interests in personal property. The exclusion of landlord's liens by Subsection (B) and of leases and other interests in or liens on real estate by Subsection (J) merely reiterates the limitations on coverage already made explicit in § 9-102(C). (See Comment 4 to that section.)

3. Section 9-104(C) excludes statutory liens from this article. Section 9-310 states a rule for determining priorities between such liens and the consensual security interests covered by this article.

4. Assignments of wage claims and the like present important social problems whose solution should be a matter of separate local regulation. Section 9-104(D) therefore excludes them from this article.

5. Certain governmental borrowings include collateral in the form of assignments of water, electricity or sewer charges, rents on dormitories or industrial buildings, tools etc. Since these assignments may be governed by special provisions of law, these governmental transfers are excluded from this article, except to the extent that the governmental authority, official or agency has complied with 7 N.N.C. § 621 *et seq.* and thereby elects to become subject to this article.

6. In general, sales as well as security transfers of accounts and chattel paper are within this article (see § 9-102). Section 9-104(F) excludes from the Article certain transfers of such intangibles which, by their nature, have little or nothing to do with commercial financing transactions.

7. Rights under life insurance and other policies are available as collateral except to the extent that the insurance payments secure a loan from the insurer under the policy. Deposit accounts are also available as security if the deposit account is maintained on Navajo Indian Country.

8. The remaining exclusions go to other types of claims which do not customarily serve as commercial collateral: judgments under § 9-104(H), set-offs under Subsection (I) and tort claims under Subsection (K).

#### **Cross References**

Point 1: Section 9-302(C)

Point 2: Sections 9-102(C) and 9-313.

Point 3: Sections 9-102(B) and 9-310.

Point 6: Section 9-102.

#### **Definitional Cross References**

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Deposit account". Section 9-105.

"Party". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

Except for limited types of property excluded by § 9-104 from the Article, this article permits persons and entities to use any type of personal property as collateral. Real estate is always excluded from this article. Fixtures are included in this article except to the extent that they are trust property

subject to regulation by the United States Government. (See § 2-107, Comment 2.)

**§ 9-105. Definitions and index of definitions**

A. In this article unless the context otherwise requires:

1. "Account debtor" means the person who is obligated on an account, deposit account, chattel paper or general intangible;

2. "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

3. "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold;

4. "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both the owner and the obligor where the context so requires.

5. "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization or a similar account maintained with any other type of business which is or becomes authorized to accept such deposits by the law applicable thereto. An account evidenced by a negotiable certificate of deposit is an "instrument" but a non-negotiable certificate of deposit is a deposit account, if such account is maintained in Navajo Indian Country, or a general intangible, if such account is maintained in any other jurisdiction;

6. "Document" means document of title as defined in the general definitions of Article 1 (§ 1-201), and a warehouse receipt issued by a warehouse or other bailee in order to evidence the receipt of goods to be held for the bailor or his assignee;

7. "Encumbrance" includes real estate leases, mortgages and other liens on real estate and all other rights and interests in real estate that are not ownership interests.

8. "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (§ 9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and

removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

9. "Instrument" means a negotiable instrument (defined in § 3-104), or a certificated security (as defined in this section), or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

10. "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like;

11. An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relive him from his obligation;

12. "Security agreement" means an agreement which creates or provides for a security interest;

13. "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders or owners of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party;

14. "Transmitting utility" means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.

B. In this article, unless the context otherwise requires:

1. A "certificate security" is a share, participation or other interest in property of or an enterprise of the issuer or an obligation of the issuer which is:

a. Represented by an instrument issued in bearer or registered form;

b. Of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

c. Either one of a class or series or by its term divisible into a class or series of shares, participations, interests, or obligations.

2. An "uncertificated security" is a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is:

a. Not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer;

b. Of a type commonly dealt in on securities exchanges or markets; and

c. Either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations.

3. A "security" is either a certificated or an uncertificated security. If a security is certificated, the terms "security" and "certificated security" may mean either the intangible interest, the instrument representing that interest, or both, as the context requires. A writing that is a certificated security is governed by this article and not by Article 3, even though it also meets the requirements of that Article. This article does not apply to money. If a certificated security has been retained by or surrendered to the issuer or its transfer agent for reasons other than registration of transfer, other temporary purpose, payment, exchange, or acquisition by the issuer, that security shall be treated as an uncertificated security for purposes of this article.

C. Other definitions applying to this article and the sections in which they appear are:

"Account". Section 9-106.

"Attach". Section 9-203.

"Construction mortgage". Section 9-313(A).

"Consumer goods". Section 9-109(A).

"Equipment". Section 9-109(B).

"Farm products". Section 9-109(C).

"Fixture". Section 9-313(A).

"Fixture filing". Section 9-313(A).

"General intangibles". Section 9-106.

"Inventory". Section 9-109(D).

"Lien creditor". Section 9-301(C).

"Proceeds". Section 9-306(A).

"Purchase money security interest". Section 9-107.

"United States". Section 9-103.

D. The following definitions in other Articles apply to this article:

"Check". Section 3-104.

"Contract for sale". Section 2-106.

"Holder in due course". Section 3-302.

"Note". Section 3-104.

"Sale". Section 2-106.

E. In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** Except as provided in §§ 9-105(A)(1), (5), (6), (9) and Subsection (B), this section is intended to have the same meaning and effect as § 9-105 of the Uniform Commercial Code adopted by the states. Section 9-105(A)(1) is expanded from the Official Text to include deposit accounts. Because of the rapid deregulation of financial services businesses, § 9-105(A)(5) is expanded to include deposit accounts which are similar to bank accounts regardless of the identity of the deposit holder as long as the deposit holder is legally entitled to accept such deposits under applicable law. Although negotiable certificates of deposits are "instruments", non-negotiable certificates of deposit are "deposit accounts", if maintained in Navajo Indian Country, or "general intangibles" if located outside Navajo Indian Country. Sections 9-105(A)(6) and (9) are modified because the Navajo Nation has not adopted Article 7 relating to warehouse receipts or Article 8 relating to investment securities. Subsection (B) incorporates certain definitions found in Article 8 relating to investment securities which the Navajo Nation has not otherwise adopted.

**Commentary.** 1. General. It is necessary to have a set of terms to describe the parties to a secured transaction, the agreement itself, and the property involved therein. This article generally uses terms which are defined in the Uniform Commercial Code adopted by the states.

In place of such terms as "chattel mortgage", "conditional sale", "assignment of accounts receivable", "trust receipt", etc., this article substitutes the general term ("security agreement" defined in § 9-105(A)(12)) in place of "mortgagor", "mortgaged", "conditional vendee", "conditional vendor", etc., this article substitutes "debtor", defined in § 9-105(A)(4), and "secured party", defined in § 9-105(A)(13). The property subject to the security agreement is "collateral", defined in § 9-105(A)(3). The interest in the collateral which is conveyed by the debtor to the secured party is a "security interest", defined in § 1-201(KK).

2. Parties. The parties to the security agreement are the "debtor" and the "secured party".

"Debtor": In all but a few cases the person who owes the debt and the person whose property secures the debt will be the same. Occasionally, one person furnishes security for another's debt, and sometimes property is transferred subject to a secured debt of the transferor which the transferee does not assume. In such cases, under the second sentence of the definition, the term "debtor" may, depending upon the context, include either or both such persons. Section 9-112 sets out special rules which are applicable where collateral is owned by a person who does not owe the debt or obligation that is secured.

"Secured Party": The term includes any person in whose favor there is a security interest (defined in § 1-201). The term is used equally to refer to a person who as a seller retains a lien on or title to goods sold, to a person whose interest arises initially from a loan transaction, and to an assignee of either. Note that a seller is a "secured party" in relation to his customer; but the seller becomes a "debtor" if he assigns the chattel paper as collateral to secure his own debt to a third party. This is also true of a lender who assigns the debt as collateral. With the exceptions stated in § 9-104(F) the Article applies to any sale of accounts or chattel paper: the term "secured party" includes an assignee of such intangibles whether by sale or for security, to distinguish him from the payee of the account, for example, who becomes a "debtor" by pledging the account as security for a loan.

(On the applicability of the terms "debtor" and "secured party" to consignments and leases, see § 9-408 and the Comments thereto.)

"Account debtor": Where the collateral is an account, deposit account, chattel paper or general intangible the original obligor is called the "account debtor". See § 9-105(A)(1).

3. Property subject to the security agreement. "Collateral", defined in Subsection (A)(3) is a general term for the tangible and intangible property subject to a security interest. For some purposes the Code makes distinctions between different types of collateral and therefore further classification of collateral is necessary. Collateral which consists of tangible property is "goods", defined in § 9-105(A)(8); and "goods" are again subdivided in § 9-109. For purposes of this article all intangible collateral fits one of five categories, two of which "accounts", and "general intangibles" are defined in the following § 9-106; the other three, "documents", "instruments" and "chattel paper", are defined in § 9-105(A)(6), (A)(9) and (A)(2).

"Goods": the definition in § 9-105(A)(8) is similar to that contained in § 2-105 except that the Sales Article definition refers to "time of identification to the contract for sale", while this definition refers to "the time the security interest attaches". (See § 9-203).

For the treatment of fixtures, § 9-313 should be consulted. It will be noted that the treatment of fixtures under § 9-313 does not at all points conform to their treatment under § 2-107 (goods to be severed from realty). Section 2-107 relates to sale of such goods; § 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types

of interest covered. A comparable discrepancy exists as to minerals. In the case of timber, both sections treat it as goods if it is to be severed under a contract of sale, but not otherwise.

If in any jurisdiction any minerals before severance are deemed to be personal property, they fall outside the Article's definition of "goods" and would therefore fall into the catch-all definition, "general intangibles", in § 9-106. In that case, the special provisions of § 9-103(E) would not apply and those of § 9-103(C) would apply. The resulting problems should be considered under local law.

For the purpose of this article, goods are classified as "consumer goods", "equipment", "farm products", and "inventory", as those terms are defined in § 9-109. When the general term "goods" is used in this article, it includes, as may be appropriate in the context, those subclasses of goods defined in § 9-109.

"Instrument": the term as defined in § 9-105(A)(9) includes not only negotiable instruments and certificated securities but also any other intangibles evidenced by writings which are in ordinary course of business transferred by delivery. As in the case of chattel paper "delivery" is only the minimum stated and may be accompanied by other steps. If a writing is itself a security agreement or lease with respect to specific goods it is chattel paper and not an instrument, although it otherwise meets the term of the definition of instrument. (See Comment below on "chattel paper".) However, the fact that an instrument is secured by collateral, whether the collateral be other instruments, documents, goods, accounts or general intangibles, does not change the character of the principal obligation as an instrument or convert the combination of instrument and collateral into a separate Code classification of personal property. The single qualification to this principle is that an instrument which is secured by chattel paper is itself part of the chattel paper, while also retaining its identify as an instrument.

"Document": (See the Comments under §§ 1-201(O)).

"Chattel paper": To secure his own financing a secured party may wish to borrow against or sell the security agreement itself along with his interest in the collateral which he has received from his debtor. Since the refinancing of paper secured by specific goods presents some problems of its own, the term "chattel paper" is used to describe this kind of collateral. The Comments under § 9-308 further describe this concept. Thus, chattel paper includes a purchaser's obligation to pay a purchase price and the security agreement granting the seller a security interest in the goods sold to the purchaser, whether the obligation and security agreement are contained in one or more different documents. Similarly, when a lessor wishes to assign a security interest in a lease of goods, the lease collateral is chattel paper. Charters of vessels are excluded from the definition of chattel paper because they fit under the definition of accounts. (See Comment to § 9-106). The term "charter" as used herein and in § 9-106 includes bareboat charters, time charters, successive voyage charters, contracts of affreightment, contracts of carriage, and all other arrangements for use of vessels.

4. The following transactions illustrate the use of the term "chattel paper" and some of the other terms defined in this section. A dealer sells a tractor

to a farmer on conditional sales contract or purchase money security interest. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in § 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment, the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in § 1-201(KK) a lease does not create a security interest unless intended as security. Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

Security agreements of the type formerly known as chattel mortgages and conditional sales contracts are frequently executed in connection with a negotiable note or a series of such notes. Under the definitions in § 9-105(A)(2) and (A)(9) the rules applicable to chattel paper, rather than those relating to instruments, are applicable to the group of writings (contract plus note) taken together.

5. Miscellaneous definitions. "Deposit account" is a type of collateral excluded from this article under § 9-104(L), except when it constitutes proceeds of other collateral under § 9-306 or is maintained in Navajo Indian Country.

The terms "encumbrance" and "mortgage" are defined for use in § 9-313 regarding fixtures.

The term "transmitting utility" is defined to designate a special class of debtors for whom separate filing rules are provided in Part 4, thus obviating all local filing and particularly the several local filings that would be necessary under the usual rules of § 9-401 for the fixture collateral of a far-flung public utility debtor. (See Comments under §§ 9-401 and 9-403).

The term "pursuant to commitment" is defined for use in the rules relating to priority of future advances in §§ 9-301(D), 9-307(C), and 9-312(G).

6. Subsection (B) defines "security", the basic term of this section. Paragraphs (1) and (2) respectively define "certificated security" and "uncertificated security") and paragraph (3) states that the term "security" comprises both. These definitions are functional rather than formal. At the core is the notion that a security is a share or participation in an enterprise or an obligation that is of a type commonly traded in organized markets for such interests or is commonly recognized as a medium for investment. The ambit of the definition will change as "securities" trading practices evolve to include or exclude new property interests. It is believed that the definition will cover anything which securities markets, including not only the organized exchanges but as well the "over-the-counter" markets, are likely to regard as suitable for trading. For example, transferable warrants evidencing rights to

subscribe for shares in a corporation will normally be "certificated securities" within the definition, since they (1) are issued in bearer or registered form, (2) are of a type commonly dealt in on securities markets, (3) constitute a class or series of instruments, and (4) evidence an obligation of the issuer, namely the obligation to honor the warrant upon its due exercise and issue shares accordingly.

Notice that the definition of uncertificated security does not include the phrase "or commonly recognized in any area in which it is issued or dealt in as a medium for investment". Since there is no requirement of representation by an instrument, a great many interests that might be regarded as media for investment would be classified as securities under the umbrella of the omitted phrase. For example, interests such as bank checking and savings accounts are intended to be excluded from the definition because they are not commonly traded; but since those accounts are commonly recognized as media for investment, the omitted language might bring them within the scope of the definition.

Interests such as the stock of closely-held corporations, although they are not actually traded upon securities exchanges, are intended to be included within the definitions of both certificated and uncertificated securities by the inclusion of interests "of a type" commonly traded in those markets. (See Subsections (B) (1) (b) and (B) (2) (b)).

The second sentence of Subsection (B) (3) is intended to eliminate confusion arising from the fact that certificated securities are alternatively viewed as the actual pieces of paper and the interests they represent. The final sentence of Subsection (B) (3) is modified to recognize that an issuer that nominally issues certificated securities but does not normally send the certificates to the owners is functionally identical to the issuer of uncertificated securities and should be guided by the same rules.

7. Comments to the definitions indexed in § 9-105(C) and (D) follow the sections in which the definitions are contained.

#### **Cross References**

Point 2: Sections 9-104(F) and 9-112.

Point 3: Sections 2-105, 2-107, 9-106, 9-109, 9-303 and 9-313.

#### **Definitional Cross References**

"Account". Section 9-106.

"Agreement". Section 1-201.

"Document of title". Section 1-201.

"General intangibles". Section 9-106.

"Holder". Section 1-201.

"Money". Section 1-201.

"Negotiable instrument". Section 3-104.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

"Writing". Section 1-201.

Construction and effect of UCC Art 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper, 30 A.L.R.3d 9 (1970).

#### **Special Plain Language Comment**

This section 9-105 contains the basic definitions which are used in Article 9, as supplemented by the definitions in §§ 9-106, 9-107 and 9-109 and by the general definitions in § 1-201. Each provision in this article must be read carefully in the context of such definitions. Rather than explain such definitions in simpler terms in this comment, the Comments to the substantive portions of this article will be expanded to provide illustrations which demonstrate the use of defined terms.

#### **§ 9-106. Definitions: "account"; "general intangibles"**

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including rights to bring lawsuits and other things in action) other than goods, accounts, deposit accounts, chattel paper, documents, instruments and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-106 of the Uniform Commercial Code adopted by the states, except that non-negotiable certificates of deposit are included as general intangibles pursuant to § 9-105(E), if they are maintained off the Navajo Reservation, and deposit accounts are treated as a separate type of collateral.

**Commentary.** The terms in this section round out the classification of intangibles: see the definitions of "document", "chattel paper" and "instrument" in § 9-105. Those three terms cover the various categories of

commercial paper which are either negotiable or to a greater or less extent dealt with as if negotiable. The term "account" covers most choses in action which maybe the subject of commercial financing transactions but which are not evidenced by an indispensable writing. The term "general intangibles" brings under this article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents, except to the extent that they may be excluded by § 9-104(A). This article solves the problems of filing of security interests in these types of intangibles (§§ 9-103(C) and 9-401). Note that this catch-all definition does not apply to money or to types of intangibles which are specifically excluded from the coverage of the Article (§ 9-104). Note also that under § 9-302 filing under a federal statute may satisfy the filing requirements of this article.

A right to the payment of money is frequently buttressed by ancillary covenants to insure the preservation of collateral, such as covenants in a purchase agreement, note or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve credit-worthiness of the promisor, such as covenants restricting dividends, etc. While these miscellaneous ancillary rights might conceivably be thought to fall within the definition of "general intangibles", it is not the intention of the Code to treat them separately and require the perfection of assignment thereof by filing in the manner required for perfection of an assignment of general intangibles. Whatever perfection is required for the perfection of an assignment of the right to the payment of money will also carry these ancillary rights.

Similarly, when the right to the payment of money is not yet earned by performance, there are frequently ancillary rights designed to assure that an assignee may complete the performance and crystallize the right to payment of money. Such rights are frequently present in a "maintenance" lease, where the lessor has continuing duties to perform, or in a ship charter. These ancillary rights, if considered in the abstract, might be thought to be "general intangibles", since they do not themselves involve the payment of money. However, it is not the intent of the Code to split up the rights to the payment of money and its ancillary supports, and thereby multiply the problem of perfection of assignments. Therefore, all rights of the lessor in a lease are to be perfected as "chattel paper", and all rights of the owner in a ship charter are to be perfected as "accounts".

"Account" is defined as a right to payment for goods sold or leased or services rendered; the ordinary commercial account receivable. In some special cases a right to receive money not yet earned by performance crystallizes not into an account but into a general intangible, for it is a right to payment of money that is not "for goods sold or leased or for services rendered". Examples of such rights are the right to receive payment of a loan not evidenced by an instrument or chattel paper; a right to receive partial refund of purchase prices paid by reason of retroactive volume discounts; rights to receive payment under licenses of patents and copyrights, exhibition contracts, etc.

This article rejects any lingering common law notion that only rights already earned can be assigned. In the triangular arrangement following assignment, there is reason to allow the original parties-assignor and account debtor-more

flexibility in modifying the underlying contract before performance than after performance (see § 9-318). It will, however, be found that in most situations the same rules apply to accounts both before and after performance.

#### **Cross References**

Sections 9-103(B), 9-104, 9-302(C), 9-318 and 9-401.

#### **Definitional Cross References**

"Chattel paper". Section 9-105.

"Contract". Section 1-201.

"Document". Section 9-105.

"Goods". Section 9-105.

"Instrument". Section 9-105.

#### **Special Plain Language Comment**

"Choses" or "things in action" mentioned with respect to general intangibles are basically rights to bring a legal action to enforce an obligation or a claim, although § 9-104 excludes claims other than those for breach of contract and certain related legal theories. General intangibles is thus a "catch-all" category including everything (besides money) which is permitted collateral under this article (see §§ 9-102 and 9-104) and which is not defined in § 9-106 as accounts or in § 9-105 as goods, deposit accounts, chattel paper, documents or instruments.

Comments to the substantive provisions in this article will illustrate meanings of accounts and general intangibles.

#### **§ 9-107. Definitions: "purchase money security interest"**

A security interest is a "purchase money security interest" to the extent that it is:

A. Taken or retained by the seller of the collateral to secure all or part of its price; or

B. Taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-107 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under existing rules of law and under this article purchase money obligations often have priority over other obligations. Thus, a purchase money obligation has priority over an interest acquired under an after-acquired property clause (§ 9-312(C) and (D)). Where filing is required, a grace period of 10 days is allowed against creditors and transferees in bulk (§ 9-301(B)). In some instances filing may not be necessary (§ 9-302(A)(4)).

Under this section a seller has a purchase money security interest if he retains a security interest in the goods. A financing agency has a purchase money security interest when it advances money to the seller, taking back an assignment of chattel paper, and also when the financier advances money to the buyer to enable him to buy the property, and the buyer uses the money for that purpose.

2. When a purchase money interest is claimed by a secured party who is not a seller, he must of course have given present consideration. This section therefore provides that the purchase money party must be one who gives value "by making advances or incurring an obligation"; which quoted language excludes from the purchase money category any security interest taken as security for or in satisfaction of a preexisting claim or antecedent debt.

3. If a secured party wishes he may acquire both a purchase money security interest to secure the purchase money obligation and a regular security interest to secure other obligations. Although some court decisions in other jurisdictions would seem to require separate documentation for each type of security interest, this section permits the same security agreement to create (and the same financing statement to perfect) both types of security interests.

#### **Cross References**

Point 1: Sections 9-301, 9-302, and 9-312.

Point 2: Section 9-108.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Person". Section 1-201.

"Rights". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

A seller can acquire a purchase money security interest to secure the unpaid portion of the price of collateral sold to the buyer. A lender can also acquire a purchase money security interest by loaning the debtor the funds

which he uses to purchase the collateral. However, the lender has to be able to prove that its loan funds were used to pay the purchase price, for example, by using a cashiers or certified check evidencing the loan funds to pay the purchase price to the seller.

Purchase money security interests can have various advantages over regular security interests, including priority under §§ 9-312(C) and (D).

#### **§ 9-108. When after-acquired collateral not security for antecedent debt**

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property, his security interest in the after-acquired collateral shall be deemed to be taken for new value (and not as security for an antecedent debt) if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-108 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Many financing transactions contemplate that the collateral will include both the debtor's existing assets and also assets thereafter acquired by him in the operation of his business. This article generally validates such after-acquired property interests (see § 9-204 and Comment), although they may be subordinated to later purchase money security interests under § 9-312(C) and (D).

Two tests must be met under this section for an interest in after-acquired property to be one not taken for an antecedent debt. First: the secured party must, at the inception of the transaction, have given new value in some form. Second: the after-acquired property must come in either in the ordinary course of the debtor's business or as an acquisition which is made under a contract of purchase entered into within a reasonable time after the giving of new value and pursuant to the security agreement. The reason for the first test needs no comment. The second is in line with limitations which judicial construction has placed on the operation of after-acquired property clauses. Their coverage has been in many cases restricted to subsequent ordinary course acquisitions: this article does not go so far (see § 9-204 and Comment), but it does deny present value status to out of ordinary course of business acquisitions that are not made pursuant to the original loan agreement.

2. The term "value" is defined in § 1-201(RR) and discussed in the accompanying Comment. In this section and in other sections of this article the term "new value" is used but is left without statutory definition. The several illustrations of "new value" given in the text of this section (making an advance, incurring an obligation, releasing a perfected security interest) as

well as the "purchase money security interest" definition in § 9-107 indicate the nature of the concept. In other situations it is left to the courts to distinguish between "new" and "old" value, between present considerations and antecedent debt. As a practical matter, the concept of "new value" will be governed in most cases by the definition of "new value" in 11 U.S.C. § 547(a)(2), which relates to the preference tests under the Bankruptcy Code.

#### **Cross References**

Point 1: Sections 9-204 and 9-312.

Point 2: Section 9-107.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

This article permits the debtor to grant a security interest in collateral which he may acquire in the future. (See § 9-204. This section describes the tests for deciding when that security is acquired for new value or when it is acquired for an old (or "antecedent") debt.)

**§ 9-109. Classification of goods: "consumer goods"; "equipment"; "farm products"; "inventory"**

Goods are:

A. "Consumer goods" if they are regularly used or bought for use for personal, family or household purposes;

B. "Equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

C. "Farm products" if they are crops or livestock or supplies used or

produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wooldip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory; or

D. "Inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service (or if he has so furnished them), or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-109 of the Uniform Commercial Code adopted by the states, except that goods which are regularly used by consumers for their personal, family or household purposes are defined as consumer goods even if they are more often also used for business purposes and that Navajo law apart from this Code may further clarify and regulate the matters relating to consumer goods.

**Commentary.** 1. This section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (§ 9-307), in certain question of priority (§ 9-312), in determining the place of filing (§ 9-40 1) and in working out rights after default (Part 5). Comment 5 to § 9-102 contains an index of the special rules under this Code applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases—a physician's car or a farmer's jeep which might be either consumer goods or equipment—the principal use to which the property is put should be considered as determinative, although under Navajo law, goods which have regular use for personal, family or household purposes will be consumer goods even if they are also regularly used for business purposes by an individual consumer. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder. When goods are owned by a corporation, partnership or other business entity, it is presumed that such goods are not consumer goods.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract of services are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a

stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general, it maybe said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined: however, it is obvious from the text that "farming operations" includes raising livestock as well as crops. Similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in fanning operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this article. At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand, an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical types of equipment. Furthermore, any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

#### **Cross References**

Point 1: Sections 9-102, 9-307, 9-312, 9-401 and Part 5.

Point 3: Section 9-307.

Point 4: Section 9-307.

#### **Definitional Cross References**

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Organization". Section 1-201.

"Person". Section 1-201.

"Sale". Sections 2-106 and 9-105.

#### **Special Plain Language Comment**

This article provides for different rights and obligations to apply to different types of goods. This section describes the tests for classifying goods as "consumer goods", "equipment", "farm products" or "inventory". Those four categories are mutually exclusive, and the same item can only be placed in one category at a time. However, the classification of goods can depend upon their use, and the same item can have a different classification in the hands of different people. For example, a pick-up truck can be "consumer goods" of an individual who uses it for personal transportation, "equipment" of a business that uses it for deliveries, and "inventory" of a truck dealer.

#### **§ 9-110. Sufficiency of description**

For the purposes of this article any description of personal property or real estate is sufficient, whether or not it is specific, if it reasonably identifies what is described.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-110 of the Uniform Commercial Code adopted by the states.

**Commentary.** The requirement of description of collateral (see § 9-203 and Comment thereto) is evidentiary. The test of sufficiency of a description laid down by this section is that the description do the job assigned to it—that it make possible the identification of the thing described. Under this rule it is not essential that descriptions be of the most exact and detailed nature, the so-called "serial number" test. The same test of reasonable identification applies where a description of real estate is required in a financing statement. (See § 9-402). The functional test for the adequacy of a description is whether a third person could determine what the collateral is without an unreasonable amount of difficulty.

#### **Cross References**

Sections 9-203 and 9-402.

### **Special Plain Language Comment**

The collateral must be described in financing statements and security agreements. This section describes the rule for deciding whether a collateral description is adequate. If a financing statement description of collateral is inadequate, then the financing statement is ineffective. If a security agreement description is inadequate, the security agreement may be ineffective, although the Courts can use oral or other evidence in order to resolve ambiguities concerning what collateral the parties intended the agreement to cover and to reform the agreement to be consistent with the intention of the parties.

**§ 9-111. [Omitted]**

#### **History**

CJA-1-86, January 29, 1986.

**§ 9-112. Where collateral is not owned by debtor**

Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral: (i) is entitled to received from the secured party any surplus under § 9-502(B) or under § 9-504(A); (ii) is not liable for the debt or for any deficiency after resale; and (iii) has the same right as the debtor:

A. To receive statements under § 9-208;

B. To receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under § 9-505;

C. To redeem the collateral under § 9-506;

D. To obtain injunctive or other relief under § 9-507(A); and

E. To recover losses caused to him under § 9-208(B).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-112 of the Uniform Commercial Code adopted by the states.

**Commentary.** Under the definition of § 9-105, in any provisions of this article dealing with the collateral the term "debtor" means the owner of the collateral even though he is not the person who owes payment or performance of the obligation secured. For example, if the owner of a corporation grants a security interest in equipment which he owns in order to secure a loan to the corporation, both the owner and the corporation are "debtors", even though the owner has not promised to repay the loan. This section covers several situations in which the implications of this broad definition of "debtor" are

specifically set out.

The duties which this section imposes on a secured party toward such an owner of collateral are conditioned on the secured party's knowledge of the true state of the facts. Short of such knowledge he may continue to deal exclusively with the person who owes the obligation. This section does not suggest that the secured party is under any duty of inquiry. It does not purport to cut across or alter the law of conversion or of ultra vires. Whether a person who does not own property has authority to encumber it for his own debts, and whether a person is free to encumber his property as collateral for the debts of another, are each matters to be decided under other rules of law and are not covered by this section. This section also does not affect any rights which the owner of collateral may have under laws relating to suretyship or guaranties.

This section does not purport to be an exhaustive treatment of the subject. It isolates certain problems which maybe expected to arise and states rules as to them. Others will no doubt arise: their solution is left to the courts.

#### **Cross References**

Sections 9-105, 9-208 and Part 5.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Notice". Section 1-201.

"Person". Section 1-201.

"Receive notice". Section 1-201.

"Right". Section 1-201.

"Secured party". Section 9-105.

#### **Special Plain Language Comment**

This section recognizes that people sometimes grant security interests in their property in order to secure obligations of another person. Although this article refers to both that owner of the collateral and person having the obligation as "debtors", those two types of "debtors" have different rights and obligations. This section describes some of the protections available to the owner of collateral who is not obligated on the obligation secured by that collateral.

#### **§ 9-113. Security interests arising under Article on sales**

A security interest arising solely under the Article on Sales (Article 2) is subject to the provisions of this article, except that to the extent that (and so long as) the debtor does not have or does not lawfully obtain

possession of the goods:

A. No security agreement is necessary to make the security interest enforceable; and

B. No filing is required to perfect the security interest; and

C. The rights of the secured party on default by the debtor are governed by the Article on Sales (Article 2).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-113 of the Uniform Commercial Code adopted by the states.

**Commentary.** 1. Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., §§ 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under §§ 2-703, 2-705 and 2-706, which are similar to the rights of a secured party. Similarly, under such sections as §§ 2-506, 2-707 and 2-711, a financing agency, an agent, a buyer or another person may have a security interest or other right in goods similar to that of a seller. The use of the term "security interest" in the Sales Article is meant to bring the interests so designated within this article. This section makes it clear, however, that such security interests are exempted from certain provisions of this article.

2. The security interests to which this section applies commonly arise by operation of law in the course of a sales transaction. Since the circumstances under which they arise are defined in the Sales Article, there is no need for the "security agreement" defined in § 9-105(A)(12) and required by § 9-203(A), and Subsection (A) dispenses with such requirements. The requirement of filing may be inapplicable under §§ 9-302(A)(1) and (2), 9-304 and 9-305, where the goods are in the possession of the secured party or of a bailee other than the debtor. To avoid difficulty in the residual cases, as for example where a bailee does not receive notification of the secured party's interest until after the security interest arises, Subsection (B) dispenses with any filing requirement. Finally, Subsection (C) makes inapplicable the default provisions of Part 5 of this article, since the Sales Article contains detailed provisions governing stoppage of delivery and resale after breach. (See §§ 2-705, 2-706, 2-707(B) and 2-711(C)).

3. These limitations on the applicability of this article to security interests arising under the Sales Article are appropriate only so long as the debtor does not have or lawfully obtain possession of the goods. A secured party who wishes to retain a security interest after the debtor lawfully obtains possession must comply fully with all the provisions of this article and ordinarily must file a financing statement to perfect his interest. This is the effect of the "except" clause in the preamble to this section. Note that in the case of a buyer who has a security interest in rejected goods under § 2-

711(C), the buyer is the "secured party" and the seller is the "debtor".

4. This section applies only to a "security interest". The definition of "security interest" in § 1-201(KK) expressly excludes the special property interest of a buyer of goods on identification of those goods to a contract under § 2-401(A). The seller's interest after identification and before delivery may be more than a security interest by virtue of explicit agreement under § 2-401(A) or 2-501(A), by virtue of the provisions of § 2-401(B) or (C) or (D), or by virtue of substitution pursuant to § 2-501(B). In such cases, Article 9 is inapplicable by the terms of § 9-102(A)(1).

5. Where there is a "security interest", this section applies only if the security interest arises "solely" under the Sales Article. Thus, § 1-201 (KK) permits a buyer to acquire by agreement a security interest in goods not in his possession or control. Such a security interest does not impair the buyer's rights under the Sales Article, but any rights based on the security agreement are fully subject to this article without regard to the limitations of this section. Similarly, a seller who reserves a security interest by agreement does not lose his rights under the Sales Article, but rights other than those conferred by the Sales Article depend on full compliance with this article.

#### **Cross References**

Point 1: Sections 2-401, 2-505, 2-506, 2-705, 2-706, 2-707 and 2-711(Q).

Point 2: Sections 2-705, 2-706, 2-707(B), 2-711(C), 9-203(A), 9-302(A)(1) and (2), 9-304, 9-305 and Part 5.

Point 3: Section 2-711(C).

Point 4: Sections 2-401, 2-501 and 9-102(A)(1).

#### **Definitional Cross References**

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section reconciles this article 9 with Article 2 which also grants rights which are in some or all respects like security interests. If the seller or his agents still have possession of goods being sold to a buyer, the seller can have numerous rights under Article 2 which are not affected by the requirements of this article 9.

## **§ 9-114. Consignment**

A. A person who delivers goods under a consignment which is not a security interest and who would be required to file under this article by § 2-326(C) (3): (i) has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee; and (ii) also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if:

1. The consignor complies with the filing provision of the Article on Sales with respect to consignments (§ 2-326(C)(3)) before the consignee receives possession of the goods; and

2. The consignor gives notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and

3. The holder of the security interest receives the notification within five (5) years before the consignee receives possession of the goods; and

4. The notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.

B. In the case of a consignment which is not a security interest and in which the requirements of the preceding Subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor, except for artists (see § 2-326).

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-114 of the Uniform Commercial Code adopted by the states except that artists who consign goods have priority over the consignor's creditors.

**Commentary.** 1. This section requires that where goods are furnished to a merchant under the arrangement known as consignment, rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing the goods under an inventory security agreement instead of under a consignment.

For the distinction between true consignment and security arrangements, see § 1-201(MM). For the assimilation of consignments under certain circumstances to goods on sale or return and the requirement of filing in the case of

consignments, see § 2-326.

The requirements of notice in this section conform closely to the concepts and the language of § 9-312(C), which should be consulted together with the relevant Comments thereto.

Except in the limited cases of identifiable cash proceeds received on or before delivery of the goods to a buyer, no attempt has been made to provide rules as to perfection of a claim to proceeds of consignments (compare § 9-306) or the priority thereof (compare § 9-312). It is believed that under many true consignments the consignor acquires a claim for an agreed amount against the consignee at the moment of sale, and does not look to the proceeds of sale. In contrast to the assumption of this article that rights to proceeds of security interests under § 9-306 represent the presumed intent of the parties (compare § 9-203(C)), the Article goes on the assumption that if consignors intend to claim the proceeds of sale, they will do so by expressly contracting for them and will perfect their security interests therein.

#### **Cross References**

Sections 2-326 and 9-312(C).

#### **Definitional Cross References**

"Consignment". Section 1-201(MM).

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Notification". Section 1-201(Z).

"Proceeds". Section 9-306.

"Security interest". Section 1-201(MM).

#### **Special Plain Language Comment**

This section refers to certain arrangements made under Article 2 which are described as "consignments", and reconciles the competing interests of the interested parties in the consigned property. For example, if the owner of a painting delivered the painting to a gallery for sale by the gallery to third parties, the owner can be described as a "consignor" and the gallery can be described as the "consignee". This section describes the rights of the consignor (e.g., the owner of the painting) against the consignee (e.g., the gallery) and its secured creditors.

### **Part 2. Validity of Security Agreement and Rights of Parties Thereto**

#### **§ 9-201. General validity of security agreement**

Except as otherwise provided by applicable law, a security agreement is effective according to its terms between the parties, against purchasers of the

collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, consumer protection, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-201 of the Uniform Commercial Code as adopted by the states, except that this section recognizes that federal and other laws outside this Code can affect the terms of a security agreement.

**Commentary.** This section states the general validity of a security agreement. In general, the security agreement is effective between the parties. It is likewise effective against third parties. Exceptions to this general rule arise where there is a specific provision in any Article of this Code or other applicable law; for example, where Article I invalidates a disclaimer of the obligations of good faith, etc. (§ 1-102(Q)), or this article subordinates the security interest because it has not been perfected (§ 9-301) or for other reasons (see § 9-312 on priorities) or defeats the security interest where certain types of claimants are involved (for example, § 9-307 on buyers of goods). As pointed out in the Comment to § 9-102, there is no intention that the enactment of this article should repeal retail installment selling acts, small loan acts or other consumer protection laws. Nor of course are any applicable usury laws repealed. These are mentioned in the text of § 9-201 as examples of applicable laws, outside this Code entirely, which might invalidate terms of a security agreement.

#### **Cross References**

Sections 1-102(C), 9-301, 9-307 and 9-312.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Party". Section 1-201.

"Purchaser". Section 1-201.

"Security agreement". Section 9-105.

#### **Special Plain Language Comment**

This section recognizes the legal effect of security agreements, which can be affected by other applicable laws.

## **§ 9-202. Title to collateral immaterial**

Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-202 of the Uniform Commercial Code as adopted by the states.

**Commentary.** The rights and duties of the parties to a security transaction and of third parties are stated in this article without reference to the location of "title" to the collateral. Thus, the incidents of a security interest which secures the purchase price of goods are the same under this article whether the secured party appears to have retained title or the debtor appears to have obtained title and then conveyed it or a lien to the secured party. This article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title. Thus, if a revenue law imposes a tax on the "legal" owner of goods, or if a corporation law makes a vote of the stockholders prerequisite to a corporation "giving" a security interest but not if it acquires property "subject" to a security interest, this article does not attempt to define whether the secured party is a "legal" owner or whether the transaction "gives" a security interest for the purpose of such laws. Other rules of law or the agreement of the parties determine the location of "title" for such purposes.

Petitions for reclamation brought by a secured party in his debtor's insolvency proceedings have often been granted or denied on a title theory: where the secured party has title, reclamation will be granted; where he has "merely a lien", reclamation may be denied. (For the treatment of such petitions under this article, see Point 1 of Comment to § 9-507).

### **Cross References**

Sections 2-401 and 2-507.

### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

### Special Plain Language Comment

This section recognizes that a relationship of "debtor" and "secured party" can exist even though the secured party remains the technical owner of the property subject to the right of the debtor-buyer to acquire title to the property when he pays the full purchase price.

#### **§ 9-203. Attachment and enforceability of security interest; proceeds; formal requisites**

A. Subject to the provisions of other applicable laws on the security interest of a collecting bank such rights are governed by § 4-208 of the Uniform Commercial Code, on security interests in securities (since the Navajo Nation has not adopted Article 4 and Article 8 of the Uniform Commercial Code rights which would be governed under those Articles are governed by Navajo law pursuant to 7 N.N.C. § 204) and subject to § 9-113 on a security interest arising under Article 2 on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

1. The collateral is in the possession of the secured party pursuant to an agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;
2. Value has been given; and
3. The debtor has rights in the collateral.

B. A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in Subsection (A) have taken place unless explicit agreement postpones the time of attaching.

C. Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by § 9-306.

D. A transaction, although subject to this division, is subject to other statutes enacted by the Navajo Nation Council. A transaction, although subject to this division, is also subject to certain other statutes of the States. Such statutes are not pre-empted by this Code (although such statutes may be pre-empted by further legislation of the Navajo Nation Council). Unless otherwise agreed in writing the law of the state in which a natural person resides, or in the case of all other entities, the state in which the entity has its principal place of business shall be the governing statutes. Such statutes are those set forth in the following sections of the state statutes: Ariz. Rev. Stat. Ann. § 47-9203(D) in Arizona, N.M. Stat. Ann. § 55-9-203(B) in New Mexico and Utah Code Ann. § 70A-9-203(D) in Utah.

E. In case of conflict between the provisions of this article and any such statutes, the provisions of such statutes control. Failure to comply with any applicable statute has only the effect which is specified therein.

## History

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-203 of the Uniform Commercial Code as adopted by the states, except that Subsection (D) recognizes that statutes of the Navajo Nation Council and certain states may have an effect on this article.

**Commentary.** 1. Subsection (A) states three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing unless the collateral is in the possession of the secured party (including an agent on his behalf—see Comment 2 to § 9-305). When all of these elements exists, the security agreement becomes enforceable between the parties and is said to "attach". Perfection of a security interest (see § 9-303) will in many cases depend on the additional step of filing a financing statement (see § 9-302) or possession of the collateral (§§ 9-304(A) and 9-305). Section 9-301 states who will take priority over a security interest which has attached but which has not been perfected. Subsection (B) states a rule of construction under which the security interest, unless postponed by explicit agreement, attaches automatically when the stated events have occurred.

2. As to the type of description of collateral in a written security agreement which will satisfy the requirements of this section, see § 9-110 and the Comment thereto. In the case of crops growing or to be grown or timber to be cut the best identification is by describing the land, and Subsection (A)(1) requires such a description.

3. One purpose of the formal requisites stated in Subsection (A)(1) is evidentiary. The requirement of a written record minimizes the possibility of future dispute as to the terms of a security agreement and as to what property stands as collateral for the obligation secured. Where the collateral is in the possession of the secured party, the evidentiary need for a written record is much less than where the collateral is in the debtor's possession; customarily, of course, as a matter of business practice the written record will be kept, but, in this article the writing is not a formal requisite. Subsection (A)(1), therefore, dispenses with the written agreement—and thus with signature and description—if the collateral is in the secured party's possession.

4. The definition of "security agreement" (§ 9-105) is "an agreement which creates or provides for a security interest". Under that definition the requirement of this section that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown to have been in fact given as security. Under this article a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgment of satisfaction.

5. The formal requisite of a writing stated in this section is not only a

condition to the enforceability of a security interest against third parties, it is also in the nature of a Statute of Frauds. Unless the secured party or his agent is in possession of the collateral, his security interest, absent a writing which satisfies Subsection (A)(1), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like. If the secured party has advanced money, he is, of course, a creditor and, like any creditor, is entitled after judgment to appropriate process to enforce his claim against his debtor's assets. That secured party will not, however, have against his debtor the rights given a secured party by Part 5 of this article on default. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

6. The provisions of regulatory statutes covering the field of consumer finance prevail over the provisions of this article in case of conflict. Failure to comply with any applicable regulatory statute has whatever effect may be specified in that statute, but no more.

#### **Cross References**

Section 9-113.

Point 1: Section 9-110.

Point 5: Part 5.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

#### **Special Plain Language Comment**

This section describes the fundamental requirements for a security interest to attach to any collateral. Although a written agreement is necessary to create a security interest in collateral not possessed by the secured party or his agent, the security interest requires "value" in order to attach to collateral. The security interest only attaches to the extent of the debtor's interest in the collateral. If the debtor has no interest in particular collateral when he signs a security agreement, no security interest attaches to that collateral until the debtor acquires rights in the collateral to which the security

interest can attach. The timing of the attachment of the security interest can affect the rights of the parties under other provisions of this article.

#### **§ 9-204. After-acquired property; future advances**

A. Except as provided in Subsection (B), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.

B. No security interest attaches under an after-acquired property clause to consumer goods other than accessions (§ 9-314) when given as additional security unless the debtor acquires rights in them within 10 days after the secured party gives value.

C. Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (§ 9-105(A)).

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-204 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Subsection (A) makes clear that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. That is to say: the security interest in after-acquired property is not merely an "equitable" interest; no further action by the secured party—such as the taking of a supplemental agreement covering the new collateral—is required. This does not, however, mean that the interest is proof against subordination or defeat: Section 9-109 should be consulted on when a security interest in after-acquired collateral is not security for antecedent debt, and § 9-312(C) and (D) on when such a security interest may be subordinated to a conflicting purchase money security interest in the same collateral.

2. This article accepts the principle of a "continuing general lien" or a "floating security interest". This article validates a security interest in the debtor's existing and future assets, even though (see § 9-205) the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral. (See further, however, § 9-306 on Proceeds and Comment thereto.)

Notice that the question of assignment of future accounts is treated like any other case of after-acquired property—no periodic list of accounts is required by this Code. Where less than all accounts are assigned, such a list may, of course, be necessary to permit identification of the particular accounts assigned.

3. Subsection (A) also serves to validate the so-called "cross-security" clause

under which collateral acquired at any time may secure advances whenever made or obligations whenever arising.

4. Subsection (B) limits the operation of the after-acquired property clause against consumers. No such interest can be claimed as additional security in consumer goods (defined in § 9-109), except accessions (see § 9-314), acquired more than 10 days after the giving of value.

5. Under Subsection (C) collateral may secure future as well as present, advances or obligations when the security agreement so provides. In line with the policy of this article toward after-acquired property interests that Subsection validates the future advance interest, provided only that the obligation be covered by the security agreement.

The effect of after-acquired property and future advance clauses in the security agreement should not be confused with the use of financing statements in notice filing. The references to after-acquired property clauses and future advance clauses in § 9-204 are limited to security agreements. This section follows § 9-203, the section requiring a written security agreement, and its purpose is to make clear that confirmatory agreements are not necessary where the basic agreement has the clauses mentioned. This section has no reference to the operation of financing statements. The filing of a financing statement is effective to perfect security interests as to which other required elements for perfection exist, whether the security agreement involved is one existing at the date of filing with an after-acquired property clause or a future advance clause, or whether the applicable security agreement is executed later. Indeed, § 9-402(A) expressly contemplates that a financing statement may be filed when there is no security agreement. There is no need to refer to after-acquired property or future advances in the financing statement.

As in the case of interests in after-acquired collateral, a security interest based on future advances or obligations may be subordinated to conflicting interests in the same collateral. See §§ 9-301(D), 9-307(C), 9-312(C), (D) and (G).

#### **Cross References**

Point 1: Sections 9-108 and 9-312.

Point 2: Sections 9-205 and 9-306.

Point 4: Sections 9-109 and 9-314.

Point 5: Sections 9-301(D), 9-307(C), 9-312(C), (D) and (G).

#### **Definitional Cross References**

"Account". Section 9-106.

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Purchase". Section 1-201.

"Pursuant to commitment". Section 9-105.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

Except for consumer goods, a security agreement may grant a security interest in specified collateral, whether then existing or thereafter acquired by the debtor, to secure any or all of the obligations of the debtor to the secured party, whether then existing or thereafter arising.

#### **§ 9-205. Use or disposition of collateral without accounting permissible**

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of an or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-205 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. This article expressly validates the floating charge or lien on a shifting stock. (See §§ 9-201, 9-204, and Comment to § 9-204.) This section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral.

2. While this section does not require a secured party to "police" his

collateral, the filing requirements (§ 9-302) give other creditors the opportunity to ascertain from public sources whether property of their debtor or prospective debtor is subject to secured claims, and the provisions about proceeds (§ 9-306(D)) enable creditors to claim collections which were made by the debtor more than 10 days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings.

3. Nothing in § 9-205 prevents such "policing" or dominion as the secured party and the debtor may agree upon. Business and not legal reasons win determine the extent to which strict accountability, segregation of collections, daily reports and the like will be employed.

4. The last sentence is added to make clear that this section does not mean that the holder of an unfiled security interest, whose perfection depends on possession of the collateral by the secured party or by the bailee (such as a field warehouseman), can allow the debtor access to and control over the goods without thereby losing his perfected interest. The rules on the degree and extent of possession which are necessary to perfect a pledge interest or to constitute a valid field warehouse are not relaxed by this or any other Section of this article.

#### **Cross References**

Point 1: Sections 9-201 and 9-204.

Point 2: Sections 9-302 and 9-306(D).

Point 4: Sections 9-304 and 9-305.

#### **Definitional Cross References**

"Account". Section 9-106.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section clarifies the fact that the secured parties legal rights are generally not impaired by his failure to control the debtor's use or disposition of the collateral.

**§ 9-206. Agreement not to assert defenses against assignee; modification of sales warranties where security agreement exists**

A. Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

B. When a seller retains a purchase money security interest in goods, the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-206 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Clauses are frequently inserted in installment purchase contracts under which the conditional vendee agrees not to assert defenses against an assignee of the contract. Under Subsection (A) such clauses in a security agreement are validated outside the consumer field, but only as to defenses which could be cut-off if a negotiable instrument were used. This limitation is important, since if the clauses were allowed to have full effect as typically drafted, they would operate to cut-off real as well as personal defenses. The execution of a negotiable note in connection with a security agreement is given like effect as the execution of an agreement containing a waiver of defense clause. The same rules are made applicable to leases as to security agreements, whether or not the lease is intended as security.

2. This article takes no position on the controversial question whether a buyer of consumer goods may effectively waive defenses by contractual clause or by execution of a negotiable note. This article neither adopts nor rejects the approach taken in such statutes and decisions, except that the validation of waivers in Subsection (A) is expressly made "subject to any statute or decision" which may restrict the waiver's effectiveness in the case of a buyer of consumer goods.

3. Subsection (B) makes clear that purchase money security transactions are sales, and warranty rules for sales are applicable. It also prevents a buyer from inadvertently abandoning his warranties by a "no warranties" term in the security agreement when warranties have already been created under the sales arrangement. Where the sales arrangement and the purchase money security transaction are evidenced by only one writing, that writing may disclaim, limit or modify warranties to the extent permitted by Article 2.

### **Cross References**

Point 1: Section 3-305.

Point 2: Section 9-203(B).

Point 3: Section 2-102 and 2-316.

### **Definitional Cross References**

"Agreement". Section 1-201.

"Consumer goods". Section 9-109.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Section 3-104.

"Notice". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

### **Special Plain Language Comment**

This section discusses the extent to which a seller or lessor can include waivers in his contract which enable his successor by assignment to enforce the contract even though the buyer or lessee would otherwise have a defense to such enforcement by the seller or lessor personally.

#### **§ 9-207. Rights and duties when collateral is in secured party's possession**

A. A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed in writing.

B. Unless otherwise agreed in writing, when collateral is in the secured party's possession:

1. Reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;

2. The risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;

3. The secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

4. The secured party must keep the collateral identifiable, but fungible collateral may be commingled; and

5. The secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.

C. A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding Subsections, but does not lose his security interest.

D. A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-207 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Subsection (A) states the duty to preserve collateral imposed on a pledge. In many cases a secured party having collateral in his possession may satisfy this duty by notifying the debtor of any act which must be taken and allowing the debtor to perform such act himself. If the secured party himself takes action, his reasonable expenses may be added to the secured obligation.

Under § 1-102(C) the duty to exercise reasonable care may not be disclaimed by agreement, although under that section the parties remain free to determine by agreement, in any manner not manifestly unreasonable, what shall constitute reasonable care in a particular case.

2. Subsection (B) states rules which apply, unless there is written agreement otherwise, in typical situations during the period while the secured party is in possession of the collateral.

3. The right of a secured party holding instruments or documents to have them

endorsed or transferred to him or his order is dealt with in the relevant sections of Article 3 (Commercial Paper).

4. This section applies when the secured party has possession of the collateral before default, as a pledgee, and also when he has taken possession of the collateral after default. (See §§ 9-501(A) and (B) and 9-503.) Subsection (D) permits operation of the collateral in the circumstances stated, and Subsection (B)(1) authorizes payment of or provision for expenses of such operation. Agreements providing for such operation are common in trust indentures securing corporate bonds and are particularly important when the collateral is a going business. Such an agreement cannot, of course, disclaim the duty of care established by Subsection (A), nor can it waive or modify the rights of the debtor contrary to § 9-501(C).

#### **Cross References**

Point 1: Section 1-102(C).

Point 3: Section 3-201.

Point 4: Section 9-501(B) and Part 5.

#### **Definitional Cross References**

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Instrument". Section 9-105.

"Money" Section 1-201.

"Party". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section describes certain rights and obligation of a secured party when he has possession of the collateral. To a limited extent these rights and obligations may be altered by agreement.

#### **§ 9-208. Request for statement of account or list of collateral**

A. A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral, a debtor may similarly request the secured party to approve or correct a list of the collateral.

B. The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor, the secured party may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply, he is liable for any loss caused to the debtor thereby, and; if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both, the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If the secured party no longer has an interest in the obligation or collateral at the time the request is received, he must disclose the name and address of any successor in interest known to him, and he is liable for any loss caused to the debtor as a result of any failure to so disclose. A successor in interest is not subject to this section until a request is received by him.

C. A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10.00) for each additional statement furnished.

D. If the secured party is an organization maintaining branches or branch offices, the requests provided for herein shall be sent to the branch or office at which the secured transaction was entered into or at which the debtor is permitted or required to pay his obligation. Unless the secured party shall otherwise so specify in his statement, the secured party's statement shall be deemed to apply only to obligations entered into or payable at such branch or office and to any collateral taken at such branch or office. If such branch or office is closed before such a statement is issued, the secured party's obligations are not limited to any branch or office.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-208 of the Uniform Commercial Code as adopted by the states, except that Subsection (D) has been added in order to clarify the obligations of a secured party with multiple branches or offices in a manner similar to the version of the Code adopted in California and certain other states.

**Commentary.** 1. The purpose of this section is to provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

2. The financing statement required to be filed under this article (see § 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement, third parties are told neither the amount of the obligation secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under

which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only when his own records identify the collateral and that, if he claims all of a particular type of collateral owned by the debtor, he is not required to approve an itemized list.

#### **Cross References**

Point 2: Section 9-402.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Good faith". Section 1-201.

"Know". Section 1-201.

"Person". Section 1-201.

"Receive". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Written". Section 1-201.

#### **Special Plain Language Comment**

The section creates a mechanism which the debtor may use to check on the status of his transaction with the secured party or to obtain proof of that status for other creditors or persons.

### **Part 3. Rights of Third Parties; Perfected and Unperfected Security Interests; Rules of Priority**

**§ 9-301. Persons who take priority over unperfected security interests; rights of "lien creditor"**

A. Except as otherwise provided in Subsection (B), an unperfected security interest is subordinate to the rights of:

1. Persons entitled to priority under § 9-312;

2. A person who becomes a lien creditor before the security interest is perfected;

3. In the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interests and before it is perfected;

4. In the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that gives value without knowledge of the security interest and before it is perfected.

B. If the secured party files with respect to a purchase money security interest before or within 10 days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or other buyer out of the ordinary course of business or of a lien creditor which arise between the time the security interest attaches and the time of filing.

C. A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

D. A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he or she becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-301 of the Uniform Commercial Code as adopted by the states, except to the extent buyers of farm products are given greater protection under § 9-307 of this Code, which protection is recognized in this section 9-301.

**Commentary.** 1. This section lists the classes of persons who take priority over an unperfected security interest. As in § 547 of the Federal Bankruptcy Code, the term "perfected" is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors. A security interest is "perfected" when the secured party has taken whatever steps are necessary to give him such a perfected interest. These

steps are explained in the five following sections (9-302 through 9-306).

2. Section 9-312 states general rules for the determination of priorities among conflicting security interests and in addition refers to other sections which state special rules of priority in a variety of situations. The interests given priority under § 9-312 and the other sections therein cited take such priority in general even over a perfected security interest. Therefore, perfected and other priority interests also take priority over an unperfected security interest, and Subsection (A) (1) of this section so states.

3. Subsection (A) (2) provides that an unperfected security interest is subordinate to the rights of lien creditors. The section subordinates the unperfected security interest, but does not subordinate the secured debt to the competing lien.

4. Subsections (A) (3) and (A) (4) deal with purchasers (other than secured parties) of collateral who would take subject to a perfected security interest but who are by these Subsections given priority over an unperfected security interest. In the cases of goods and of intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (instruments, documents and chattel paper) the purchaser who takes priority must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection (Subsection (A) (3)). Thus, even if the purchaser gave value without knowledge and before perfection, he would take subject to the security interest if perfection occurred before physical delivery of the collateral to him. The Subsection (A) (3) rule is obviously not appropriate where the collateral consists of intangibles and there is no representative piece of paper whose physical delivery is the only or the customary method of transfer. Therefore, with respect to such intangibles (accounts and general intangibles), Subsection (A) (4) gives priority to any transferee who has given value without knowledge and before perfection of the security interest.

The term "buyer in ordinary course of business" referred to in Subsection (A) (3) is defined in § 1-201(1).

Other secured parties are excluded from Subsections (A) (3) and (A) (4) because their priorities are covered in § 9-312 (see point 2 of this comment).

5. Except to the extent provided in Subsection (B), this article does not permit a secured party to file or take possession after another interest has received priority under Subsection (A) and thereby protect himself against the intervening interest. Subsection (B) gives a grace period for perfection by filing as to purchase money security interests only (as defined in § 9-107). The grace period runs for ten (10) days after the debtor receives possession of the collateral, but operates to cut off only the interests of intervening lien creditors, bulk purchasers or other buyers out of the ordinary course of business.

6. Subsection (D) deals with the question whether advances under an existing security interest in collateral, made after rights of lien creditors have attached to that collateral, will take precedence over rights of lien creditors. (See related problems in §§ 9-307(C) and 9-312(G)). In this section, because of the impact of the rule chosen on the question whether the

security interest for future advances is "protected" under § 6323(3)(2) and (4) of the Internal Revenue Code as amended by the Federal Tax Lien Code of 1966, the priority of the security interest for future advances over a judgment lien is made absolute for 45 days, regardless of knowledge of the secured party concerning the judgment lien. If, however, the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien obtain by legal proceedings. The importance of the rule chosen for actual conflicts between secured parties making subsequent advances and judgment lien creditors may not be great; but the rule chosen for the first 45 days is important in effectuating the intent of the Federal Tax Lien Code of 1966.

#### **Cross References**

Section 9-312.

Point 1: Sections 9-302 through 9-306.

Point 6: Sections 9-204, 9-307(C) and 9-312(G).

#### **Definitional Cross References**

"Account". Section 9-106.

"Buyer in ordinary course of business". Section 1-201.

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Delivery". Section 1-201.

"Document". Section 9-105.

"General intangibles". Section 9-106.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

This section describes the priorities between unperfected security interests (i.e., those where the secured party has not filed required financing statement or complied with requirements for taking possession of collateral or for giving notice to third parties in possession) and competing liens and interests in the collateral.

#### **§ 9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply**

A. A financing statement must be filed to perfect all security interests except the following:

1. A security interest in collateral in possession of the secured party under § 9-305;

2. A security interest temporarily perfected in instruments or documents without delivery under § 9-304 or in proceeds for a 10-day period under § 9-306;

3. A security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

4. A purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered by applicable law; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in § 9-313;

5. An assignment of accounts which does not alone (or in conjunction with other assignments to the same assignee) transfer a significant part of the outstanding accounts of the assignor;

6. A security interest of a collecting bank or arising under the Article on Sales (see § 9-113) or covered in Subsection (C) of this section;

7. An assignment for the benefit of A the creditors of the transferor, and subsequent transfers by the assignee thereunder;

8. A security interest in a deposit account, which interest is perfected instead: (i) automatically upon the execution of the security agreement when the deposit account is maintained with the secured party; and (ii) when notice thereof is given in writing to the organization with whom the deposit account is maintained (if different than the secured party); and

9. A security interest in or claim under any policy of insurance,

including unearned premiums, which interest is perfected instead when notice thereof is given in writing to the insurer.

B. If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

C. The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to:

1. A statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interest; or

2. Any Navajo law which provides for the registration of title or liens on motor vehicles or other personal property, but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (Part 4) apply to a security interest in that collateral created by him as debtor; or

3. A certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (§ 9-103(B)).

D. Compliance with a statute or treaty described in Subsection (C) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in § 9-103 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-302 of the Uniform Commercial Code as adopted by the states, except that this section makes certain adjustments because this Code does not presently include Article 4 or 8 of the Uniform Commercial Code and because this Code follows the approach taken in California to the perfection of security interests in deposit accounts and insurance policies.

**Commentary.** 1. Subsection (A) states the general rule that to perfect a security interest under this article a financing statement must be filed. Subsections (A) (1)(A) (9) exempt from the filing requirement the transactions described. Subsection (C) further sets out certain transactions to which the

filing provisions of this article do not apply, but it does not defer to another statute on the filing of inventory security interests. The cases recognized are those where suitable alternative systems for giving public notice of a security interest are available. Subsection (D) states the consequences of such other form of notice.

Section 9-303 states the time when a security interest is perfected by filing or otherwise. Part 4 of the Article deals with the mechanics of filing: place of filing, form of financing statement and so on.

2. There is no requirement of filing when the secured party has possession of the collateral in a pledge transaction (Subsection (A)(1)). Section 9-305 should be consulted on what collateral may be pledged and on the requirements of possession.

3. Under this article, filing is not effective to perfect a security interest in instruments. (See § 9-304(A)).

4. Where goods subject to a security interest are left in the debtor's possession, the only permanent exception from the general filing requirement is that stated in Subsection (A)(4): purchase money security interests in consumer goods. For temporary exceptions, see §§ 9-304(E)(1) and 9-306.

Although the security interests described in Subsection (A)(4) are perfected without filing, § 9-307(B) provides that unless a financing statement is filed certain buyers may take free of the security interest even though perfected. See that section and the Comment thereto.

On filing for security interests in motor vehicles under certificate of title laws, see Subsection (C) of this section.

5. A financing statement must be filed to perfect a security interest in accounts except for the transactions described in Subsection (A)(5) and (7). It should be noted that this article applies to sales of accounts and chattel paper as well as to transfers thereof for security (§ 9-102(A)(2)); the filing requirement of this section applies both to sales and to transfers thereof for security. This article adopts that filing requirement, on the theory that there is no valid reason why public notice is less appropriate for assignments of accounts than for any other type of nonpossessory interest. Section 9-305, furthermore, excludes accounts from the types of collateral which may be the subject of a possessory security interest: filing is thus the only means of perfection contemplated by this article. See § 9-306 on accounts as proceeds.

The purpose of the Subsection (A)(5) exemption is to save from ex post facto invalidation casual or isolated assignments. Any person who regularly takes assignments of any debtor's accounts should file. In this connection § 9-104(F) which excludes certain transfers of accounts from the Article should be consulted.

Assignments of interests in trusts and estates are not required to be filed because they are often not thought of as collateral comparable to the types dealt with by this article. Assignments for the benefit of creditors are not required to be filed because they are not financing transactions and the debtor will not ordinarily be engaging in further credit transactions.

6. With respect to the Subsection (A)(6) exemptions, see the sections cited therein and Comments thereto.

7. The following example will explain the operation of Subsection (B): Buyer buys goods from Seller who retains a security interest in them which he perfects. Seller assigns the perfected security interest to X. The security interest, in X's hands and without further steps on his part, continues perfected against Buyer's transferees and creditors. If, however, the assignment from Seller to X was itself intended for security (or was a sale of accounts or chattel paper), X must take whatever steps may be required for perfection in order to be protected against Seller's transferees and creditors.

8. Subsection (C) exempts from the filing provisions of this article transactions as to which an adequate system of filing, Navajo, state or federal, has been set up outside this article and Subsection (D) makes clear that when such a system exists perfection of a relevant security interest can be had only through compliance with that system (i.e., filing under this article is not a permissible alternative). Examples of the type of federal statute referred to in Subsection (C)(1) are the provisions of 17 U.S.C. §§ 28, 30 (copyrights), 49 U.S.C. § 1403 (aircraft), 49 U.S.C. § 20(3) (railroads). The Assignment of Claims Code of 1940, as amended, provides for notice to contracting and disbursing officers and to sureties on bonds but does not establish a national filing system and therefore is not within the scope of Subsection (C)(1). An assignee of a claim against the United States, who must of course comply with the Assignment of Claims Code, must also file under this article in order to perfect his security interest against creditors and transferees of his assignor.

Some states have enacted central filing statutes with respect to security transactions in kinds of property which are of special importance in the local economy. Subsection (C) adopts such statutes as the appropriate filing system for such property.

In addition to such central filing statutes many states have enacted certificates of title laws covering motor vehicles and the like. Subsection (C) exempts transactions covered by such laws from the filing requirements of this article. For a discussion of the operation of state motor vehicle certificate of title laws in interstate contexts, see Comment 4 to § 9-103.

9. Perfection of a security interest under a state or federal statute of the type referred to in Subsection (C) has all the consequences of perfection under the provisions of this article, Subsection (D).

#### **Cross References**

Point 1: Section 9-303 and Part 4.

Point 2: Section 9-305.

Point 3: Section 9-304(A).

Point 4: Section 9-307(B).

Point 5: Section 9-102(A)(2), 9-104(F) and 9-305.

Point 6: Section 9-113.

#### **Definitional Cross References**

"Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Delivery". Section 1-201.

"Document". Section 9-105.

"Equipment". Section 9-109.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Instrument". Section 9-105.

"Inventory". Section 9-109.

"Proceeds". Section 9-306.

"Purchase". Section 1-201.

"Purchase money security interest". Section 9-107.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section describes when it is not necessary to file a financing statement in order to perfect a security interest in particular types of collateral. In certain cases, alternative methods of perfection are stated.

#### **§ 9-303. When security interest is perfected; continuity of perfection**

A. A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in §§ 9-302, 9-304, 9-305, and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

B. If a security interest is originally perfected in any way permitted under this article and is subsequently perfected in some other way under this article, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-303 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. The term "attach" is used in this article to describe the point at which property becomes collateral subject to a security interest. The requisites for attachment are stated in § 9-203. When it attaches a security interest may be either perfected or unperfected. "Perfected" means that the secured party has taken all the steps required by this article as specified in the several sections listed in Subsection (A). A perfected security interest may still be or become subordinate to other interests (see § 9-312), but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor. Subsection (A) states the truism that the time of perfection is when the security interest has attached and any necessary steps for perfection (such as taking possession or filing) have been taken. If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches.

2. The following example will illustrate the operation of Subsection (B): A bank which has issued a letter of credit honors drafts drawn under the credit and receives possession of the negotiable bill of lading covering the goods shipped. Under §§ 9-304(B) and 9-305 the bank now has a perfected security interest in the document and the goods. The bank releases the bill of lading to the debtor for the purpose of procuring the goods from the carrier and selling them. Under § 9-304(E) the bank continues to have a perfected security interest in the document and goods for 21 days. The bank files a financing statement before the expiration of the 21-day period. Its security interest now continues perfected for as long as the filing is good. The goods are sold by the debtor. The bank continues to have a security interest in the proceeds of the sale to the extent stated in § 9-306.

If the successive stages of the bank's security interest succeed each other without an intervening gap, the security interest is "continuously perfected" and the date of perfection is when the interest first became perfected (i.e., in the example given, when the bank received possession of the bill of lading against honor of the drafts). If, however, there is a gap between stages—for example, if the bank does not file until after the expiration of the 21-day period specified in § 9-304(E), the collateral still being in the debtor's possession—then, the chain being broken, the perfection is no longer

continuous. The date of perfection would now be the date of filing (after expiration of the 21-day period); the bank's interest might now become subject to attack under § 547 of the Federal Bankruptcy Code and would be subject to any interests arising during the gap period which under § 9-301 take priority over an unperfected security interest.

The rule of Subsection (B) would also apply to the case of collateral brought into this jurisdiction subject to a security interest which become perfected in another state or jurisdiction. See § 9-103(A)(4).

#### **Cross References**

Sections 9-302, 9-304, 9-305 and 9-306.

Point 1: Sections 9-204 and 9-312.

Point 2: Sections 9-103(A)(4) and 9-301.

#### **Definitional Cross References**

"Attach". Section 9-203.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section deals with the consequences of changes in circumstances which may cause a "perfected" security interest to become "unperfected" without further action by one or both of the parties.

#### **§ 9-304. Perfection of security interest in instruments, documents and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession**

A. A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in Subsections (D) and (E) of this section and § 9-306(B) and (C) on proceeds.

B. During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

C. A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.

D. A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.

E. A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor:

1. Makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to § 9-312(C); or

2. Delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

F. After the 21-day period in Subsections (D) and (E) perfection depends upon compliance with applicable provisions of this article.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-304 of the Uniform Commercial Code as adopted by the states, except as to certain adjustments which were necessary because this Code does not contain an Article 8 of the Uniform Commercial Code regarding certificated securities.

**Commentary.** 1. For most types of property, filing and taking possession are alternative methods of perfection. For some types of intangibles (i.e., accounts and general intangibles) filing is the only available method (see § 9-305 and Point 1 of Comment thereto). With respect to instruments Subsection (A) provides that, except for the cases of "temporary perfection" covered in Subsections (D) and (E), taking possession is the only available method of perfection. That rule is based on the thought that where the collateral consists of instruments, it is universal practice for the secured party to take possession of them in pledge; any surrender of possession to the debtor is for a short time; therefore it would be unwise to provide the alternative of perfection for a long period by filing which, since it in no way corresponds with commercial practice, would serve no useful purpose. For similar reasons, filing is not permitted as to money.

Subsection (A) further provides that filing is available as a method of perfection for security interests in chattel paper and negotiable documents, which also come within § 9-305 on perfection by possession. Chattel paper is sometimes delivered to the assignee, sometimes left in the hands of the assignor for collection; Subsection (A) allows the assignee to perfect his interest by filing in the latter case. Negotiable documents may be, and usually are, delivered to the secured party, and Subsection (A) allows an alternative method of perfection. Perfection of an interest in goods through a non-negotiable document is covered in Subsection (C).

2. Subsection (B) takes the position that, so long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document, and the proper way of dealing with such goods is through the document. Perfection therefore is to be made with respect to the document and, when made, automatically, carries over to the goods. Any interest perfected directly in the goods while the document is outstanding (for example, a chattel mortgage type of security interest on goods in a warehouse) is subordinated to an outstanding negotiable document.

3. Subsection (C) takes a different approach to the problem of goods covered by a non-negotiable document or otherwise in the possession of a bailee who has not issued a negotiable document. Here title to the goods is not looked on as being locked up in the document, and the secured party may perfect his interest directly in the goods by filing as to them. The Subsection states two other methods of perfection: issuance of the document in the secured party's name (as consignee of a straight bill of lading or the person to whom delivery would be made under a non-negotiable warehouse receipt), and receipt of notification of the secured party's interest by the bailee which, under § 9-305, is looked on as equivalent to taking possession by the secured party.

4. Subsections (D) and (E) give perfected status to security interests in instruments and documents for a short period although there has been no filing and the collateral is in the debtor's possession. There are a variety of legitimate reasons—some of them are described in Subsections (E)(1) and (E)(2)—why such collateral has to be temporarily released to a debtor, and no useful purpose would be served by cluttering the files with records of such exceedingly short term transactions. Under Subsection (D) the 21-day perfection runs from the date of attachment. There is no limitation on the purpose for which the debtor is in possession, but the secured party must have given new value under a written security agreement. Under Subsection (E) the 21-day perfection runs from the date a secured party who already has a perfected security interest turns over the collateral to the debtor (an example is a bank which has acquired a bill of lading by honoring drafts drawn under a letter of credit and subsequently turns over the bill of lading to its customer). There is no new value requirement, but the turnover must be for one or more of the purposes stated in Subsections (E)(1) and (E)(2). Note that while Subsection (D) is restricted to instruments and negotiable documents, Subsection (E) extends to goods covered by non-negotiable documents as well. Thus, the letter of credit bank referred to in the example could make a Subsection (E) turn-over without regard to the form of the bill of lading, provided that, in the case of a non-negotiable document, it had previously perfected its interest under one of the methods stated in Subsection (C). But note that the discussion of Subsection (E) in this comment deals only with perfection. Priority of a security interest in inventory after surrender of the document depends on compliance with the requirements of § 9-312(C) on notice to prior inventory financier.

Finally, it should be noted that the 21 days applies only to the documents and to the goods obtained by surrender thereof. If the goods are sold, the security interest will continue in proceeds for only 10 days under § 9-306, unless a further perfection occurs as to the security interest in proceeds.

#### **Cross References**

Sections 9-302, 9-305 and 9-312(C).

#### **Definitional Cross References**

"Chattel paper". Section 9-105.

"Debtor". Section 9-105.

"Document". Section 9-105.

"Goods". Section 9-105.

"Instrument". Section 9-105.

"Receives" notification. Section 9-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201

"Value". Section 1-201.

"Written". Section 1-201.

#### **Special Plain Language Comment**

This section describes the means for handling and perfecting collateral in the form of "instruments", "chattel paper", "documents", and goods covered by "documents". Among other things, the section describes how the secured party handles goods which are in the possession of warehousemen or other "bailees" who issue either a "negotiable" or "non-negotiable" document which represents rights with respect to the goods in his possession.

#### **§ 9-305. When possession by secured party perfects security interest without filing**

A security interest in letters of credit and advices of credit, goods, instruments, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest maybe otherwise perfected as provided in this article before or after the period of possession by the secured party.

#### **History**

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-305 of the Uniform Commercial Code as adopted by the states, except for the adjustment for certificated securities which are treated like other instruments because this Code does not presently include Article 8 of the Uniform Commercial Code.

**Commentary.** 1. As under the common law of pledge, no filing is required by this article to perfect a security interest where the secured party has possession of the collateral. (Compare § 9-302(A)(1)). This section permits a security interest to be perfected by transfer of possession only when the collateral is goods, instruments, documents or chattel paper: that is to say, accounts and general intangibles are excluded. A security interest in accounts and general intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the claim—may under this article be perfected only by filing, and this rule would not be affected by the fact that a security agreement or other writing described the assignment of such collateral as a "pledge". Section 9-302(A)(5) exempts from filing certain assignments of accounts which are out of the ordinary course of financing: such exempted assignments are perfected when they attach under § 9-303(A); they do not fall within this section.

2. Possession may be by the secured party himself or by an agent on his behalf. It is, of course, clear, however, that the debtor or person controlled by him cannot qualify as such an agent for the secured party. See also the last sentence of § 9-205. Where the collateral (except for goods covered by a negotiable document) is held by a bailee, the time of perfection of the security interest, under the second sentence of the section, is when the bailee receives notification of the secured party's interest. It is not necessary for the bailee to attorn to the secured party or acknowledge that the bailee now holds on behalf of the secured party.

3. The third sentence of this section rejects the "equitable pledge" theory of relation back, under which the taking possession was deemed to relate back to the date of the original security agreement. Where a pledge transaction is contemplated, perfection dates only from the time possession is taken, although a security interest may attach, unperfected, before that time under the rules stated in § 9-204. The only exception to this rule is the short 21-day period of perfection provided in § 9-304(D) and (E) during which a debtor may have possession of specified collateral in which there is a perfected security interest.

### Cross References

Sections 9-204, 9-302, 9-303, and 9-304.

### Definitional Cross References

"Chattel paper". Section 9-105.

"Collateral" § 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Receives" notification. Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section describes the circumstances under which possession by the secured party or his agents is sufficient to "perfect" a security interest in collateral.

#### **§ 9-306. "Proceeds"; secured party's rights on disposition of collateral**

A. "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

B. Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof, unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

C. The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected, but it ceases to be a perfected security interest and becomes unperfected 10 days after receipt of the proceeds by the debtor unless:

1. A filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or

2. A filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

3. The security interest in the proceeds is perfected before the expiration of the 10 day period. Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

D. In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

1. In identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;

2. In identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

3. In identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

4. In all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (4) is:

a. Subject to any right to set-off, and

b. Limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (i) the payments to the secured party on account of cash proceeds received by the debtor during such period; and (ii) the cash proceeds received by the debtor during such period to which the secured party is entitled under Subsection (D) (1)-(3).

E. If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

1. If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

2. An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (1) to the extent that the transferee of the chattel paper was entitled to priority under § 9-308.

3. An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (1).

4. A security interest of an unpaid transferee asserted under paragraph (2) or (3) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-306 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. This section states a secured party's right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected. It makes clear that insurance proceeds from casualty loss of collateral are proceeds within the meaning of this section. As to the proceeds of consigned goods, see § 9-114 and the Comment thereto.

2. A. This section provides rules for insolvency proceedings. Subsections (D)(1)-(3) substitute specific rules of identification for general principles of tracing. Subsection (D)(4) limits the security interest in proceeds not within these rules to an amount of the debtor's cash and deposit accounts not greater than cash proceeds received within 10 days of insolvency proceedings less the cash proceeds during this period already paid over and less the amounts for which the security interest is recognized under Subsection (D)(1)-(3).

B. Subsections (B) and (C) make clear that the three-month period for calculating a voidable preference in bankruptcy begins with the date of the secured party's obtaining the security interest in the original collateral and not with the date of his obtaining control of the proceeds. The interest in the proceeds "continues" as a perfected interest if the original interest was perfected; but the interest ceases to be perfected after the expiration of 10 days unless a filed financing statement covered the original collateral and the proceeds are collateral of a type as to which a security interest could be perfected by a filing in the same office or unless the secured party perfects his interest in the proceeds themselves-i.e., by filing a financing statement covering them or by taking possession. See § 9-312(F) and Comment thereto for priority of rights in proceeds perfected by a filing as to original collateral.

C. Where cash proceeds are deposited into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds when such payments and transfers occur in the ordinary course of business. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.

3. In most cases when a debtor makes an unauthorized disposition of collateral, the security interest under this article, continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may

repossess the collateral from him or in an appropriate case maintain an action for conversion. Subsection (B) codifies this rule. The secured party may claim both proceeds and collateral, but may of course have only one satisfaction.

In many cases a purchaser or other transferee of collateral will take free of a security interest, and in such cases the secured party's only right will be to proceeds. The transferee will take free whenever the disposition was authorized, which authorization may be contained in the security agreement or otherwise given. The right to proceeds, either under the rules of this section or under specific mention thereof in a security agreement or financing statement, does not in itself constitute an authorization of sale.

Section 9-301 states when certain transferees take free of unperfected security interests. Section 9-307 on goods, § 9-308 on chattel paper and instruments and § 9-309 on negotiable instruments, negotiable documents and securities state when purchasers of such collateral take free of a security interest even though the disposition was not authorized.

4. Subsection (E) states rules to determine priorities when collateral which has been sold is returned to the debtor: for example, goods returned to a department store by a dissatisfied customer. The most typical problems involve sale and return of inventory, but the Subsection can also apply to equipment. Subsection (E)(1) of this section reinforces the rule of § 9-205: as between secured party and debtor (and debtor's trustee in bankruptcy) the original security interest continues on the returned goods. Whether or not the security interest in the returned goods is perfected depends upon factors stated in the text.

Subsections (E)(2), (3) and (4) deal with a different aspect of the returned goods situation. Assume that a dealer has sold an automobile and transferred the chattel paper or the account arising on the sale to Bank X (which had not previously financed the car as inventory). Thereafter the buyer of the automobile rightfully rescinds the sale, say for breach of warranty, and the car is returned to the dealer. Subsection (E)(2) gives the bank as transferee of the chattel paper or the account a security interest in the car against the dealer. For protection against dealer's creditors or purchasers from him (other than buyers in the ordinary course of business, see § 9-307), Bank X as the transferee, under Subsection (E)(4), must perfect its interest by taking possession of the car or by filing as to it. Perfection of his original interest in the chattel paper or the account does not automatically carry over to the returned car, as it does under Subsection (E)(1) where the secured party originally financed the dealer's inventory.

In the situation covered by Subsections (E)(2) and (E)(3) a secured party who financed the inventory and a secured party to whom the chattel paper or the account was transferred may both claim the returned goods—the inventory financier under Subsection (E)(1), the transferee under Subsections (E)(2) and (E)(3). With respect to chattel paper, § 9-308 regulates the priorities. With respect to an account, Subsection (E)(3) subordinates the security interest of the transferee of the account to that of the inventory financier. However, if the inventory security interest was unperfected, the transferee's interest could become entitled to priority under the rules stated in § 9-312(E).

In cases of repossession by the dealer and also in cases where the chattel was returned to the dealer by the voluntary act of the account debtor, the dealer's position may be that of a mere custodian; he may be an agent for resale, but without any other obligation to the holder of the chattel paper; he may be obligated to repurchase the goods, the chattel paper or the account from the secured party or to hold it as collateral for a loan secured by a transfer of the chattel paper or the account.

If the dealer thereafter sells the goods to a buyer in ordinary course of business in any of the foregoing cases, the buyer is fully protected under § 2-403(B) as well as under § 9-307(A), whichever is technically applicable.

#### **Cross References**

Sections 9-307, 9-308 and 9-309.

Point 3: Sections 1-205 and 9-301.

Point 4: Sections 2-403(B), 9-205 and 9-312.

#### **Definitional Cross References**

"Account". Section 9-106.

"Bank". Section 1-201.

"Chattel paper". Section 9-105.

"Check". Sections 3-104 and 9-105.

"Collateral". Section 9-105.

"Creditors". Section 1-201.

"Debtor". Section 9-105.

"Deposit account". Section 9-105.

"Goods". Section 9-105.

"Insolvency proceedings". Section 1-201.

"Money". Section 1-201.

"Purchaser". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

### **Special Plain Language Comment**

This section states rules which govern in various circumstances the treatment of "proceeds" which arise upon the sale or other disposition of collateral. This section also describes the treatment of goods which are returned to or recovered by a seller.

#### **§ 9-307. Protection of buyers of goods**

A. A buyer of goods in ordinary course of business (§ 1-201(J)) takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

B. In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes.

C. A buyer of goods other than a buyer in ordinary course of business (Subsection (A) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-307 of the Uniform Commercial Code as adopted by the states, except that like California and other states, this section does not deny protection to buyers in the ordinary course of business of farm products as provided in the Official Text or to consumer purchasers of consumer goods without knowledge of the security interest.

**Commentary.** 1. This section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course takes free of an unperfected one. Section 9-301 should be consulted to determine what purchasers, in addition to the buyers covered in this section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (§ 2-403).

2. The definition of "buyer in ordinary course of business" in § 1-201(1) restricts the application of Subsection (A) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind". Thus, the Subsection applies, in the terminology of this article, primarily to inventory and farm products. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party". This section provides that such a buyer takes free of a security interest, even

though perfected, and although he knows that the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods, but takes subject to the security interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this section. Section 9-306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (B) deals with buyers of "consumer goods" (defined in § 9-109). Under § 9-301(A) (4) no filing is required to perfect a purchase money interest in consumer goods subject to this Subsection except motor vehicles required to be registered; filing is required to perfect security interests in such goods other than purchase money interests and, registration is required for motor vehicles, even in the case of purchase money interests. (The special case of fixtures has added complications that are apart from the point of this discussion.)

Under Subsection (B) a buyer of consumer goods takes free of a security interest even though perfected: (a) if he buys without knowledge of the security interest; (b) for value; and (c) for his own personal, family, or household purposes. As to purchase money security interests which are perfected without filing under § 9-302(A) (4): A secured party may file a financing statement (although filing is not required for perfection). However, whether or not the secured party files, a buyer who meets the qualifications stated in the preceding sentence takes free of the security interest. So long as the security interest remains unperfected, not only the buyers described in Subsection (B), but the purchasers described in § 9-301 will take free of the interest. In any event, after compliance by a secured party with the applicable certificate of title law, all subsequent buyers, under the rule of Subsection (B), are subject to the security interest. Thus, consumer purchasers are deemed to have knowledge of security interests reflected on the registration title documents for motor vehicles.

4. Although a buyer is of course subject to the Code's system of notice from filing or possession, Subsection (C) makes clear that he will not be subject to future advances under a security interest after the secured party has knowledge that the buyer has purchased the collateral and in any event after 45 days after the purchase unless the advances were made pursuant to a commitment entered into before the expiration of the 45 days and without knowledge of the purchase. Of course, a buyer in ordinary course who takes free of the security interest under Subsection (A) is not subject to any future advances. (Compare §§ 9-301(D) and 9-312(G)).

#### **Cross References**

Point 1: Sections 2-403 and 9-301.

Point 2: Section 9-306.

Point 3: Sections 9-301 and 9-302.

Point 4: Sections 9-301(D) and 9-312(G).

#### **Definitional Cross References**

"Buyer in ordinary course of business". Section 1-201.

"Consumer goods". Section 9-109.

"Goods". Section 9-105.

"Knows" and "Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Pursuant to commitment". Section 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

This section describes when buyers of goods are protected from continuing security interests created by their sellers and when the secured parties of the sellers retain the right to foreclose upon the goods in order to satisfy the obligations of the seller.

#### **§ 9-308. Purchase of chattel paper and instruments**

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

A. Which is perfected under § 9-304 (permissive filing and temporary perfection) or under § 9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or

B. Which is claimed merely as proceeds of inventory or other goods subject to a security interest (§ 9-306) even though he knows that the specific paper or instrument is subject to the security interest.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-308 of the Uniform Commercial Code as adopted by the states, except that the protection for purchasers of chattel paper or instruments extends to persons claiming security interests in such collateral as proceeds from the sale of all goods, not merely inventory.

**Commentary.** 1. Chattel paper is defined (§ 9-105) as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods". Such paper has become an important class of collateral in financing arrangements, which may—as in the automobile and some other fields—follow an earlier financing arrangement covering inventory or which may begin with the chattel paper itself

Arrangements where the chattel paper is delivered to the secured party who then makes collections, as well as arrangements where the debtor, whether or not he is left in possession of the paper, makes the collections, are both widely used, and are known respectively as notification (or "direct collection") and non-notification (or "indirect collection") arrangements. In the automobile field, for example, when a car is sold to a consumer buyer under an installment purchase agreement and the resulting chattel paper is assigned, the assignee usually takes possession, the obligor is notified of the assignment and is directed to make payments to the assignee. In the furniture field, for an example on the other hand, the chattel paper may be left in the dealer's hands or delivered to the assignee; in either case the obligor may not be notified, and payments are made to the dealer-assignor who receives them under a duty to remit to his assignee. The widespread use of both methods of dealing with chattel paper is recognized by the provisions of this article, which permit perfection of a chattel paper security interest either by filing or by taking possession.

2. Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper allowed to remain in the debtor's possession take free of the security interest despite the filing. Subsection (B) of the section deals with the case where the security interest in the chattel paper is claimed merely as proceeds—e.g., on behalf of an inventory financier who has not by some new transaction with the debtor acquired a specific interest in the chattel paper. In that case a purchaser, even though he knows of the inventory financier's proceeds interest, takes priority provided he gives new value and takes possession of the paper in the ordinary course of his business. The same basic rule applies in favor of a purchaser of other instruments who claims priority against a proceeds interest therein of which he has knowledge. Thus, a purchaser of a negotiable instrument might prevail under Subsection (B) even though his knowledge of the conflicting proceeds claim precluded his having holder in due course status under § 9-309.

3. Subsection (A) deals with the case where the non-possessory security interest in the chattel paper is more than a mere claim to proceeds—i.e., exists in favor of a secured party who has given value against the paper, whether or not he financed the inventory whose sale gave rise to it. In this case the purchaser, to take priority, must not only give new value and take possession in the ordinary course of his business, but he must also take without knowledge of the existing security interest. Thus a secured party who has a specific interest in the chattel paper and not merely a claim to proceeds

and who wishes to leave the paper in the debtor's possession can, because of the knowledge requirement, protect himself against purchasers by stamping or noting on the chattel paper the fact that it has been assigned to him.

4. It should be noted that under § 9-304(A) a security interest in an instrument, negotiable or non-negotiable, cannot be perfected by filing (except where the instrument constitutes part of chattel paper). Thus, the only types of perfected non-possessory security interest that can arise in an instrument are the temporary 21-day perfection provided for in § 9-304(D) and (E) or the 10-day perfection in proceeds of § 9-306. Where such a perfected interest exists in a non-negotiable instrument, purchasers will take free if they qualify under Subsection (A) of the section.

#### **Cross References**

Point 1: Sections 9-304(A) and 9-305.

Point 2: Section 9-306.

Point 4: Sections 9-304 and 9-306.

#### **Definitional Cross References**

"Chattel paper". Section 9-105.

"Instrument". Section 9-105.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Proceeds". Section 9-306.

"Purchaser". Section 1-201.

"Security interest". Section 1-201.

"Value". Section 1-201.

#### **Special Plain Language Comment**

This section describes the competing priorities between (1) buyers of chattel paper and instruments, and (2) persons with security interests in such collateral, either directly or as "proceeds" of goods sold by the debtor.

#### **§ 9-309. Protection of purchasers of instruments, documents and securities**

Nothing in this article limits the rights of a holder in due course of a negotiable instrument (§ 3-302) or a holder to whom a negotiable document of title has been duly negotiated or a bona fide purchaser of a security, and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this article does not constitute notice of the security interest to such holders or purchasers.

## History

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-309 of the Uniform Commercial Code as adopted by the states, although this Code does not presently include Articles 7 (regarding documents) and 8 (regarding securities) of the Uniform Commercial Code.

**Commentary.** 1. Under this article the rights of purchasers of negotiable paper, including negotiable documents of title and investment securities, are determined by the rules of holding in due course and the like which are applicable to the type of paper concerned. See Article 3 of this Code. The rights of parties which would be governed under Articles 7 and 8 of the Uniform Commercial Code are governed under Navajo law pursuant to 7 N.N.C. § 204.

2. Under § 9-304(A) filing is ineffective to perfect a security interest in instruments (including securities) except those instruments which are part of chattel paper, and, of course, is ineffective to constitute notice to subsequent purchasers. Although filing is permissible as a method of perfection for a security interest in documents, this section provides that the filing does not constitute notice to purchasers.

## Cross References

Article 3 and §§ 9-304(A) and 9-308.

## Definitional Cross References

"Document of title". Section 1-201.

"Holder". Section 1-201.

"Holder in due course". Sections 3-302 and 9-105.

"Negotiable instrument". Sections 3-104 and 9-105.

"Notice". Section 1-201.

"Purchaser". Section 1-201.

"Security". Section 9-105.

"Security interest". Section 1-201.

## Special Plain Language Comment

This section describes the protection which certain holders of negotiable documents and instruments and which certain purchasers have as against competing security interests.

**§ 9-310. Priority of certain liens arising by operation of law**

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-310 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. The purpose of this section is to provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected.

2. There was generally no specific statutory rule as to priority between security devices and liens for services or materials. This section makes the lien for services or materials prior in all cases where they are furnished in the ordinary course of the lienor's business and the goods involved are in the lienor's possession. Some of the statutes creating such liens may expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.

#### **Cross References**

Sections 9-102(B), 9-104(C) and 9-312(A).

#### **Definitional Cross References**

"Goods". Section 9-105.

"Person". Section 1-201.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section recognizes that, when a person has a lien for services rendered or materials provided to improve, repair or protect collateral, such a lien will generally have priority over competing security interests created under this article. Mechanic liens are an example of such liens. The creation and terms of such liens are determined by other statutes or decisions by the Navajo courts.

**§ 9-311. Alienability of debtor's rights; judicial process**

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default, although a provision in a security agreement making such transfer constitute a default is valid.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-311 of the Uniform Commercial Code as adopted by the states, although like in California and other states the last clause has been added in order to clarify that such transfers may constitute defaults under the security agreement. Thus, the debtor retains the right to transfer effectively any or all of his interest in the collateral to a third party, although such a transfer may give the secured party remedies against the collateral depending upon the terms of the security agreement.

**Commentary.** 1. The purpose of this section is to make clear that in all security transactions under this article, the debtor has an interest (whether legal title or an equity) which he can dispose of and which his creditors can reach.

2. This section provides that in all security interests the debtor's interest in the collateral remains subject to claims of other creditors who take appropriate action. Other Navajo laws determine the form of "appropriate process" for other creditors to use to reach a debtor's property.

3. Where the security interest is in inventory, difficult problems arise with reference to attachment and levy. Assume that a debt of one hundred thousand dollars (\$100,000) is secured by inventory worth twice that amount. If by attachment or levy certain units of the inventory are seized, the determination of the debtor's equity in the units seized is not a simple matter. The section leaves the solution of this problem to the courts. Procedures such as marshalling may be appropriate.

### **Cross References**

Sections 9-301(D), 9-307(C) and 9-312(G).

### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section allows the owner of collateral to transfer any or all of his interest in collateral to another secured creditor or purchaser even though a prior security interest exists in the collateral. Other creditors of the owner can also use the court procedures to require the owner's property to be sold in order to satisfy the owner's debts. However, the security agreement signed by the owner of the property may provide that such transfers of the collateral to third parties are defaults entitling the secured creditor to exercise various remedies under this article with respect to the collateral. See §§ 9-502, 9-503 and 9-504.

#### **§ 9-312. Priorities among conflicting security interests in the same collateral**

A. The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: Section 9-103 on security interests related to other jurisdictions; and § 9-114 on consignments. The security interests of collecting banks in an item being collected, accompanying documents and proceeds to secure credit given by such bank on such item shall have priority over conflicting perfected security interests in the item and any accompanying documents or proceeds.

B. A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

C. A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if:

1. The purchase money security interest is perfected at the time the debtor receives possession of the inventory, and

2. The purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party; or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (§ 9-304(E)); and

3. The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory, and

4. The notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

D. A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 10 days thereafter.

E. In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (C) and (D) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

1. Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection; and

2. So long as conflicting security interests are unperfected, the first to attach has priority.

F. For the purposes of Subsection (E) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

G. If future advances are made while a security interest is perfected by filing, the taking of possession, or other perfection, the security interest has the same priority for the purpose of Subsection (E) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as 9-312 of the Uniform Commercial Code as adopted by the states, except for certain adjustments made because the Code does not presently include Article 4 of the Official Text. The rights which the parties would have under Article 4 of the Uniform Commercial Code are governed under Navajo law pursuant to 7 N.N.C. § 204.

**Commentary.** 1. In a variety of situations two or more people may claim an interest in the same property. The several sections specified in Subsection (A) contain rules for determining priorities between security interests and such other claims in the situations covered in those sections. For cases not

covered in those Sections, this section states general rules or priority between conflicting security interests.

2. Subsection (B) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops become growing crops. This priority is not affected by the fact that the person making the crop loan knew of the earlier security interest. In the case of crops which are grown on trees or vines, the crop begins to grow for the purposes of this section when customary cultivation practices begin for a crop season (e.g. pruning or spraying) or when the buds or fruit first appears, whichever occurs first.

3. Subsections (C) and (D) give priority to a purchase money security interest (defined in § 9-107) under certain conditions over non-purchase money interests, which in this context will usually be interests asserted under after-acquired property clauses. See § 9-204 on the extent to which after-acquired property interests are validated and § 9-108 on when a security interest in after-acquired property is deemed taken for new value. While this article broadly validates the after-acquired property interest, it also recognizes as sound the preference for the purchase money interest. That policy is carried out in Subsections (C) and (D).

Subsection (D) states a general rule applicable to all types of collateral except inventory: the purchase money interest takes priority if it is perfected when the debtor receives possession of the collateral or within 10 days thereafter. As to the 10-day grace period, compare § 9-301(B). The perfection requirement means that the purchase money secured party either has filed a financing statement before that time or has a temporarily perfected statement before that time or has a temporarily perfected interest in goods covered by documents under § 9-304(D) and (E) (which is continued in a perfected status by filing before the expiration of the 21-day period specified in that section). There is no requirement that the purchase money secured party be without notice or knowledge of the other interest, and the purchase money secured creditor takes priority although he knows of it or it has been filed.

Under Subsection (C), the-same rule of priority, but without the 10-day grace period for filing, applies to a purchase money security interest in inventory, with the additional requirement that the purchase money secured party give notification, as stated in Subsection (C), to any other secured party who filed earlier for the same item or type of inventory. The reason for the additional requirement of notification is that typically the arrangement between an inventory secured party and his debtor will require the secured party to make periodic advances against incoming inventory or periodic releases of old inventory as new inventory is received. A fraudulent debtor may apply to the secured party for advances even though he has already given a security interest in the inventory to another secured party. The notification requirement protects the inventory financier in such a situation: if he has received notification, he will presumably not make an advance; if he has not received notification (or if the other interest does not qualify as a purchase money interest), any advance he may make will have priority. Since an arrangement for periodic advances against incoming property is unusual outside the

inventory field, no notification requirement is included in Subsection (D).

Where the purchase money inventory financing began by possession of a negotiable document of title by the secured party, he must in order to retain priority give the notice required by Subsection (C) at or before the usual time, i.e., when the debtor gets possession of the inventory, even though his security interest remains perfected for 21 days under § 9-304(E).

When under these rules the purchase money secured party has priority over another secured party, the question arises whether this priority extends to the proceeds of the original collateral. Under Subsection (D) which deals with non-inventory collateral and where there was no ordinary expectation that the goods would be sold, the section gives an affirmative answer. In the case of inventory collateral under Subsection (C), where it was expected that the goods would be sold and where financing frequently is based on the resulting accounts, chattel paper, or other proceeds, the Subsection gives an answer limited to the preservation of the purchase money priority only in so far as the proceeds are cash received on or before the delivery of the inventory to a buyer, that is, without the creation of an intervening account to which conflicting rights might attach. The conflicting rights to proceeds consisting of accounts are governed by Subsection (E). See Comment 8.

The foregoing rules applicable to purchase money security interests in inventory apply also to the rights in consigned merchandise. See § 9-114.

4. Subsection (E) states a rule for determining priority between conflicting security interests in cases not covered in the sections referred to in Subsection (A) or in Subsections (B), (C) and (D) of this section. Note that Subsection (E) applies to cases of purchase money security interests which do not qualify for the special priorities set forth in Subsections (C) and (D).

There is a single priority rule based on precedence in the time as of which the competing parties either filed their security interests or perfected their security interests. The form of the claim to priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the first filing or perfection so long as there is no intervening period without filing or perfection. Filing may occur as to particular collateral before the collateral comes in existence. Under the standards of § 9-203 perfection cannot occur as to particular collateral until the collateral itself (and not prior collateral) comes into existence and the debtor has rights therein; but under Subsection (F) of this section the secured party's priority may date from his time of perfection as to the prior collateral, if perfection or filing has been continuously maintained. Subsection (F) provides that a date of filing or perfection as to original collateral is also a date of filing or perfection as to proceeds. This rule should also be read with § 9-306, which makes it unnecessary to claim proceeds expressly in a financing statement and provides in effect that a filing as to original collateral is also a filing as to proceeds (with exceptions therein stated). Thus, if a financing statement is filed covering inventory, then (subject to the exception involving multistate problems) this filing is also a filing as to the resulting accounts and constitutes the date of filing as to the accounts.

The party who may have had a prior security interest in inventory (or may have had the only such security interest) does not automatically for that reason

have priority as to the accounts. His claim in accounts may or may not have priority over competing filed claims to accounts. The priority is based on precedence as to the accounts under the rules stated in the preceding paragraph.

5. The operation of this section is illustrated by the examples set forth under this and the succeeding Points.

Example 1. "A" files against "X" (debtor) on February 1. "B" files against "X" on March 1. "B" makes a non-purchase money advance against certain collateral on April 1. "A" makes an advance against the same collateral on May 1. "A" has priority even though "B's" advance was made earlier and was perfected when made. It makes no difference whether or not "A" knew of "B's" interest when he made his advance.

The problem stated in the example is peculiar to a notice filing system under which filing may be made before the security interest attaches (see § 9-402). The justification for the rule lies in the necessity of protecting the filing system—that is, of allowing the secured party who has first filed to make subsequent advances without each time having, as a condition of protection, to check for filing later than his. Note, however, that his protection is not absolute: if, in the example, "B's" advance creates a purchase money security interest, he has priority under Subsection (D), or, in the case of inventory, under Subsection (C) provided he has properly notified "A". (See further Example 3 below.)

Example 2. "A" and "B" make non-purchase money advances against the same collateral. The collateral is in the debtor's possession and neither interest is perfected when the second advance is made. Whichever secured party first perfects his interest (whether by taking possession of the collateral, by filing or otherwise) takes priority, and it makes no difference whether or not he knows of the other interest at the time he perfects his own.

This result may be regarded as a race of diligence among creditors. Subsection (E)(2) adds the thought that so long as neither of the interests is perfected, the one which first attached (i.e., under the advance first made) has priority. The last mentioned rule maybe thought to be of merely theoretical interest, since it is hard to imagine a situation where the case would come into litigation without either "A" or "B" having perfected his interest. If neither interest had been perfected at the time of the filing of a petition in bankruptcy, of course neither would be good against the trustee in bankruptcy. See Bankruptcy Code § 547.

Example 3. "A" has a temporarily perfected (21-day) security interest, unfiled, in a negotiable document in the debtor's possession under § 9-304(D) or (E). On the fifth day "B" files and thus perfects a security interest in the same document. On the tenth day "A" files. "A" had priority, whether or not he knows of "B's" interest when he files, because "A" perfected first and has maintained continuous perfection or filing.

6. The application of the priority rules to after-acquired property must be considered separately for each item of collateral. Priority does not depend only on time of perfection, but may also be based on priority in filing before perfection.

Example 4. On February 1 "A" makes advances to "X" (the debtor) under a security agreement which covers "all the machinery in X's plant" and contains an after-acquired property clause. "A" promptly files his financing statement. On March 1 "X" acquires a new machine, "B" makes an advance against it and files his financing statement. On April 1 "A", under the original security agreement, makes an advance against the machine acquired March 1. If "B's" advance creates a purchase money security interest, he has priority under Subsection (D) (provided he filed before "X" received possession of the machine or within 10 days thereafter). If "B's" advance, although he gave new value, did not create a purchase money interest, "A" has priority as to both of his advances by virtue of his priority in filing, although the parties perfected simultaneously on March 1 as to the new machine.

The application of the priority rules to proceeds presents special features discussed in Comment 8.

7. The application of the priority rules to future advances is complicated. In general, since any secured party must operate in reference to the Code's system of notice, he takes subject to future advances under a priority security interest while it is perfected through filing, possession, or otherwise, whether the advances are committed or non-committed, and to any advances subsequently made "pursuant to commitment" (§ 9-105) during that period. In the rare case when a future advance is made without commitment while the security interest is perfected temporarily without either filing, possession, or otherwise, the future advance has priority from the date it is made. These rules are more liberal toward the priority of future advances than the corresponding rules applicable to an intervening buyer (§ 9-307(C)) because of the different characteristics of the intervening party. Compare the corresponding rule applicable to an intervening judgment creditor. (§ 9-301(D).)

Example 5. On February 1 "A" makes an advance against machinery in the debtor's possession and files his financing statement. On March 1 "B" makes an advance against the same machinery and files his financing statement. On April 1 "A" makes a further advance under the original security agreement, against the same machinery (which is covered by the original financing statement and thus perfected when made). "A" has priority over "B" both as to the February 1 and as to the April 1 advance, and it makes no difference whether or not "A" knows of "B's" intervening advance when he makes his second advance.

"A" wins, as to the April 1 advance, because he first filed even though "B's" interest attached, and indeed was perfected, before the April 1 advance. The same rule would apply if either "A" or "B" had perfected through possession. Section 9-204(C) and the Comment thereto should be consulted for the validation of future advances.

The same result would be reached even though "A's" April 1 advance was not under the original security agreement, but was under a new security agreement under "A's" same financing statement or during the continuation of "A's" possession.

8. The application of the priority rules of Subsections (E) and (F) to proceeds is shown by the following examples:

Example 6: "A" files a financing statement covering a described type of inventory then owned or thereafter acquired. "B" subsequently takes a purchase money security interest in certain inventory described in "A's" financing statement and achieves priority over "A" under Subsection (C) as to this inventory. This inventory is then sold, producing proceeds.

If the proceeds of the inventory are instruments or chattel paper, the rights of "A" and "B" (on the one hand) and any adverse claimant to these proceeds (on the other hand) are governed by §§ 9-308 and 9-309. If the proceeds are cash, Subsection (C) indicates that "B's" priority as to the inventory carries over to the cash. Proceeds which are accounts constitute different collateral, and the priorities as to the original collateral do not control the priority as to the accounts. Under §§ 9-306 and 9-312(F), "A's" first filing as to the inventory constitutes a first filing as to the accounts, provided that the same filing office would be appropriate for filing as to accounts under the rules of § 9-306(C). Therefore, "A" has priority as to the accounts.

Many parties financing inventory are quite content to protect their first security interest in the inventory itself, realizing that when inventory is sold, someone else will be financing the accounts and the priority for inventory win not run forward to the accounts. Indeed, the cash supplied by the accounts financier will be used to pay the inventory financing. In some situations, the party financing the inventory on a purchase money basis makes contractual arrangements that the proceeds of accounts financing by another be devoted to paying off the first inventory security interest.

Example 7. In the foregoing case, if "B" had filed directly as to accounts, the date of that filing as to accounts would be compared with the date of "A's" first filing as to the inventory, and the first-to-file rule would prevail.

Subsection (F) provides that a filing as to original collateral determines the date of a filing as to the proceeds thereof. This rule implies, of course, that the filing as to the original collateral is effective as to proceeds under the rule of § 9-306(C).

Example 8. If "C" had filed as to accounts in Example 6 above before either "A" or "B" had filed as to inventory, "C's" first filing as to accounts would have priority over the filings of "A" and "B", which would also constitute filings as to accounts under the rule just mentioned. "A's" and "B's" position as to the inventory gives them no automatic claim to the proceeds of the inventory consisting of accounts against someone who has filed earlier as to accounts. If, on the other hand, either "A's" or "B's" filings as to the inventory constituted good filings as to accounts and these filings preceded "C's" direct filings as to accounts, "A" or "B" would outrank "C" as to the accounts.

If the filings as to inventory were not effective under Subsection (F) for filing as to accounts because a filing for accounts would have to be in a different filing office under § 9-103(C), these inventory filings would nevertheless be effective for 10 days as to accounts. See § 9-306. If the perfection of the security interest in accounts was continued within the 10 days by appropriate filings, then "A's" and "B's" interests in the accounts would date from the date of filing as to inventory.

### **Cross References**

Sections 9-204(A) and 9-303.

Point 1: Sections 9-114, 9-301, 9-304, 9-306, 9-307, 9-308, 9-309, 9-310, 9-313, 9-314, 9-315 and 9-316.

Point 3: Sections 9-108, 9-204, 9-304(D) and (E).

Points 4 to 7: Sections 9-204, 9-301(D), 9-304(D) and (E), 9-306, 9-307(C) and 9-402(A).

Point 8: Sections 9-103(F) and 9-306(C).

### **Definitional Cross References**

"Chattel paper". Section 9-105.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Give notice". Section 1-201.

"Goods". Section 9-105.

"Instruments". Section 9-105.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchase money security interest". Section 9-107.

"Pursuant to commitment". Section 9-105.

"Receives" notification. Section 1-201.

"Secured party". Section 9-105.

"Security". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

### **Special Plain Language Comment**

This section states the rules for priority among competing security interests in various types of collateral and in proceeds from the sale or other disposition of collateral.

**§ 9-313. Priority of security interests in fixtures**

A. In this section and in the provisions of Part 4 of this article referring to fixture filing, unless the context otherwise requires:

1. Goods are "fixtures" when they become so related to particular real estate because of their attachment or affixation to realty or other fixtures, that a deed to the real property would transfer the goods if they were not removed from the real property (assuming for such purposes that the realty could be lawfully deeded). Nothing in this article shall be deemed to make fixtures real property or, to the maximum extent permitted by federal law, to cause fixtures to become part of any real property held in trust for the Navajo Nation. No personal property which is not permanently affixed or attached to real property shall be deemed to be a fixture. No personal property which is affixed or attached to any real property (or to any building or other real property structure or improvement) and becomes a fixture or fixtures shall lose its character or status as personal property subject to this article as long as the fixture can be removed without causing damage to the real property which could only be repaired at a cost exceeding the value of the fixture or fixtures at such time (excluding from such computation any decrease in the value of the realty because of the removal of the fixtures).

2. A "fixture filing" is the filing in the required office (§ 9-401(A)(1)) of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of § 9-402(E).

3. A mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if the recorded writing so indicates.

B. A security interest under this article may be created in goods which are fixtures or may continue in goods which becomes fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

C. This article does not prevent creation of an encumbrance upon, fixtures pursuant to real estate law.

D. A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

1. The security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter, and the debtor has an interest of record in the real estate, is in possession of the real estate (whether or not such possession is exclusive or continuous)

or, in the case of land owned by or held in trust for the Navajo Nation, the debtor has a right to use of the land; or

2. The security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate, is in possession of the real estate (whether or not such possession is exclusive or continuous) or, in the case of land owned by or held in trust for the Navajo Nation, the debtor has a right to use of the land; or

3. The fixtures are readily removable factory, office or business machines and other goods or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any methods permitted by this article; or

4. The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

E. A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where:

1. The encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or

2. The debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.

F. Notwithstanding Subsection (D)(1), but otherwise subject to Subsections (D), (E) and (I), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

G. Subject to Subsection (I), in cases not within the preceding Subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

H. When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate, but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives

adequate security for the performance of this obligation.

I. Except as may otherwise be stated in any lease or other agreement between the Navajo Nation (or any authorized governmental official, agency or authority) and any owner or secured party relating to the use or possession of any real property owned by or held in trust for the Navajo Nation, and to the extent permitted by federal law, (i) the Navajo Nation consents to the creation of security interests in fixtures owned by persons having the right to use or possess any such real property and (ii) the Navajo Nation's interest in any fixtures shall not have priority over any security interests in fixtures under this article.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-313 of the Uniform Commercial Code as adopted by the states, except that:

A. The term "fixtures" is defined in a functional manner because of the complex state of the applicable real property laws and because of the policies described in these Comments;

B. Goods are less readily classified as real property compared to the Official Text because that characterization might result in goods becoming part of trust property of the Navajo Nation (the extent to which improvements become trust property, if at all, is unclear); and

C. The requirement for the debtor's ownership of a record interest in the land on which the fixtures are located or possession of that land is relaxed to accommodate the customary and sometimes non-exclusive uses of Tribal lands by members of the Tribe without recorded interests.

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. Consistent with that policy, goods do not become fixtures or lose their status as inventory, equipment, farm products or consumer goods unless they are affixed or attached to land or buildings or other real property improvements in a manner which has substantial permanence and which would cause the fixtures to be included in a conveyance by deed of the real property. Federal law provides that improvements on a leasehold held in trust for the Navajo Nation or an individual Indian becomes the property of the lessor unless the lease provides otherwise. 25 C.F.R. § 162.9 (1984). Improvements are not defined in the regulations, but the Code in Subsection (B) uses the term improvement. Improvement is generally considered to be a class of property distinct from fixtures. Improvements are much more integrally related to the land than fixtures. For some examples of fixtures see 16 N.N.C. § 1401(B). Temporary attachments or the creation of safety devices or braces to support the goods do not cause the goods to become fixtures, since a contrary rule might cause persons wishing to prevent goods from becoming fixtures to minimize safety precautions. As stated in Subsection (I), this article attempts to distinguish

fixtures from trust property and improvements on the trust property of the Navajo Nation in order to facilitate financing for such property.

**Commentary.** 1. Section 9-313 deals with the problem that certain goods which are the subject of Article 9 financing become so affixed or otherwise so related to real estate they may become part of the real estate, and that personal property security interests would be subordinate to real estate interests except as protected by the priorities regulated by the section. These goods are called "fixtures". Some fixtures also retain their personal property nature in that an Article 9 financing with respect to them may exist and may continue to be recognized, if notice therefore is given to real estate interests in accordance with this section. However, this concept does not apply if the goods are integrally incorporated into the real estate in the forming of a permanent structure, i.e., an improvement. Improvements may also become the property of the lessor on land held in trust either for the Navajo Nation or individual Indians. 25 C.F.R. § 162.9 (1984).

The term "fixture filing" has been introduced and defined. It emphasizes that when a filing is intended to give the priority advantages herein discussed against real estate interests, the filing must (except as stated below) be for record in the real estate records and indexed therein, so that it will be found in a real estate search, except for lands owned by or held in trust for the Navajo Nation, which are filed as described in § 9-401(A)(1).

Since the determination in advance of judicial decision of the question whether goods have become fixtures is a difficult one, no inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary.

2. "Fixture" is defined to include any goods which become so related to particular real estate that an interest in them may arise under real estate law, and therefore, goods integrally incorporated into the real estate are fixtures. However, under Subsection (B) no security interest exists under Article 9 in ordinary building materials incorporated into an improvement on land. Goods may be technically "ordinary building materials", e.g., window glass, but if they are incorporated into a structure which as a whole has not become an integral part of the real estate, the rules applicable to the ordinary building materials follow the rules applicable to the structure itself. The outstanding examples presenting this kind of problem are the modern "mobile homes" and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land or other land not owned by the debtor, and the right of the debtor under a mobile home purchase contract to remove the goods as lessee or user of the land will make clear that his secured party ordinarily has a similar right. See § 9-313(E)(2). Although such mobile homes and prefabricated buildings might not be considered improvements under 25 C.F.R. § 162.9, owners of such structures who place them on leased land should ensure that the lease grants them the authority to remove them.

In cases where mobile homes or prefabricated steel buildings are erected by a person having an ownership interest in the land, the question into which category the buildings fall is one determined by other applicable law. In general, the governing law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between

mortgagor and mortgagee, or between grantor and grantee, but rather that applicable in a three party situation, determining whether secured financing under Article 9 can survive as against parties who acquire rights through the affixation of the goods to the real estate.

The assertion that no security interest exists in ordinary building materials is only for the operation of the priority provisions of this section. It is without prejudice to any rights which the secured party may have against the debtor himself if he incorporated the goods into real estate or against any party guilty of wrongful incorporation thereof in violation of the secured party's rights.

3. Under these concepts the section recognizes three categories of goods: (1) those which retain their character entirely as goods and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their character as goods for purposes of finance; and (3) an intermediate class which may have become real estate for certain purposes, but as to which secured financing under Article 9 maybe preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not exhaustively delineated by this section, the determination of whether a good is a fixture will depend on the same three-part test which is common in many jurisdictions: (1) annexation to the realty; (2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriate; and (3) intention to make the article a permanent accession to the real property. See *Energy Control Services, Inc. v. Arizona Department of Economic Security*, 135 Ariz. 20, 658 P.2d 820 (1982); *Garrison General Tire Service v. Montgomery*, 75 N.M. 321, 404 P.2d 143 (1965); *State Road Commission v. Papanikolas*, 19 Utah 2d 153, 427 P.2d 749 (Utah 1967).

4. In considering fixture priority problems, there will always first be a preliminary question whether real estate interests per se have an interest in the goods as part of real estate. If not, it is immaterial, so far as concerns real estate parties as such, whether a security interest in goods is perfected or unperfected. In no event does a real estate party acquire an interest in "pure" goods as defined in this article just because a security interest therein is unperfected. If, on the other hand, real estate law gives real estate parties an interest in the goods, a conflict arises between the laws relating to real and personal property, and this section states the priorities.

A. The principal exception to the general rule of priority stated in Comment (B) based on time of filing or recording is a priority given in Subsection (D) (1) to purchase money security interests in fixtures as against prior recorded real estate interests, provided that the purchase money security interest is filed as a fixture filing in the required place before the goods become fixtures or within 10 days thereafter. This priority corresponds to one given in § 9-312(D), and the 10 days of grace represents a reduction of the purchase money priority as against prior interests in the real estate under the present § 9-313, where the purchase money priority exists even though the security interest is never filed.

It should be emphasized that this purchase money priority with the 10 day grace period for filing is limited to rights against prior real estate interests. There is no such priority with the 10-day grace period as against subsequent

real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in Subsection (D)(2) or as otherwise provided in this section.

B. The general principle of priority announced in this section is set forth in Subsection (D)(2). It is basically that a fixture filing gives to the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file or record prevails. An apparent limitation to this principle set forth in Subsection (D)(2) (namely that the secured party must have had priority over any interest of a predecessor in title of the conflicting encumbrancer or owner) is not really a limitation, but is an expression of the usual rule that a person must be entitled to transfer what he has. Thus, if the fixture security interest is subordinate to a mortgage, it is subordinate to an interest of an assignee of the mortgage even though the assignment is a later recorded instrument. Similarly, if the fixture security interest is subordinate to the rights of an owner, it is subordinate to a subsequent grantee of the owner and likewise subordinate to a subsequent mortgagee of the owner.

C. A qualification to the rule based on priority of filing or recording is Subsection (D)(4), where priority based on precedence in filing or recording is preserved, but there is no requirement that, as against a judgment lienor of the real estate, the prior filing of the fixture security interest must be in the real estate records. The fixture security interest if perfected first should prevail even though not filed or recorded in real estate records, because generally a judgment creditor is not a reliance creditor who would have searched records. Thus, even a prior filing in the records required for goods protects the priority of a fixture security interest against a subsequent judgment lien.

It is hoped that this rule will have the effect of preserving a fixture security interest so filed against invalidation by a trustee in bankruptcy. That would be the result under § 544(1) of the Bankruptcy Code if the time of perfection of the fixture security interest were measured by the judgment creditor test applicable to personal property. It would not be the result if the time of perfection were measured by the purchase test applicable to real estate. Since the fixture security interest arises against the goods in their capacity as personal property, the bankruptcy courts should apply the judgment creditor test. The effectiveness of the drafting to achieve its purchase cannot be known certainly until the courts adjudicate the question or until it is settled by amendment to the Bankruptcy Code.

The phrase "lien by legal or equitable proceedings" in § 9-313(D)(4) is intended to encompass all liens on real estate obtained by any creditor action under the Bankruptcy Code.

D. A special exception to the usual rule if priority based on precedence in time is the one of § 9-313(D)(3) in favor of holders of security interests in factory, office and business machines and other goods, and in certain replacement domestic appliances, as discussed below. To repeat, a fixture conflict is not reached if the goods are held as a matter of applicable law not to have become part of the real estate, which will frequently be the holding for goods of these types. If the opposite is held, the rule of Subsection

(D)(3) operates only if the fixture security interest is perfected before the goods become fixtures. Having been perfected, it would of course have priority over subsequent real estate interests under the rule of Subsection (D)(2). Since it would in almost all cases be a purchase money security interest, it would also have priority over other real estate interests under the purchase money priority of Subsection (D)(1), discussed in Subsection (A) above. The rule is stated separately because the permitted perfection is by any method permitted by the Article, and not exclusively by a fixture filing.

As an additional point, in the case of machinery, the separate statement of this rule makes clear that it is not overridden by the construction mortgage priority of § 9-313(F) discussed in Comment (E) below, as may have been true if reliance had been solely on the purchase money priority. Factory, office and business machines and other goods are not always financed as part of a construction mortgage, and the mortgagee should be alert to conflicting chattel financing of these machines and other goods.

As to appliances, the rule stated is limited to readily removable replacements, not original installations, of appliances which are consumer goods in the hands of the debtor (§ 9-109). To facilitate financing of original appliances in new dwellings as part of the real estate financing of the dwellings, no special priority is given to chattel financing or original appliances. The section leaves to other applicable law the question whether original installations are fixtures to which the protection accorded by this section to construction mortgages would be applicable. Likewise, it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings may be intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of Article 9 financing is limited to situations where the installation of appliances may not be intended to be permanent, e.g., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase-money replacement of consumer goods, perfection without any filing will be possible. (The priority of the construction mortgage has no application to replacement appliances.)

E. The purchase money priority presents a difficult problem in relation to construction mortgages. The latter will ordinarily have been recorded even before the commencement of delivery of materials to the job, and therefore would be prior in rank to the fixture security interests were it not for the problem of the purchase money priority. Subsection (F) expressly gives priority to the construction mortgage recorded before the filing of the fixture security interest, but this priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. As to additions to the building made long after completion of the improvement, the construction priority will not apply simply because the additions are financed by the real estate mortgagee under an open end clause of his construction mortgage. In such case, the applicable principles will be those of §§ 9-313(D)(1) and (13)(2). A refinancing of a construction mortgage has the same priority as the mortgage itself.

The phrase "an obligation incurred for the construction of an improvement"

covers both optional advances and advances pursuant to commitment, and both types of advances have the same priority under the section.

5. The section does recognize that fixture filing may be necessary when the debtor is in possession of the real estate (e.g., a lessee) even without an interest of record. This possibility of a filing against a debtor who is not in the real estate chain of title makes it necessary to require the furnishing of the name of a record owner in such cases. See §§ 9-401(A)(1), 9-402(C), item 3; 9-402(E); and 9-403(G).

6. The status of fixtures installed by tenants (as well as such persons as licensees and holders of easements) is defined by Subsection (E)(2) to the effect that if the debtor (tenant or other interest mentioned) has the right to remove the fixture as against a real estate interest, the secured party has priority over that real estate interest.

7. Real estate lenders and title companies will have little difficulty in locating relevant fixture security interests applicable to particular parcels of real estate because of the provisions as to real estate description in fixture filings, the indexing thereof, and other related provisions in Part 4 of Article 9.

8. Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short term, will result in the modernization and improvement of real estate, rather than in its deterioration, and will on balance benefit long-term real estate lenders. Because of the short-term character of the Article 9 financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.

9. Subsection (H) provides that a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant (other than the debtor himself) for any physical injury caused by the removal. The right to reimburse is implemented by the last sentence of Subsection (H) which gives the real estate claimant a statutory right to security or indemnity failing which he may refuse permission to remove fixtures. The Subsection (H) rule thus protects the real estate claimant under the reimbursement provisions.

10. Section 9-313(I) addresses the unique status of much of the real property subject to the jurisdiction of the Navajo Nation and to a significant extent the jurisdiction of the federal government. See 25 U.S.C. §§ 81, 396, 397, 402, 415, & 635. This section does not, of course, alter federal law, but it does state the general rules which govern to the extent of the jurisdiction of the Navajo Nation over its real property and fixtures.

#### **Cross References**

Sections 2-107, 9-102(A), 9-104(J) and 9-312(A), and Parts 4 and 5.

### **Definitional Cross References**

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Encumbrance". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Mortgage". Section 9-105.

"Person". Section 1-201.

"Purchase". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

### **Special Plain Language Comment**

This section states the treatment for competing interests in goods which are so affixed or attached to real estate that they could be claimed both by persons having an interest in the real estate and by persons having a security interest in the goods under this article. This section is especially important because of the trust character of much of the real estate subject to the jurisdiction of the Navajo Nation.

#### **§ 9-314. Accessions**

A. A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in Subsection (C), and subject to § 9-315(A).

B. A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in Subsection (C), but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed

an interest in the goods as part of the whole.

C. The security interests described in Subsections (A) and (B) do not take priority over:

1. A subsequent purchaser for value of any interest in the whole;  
or

2. A creditor with a lien on the whole subsequently obtained by judicial proceedings; or

3. A creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for, without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale (other than the holder of a perfected security interest purchasing at his own foreclosing sale) is a subsequent purchaser within this section.

D. When under Subsection (A) or (B) and (C) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default (subject to the provisions of Part 5) remove his collateral from the whole, but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury (but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them). A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-314 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. The purpose of this section is to state when a secured party claiming an interest in goods installed in or affixed to other goods is entitled to priority over a party with a security interest in the whole.

2. This section does not apply to goods which, for example, are so commingled in a manufacturing process that their original identity is lost. That type of situation is covered in § 9-315. Section 9-315 should also be consulted for the effect of a financing statement which claims both component parts and the resulting product.

#### **Cross References**

Sections 9-203(A), 9-303, 9-312(A) and Part 5.

Point 2: Section 9-315.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Purchaser". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Value". Section 1-201.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

This section describes the treatment of goods which are added to other goods to create combined products and the competing interests of secured creditors with interests in the component goods and in the combined whole products. For example, if a citizens band radio is added to a car, the radio is an "accession" to the whole car.

#### **§ 9-315. Priority when goods are commingled or processed**

A. If a security interest in goods was performed and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if:

1. The goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or

2. A financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled. In a case to which Subsection (2) applies, no separate security interest in the part of the original goods which has been manufactured, processed or assembled into the product may be claimed under § 9-314.

B. When under Subsection (A) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

## History

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-315 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. The purpose of this section is to state when a secured party whose collateral contributes to a product has priority over others who have conflicting claims in the same product.

2. Under this section the security interest continues in the resulting mass or product in the cases stated in Subsection (A).

3. This section applies not only to cases where flour, sugar and eggs are commingled into cake mix or cake, but also to cases where components are assembled into a machine. In the latter case a secured party is put to an election at the time of filing, by the last sentence of Subsection (A), whether to claim under this section or to claim a security interest in one component under § 9-314.

4. Subsection (B) is needed because under Subsection (A) it is possible to have more than one secured party claiming an interest in a product. The rule stated treats all such interests as being of equal priority entitled to share ratably in the product.

## Cross References

Sections 9-203(A), 9-303, 9-312(A) and 9-314.

## Definitional Cross References

"Goods". Section 9-105.

"Security interest". Section 1-201.

## Special Plain Language Comment

This section describes the treatment of security interests in goods which become part of a product or mass. For example, this section covers grain which is commingled with other grain of the same type in a silo or other storage facility and grain which is made into bread.

## § 9-316. Priority subject to subordination

Nothing in this article prevents subordination by agreement by any person entitled to priority.

## History

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-316 of the Uniform Commercial Code as adopted by the states.

**Commentary.** The several preceding sections deal elaborately with questions of priority. This section is inserted to make it entirely clear that a person entitled to priority may effectively agree to subordinate his claim. Only the person entitled to priority may make such an agreement: his rights cannot be adversely affected by an agreement to which he is not a party.

### **Cross References**

Sections 1-102 and 9-312(A).

### **Definitional Cross References**

"Agreement". Section 1-201.

"Person". Section 1-201.

### **§ 9-317. Secured party not obligated on contract of debtor**

The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-317 of the Uniform Commercial Code as adopted by the states. This section shall apply to all approved contracts.

This section clarifies that the secured party is not liable for the conduct or contracts of the debtor. The secured party is not the principal or agent of the debtor, even if the secured transaction contemplates the debtor's sale of collateral and the payment of proceeds to the secured party. This is true for all types of secured transactions, including those involving trust receipts.

### **Cross References**

Section 2-210(D).

### **Definitional Cross References**

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

**§ 9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment**

A. Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 9-206, the rights of an assignee are subject to:

1. All the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

2. Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment which conspicuously states that the assignee intends by such notice to limit defenses and offsets by the account debtor on his obligations to the debtor.

B. So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee, unless the account debtor has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

C. The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

D. A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

**History**

CJA-1-86, January 29, 1986.

**Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-318 of the Uniform Commercial Code as adopted by the states, except that it requires greater clarity in a secured party's notification to the account

debtor.

**Commentary.** 1. An assignee (including a secured party) has traditionally been subject to defenses or set offs existing before an account debtor is notified of the assignment. When the account debtor's defenses on an assigned claim arise from the contract between him and the assignor, it makes no difference whether the breach giving rise to the defense occurs before or after the account debtor is notified of the assignment (Subsection (A)(1)). The account debtor may also have claims against the assignor which arise independently of that contract: an assignee is subject to all such claims which accrue before, and free of all those which accrue after, the account debtor is notified (Subsection (A)(2)). The account debtor may waive his right to assert claims or defenses against an assignee to the extent provided in § 9-206.

2. Subsection (B) makes good faith-modifications by assignor and account debtor without the assignee's consent effective against the assignee even after notification. When, for example, it becomes necessary for a government agency to cut back or modify existing contracts, comparable arrangements must be made promptly in hundreds and even thousands of subcontracts lying in many tiers below the prime contract. Typically, the right to payments under these subcontracts will have been assigned. The government as sovereign, might have the right to amend or terminate existing contracts apart from statute. This Subsection gives the prime contractor (the account debtor) the right to make the required arrangements directly with his subcontractors without undertaking the task or procuring assents from the many banks to whom rights under the contracts may have been assigned. Assignees are protected by the provision which gives them automatically corresponding rights under the modified or substituted contract. Notice that Subsection (B) applies only so far as the right to payment has not been earned by performance, and therefore its application ends entirely when the work is done or the goods are furnished.

3. Subsection (C) clarifies the right of an account debtor to make payment to his seller-assignor in an "indirect collection" situation (see Comment to § 9-308). So long as the assignee permits the assignor to collect claims or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.

4. Subsection (D) denies effectiveness to contractual terms prohibiting assignment of sums due and to become due under contracts of sale, construction contracts and the like. Under the rule as stated, an assignment would be effective, even if made to an assignee who took with full knowledge that the account debtor had sought to prohibit or restrict assignment of the claims.

5. The Federal Assignment of Claims Code of 1940 - to which of course this section is subject - requires that assignments of claims against the United States be filed as provided in that Code. Many large business enterprises, situated like the United States in that claims against them are held by hundreds or thousands of subcontractors or suppliers, often require in their contract or purchase order forms that assignments against them be filed in a prescribed way. Subsection (C) requires reasonable identification of the account assigned and recognizes the right of an account debtor to require

reasonable proof of the making of the assignment and to that extent validates such requirements in contracts or purchase order forms. If the notification does not contain such reasonable identification or if such reasonable proof is not furnished on request, the account debtor may disregard the assignment and make payment to the assignor. What is "reasonable" is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it, unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

#### **Cross References**

Point 1: Section 9-206.

Point 3: Sections 9-205 and 9-308.

Point 4: Section 2-210(B) and (C).

#### **Definitional Cross References**

"Account". Section 9-106.

"Account debtor". Section 9-105.

"Agreement". Section 1-201.

"Contract". Section 1-201.

"Good faith". Section 1-201.

"Party". Section 1-201.

"Receives notification". Section 1-201.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Seasonably". Section 1-204.

"Term". Section 1-201.

#### **Special Plain Language Comment**

This section describes the rights and obligations between a person who owes money on a right to payment which has become collateral and the secured party with a security interest in that collateral. In particular, this section describes the extent to which a buyer of property from the seller-debtor may assert defenses which the buyer has against the seller-debtor to the payment of the purchase price against the secured party of the seller-debtor or against a purchaser of that right to receive payment.

## **Part 4. Filing**

### **§ 9-401. Place of filing; erroneous filing; removal of collateral**

A. The proper place to file in order to perfect a security interest is as follows:

1. When the collateral is timber to be cut, or is minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or when the financing statement is filed as a fixture filing (§ 9-313) and the collateral is goods which are or are to become fixtures, then, in the Commerce Department within the Division of Economic Development or its designated successor;

2. In all other cases, in the Commerce Department within the Division of Economic Development or its designated successor.

B. A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

C. A filing which is made in the proper place under the law of this jurisdiction continues effective for four months after a change in the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is changed. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new required place within said period. The security interest may also be perfected in the new place after the expiration of the four-month period; in such case perfection dates from the time of perfection in the new place. A change in the use of the collateral does not impair the effectiveness of the original filing.

D. The rules stated in § 9-103 determine whether filing is necessary in this jurisdiction.

E. Notwithstanding the preceding Subsections, and subject to § 9-302(C), the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the Commerce Department within the Division of Economic Development or its designated successor. This filing constitutes a fixture filing (§ 9-313) as to the collateral described therein which is or is to become fixtures.

F. For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.

## **History**

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-401 of the Uniform Commercial Code as adopted by the states, except that adjustments have been made in the filing requirements to reflect the differences in the manner in which land is held within Navajo Indian Country and most states. The 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.

**Commentary.** 1. When a secured party has in good faith attempted to comply with the filing requirements but has not done so correctly, Subsection (B) makes his filing effective in so far as it was proper, and also makes it good for all collateral covered by the financing statement against any person who actually knows the contents of the improperly filed statement.

2. Subsection 9-401(C) deals with change of residence or place of business or the location or use of the goods after a proper filing has been made. The Subsection is important only when local filing is required, and covers only changes between local filing units in this jurisdiction. For changes of location between jurisdiction see § 9-103(A)(4).

3. The usual filing rules do not apply well for a transmitting utility (defined in § 9-105). The Code provides that for transmitting utilities the filing need only be in the Commerce Department within the Division of Economic Development or its designated successor. The nature of the debtor will inform persons searching the record as to where to make a search.

#### **Cross References**

Sections 9-302, 9-304 and 9-307(B).

Point 2: Section 9-103(C).

Point 3: Sections 9-402(E) and 9-403(F).

#### **Definitional Cross References**

"Account". Section 9-106.

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Farm products". Section 9-109.

"Financing statement". Section 9-402.

"Fixture filing". Section 9-313.

"Good faith". Section 1-201.

"Goods". Section 9-105.

"Knowledge". Section 1-201.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

#### **Special Plain Language Comment**

This section describes the place where financing statements are to be filed for each type of collateral requiring filing to "perfect" (i.e., complete) the security interest. This section also describes rules relating to filing in an incorrect place or to filing when the debtor relocates.

#### **§ 9-402. Formal requisites of financing statement; amendments; mortgage as financing statement**

A. A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or when the financing statement is filed as a fixture filing (§ 9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with Subsection (E). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this jurisdiction.

B. A financing statement which otherwise complies with Subsection (A) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in:

1. Collateral already subject to a security interest in another jurisdiction when it is brought into this jurisdiction, or when the debtor's location is changed to this jurisdiction. Such a financing

statement must state that the collateral was brought into this jurisdiction or that the debtor's location was changed to this jurisdiction under such circumstances; or

2. Proceeds under § 9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or

3. Collateral as to which the filing has lapsed; or

4. Collateral acquired after a change of name, identity or corporate structure of the debtor (Subsection (G)).

C. A form substantially as follows is sufficient to comply with Subsection (A):

Name of debtor (or assignor) \_\_\_\_\_

Address \_\_\_\_\_

Name of secured party (or assignee) \_\_\_\_\_

Address \_\_\_\_\_

1. This financing statement covers the following types (or items) of property: (Describe) \_\_\_\_\_

2. (If collateral is crops) The above described crops are growing or are to be grown on: (Describe Real Estate) \_\_\_\_\_

3. (If applicable) The above goods are to become fixtures on\* / (Describe Real Estate) \_\_\_\_\_, and this financing statement is to be filed for record in the real estate records. (If the debtor does not have an interest of record.) The name of a record owner is \_\_\_\_\_

4. (If products of collateral are claimed) Products of the collateral are also covered.

(Use whichever is applicable) \_\_\_\_\_

Signature of Debtor (or Assignor) \_\_\_\_\_

Signature of Secured Party (or Assignee) \_\_\_\_\_

D. A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the

amendment. In this article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

E. A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or a financing statement filed as a fixture filing (§ 9-313) where the debtor is not a transmitting utility, must (i) show that it covers this type of collateral, (ii) recite that it is to be filed in the real estate records, and (iii) contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under Navajo law. If the debtor does not have an interest of record in the real estate, the financing statement must show the name of a record owner.

F. To the extent that this section requires the recording of a fixture filing in the real estate records where mortgages are recorded, a mortgage is effective as a financing statement filed as a fixture filing from the data of its recording if:

1. The goods are described in the mortgage by item or type; and
2. The goods are or are to become fixtures related to the real estate described in the mortgage; and
3. The mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and
4. The mortgage is duly recorded.

So far as this article relates to the matter, no fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.

G. A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or names of partners. Where the debtor so changes his name or, in the case of an organization, its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

H. A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

#### **History**

CJA-1-86, January 29, 1986.

## Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-402 of the Uniform Commercial Code as adopted by the states. See § 9-401.

**Commentary.** 1. Subsection (A) sets out the simple formal requisites of a financing statement under this article. These requirements are: (1) signature of the debtor; (2) addresses of both parties; (3) a description of the collateral by type or item.

Where the collateral is crops growing or to be grown or when the financing statement is filed as a fixture filing (§ 9-313) or when the collateral is timber to be cut or minerals or the like (including oil and gas) financed at wellhead or minehead or accounts resulting from the sale thereof, the financing statement must also contain a description of the lands concerned. On description generally, see § 9-110 and Comment 4 to the present section. An important distinction must be drawn, however, between the function of the description of land in reference to crops and its function in the other cases mentioned. For crops it is merely part of the description of the crops concerned, and the security interest in crops is a Code security interest. In contrast, in the other cases mentioned the function of the description of land is to have the financing statement filed in the appropriate real estate records, as distinguished from the personal property records. Subsection (C) suggests a form which complies with the statutory requirements and makes clear that for the types of collateral mentioned other than crops, the financing statement containing a description of the land concerned is to go in the realty records. Note also Subsection (E) on the adequacy of the description of land where the filing is to be in the real estate records. See also § 9-403.

A copy of the security agreement may be filed in place of a separate financing statement, if it contains the required information and signature.

2. This section adopts the system of "notice filing". What is required to be filed is not the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. Section 9-208 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure. Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refileing of each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution. Sometimes more than one copy of a financing statement or of a security agreement used as a financing statement is needed for filing. In such a case the section permits use of a carbon copy or photographic copy of the paper, including signatures.

However, even in the case of filings that do not necessarily involve a series of transactions the financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the description of collateral in the financing

statement is broad enough to encompass them. Similarly, the financing statement is valid to cover after-acquired property and future advances under security agreements whether or not mentioned in the financing statement.

3. Subsection (B) allows the secured party to file a financing statement signed only by himself where the filing is required by any of the events listed, each of which occurs after the commencement of the financing, and therefore under circumstances where the cooperation of the debtor is not certain. See § 9-401(C). The secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor. Financing statements filed under this Subsection must explain the circumstances under which they are filed with the signature of the secured party rather than that of the debtor.

In contrast to the signatures on original financing statements, an amendment to a financing statement must be signed by both parties, to preclude either from adversely affecting the interests of the other.

The reference in Subsection (D) to an amendment which "adds collateral" refers to additional types of collateral. A security interest on additional units of a type of collateral already described can be created under an after-acquired property clause or a new security agreement. See Comment to § 9-204. On priorities in such cases see § 9-312 and Comments thereto.

4. A description of real estate must be sufficient to identify it. See § 9-110. This formulation rejects the view that the real estate description must be by metes and bounds, or otherwise conforming to traditional real estate practice in conveyancing, but of course the incorporation of such a description by reference to the recording data of a deed, mortgage or other instrument containing the description should suffice under the most stringent standards. The proper test for the description in a filing for fixtures, minerals, accounts subject to § 9-103(E) or timber to be cut is that a description of real estate must be sufficient so that the fixture financing statement will fit into the real estate search system and the financing statement be found by a real estate searcher; in other words, the test of adequacy of the description is whether it would be adequate in a mortgage of the real estate. However, the description of the real estate on which the crops are located need only satisfy the requirements of the local recorder for such crop filings where the crops are not grown on land owned by or held in trust for the Navajo Nation. In the case of crops grown on lands within Navajo Indian Country, the description of the land need only include its approximate location to the extent that no more precise location is reasonably available. Because it may not be practical to obtain with reasonable effort a precise description of some Navajo land and this Code does not wish to discourage commercial financing by imposing impractical or expensive requirements, the description of Navajo land which is difficult to describe in a formal sense shall not be invalid as long as the parties make a reasonable effort to distinguish the crop from other crops of the same debtor. In such cases, other creditors of the debtor will have the burden of distinguishing between separate crops of the same debtor, and the emphasis of such descriptions is not so much how to locate the land as it is how to distinguish between separate crops of the debtor in which different secured parties have a security interest or in which there is no security interest.

Where the debtor does not have an interest of record in the real estate, a fixture financing statement must show the name of a record owner. Thus, in such cases the fixture financing will fit into the real estate search system.

5. A real estate mortgage may provide that it constitutes a security agreement with, respect to fixtures (or other goods) in conformity with this article. Combined mortgages on real estate and goods are common and useful for certain purposes. This section goes further and makes provision that the recording of the real estate mortgage, (if it complies with the requirements of financing statement) shall constitute the filing of a financing statement as to the fixtures (but not, of course, as to the other goods). See § 9-403. Of course, if a combined mortgage covers goods which are not fixtures, a regular filing is necessary for such goods, and Subsection (F) is inapplicable to such goods. Likewise, filing as a "fixture filing" provided in § 9-401 does not apply to true goods.

6. Subsection (G) undertakes to deal with some of the problems as to who is the debtor. In the case of individuals, it contemplates filing only in the individual name, not in a trade name. In the case of partnerships it contemplates filing in the partnership name, not in the names of any of the partners, and not in any other trade names. Trade names are deemed to be too uncertain and too likely not to be known to the secured party or person searching the record, to form the basis for a filing system. See § 9-403(E).

Subsection (G) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading. Not all cases can be imagined and covered by statutes in advance. However, the principle sought to be achieved by the Subsection is that after a change which would be seriously misleading, the old financing statement is not effective as to new collateral acquired more than four months after the change, unless a new appropriate financing statement is filed before the expiration of the four months. The old financing statement, if legally still valid under the circumstances, would continue to protect collateral acquired before the change and, if still operative under the particular circumstances, would also protect collateral acquired within the four months. Obviously, the Subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor.

7. Subsection G) also deals with a different problem, namely whether a new filing is necessary where the collateral has been transferred from one debtor to another. This article answers the question in the negative. Thus, any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it. But see § 9-307.

8. Subsection (H) is in line with the policy of this article to simplify formal requisites and filing requirements and is designed to discourage the fanatical and impossibly refined reading of such statutory requirements.

#### **Cross References**

Point 1: Section 9-110.

Point 2: Section 9-208.

Point 3: Sections 9-103, 9-306 and 9-401(C).

Point 4: Section 9-110.

Point 5: Section 9-403(F).

Point 6: Section 9-403(H).

Point 7: Section 9-311.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Goods". Section 9-105.

"Party". Section 1-201.

"Proceeds". Section 9-306.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Signed". Section 1-201.

"Transmitting utility". Section 9-105.

#### **Special Plain Language Comment**

This section describes the form for various types of "financing statements" and "fixture filings" and the preparation and use of such forms.

#### **§ 9-403. What constitutes filing; duration of filing; effect of lapsed filing; duties of filing officer**

A. Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this article.

B. Except as provided in Subsection (F) a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the

five year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five year period, whichever ever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.

C. A continuation statement may be filed by the secured party within six months prior to the expiration of the five-year period specified in Subsection (B). Any such continuation statement must be signed by the secured party, identify the original statement by file number and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with § 9-405(B), including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in Subsection (B) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement.

D. Except as provided in Subsection (G), a filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition, the filing officer shall index the statement according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.

E. The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be set by regulation. The uniform fee for each name more than one required to be indexed shall be set by regulation.

F. If the debtor is a transmitting utility (§ 9-401(E)) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under § 9-402(F) remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

G. When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to § 9-103(E), or is filed as a fixture filing, the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors; in a mortgage of the real estate described, and, to the extent that the law of this jurisdiction provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage

of the real estate described.

### History

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

### Official Comment

**Changes.** This section is intended to have the same meaning and effect as § 9-403 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

**Commentary.** 1. Subsection (A) clarifies that a financing statement filed for record gives constructive notice from the time of presentation to the filing officer, rather than from the time of indexing.

2. Subsection (B) establishes five years as the filing period, with an exception for the cases mentioned in Subsection (F). Subsection (C) provides for the filing of one or more continuation statements (which need be signed only by the secured party), if it is desired to continue the effectiveness of the original filing.

The theory of this article is that the public files of financing statements are self-clearing, because the filing officer may automatically discard each financing statement after a period of five years, unless a continuation statement is filed or the financing statement is still effective under Subsection (F). This theory materially lessens the tension that would otherwise exist to have the files cleared by termination statements under § 9-404. Similarly, a person searching the files need not go back into the past indefinitely, and he has a limited and defined search problem.

Subsection (F) provides certain special filing rules, namely, filings against transmitting utilities (§ 9-105), for which financing statements are filed in the Commerce Department of the Division of Economic Development and real estate mortgages which serve as fixture financing statements and which are filed in the Commerce Department of the Division of Economic Development or its successor. In both of these cases the financing statement is valid for the life of the obligations secured. No confusion as to the required scope of search should result, because of the special nature of the filings involved.

3. Under Subsection (B) the security interest becomes unperfected when filing lapses. Thereafter, the interest of the secured party is subject to defeat by purchasers and lienors even though before lapse the conflicting interest may have been junior. Compare the situation arising under § 9-103(A)(4) when a perfected security interest under the law of another jurisdiction is not perfected in this jurisdiction within four months after the property is brought into this jurisdiction.

Thus, if "A" and "B" both make non-purchase money advances against the same collateral, and both perfect security interests by filing, "A" (who files first) is entitled to priority under § 9-312(E). But if no continuation

statement is filed, "A's" filing may lapse first. So long as "B's" interest remains perfected thereafter, he is entitled to priority over "A's" unperfected interest.

4. Subsection (G) makes clear that the filings in real estate records (§§ 9-401 and 9-402(C) and (E)), shall be indexed in the real estate records, where they will be found by a real estate searcher. Where the debtor is not an owner of record, the financing statement must show the name of an owner of record, and the statement is to be indexed in his name. See §§ 9-313(D)(2) and (3); 9-402(C); and 9-402(E).

#### **Cross References**

Point 3: Sections 9-103(C), 9-301 and 9-312(E).

#### **Definitional Cross References**

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Fixture". Section 9-313.

"Fixture filing". Section 9-313.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Transmitting utility". Section 9-105.

#### **Special Plain Language Comment**

This section describes the mechanical aspects for the filing of "financing statements" and for filing "continuation statements" needed to avoid the lapse of a prior filing.

#### **§ 9-404. Termination statement**

A. If a financing statement covering consumer goods is filed on or after July 30, 1986, then within (i) one month or (ii) within 10 days following written demand by the debtor, whichever occurs first, after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. In other cases, whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the security party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number. A termination statement signed by a person other than the secured party of record must be accompanied by a separate

written statement of assignment signed by the secured party of record complying with § 9-405(B), including payment of the required fee. If the affected secured party fails to file such a termination statement as by this Subsection, or to send such a termination statement within 10 days after proper demand therefor, he shall be liable to the debtor for one hundred dollars (\$100.00) and (in addition) for any loss caused to the debtor by such failure.

B. On presentation to the filing officer of such a termination statement he must note it in the index. If he has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.

C. If the termination statement is in the standard form prescribed by the Commerce Department within the Division of Economic Development or its designated successor, the uniform fee for filing and indexing the termination statement shall be set by regulation.

#### **History**

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-404 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

**Commentary.** 1. The purpose of this section is to provide a procedure for noting discharge of the secured obligation on the records and for noting that a financing arrangement has been terminated.

Since most financing statements expire in five years unless a continuation statement is filed (§ 9-403), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance of clearing the situation as it appears on file, an affirmative duty is put on the secured party in that case. However, many purchase money security interests in consumer goods will not be filed, except for motor vehicles (§ 9-302(A)(4)), in which case a certificate of title law may control instead of the filing provisions of Article 9.

2. This section adds a provision covering the problem which arises because a secured party under a notice filing system may file notice of an intention to make advances which may never be made. Under this section a debtor may require a secured party to send a termination statement when there is no outstanding

obligation and no commitment to make future advances.

#### **Cross References**

Point 2: Section 9-402(A).

#### **Definitional Cross References**

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

#### **Special Plain Language Comment**

This section describes the arrangements for terminating financing statements.

#### **§ 9-405. Assignment of security interest**

A. A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in § 9-403(D). The uniform fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be set by regulation.

B. A secured party may assign of record all or part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to § 9-103(E), he shall

index the assignment under the name of the assignor as grantor and, to the extent that Navajo law provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee. The uniform fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be set by regulation. Notwithstanding the provisions of this Subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (§ 9-402(F)) may be made only by an assignment of the mortgage in the manner provided by the law applicable to the recording of such mortgages.

C. After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

#### **History**

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-405 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made because of the establishment of a Navajo filing system.

**Commentary.** This section provides a permissive device whereby a secured party who has assigned all or part of his interest may have the assignment noted of record. Note that under § 9-302(B) no filing of such an assignment is required as a condition of continuing the perfected status of the security interest against creditors and transferees of the original debtor. A secured party who has assigned his interest might wish to have the fact noted of record, so that inquiries concerning the transaction would be addressed not to him but to the assignee (see Point 2 of comment to § 9-402). After a secured party has assigned his rights of record, the assignee becomes the "secured party of record" and may file a continuation statement under § 9-403, a termination statement under § 9-404, or a statement of release under § 9-406.

Where a mortgage of real estate is effective as a financing statement filed as a fixture filing (§ 9-402(F)), then an assignment of record of the security interest may be made only in the manner in which an assignment of the mortgage may be made under the law applicable to such mortgages.

#### **Cross References**

Sections 9-302(B) and 9-402 through 9-406.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Signed". Security 1-201.

"Written". Section 1-201.

#### **Special Plain Language Comment**

This section describes certain mechanical arrangements for the transfer of a secured party's position to a new secured party.

#### **§ 9-406. Release of collateral**

A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with § 9-405(B), including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be set by regulation.

#### **History**

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-406 of the Uniform Commercial Code as adopted by the states, except for adjustments which have been made to reflect the establishment of a Navajo filing system.

**Commentary.** Like the preceding section, this section provides a permissive device for noting of record any release of collateral. There is no requirement that such a statement be filed when collateral is released (*cf.* § 9-404 on Termination Statements). It is merely a method of making the record reflect the true state of affairs so that fewer inquiries will have to be made by persons who consult the files.

If the statement of release is not signed by the secured party of record, the assignment procedure of § 9-405(B) must be followed.

## **Cross References**

Section 9-404.

### **Definitional Cross References**

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Secured party". Section 9-105.

"Signed". Section 1-201.

### **Special Plain Language Comment**

This section describes the mechanics for a secured party to release some collateral without terminating the entire financing statement.

#### **§ 9-407. Information from filing officer**

A. If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.

B. Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be set by regulation. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of to be set by regulation.

### **History**

CD-61-86, December 11, 1986.

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-407 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Subsection (A) requires the filing officer upon request to return to the secured party a copy of the financing statement on which the material data concerning the filing are noted. Receipt of such a copy will assure the secured party that the mechanics of filing have been complied with.

Note, however, that under § 9-403(A) the secured party does not bear the risk that the filing officer will not properly perform his duties; under that section the secured party has complied with the filing requirements when he presents his financing statement for filing and the filing fee has been tendered or the statement accepted by the filing officer.

2. Subsection (B) requires the filing officer on request to issue to any person who has tendered the proper fee his certificate as to what filings have been made against any particular debtor and to furnish copies of such filed financing statements. In view of the centralized filing system adopted by this article (see § 9-401 and Comment thereto), this provision is of obvious convenience to a person who wishes to know what the files contain but who cannot conveniently consult files located in the capital of the Navajo Nation.

#### **Cross References**

Point 1: Section 9-403(A).

Point 2: Section 9-401.

#### **Definitional Cross References**

"Debtor". Section 9-105.

"Financing statement". Section 9-402.

"Person". Section 1-201.

"Secured party". Section 9-105.

"Send". Section 1-201.

#### **§ 9-408. Financing statements covering consigned or leased goods**

A consignor or lessor of goods may file a financing statement using the terms "consignor", "consignee", "lessor", "lessee" or the like instead of the terms specified in § 9-402. The provisions of this part shall apply as appropriate to such a financing statement, but its filing shall not of itself be a factor in determining whether or not the consignment or lease is intended as security (§ 1-201(KK)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

This section is intended to have the same meaning and effect as § 9408 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. Where filing is required under §§ 2-326(C) and 9-114 for a

consignment which is not a security interest (§ 1-201(KK)), this section authorizes the appropriate adaptations of terminology.

Apart from the rules in Part 4, the rules of this article using the terms "debtor" and "secured party" will not apply to consignments if they are not security interests. Section 9-114 on consignments essentially parallels § 9-312(C) on inventory priorities, and the latter rule therefore does not apply to consignments. Section 2-326 states the rights of creditors of a consignee who has not filed or otherwise complied with Subsection (C), and § 9-301 on unperfected security interests is therefore not applicable. Section 2-326 and the law of consignments supply rules which are provided by § 9-311 for security interests and that section is therefore not applicable to consignments. For reasons indicated in the Comment to § 9-114, § 9-306 on proceeds is inapplicable to consignments. An equivalent to the protection of a buyer in ordinary course of business against a security interest under § 9-307(A) is provided against consignments by § 2-403(B) and (C).

2. If a lease is actually intended as security (§ 1-201(KK)), this article applies in full. However, this question of intention is a doubtful one, and the lessor may choose to file for safety even while contending that the lease is a true lease for which no filing is required. This section authorizes filing with appropriate changes of terminology, and without affecting the substantive question of classification of the lease. If the lease is a true lease, none of the provisions of the Article is applicable to the lease as an interest in the chattel. Note, however, that the Article may be applicable to the lease in its aspect as chattel paper. See § 9-105(B).

#### **Cross References**

Point 1: Sections 1-201(KK), 2-326, 2-403, 9-114, 9-301, 9-306, 9-307, and 9-312.

Point 2: Sections 1-201(KK) and 9-105(B).

#### **Definitional Cross References**

"Debtor". Section 9-105.

"Financing Statement". Section 9-402.

"Goods". Section 9-105(A) (8).

"Secured Party". Section 9-105.

#### **Special Plain Language Comment**

Persons who allow others to sell their goods (e.g. "consignors") and persons who allow others to use their goods (e.g., "lessors") sometimes do not want to be treated as "secured parties" under this article, but wish to file under this article to protect themselves in case they are determined by a court to be a "secured party". This section accommodates that concern.

#### **Part 5. Default**

**§ 9-501. Default; procedure when security agreement covers both real and personal property**

A. When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and, except as limited by Subsection (C), those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights remedies and duties provided in § 9-207. The rights and remedies referred to in this Subsection are cumulative.

B. After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in § 9-207.

C. To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the Subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (§ 9-504(C) and § 9-505) and with respect to redemption of collateral (§ 9-506), but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured, if such standards are not manifestly unreasonable.

1. Section 9-502(B) and § 9-504(B) insofar as they require accounting for surplus proceeds of collateral;

2. Section 9-504(C) and § 9-505(A) which deal with disposition of collateral;

3. Section 9-505(B) which deals with acceptance of collateral as discharge of obligation;

4. Section 9-506 which deals with redemption of collateral;

5. Section § 9-507(A) which deals with the secured party's liability for failure to comply with this part; and

6. Section 9-503 which deals with the repossession of personal property-7 N.N.C. § 621.

D. If the security agreement covers both real and personal property or fixtures, the secured party may proceed under this part as to the personal property or fixtures, or he may proceed as to both the real and the personal property or fixtures in accordance with his rights and remedies in respect of the real property, in which case the provisions of this part do not apply.

E. When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this

article.

### **History**

CJA-1-86, January 29, 1986.

**Note.** Repossession of personal property moved from 7 N.N.C. § 607 to 7 N.N.C. § 621 and renamed "Repossession of consumer goods."

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-501 of the Uniform Commercial Code as adopted by the states, except as adjusted for clarification of the position regarding fixtures in Subsection (D).

**Commentary.** 1. The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction. These are the rights which distinguish the secured from the unsecured lender. This section and the following six sections state those rights as well as the limitations on their free exercise which legislative policy requires for the protection not only of the defaulting debtor but of other creditors. However, Subsections (A) and (B) make it clear that the statement of rights and remedies in this part does not exclude other remedies provided by agreement.

2. Following default and the taking possession of the collateral by the secured party, there is no longer any distinction between the security interest which before default was non-possessory and that which was possessory under a pledge. Therefore, no general distinction is taken in this part between the rights of a non-possessory secured party and those of a pledgee; the latter, being in possession of the collateral at default, will of course not have to avail himself of the right to take possession under § 9-503.

3. Section 9-207 states rights, remedies and duties with respect to collateral in the secured party's possession. That Section applies not only to the situation where he is in possession before default, as a pledgee, but also, but Subsections (A) and (B) of this section, to the secured party in possession after default. Nevertheless, the relations of the parties have been changed by default, and § 9-207 (as it applies after default) must be read together with this part. In particular, agreements, permitted under § 9-207 cannot waive or modify the rights of the debtor contrary to Subsection (C) of this section.

4. Section 1-102(C) states rules to determine which provisions of this Code are mandatory and which may be varied by agreement. In general, provisions which relate to matters which come up between immediate parties may be varied by agreement. In the area of rights after default our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties: no mortgage clause has ever been allowed to clog the equity of redemption. The default situation offers great scope for overreaching; the suspicious attitude of the courts have been grounded in common sense. Subsection (C) of the section contains a codification of this long-standing and deeply rooted attitude: the specified rights of the debtor and duties of the secured party may not be waived or varied except as stated. Provisions not specified in Subsection (C) are subject to the general rules stated in § 1-102(C).

5. The collateral for many corporate security issues consists of both real and personal property. In the interest of simplicity and speed Subsection (D) permits, although it does not require, the secured party to proceed as to both real and personal property in accordance with his rights and remedies in respect of the real property. Except for the permission so granted, this Code leaves to other applicable law all questions of procedure with respect to real property. For example, this Code does not determine whether the secured party can proceed against the real estate alone and later proceed in a separate action against the personal property in accordance with his rights and remedies against the real estate. By such separate actions the secured party "proceeds as to both", and this part does not apply in either action. However, Subsection (D) does give the secured party an option to proceed under this part as to the personal property.

6. Under Subsection (A) a secured party is entitled to reduce his claim to judgment or to foreclose his interest by any available procedure, outside this article, which applicable law may provide. The first sentence of Subsection (E) makes clear that any judgment lien which the secured party may acquire against the collateral is, so to say, a continuation of his original interest (if perfected) and not the acquisition of a new interest or a transfer of property to satisfy an antecedent debt. The judgment lien is therefore stated to relate back to the date of perfection of the security interest. The second sentence of the Subsection makes clear that a judicial sale following judgment, execution and levy is one of the methods of foreclosure contemplated by Subsection (A); such a sale is governed by other law and not by this article and the restrictions which this article imposes on the right of a secured party to buy in the collateral at a sale under § 9-504 do not apply.

#### **Cross References**

Point 2: Section 9-503.

Point 3: Section 9-207.

Point 4: Section 1-102(C).

Point 5: Sections 9-102(A) and 9-104(j).

Point 6: Section 9-504.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Documents". Section 9-105.

"Goods". Section 9-105.

"Remedy". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

#### **Special Plain Language Comment**

This section describes the extent to which the rights and obligations of "debtors" and "secured parties" may be changed by agreement. This section also describes the interaction between this article and other laws and procedures dealing with creditor rights after default.

#### **§ 9-502. Collection rights of secured party**

A. When so agreed in a conspicuous manner in writing and, in any event, on default the secured party is entitled to notify an account debtor or the obligor on an instrument or deposit account to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which the secured party is entitled under § 9-306.

B. A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-502 of the Uniform Commercial Code as adopted by the states, except that it has been adjusted to include a remedy for the security interest in deposit accounts and to require conspicuous written agreement to predefault collection of assigned rights to payment.

**Commentary.** 1. The assignee of accounts, deposit accounts, chattel paper, or instruments hold as collateral property which is not only the most liquid asset of the debtor's business, but also property which may be collected without any interruption of the business (assuming that it continues after default). The situation is far different from that where the collateral is inventory or equipment, whose removal may bring the business to a halt. Furthermore, the

problems of valuation and identification, present where the collateral is tangible goods, do not arise so sharply on the assignment of intangibles. Considerations, similar although not identical, apply to assignments of general intangibles, which are also covered by the rule of the section. Consequently, this section recognizes the fact that financing by assignment of intangibles lacks many of the complexities which arise after default in other types of financing, and allows the assignee to liquidate in the regular course of business by collecting whatever may become due on the collateral, whether or not the method of collection contemplated by the security arrangement before default was direct (i.e., payment by the account debtor to the assignee, "notification" financing) or indirect (i.e., payment by the account debtor to the assignor, "non-notification" financing). By agreement, of course, the secured party may have the right to give notice and to make collections before default.

2. In one form of accounts receivable financing, which is found in the "factoring" arrangements, which are common in the textile industry, the assignee assumes the credit risk—that is, he buys the account under an agreement which does not provide for recourse or charge-back against the assignor in the event the account proves uncollectible. Under such an arrangement, neither the debtor nor his creditors have any legitimate concern with the disposition which the assignee makes of the accounts. Under another form of accounts receivable financing, however, the assignee does not assume the credit risk and retains a right of full or limited recourse or charge-back for uncollectible accounts. In such a case, both debtor and creditors have a right that the assignee not dump the accounts, if the result will be to increase a possible deficiency claim or to reduce a possible surplus.

3. Where an assignee has a right of charge-back or a right of recourse, Subsection (B) provides that liquidation must be made with due regard to the interest of the assignor and of his other creditors—"in a commercially reasonable manner" (compare § 9-504 and see § 9-507(B)) and the proceeds allocated to the expenses of realization and to the indebtedness. If the "charge-back" provisions of the assignment arrangement provide only for "charge-back" of bad accounts against a reserve, the debtor's claim to surplus and his liability for a deficiency are limited to the amount of the reserve.

4. Financing arrangements of the type dealt with by this section are between businessmen. The last sentence of Subsection (B) therefore preserves freedom of contract, and the Subsection recognizes that there may be a true sale of accounts or chattel paper, although recourse exists. The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts. Note that, under § 9-102, this article applies both to sales and to security transfers of such intangibles.

#### **Cross References**

Sections 9-205 and 9-306.

Point 3: Sections 9-504 and 9-507(B).

Point 4: Sections 9-102(A)(2) and 9-104(F).

#### **Definitional Cross References**

"Account". Section 9-106.  
"Account debtor". Section 9-105.  
"Agreement". Section 1-201.  
"Chattel paper". Section 9-105.  
"Collateral". Section 9-105.  
"Debtor". Section 9-105.  
"Instrument". Section 9-105.  
"Notify". Section 1-201.  
"Proceeds". Section 9-306.  
"Secured party". Section 9-105.  
"Security agreement". Section 9-105.

#### **Special Plain Language Comment**

This section describes the operation of a remedy by which the secured party may enforce collection of collateral in the form of rights to payment owing to the debtor.

#### **§ 9-503. Secured party's right to take possession after default**

A secured party has on default the right to take possession of the collateral solely in accordance with the Navajo law which does not permit a secured party to repossess personal property of Navajo Indians without judicial process. See 7 N.N.C. § 621. If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may, in accordance with applicable Navajo law, render equipment unusable, and may dispose of collateral on the debtor's premises under § 9-504.

#### **History**

CJA-1-86, January 29, 1986.

**Note.** Repossession moved from 7 N.N.C. § 607 to 7 N.N.C. § 621.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-503 of the Uniform Commercial Code as adopted by the states, except that repossession of collateral located within Navajo Indian Country and entry on Navajo Indian Country to exercise such remedies must be done in accordance with applicable Navajo law.

**Commentary.** Under this article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default unless otherwise agreed in the security agreement. In the case of collateral such as heavy equipment, the physical removal from the debtor's plant and the storage of the equipment pending resale maybe exceedingly expensive and in some cases impractical. The section therefore provides that in lieu of removal, the lender may render equipment unusable or dispose of collateral on the debtor's premises. The authorization to render equipment unusable or to dispose of collateral without removal would not justify unreasonable action by the secured party, since, under § 9-504(C), all his actions in connection with disposition must be taken in "commercially reasonable manner". However, all such remedies of the secured party must be exercised on Navajo Indian Country in accordance with the laws and procedures of that jurisdiction.

#### **Cross References**

Section 9-504.

#### **Definitional Cross References**

"Action". Section 1-201.

"Collateral". Section 9-105.

"Debtor". Section 9-105.

"Equipment". Section 9-109.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

Navajo Rules of Court Relating to Repossession.

#### **Special Plain Language Comment**

This section describes the remedy of the secured party after default by the debtor on the obligation secured by collateral to recover possession of that collateral from the debtor or to enter the debtor's property in order to assemble the collateral, to render the collateral inoperable, or to sell it.

#### **§ 9-504. Secured party's right to dispose of collateral after default; effect of disposition**

A. A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). Unless otherwise provided in the security agreement, the proceeds of disposition shall be applied in the order followed to:

1. The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party; and

2. The satisfaction of indebtedness secured by the security interest under which the disposition is made; and

3. The satisfaction of indebtedness secured by any subordinate security, interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

B. If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

C. Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. Such notices must be delivered personally or be deposited in the United States mail postage prepaid addressed: (i) to the debtor at his address as set forth in the financing statement or in the security agreement or at such other address as may have been furnished to the secured party for such purpose, or if no address has been so set forth or furnished, at his last known address; and (ii) to any other secured party at the address set forth in his request for notice. Unless a debtor is entitled to greater notice and advertising by agreement, there is a rebuttable presumption that: (i) a private sale or disposition notice shall be commercially reasonable if it is given at least 10 days in advance of the disposition; and (ii) a public sale or disposition notice shall be deemed commercially reasonable if it is given at least 10 days in advance of the disposition and if notice of the time and place of such disposition is given at least five days before such disposition by publication at least twice in both a newspaper of general circulation in the county in which the sale is to be held and a newspaper of general circulation in the Navajo Indian Country. Any public sale or disposition may be postponed from time to time by public announcement at the time and place last scheduled for the disposition and by commercially reasonable notice of the new sale or

disposition. The secured party may buy at any public sale, and, if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

D. When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings:

1. In the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
2. In any other case, if the purchaser acts in good faith.

E. A. person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-504 of the Uniform Commercial Code as adopted by the states, except that certain issues are clarified such as the notice arrangement. In order to prevent uncertainty concerning reasonable time for notice of a sale or disposition, the Subsection (C) states a rebuttable presumption for a satisfactory minimum notice standard which will create a "safe harbor" in all but the most unusual cases where greater notice is obviously necessary (e.g., in order to allow advertising of specialty collateral in a specialized trade publication). Nothing in this section is intended to discourage greater notice or advertising, and this section focuses solely upon minimum standards.

**Commentary.** 1. Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction placed on the secured party's method of disposition is that it must be commercially reasonable. In this respect this section follows the provisions of the section on resale by a seller following a buyer's rejection of goods. (§ 2-706). Subsection (A) does not restrict disposition to sale: the collateral may be sold, leased or otherwise disposed of-subject of course to the general requirement of Subsection (B) that all aspects of the disposition be "commercially reasonable". Section 9-507(B) states some tests as to what is "commercially reasonable".

2. Subsection (A) contains provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency. Under Subsection (A)(3) the secured party, after paying expenses of retaking and disposition and his own debt, is required to pay over remaining proceeds to the extent necessary to satisfy the holder of any junior security interest in the same collateral if the holder of the junior interest has made a written demand and furnished on request reasonable proof of his interest. This provision is necessary in view of the fact that under Subsection (D) the junior interest is discharged by the disposition. Since the requirement is conditioned on written demand, it should not result in undue burden on the secured party making the disposition. It should be noted also that under § 9-112 where the secured party knows that the collateral is owned by a person who is not the debtor, the owner of the collateral and not the debtor is entitled to any surplus.

3. In any security transaction the debtor (or the owner of the collateral if other than the debtor: see § 9-112) is entitled to any surplus which results from realization on the collateral. The debtor will also, unless otherwise agreed, be liable for any deficiency, and Subsection (B) so provides. Since this article covers sales of certain intangibles as well as transfers for security, the Subsection also provides that (apart from agreement) the right to surplus or liability for deficiency does not accrue where the transaction between debtor and secured party was a sale and not a security transaction.

4. Subsection (D) provides that a purchaser for value from a secured party after default takes free of any rights of the debtor and of the holders of junior security interests and liens, even though the secured party has not complied with the requirements of this part or of any judicial proceedings. Where the purchaser for value has bought at a public sale, he is protected under paragraph (1) if he has no knowledge of any defects in the sale and was not guilty of collusive practices. Where the purchaser for value has bought at a private sale he must, to receive the protection of paragraph (2), qualify in all respects as a purchaser in good faith. Thus, while the purchaser at a private sale is required to proceed in the exercise of good faith, the purchaser at public sale is protected so long as he is not actively in bad faith, and is put under no duty to inquire into the circumstances of the sale.

5. Under Subsection (C), the secured party in most cases is required to give reasonable notification of disposition to the debtor unless the debtor has after default signed a statement renouncing or modifying his right to notification of sale. The secured party must also (except for consumer goods) give notice to any other secured parties who have in writing given notice of a claim of an interest in the collateral. This latter notice must be given before the debtor renounces his rights or before the secured party gives his notification to the debtor. Compare § 9-505(B). Except for the requirement of notification, there is no statutory period during which the collateral must be held before disposition. "Reasonable notification" is not defined in this article, although certain rebuttable presumptions are included as guides to the parties. At a minimum, notice must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interests by paying the defaulted obligation or by taking part in the sale or other disposition if they so desire.

6. No period is set within which the disposition must be made, except in the case of consumer goods which under § 9-505(A) must in certain instances be sold

within 90 days after the secured party has taken possession. The failure to prescribe a statutory period during which disposition must be made is in line with the policy adopted in this article to encourage disposition by private sale through regular commercial channels. It may, for example, be wise not to dispose of goods when the market has collapsed, or to sell a large inventory in parcels over a period of time instead of in bulk. Note, however, that under Subsection (C) every aspect of the sale or other disposition of the collateral must be commercially reasonable; this specifically includes, method, manner, time, place and terms. See § 9-507(B). Under that provision a secured party who without proceeding under § 9-505(B) held collateral a long time without disposing of it, thus running up large storage charges against the debtor, where no reason existed for not making a prompt sale, might well be found not to have acted in a "commercially reasonable" manner. See also § 1-203 on the general obligation of good faith.

#### **Cross References**

- Point 1: Sections 2-706 and 9-507(B).
- Point 2: Section 9-112.
- Point 3: Sections 9-102(A)(2) and 9-112.
- Point 4: Section 2-706.
- Point 6: Sections 9-505 and 9-507(B).

#### **Definitional Cross References**

- "Account". Section 9-106.
- "Agreement". Section 1-201.
- "Chattel paper". Section 9-105.
- "Collateral". Section 9-105.
- "Consumer goods". Section 9-109.
- "Contract". Section 1-201.
- "Debtor". Section 9-105.
- "Financing statement". Section 9-402.
- "Gives" notification. Section 1-201.
- "Good faith". Section 1-201.
- "Goods". Section 9-105.
- "Knowledge". Section 1-201.
- "Person". Section 1-201.

"Proceeds". Section 9-306.

"Purchaser". Section 1-201.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Sale". Sections 2-106 and 9-105.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Term". Section 1-201.

"Value". Section 1-201.

"Written". Section 1-201.

#### **Special Plain Language Comment**

This section describes the procedures for a secured party to follow in selling or otherwise disposing of the collateral after default on the secured obligation of the debtor.

#### **§ 9-505. Compulsory disposition of collateral; acceptance of the collateral as discharge obligation**

A. If the debtor has paid sixty percent (60%) of the cash price in the case of a purchase money security interest in consumer goods or sixty percent (60%) of the loan in the case of another security interest in consumer goods, and the debtor has not signed after default a statement renouncing or modifying his rights under this part, a secured party who has taken possession of collateral must dispose of it under § 9-504, and, if the secured party fails to do so within 90 days after he takes possession, the debtor at his option may recover in conversion or under § 9-507(A) on secured party's liability.

B. In any other case involving consumer goods or any other collateral, a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation (or, if agreed by the debtor after default, in satisfaction of an agreed part of the obligation). Written notice of such proposal shall be sent to the debtor and, except in the case of consumer goods, notice shall be sent to any other secured party from whom the secured party has received (before sending his, notice to the debtor) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from the debtor or other secured party entitled to receive notification within 30 days after the notice was sent, the secured party must dispose of the collateral under § 9-504 or collect collateral

consisting of rights to payment under § 9-502. In the absence of such written objection, the secured party may retain the collateral in satisfaction of the debtor's obligation.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as 9-505 of the Uniform Commercial Code as adopted by the states, except that it (i) clarifies the right of the debtor to agree after default to a transfer of collateral in satisfaction of less than all of the debt, ii) maintains the absolute right of the debtor to written notice from the 1962 version of the Uniform Commercial Code (this section was modified in the 1972 amendments to permit waiver of such notice by the debtor), (iii) maintains the 30-day notice period from the 1962 version of the Uniform Commercial Code; and (iv) clarifies the right of a secured party whose proposal has been rejected to collect rights to payment under § 9-502 instead of selling them under § 9-504.

**Commentary.** 1. Experience has shown that the parties are frequently better off without a resale of the collateral; hence this section sanctions an alternative arrangement. In lieu of resale or other disposition, the secured party may propose under Subsection (B) that he keep the collateral as his own, thus discharging the obligation and abandon any claim for a deficiency unless otherwise agreed by the debtor after default. This right may not be exercised in the case of consumer goods where the debtor has paid sixty percent (60%) of the price or obligation and thus has a substantial equity, and this right may be exercised in other cases only on notification to the debtor, and (except in the case of consumer goods) to any other secured party who was given written notice of a claim of an interest in the collateral. In the latter case, notice must be given before the secured party sends his notice to the debtor. The secured party may keep the goods in lieu of sale on failure of anyone receiving notification to object within 30 days.

2. When an objection is received by the secured party, he must then proceed to dispose of the collateral in accordance with § 9-504 (or, in the case of rights to payment, to collect it under § 9-502), and on failure to do so would incur the liabilities set out in § 9-507. In the case of consumer goods where sixty percent (60%) of the price or obligation has been paid, the disposition must be made within 90 days after possession taken. For failure to make the sale within the 90-day period the secured party is liable in conversion or alternatively may incur the liabilities set out in § 9-507. In the absence of objection the secured party is bound by this notice.

3. After default (but not before) a consumer-debtor who has paid sixty percent (60%) of the cash price may sign a written renunciation of his rights to require resale of the collateral.

### **Cross References**

Sections 9-504 and 9-507(A).

### **Definitional Cross References**

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Debtor". Section 9-105.

"Knows". Section 1-201.

"Notice". Section 1-201.

"Person". Section 1-201.

"Purchase money security interest". Section 9-107.

"Receives" notification. Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Signed". Section 1-201.

"Written". Section 1-201.

### **Special Plain Language Comment**

This section describes a procedure whereby the secured party enforces his proposal to keep the collateral in satisfaction of the secured obligation unless the debtor objects within thirty (30) days, except in certain specified cases involving consumer goods or other agreements among the parties.

#### **§ 9-506. Debtor's right to redeem collateral**

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 9-504 or before the obligation has been discharged under § 9-505(B), the debtor or any other secured party may (unless otherwise agreed in writing after default) redeem the collateral by tendering fulfillment of an obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and, to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

### **History**

CJA-1-86, January 29, 1986.

### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-506 of the Uniform Commercial Code as adopted by the states.

**Commentary.** Except in the case stated in § 9-505(A) (consumer goods) the secured party is not required to dispose of collateral within any stated period of time. Under this section so long as the secured party has not disposed of collateral in his possession or contracted for its disposition, and so long as his right to retain it has not become fixed under § 9-505(B), the debtor or another secured party may redeem. The debtor must tender fulfillment of all obligations secured, plus certain expenses: if the agreement contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered. "Tendering fulfillment" obviously means more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and, performance in full of all other obligations then matured. If unmatured obligations remain, the security interest continues to secure them as if there had been no default.

Under § 9-504 the secured party may make successive sales of parts of the collateral in his possession. The fact that he may have sold or contracted to sell part of the collateral would not affect the debtor's right under this section to redeem what was left. In such a case, of course, in calculating the amount required to be tendered the debtor would receive credit for net proceeds of the collateral sold.

#### **Cross References**

Sections 9-504 and 9-505.

#### **Definitional Cross References**

"Agreement". Section 1-201.

"Collateral". Section 9-105.

"Contract". Section 1-201.

"Debtor". Section 9-105.

"Secured party". Section 9-105.

"Writing". Section 1-201.

#### **Special Plain Language Comment**

This section describes the debtor's right to reclaim his collateral by satisfying the secured obligations and certain expenses of the secured party before the secured party has disposed of such collateral or obligated himself to do so.

#### **§ 9-507. Secured party's liability for failure to comply with this part**

A. If it is established that the secured party is not proceeding in accordance with the provisions of this part, disposition may be ordered or

restrained on appropriate terms and conditions. If the disposition has occurred, the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover, in any event, an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price.

B. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

#### **History**

CJA-1-86, January 29, 1986.

#### **Official Comment**

**Changes.** This section is intended to have the same meaning and effect as § 9-507 of the Uniform Commercial Code as adopted by the states.

**Commentary.** 1. The principal limitation on the secured party's right to dispose of collateral is the requirement that he proceed in good faith (§ 1-203) and in a commercially reasonable manner. See § 9-504. In the case where he proceeds, or is about to proceed, in a contrary manner, it is vital both to the debtor and other creditors to provide a remedy for the failure to comply with the statutory duty. This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This section therefore provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted. The section further provides for damages where the unreasonable disposition has been concluded, and, in the case of consumer goods, states a minimum recovery.

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as

collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition, although reasonable in other respects, in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates.

2. In view of the remedies provided the debtor and other creditors in Subsection (A) when a secured party does not dispose of collateral in a commercially reasonable manner, it is of great importance to make clear what types of disposition are to be considered commercially reasonable, and in an appropriate case to give the secured party means of getting, by court order or negotiation with a creditors' committee or a representative of creditors, approval of a proposed method of disposition as a commercially reasonable one. Subsection (B) states rules to assist in the determination, and provides for such advance approval in appropriate situations. One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns, since the secured party does not usually maintain his own facilities for making such sales. Such a method of sale, fairly conducted, is recognized as commercially reasonable under the second sentence of Subsection (B). However, none of the specific methods of disposition set forth in Subsection (B) is to be regarded as either required or exclusive, provided only that the disposition made or about to be made by the secured party is commercially reasonable.

#### **Cross References**

Point 1: Section 1-203, 9-202 and 9-504.

#### **Definitional Cross References**

"Collateral". Section 9-105.

"Consumer goods". Section 9-109.

"Creditor". Section 1-201.

"Debtor". Section 9-105.

"Knows". Section 1-201.

"Notification". Section 1-201.

"Person". Section 1-201.

"Representative". Section 1-201.

"Rights". Section 1-201.

"Secured party". Section 9-105.

"Security interest". Section 1-201.

## **Special Plain Language Comment**

This section describes the penalties for bad faith or commercially unreasonable acts by the secured party and procedures for protection of the debtor and other interested creditors from such wrongful conduct. The section also provides some clarification guiding the secured creditor in the proper method of exercising his remedies.

### **Title 6**

#### **Community Development**

##### **Chapter 1. Community Activities and Development**

###### **Subchapter 1. Generally**

###### **§ 1. Statement of policy**

Political, social, educational, and recreational activities of the local community shall be centered in the chapter houses and community centers. A more direct relationship of the local community to the Navajo Nation Council shall be fostered as recommended in Resolution CJ-20-55. In order to achieve community development, chapter houses and community centers shall be used for a variety of purposes such as adult education, health clinics, recreation, social activities, laundry, bathing, sewing, and meetings.

###### **History**

ACJ-40-57, June 21, 1957.

CF-35-57, February 15, 1957.

###### **§ 2. Community participation**

In order to develop a feeling of self-reliance, responsibility, and pride in each local community, a program of community organization and planning shall be conducted in each community to achieve the following objectives:

A. To explain the plan and aims for the Navajo Nation construction of community buildings and the role of the local community in relationship to the over-all program.

B. To allow each community to participate in developing a planned program for using the new facilities and to select the type of building and its location.

C. To develop a custodial responsibility in the community so that the building and its equipment will be properly maintained.

D. To encourage the community to contribute labor, materials, equipment or ideas in the construction of the building, and thereby to maximize the feeling of community ownership and responsibility for the chapter house or community center.

E. To develop an attitude of readiness in the community to utilize the facilities to achieve a more wholesome community life and to encourage continuing participation in programs of community development.

#### **History**

ACJ-40-57, June 21, 1957.

#### **Cross References**

Transportation and Community Development Committee, see 2 N.N.C. § 420 *et seq.*

#### **§ 3. Community development program and activities; conferences; assistance**

A. The Division of Community Development is authorized to hold conferences in which chapter officers of different chapters get together to discuss community development program and chapter activities.

B. The President of the Navajo Nation and the Division of Community Development are authorized and directed to develop programs to assist chapters and community centers to operate, utilize, and maintain the facilities authorized herein.

#### **History**

ACJ-78-58, July 10, 1958.

CM-46-57, May 14, 1957.

**Revision note (1995).** The words "Division of Community Development" replace previous references to the "Community Development Department".

#### **§ 4. Community planning**

A. The Transportation and Community Development Committee of the Navajo Nation Council is declared to be the body responsible for developing, coordinating and approving comprehensive community improvement plans for the communities under the jurisdiction of the Navajo Nation.

B. Comprehensive community improvement plans shall include a land use plan, a major thoroughfare plan, a community facilities plan, zoning plans, subdivision regulations and public improvement programs.

C. The Transportation and Community Development Committee shall call upon all necessary and available technical assistance from Navajo Nation staff, the Bureau of Indian Affairs, the Public Health Service and other agencies to assist in the development of comprehensive community plans. The Navajo Nation President is authorized to appoint an employee of the Navajo Nation to coordinate the technical assistance.

D. No community plan shall be adopted unless it has been approved by a duly called meeting of the Chapter organization in which the community is located. Every effort will be made to involve persons living in the

communities concerned to participate in the planning process.

E. The Navajo Nation President is authorized to sign on behalf of the Navajo Nation a workable program for community improvement, for submission to the Housing and Home Finance Agency.

#### **History**

ACMY 72-63, May 2, 1963.

**Revision note.** Previous references to the "Advisory Committee" have been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

#### **§ 5. Code review**

A. The Transportation and Community Development Committee of the Navajo Nation Council is declared to be the body responsible for reviewing codes and recommending the same for adoption or amendment to the Navajo Nation Council.

B. Codes subject to review by the Transportation and Community Development Committee shall include building code, electrical code, plumbing code, housing code, sanitation code, zoning code.

#### **History**

CN-93-68, November 18, 1968.

CS-75-65, September 1, 1965.

ACMY-72-63, May 2, 1963.

**Revision note (1995).** Previous references to the "Advisory Committee" have been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

**Note.** Regarding the compilation and codification of Navajo Nation laws, see the authority of the Office of Legislative Counsel (2 N.N.C. § 964(B)) and the Ethics and Rules Committee of the Navajo Nation Council (2 N.N.C. § 834(B)(4)).

#### **§ 6. Code Advisory Committee**

To assist the Transportation and Community Development Committee of the Navajo Nation Council in discharging its responsibility for code review, there is created a Code Advisory Committee consisting of a representative of the Navajo Nation appointed by the President of the Navajo Nation; the General Manager of the Navajo Tribal Utility Authority; the Head of the Design and Engineering Services Department, Navajo Nation; Chief Sanitary Engineer, Public Health Service; Maintenance Engineer, Bureau of Indian Affairs, and such other persons as the President of the Navajo Nation may from time to time designate.

#### **History**

ACMY-72-63, May 2, 1963.

**Revision note (1995).** Slightly reworded for purposes of statutory form.

**Note.** For the authority of the Transportation and Community Development Committee, see 2 N.N.C. § 420 *et seq.* Regarding the compilation and codification of Navajo Nation laws, see the authority of the Office of Legislative Counsel (2 N.N.C. § 964(B)) and the Ethics and Rules Committee of the Navajo Nation Council (2 N.N.C. § 834(B)(4)).

## **§ 7. Participation under Economic Opportunity Act of 1964**

A. The President of the Navajo Nation, the Navajo Nation, Council and the Executive Staff are authorized and directed to assist in implementing programs under Titles I-VI of the Economic Opportunity Act of 1964,<sup>1</sup> which are beneficial to the Navajo Nation and the Navajo People. The President of the Navajo Nation and the Navajo Nation Council are further authorized to execute on behalf of the Navajo Nation all necessary documents to accomplish the purposes of this Section.

B. The appropriate committees of the Navajo Nation Council are authorized to approve general policies, plans of operation, and programs which are beneficial to the Navajo Nation and Navajo People under Titles I-VI of the Economic Opportunity Act of 1964.<sup>1</sup>

C. The appropriate committees of the Navajo Nation Council, in conjunction with the Budget and Finance Committee of the Navajo Nation Council, shall make recommendations to the Navajo Nation Council for any appropriations of Navajo Nation funds which may be necessary to accomplish the purposes of this Section.

### **History**

CJA-6-65, January 11, 1965.

CS-53-64, September 8, 1964.

**Note.** Pursuant to 2 N.N.C. Subchapter 9, *et seq.*, various standing committees of the Navajo Nation Council have policy, oversight, and certain delegated authorities and duties related to plans of operation and programs of the Navajo Nation government. See generally, CD-68-89, December 15, 1989.

## **Subchapter 3. Chapter Houses**

### **§ 41. Eligibility**

Each Chapter organization officially recognized under the provisions of 26 N.N.C. § 1 *et seq.* shall be eligible for the construction or improvement of a community chapter house to meet its requirements in accordance with the standards hereinafter set forth in this Subchapter.

### **History**

ACJN-90-65, June 21, 1965.

CD-70-62, December 4, 1962.

ACMY-76-61, May 12, 1961.

ACAP-61-60, April 29, 1960.

CM-28-58, May 5, 1958.

CM-46-57, May 14, 1957.

ACJ-40-57, June 21, 1957.

**Revision Note.** Reference to 2 N.N.C. §§ 4001 and 4006 has been replaced by Navajo Local Governance Act, 26 N.N.C. § 1 *et seq.*

#### **§ 42. Location; final approval; standards for selection**

A. Final approval for the location of each chapter house shall be granted in its discretion by the Transportation and Community Development Committee of the Navajo Nation Council.

B. Each Chapter shall be guided by the following criteria in the selecting of the location of a new chapter house:

1. The site shall be located so that it will conveniently serve the entire community.

2. The site shall be chosen giving consideration to the road network of the community.

3. The chapter building shall be located near a developed source of water. The development of an adequate source of water must in all instances precede location of the building. In no instance shall water be piped in excess of 2,000 feet.

4. The chapter building shall be near power, if available.

5. Wherever possible, the site shall be adjacent to a school, clinic, police substation or other service facility, in order that custodial attention may be provided by someone living nearby.

#### **History**

ACAP-61-60, April 29, 1960.

ACJ-4-57, January 8, 1957.

**Revision note (1995).** Previous reference to the "Advisory Committee" has been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

#### **§ 43. Plans**

A. Each new chapter house shall be built from architectural plans. The chapter membership shall choose one of several basic plans previously approved by the Transportation and Community Development Committee of the Navajo Nation Council and such plan may be varied by the community only as to materials, appearance and utility equipment.

B. Renovation or improvement of existing chapter houses shall be done from architectural plans, or in relatively uncomplicated situations, from plans prepared by the Design and Engineering Services Department, as may be administratively determined feasible and economical.

#### **History**

ACJA-14-67, January 31, 1967.

ACO-206-66, October 19, 1966.

ACAU-166-62, August 22, 1962.

ACO-193-60, October 27, 1960.

ACAP-61-60, April 29, 1960.

ACJ-40-57, June 21, 1957.

**Revision note.** Previous reference to the "Advisory Committee" has been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

**Note.** By GSCO-60-91, the Government Services Committee adopted a Plan of Operation for the Division of Community Development which includes a Design and Engineering Services department whose director provides architectural and engineering services to chapters.

#### **§ 44. Applications-Generally**

Applications for the construction or improvement of chapter facilities shall be presented to the President of the Navajo Nation for review by the Executive Staff. The Executive Director, Division of Community Development or his or her representative shall present the applications to the Transportation and Community Development Committee of the Navajo Nation Council with comments and recommendations.

#### **History**

ACAP-61-60, April 29, 1960.

**Revision note (1995).** Slightly reworded for purposes of statutory form. Previous reference to the "Public Services Division" has been replaced by the "Division of Community Development" and previous reference to the "Advisory Committee" has been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

**§ 45. Form**

Applications for community Chapter House construction or improvement shall be submitted on form "Application for Construction or Improvement of Chapter House". The applications shall be signed by the Navajo Nation Council delegate serving the Chapter area, the President, Vice-President and Secretary of the chapter organization and shall be further supported by individual signatures of not less than 100 adult members of the community to be served.

**History**

ACAP-61-60, April 29, 1960.

**§ 46. Review by Transportation and Community Development Committee; decision**

A. The Transportation and Community Development Committee shall consider all applications for new chapter houses on the following basis:

1. Population and area to be served.
2. Average meeting attendance records.
3. Operating management and maintenance skills within the community.
4. General acculturation and educational level of the community.
5. Actual need of the community for the facilities requested.
6. Comparison of requested facilities with facilities granted other communities similarly situated.
7. Kind, type and probable difficulty of operating and maintaining utility equipment.
8. Reasonableness of request.
9. Comparative costs as related to budgeted funds.
10. Ability and plans of community to provide operating costs in full.
11. Ability and plans of community to provide total maintenance or to pay one-half maintenance costs of a Navajo Nation mobile unit.
12. Current financial status of requesting chapter.
13. Acceptance of agreement to operate and maintain building.
14. Type of chapter house selected and suitability to the community.

B. After review of each request for construction of a Chapter House, the Transportation and Community Development Committee shall render its decision.

If the decision is affirmative, the construction shall be authorized by appropriate resolution. If the decision is adverse, the Director, Division of Community Development, shall immediately so inform the requesting chapter organization with a full statement of the reasons for denial of the request and suggestions for remedial action.

C. The Transportation and Community Development Committee shall consider all requests for renovation, remodeling and major repair of existing chapter houses on the basis of applicable items listed under Subsection (A) of this Section and shall render its decision under the terms of Subsection (B) of this Section.

#### **History**

ACAP-61-60, April 29, 1960.

**Revision note (1995).** By GSCO-60-91 the Government Services Committee of the Navajo Nation Council adopted a Plan of Operation for the Division of Community Development which plan states in pertinent part the Division has as a purpose "to administer, plan, manage and monitor resources for communities and their members which will foster and support housing infrastructure, public facilities...." Previous references to the "Advisory Committee" have been replaced by the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

#### **§ 47. Force account; employment of workers**

A. The construction, renovation, and improvement of chapter houses shall be done on force account by the Design and Engineering Services Department.

B. Preferential employment of local qualified workers shall be provided for in the construction, renovation and improvement of chapter houses, however, in the absence thereof, the Design and Engineering Services Department in cooperation with the Employment and Personnel Department shall employ non-local qualified workers to the extent required to meet budgetary and time schedules.

C. To achieve economical results, the Design and Engineering Services Department is instructed to disregard external and community interference or pressure to hire unqualified or unnecessary members or workers.

D. Each Chapter House project shall be under the supervision of a foreman and one leadman.

E. Local available labor shall be rotated on 10 work-day shifts.

#### **History**

ACAP-61-60, April 29, 1960.

**Revision note (1995).** Previous references to the "Design and Construction Department" have been replaced by the "Design and Engineering Services Department". Also, the wording of Subsection (B) was slightly reworded and reorganized for form and clarity.

#### **§ 48. Operation**

A. Responsibility for the operation of all chapter houses rests solely with the chapter organization. This includes all operating costs, if any, for fuel, water, sewage disposal, power and caretaker service.

B. The community is required to contribute or to earn through its program plan sufficient income to provide for operating costs of conducting its meetings, programs and chapter building operation. This is a condition of the Navajo Nation grant for construction.

C. The community is expected to fully provide for the cleanliness and orderliness of the building and adjacent premises.

#### **History**

ACAP-61-60, April 29, 1960.

#### **§ 49. Maintenance**

A. The policy of the Navajo Nation Council in providing communities with chapter house facilities requires the chapters to maintain these buildings in operable condition and in good repair.

B. Because many chapters are experiencing maintenance problems due to lack of trained local manpower and shortage of available funds, a skilled chapter house maintenance crew of two men and a mobile equipment and supply truck shall be made available to serve the chapter organizations.

C. Service of this mobile unit may be had by chapters on request. The Navajo Nation shall pay one-half of the actual cost of personnel time, materials and travel and chapters will be billed for one-half the cost. Such maintenance bill shall be settled in full in each instance before the next request for service is honored.

D. Any required additional common labor shall be hired locally and the chapter shall be billed one-half the cost as provided in Subsection (C) of this Section.

#### **History**

ACAP-61-60, April 29, 1960.

#### **§ 50. Program development**

The President of the Navajo Nation and the Division of Community Development together with the several related standing committees of the Navajo Nation Council shall assist the chapters to develop programs to utilize, operate and maintain their chapter facilities.

#### **History**

ACAP-61-60, April 29, 1960.

**Revision note (1995).** Slightly reworded for purposes of statutory form.

### **Chapter 3. Chapter Recreation Program**

#### **§ 251. Objective**

The objective of the Navajo Nation's Chapter Recreation Program is to provide wholesome recreational activities for youth and adults in the chapter communities. The program is especially intended to fill the need for summer activities for the thousands of young people who return to their homes from off-Reservation schools, bordertown dormitories and Reservation schools.

#### **History**

ACS-177-60, September 21, 1960.

#### **Cross References**

Navajo Youth Camp, see 19 N.N.C. § 801.

#### **§ 252. Scope**

The type or types of recreational or educational activities to be included in the chapter program must be clearly determined by the chapter. These activities may relate to entertainment, education, sports, games, development of skills, and/or others activities desired by the local communities. A chapter might desire to promote an athletic team and purchase the necessary equipment. A chapter may wish to purchase movie projector equipment, sewing machines or shop tools. All suggested programs are subject to review and concurrence.

#### **History**

ACS-177-60, September 21, 1960.

#### **§ 253. Funds**

A. Funds for the Chapter Recreation Program shall be made available to chapter organizations in accordance with a Plan of Operation in amounts not to exceed seven hundred fifty dollars (\$750.00) for approved expenditures for the purchase of supplies and equipment needed for recreational programs outlined by each chapter in its presentation, if acceptable.

B. Funds available for the Program shall be used for equipment and supplies associated closely with its objectives.

C. Salaries, wages or per diem shall not be paid from these funds.

#### **History**

ACS-177-60, September 21, 1960.

#### **§ 254. Applications for assistance forms**

Application forms for Chapter Recreation Program assistance shall be available from community workers, or the Division of Community Development. Application forms shall initially be mailed by the Division of Community Development to all chapter presidents, together with a copy of the Plan of Operation. Community workers shall give assistance to chapters in preparing these application forms.

#### **History**

ACS-177-60, September 21, 1960.

**Revision note (1995).** Reference to the "Department of Community Development" has been changed to the "Division of Community Development". Reference to the "Public Services Division" has been deleted.

#### **§ 255. Review, approval and processing**

Applications for Chapter Recreation Program assistance shall be submitted to the Director, Division of Community Development, for review, approval and processing. Any application which fails to secure the approval of the Director, Division of Community Development, shall be presented to the Transportation and Community Development Committee for advice, assistance and guidance in making a decision. If the application is rejected, the Director, Division of Community Development, shall so notify the chapter stating the reasons for rejection and making suggestions for modification. Rejected applications may be appealed by the chapter directly to the Transportation and Community Development Committee which shall review the request and render the final decision. When the application is approved, the Division of Community Development shall take the necessary action to request the purchase of the enumerated equipment or supplies.

#### **History**

ACS-177-60, September 21, 1960.

**Revision note (1995).** References to the "Head, Department of Community Development", "Education Committee", and "Advisory Committee" changed to "Director, Division of Community Development", and "Transportation and Community Development Committee" respectively. See 2 N.N.C. § 423(B) (3).

#### **§ 256. Management and operations**

Management and operation of the chapter program shall be determined by the people of the chapter community in a regularly called meeting of the chapter.

#### **History**

ACS-177-60, September 21, 1960.

#### **Cross Reference**

See also, Navajo Nation Local Governance Act, 26 N.N.C. § 1 *et seq.*

**§ 257. Purchase of equipment and supplies**

Purchasing of equipment and supplies for the Chapter Recreational Program shall be by Navajo Nation Purchase Order, through the Purchasing Section of the Navajo Nation.

**History**

ACS-177-60, September 21, 1960.

**Cross Reference**

See generally, Navajo Nation Procurement Act, 12 N.N.C. § 301 *et seq.*

**Chapter 5. Housing Projects**

**Subchapter 1. Shiprock Low-Cost Housing Area**

**§ 451. Establishment; authority**

The President of the Navajo Nation is authorized by and with the approval of the Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council and upon concurrence of the Shiprock Chapter officers and the Shiprock Land Board, to establish a permanent low-cost housing area at or in the vicinity of Shiprock for occupancy by members of the Navajo Nation and their families. It is contemplated that the area will be surveyed and streets, necessary alleys, and property lines established.

**History**

CN-58-56, November 1, 1956.

**Revision note (1995).** The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council under 2 N.N.C. §§ 420 *et seq.* and 691 *et seq.*, respectively, now have controlling authority under this Section.

**Cross Reference**

See also, 6 N.N.C. § 601 *et seq.*

**§ 452. Plan of land tenure; authority**

The President of the Navajo Nation by and with the approval of the Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council shall establish a plan of land tenure for low-cost housing area for the benefit of the members of the Navajo Nation and their families, which plan may provide for homesite tenure under assignment, permit or lease.

**History**

CN-58-56, November 1, 1956.

**Revision note (1995).** The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council under 2 N.N.C. § 420 *et seq.*, and § 691 *et seq.*, respectively, now have controlling authority under this Section. See also, authority of the Navajo Housing Authority at 6 N.N.C. § 601 *et seq.*

**§ 453. Availability of homesites without cost**

It is the expressed policy of the Navajo Nation Council with respect to the administration of the low-cost housing area at Shiprock that homesites shall be made available in such area to members of the Navajo Nation without cost; provided, that lands acquired thereunder shall be subject to any liens which now are or may become enforceable against the Navajo Nation and its members.

**History**

CN-58-56, November 1, 1956.

**Cross Reference**

See also, 6 N.N.C. § 601 *et seq.*

**§ 454. Sanitation requirements**

Minimum sanitation requirements for the low-cost housing area shall be in accordance with the requirements established by the United States Public Health Service.

**History**

CN-58-56, November 1, 1956.

**§ 455. Plan of administration; establishment**

The President of the Navajo Nation, by and with the approval of the Transportation and Community Development Committee and Resources Committee, shall establish a plan of administration for the low-cost housing area with appropriate recognition of the Council's expressed desire to proceed with community development at Shiprock in a manner responsive to the needs and wishes of members of the Navajo Nation residing in the Shiprock community.

**History**

ACM-42-58, March 21, 1958.

CN-58-56, November 1, 1956.

**Revision note (1995).** The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council under 2 N.N.C. §§ 420 *et seq.*, and 691 *et seq.*, respectively, now have controlling authority under this Section.

**§ 456. Advisory Committee as Shiprock Community Board**

The Advisory Committee of the Tribal Council shall function as an interim Shiprock Community Board until such time as a Board can be composed of the residents of the Shiprock low-cost housing area.

**History**

ACM-42-58, March 21, 1958.

CM-40-57, March 21, 1957.

ACJ-50-57, July 11, 1957.

ACA-28-57, April 26, 1957.

CN-58-56, November 1, 1956.

**Revision Note (1995).** The Transportation and Community Development Committee of the Navajo Nation Council, under 2 N.N.C. § 420 *et seq.*, now has oversight authority over community housing matters.

**Note.** The Advisory Committee of the Navajo Tribal Council was disestablished by CD-68-89, December 15, 1989.

**§ 457. Applications for permits; Authority to receive**

The Division of Community Development is authorized and directed to receive applications for permits to occupy lots in the Shiprock low-cost housing area, and to bring such applications before the Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council for necessary action.

**History**

ACM-42-58, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council under 2 N.N.C. §§ 420 *et seq.*, and § 691 *et seq.*, respectively, now have oversight authority over community housing matters and land use permits. See also, authority of the Navajo Housing Authority, 6 N.N.C. § 601 *et seq.*

**§ 458. Persons who may make an application; form**

Any adult or person who is an enrolled member of the Navajo Nation or an enrolled Navajo in his or her minority who is the head of a family, may make application in writing to the Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council for a permit to occupy a lot in the low-cost housing area for residential purposes. Such application shall designate a specific lot. The Navajo Nation Office of Attorney General is authorized and directed to prepare a suitable application form for this purpose.

### **History**

ACM-42-68, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89. Also, reference to the "Legal Department of the Navajo Tribe" has been changed to the "Navajo Nation Office of the Attorney General".

### **§ 459. Conflicting applications**

A. In the event the Transportation and Community Development Committee and Resources Committee of the Navajo Nation Council receive conflicting applications to occupy the same parcel of land, the Transportation and Community Development Committee and Resources Committee of the Navajo Nation Council shall conduct an open hearing at which all parties in conflict shall be given an opportunity to be heard and the Transportation and Community Development Committee and Resources Committee of the Navajo Nation Council shall thereupon make a determination as to which applicant shall prevail by such manner as the Committees may determine.

B. Generally, any applicant who at the time of such application is occupying lands within a three mile radius of the middle of the bridge on New Mexico Highway 491 over the San Juan River at Shiprock without valid authority for such occupancy shall be given preference.

### **History**

ACM-42-58, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89. Revision note (2003). Reference to "Highway 666" changed to "Highway 491" pursuant to Legislation of the New Mexico State Legislature.

### **§ 460. Issuance of occupancy permits; assignment**

The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council, upon consideration of an application for an occupancy permit and favorable action thereon shall issue the occupancy permit to the applicant, which permit shall extend for a term of two years from date of issuance. Such permit shall be in writing on a form to be provided by the Navajo Nation Office of the Attorney General and shall be assignable for residential use only with the approval of said Committees.

### **History**

ACM-42-58, March 21, 1958.

**Revision note.** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89. Reference to

the "Legal Department of the Navajo Tribe" has been changed to the "Navajo Nation Office of the Attorney General".

**§ 461. Assignment of lands; application**

A. Upon lapse of the occupancy permit issued to any occupant of the low-cost housing area, such occupant shall be considered, in the absence of evidence to the contrary, as having applied to the Transportation and Community Development Committee and/or the Resources Committee of the Navajo Nation Council for an assignment of the lands occupied by such occupant, such assignment to remain in effect for as long as the land is used for residential purposes in accordance with applicable regulations of the Navajo Nation now or hereafter in force.

B. The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council shall consider each application for assignment and either approve or disapprove such application provided that grounds for disapproval shall be limited to a finding that continued occupancy of the land in the low-cost housing area by the applicant will result in continuance of a demonstrated condition of disaffection and dissatisfaction among Shiprock residents or the public generally due to conduct of such applicant or members of his or her immediate family, or to a finding that the occupant is not in fact occupying the premises.

C. Advice of the approval of such application shall be forwarded to the Navajo Nation Office of the Attorney General which shall prepare and cause to be issued to the applicant an assignment, executed by the President of the Navajo Nation on behalf of the Navajo Nation.

**History**

ACM-42-58, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89. Also, reference to the "Legal Department of the Navajo Tribe" has been changed to the "Navajo Nation Office of the Attorney General".

**§ 462. Conditions**

Any assignment covering lands in the low-cost housing area shall among its conditions include the following:

A. Assignments shall prohibit nonresidential uses.

B. Assignments shall be transferable only to members of the Navajo Nation and only with the prior approval of the Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council.

**History**

ACM-42-58, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89.

**§ 463. Local improvements**

The Transportation and Community Development Committee and the Resources Committee of the Navajo Nation Council, upon their own initiative and in conformity with the provisions of this Subchapter may at any time establish a plan of local improvements which shall be of general benefit to the occupants of the lands and such improvements may include extension and expansion of the domestic water supply, improvement of roads and bridges, irrigation water for gardening purposes, street and area-way lighting, sewage and garbage disposal, walkways, playground improvements, and such other public services as the said Committees may, from time to time, authorize.

**History**

ACM-42-58, March 21, 1958.

**Revision note (1995).** The Transportation and Community Development Committee (2 N.N.C. § 420 *et seq.*) and the Resources Committee (2 N.N.C. § 691 *et seq.*) have been substituted for the Advisory Committee pursuant to CD-68-89.

**§ 464. Use of land; construction requirements**

Each lot in the low-cost housing area is to be used exclusively for a single residence and for garden purposes by the occupant and immediate family. Minimum construction requirements shall include a single family dwelling and a privy, the latter being constructed in accordance with standards established by the United States Public Health Service. The privy shall be constructed prior to occupancy of the land by the permittee.

**History**

ACM-42-58, March 21, 1958.

**Subchapter 3. Window Rock Navajo Nation Housing Project**

**Article 1. General Provisions**

**§ 521. Definitions; employee**

As used in this Subchapter, the term "employee" shall include all persons paid by the Navajo Nation for substantially fulltime services of any nature.

**History**

ACM-54-56, July 3, 1956.

**§ 522. Establishment; housing units designated**

The Window Rock Navajo Nation Housing Project is established and the housing units composing such Project are so designated.

### **History**

CJ-15-56, January 27, 1956.

### **Cross Reference**

See also, Plan of Operation for Navajo Nation Employee Housing Program, Division of General Services.

### **§ 523. Nature**

The houses constituting the Window Rock Housing Project are not a business enterprise, but part of the administrative buildings of the Navajo Nation, and repayment of the Navajo Nation's capital investment shall be accomplished primarily from improved performance of duty by higher caliber employees.

### **History**

ACM-54-56, March 19, 1956.

### **§ 524. Purpose**

The houses constituting the Window Rock Navajo Nation Housing Project were authorized to be built by the Navajo Nation Council for the reason that housing was not available in or near Window Rock, making it impossible to recruit and retain competent employees for the organization.

### **History**

ACM-54-56, March 19, 1956.

### **§ 525. Plan of Operation; adoption; amendment**

Authority is delegated to the Government Services Committee to act in place of the Navajo Nation Council in adopting and amending from time to time a Plan of Operation for the Window Rock Navajo Nation Housing Project.

### **History**

ACM-54-56, March 19, 1956.

CJ-15-56, January 27, 1956.

**Revision note (1995).** Reference to the Advisory Committee has been changed to the Government Services Committee. The Window Rock Navajo Nation Housing Project is currently under the administrative authority of the Division of General Services with standing committee oversight by the Government Services Committee, ACO-375-72. See generally, 2 N.N.C. § 341 *et seq.*

### **§ 526. Administrator; designation**

The Director of the Division of General Services of the Navajo Nation or

such person as s/he shall designate shall be Administrator of the Window Rock Navajo Nation Housing Project.

#### **History**

CJ-15-56, January 27, 1956.

**Revision note (1995).** The Window Rock Navajo Nation Housing Project is currently under the administrative authority of the Division of General Services. ACO-375-72.

#### **§ 527. Apartments of Window Rock Motel Center**

The eight efficiency apartments of the Window Rock Motel Center shall be rented to the Window Rock Navajo Nation Housing Project at the rate of forty dollars (\$40.00) per month each, not including utilities payable from the Project revolving fund, and shall be operated as a part of such Project until the Administrator determines that they are no longer needed. Utilities for these efficiency apartments shall be paid by the Project.

#### **History**

ACM-54-56, March 21, 1956.

**Note.** In 1973, these apartments were transferred to the Navajo Housing and Development Enterprise pursuant to ACAP-185-73. As of 2003, various Navajo Nation programs occupy what were once apartments.

#### **§ 528. Housing Reserve**

A specifically described area, containing 197.72 acres, more or less, is withdrawn from all other uses and disposition and is reserved for the purposes of the Window Rock Navajo Nation Housing Project.

#### **History**

ACM-54-56, March 19, 1956.

#### **§ 529. Revolving Fund**

A. There is established a Window Rock Navajo Nation Housing Project Revolving Fund. All rentals and damages received on account of the Window Rock Navajo Nation Housing Project shall be placed in this fund, which shall be administered by the Controller of the Navajo Nation, and shall be available for paying costs of utilities, maintenance, landscaping, remodeling, sidewalks, paving and repaving, fencing, equipment, recreational facilities, and any other costs reasonably connected with the Window Rock Navajo Nation Housing Project.

B. Disbursements may be made by the Controller in accordance with general or special authorizations of the Housing Committee.

C. The Controller shall report to the Navajo Nation Council each year during consideration of the Navajo Nation Council budget on the condition of the fund and shall state whether in view of actual and estimated expenses and

in view of the purpose for which the houses were built, any part of the fund can at that time be transferred to the general fund of the Navajo Nation.

#### History

ACM-54-56, March 19, 1956.

**Revision note (1995).** Reference to "Treasurer of the Tribe" has been changed to the "Controller of the Navajo Nation".

#### § 530. Employee occupants; agreement

A. Every employee of the Navajo Nation permitted to occupy a unit of the Window Rock Navajo Nation Housing Project shall sign a written agreement to pay rent promptly (unless he or she is an officer of the Navajo Nation or his or her contract provides for rent free quarters); to pay for any damage to any part of the housing project by him or herself or any member of his family or any animal or machine kept by him or her, reasonable wear and tear excepted; to pay damages for excessive use of utilities; to accept the decision of the Housing Committee when approved by the Administrator as to all damages; and authorizing the Controller of the Navajo Nation to deduct from any sum owed by the Navajo Nation all rentals when due and all damages determined by the Housing Committee with the approval of the Administrator to have been caused by occupant, a member of occupant's family, or any animal or machine kept by occupant.

B. The Housing Committee with the approval of the Administrator shall prepare a standard form of agreement, and may include therein additional terms not inconsistent with those above specified.

#### History

ACM-54-56, March 19, 1956.

**Revision note (1995).** Reference to the "Treasurer" has been changed to the "Controller of the Navajo Nation".

#### § 531. Rentals

A. Rentals to be charged employees occupying houses of the Window Rock Navajo Nation Housing Project shall be due in advance on the first day of each month at the following rates:

Houses built pursuant to Resolution No. CJ-29-54 (unfurnished)

For employees making six thousand dollars (\$6,000)  
per year or less.....Sixty-five dollars (\$65.00)

For employees making more than six thousand  
dollars (\$6,000) per year.....Seventy-five  
dollars (\$75.00)

Apartments in Tribal houses in old residential area  
(furnished).....Fifty-five dollars (\$55.00)

Efficiency apartments in motel.....Thirty-five dollars (\$35.00)

B. All rents shall include utility services in reasonable amounts. The Housing Committee with the approval of the Administrator shall decide when the use of any utility service by any householder exceeds a reasonable amount and shall assess actual damages for such excess use. All personal toll telephone calls shall be at the expense of the householder.

C. Rates of rental may be changed at any time by the Administrator with the approval of the Government Services Committee.

D. The houses occupied by the President and Vice-President, and any employees whose contracts so provide shall be rent free.

#### **History**

ACM-54-56, March 19, 1956.

#### **Cross Reference**

Government Services Committee oversight authority for this Section, see 2 N.N.C. § 341 *et seq.*

Housing for the Speaker of the Navajo Nation Council, see 2 N.N.C. § 283.

Plans of operation for the Navajo Nation Employee Housing Program and the Division of General Services.

#### **§ 532. Non-employee occupants; rental; rate**

A. Any units of the Window Rock Navajo Nation Housing Project not needed for employee housing may be rented to non-employees by the Administrator upon such terms and conditions as the Administrator, with the advice of the Housing Committee, may deem proper. It shall be conditionally agreed that occupants must vacate the premises upon 30 days' notice from the Administrator. The Administrator may prescribe the form of agreement to be signed by non-employed occupants and their employing agency.

B. The rentals in such cases shall be at a fixed figure which, in the opinion of the Administrator, will amortize the cost of the house rented over a reasonable period and will provide the Navajo Nation a reasonable interest rate.

#### **History**

ACM-54-56, March 19, 1956.

#### **Cross Reference**

See also, Plan of Operation for the Navajo Nation Employee Housing Program and the Division of General Services.

## **Article 2. Housing Committee**

### **§ 551. Establishment; purpose**

A. There is established a Window Rock Navajo Nation Housing Committee.

B. The purpose of the Window Rock Navajo Nation Housing Committee is to plan, implement, supervise and control all activities relative to the administration of the Window Rock and Fort Defiance Navajo Nation housing areas.

#### **History**

ACO-375-72, October 25, 1972.

### **§ 552. Composition**

The Window Rock Navajo Nation Housing Committee shall be composed of the following Navajo Nation representatives:

A. Director, Division of Community Development;

B. Director, Division of Economic Development;

C. Attorney General, Department of Justice;

D. Auditor General, Office of Auditor General;

E. Director, Division of Finance (shall serve as Chairperson, Window Rock Navajo Nation Housing Committee).

#### **History**

ACO-109-78, October 19, 1978.

ACO-375-72, October 25, 1972.

**Revision Note (1995).** The Navajo Tribal Legal Office was redesignated the Tribal Legal Department by the 1978 Budget pages IX-I and IX-12 and was moved from 2 N.N.C. § 1101-1104 to 2 N.N.C. §§ 1991-1994. By CF-8-82, the Navajo Legal office was abolished and the Department of justice was established, with the Attorney General given authority over administrative and operating policies and supervisory control over the Department. See 2 N.N.C. § 1961 *et seq.*

### **§ 553. Authority and duties**

The Window Rock Navajo Nation Housing Committee shall:

A. Adopt and change from time to time rules and regulations governing admission and expulsion of tenants as it may deem necessary;

B. Adopt and change from time to time rules and regulations governing sanitation, control of livestock, and fire hazards in accordance with

applicable regulations governing such;

C. Adopt and change from time to time rules and regulations governing remodeling, repainting and any other improvements reasonably connected with housing;

D. Adopt and change from time to time rules and regulations governing rental fees, utility fees and any other fees reasonably connected with housing to insure an adequate income by which houses can be maintained and the number of houses can be increased to meet the ever increasing need for housing by employees of the Navajo Nation;

E. Design and implement such forms and agreements as may be necessary to fulfill its purposes;

F. Adopt and maintain procedures to effect periodic inspections of the premises, cause repairs to be made as may be deemed necessary, and assess costs for damages where damage to tribal property is due to more than normal wear;

G. Undertake whatever projects as may be assigned by appropriate authorities;

H. Give prompt and orderly consideration to all applications for housing in order that the Navajo Nation can recruit and retain competent employees;

I. Institute and maintain principles of sound management in order that the Window Rock and Fort Defiance Navajo Nation housing areas are maintained in a manner to meet sanitation requirements of assigned houses and surrounding grounds; and to insure a sound maintenance program; and do any and all things necessary to provide additional housing as funds become available;

J. Give notices of changes in occupancy status or rental rates to the Navajo Nation Controller promptly, and to involved renters.

#### **History**

ACO-375-72, October 25, 1972.

**Revision Note (1995).** At Subsection (J), reference to "Tribal Controller" changed to "Navajo Nation Controller".

#### **§ 554. Meetings**

A. The Window Rock Navajo Nation Housing Committee shall meet monthly at a time and place to be determined by the Chairperson, Window Rock Navajo Nation Housing Committee.

B. The Chairperson, Window Rock Navajo Nation Housing Committee, shall preside at all meetings and shall be responsible for maintaining an orderly and dignified meeting.

C. Each representative shall appoint an alternate to serve when unable to attend a meeting.

D. A quorum of the Committee must be present to conduct a valid meeting; a quorum shall consist of at least three members.

E. Majority vote of those representatives voting shall, in all cases, constitute the final opinion of the Window Rock Navajo Nation Housing Committee.

F. A written record of official actions taken at each meeting shall be maintained. A copy of such record shall be provided to each member of the Committee immediately following each meeting.

#### **History**

ACO-375-72, October 25, 1972.

#### **§ 555. Fiscal responsibility**

A. There is established the Window Rock Navajo Nation Housing Revolving Fund to be maintained by the Controller of the Navajo Nation. All receipts from rentals, damages or other sources relating to Window Rock Navajo Nation Housing operations shall be credited to this fund to be available for payment of costs reasonably connected with the operation and maintenance of the housing areas. Disbursements from the fund shall be made by the Controller of the Navajo Nation pursuant to general or special authorizations of the Housing Committee.

B. Provided the balance in the fund is sufficient to sustain ordinary operations, additional housing units may be procured.

C. The Controller of the Navajo Nation shall provide, at least monthly, reports showing the income, expenditures and balance remaining in the fund.

#### **History**

ACO-375-72, October 25, 1972.

### **Subchapter 5. Navajo Housing Authority**

#### **§ 601. Definitions**

The following terms, wherever used or referred to in this Subchapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

A. "Area of Operation" means all areas within the territorial jurisdiction of the Navajo Nation.

B. "Board" means the Board of Commissioners of the Authority.

C. "Council" means the Navajo Nation Council.

D. "Federal Government" includes the United States of America, the Department of Housing and Urban Development, or any other agency or

instrumentality, corporate or otherwise, of the United States of America.

E. "Home-buyer" means a person(s) who has executed a purchase agreement, lease-purchase agreement or other conveyance agreement with the Authority and who has not yet achieved home ownership.

F. "Housing Project" or "Project" means any work or undertaking to provide or assist in providing (by any suitable method, including but not limited to: rental; sale of individual units in single or multi-family structures under conventional condominium, or cooperative sales contracts or conventional purchase agreements or lease purchase agreements; loans, or subsidizing of rentals or charges) decent, safe and sanitary dwellings, apartments, or other living accommodations for persons of low income. Such work or undertaking may include buildings, land, leaseholds, equipment, facilities, and other real or personal property for necessary, convenient, or desirable appurtenances, for streets, sewers, water service, utilities, parks, site preparation or landscaping, and for administrative, community, health, recreational, welfare, or other purposes. The term "Housing Project" or "Project" also may be applied to the planning of the buildings and improvements, the acquisition of property or any interest therein, the demolition of existing structures, the construction, reconstruction, rehabilitation, alteration or repair of the improvements or other property and all other work in connection therewith, and the term shall include all other real and personal property and all tangible or intangible assets held or used in connection with the housing project.

G. "Obligations" means any notes, bonds, interim certificates, debentures, or other forms of obligation issued by the Authority pursuant to this Subchapter.

H. "Obligee" includes any holder of an obligation, agent or trustee for any holder of an obligation, or lessor demising to the Authority property used in connection with a project, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal Government when it is a party to any contract with the Authority in respect to a housing project.

I. "Persons of Low Income" means persons or families who cannot afford to pay enough to cause private enterprise in their locality to build an adequate supply of decent, safe, and sanitary dwellings for their use or as otherwise defined by the Native American Housing Assistance and Self Determination Act.

### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

### **§ 602. Establishment**

A. Pursuant to the inherent authority vested in the Navajo Nation by its status as a self-governing sovereign and its authority to provide for the health, safety, morals, and welfare of the Navajo people, the Navajo Nation

Council establishes a public body of the Navajo Nation known as the Navajo Housing Authority (hereinafter referred to as the Authority), and enacts this Subchapter which shall establish the purposes, powers and duties of the Authority.

B. In any suit, action or proceeding involving the validity or enforcement of or relating to any of its contracts, the Authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this Subchapter as amended by CMY-41-77. A copy of CMY-41-77 duly certified by the then presiding Chairman of the Council shall be admissible in evidence in any suit, action or proceeding.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, § 2, June 11, 1963.

CAP-5-63, April 16, 1963.

#### **Cross Reference**

Navajo Nation Sovereign Immunity Act, inclusion of NHA, 1 N.N.C. § 552(P).

#### **§ 603. Declaration of need**

It is hereby declared:

A. That there exist within the area of the jurisdiction of the Council unsanitary, unsafe and overcrowded dwelling accommodations; that there is a shortage of decent, safe and sanitary dwelling accommodations available at rents or prices which persons of low income can afford; and that such shortage forces such persons to occupy unsanitary, unsafe and overcrowded dwelling accommodations;

B. That these conditions cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare; and that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety protection, fire and accident prevention, and other public services and facilities;

C. That the shortage of decent, safe and sanitary dwellings for persons of low income cannot be relieved through the operation of private enterprise;

D. That the providing of decent, safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which money may be spent and private property acquired and are governmental functions of concern to the Council;

E. That residential construction activity and a supply of acceptable

housing are important factors to general economic activity, and that the undertakings authorized by this Subchapter to aid the production of better housing and more desirable neighborhood and community development at lower costs will make possible a more stable and larger volume of residential construction and housing supply which will assist materially in achieving full employment;

F. That economic development activities in related housing fields will aid in creating employment opportunities within or near the Navajo Nation, assist in fostering a viable local economy and encourage self-sufficiency and self-reliance for the general benefit of the Navajo Nation; and

G. That the necessity in the public interest for the provisions of this Subchapter is hereby declared as a matter of legislative determination.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

#### **§ 604. Purposes**

The Authority shall be organized and operated for the purposes of:

A. Remedying unsafe and unsanitary housing conditions that are injurious to the public health, safety and morals;

B. Alleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income;

C. Providing employment opportunities through the construction, reconstruction, improvement, extension, alteration or repair and operation of low income dwellings; and

D. Promoting economic growth and development activities within and near the Navajo Nation.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

#### **§ 605. Board of Commissioners**

The affairs of the Authority shall be managed by a Board of Commissioners composed of eight persons.

#### **History**

ACMA-37-84, March 15, 1984.

CMY-41-77, May 6, 1977.

CO-58-73, October 18, 1973.

ACJN-85-63, June 11, 1963.

## **Annotations**

### **1. Validity**

"NHA approved the articles of incorporation under the power granted by the Navajo Nation Code in 6 N.N.C. §§ 605, 616(B)(14)." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 5 (Nav. Sup. Ct. February 11, 2004).

### **§ 606. Appointment**

A. The Board Members shall be appointed, and may be reappointed, by the Government Services Committee of the Navajo Nation Council. A resolution of the Government Services Committee of the Navajo Nation Council as to the appointment or reappointment of any Commissioner shall be conclusive evidence of the due and proper appointment of the Commissioner. Upon appointment by the Government Services Committee and prior to assumption of duties as a Commissioner, the NHA shall cause to be administered to the appointed Commissioner an oath of office by a duly appointed judge or justice of the courts of the Navajo Nation.

B. A Commissioner shall be a member of the Navajo Nation, and no more than two Commissioners shall be members of the Navajo Nation Council. Three of the Commissioners shall represent the tenants and homebuyers participating in programs administered by the Authority, one shall reside in the State of New Mexico, one shall reside in the State of Arizona, and one shall reside in the State of Utah. There shall be one representative on the Board from each of the five agencies comprising the Navajo Nation. These individuals shall have some formal education, or at least three years of leadership experience in a local unit of government.

C. No person shall be barred from serving on the Board because that person is a tenant or homebuyer in a housing project of the Authority; and such Commissioner shall be entitled to fully participate in all meetings concerning matters that affect all of the tenants or homebuyers, even though such matters affect the Commissioner as well. However, no such Commissioner shall be entitled or permitted to participate in or be present at any meeting (except in his capacity as a tenant or homebuyer), or to be counted or treated as a member of the Board, concerning any matter involving his or her individual rights, responsibilities or status as a tenant or homebuyer.

## **History**

CJY-51-05, July 22, 2005.

CO-78-91, October 25, 1991.

CMY-41-77, May 6, 1977.

CO-58-73, October 18, 1973.

ACJN-85-63, June 11, 1963.

**§ 607. Term of office**

The term of office shall be four years and staggered. When the Board is first established, one member's term shall be designated to expire in one year, another to expire in two years, a third to expire in three years, and the last two in four years. Thereafter, all appointments shall be for four years, except that in the case of a prior vacancy, an appointment shall be only for the length of the unexpired term. Each member of the Board shall hold office until his successor has been duly appointed.

**History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

CO-58-73, October 18, 1973

ACJN-85-63, June 11, 1963.

**Cross Reference**

Regarding Subsection (C), see also, 6 N.N.C. § 619(A).

**§ 608. Compensation**

The Commissioners shall be reimbursed for actual travel expenses, meals and other costs and expenses incurred which are directly attributed to attendance at duly called Board meetings unless otherwise authorized by applicable Navajo Nation laws. At its discretion, the Board of Commissioners may propose a stipend be paid to its members for attendance at Board meetings subject to 5 N.N.C. § 1991(A). All Board expenses and stipends shall be paid from NHA funds budgeted for that purpose. Commissioners shall be entitled to reimbursement, as above, for attendance at duly called Board meetings, where due to absences of other Board members, a quorum is not present.

**History**

CJY-51-05, July 22, 2005.

CAP-47-99, April 23, 1999.

ACAU-134-86 August 13, 1986.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**§ 609. Officers; election; presiding officer**

The Board shall elect from among its members a Chairperson, a Vice Chairperson, a Secretary, and a Treasurer; and a member may hold the position of Secretary/Treasurer. In the absence of the Chairperson, the Vice Chairperson shall preside; and in the absence of both the Chairperson and Vice Chairperson, the Secretary shall preside.

**History**

CJY-57-95, July 20, 1995.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**Note (2005).** References to "Chairman" changed to "Chairperson."

**§ 610. Secretary**

The Secretary shall keep complete and accurate records of an meetings and action taken by the Board.

**History**

ACJN-85-63, June 11, 1963.

**Cross References**

Duty of Secretary to preside in absence of other officers, see § 609 of this Title.

**§ 611. Treasurer; duties; bond**

The Treasurer shall keep full and accurate financial records, make periodic reports to the Board, and submit a complete annual report, in written form, to the Navajo Nation Council as required by 6 N.N.C. § 618.

**History**

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**Revision note.** "Annual" report changed to "quarterly" report pursuant to amendments made to 6 N.N.C. § 618 by CO-78-91, October 25, 1991.

**§ 612. Meetings**

Meetings of the Board shall be held at regular intervals as provided in the bylaws. Special meetings may be held upon 24 hours actual notice and business transacted, provided that not less than a majority of a quorum of the

Board concurs in the proposed action.

**History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**§ 613. Quorum**

A majority of the full Board, notwithstanding the existence of any vacancies, shall constitute a quorum for the transaction of business.

**History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**§ 614. Exercise of powers**

The Board shall have authority to exercise, by majority vote of those present and voting, any and all powers delegated to the Authority by this Subchapter or any amendments thereto, except as provided in 6 N.N.C. § 617, for the adoption of Board resolutions.

**History**

ACJN-85-63, June 11, 1963.

**§ 615. Removal of members**

A member of the Board may be removed by the appointing power for serious inefficiency or neglect of duty or for misconduct in office, but only after a hearing before the appointing power and only after the member has been given a written notice of the specific charges against him or her at least 10 days prior to the hearing. At any such hearing, the member shall have the opportunity to be heard in person or by counsel and to present witnesses on his or her behalf. In the event of removal of any Board member, a record of the proceedings, together with the charges and findings thereon, shall be filed with the appointing power.

**History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

**§ 616. Powers**

A. The Authority shall have perpetual succession in its corporate name.

B. The Authority shall have the following powers which it may exercise consistent with the purposes for which it is established:

1. Subject to the Navajo Sovereign Immunity Act, the Navajo Nation gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities, and the Authority may expressly agree by contract, on a case by case basis, to waive any immunity from suit which the Navajo Housing Authority might otherwise have; but under no circumstances shall the Navajo Nation be liable for the debts and obligations of the Authority, nor shall the land, funds and all other real or personal property of the Navajo Nation be subject to execution or levy on account of the debts or obligations of the Authority. Nothing contained herein nor in any other provision of this Subchapter shall be construed to waive the right of the Navajo Nation to assert the defense of sovereign immunity in any lawsuit against the Navajo Nation, and nothing contained herein nor in any other provision of this Subchapter shall impair the validity of this defense; and the right to assert that defense is and shall remain inviolate and inviolable.

2. To adopt and use a corporate seal.

3. To enter into agreements, contracts and understandings with any governmental agency, federal, state or local (including the Navajo Nation Council and/or standing committees) or with any person, partnership, corporation or Indian Tribe; and to agree to any conditions attached to federal financial assistance. Notwithstanding anything to the contrary contained in this Subchapter or in any other provision of law, to agree to any conditions attached to federal financial assistance relating to the determination of prevailing salaries or wages or payment of not less than prevailing salaries or wages or compliance with labor standards, in the development or administration of projects, and to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum salaries or wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project. The Authority shall exercise any other power, duties or responsibilities as shall be delegated by law or regulation including the Native American Housing Assistance and Self-Determination Act (NAHASDA).

It is the purpose and intent of this Subchapter to authorize the Authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any project by the Authority.

4. To lease property from the Navajo Nation and others for such periods as are authorized by law, and to hold and manage or to sublease the same.

5. To borrow money, to issue temporary or long-term evidence of indebtedness; and to repay the same. Corporate bonds shall be issued and repaid in accordance with the provisions of 6 N.N.C. § 617.

6. To pledge the assets and receipts of the Authority as security for debts; and to acquire, sell, lease, exchange, transfer or assign personal property or interests therein.

7. To purchase land or interests in land or take the same by gift; to lease land or interests in land to the extent provided by law.

8. To undertake and carry out studies and analyses of the housing needs in areas under the jurisdiction of the Navajo Nation, to prepare housing plans, to execute the same, to operate projects and to provide for the construction, reconstruction, improvement, extension, alteration or repair of any project or any part thereof.

9. With respect to any dwellings, accommodations, lands, buildings or facilities embraced within any project (including individual cooperative or condominium units): to lease or rent, sell, enter into purchase agreements, mortgages, encumbrances, lease-purchase agreements or leases with option to purchase; to establish and revise rents or required monthly payments; to make rules and regulations concerning the selection of tenants or homebuyers, including the establishment of priorities, and concerning the occupancy, rental, care and management of housing units; and to make such further rules and regulations as the Board may deem necessary and desirable to effectuate the powers granted by this Subchapter.

10. To purchase insurance in any stock or mutual company for any property or against any risks or hazards.

11. To invest such funds as are not required for immediate disbursement.

12. To establish and maintain such bank accounts as may be necessary or convenient.

13. To employ an executive director, technical and maintenance personnel and such other officers and employees, permanent or temporary, as it may require; and to delegate to such officers and employees such powers or duties as the Board shall deem proper.

14. To take such further actions as are commonly engaged in by corporate bodies of this character as the Board may deem necessary and desirable to effectuate the purposes of the Authority.

15. To adopt such bylaws as the Board deems necessary and appropriate.

16. To join or cooperate with any other public housing agency or agencies operating under the laws or ordinances of a state or another tribe in the exercise, either jointly or otherwise, of any or all of the

powers of the Authority and such other public housing agency or agencies for the purpose of financing (including but not limited to the issuance of notes or other obligations and giving security therefor), planning, undertaking, owning, constructing, operating, or contracting with respect to a housing project or projects of the Authority or such other public housing agency or agencies. For such purpose, the Authority may by resolution prescribe and authorize any other public housing agency or agencies, so joining or cooperating with the Authority, to act on the Authority's behalf with respect to any or all powers, as the Authority's agent or otherwise, in the name of the Authority or in the name of such agency or agencies.

17. To finance purchase of a home by an eligible homebuyer in accordance with regulations and requirements of the Department of Housing and Urban Development including development of lending, mortgage, loan guaranty or other financial assistance programs.

18. To terminate any lease or rental agreement, lease purchase agreement, purchase agreement or other agreements when the tenant or homebuyer who has violated the terms of such agreement, or failed to meet any of its obligations thereunder, or when such termination is otherwise authorized under the provisions of such agreement; and to bring action for foreclosure, breach of contract, eviction or other legal remedies against such tenant or homebuyer.

19. To aid in increasing employment opportunities and diversification of Navajo economic development, the Authority is authorized and empowered to engage in economic development and business development activities.

C. No ordinance or other enactment of the Navajo Nation with respect to the acquisition, operation, or disposition of Navajo Nation property shall be applicable to the Authority in its operations pursuant to this Subchapter.

D. It is the purpose and intent of this Subchapter to authorize the Authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any project by the Authority.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACMA-80-71, March 16, 1971.

CN-75-66, June 21, 1966.

CN-21-63, June 14, 1963.

ACJN-85-63, June 11, 1963.

#### **Cross References**

Approval of financial assistance contract by Secretary of the Interior, see § 625 of this Title.

Bonds, powers with respect to issuance of, see § 617 of this Title.

Exercise of powers by Board, see § 614 of this Title.

Navajo Nation Sovereign Immunity Act, inclusion of NHA, 1 N.N.C. § 552(P).

## **Annotations**

### **1. Construction and application**

"NHA approved the articles of incorporation under the power granted by the Navajo Nation Code in 6 N.N.C. §§ 605, 616(B)(14)." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 5 (Nav. Sup. Ct. February 11, 2004).

### **2. Immunity**

"This case concerns whether a monetary judgment against the Navajo Housing Authority (NHA) may be enforced, or whether sovereign immunity, Navajo statutory exemption from execution, or a circular issued by the U.S. Office of Management and Budget (OMB) prohibits the enforcement. The Court holds that only certain NHA funds are exempt from execution, and that the judgment must be satisfied with those that are non-exempt." *Tso v. Navajo Housing Authority*, No. SC-CV-20-06, slip op. at 1 (Nav. Sup. Ct. December 6, 2007).

"Based on this history, it is clear that the Resolution did not merely 'clarify' an ambiguity, but altered the legal landscape by purporting to bring NHA under the Sovereign Immunity Act." *Phillips v. Navajo Housing Authority*, No. SC-CV-13-05, slip op. at 6 (Nav. Sup. Ct. December 8, 2005).

"As we have previously noted, NHA does not have sovereign immunity from a lawsuit, but NHA generally is exempt from levy and execution. See 6 N.N.C. §§ 616, 623." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 4 (Nav. Sup. Ct. August 26, 2004).

"Under this Section, NHA is required to waive its immunity from suits in any agreement with another party. Even when NHA fails to do so, it lacks immunity under the clear language of Section 616(b)(1)." *NHA v. Bluffview Resident Management Corporation, Board of Directors, et al.*, No. SC-CV-35-00, slip op. at 9 (Nav. Sup. Ct. December 17, 2003).

"... [T]he NHA can waive its immunity from levy and execution by contract. The contract language that waives the NHA's immunity from levy and execution must be clear and express, and any ambiguity will not be construed as a waiver of immunity." *The Navajo Housing Authority v. Dana and Associates*, 5 Nav. R. 157, 160 (Nav. Sup. Ct. 1987).

### **§ 617. Bonds**

A. The Authority may issue obligations from time to time in its

discretion for any of its purposes and may also issue refunding obligations for the purpose of paying or retiring obligations previously issued by it. The Authority may issue such types of obligations as it may determine, including obligations on which the principal and interest are payable:

1. Exclusively from the income and revenues of the project financed with the proceeds of such obligations, or with such income or revenues together with a grant from the federal government in aid of such project;

2. Exclusively from the income and revenues of certain designated projects whether or not they were financed in whole or in part with the proceeds of such obligations; or

3. From its revenues generally. Any of such obligations may be additionally secured by a pledge of any revenues of any project or other property of the Authority.

B. Neither the Commissioners of the Authority nor any person executing the obligations shall be liable personally on the obligations by reason of issuance thereof.

C. The notes and other obligations of the Authority shall not be a debt of the Navajo Nation and the obligations shall so state on their face.

D. Obligations of the Authority are declared to be issued for an essential public and governmental purpose and to be public instrumentalities and, together with interest thereon and income therefrom, shall be exempt from taxes imposed by the Navajo Nation. The tax exemption provisions of this Subchapter shall be considered part of the security for the repayment of obligations and shall constitute, by virtue of this Subchapter and without necessity of being restated in the obligations, a contract between the Authority and the Navajo Nation and the holders of obligations and each of them, including all transferees of the obligations from time to time.

E. Obligations shall be issued and sold in the following manner:

1. Obligations of the Authority shall be authorized by a resolution adopted by the vote of a majority of the full Board and may be issued in one or more series;

2. The obligations shall bear such dates, mature at such times, bear interest at such rates, be in such denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment and at such places, and be subject to such terms of redemption, with or without premium, as such resolution may provide;

3. The obligations may be sold at public or private sale at not less than par value;

4. In case any of the Commissioners of the Authority whose signatures appear on any obligations cease to be Commissioners before the delivery of such obligations, the signatures shall, nevertheless, be

valid and sufficient for all purposes, the same as if the Commissioners had remained in office until delivery.

F. Obligations of the Authority shall be fully negotiable. In any suit, action or proceeding involving the validity or enforceability of any obligations of the Authority or the security therefor, any such obligation reciting in substance that it has been issued by the Authority to aid in financing a project pursuant to this Subchapter shall be conclusively deemed to have been issued for such purpose, and the project for which such obligation was issued shall be conclusively deemed to have been planned, located and carried out in accordance with the purposes and provisions of this Subchapter.

G. In connection with the issuance of obligations or incurring of obligations under leases and to secure the payment of such obligations, the Authority, subject to the limitations in this Subchapter, may:

1. Pledge all or any part of its gross or net rents, fees or revenues to which its right then exists or may thereafter come into existence;

2. Provide for the powers and duties of obligees and limit their liabilities, and provide the terms and conditions on which such obligees may enforce any covenants or rights securing or relating to the obligations;

3. Covenant against pledging all or any part of its rents, fees and revenues or against mortgaging any or all of its real or personal property to which its title or right then exists or may thereafter come into existence or permitting or suffering any lien on such revenues or property;

4. Covenant with respect to limitations on its right to sell, lease or otherwise dispose of any project or any part thereof,

5. Covenant as to what other or additional debts or obligations may be incurred by it;

6. Covenant as to the obligations to be issued and as to the issuance of such obligations in escrow or otherwise, and as to the use and disposition of the proceeds thereof;

7. Provide for the replacement of lost, destroyed or mutilated obligations;

8. Covenant against extending the time for the payment of its obligations or interest thereof;

9. Redeem the obligations and covenant for their redemption and provide the terms and conditions thereof;

10. Covenant concerning the rents and fees to be charged in the operation of a project or projects, the amount to be raised each year or other period of time by rents, fees and other revenues, and as to the use and disposition to be made thereof;

11. Create or authorize the creation of special funds for monies held for construction or operating costs, debt service, reserves or other purposes, and covenant as to the use and disposition of the monies held in such funds; .

12. Prescribe the procedures, if any, by which the terms of any contract with holders of obligations may be amended or abrogated, the proportion of outstanding obligations the holders of which must consent thereto, and the manner in which such consent may be given;

13. Covenant as to the use, maintenance and replacement of its real or personal property, the insurance to be carried thereon and the use and disposition of insurance monies;

14. Covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition or obligation;

15. Covenant and prescribe as to events of default and terms and conditions upon which any or all of its obligations become or may be declared due before maturity, and as to the terms and conditions upon which such declaration and its consequences may be waived;

16. Vest in any obligee or any proportion of them the right to enforce the payment of the obligations or any covenants securing or relating to the obligations;

17. Exercise all or any part or combination of the powers granted in this Section;

18. Make covenants other than and in addition to the covenants expressly authorized in this Section, of like or different character;

19. Make any covenants and do any acts and things necessary or convenient or desirable in order to secure its obligations, or, in the absolute discretion of the Authority, tending to make the obligations more marketable although the covenants, acts or things are not enumerated in this Section.

#### **History**

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

#### **Cross References**

Powers generally, see § 616 of this Title.

#### **§ 618. Quarterly report**

The Authority shall submit quarterly reports, signed by the Chairperson of the Board, to the Navajo Nation Council showing:

- A. A summary of the quarter's activities;
- B. The financial condition of the Authority;
- C. The condition of the properties;
- D. The number of units and vacancies;
- E. Any significant problems and accomplishments;
- F. Plans for the future;
- G. Such other information as the Authority or the Navajo Nation Council shall deem pertinent.

### **History**

CO-78-91, October 25, 1991.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

### **§ 619. Interest of officers or employees in project or property**

A. During his or her tenure and for one year thereafter, no Commissioner, officer or employee of the Authority, or any member of any governing body of the Navajo Nation, or any other public official who exercises any responsibilities or functions with regard to the project, shall voluntarily acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, or in any contract or proposed contract relating to any project, unless prior to such acquisition, he or she discloses his or her interest in writing to the Authority and such disclosure is entered upon the minutes of the Authority, and the Commissioners, officer or employee shall not participate in any action by the Authority relating to the property or contract in which he or she has any such interest.

B. If any Commissioner, officer or employee of the Authority involuntarily acquires any such interest, or voluntarily or involuntarily acquired any such interest prior to appointment or employment as a Commissioner, officer or employee, the Commissioner, officer or employee, in any such event, shall immediately disclose his or her interest in writing to the Authority, and such disclosure shall be entered upon the minutes of the Authority, and the Commissioner, officer or employee shall not participate in any action by the Authority relating to the property or contract in which he or she has any such interest.

C. Any violation of the foregoing provisions of this Section shall constitute misconduct in office.

D. This Section shall not be applicable to the acquisition of any interest in obligations of the Authority issued in connection with any project, or to the execution of agreements by banking institutions for the deposit or handling of funds in connection with a project or to act as trustee under any

trust indenture, or to utility services the rates for which are fixed or controlled by a governmental agency, or to membership on the Board as provided in § 606(C) of this Title.

#### **History**

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

#### **Cross Reference**

Concerning Subsection (A), see also 6 N.N.C. § 606.

#### **§ 620. Planning, zoning, sanitary and building regulations**

All projects of the Authority shall be subject to the planning, zoning, sanitary and building regulations applicable to the locality in which the planned project is situated.

#### **History**

ACJN-85-63, June 11, 1963.

#### **§ 621. Non-profit construction or operation**

The Authority shall not construct or operate any project for profit where the funding agency imposes limitations and conditions upon the use of the funds or the funds are otherwise restricted. In those instances where the Authority is utilizing non-restricted funds the Authority may construct or operate projects for profit.

#### **History**

CJY-51-05, July 22, 2005.

ACJN-85-63, June 11, 1963.

#### **§ 622. Tax exemption**

The property of the Authority is declared to be public property used for essential public and governmental purposes and such property and the Authority are exempt from all taxes and special assessments of the Navajo Nation.

#### **History**

ACJN-85-63, June 11, 1963.

#### **§ 623. Exemption from execution or other judicial process**

Without exception, all property, including funds acquired or held by the Authority pursuant to this Subchapter, shall be exempt from levy and sale by virtue of any and all execution, and no execution or other judicial process shall issue against the same nor shall any judgment against the Authority be a

charge or lien upon such property. No exception to this Section shall be recognized without a specific reference in any statute citing this provision and stating clearly that the exception is waived. However, the provisions of this Section shall not apply to or limit the right of the obligee to pursue any remedies for the enforcement of any pledge or lien given by the Authority on its rents, fees or revenues or the right of the federal government to pursue any remedies conferred upon it pursuant to the provisions of this Subchapter or the right of the Authority to bring eviction actions in accordance with § 616(B) (18) of this Title.

### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

### **Cross Reference**

Navajo Nation Sovereign Immunity Act, inclusion of NHA, 1 N.N.C. § 552(P).

### **Annotations**

#### **1. Defenses**

" ... [S]overeign immunity is a jurisdictional defense, which may be raised for the first time on appeal." *The Navajo Housing Authority v. Dana and Associates*, 5 Nav. R. 157, 160 (Nav. Sup. Ct. 1987).

#### **2. Immunity**

"This case concerns whether a monetary judgment against the Navajo Housing Authority (NHA) may be enforced, or whether sovereign immunity, Navajo statutory exemption from execution, or a circular issued by the U.S. Office of Management and Budget (OMB) prohibits the enforcement. The Court holds that only certain NHA funds are exempt from execution, and that the judgment must be satisfied with those that are non-exempt." *Tso v. Navajo Housing Authority*, No. SC-CV-20-06, slip op. at 1 (Nav. Sup. Ct. December 6, 2007).

"The real issue in this case is whether the NPEA overrides the general exemption in Section 623. In considering the relationship between the two statutes, we emphasize the difference between sovereign immunity and a statutory exemption. Ordinarily, a legislative body must waive sovereign immunity through explicit language in the statute. See, e.g., *United States v. King*, 395 U.S. 1, 4 (1969). However, as Section 623 does not address the sovereign immunity of NHA, we do not require the same explicit expression to find a waiver of the statutory exemption. We hold that the Navajo Nation Council may override a statutory exemption if there is clear intent in the plain language and/or structure of the later law to include the exempted individual or entity in a generally applicable regulation." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 5 (Nav. Sup. Ct. August 26, 2004).

"The Navajo Nation Council (Council) waived NHA's sovereign immunity, but there is a separate section in the Navajo Nation Code that provides for an exemption from execution of 'other judicial process'.... " *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 4 (Nav. Sup. Ct. August 26, 2004).

**§ 624. Navajo Nation cooperation**

A. For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of projects, the Navajo Nation agrees that:

1. It will not levy or impose any real or personal property taxes or special assessments upon the Authority or any project.

2. It will furnish or cause to be furnished to the Authority and the tenants of projects all services and facilities of the same character and to the same extent as the Navajo Nation furnishes from time to time without cost or charge to other dwellings and inhabitants in areas under the jurisdiction of the Navajo Nation.

3. Insofar as it may lawfully do so, it will grant such deviations from any present or future building or housing codes of the Navajo Nation as are reasonable and necessary to promote economy and efficiency in the development and operation of any project, and at the same time safeguard health and safety, and make such changes in any zoning of the site and surrounding territory of any project as are reasonable and necessary for the development and protection of such project, and the surrounding territory.

4. It will do any and all things, within its lawful powers, necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of projects.

5. It will join in any disposition of project property or interest therein by the Authority and make assignments or other appropriate disposition of the underlying land as permitted by law, where action is required in order to grant the maximum interest therein permitted by law.

6. This Section will not be abrogated, changed, or modified without the consent of the Public Housing Administration.

B. The Navajo Nation declares its intention to use its lawful powers, to the extent feasible, to eliminate unsafe or unsanitary dwelling units in areas subject to the jurisdiction of the Navajo Nation, as additional dwellings are provided by projects of the Authority.

C. The provisions of Subsection (A) of this Section shall remain in effect with respect to any project so long as the project is either owned by a public body or governmental agency and is used for low-rent housing purposes, any contract between the Authority and the Public Housing Administration for loans or annual contributions, or both, in connection with such project remains in force and effect, or any bonds issued in connection with such project or any monies due to the Public Housing Administration in connection with such project remain unpaid, whichever period is the longest.

D. If at any time title to or possession of any project is held by any public body or governmental agency authorized by law to engage in the development or operation of low income housing, including the federal government, the provisions of this Section shall inure to the benefit of and be enforced by such public body or governmental agency.

E. It will do any and all things, within its lawful powers, necessary or convenient to aid and cooperate in the planning, undertaking, construction or operation of projects.

F. The Navajo Nation declares that the powers of the Navajo Nation shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contract violations including action through the appropriate courts.

G. The appropriate court shall have jurisdiction to hear and determine an action for eviction of a tenant or homebuyer. The Navajo Nation declares that the powers of said Court shall be vigorously utilized and the Navajo Nation will cooperate to the fullest extent possible to enforce eviction of a tenant or homebuyer for nonpayment or other contract violations.

#### **History**

CMY-41-77, May 6, 1977.

ACJN-85-63, June 11, 1963.

#### **Cross References**

Tax exemption, see § 622 of this Title.

#### **§ 625. Actions involving validity or enforcement of contracts; evidence**

In any suit, action or proceeding involving the validity or enforcement of or relating to any of its contracts, the Authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this Subchapter.

#### **History**

CJY-51-05, July 22, 2005.

ACJN-85-63, June 11, 1963.

**Note.** Renumbered; previously at § 626. Previous § 625, Approval by Secretary of the Interior, was deleted by CJY-51-05, July 22, 2005.

#### **Cross References**

Financial assistance generally, see § 616 of this Title.

#### **§ 626. Federal law**

Each project developed or operated under a contract, grant or other agreement providing for federal financial assistance shall be developed and operated in compliance with all requirements of such contract and applicable federal legislation, and with all regulations and requirements prescribed from time to time by the federal government in connection with such assistance.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

**Note.** Renumbered; previously at § 627.

#### **§ 627. Fidelity bonds**

The Authority may, at its discretion, obtain or provide for adequate fidelity bond coverage of its officers, agents, or employees handling cash or authorized to sign checks or certify vouchers.

#### **History**

CJY-51-05, July 22, 2005.

CMY-41-77, May 6, 1977.

**Note.** Renumbered; previously at § 628.

### **Subchapter 1. Navajo Planning and Development Board**

**§§ 1001 to 1006. [Repealed]**

#### **History**

CAU-37-73, August 22, 1973.

**Revision note.** By CAU-37-73, the Navajo Nation Council merged the duties of the Navajo Planning and Development Board with those given to the Economic Development and Planning Committee, a standing committee of the Navajo Nation Council. The functions of the Economic Development and Planning Committee were redelegated to the Community Development Committee (now the Transportation and Community Development Committee), the Economic Development Committee and the Resources Committee. See 2 N.N.C. §§ 420, 721, and 691 respectively. CD-68-89, December 15, 1989.

### **Subchapter 3. Zoning**

#### **§ 1051. Preparation of ordinances**

The Transportation and Community Development Committee is authorized to adopt zoning ordinances for communities having an adopted Comprehensive

Community Plan where land for the community as defined therein has been withdrawn.

#### **History**

CS-76-65, September 1, 1965.

**Revision note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Transportation and Community Development Committee has been delegated authority to review and approve comprehensive community land use plans and zoning ordinances pursuant to 2 N.N.C. § 423(C)(2).

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1052. Approval and adoption**

The Planning and Zoning Officer, Navajo Nation, shall cause to be prepared proposed zoning ordinances for the communities. The proposed ordinances shall require approval by the Transportation and Community Development Committee before becoming effective.

#### **History**

CS-76-65, September 1, 1965.

**Revision note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Transportation and Community Development Committee has been delegated authority to review and approve comprehensive community land use plans and zoning ordinances pursuant to 2 N.N.C. § 423(C)(2). Also, the statutory reference to the Navajo Community Planning Board was repealed by CAU-37-73, August 22, 1973.

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1053. Enforcement and information**

The Planning and Zoning Officer shall be responsible for the enforcement of all zoning ordinances adopted by the Transportation and Community Development Committee. The Officer shall further provide and maintain a public information office relative to all matters arising from adopted zoning ordinances.

#### **History**

CS-76-65, September 1, 1965.

**Revision note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Transportation and Community Development Committee has been delegated authority to review and approve comprehensive community land use plans and zoning ordinances pursuant to 2 N.N.C. § 423(C)(2).

### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

### **§ 1054. Amendments**

All proposed amendments to zoning ordinances shall first be reviewed by the Local Planning Board, and shall require approval by the Transportation and Community Development Committee before becoming effective.

### **History**

CS-76-65, September 1, 1965.

**Revision note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Transportation and Community Development Committee has been delegated authority to review and approve comprehensive community land use plans and zoning ordinances pursuant to 2 N.N.C. § 423(C)(2). Also, the statutory reference to the Navajo Community Planning Board was repealed by CAU-37-73, August 22, 1973.

### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

## **Subchapter 5. Comprehensive Plan**

### **§ 1101. Origin and purpose**

The Chapter, at a meeting called for that purpose, shall formally request of the Planning and Zoning Officer, Navajo Nation, the preparation of a Comprehensive Community Plan of the community. A Comprehensive Community Plan will provide a means for the Chapter, working with the Local Planning Board assisted by technical experts, to make an assessment of the resources of the community and to develop a plan and a program for providing the kind of environment needed for improvement, growth and development of the community. Such a plan shall include, but not be limited to, the following:

A. An *Open Space Plan* which preserves for the people certain areas to be retained in their natural state or developed for recreational purposes.

B. A *Land Use Plan* which projects future community land needs, showing by location and extent, areas to be used for residential, commercial, industrial, and public purposes.

C. A *Thoroughfare Plan* which provides a system of and design criteria for major streets, existing and proposed, distinguishing between limited access, primary, and secondary thoroughfares, and relating major thoroughfares to the road network and land use of the surrounding area.

D. A *Community Facilities Plan* which shows the location, type, capacity, and area served, of present and projected or required community facilities

including, but not limited to, recreation areas, schools, libraries, and other public buildings. It will also show related public utilities and services and indicate how these services are associated with future land use.

#### **History**

CAU-72-65, August 31, 1965.

**Note.** The Transportation and Community Development Committee of the Navajo Nation Council is authorized to review and approve comprehensive community land use plans and zoning ordinances, including land withdrawals necessary for the implementation of such land use plans. See 2 N.N.C. § 423(C)(2). Also, the statutory reference to the Navajo Community Planning Board was repealed by CAU-37-73, August 22, 1973.

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1102. Preparation of plan**

The Planning and Zoning Officer, Navajo Nation, shall prepare with the assistance of appropriate technical staff of the Navajo Nation, the Bureau of Indian Affairs, and the United States Public Health Service, a Comprehensive Community Plan. The Planning and Zoning Officer shall consult with the Chapter and the Local Planning Board during the preparation of this plan for advice. He shall consult with the Transportation and Community Development Committee for advice during the preparation of this plan and their written approval of the plan shall be required before the same may be submitted to the Chapter for final approval. The officer shall be responsible for the preparation of a proper Comprehensive Community Plan to fit the needs of the community.

#### **History**

CAU-72-65, August 31, 1965.

**Note.** The Transportation and Community Development Committee of the Navajo Nation Council is authorized to review and approve comprehensive community land use plans and zoning ordinances, including land withdrawals necessary for the implementation of such land use plans. See 2 N.N.C. § 423 (C) (2).

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1103. Presentation of plan**

The Comprehensive Community Plan so prepared for a community shall be presented to the Chapter at a duly called meeting for approval.

#### **History**

CAU-72-65, August 31, 1965.

**Note.** The Transportation and Community Development Committee of the Navajo Nation Council is authorized to review and approve comprehensive community land use plans and zoning ordinances, including land withdrawals necessary for the implementation of such land use plans. See 2 N.N.C. § 423(C)(2).

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1104. Control by the Transportation and Community Development Committee**

The Comprehensive Community Plan, as approved by the local Chapter, shall be presented to the Transportation and Community Development Committee for adoption and withdrawal of the land for the community as defined in the plan. The Transportation and Community Development Committee shall have full control and complete authority of land utilization of community withdrawn lands as defined by the adopted Comprehensive Community Plan. No person shall, after Transportation and Community Development Committee adoption of the plan and withdrawal of the land for the community, as defined in the plan, utilize any land therein without specific written approval of the Transportation and Community Development Committee; provided that easements and rights-of-way may be granted as provided by Navajo Nation law so long as same comply with the Comprehensive Community Plan.

#### **History**

CAU-72-65, August 31, 1965.

**Revision note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Transportation and Community Development Committee has been delegated authority to review and approve comprehensive community land use plans and zoning ordinances pursuant to 2 N.N.C. § 423(C)(2).

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1105. Land use; variations**

The utilization of all withdrawn lands of the community as defined by the adopted Comprehensive Community Plan shall be in accordance with the provisions of said plan; provided that variations thereunder shall be permitted when approved by the Transportation and Community Development Committee.

#### **History**

CAU-72-65, August 31, 1965.

**Revision note.** The Navajo Community Planning Board was repealed by CAU-37-73, August 22, 1973. See 2 N.N.C. § 423(C)(2) for the authority of the Transportation and Community Development Committee.

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

#### **§ 1106. Applications for land use**

All applications for Transportation and Community Development Committee consideration for utilization of lands within a community to be developed under a Transportation and Community Development Committee approved Comprehensive Community Plan and where lands for the community, as defined in the plan have been withdrawn by the Transportation and Community Development Committee shall be reviewed expeditiously first by:

- A. The Local Planning Board;
- B. The Planning and Zoning Officer, Navajo Nation;
- C. The Bureau of Indian Affairs;
- D. The United States Public Health Service;
- E. Department of Justice, Navajo Nation;
- F. The President, Navajo Nation;

G. The Office of Legislative Counsel, Navajo Nation prior to being submitted to the Transportation and Community Development Committee, to insure conformance with the Comprehensive Community Plan.

#### **History**

CS-74-65, September 1, 1965.

**Revision note.** By CF-8-82 the Navajo Tribal Legal Office was abolished and the Department of Justice was established with the Attorney General given authority over administrative and operating policies and supervisory control over the Department. See 2 N.N.C. § 1961 *et seq.* The Navajo Tribal Legal Office was redesignated the Tribal Legal Department by the 1978 Budget pages IX-1 and IX-12 and was moved from 2 N.N.C. § 1101-1104 to 2 N.N.C. § 1991-1994. The Legislative Secretary no longer exists in Navajo Nation government. The Office of Legislative Counsel provides legal advice and legislative services to the Navajo Nation Council and its standing committees. See 2 N.N.C. § 960 *et seq.*, see also, 2 N.N.C. § 164.

#### **Cross Reference**

Regarding zoning, see also, 26 N.N.C. § 2004.

### **Subchapter 7. Damages**

#### **§ 1151. Damages to improvements**

A. When in accomplishing the purpose of the Comprehensive Community Plan, the Navajo Nation disposes of land containing any improvement belonging to a person who will not donate the same whether the disposition is made by surface

lease, permit, consent to grant of right-of-way or consent to commencement of construction on a proposed right-of-way, or in any other manner that gives the grantee or proposed grantee exclusive use of the surface of the land containing such improvement, or authorizes the grantee or proposed grantee to use the surface of the land in such manner that said improvement or improvements must be removed, damaged, or destroyed, the Navajo Nation will pay or require to be paid damages to the rightful claimant of such improvement or improvements.

1. As used herein "improvement" means houses, hogans, sunshades, stables, storage sheds and dugouts, and sweathouses; sheep and horse corrals, lamb pens, and fences lawfully maintained; irrigation ditches, dams, charcos, development work on springs, and other water supply developments; any and all structures used for lawful purposes and other things having economic value. Where any improvement of a person is readily removable and he or she has an opportunity to remove the same, damages payable on account of said improvement shall be limited to the reasonable cost of removal, if any, even though the claimant thereof may have failed to remove such improvement and it may have been destroyed or damaged in the authorized course of use of the land on which it is located.

2. No damages shall be paid to any person for any improvement, when such person at the time of building or acquiring said improvement knew or with reasonable diligence ought to have known that the area in which it was located was proposed to be disposed of by the Navajo Nation adversely to such person's interest.

B. Upon adverse disposition by the Navajo Nation of a person's lawful interest, the President of the Navajo Nation shall cause to be prepared an appraisal of the improvements for which the person is entitled to compensation as hereinabove provided. The President of the Navajo Nation or his authorized representative shall negotiate with the person for settlement of his or her claim for payment of the value of the improvement or the reasonable cost of its removal. If a settlement satisfactory to the President of the Navajo Nation or his or her authorized representative and the person is reached, the proposed agreement shall be submitted to the Transportation and Community Development Committee for approval, and authorization to pay the claim if appropriate.

C. If a settlement satisfactory to the President of the Navajo Nation or his authorized representative and the person cannot be reached, the President of the Navajo Nation shall appoint a negotiating committee with representation from the following to make a settlement of the claim:

1. Local Planning Board
2. Resources Committee, Navajo Nation Council; and
3. Land Administration Department, Navajo Nation.

D. If a settlement satisfactory to the negotiating committee and the person cannot be reached, the claim will be referred to the Transportation and Community Development Committee for review and further directions in accordance with appropriate laws of the Navajo Nation.

## History

CS-78-65, September 2, 1965.

**Revision note.** In Subsection (B) the words "and the person" were added after "representative" for clarity. Land Administration Department was added in place of Land Investigation Department as that is the successor agency. The Navajo Community Planning Board was repealed by CAU-37-73, August 22, 1973. See 2 N.N.C. § 420 *et seq.* for the Transportation and Community Development Committee's authority.

## Cross Reference

Concerning damages, see also, 16 N.N.C. § 1401 *et seq.* and 26 N.N.C. § 2005.

### § 1152. Damages to intangible interests

When in accomplishing the purpose of the Comprehensive Community Plan, the Navajo Nation as a result of the granting of any lease or permit embracing Navajo Nation land, or of granting permission by the Navajo Nation for the use of Navajo Nation land, or as a result of the use of Navajo Nation land under such lease, permit or permission, the value of any part of such land for its customary use by a person formerly lawfully using the same is destroyed or diminished, the Navajo Nation will compensate or cause to be compensated the former user in the manner hereinafter specified.

A. When the livelihood of the former Navajo Indian user is gravely affected by the new use, such user shall have first priority in resettling on other lands acquired by the Navajo Nation, except the area acquired pursuant to the Act of September 2, 1958 (72 Stat. 1686); and the Nation shall pay the expense of removing said person, his or her family, and property to any new land made available for his or her use, and such shall constitute full compensation to such Navajo.

B. 1. In all other cases involving damages under this Paragraph, the amount thereof shall be fixed and determined in the manner specified in § 1151(A)(1) of this Subchapter.

2. If a settlement satisfactory to the President of the Navajo Nation or his authorized representative and the person cannot be reached, settlement will be made as specified under § 1151(A)(2) and (B) of this Subchapter.

C. Where, through reseeding, irrigation or otherwise, the remaining land in the customary use area of any individual damaged by adverse disposition of Navajo Nation land is within a reasonable time made able to provide the same economic return as his former entire customary use area, no damages shall be payable to such person, except for the period, if any, between adverse disposition of land in the customary use area and the time when the productivity of the remaining land achieves equality with the entire former customary use area.

D. Only lawful and authorized use shall be compensated under this Section. Thus, no person shall be compensated for loss of use of land for

grazing animals in excess of his permitted number, or without a permit.

E. Every person otherwise entitled to damages under Subsection (B) of this Section shall not be entitled to receive any payment thereof until he or she has surrendered for cancellation his or her grazing permit as to all animal units in excess of the carrying capacity of the land remaining in his or her customary use area. Persons so surrendering their grazing permits shall be entitled to an immediate appropriate lump sum payment for each sheep unit cancelled.

#### **History**

CS-78-65, September 2, 1965.

#### **Cross Reference**

Concerning damages, see also, 16 N.N.C. § 1401 *et seq.* and 26 N.N.C. § 2005.

### **Chapter 9. Swimming Pools**

#### **§ 1301. Definitions**

For the purposes of this Chapter the following definitions shall apply:

A. "Swimming pool" shall mean any artificial swimming pool together with the buildings and appurtenances essential to the use thereof, and shall include public swimming pools, semiprivate swimming pools and wading pools.

B. "Artificial swimming pool" shall mean a structure intended for bathing or swimming purposes, made of concrete, masonry, metal, plastic or other impervious material, together with building and appurtenances located either indoors or outdoors and provided with a controlled water supply.

C. "Public swimming pool" shall mean a swimming pool, admission to which may be gained by the general public with or without the payment of a fee, such as a school, community, municipal or commercial pool, and shall include all swimming pools operated and maintained in conjunction with or by clubs and community associations.

D. "Semiprivate swimming pool" shall mean a swimming pool on the premises of or which is part of a hotel, motel, trailer court, apartment house, recreation camp or similar establishment where the primary business of the establishment is not the operation of swimming facilities and where admission to the use of the pool is included in the fee or consideration given for the primary use of the premises.

E. "Wading pool" shall mean a shallow public or semiprivate swimming pool intended chiefly for use of children and having a maximum depth of two feet.

F. "Lifeguard" shall mean a person who holds a valid Red Cross or YMCA Senior Lifeguard Certificate or who has equivalent qualifications and who has no duties other than to superintend the safety of those using the swimming pool during the time the pool is open.

G. "Approved" shall mean acceptable to the Health Advisor based on a determination as to conformance with appropriate standards and good health practice.

H. "Transportation and Community Development Committee" shall mean the Transportation and Community Development Committee of the Navajo Nation Council.

I. "Health Advisor" shall mean the Director, Navajo Area Indian Health Service, United States Public Health Service, Window Rock, Arizona, or his or her designated representative.

J. "Operator's Permit" shall mean a written permit issued by the Office of Navajo Resources and Security upon recommendation of the Health Advisor, reflecting a swimming pool operator's compliance with this Chapter.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note (1995).** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. See 2 N.N.C. § 420 *et seq.* for the authority of the Transportation and Community Development Committee.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2, Navajo Division of Natural Resources.

#### **§ 1302. Plans and specifications; submission and approval**

Whenever any alterations, modifications or new construction of a swimming pool is contemplated by the operator or prospective operator, three sets of plans and specifications shall be submitted to the Health Advisor for review, who shall recommend approval or such modifications as are necessary for approval.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially reworded for purpose of clarity.

#### **§ 1303. Operator's permit**

No person shall operate or maintain a public or semiprivate swimming pool unless he or she has a valid operator's permit to operate such pool that has been obtained through the Office of Navajo Resources and Security. Only persons who comply with the provisions of this Chapter and other applicable laws, regulations and ordinances shall be entitled to receive or retain such an operator's permit. Such permits are not transferable to another owner, person or location. A permit shall be permanent unless revoked for cause.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** First sentence partially reworded for purpose of clarity.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2, Navajo Division of Natural Resources.

#### **§ 1304. Revocation of permit**

The Office of Navajo Resources and Security may revoke any permit for failure to comply with any of the provisions of this Chapter. Before a permit is revoked, the person holding the permit shall be given notice in writing enumerating the alleged failure to comply with the provisions of these regulations and specifying a reasonable time for compliance. If after the stated time the Office of Navajo Resources and Security finds such violations have not been remedied, he shall give notice that the permit has been revoked.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Second and third sentences partially reworded for purpose of clarity.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2, Navajo Division of Natural Resources.

#### **§ 1305. Hearing**

Any person affected by any notice issued in connection with the enforcement of any provision of this Chapter may request and shall be granted a hearing on the matter according to the approved procedures. Such person shall file in the Office of the President of the Navajo Nation, a written petition requesting such hearing and setting forth a brief statement of the grounds for such request within 10 days after the day notice was served. Upon receipt of such petition the Office of Navajo Resources and Security shall set a time and place for such hearing and give the petitioner written notice thereof. At the hearing, petitioners shall be given an opportunity to be heard and to show cause why such notice should be modified or withdrawn. The hearing shall be commenced not later than 10 days after the day on which the petition was filed: Provided the petitioner has not upon application submitted good and sufficient reason for postponement of such hearing.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially rephrased for purpose of clarity.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2,

Navajo Division of Natural Resources.

**§ 1306. Decision and order**

After a hearing, the Office of Navajo Resources and Security, with the consultation of the Health Advisor, shall sustain, modify or withdraw the notice, depending on the findings as to compliance or noncompliance with this Chapter. If the Office of Navajo Resources and Security shall sustain or modify such notice, it shall be deemed to be an order.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially reworded for purpose of clarity.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2, Navajo Division of Natural Resources.

**§ 1307. Emergency orders; hearing**

A. Whenever the Office of Navajo Resources and Security, upon the advice of the Health Advisor, finds that an emergency matter exists which requires immediate action to protect public health, he may, without notice or hearing, issue an order reciting the existence of such emergency and requiring that such action be taken as is deemed necessary in view of the emergency. Notwithstanding any other provision of this Chapter, such order shall be effective immediately.

B. Upon petition to the Office of Navajo Resources and Security, petition shall be afforded a hearing as soon as possible. After such hearing, depending upon findings regarding compliance or noncompliance with the provisions of this Chapter, the Office may continue the order in effect, or modify or revoke it.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Reworded for purpose of clarity.

**Note.** The Office of Navajo Resources and Security was discontinued in 1978 pursuant to the 1978 Budget resolution and organization chart. See Title 2, Navajo Division of Natural Resources.

**§ 1308. Reissuance of revoked permit**

Any permit revoked in accordance with the provisions of this Chapter shall be reissued upon proper application by the operator and presentation of evidence that the deficiencies causing the revocation have been corrected.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially reworded for purpose of clarity.

**§ 1309. Regulations of other agencies**

All public and semiprivate pools shall comply with all requirements of the electrical, plumbing and other agencies, whose regulations are considered to be the minimum requirements for the health and safety of bathers.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially reworded for purpose of clarity.

**§ 1310. Physical features of swimming pools; cleanliness; inoperative equipment**

A. All swimming pools, and their accompanying premises, shall be so designed, constructed, equipped, operated and maintained as to insure clean and sanitary conditions at all times.

B. Inoperative equipment shall constitute grounds for closing the pool.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Subsection (A) partially rephrased for purpose of clarity.

**§ 1311. Dimensions**

A. *Depth of water.* The minimum depth of water in the deepest part of any pool which is used for diving purposes shall not be less than eight feet six inches. A pool designed for swimming purposes only shall have a maximum depth of five feet.

B. *Width.* The minimum width of any section of a swimming pool shall be 15 feet.

C. *Length.* The length of the diving portion (section of pool where water is over five feet in depth) shall be a minimum of 18 feet with the center line of the deepest part of the pool being not less than 10 feet from the deep end of the pool. The minimum length of any swimming pool which is greater than five feet in depth shall be 36 feet, unless exempted by extenuating circumstances.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Subsection (C) slightly reworded for purpose of clarity.

**§ 1312. Design and construction requirements**

A. *Slope.* The slope of the bottom of any part of a pool where the water is less than five feet deep must be not more than one foot in each 12 feet. There shall be no sudden changes of slope within the area where the water depth is less than five feet. (Any flat area on the pool bottom offers excellent lodging places for sediment and shall be avoided.) All portions of the pool bottom shall have a definite slope toward the pool drains.

B. *Walls.* The inside wall surface of a swimming pool shall be vertical, except that, where covered construction is used between the side walls and bottom of a swimming pool, the radius of curvature in the area less than five feet deep shall not exceed six inches; in the area between the deep end of the pool and the point of maximum depth, a minimum of a five-foot radius cove at the base of a three-foot top vertical section shall be provided. There shall be a uniform transition in the cove between five-foot depth and the cove at the maximum pool depth.

C. *Steps.* Steps for entering and leaving the pool shall be of such construction as to minimize chances of accidents. Ladders shall be located at one or preferably both sides of the pool; a ladder or steps shall be placed at the shallow end of the pool. Treads of ladders or steps shall be of nonslip material. In public pools, all steps must be recessed and shall not protrude into the pool proper. In semiprivate pools, the maximum projection shall be limited to three feet six inches, but no abrupt projection will be permitted if it creates a safety hazard.

D. *Runways.* A runway at least four feet wide, constructed of concrete or other impervious material, shall completely surround the pool. The runway shall have a slope between one-fourth and three-eighths inch per foot away from the pool; it shall be an integral part of the pool walls or it shall overlap the walls. Either floor drains, in the ratio of not less than one per 200 square feet of runway area, provided they shall not exceed 25 feet on centers, or collecting troughs covered with gates shall be provided unless drainage is to the surrounding area. The drainage from runways shall be considered sewage and shall be conducted to the sewer or drained to the area outside the runway paved area around the pool. A complete and effective break shall be provided between the drains for the runway area and the sewer to prevent the possibility of sewage backing up into the runway area drains. Runway drains shall not be interconnected with scum gutter drain lines.

E. *Barrier.* There shall be an effective separation of the space used by spectators from that used by bathers in all public pools. The swimming pool and bather area of all pools shall be completely enclosed by a barrier at least 36 inches high. There shall be no unpaved area within the barrier enclosed bathing area surrounding public pools.

F. *Curbs.* No elevated curbs shall be permitted within the bathing area.

G. *Scum gutters.* Scum gutters shall be provided around the entire perimeter of swimming pools. Scum gutter drains shall not exceed 15 feet on centers. Water from scum gutters may be either recirculated through the filters or discharged to the sewer. If discharged to the sewer there shall be a minimum of an eighth-inch gap between the scum gutter drain line and the top rim of the sewer manhole or drain box.

1. Skimmers may be used in lieu of scum gutters providing the following minimum requirements are met: A minimum of two skimmers shall be required for all swimming pools; an additional skimmer shall be provided for each 450 square feet of surface area or fraction thereof in excess of 900 square feet. Skimmers, when used on swimming pools whose surface area exceeds 2000 square feet, shall be used in combination with scum gutters, which shall be provided around at least fifty percent (50%) of the pool perimeter. Piping for skimmers shall be of a size allowing at least sixty percent (60%) of the total outflow of water to be handled. An adjustable skimmer wire and strainer basket shall be provided for each skimmer.

2. Skimmers should not be used as a means of adding filter aid to filters.

H. *Vacuum line.* A separate vacuum line is desirable for use in vacuuming the pool.

I. *Drains.* Where the pool width is greater than 25 feet, multiple outlet drains shall be provided. The drainage system including the backwash filter line, for a swimming pool shall be constructed with a minimum of an eighth-inch air gap to prevent sewage or other waste from siphoning, flooding, or otherwise discharging into the swimming pool. Drains shall be covered with an approved grate.

J. *Fill spout.* The fill spout shall be so located as to constitute a minimum hazard to persons in the pool area, such as under the diving board or adjacent to a ladder. The discharge end of the fill pipe shall have a minimum effective air gap of five inches above the overflow level.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Subsections (B), (C), (E), (G), 2nd par., and (J) partially reworded for purpose of clarity.

#### **§ 1313. Color, longitudinal stripes and depth marks**

A. *Color.* The swimming pool walls and floor surfaces shall be a light color.

B. *Striping.* Dark contrasting stripes, a minimum of four inches wide, shall divide the pool into longitudinal lines five to seven feet wide on all public swimming pools. The striping on semiprivate pools shall be five feet from the pool ends.

C. *Depth markings.* Depth markings of a dark color and of sufficient size to be clearly visible across the pool shall be placed in pairs, one of each pair being on either side of the pool on the vertical wall near the water level. A pair of markings shall be placed at each successive one-foot increment of depth, except depth markings need not be placed less than four feet apart. The minimum and maximum depths shall be so designated, including

the five-foot depth.

### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Partially reworded for purpose of clarity.

### **§ 1314. Diving boards; regulation and nonregulation**

A. Diving boards shall be installed with one thought in mind: the provision of maximum safety for the diver.

B. Regulation one meter and three meter board installations must comply with the following requirements:

1. The minimum depth of water under a regulation one meter board shall not be less than eight feet six inches.

2. The minimum depth of water under a regulation three meter board shall not be less than 12 feet.

3. Open water of the recommended minimum depth shall be provided in the area of a 200-degree arc extending forward and to either side of the center of the tip of the board. The radius of such arc shall be a minimum of eight feet for the one meter board installations and 12 feet for three meter board installations.

4. The minimum length of the diving area of a swimming pool having a one meter board installation shall be 25 feet, and the minimum length of the diving area of a swimming pool having a three meter board shall be 35 feet.

5. A minimum of 12 feet of free, unobstructed headroom shall be provided above the installation of a regulation one meter or three meter diving board.

6. Parallel or diverging multiple diving board installations shall be allowed providing all the above requirements are met and the boards are not placed closer than 12 feet at the center of the tips of the boards.

C. Nonregulation diving board installations must comply with the following requirements:

1. In all installations of nonregulation diving boards, safety of use shall be the prime consideration.

2. An area which is a minimum of four feet square shall be provided in the diving portion of the pool, and this area shall not be less than eight feet six inches deep. The center line of this area shall be in line with the diving board and the nearest edge of this area shall be eight feet from the deep end of the pool.

3. The area above the diving board shall be such that there is no possibility of collision by the diver with any overhead obstruction.

### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Words "must comply with the following requirements" added in Subsections (B) and (C); Subsection (C) slightly reworded for purpose of clarity.

### **§ 1315. Wading pools; requirements**

A. *Barrier.* A barrier at least 36 inches high shall be provided to separate a wading pool from a swimming pool.

B. *Depth.* The maximum depth of a wading pool shall be 24 inches.

C. *Slope.* The maximum slope of the bottom of a wading pool shall be not more than one foot in each 12 feet.

D. *Main drain.* Wading pools shall have a main drain located in the deepest part of the pool.

E. *Scum gutter or skimmer.* Wading pools shall be equipped with a scum gutter, skimmer or other means to remove floating material. If skimmers are used, one skimmer shall be provided for each 400 square feet of pool area or fraction thereof.

F. *Air gap.* There shall be a minimum of five-inch air gap on the fill line to prevent the possibility of any wading pool water siphoning or otherwise getting into the domestic water supply.

1. The fill line or fill spout shall be located so it does not present a hazard to children in the pool area.

2. There shall be a minimum effective air gap of eight inches between the pool and filter drain lines and that of the top of the sewer manhole.

G. *Runways.* A runway at least four feet wide constructed of concrete or other impervious material shall completely surround the pool. The runway shall have a slope between one-fourth and three-eighths inch per foot away from the pool; it shall be an integral part of the pool walls. The drainage from runways shall be constructed as a sewage and either be conducted to a sewer or allowed to drain the area outside the barrier.

H. *Water.* Water in the wading pools shall be from a potable source. The turnover period shall not exceed two hours. Incoming water shall be chlorinated to maintain a free chlorine residual as near 0.6 ppm as practical. Supplemental hand chlorination is desirable to maintain a minimum of 0.6 ppm or more of free chlorine residual in the pool. The pH range of the pool water should be maintained between 7.2 and 8.0.

## History

ACMY-191-71, May 12, 1971.

### § 1316. Water supply and quality

Water used to fill or add to a swimming pool shall be from a supply properly located, protected and operated; and shall be easily accessible, adequate and of a safe, sanitary quality. No water supply shall be used except under conditions approved by the Health Advisor. Bacteriological quality shall be maintained in the pool as follows:

A. *Public pool.* At least one sample containing five ten milliliter portions must be submitted to a laboratory approved by the Health Advisor each week that the pool is in operation. If a nonconforming sample is obtained, additional samples shall be submitted by the Health Advisor as soon as possible and two consecutive nonconforming samples shall constitute grounds for closing the pool unless evidence of correction of this deficiency is provided.

B. *Semiprivate pools.* At least two samples containing five ten milliliter portions each must be submitted by the Health Advisor to a laboratory each month that the pool is in operation. If a nonconforming sample is obtained, additional samples shall be submitted by the Health Advisor as soon as possible, and two consecutive nonconforming samples shall constitute grounds for closing the pool unless evidence of correction of this deficiency is provided.

## History

ACMY-191-71, May 12, 1971.

### § 1317. Clarity, disinfection and pH of water

A. *Clarity.* All water in the pool at times of use shall be sufficiently clear to permit a black disc six inches in diameter on a white field, when placed on the bottom of the pool at the deepest point to be clearly visible from the runway around the deep area.

B. *Disinfection.* Swimming pool water shall be disinfected by chlorination secured through the use of chlorine or hypochlorites. The dosage of chlorine or hypochlorites added shall be sufficient to secure a concentration of at least 0.4 ppm free available chlorine (flash reaction) at all times when the pool is in operation.

1. An approved mechanical chlorinator having a capacity to feed a minimum of one pound of chlorine in 24 hours for each 5000 gallons of pool capacity shall be provided. Hand chlorination of swimming pool water is not acceptable, except for emergency or supplemental operation.

2. The disinfection residual in a swimming pool shall be checked immediately prior to opening the pool to swimming. It is important that frequent checks be made on the chlorine residual during periods of heavy bather load and during periods of high intensity of sunlight.

3. Other disinfecting agents will be permitted when approved by the Health Advisor.

C. *Handling of toxic materials.* Toxic materials such as gas chlorinators and chlorine gas cylinders shall be housed in an enclosure separated from the swimming pool, corridors, dressing rooms, and other space used by bathers by a tight partition wall with no doors or other access opening in the partition wall.

1. In the room where chlorine gas is stored or in a room where a gas chlorinator is located, a door to the outside extending to the floor level shall be provided.

2. Chlorine gas equipment or chlorine gas shall not be located where the floor is below grade, and access to the room shall be only through a door to the outside of the building.

3. The requirements of this regulation shall also apply to other toxic gaseous disinfecting agents.

4. Existing nonconforming installations may be permitted subject to the approval of the Health Advisor.

D. *Chlorine testing kit.* A chlorine comparator testing kit, preferably of the color disc type, to read 0.1, 0.4, 0.6 and 1.0 ppm shall be provided. It is desirable to have a chlorine testing kit with additional intermediate readings and broader range. If chemicals other than chlorine are used, an approved testing kit shall be provided for testing the residual of these chemicals.

E. *pH control.* The pH of the water in the pool shall be maintained between 7.2 and 8.0. A pH comparator testing kit preferably of the color disc type, to read from 6.8 to 8.4, with at least two intermediate readings, shall be provided.

### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** In Subsection (B), "when" added near end of 1st paragraph and "opening the pool" substituted for "being opened" in 3rd paragraph. In Subsection (C), "the" added in last sentence of 2nd paragraph.

### **§ 1318. Filtration**

A. All swimming pool water shall be recirculated through rapid sand or diatomite filters. The filter rate shall not exceed the manufacturer's recommended filter rate and in no case shall the filter rate exceed three gallons per minute per square foot. The turnover period shall not exceed six hours for public pools and seven hours for semiprivate pools. Other methods of filtration using equipment bearing the Seal of Approval of the National Sanitation Foundation may be approved in lieu of rapid sand or diatomite filters.

B. If rapid sand filters are used at least 36 inches of sand, free of clay, organic, and soluble material, having an effective size of .4 to .5 mm, and a uniformity coefficient not exceeding 1.75 shall be provided, unless other treatment approved by the Health Advisor is provided.

C. Filters shall be equipped for effective backwashing. If rapid sand filters are to be used a minimum of three filters shall be provided and the pump shall have sufficient capacity to backwash filters at a minimum rate of nine gallons per square foot of filter area per minute.

D. Filters shall be equipped with pressure gauges on the inlet and outlet filter lines. Rapid sand filters shall also have suitable provision for feeding chemicals.

E. A lint and hair catcher shall be provided on all swimming pools.

F. All public pools shall be equipped with a rate of flow meter.

G. Diatomite filters should be equipped with slurry and precoat feeders for adding filter aid. Skim filters are not approved.

#### **History**

ACMY-191-71, May 12, 1971.

#### **§ 1319. Plumbing connections; cross connections; back siphonage**

There shall be no physical connection between a swimming pool and a water supply and/or sewers. All plumbing and piping shall be so arranged as to prevent back siphonage. Cross-connections are prohibited.

#### **History**

ACMY-191-7 1, May 12, 197 1.

**Revision note.** Word "so" added in second sentence.

#### **§ 1320. Bath houses**

A. *Dressing room.* Adequate and sanitary dressing rooms shall be provided for all public swimming pools.

B. *Showers.* Showers in sufficient number shall be provided with hot and cold water with soap. The minimum number to be provided shall be one for the first 40 bathers or fraction thereof, and an additional one for each additional 40 bathers or fraction thereof of the bathing load design.

The hot water heater shall be of adequate capacity to provide hot water for all bathers using the showers.

C. *Toilet facilities.* The minimum number of water closets to be provided per sex shall be one for the first 40 bathers or fraction thereof, and an additional one for each additional 40 bathers or fraction thereof of the bathing load design; provided, however, urinals may be substituted for the

male sex, not to exceed one-third of the total number of water closets required. Urinals shall be so constructed as to prevent splashing.

D. *Wash basins.* Wash basins in the ratio of one to each two toilet facilities shall be provided for each sex.

E. *Floors.* Floors in toilets, dressing rooms, walkways, and runways shall have a slope between one-fourth and three-eighths inch each per foot to floor drains. Floor finish shall be nonskid Portland cement, tile or other impervious material.

F. *Drinking fountains.* At least one approved sanitary drinking fountain utilizing the slanting jet principle with surrounding guard, nonsubmersible opening, and supplied with water under adequate pressure shall be provided at a convenient point on all public swimming pools and also preferably on semiprivate pools.

G. *Ventilation.* Good ventilation shall be provided to minimize condensation and odors,

H. *Heating facilities.* All gas-fired heating appliances, including water heaters, shall be vented directly to the outside air with "B" vents. Open-face heaters are prohibited. Gas-fired heaters shall not be located in any service room or bathhouse. All liquefied petroleum installations shall have one hundred percent (100%) shut-off. All gas installations shall comply with all laws governing such installations.

I. *Semiprivate pools.* In the case of semiprivate swimming pools, facilities provided for separate lodging units and/or other shower and restroom facilities may be used to satisfy this Section.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Subsections (C) and (D) partially reworded for purpose of clarity.

#### **§ 1321. Prevention of the spreading of diseases**

A. *Shower.* A cleansing shower with soap shall be required of all bathers entering or reentering the enclosed bathing area.

B. *Suspected persons excluded.* No person having a communicable disease shall be employed at a public or semiprivate swimming pool. All patrons known to be, or suspected by the Health Advisor or the management of being afflicted with an infectious disease, suffering from sores or wearing bandages shall be excluded from all public or semiprivate bathing places, except on presentation of a written statement of current dates as approved by the Health Advisor.

C. *Foot baths.* Foot baths are not approved in swimming pools.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** The word "enclosed" substituted for "fenced".

**§ 1322. Construction and care of indoor floor surfaces**

All floors of dressing rooms, toilet rooms, passageways, walkways and runways at every indoor swimming pool shall be constructed of impervious material, having no holes or places for water to stand, provided with a nonskid surface, maintained in a clean condition, and rinsed daily with a chlorine solution having not less than 1,000 ppm of chlorine, or other approved disinfecting solutions. All new floor surfaces shall have a slope between one-fourth and three-eighths inch per foot to drains.

**History**

ACMY-191-7 1, May 12, 1971.

**§ 1323. Suits and towels; cleaning and storing**

Provision shall be made for laundering, rinsing and drying all suits and towels supplied by the management. All suits and towels owned by the management shall be laundered with a detergent or soap by one of the following methods: In 160° F water for 15 minutes; in 170° F water for eight minutes; 212° F water for three minutes.

Clean suits and towels must be kept strictly separated from those which have been used.

**History**

ACMY-191-71, May 12, 1971.

**Revision note.** Subsections (D) and (E), first sentence, slightly reworded for purpose of clarity.

**§ 1324. Maximum permissible number of bathers**

The maximum number of bathers permitted within the enclosed bathing area at any one time shall not exceed one bather for each 25 square feet of water surface of the pool.

**History**

ACMY-191-7 1, May 12, 1971.

**Revision note.** Word "enclosed" substituted for "fenced".

**§ 1325. Safety precautions**

A. *Ring buoys.* At every swimming pool there shall be provided two or more throwing ring buoys having a maximum outside diameter of 18 inches and with a one-fourth inch line attached whose length shall be not less than the pool width plus 10 feet, placed on racks at strategic intervals about the pool.

B. *Poles or life hooks.* One or more light but strong poles (bamboo or other) with blunt ends not less than 12 feet in length, for making reaching assists or rescues shall be provided.

C. *First aid kit and supplies.* A first aid kit containing sterile gauze, absorbent cotton, adhesive tape, bandages of various widths and a lifesaving plastic airway for mouth to mouth resuscitation shall be provided.

D. *Telephone.* Every swimming pool shall be provided with a telephone and the telephone numbers of one or more doctors, ambulances, hospitals, police departments, fire departments and sheriff's departments.

E. *Lifeguard.* A lifeguard shall be on duty in the bathing area at all times that a public swimming pool is in operation. For a semiprivate pool, a responsible person shall be in the pool area at all times the pool is open to swimmers. If regulation lifeguard service is not provided at semi private pools a sign shall be posted clearly stating that this service is not provided.

F. *Glass containers.* Glass containers shall not be permitted in shower rooms or the enclosed area of any pool.

G. *Lighting.* Pools open for night swimming shall be equipped with adequate artificial area lighting, including underwater lights.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Second paragraph slightly reworded for purpose of clarity.

#### **§ 1326. Food and refreshments**

A. No food or refreshments shall be permitted in the immediate enclosed bathing area of a public swimming pool.

B. The operator of a semiprivate swimming pool may provide food and drink service within the enclosed barrier area, providing non-breakable eating and drinking utensils and containers.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Word "may" substituted for "is allowed to" in second paragraph.

#### **§ 1327. Spectators**

Spectators may be allowed within the enclosed bathing area of semiprivate pools only, except that during recognized, organized aquatic programs, spectators may be allowed in the bathing area of public pools.

#### **History**

ACMY-191-71, May 12, 1971.

**Revision note.** Rephrased for purpose of clarity.

**§ 1328. Operating records**

The daily operating record for a public swimming pool shall include the following: date; the total number of bathers accommodated; the maximum number of bathers at any time; starting and stopping time of filters; time of backwashing; whether or not the pool bottom at its greatest depth is plainly visible at all times; results of disinfecting residuals; pH of pool water; kinds and quantities of chemicals added; and the name of the pool operator. Accidents shall be recorded.

**History**

ACMY-191-71, May 12, 1971.

**Title 7**

**Courts and Procedure**

**Chapter 1. Definitions**

**§ 101. Signature defined**

The term "signature" as used in this Title shall be defined as the written signature, official seal, or the witnessed thumb print or mark of any individual.

**History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

**§ 102. Navajo Nation Council defined**

The term "Navajo Nation Council," as used in this Title shall be construed to refer to the Navajo Nation Council, as defined in 2 N.N.C. § 101.

**History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

**§ 103. District Courts defined**

The term "District Courts" as used in this Title shall include the District Courts, the Family Courts of the Navajo Nation, and any divisions thereof established by the Navajo Nation Council.

#### **History**

CO-72-03, October 24, 2003.

CAU-46-89, August 16, 1989.

CD-94-85, December 4, 1985.

#### **Annotations**

##### **1. Purpose**

"The Peacemaker Division (the name was changed from 'Peacemaker Court') was created as part of the district court, but because the family court is part of the district court by definition, 7 N.N.C. § 103 (1995 ed.), local peacemaking programs in the seven judicial districts are also attached to the family court. Over the years, a practice has evolved where people use the local peacemaking program to resolve various kinds of cases, including probate actions." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4, 5 (Nav. Sup. Ct. August 2, 2001).

### **Chapter 3. Judicial Branch**

#### **Subchapter 1. Generally**

##### **§ 201. Establishment; composition**

A. There is a Judicial Branch of the Navajo Nation.

B. The Judicial Branch of the Navajo Nation government shall consist of the District Courts, the Supreme Court of the Navajo Nation, and such other Courts as may be created by the Navajo Nation Council.

C. The Judicial Branch of the Navajo Nation shall also consist of such additional Judicial Branch divisions, departments, offices or programs that further the purposes of the Courts as may be created, subject to amendment or abolishment, by the Judiciary Committee through adoption of their plans of operation.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **§ 202. Seals of Courts**

The Courts of the Navajo Nation shall each adopt a seal which shall be used to authenticate their respective judgments and other papers. The form of the seals and regulations for their use shall be specified by rules of court adopted and placed in effect as provided in 7 N.N.C. § 601.

### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **§ 203. [Reserved]**

## **§ 204. Law applicable**

A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.

B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.

C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.

D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

### **Cross References**

The Foundation of the Diné, Diné Law and Diné Government, see 1 N.N.C. § 201 *et seq.*

Construction and application of federal tribal exhaustion doctrine, 186 A.L.R. Fed. 71 (2003).

Federal question, 41 Am. Jur. 2d Indians, § 167.

### **Annotations**

#### **1. Navajo law and custom**

"The Navajo Nation courts have the authority to apply "customs of the Navajo Nation" as law, 7 N.N.C. § 204(A) (1995 ed.)." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4 (Nav. Sup. Ct. August 2, 2001).

" ... [T]he customs and traditions of the Navajo people have the force of law. They provide a unique body of law known as Navajo common law." *Navajo Nation v. Platero*, 6 Nav. R. 422, 424 (Nav. Sup. Ct. 1991).

"Navajo custom and tradition may be shown in several ways: it may be shown through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed; or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court." *In the Matter of the Estate of Belone*, 5 Nav. R. 161, 165 (Nav. Sup. Ct. 1987).

This Section clearly expresses the intent that Navajo law apply wherever possible. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).

The application of custom depends on a good many circumstances and all the facts of the case. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

When applying custom, the courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the court. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

#### **2. Common law**

"As the NPEA does not discuss when employment contracts are validly made, we look to other non-statutory law to decide this case. In the absence of statutory law, we first and foremost consider *Diné bi beenahaz'áanii* (Navajo Fundamental Law)." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 6 (Nav. Sup. Ct. July 18, 2005).

"Resolutions CN-69-02 (recognizing the Fundamental Laws of the Diné) and CO-72-03 (adopting amendments to 7 N.N.C. § 204 choice of law provisions) expand the *Belone* rule beyond the initial pleading requirement for asserting the application of *Diné bi beenahaz'áanii* in our Courts. Resolution CN-69-02 instructs our judges and justices to take notice of *Diné bi beenahaz'áanii* in their decisions, when applicable. Thus, the failure to raise *Diné bi beenahaz'áanii* in the initial pleading will not lead to exclusion of the claim. Importantly, we do not suggest that common law be raised with reckless abandon wherever and whenever it strikes one's fancy, nor that it be raised in dilatory fashion. We suggest that whenever common law is raised, and whether it is raised *sua sponte* or by a party, the parties should be given ample time and

opportunity to address the issue." *Judy v. White*, No. SC-CV-35-02, slip op. at 17 (Nav. Sup. Ct. August 2, 2004).

" ... [I]f a district court takes judicial notice of a particular custom as Navajo common law, it must clearly set forth in its order the custom on which it is relying, so that the basis for its decision is clear and can be reviewed by this Court." *In the Matter of the Estate of Belone*, 5 Nav. R. 161, 165-166 (Nav. Sup. Ct. 1987).

Navajo Common Law is a body of law which is fully binding on the Navajo Court of Appeals and consists of the customs, traditions and usages of the Navajo people. *Tome v. Navajo Nation*, 4 Nav. R. 159 (Nav. Ct. App. 1983).

### **3. State law**

Courts should carefully make certain that the matter is "not covered" by Navajo law, under Subsection (C) of this Section, before considering or proceeding to the use of state law. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).

Under this Section, the traditions and customs of the Navajo people are to be applied where the Navajo Tribal Code is silent and federal law does not prohibit the application of tradition and custom; it is only in a situation where there is no tradition or custom that the Tribal Courts are authorized to apply state law. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

### **4. Divorce—Division of property**

Since nothing is specifically stated in the Navajo Tribal Code as to how either separate or community property is to be divided upon divorce, this Section is controlling in the matter. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

Since, under Navajo tradition, a land use permit given from a father to a son cannot be characterized as his separate property, nor as community property, the land use permit belongs to the entire family to be used for the benefit of the entire family. The District Court properly applied Navajo tradition and custom in awarding land use permits, grazing permit and all other property connected with a farm to wife in divorce proceedings and the award and distribution of the property rights between the parties was a fair and just settlement pursuant to 9 N.N.C. § 404. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

### **5. Alimony**

The courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to this Section and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

### **6. Child Custody**

Since Navajo custom and tradition is but one of many factors to be considered in child custody cases, a trial judge may be justified in disregarding old ways, and the Court of Appeal will not overturn such a decision unless it was clearly an abuse of discretion. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

#### **7. Federal law questions**

"Absent Navajo law interpreting the Navajo Rules of Civil Procedure (NRCP), we look to the federal law on similar questions for guidance. See 7 N.N.C. § 204 (authorizing use of federal law)." *Dale Nicholson Trust v. Chavez, et al.*, No. SC-CV-69-00, slip op. at 4 (Nav. Sup. Ct. January 6, 2004).

Navajo tribal court could determine validity of allottee's patent and allotment application under federal law in ejectment and trespass action brought by United States on behalf of Navajo allottee against Navajo occupant of parcel. *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir.(N.M.) 1996). Indians <KEY> 221

"The courts of the Navajo Nation must conform their decisions to applicable federal law." *Biakeddy v. Biakeddy*, 6 Nav. R. 391, 392 (Nav. Sup. Ct. 1991).

"Section 204 does authorize the Navajo courts to use any applicable law of the United States in any controversy, so the district court's use of Rule 23 of the Federal Rules of Civil Procedure was proper. Class actions are often a desirable method of dispute resolution, because they eliminate separate suits thereby providing for judicial efficiency." *Billie v. Abbott*, 6 Nav. R. 66, 75 (Nav. Sup. Ct. 1988).

#### **8. Suits against Navajo Nation**

"We disagree with TBI's position that 7 N.T.C. § 204(a) authorizes suits against the Navajo Tribe if a violation of civil rights is asserted. Neither the Navajo Bill of Rights, 1 N.T.C. §§ 1-9, nor 7 N.T.C. § 204(a) explicitly authorizes suits against the Navajo Nation. [ ... ] ... [T]his is a breach of contract action brought against the Navajo Nation, therefore, arguments of civil rights abuse under the Navajo Bill of Rights is inappropriate. [.... ] Instead of arguing civil rights violations, TBI should have argued whether any provisions in the contract waived the Tribe's immunity from suit." *TBI Contractors v. Navajo Tribe*, 6 Nav. R. 57, 61 (Nav. Sup. Ct. 1988).

#### **9. Expert witnesses, generally**

"The court must first determine the witness's status as an 'expert,' assess the relevance of his testimony, and find it will aid the court's or the jury's understanding of a given custom before relying upon the testimony". *Jensen v. Giant Industries, Arizona, Inc.*, No. SC-CV-51-99, slip op. at 4 (Nav. Sup. Ct. January 22, 2002), citing *In re Estate of Belone v. Yazzie*, 5 Nav. R. 161 (Nav. Sup. Ct. 1987).

#### **§ 205. Record of proceedings**

A. Each Court of the Navajo Nation shall keep a record of all proceedings of the Court, which shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all

witnesses, the date of the hearing or trial, the name of the presiding Judge, the findings of the Court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case.

B. A record of all proceedings shall be kept at the appropriate court and shall be available for public inspection unless prohibited by order of the Court for good cause or by applicable laws.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

### **§ 206. Cooperation of Navajo Nation, federal and state employees**

A. No employee or official of the Navajo Nation, federal or state government shall obstruct, interfere with or control the functions of any Court of the Navajo Nation or attempt to influence such functions in any manner except as permitted by Navajo Nation laws or regulations or in response to a request for advice or information from the Court.

B. Navajo Nation employees, particularly those who are engaged in social service, law enforcement, health and educational work, shall assist the Court, upon its request, in the preparation and presentation of the facts in the case and in the proper disposition of the case.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

**Note.** Previous Section 207 revised and relocated to Section 631 by CO-72-03, October 24, 2003.

## **Subchapter 3. District Courts**

### **§ 251. Composition**

A. The District Courts of the Navajo Nation shall consist of judges recommended by the Judiciary Committee of the Navajo Nation Council, appointed by the President of the Navajo Nation, and confirmed by the Navajo Nation Council.

B. The District Courts of the Navajo Nation shall be located in such Judicial Districts of the Navajo Nation as are developed by the Judicial Branch, approved by the Judiciary Committee, and provided for in the Navajo Nation operating budget.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CD-88-78, §§ 2, 3, December 20, 1978.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **§ 252. [Reserved]**

### **History**

**Note.** Previous Section 252 revised and relocated to Section 253(B) by CO-72-03, October 24, 2003.

### **§ 253. Jurisdiction—Generally**

A. The District Courts of the Navajo Nation shall have original jurisdiction over:

1. Crimes. All offenses in the Navajo Nation Criminal Code (17 N.N.C. § 101 *et seq.*) whereby any person commits an offense by his or her own conduct if the conduct constituting any element of the offense or a result of such conduct occurs within the territorial jurisdiction of the Navajo Nation Courts as defined in 7 N.N.C. § 254, or such other dependent Indian communities as may hereafter be determined to be under the jurisdiction of the Navajo Nation and the Courts of the Navajo Nation. The Navajo Nation Courts shall also have jurisdiction over any member of the Navajo Nation who commits an offense against any other member of the Navajo Nation wherever the conduct which constitutes the offense occurs.

2. Civil Causes of Action. All civil actions in which the defendant: (1) is a resident of Navajo Indian Country ; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation.

3. Miscellaneous. All other matters provided by Navajo Nation statutory law, Diné bi beenahaz'áanii, and Navajo Nation Treaties with the United States of America or other governments. All causes of action recognized in law, including general principles of American law applicable to courts of general jurisdiction.

B. The Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children's Code.

## History

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-19-80, February 13, 1980.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## Annotations

### 1. Construction and application

"The Navajo Nation courts were established by the Navajo Nation Council, and the district courts find their legislative grant of general jurisdiction in 7 N.N.C. § 253 (as amended by CO-72-03, 10/27/03). That Section confers original jurisdiction to the district courts over crimes, civil actions where the defendant is a resident of the Navajo Nation or causes an action or injury to occur within the territorial jurisdiction of the Navajo Nation, and 'all other matters provided by Navajo Nation statutory law, *Diné bi beehaz'áanii*, and Navajo Nation treaties with the United States of America or other governments.' "*Judy v. White*, No. SC-CV-35-02, slip op. at 6 (Nav. Sup. Ct. August 2, 2004).

"... [T]here is a presumption against multiple litigation, where it can be avoided." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 4 (Nav. Sup. Ct. July 25, 2001).

"... [B]y applying a Navajo common law interpretation, ... the family court is better suited to hear quiet title actions." *In re: Harvey*, 6 Nav. R. 413, 415 (Nav. Sup. Ct. 1991).

"The Navajo courts have civil jurisdiction over all persons who cause an action to occur in Navajo Indian Country." *Taylor v. Bradley*, 6 Nav. R. 147, 149 (Nav. Sup. Ct. 1989).

"Tribal civil jurisdiction is derived from a tribe's retained inherent sovereignty." *Taylor v. Bradley*, 6 Nav. R. 147, 149 (Nav. Sup. Ct. 1989).

"The courts of the Navajo Nation have the authority to probate the unrestricted property of a decedent. [... ] Unrestricted property includes property owned by individuals, and for which the Navajo Nation does not hold title for all tribal members." *In re: Estate of Wauneka, Sr.*, 5 Nav. R. 79, 81 (Nav. Sup. Ct. 1986).

"History shows that the Navajo Tribal Council gave the Navajo courts their jurisdiction. Consequently, the Navajo courts can exercise only that jurisdiction granted by the Navajo Tribal Council." *Plummer v. Brown II*, 6 Nav. R. 88, 90 (Nav. Sup. Ct. 1989), citing *Nez v. Barney*, 3 Nav. R. 126, 129 (1982).

" ... [T]he Navajo Nation has not expressed its consent to be sued under 7 N.T.C. § 253." *Johnson v. The Navajo Nation*, 5 Nav. R. 192, 196 (Nav. Sup. Ct. 1987).

This Section does not exclude review of Navajo Tribal Council actions from its broad grant of power to the courts. *Halona v. MacDonald*, 1 Nav. R. 189 (Nav. Ct. App. 1978).

## **2. Alimony**

The Courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to 7 N.N.C. § 204 and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Johnson v. Johnson*, 3 Nav. R. 5 (Nav. Ct. App. 1980).

## **3. Criminal prosecutions**

" ... [T]he authority of the Navajo courts to order the forfeiture of an automobile used for the illegal delivery of liquor derives from many sources. These sources are: 7 N.T.C. § 253(1) (1985 Cumm. Supp.) which gives the district courts original jurisdiction over 'all violations of laws of the Navajo Nation'; 17 N.T.C. § 202(3) and (4) (1985 Cumm. Supp.) which state the purposes of the Navajo Criminal Code; 17 N.T.C. § 203 (1985 Cumm. Supp.) which gives the Navajo Nation courts jurisdiction over any person who commits an offense within the 'Navajo Indian Country'; and 17 N.T.C. § 220(c) which gives the Navajo courts general sentencing power pursuant to its legal authority to decide criminal matters." *Begay v. Navajo Nation*, 6 Nav. R. 20, 21 (Nav. Sup. Ct. 1988).

Paragraph (A) of this Section enables the Courts of the Navajo Nation to issue summons or warrants applicable to a criminal prosecution. *Navajo Nation v. Atcity*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

## **4. Foreign corporations**

Navajo Nation has the power to grant its courts personal jurisdiction over foreign corporations as a consequence of such corporations' acts in Navajo territory, such as wrongful repossession alleged in instant case, according to modern expansions of the "minimum contacts" due process standard. *Thompson v. Lovelady's Frontier Ford*, 1 Nav. R. 282 (Nav. Ct. App. 1978).

This Section's provision for jurisdiction over all other matters over which jurisdiction has been or may be vested implicitly asserts Navajo Nation jurisdiction over non-Indian, non-resident businesses and individuals, and court has jurisdiction over a non-Indian, non-resident business which allegedly wrongfully repossesses personal property upon Navajo land. *Thompson v. Lovelady's Frontier Ford*, 1 Nav. R. 282 (Nav. Ct. App. 1978).

## **5. Injunctions**

District Court has civil jurisdiction, under this Section's provision for

jurisdiction over "all other matters which may hereafter be placed within the jurisdiction of the Trial Court," to enjoin a threatened criminal trespass prohibited by the code. *Salt River Project Agricultural Improvement and Power District v. International Brotherhood of Electrical Workers Local Union No. 266*, 1 Nav. R. 277 (Nav. Ct. App. 1978).

## 6. Non-Indians

"The Court holds that the Navajo Nation courts have authority to hear a claim against a motor vehicle manufacturer alleging that a vehicle defect resulted in the death of a Navajo police officer on a road located on trust land within the Navajo Reservation." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 1 (Nav. Sup. Ct. December 18, 2008).

"As we stated in *Dale Nicholson Trust*, Article II specifically recognizes the Navajo Nation's authority to regulate all non-members other than certain federal employees on its lands. [ ... ] The Nation's Article II authority is no different whether on the original Reservation or later extensions." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 6 (Nav. Sup. Ct. December 18, 2008).

"We believe delinquency jurisdiction over non-Indians, as long as detention is not allowed, is civil in nature, and therefore within the jurisdiction of our courts. Our Children's Code, like those of states, classifies juvenile proceedings as civil." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 6 (Nav. Sup. Ct. May 26, 2005).

"In juvenile cases, the 'criminal' nature of the proceeding arises out of the possibility of detention, the functional equivalent of adult incarceration, as the child's liberty is taken away. As we prohibited detention for A.P. as beyond the authority of the Tuba City Family Court in our previous Order of Release, the current proceeding is 'civil' in nature. Under general principles of federal Indian law, as interpreted by this Court, we hold that the Navajo Nation has civil jurisdiction to adjudicate non-Indian children in a delinquency proceeding for activity on tribal lands, as long as detention is not a possible disposition." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

"Though principles of federal Indian law do not prohibit the Nation's delinquency jurisdiction over non-Indian children, the Navajo Nation Council may still bar such jurisdiction. The Children's Code establishes family court exclusive jurisdiction over 'all proceedings ... in which a child is alleged to be ... a delinquent child'." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

"The term 'child' is defined as 'an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen (18) years.' 9 N.N.C. § 1001(F) (1995) (emphasis added). Under these provisions, the Children's Code does not prohibit jurisdiction over non-Indian children, but such jurisdiction is co-extensive with the Nation's general authority, presumably as established by the Treaty and general principles of federal Indian law discussed above. Therefore, we hold that under Navajo

statutory law, family courts general have delinquency jurisdiction over non-Indian children." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

"We therefore hold that a non-Indian child must have a dispositional hearing before the court may exclude him or her. As no hearing was held, the family court violated A.P.'s due process rights, and we must bar it from excluding her from the Navajo Nation." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 10 (Nav. Sup. Ct. May 26, 2005).

" ... [T]his statute authorizes personal jurisdiction over non-resident defendants to the extent allowed by Navajo due process." *Sells v. Espil*, 6 Nav. R. 195, 197 (Nav. Sup. Ct. 1990).

A non-Indian may be sued in the Navajo courts if he is found within the tribe's territorial jurisdiction; so that defendant corporations could be sued for forcible entry and detainer. *Navajo Tribe v. Orlando Helicopter Airways, Inc.*, (Nav. Ct. App. January 12, 1972).

## **7. Controversies arising on Navajo Nation lands**

"Whenever any right that an enrolled Navajo has while residing on the Navajo Reservation is abrogated by a state official, that Navajo has suffered a personal injury. [... ] If a state official interferes in the domestic disputes of Navajos living on the reservation then the official has caused an action to occur within the Navajo Nation. This is true although the state official may not have entered the reservation." *Billie v. Abbott*, 6 Nav. R. 66, 73 (Nav. Sup. Ct. 1988).

"At the outset we establish that a defendant may cause personal injury actionable in Navajo court without ever having set foot on Navajo soil. In a prior decision this Court said that the Navajo courts have jurisdiction 'over any person doing injury within the Navajo Nation ... ' " *Billie v. Abbott*, 6 Nav. R. 66, 73 (Nav. Sup. Ct. 1988), citing *Deal v. Blatchford*, 3 Nav. R. 159, 160 (1982).

Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants, and no Federal Act has given state courts jurisdiction over such controversies. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959).

Arizona courts are not free to exercise jurisdiction over a civil suit by a non-Indian against a Navajo Indian where cause of action was derived from transaction which took place on the Navajo Reservation. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959).

## **8. Consent to jurisdiction**

"Personal jurisdiction means that a court has authority over a party, even if he or she resides outside the Navajo Nation, if he or she consents to have the case heard in the Navajo courts, or if his or her actions have effects within the Navajo Nation." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 & 4 (Nav. Sup. Ct. April 30, 2007).

Vehicle manufacturer did not consent, in financing and lease agreement between Indian tribe and financing subsidiary of manufacturer, to submit to tribal jurisdiction over any foreseeable tort claims arising out of use of its vehicles on reservation; agreement's exclusive forum selection clause related only to disputes connected to the lease and financing contract and was unrelated to product liability action arising out of one-vehicle accident involving vehicle financed under agreement. *Ford Motor Co. v. Todecheene*, 221 F.Supp.2d 1070 (D.Ariz. 2002). Indians <KEY> 223; Indians <KEY> 142(1); Contracts <KEY> 206

#### **9. Need for unique remedy**

Vehicle manufacturer was not subject to Indian tribal court's jurisdiction, on basis of need to preserve political integrity of tribe, in product liability claims arising out of one-vehicle accident involving vehicle built by manufacturer; single vehicle roll-over underlying products liability lawsuit did not require a unique tribal court remedy and did not threaten or have a sufficiently adverse effect on the political integrity, economic security, or health or welfare of the tribe as a whole. *Ford Motor Co. v. Todecheene*, 221 F.Supp.2d 1070 (D.Ariz. 2002), stay granted 488 F.3d 1215. Indians <KEY> 223

#### **10. Business with tribe members**

Non-Indian off-reservation automobile dealer could not avoid Indian tribe's exercise of civil jurisdiction over it on ground that it had not conducted business with the tribe, but only with individual Indians. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 36 UCC Rep.Serv. 1809 (9th Cir.(Ariz.) 1983), cert. denied 466 U.S. 926. Indians <KEY> 223

#### **11. Subject matter jurisdiction**

"Subject matter jurisdiction means that a court has authority over a case or issue, as defined by Navajo Nation statutory law and the Treaty of 1868." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

"Our district courts are courts of general jurisdiction under the Navajo Nation Code, 7 N.N.C. § 253, but their jurisdiction is limited by federal statutes and by United States Court case law. Under these authorities a tribal court has subject matter jurisdiction over non-Indians from several sources. A tribe may exercise its broad inherent sovereignty over non-Indian conduct anywhere within its territory." *Nelson, et al. v. Pfizer, Inc. et al.*, No SC-CV-01-02, slip op. at 3 (Nav. Sup. Ct. November 17, 2003).

Navajo Nation district court lacked subject-matter jurisdiction over insurance company which provided liability insurance to medical clinic being sued in Navajo court; insurance company was not a member of the tribe and did not engage in any consensual relationship with tribe, inasmuch as its contractual relationship was with clinic which was a nonmember of the tribe. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir.(Utah) 2002), cert. denied 128 S.Ct. 1229. Indians <KEY> 223

Navajo Nation district court lacked subject-matter jurisdiction over attorney who was hired by liability insurance provider for medical clinic being sued in

Navajo court, even though attorney was a member of Navajo Nation Bar Association; attorney's membership in Bar Association, although a consensual relationship, did not provide requisite nexus to exertion of tribal authority to join attorney as a defendant with clients he was representing, and such jurisdiction was not necessary to protect Navajo self-government. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir.(Utah) 2002), cert. denied 128 S.Ct. 1229. Indians <KEY> 223

" ... [S]ince the apportionment plan was invalid, the District Court had to do something when it was made aware that the Navajo Nation was attempting to conduct elections under a plan that we had declared invalid. In addition, a new event (passage of Navajo Nation Council Resolution No. CF-29-98) affecting the case arose. In light of these events, the District Court correctly ruled that it had the inherent authority to conduct a status review of the case and to grant relief based on the status of the case. That is part of the District Court's inherent power to implement adjudication." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 4 (Nav. Sup. Ct. July 25, 2001).

## **12. Concurrent jurisdiction**

In determining whether Navajo Tribal Court had concurrent jurisdiction over ejectment and trespass action brought in district court, Court of Appeals would consider statutes of Navajo Nation. *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir.(N.M.) 1996). Courts <KEY> 510

## **13. Divorce proceedings**

"Under the foregoing the Court holds that dissolution of marriage is an action affecting the status of marriage and that the Navajo Tribal Courts have jurisdiction to grant a dissolution of marriage when one of the spouses is domiciled within the territorial jurisdiction of the Navajo Nation if the complaining party has met the residency requirements even though the other spouse is domiciled outside the Navajo Nation." *Yazzie v. Yazzie*, 5 Nav. R. 66, 70 (Nav. Sup. Ct. 1985).

## **14. Judgment debts**

"We hold that Section 3 of the Navajo Nation Bill of Rights prohibited her incarceration for failure to pay the judgment on a contract as an unreasonable deprivation of liberty." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 7 (Nav. Sup. Ct. May 4, 2001).

" ... [G]iven the difficulty in framing a general rule, we will restrict our focus to the question of whether a judgment debtor who fails to pay a civil judgment on a contract for a loan may be incarcerated for failure to pay the judgment, whether the judgment debtor is indigent or not." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 3-4 (Nav. Sup. Ct. May 4, 2001).

## **15. Personal jurisdiction**

"Personal jurisdiction means that a court has authority over a party, even if he or she resides outside the Navajo Nation, if he or she consents to have the case heard in the Navajo courts, or if his or her actions have effects within

the Navajo Nation." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 & 4 (Nav. Sup. Ct. April 30, 2007).

"Under these principles, the District Court may consider the federal 'minimum contacts' standard, and incorporate it into its analysis. [ ... ] However, such analysis cannot be used exclusively to decide the issue, as, regardless of federal concepts of due process, the District Court must decide whether, taking into account all the circumstances of the case, the assertion of personal jurisdiction over these Appellees is fair under Navajo values." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 8 (Nav. Sup. Ct. April 30, 2007).

## **16. Treaty**

"The Court holds that the Navajo Nation courts have authority to hear a claim against a motor vehicle manufacturer alleging that a vehicle defect resulted in the death of a Navajo police officer on a road located on trust land within the Navajo Reservation." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 1 (Nav. Sup. Ct. December 18, 2008).

"The Navajo Nation retains civil jurisdiction over claims arising within the Nation by inherent sovereignty under Article II of the Treaty." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 4 (Nav. Sup. Ct. December 18, 2008).

"As we stated in *Dale Nicholson Trust*, Article II specifically recognizes the Navajo Nation's authority to regulate all non-members other than certain federal employees on its lands. [...] The Nation's Article II authority is no different whether on the original Reservation or later extensions." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 6 (Nav. Sup. Ct. December 18, 2008).

### **§ 253a. Long-Arm Civil Jurisdiction and Service of Process Act**

A. Definitions. As used in this Act, the term "person" includes an individual, executor, administrator, or other personal representative, or a corporation, partnership, association or any other legal or commercial entity, whether or not a citizen or domiciliary of the Navajo Nation and whether or not organized under the laws of the Navajo Nation. The term includes all persons, natural or fictitious, of any kind.

B. Personal jurisdiction based on enduring relationship or status. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over a person domiciled in, organized under the laws of, or maintaining his, her, or its place of business in the Navajo Nation as to any cause of action or claim for relief. A Court of the Navajo Nation may exercise personal jurisdiction over any member of the Navajo Nation regarding that person's status as a member of the Navajo Nation for activities outside this jurisdiction which affect any other member of the Navajo Nation. A Court of the Navajo Nation may exercise civil jurisdiction over any person who assumes tribal relations with Navajos and the Navajo Nation by marriage, adoption, guardianship or other enduring relationship with Navajos.

C. Personal jurisdiction based on conduct. A Court of the Navajo Nation may exercise personal and subject matter jurisdiction over any non-member who consents to jurisdiction by commercial dealings, residence, employment, written or implied consent, or any action or inaction which causes injury which affects the health, welfare, or safety of the Navajo Nation or any of its members located within the territorial jurisdiction of the Navajo Nation, or any other act which constitutes the assumption of tribal relations and the resulting express or implied consent to jurisdiction. A Court of the Navajo Nation may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action for relief arising from the person's:

1. Transacting any business in the Navajo Nation;
2. Contracting at any place to supply services or things within the Navajo Nation;
3. Causing tortious injury by any act or omission within the Navajo Nation;
4. Causing tortious injury in the Navajo Nation by an act or omission outside the Navajo Nation if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the Navajo Nation;
5. Having an interest in, using, or possessing real property in the Navajo Nation, including the actual occupancy or lease of trust land, allotted land, fee land, or any other land within Navajo Indian country;
6. Contracting to insure any person, property or risk located within the Navajo Nation;
7. Causing an act which creates an environmental hazard or degradation of the air, waters, flora, fauna, cultural artifact, or other resource of the Navajo Nation;
8. Selling alcohol to any person who enters the Navajo Nation and who causes an injury in the Navajo Nation under the influence of alcohol; or
9. Any action or inaction outside this jurisdiction which causes actual injury or damage within the Navajo Nation, where such injury or damage was reasonably foreseeable.

D. Service of process outside the Navajo Nation. When the exercise of personal jurisdiction is authorized by this Act, service of process may be made outside the Navajo Nation, and where such service is not reasonably feasible, service may be made by any means which is likely to give the defendant actual notice of the pendency of an action.

E. Inconvenient forum. When a Navajo Nation Court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.

F. Other basis of jurisdiction unaffected. A Court of the Navajo Nation may exercise jurisdiction on any other basis authorized by law, including the inherent and treaty jurisdiction of the Navajo Nation.

G. Manner and proof of service.

1. When the law of the Navajo Nation authorizes service outside the Navajo Nation, the service, when calculated to give actual notice, may be made:

a. By personal delivery in the manner prescribed for service within the Navajo Nation;

b. In the manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

c. By any form of mail addressed to the person to be served and requiring a signed receipt;

d. As directed by a foreign authority in response to a letter rogatory; or

e. As directed by the Court.

2. Proof of service outside the Navajo Nation may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Navajo Nation, the order pursuant to which service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee satisfactory to the court and showing that the service was reasonably calculated to give actual notice.

H. Individuals to be served; special cases. When the law of the Navajo Nation requires that in order to effect service one or more designated individuals be served, service outside the Navajo Nation under this Act must be made upon the designated individual or individuals.

I. Assistance to tribunals and litigants outside the Navajo Nation.

1. A Court of the Navajo Nation may order service upon any person who is domiciled or can be found within the Navajo Nation of any document issued in connection with a proceeding in a tribunal outside the Navajo Nation. The order may be made upon application of any interested person or in response to a letter rogatory issued by a tribunal outside the Navajo Nation and shall direct the manner of service. Otherwise, no process which is not process issued by a Navajo Nation Court or administrative tribunal with jurisdiction over the cause may be served within the Navajo Nation, and the Navajo Nation denies consent to admission to the Navajo Indian country to any state official or process server for the service of process unless the same is done under this Section.

2. Service in connection with a proceeding in a tribunal outside the Navajo Nation may be made within the Navajo Nation only with an order of a Navajo Nation Court.

3. Service under this Section does not, of itself, require the recognition or enforcement of an order, judgment, or decree rendered outside the Navajo Nation.

4. A Navajo Nation Court may decline to order service of process where a tribunal outside the Navajo Nation lacks jurisdiction over the action, where the application is fraudulent, or where the action violates the public policy of the Navajo Nation.

J. Other provisions of law unaffected. This Act does not repeal or modify any other law of the Navajo Nation permitting any other procedure for service of process.

### **History**

CO-72-03, October 24, 2003.

CJA-02-01, January 24, 2001.

### **Annotations**

#### **1. Construction and application**

"The Court holds that the Navajo Nation courts have authority to hear a claim against a motor vehicle manufacturer alleging that a vehicle defect resulted in the death of a Navajo police officer on a road located on trust land within the Navajo Reservation." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 1 (Nav. Sup. Ct. December 18, 2008).

"Through clear provisions of the Navajo Nation Code, the Council has outlawed alcohol on the Nation, 17 N.N.C. §§ 410-412 (2005), has made providers of liquor liable for injuries arising out of consumption of their liquor, 7 N.N.C. § 207 (1995) [now § 631], and, most importantly for this case, asserts personal jurisdiction over liquor sellers located outside the Navajo Nation when their liquor causes injuries on the Nation, 7 N.N.C. § 253a(C)(8) (2005)." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 5-6 (Nav. Sup. Ct. April 30, 2007).

"Given the clear mandate of the long arm statute, the District Court would have to find the statute invalid as a violation of Appellees' due process rights under the Navajo Bill of Rights." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 6 (Nav. Sup. Ct. April 30, 2007).

"If the long arm statute allows jurisdiction over Appellees, the District Court must further analyze whether the long arm statute is consistent with Navajo concepts of fairness embedded in the Due Process Clause of the Navajo Bill of Rights. As stated previously by this Court, the Navajo concept of due process

is unique, in that it applies concepts of fairness consistent with Navajo values." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 7 (Nav. Sup. Ct. April 30, 2007).

## **2. Personal jurisdiction**

"Personal jurisdiction means that a court has authority over a party, even if he or she resides outside the Navajo Nation, if he or she consents to have the case heard in the Navajo courts, or if his or her actions have effects within the Navajo Nation." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

"Indeed, the Appellants' allegations in this case bring Appellees squarely within the long arm statute, and, therefore, in the absence of some reason why the provision is invalid, the Nation's courts have personal jurisdiction over Appellees." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 6 (Nav. Sup. Ct. April 30, 2007).

## **3. Minimum contacts**

"Under the circumstances, the Court holds that Ford is present through its vehicles that entered the Nation's territory. Ford actively participated in the sale and financing of the vehicles to the Navajo Nation government through a Ford dealer and Ford financing subsidiary. Ford had full knowledge that the vehicles were intended for the specific use of tribal officials performing official tribal activities. This Court has previously recognized inherent jurisdiction over a products liability claim when a diabetes drug entered the Nation through prescription, provision and/or ingestion within Nation. *Cf. Nelson v. Pfizer*, 8 Nav. R. 369, 373 (Nav. Sup. Ct. 2003). That one of those police vehicles crashed while performing official duties on a dirt road on trust land within the Nation is enough to invoke the Nation's absolute civil jurisdiction under the Treaty. It is for these types of cases that the Navajo Nation Council enacted the Navajo Long-Arm Civil Jurisdiction and Service of Process Act, 7 N.N.C. § 253a." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 9 (Nav. Sup. Ct. December 18, 2008).

"The Court takes judicial notice that the Long Arm Civil Jurisdiction and Service of Process Act enacted in 2001 does not establish Navajo civil jurisdiction over non-members. The Act codified the inherent authority of the Navajo Nation as affirmed in Article II of the Treaty of 1868. As such, the Act clarified the modern application of this authority." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 9-10, footnote 5 (Nav. Sup. Ct. December 18, 2008).

## **4. Treaty**

"The Court holds that the Navajo Nation courts have authority to hear a claim against a motor vehicle manufacturer alleging that a vehicle defect resulted in the death of a Navajo police officer on a road located on trust land within the Navajo Reservation." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 1 (Nav. Sup. Ct. December 18, 2008).

"The Navajo Nation retains civil jurisdiction over claims arising within the Nation by inherent sovereignty under Article II of the Treaty." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 4 (Nav. Sup. Ct. December 18, 2008).

"As we stated in *Dale Nicholson Trust*, Article II specifically recognizes the Navajo Nation's authority to regulate all non-members other than certain federal employees on its lands. [ ... ] The Nation's Article II authority is no different whether on the original Reservation or later extensions." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 6 (Nav. Sup. Ct. December 18, 2008).

"Under the circumstances, the Court holds that Ford is present through its vehicles that entered the Nation's territory. Ford actively participated in the sale and financing of the vehicles to the Navajo Nation government through a Ford dealer and Ford financing subsidiary. Ford had full knowledge that the vehicles were intended for the specific use of tribal officials performing official tribal activities. This Court has previously recognized inherent jurisdiction over a products liability claim when a diabetes drug entered the Nation through prescription, provision and/or ingestion within Nation. *Cf. Nelson v. Pfizer*, 8 Nav. R. 369, 373 (Nav. Sup. Ct. 2003). That one of those police vehicles crashed while performing official duties on a dirt road on trust land within the Nation is enough to invoke the Nation's absolute civil jurisdiction under the Treaty. It is for these types of cases that the Navajo Nation Council enacted the Navajo Long-Arm Civil Jurisdiction and Service of Process Act, 7 N.N.C. § 253a." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 9 (Nav. Sup. Ct. December 18, 2008).

"The Court takes judicial notice that the Long Arm Civil Jurisdiction and Service of Process Act enacted in 2001 does not establish Navajo civil jurisdiction over non-members. The Act codified the inherent authority of the Navajo Nation as affirmed in Article II of the Treaty of 1868. As such, the Act clarified the modern application of this authority." *Ford Motor Company v. Kayenta District Court, and concerning Todecheene*, No. SC-CV-33-07, slip op. at 9-10, footnote 5 (Nav. Sup. Ct. December 18, 2008).

#### **§ 254. Territorial jurisdiction**

A. 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, all land owned in fee by the Navajo Nation, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

B. The Courts of the Navajo Nation may also exercise jurisdiction over any action for probate, domestic relations, child custody, adoption and Navajo Nation benefits and services, in which a party is a Navajo resident of the Hopi-Partitioned Lands.

#### **History**

CO-72-03, October 24, 2003.

CJA-11-00, January 28, 2000.

CD-94-85, December 4, 1985.

CJY-57-85, July 25, 1985.

CMY-28-70, May 7, 1970.

**Preamble.** CJY-57-85 contained the following preamble:

"7. It is the intent of these amendments that the reference to 'all land' is comprehensive and includes rights-of-way, fee land, and other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments and all lands held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians. Nothing herein shall be construed as constituting authorization for the purchase or lease of lands by any Band of Navajo Indians; and"

"8. 'Dependent Navajo Indian Communities' is intended to encompass all lands currently within the Eastern Navajo Agency and such other lands as may be determined consistent with federal law to constitute dependent Navajo Indian communities."

#### **Annotations**

##### **1. Concurrent jurisdiction**

In determining whether Navajo Tribal Court had concurrent jurisdiction over ejectment and trespass action brought in district court, Court of Appeals would consider statutes of Navajo Nation. *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir.(N.M.) 1996). Courts <KEY> 510

##### **2. Outside reservation**

Dispute between two Navajo Indians over land located in Navajo Indian country but outside reservation boundaries fell within jurisdiction of Navajo Tribal Court. *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir.(N.M.) 1996). Indians <KEY> 221

" ... [R]eading 7 N.T.C. § 254 as including the Moencopi Administrative Unit within its definition of Navajo Indian Country is *not* inconsistent with federal law. The Moencopi Administrative Unit lies within the exterior boundaries of the Navajo Indian Reservation *and* it has yet to be decided that the Hopi Tribe holds an *exclusive* interest in the lands." *Taylor v. Bradley*, 6 Nav. R. 147, 149 (Nav. Sup. Ct. 1989).

##### **3. Scope of jurisdiction**

"After reviewing the documents submitted by both sides in this case, we believe we do not have to reach the question of whether the parcel is within the territorial jurisdiction of the Navajo Nation. This is because Cabinets is bound by an explicit consent to Navajo jurisdiction in the lease between NHA

and the Navajo Nation." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 3-4 (Nav. Sup. Ct. February 11, 2004).

"Petitioner claims that, regardless of any Navajo Nation definition of its territorial jurisdiction, e.g. 7 N.N.C. § 254 (1995), which definition includes land owned in fee by the Nation, the Labor Commission must show that the parcel is a 'dependent Indian community' under the federal Indian Country statute, 18 U.S.C. § 1151, and the United States Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)."

"History shows that the Navajo Tribal Council gave the Navajo courts their jurisdiction. Consequently, the Navajo courts can exercise only that jurisdiction granted by the Navajo Tribal Council." *Plummer v. Brown II*, 6 Nav. R. 88, 90 (Nav. Sup. Ct. 1989), citing *Nez v. Barney*, 3 Nav. R. 126, 129 (1982).

#### **4. Elections**

"Furthermore, the use of the definition of the Navajo Nation's modern territorial jurisdiction, 7 N.N.C. § 254, to demarcate the land upon which one must reside if he or she desires to run in an election is itself unreasonable." *In the Matter of the Appeal of Vern Lee*, No. SC-CV-32-06, slip op. at 7 (Nav. Sup. Ct. August 11, 2006).

#### **5. Subject matter jurisdiction**

"Subject matter jurisdiction means that a court has authority over a case or issue, as defined by Navajo Nation statutory law and the Treaty of 1868." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

#### **§ 255. Writs or orders**

The District Courts shall have the power to issue any writs or orders necessary and proper to the complete exercise of their jurisdiction.

#### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

#### **Annotations**

##### **1. Garnishment**

Enabling language of this Section and former version of 9 N.N.C. § 1303 enable the District Courts of the Navajo Nation to order wage garnishment to any employer, trustee, financial agency or other person within the territorial jurisdiction of the Nation for child support. *Heredia v. Heredia*, 4 Nav. R. 124 (Nav. Ct. App. 1983).

Pursuant to 7 N.N.C. § 705 and this Section, coupled with Rule 23, Rules of Navajo Civil Procedure, garnishment is permitted. *Tracey v. Heredia*, 4 Nav. R. 149 (Nav. Ct. App. 1983).

## **2. Power of court**

" ... [G]iven the difficulty in framing a general rule, we will restrict our focus to the question of whether a judgment debtor who fails to pay a civil judgment on a contract for a loan may be incarcerated for failure to pay the judgment, whether the judgment debtor is indigent or not." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 3-4 (Nav. Sup. Ct. May 4, 2001).

"This Court affirms the principle that the Navajo Tribal Courts have inherent power to enforce their orders and uphold the dignity of the court through contempt powers." *In the Matter of Contempt of Sells*, 5 Nav. R. 37 (Nav. Ct. App. 1985).

## **3. Due process**

"We hold that Section 3 of the Navajo Nation Bill of Rights prohibited her incarceration for failure to pay the judgment on a contract as an unreasonable deprivation of liberty." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 7 (Nav. Sup. Ct. May 4, 2001).

## **4. Review**

"As a general principle, we will give considerable deference to a district court's exercise of discretion. *Higdon v. Nelson*, 7 Nav. R. 158, 159 (1995). The parameters of discretion are whether the district court acted within the rules, principles and customs applicable to the facts of the case. We will not overturn a discretionary decision unless the record shows that there was an actual abuse of discretion. *Little v. Begay*, 7 Nav. R. 353, 354 (1998)." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 4 (Nav. Sup. Ct. July 16, 2001).

## **5. Oral orders**

"Before considering the appropriateness of a gag order generally, the Court first notes that an oral order, whatever its subject, is ineffective. Court orders are not effective until put into writing." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 6 (Nav. Sup. Ct. November 7, 2007); citing, *Kascoli v. Kascoli*, No. SC-CV-08-05, slip op. at 3-4 (Nav. Sup. Ct. November 15, 2005).

## **§ 256. Temporary or preliminary injunctive relief**

No District Court of the Navajo Nation shall enter an order for temporary or preliminary injunctive relief in any proceeding in which there is no appearance by the defendant, unless:

A. The District Court judge certifies in writing as to the specific irreparable harm which would occur were the temporary relief not to be ordered; and

B. The legal counsel for the plaintiff certifies by affidavit the

reasonable efforts which have been made to locate the defendant or defendant's legal counsel to notify him or her of the hearing on preliminary or temporary injunctive relief.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-19-80, February 13, 1980.

#### **§ 257. Sovereign immunity of the Navajo Nation**

Jurisdiction of the District Courts of the Navajo Nation shall not extend to any action against the Navajo Nation without the Navajo Nation's express consent. Any action against the Navajo Nation shall comply with the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, and any other law providing the Navajo Nation with immunity from suit.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-19-80, February 13, 1980.

#### **Cross References**

Navajo Sovereign Immunity Act, see 1 N.N.C. § 551 *et seq.*

#### **Annotations**

##### **1. Exceptions**

Tribal sovereign immunity did not bar suit for injunctive relief against certain Navajo officials who were alleged to have violated federal law by acting beyond the scope of their authority in attempting to regulate affairs of non-Indian electric utility that operated power plant on tribal trust land. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.(Ariz.) 1995). Indians <KEY> 236

Indian tribes may not be sued absent express and unequivocal waiver of immunity by tribe or abrogation of tribal immunity by Congress. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.(Ariz.) 1995). Indians <KEY> 235

"The Navajo district courts have no jurisdiction in suits against the Navajo Nation without its express consent." *Plummer v. Brown II*, 6 Nav. R. 88, 92 (Nav. Sup. Ct. 1989).

Immunity of Navajo Tribe from suit is not absolute; it is subject to complete defeasance by act of Congress and Tribe itself can also waive immunity. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other

grounds 798 F.2d 1324. Indians <KEY> 235

Omnibus Indian Mineral Leasing Act did not diminish sovereign immunity of Navajo Tribe. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other grounds 798 F.2d 1324. Indians <KEY> 235

## **2. Common law immunity**

Navajo Tribe's common-law immunity from suit extended not only to suit for monetary damages, but also to action for injunctive or declaratory relief. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other grounds 798 F.2d 1324. Indians <KEY> 235

## **3. Dismissal of claims**

Complaint against Navajo Tribal Council and Navajo Office of Mineral Development would be dismissed on sovereign immunity grounds where relief against them, as merely parts of tribal government, would be, in effect, relief against Tribe. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other grounds 798 F.2d 1324. Indians <KEY> 235

## **4. Actions barred**

If purpose of action against Navajo tribal officials were, in effect, to obtain relief against Tribe, suit would be barred by Tribe's sovereign immunity. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other grounds 798 F.2d 1324. Indians <KEY> 235

## **5. Tribal officers**

Navajo Tribe's sovereign immunity would not protect tribal officers from suit against them in their individual capacities for acts beyond their authority. *Superior Oil Co. v. U.S.*, 605 F.Supp. 674 (D.Utah 1985), reversed on other grounds 798 F.2d 1324. Indians <KEY> 236

### **Subchapter 4. Special Division of Window Rock District Court**

#### **§ 291. Establishment**

There is established the Special Division of the Window Rock District Court.

#### **History**

CMA-11-89, March 10, 1989.

CMA-8-89, March 1, 1989.

#### **§ 292. Composition**

A. The Special Division of the Window Rock District Court shall consist of three judges or retired judges or retired justices, who shall be assigned in such manner and for such terms as is provided in this Section, for the purpose

of appointing special prosecutors pursuant to 2 N.N.C. §§ 2021–2024.

B. Judges of the Special Division shall be appointed for terms of two years each, which terms shall commence on the date of the enactment of this Section, and thereafter on the date of every other anniversary of the enactment of this Section.

C. The Chief Justice of the Navajo Nation shall designate and assign three judges or retired judges or retired justices to the Special Division for each successive two-year term. At least two of the judges shall be active permanent judges of District Courts of the Navajo Nation. The third judge may be either an active permanent judge of the Navajo Nation or a retired judge or retired justice of the Navajo Nation. Unless there are an insufficient number of active permanent judges from at least two District Courts, not more than one judge or retired judge may be assigned to the Special Division from a particular District (or preceding trial) Court. The Chief Justice shall designate one of the judges to be the presiding judge of the Special Division.

D. Judges of the Special Division may only be removed during their terms upon their resignation, or by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council. Any vacancy in such division shall be filled only for the remainder of the two-year period for which such vacancy occurs and in the same manner as initial appointments to such division were made.

E. Except as provided under Subsection (F) of this Section, assignment to the Special Division shall not bar any other judicial assignment during the term of assignment to such division.

F. No judge of the Special Division shall be eligible to participate in any judicial proceeding concerning a matter which involves a special prosecutor appointed by the Division while such special prosecutor is serving in that office, or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office.

G. Within five calendar days of the enactment of this Section, the Special Division shall be created pursuant to Subsection (C) of this Section.

#### **History**

CO-72-03, October 24, 2003.

CMA-11-89, March 10, 1989.

CMA-8-89, March 1, 1989.

#### **Cross References**

Special Prosecutor, see 2 N.N.C. § 2021 *et seq.*

### **Subchapter 5. Supreme Court**

#### **§ 301. Composition and location**

A. The Supreme Court of the Navajo Nation shall consist of the Chief Justice of the Navajo Nation and two Associate Justices of the Supreme Court.

B. The Supreme Court of the Navajo Nation shall be located in Window Rock, Navajo Nation (Arizona).

C. The Supreme Court of the Navajo Nation may sit and conduct hearings outside of the Navajo Nation in accordance with policies established for the conduct of hearings outside the Navajo Nation.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CMY-39-78, May 4, 1978.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **Annotations**

#### **1. Construction and application**

"We therefore conclude that in cases where three justices were assigned to a case and one becomes unavailable during consideration due to resignation, removal or other reason beyond the control of the Court, this Court may issue an opinion by the remaining two justices." *Benally v. Mobil Oil Corporation, nka ExxonMobil Oil Corporation*, No. SC-CV-05-01, slip op. at 4 (Nav. Sup. Ct. November 14, 2003)

"As the procedural requirement for three justices was a separate action, Section 301(A) merely defines the make-up of the Court. It does not independently restrict the Court to three justices where the Navajo Nation Council had included a separate provision to do so." *Benally v. Mobil Oil Corporation, nka ExxonMobil Oil Corporation*, No. SC-CV-05-01 slip op. at 3 (Nav. Sup. Ct. November 14, 2003)

"Though on its face 301(A) states three justices make up this Court, other Sections of the Judicial Reform Act and its predecessors demonstrate that the Navajo Nation Council authorized this Court to use a two-justice panel when necessary." *Benally v. Mobil Oil Corporation, nka ExxonMobil Oil Corporation*, No. SC-CV-05-01, slip op. at 2 (Nav. Sup. Ct. November 14, 2003)

#### **§ 302. Jurisdiction—Generally**

The Supreme Court shall have jurisdiction to hear appeals from final judgments and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law. The Supreme Court shall also have jurisdiction over original extraordinary writs. The Supreme Court shall be the Court of last resort.

## History

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## Annotations

### 1. Jurisdiction, generally

"Subject matter jurisdiction means that a court has authority over a case or issue, as defined by Navajo Nation statutory law and the Treaty of 1868." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

"Appellants filed this appeal long after the thirty (30) days expired to appeal the final order. This Court only has jurisdiction to review decisions appealed within thirty (30) days of the decision." *Mitchell, et al. v. Davis, et al.*, No. SC-CV-52-03, slip op. at 3 (Nav. Sup. Ct. August 16, 2004).

"No sanctions were imposed, and the attorney did not take an appeal. The finding of contempt was personal to the attorney, collateral to the action, and neither party has any rights as a result of the contempt finding which are part of this appeal." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 9 (Nav. Sup. Ct. July 25, 2001).

"Section 302 by itself does not vest this Court with jurisdiction over appeals of final decisions made by the administrative agencies. Instead, Section 302 requires that a law from among the laws governing an administrative agency must provide for an appeal to this Court." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 302 (Nav. Sup. Ct. 1990).

"Section 302 gave the Court jurisdiction to review final judgments and final orders of the district courts and certain administrative agencies." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 201, 202 (Nav. Sup. Ct. 1990).

"An appeal from a final administrative decision is permitted only if a statute exists which expressly provides for an appeal to the Supreme Court. [... ] ... [N]ot all final administrative decisions are appealable to the Supreme Court." *Navajo Nation Division of Resources v. Spencer*, 5 Nav. R. 109, 111-112 (Nav. Sup. Ct. 1986).

"The Supreme Court's appellate jurisdiction is not derived from general principles governing administrative law. The Supreme Court can acquire and exercise jurisdiction only in the manner dictated by the laws enacted by the legislative body." *Navajo Nation Division of Resources v. Spencer*, 5 Nav. R. 109, 111 (Nav. Sup. Ct. 1986).

"This Court's authority to issue a writ of prohibition is established at 7

N.T.C. § 302, which grants to the Court original jurisdiction to hear cases where a special writ or order is necessary or proper to carry out its jurisdiction, and supervisory jurisdiction over a trial court acting beyond its jurisdiction." *Chief Justice McCabe v. Hon. Walters*, 5 Nav. R. 43, 47 (Nav. Ct. App. 1985).

"History shows that the Navajo Tribal Council gave the Navajo courts their jurisdiction. Consequently, the Navajo courts can exercise only that jurisdiction granted by the Navajo Tribal Council." *Plummer v. Brown II*, 6 Nav. R. 88, 90 (Nav. Sup. Ct. 1989), citing *Nez v. Barney*, 3 Nav. R. 126, 129 (1982).

## **2. Exhaustion of remedies**

"The merits of the case have progressed only to the second level of the tax administrative review process with rights of appeal to the Hearing Officer and the Tax Commission intact. Conferee White's order of denial of Chuska's motion to quash cannot be interpreted as disposing of the merits of the assessment issue thereby the case is not ripe for appeal. Neither is the issuance of an administrative subpoena in the midst a valid administrative proceeding and appealable action." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 103 (Nav. Sup. Ct. 1986).

"The Supreme Court is unavailable for review until all the substantial rights of the parties have been determined in the lower tribunal, whether that tribunal be District Court or administrative agency. The case must be fully adjudicated on the merits, and the entry of the final decision must preclude further proceedings in the lower tribunal." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 102 (Nav. Sup. Ct. 1986).

"Generally, exhaustion [of administrative remedies] will not be required: 1. When the administrative remedy is inadequate. [... ] 2. When the complainant will suffer irreparable injury if required to exhaust administrative remedies. 3. When the agency is clearly acting or attempting to act in excess of its authority. 4. When pursuing the administrative process would be futile ..." *Navajo Skill Center v. Benally*, 5 Nav. R. 93, 96-97 (Nav. Sup. Ct. 1986).

"In determining when agency actions will be reviewed, the doctrines of primary jurisdiction and exhaustion of administrative remedies have been developed. Primary jurisdiction refers to the concept that the agency should act first. Exhaustion of administrative remedies is the concept that the agency should complete its procedures before the courts interfere." *Navajo Skill Center v. Benally*, 5 Nav. R. 93, 96 (Nav. Sup. Ct. 1986).

## **3. Final orders**

"In the case of *Chuska Energy Co. v. Navajo Tax Comm'n*, we construed the word 'final' in our appellate jurisdiction statute ... to mean the procedural stage where 'all the substantial rights of the parties have been determined in the lower tribunal.' 5 Nav. R. 98, 102 (1986)." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 3 (Nav. Sup. Ct. July 25, 2001).

" ... [A]n order denying a motion to dismiss is interlocutory and not final for purposes of appealability." *Billie v. Abbott*, 5 Nav. R. 201, 203 (Nav.

Sup. Ct. 1987).

#### **4. Certified questions**

"Therefore, our appellate authority over OHA [referring to 11 N.N.C. § 404(B)(14)(b)(7)] gives this Court the jurisdiction to hear its certified questions, and *Election Supervisors* is overruled." *In the Matter of Two Initiative Petitions Filed by Navajo Nation President Joe Shirley, Jr.*, No. SC-CV-41-08, slip op. at 3 (Nav. Sup. Ct. July 18, 2008)–(Order of Correction entered July 22, 2008). [See, *In re Navajo Board of Election Supervisors*, 6 Nav. R. 302, 303–304 (Nav. Sup. Ct. 1990).]

"An administrative agency cannot certify a question to this Court because that would violate separation of powers principles as well as their own powers." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 304 (Nav. Sup. Ct. 1990).

#### **5. Advisory opinions**

"We do not, and we cannot, give advisory opinions." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 304 (Nav. Sup. Ct. 1990).

#### **6. Original jurisdiction**

"There is no magic in the phrase 'original jurisdiction'; it simply means that, where the Supreme Court has jurisdiction, matters need not be decided at the trial level prior to being considered by this court." *Budget and Finance Committee v. Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 4 (Nav. Sup. Ct. January 4, 2006).

" 'Original jurisdiction' does not give this Court authority over matters which the Navajo Nation Council has explicitly deemed are outside its jurisdiction." *Budget and Finance Committee v. Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 4 (Nav. Sup. Ct. January 4, 2006).

#### **§ 303. Writs or orders**

The Supreme Court shall have the power to issue any writs or orders:

- A. Necessary and proper to the complete exercise of its jurisdiction;
- B. To prevent or remedy any act of any Court which is beyond such Court's jurisdiction; or
- C. To cause a Court to act where such Court fails or refuses to act within its jurisdiction.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **Annotations**

### **1. Construction and application**

"The Court has discretion whether to issue a writ; it is not required to do so merely because the facts as alleged by the petitioner fit within the writ the petitioner requests." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 3 (Nav. Sup. Ct. November 7, 2007).

"The Navajo Board of Election Supervisors is not a court for purposes of Section 303." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 201, 203 (Nav. Sup. Ct. 1990).

"Under its original jurisdiction, the Supreme Court has supervisory authority over lower courts. Supervisory authority permits the Court to issue extraordinary writs, which include injunctions, to the lower courts." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 201, 202 (Nav. Sup. Ct. 1990).

"To hold that the Supreme Court can supervise Conferee White and the proceedings in Formal Conference would amount to a strained interpretation of 7 N.T.C. § 303." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 101 (Nav. Sup. Ct. 1986).

"A writ of prohibition is an extraordinary remedy which we will grant only in rare cases showing absolute necessity. At a minimum we prefer that the application show that (1) the lower court is about to exercise judicial power; (2) the exercise of such power by the lower court is not authorized by law; and (3) the exercise of such power will result in injury, loss or damage for which there is no plain, speedy and adequate remedy at law." *Yellowhorse, Inc. v. The Window Rock District Court*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986).

"... [A] writ of prohibition works to keep the inferior tribunals within their lawful jurisdictional bounds." *Yellowhorse, Inc. v. The Window Rock District Court*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986).

### **2. Burden of proof**

"It will be the petitioner's burden to prove that he is entitled to the writ [of prohibition] as a matter of right." *Yellowhorse, Inc. v. The Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986).

### **3. Mandamus, generally**

"A writ of mandamus is appropriate if the District Court has a non-discretionary duty to act in some way, and has failed to do so." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 3 (Nav. Sup. Ct. November 7, 2007); citing, *In re A.P. v. Tuba City Family Court*, No. SC-CV-02-05, slip op. at 3 (Nav. Sup. Ct. May 26, 2005).

"It is imperative that the petition [for a writ of mandamus] show that (1) the

petitioner has a legal right to have the particular act performed; (2) the respondent judge has a legal duty to perform that act; and (3) the respondent judge failed or neglected to perform the act. A writ of mandamus will not be used to create new duties for district court judges." *Yellowhorse, Inc. v. The Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986).

"A writ of mandamus will be issued to compel a district court judge to perform a judicial duty required by law, only if there is no plain, speedy and adequate remedy at law." *Yellowhorse, Inc. v. The Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986).

#### **4. Jurisdiction**

"The Court specifically concluded that the Court has authority under 7 N.N.C. § 303(A), the necessary and proper clause, to issue writs against administrative agencies when the Court has appellate jurisdiction over them. See, *Budget and Finance Committee of the Navajo Nation Council v. Navajo Nation Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 4-5 (Nav. Sup. Ct. January 4, 2006). In other words, the Court's writ jurisdiction is coextensive with the Court's appellate jurisdiction, and the right to an appeal includes the right to intervene before a final judgment through an extraordinary writ when necessary and proper." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 3, footnote 3 (Nav. Sup. Ct. November 21, 2007).

"Subject matter jurisdiction means that a court has authority over a case or issue, as defined by Navajo Nation statutory law and the Treaty of 1868." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007).

"As the Council has explicitly prohibited appellate review of the sanctions assessed in this case, there is no appellate jurisdiction to preserve or protect. The Court therefore lacks jurisdiction to issue a writ of prohibition in this case." *Budget and Finance Committee v. Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 5 (Nav. Sup. Ct. January 4, 2006).

"We have jurisdiction to issue 'any writs ... [n]ecessary and proper to the complete exercise of [our] jurisdiction'." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 3 (Nav. Sup. Ct. May 26, 2005).

"Court Clerks are under the immediate control of the Court. Administrative agency clerks or custodians of agency records are beyond the immediate reach of the court, but within the Court's 'all writs' jurisdiction under 7 N.N.C. § 303(1995)." *Legislative Branch/Community Services Program, the Navajo Nation v. Hatahlie*, 7 Nav. R. 259, 261 (Nav. Sup. Ct. 1997).

"Situations inciting action under the necessary and proper clause include cases where the Supreme Court has lawfully acquired jurisdiction but efforts are being pursued to defeat jurisdiction; where the status quo must be maintained pending review of an action on appeal; and where the Supreme Court has potential appellate jurisdiction but there is interference with that jurisdiction which prevents perfection of the appeal. The test is to show a

need to preserve and protect the Supreme Court's appellate jurisdiction." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 102 (Nav. Sup. Ct. 1986).

"24 N.T.C. § 234(b) does not empower the Supreme Court with original jurisdiction to issue injunctions. Neither can the Supreme Court properly use 24 N.T.C. § 234(b) to invoke its supervisory authority over lower courts. An appeal to the Supreme Court of a final Tax Commission decision is the only remedy available under 24 N.T.C. § 234(b)." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 101 (Nav. Sup. Ct. 1986).

"[A]n original petition seeking an injunction must allege the Supreme Court's original jurisdiction under Section 303 and identify the court to be enjoined." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 100 (Nav. Sup. Ct. 1986).

"The Supreme Court's jurisdiction to issue an injunction is derived from two sources within 7 N.T.C. § 303; the necessary and proper clause and through its powers to supervise the lower courts." *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98, 100 (Nav. Sup. Ct. 1986).

#### **5. Powers of court**

"This Court, en banc, can also remove a district judge from a case using 7 N.N.C. § 303. [... ] Section 303 does not authorize the Chief Justice to act alone in removing a trial judge from a pending case." *In re: Excusal of Judge Ferguson*, 7 Nav. R. 320, 322-323 (Nav. Sup. Ct. 1998).

#### **6. Review**

"Before the Court considers the validity of the District Court's orders, the Court must decide the threshold question whether there is an adequate remedy at law for each writ request." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 3 (Nav. Sup. Ct. November 7, 2007).

"In *Hurley*, the Court discussed the 'adequate remedy at law' requirement, and stated that there is no adequate remedy if there would be potential damage to a litigant that is irreversible on appeal." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 4 (Nav. Sup. Ct. November 7, 2007); citing, *Hurley v. T0hajiilee Family Court*, No. SC-CV-44-05, slip op. at 3 (Nav. Sup. Ct. August 16, 2005).

"In contrast, this Court holds that the alleged denial of a jury trial, the 'gag order' preventing discussion of the case, and the possibility that a biased judge may sit on the case to its completion all involve potential damage that cannot be adequately remedied on appeal." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 5 (Nav. Sup. Ct. November 7, 2007).

"It is clear from the Shiprock District Court's July 28, 1999 'temporary commitment' order, which was actually an indefinite civil contempt order, that Pelt was jailed solely for her failure to pay a civil judgment for a contract debt. We hold that Section 3 of the Navajo Nation Bill of Rights prohibited her

incarceration for failure to pay the judgment on a contract as an unreasonable deprivation of liberty." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 7 (Nav. Sup. Ct. May 4, 2001).

#### **7. Superintending control**

"A writ of superintending control is appropriate when the District Court abuses its discretion in an egregious way, requiring this Court's intervention." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 3 (Nav. Sup. Ct. November 7, 2007); citing, *In re A.P. v. Tuba City Family Court*, No. SC-CV-02-05, slip op. at 3 (Nav. Sup. Ct. May 26, 2005).

#### **8. Habeas corpus**

"The Court now clarifies that written reasons are not required, as long as the district court judge clearly and adequately explains his or her reasons for denying release to the defendant, and such reasons are available in the record of the case. The primary purpose of requiring reasons is so that the defendant understands why he or she will continue to be held pending trial, and may contest those reasons before the district court, and, if necessary, before this Court in a habeas corpus proceeding." *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. at 4-5 (Nav. Sup. Ct. May 5, 2008).

"By violating Rule 15(d) [of the Navajo Rules of Criminal Procedure], the District Court detained Dawes without notice or opportunity to be heard, and also therefore violated her right to due process under the Navajo Bill of Rights." *Dawes v. Eriacho*, No. SC-CV-09-08, slip op. at 7 (Nav. Sup. Ct. May 5, 2008).

### **Subchapter 7. Justices and Judges**

#### **Article 1. Generally**

##### **§ 351. Salaries**

Salaries for Justices and Judges of the Courts of the Navajo Nation shall be established by the Judiciary Committee of the Navajo Nation Council, and in setting rates of compensation, the Committee shall take into consideration:

- A. The Navajo Nation Classification and Pay Plan;
- B. The need to attract outstanding Navajo candidates to the judiciary;
- C. The need to attract or compensate Justices or Judges who are graduates of a school of law or who have extensive experience in law or judging;
- D. Comparable salaries of Justices and Judges in the region; and
- E. Any other objective criteria relevant to judicial compensation.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, Exhibit D, December 4, 1985.

CO-53-81, October 22, 1981.

CF-6-76, February 19, 1976.

CJN-35-61, June 27, 1961.

CJN-40-59, June 10, 1959.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

**Note.** Reformatted for purposes of statutory form.

**§ 352. Removal from office**

A. The Judiciary Committee of the Navajo Nation Council may recommend the removal of any Justice or Judge from office if the Judiciary Committee determines reasonable cause exists to believe the Justice or Judge has engaged in malfeasance or misfeasance in office, serious neglect of duty, or has become mentally or physically unable to perform the duties of office. The Chief Justice may recommend to the Judiciary Committee the removal of any Justice or Judge as provided for above. Only if the Judiciary Committee does not follow the Chief Justice's recommendation may the Chief Justice recommend such removal directly to the Navajo Nation Council.

B. The Judiciary Committee of the Navajo Nation Council may recommend the removal of any Justice or Judge from office if the Judiciary Committee determines there is substantial evidence that the Justice or Judge willfully or negligently made significant misrepresentations or omissions about his or her qualifications on his or her application for the judicial position. The Chief Justice may recommend to the Judiciary Committee the removal of any Justice or Judge as provided for above. Only if the Judiciary Committee does not follow the Chief Justice's recommendation may the Chief Justice recommend such removal directly to the Navajo Nation Council.

C. A recommendation for removal under Subsections (A) or (B) above shall be presented promptly to the Navajo Nation Council by proposed resolution, and the Justice or Judge sought to be removed from office shall be given an opportunity to appear before the Navajo Nation Council and present evidence in his or her own defense. The Navajo Nation Council is not bound by the formal Rules of Evidence in its considerations or deliberations. Thereafter such Justice or Judge may be removed from office by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council.

D. Documented and conclusive evidence that a Justice or Judge has been convicted of a felony in state or federal court since taking office, or that a Justice or Judge has been convicted of any tribal criminal offense which is also identified as a Major Crime in 18 U.S.C. § 1153 since taking office, shall result in the removal of such Justice or Judge by resolution of the Judiciary

Committee of the Navajo Nation Council.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1985.

CO-69-58, October 16, 1958.

### **Cross References**

Judiciary Committee authority to recommend removal of Judges, see 2 N.N.C. § 574.

### **Annotations**

#### **1. Authority of committee**

"The Chairman and Advisory Committee also have no authority to recall retired or removed judges back to service. [... ] Judges who have been removed for misconduct have no status as retired judges. Thus, they cannot be recalled for temporary duty on the Navajo Nation bench." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

#### **§ 353. Retirement**

A. Definitions. The following definitions shall apply for purposes of this Section:

1. Judiciary Committee means the Judiciary Committee of the Navajo Nation Council.

2. Navajo Nation Judge as used in this Section shall include the Chief Justice of the Navajo Nation, all Associate Justices of the Navajo Nation Supreme Court, and all Trial Judges of the Navajo Nation District Courts and Family Courts.

3. Judges' Retirement Plan means:

a. Either duly approved and established provisions directly applicable to Judges contained within the Retirement Plan for Employees of the Navajo Nation and Participating Affiliates or its successor; or

b. A duly approved and established Navajo Nation Judges' Retirement Plan document.

B. Eligibility.

1. Judges beginning service after the effective date of this Section:

a. A Navajo Nation Judge beginning service after the effective date of this Section with a permanent appointment pursuant to 7 N.N.C. § 355 may retire and receive retirement benefits only in accordance with the Judges' Retirement Plan and only after meeting the vesting, retirement age and other eligibility requirements of the Judges' Retirement Plan.

b. The provisions of this Section specifically applicable to Navajo Nation Judges beginning service before the effective date of this Section are not applicable to Judges beginning service after the effective date of this Section.

2. Judges beginning service before the effective date of this Section:

a. The vesting, retirement age, and other eligibility requirements specifically identified in this Section as applicable to Navajo Nation Judges beginning service before the effective date of this Section shall be incorporated into and applied through the Judges' Retirement Plan.

b. A Navajo Nation Judge beginning service before the effective date of this Section with a permanent appointment pursuant to 7 N.N.C. § 355 may retire after having served a total of eight or more years in office. A Navajo Nation Judge beginning service before the effective date of this Section who retires before reaching the age of 55 years pursuant to Subsection (B), but not due to disability, shall not receive retirement benefits until the Judge has reached the age of 55 years.

c. A Navajo Nation Judge beginning service before the effective date of this Section who retires or resigns with less than a total of eight years in office shall not be eligible for retirement benefits under this Section.

3. A Navajo Nation Judge who intends to retire shall compile all the necessary paperwork and forward it to the Chief Justice. If the Chief Justice finds from the paperwork that the Judge meets the requirement for retirement, the Chief Justice shall give preliminary approval to the retirement request and forward the paperwork to the Navajo Nation Retirement Program for concurrence and processing of retirement benefits pursuant to the Judges' Retirement Plan.

4. A Navajo Nation Judge's total years of service for purposes of calculating eligibility for retirement benefits shall begin with the date of confirmation by the Navajo Nation Council and include all years served as a Navajo Nation probationary Judge and as a permanent Judge.

C. Removal; effect on retirement benefits.

1. The Navajo Nation Council may, upon recommendation of the Judiciary Committee, remove from office a permanent Navajo Nation Judge for inability to perform judicial duties due to permanent mental or physical disability. The Chief Justice shall recommend removal to the

Judiciary Committee. A Navajo Nation Judge removed under Subsection (C) shall receive retirement benefits in accordance with the disability provisions of the Judges' Retirement Plan.

2. A Navajo Nation Judge who has been removed from office for malfeasance, misfeasance, serious neglect of duty, or criminal conviction as set forth in 7 N.N.C. § 352, shall be eligible for retirement benefits under this Section but shall not have the status of retired Judge.

D. Permanent disability; eligibility.

1. A Navajo Nation Judge may retire if the Judge has become permanently disabled from performing his or her duties of office. "Permanently disabled" means the permanent inability of the Judge, by reason of physical or mental incapacity, to perform any substantial part of his or her ordinary duties as a Navajo Nation Judge. A Navajo Nation Judge who retires under Subsection (D) shall receive retirement benefits in accordance with the disability provisions of the Judges' Retirement Plan.

2. A Navajo Nation Judge who intends to retire under Subsection (D) shall compile all the necessary paperwork and forward it to the Chief Justice for review. The Chief Justice shall recommend to the Judiciary Committee whether the Judge is eligible to retire under Subsection (D). The Judiciary Committee shall recommend to the Retirement Plan Administration Committee or its successor whether the Judge is eligible to retire under Subsection (D). The Retirement Plan Administration Committee or its successor shall have final authority to determine whether a Navajo Nation Judge is eligible to retire under the disability provisions of the Retirement Plan.

3. The Retirement Plan Administration Committee or its successor, with the concurrence of the Judiciary Committee, may develop nondiscriminatory procedures for evaluating the continuing disability of a Navajo Nation Judge retired under Subsection (D). The retirement benefits of a Navajo Nation Judge retired under Subsection (D) shall be suspended for failure to comply with such procedures in a timely fashion or if the disability no longer meets the criteria of Subsection (D).

4. The retirement benefits of a Navajo Nation Judge who retires under Subsection (D) shall be suspended during any time such Judge engages in the practice of law in any way, including the teaching of law.

E. Benefit levels.

1. Retirement benefits for Navajo Nation Judges beginning service after the effective date of this Section shall be established through the Judges' Retirement Plan document and administered through the Navajo Nation Retirement Program. The Judges' Retirement Plan may take into consideration the American Bar Association Standards relating to judicial retirement.

2. Retirement benefits for Judges beginning service before the effective date of this Section shall be incorporated into the Judges'

Retirement Plan document and administered through the Navajo Nation Retirement Program. Such benefits shall be equivalent to the Section 353 in effect during the Judge's service.

3. A retired Navajo Nation Judge who is receiving retirement benefits pursuant to this Section shall not simultaneously receive salary, wages and/or stipends for work performed from those employers participating in the Retirement Plan for Employees of the Navajo Nation and Participating Affiliates or its successor.

4. A Navajo Nation Judge's retirement benefits shall not be diminished except as specifically identified under Subsections (D) and (E).

F. Pro Tempore service. The Chief Justice may recall a retired Navajo Nation Judge to service as a Navajo Nation Judge pro tempore. The retired Judge recalled to service shall be reimbursed only for reasonable expenses related to such service. A Navajo Nation Judge who has retired due to disability or has been removed pursuant to Subsection (C) shall not be eligible for recall to service.

G. Plan document. The Judges' Retirement Plan shall:

1. Incorporate the applicable amended Subsections of Section 353;
2. Incorporate provisions for the continued payment of retirement benefits which have vested or will vest under the former Section 353; and
3. Include a Judges' retirement trust fund to pay judges their retirement benefits.

H. Authority. The Budget and Finance Committee, upon positive recommendation of the Judiciary Committee and the Retirement Plan Administration Committee, shall have the authority to approve the initial Judges' Retirement Plan document and any subsequent amendments. This authority shall not be deemed to alter or amend the Retirement Plan Administration Committee's or the Navajo Nation Retirement Program's authority to administer the Judges' Retirement Plan or the Budget and Finance Committee's authority to administer the underlying trust fund.

I. Effective dates. Except for amended Subsections (B), (C), (D) and (E), these amendments to 7 N.N.C. § 353 shall become effective upon enactment. Subsections (B), (C), (D) and (E) shall become effective after a final Navajo Nation Judges' Retirement Plan has been recommended by the Judiciary Committee and the Retirement Plan Administration Committee and approved by the Budget and Finance Committee and the Judges retirement trust fund fully funded by the Navajo Nation Council. For purposes of this Subsection, fully funded shall mean funded to a level sufficient to satisfy the funding requirements of the Employees Retirement Insurance Security Act <sup>1</sup> if such Act was applicable to the Judges Retirement Plan.

#### **History**

CO-72-03, October 24, 2003.

CJA-04-03, January 29, 2003.

CJY-60-00, July 21, 2000.

CD-94-85, December 4, 1985.

CJN-33-62, June 18, 1962.

CJN-35-61, June 27, 1961.

CF-15-61, February 15, 1961.

CJN-40-59, June 10, 1959.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

**Exceptions to provision.** CJA-11-84, January 25, 1984.

#### **Annotations**

##### **1. Authority of committee**

"The Chairman and Advisory Committee also have no authority to recall retired or removed judges back to service. The legally appointed Chief Justice has the authority to recall only retired judges to the bench temporarily to help relieve congestion in the courts. [... ] Judges who have been removed for misconduct have no status as retired judges. Thus, they cannot be recalled for temporary duty on the Navajo Nation bench. A probationary judge who has been removed by the Chairman upon recommendation of the Judiciary Committee also has no status as a retired judge and cannot be recalled to service." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

##### **§ 354. Qualifications for judicial appointment**

A. District Courts. The following standards and qualifications shall apply to all judicial appointments to the District Courts of the Navajo Nation:

1. Member of Navajo Nation and Age. An applicant shall be an enrolled member of the Navajo Nation and shall be over 30 years of age.

2. Criminal Convictions. An applicant shall not have any felony or other conviction of an offense identified as a Major Crime in 18 U.S.C. § 1153 in any jurisdiction. An applicant shall not have any misdemeanor convictions in any jurisdiction within a five consecutive year period prior to the date the application is submitted.

3. Education. Each applicant shall have earned, at a minimum, an Associate of Arts or Science degree from an accredited institution of higher education. An applicant who has earned a higher educational degree shall be preferred, with particular preference being given to a

law degree (J.D. or LL.M.).

4. Experience. Each applicant shall have at least four years direct work experience in a law related area and shall have a working knowledge of Navajo and applicable federal and state laws. Those applicants with experience working with the Navajo Nation Courts or with state and federal courts shall be preferred.

5. Knowledge of Navajo Language, Culture and Tradition. Each applicant must be able to speak both Navajo and English, and have some practical knowledge of the fundamental laws of the Diné. The applicant must be able to demonstrate:

a. An understanding of K'é, including the Diné clan system;  
and

b. A basic understanding of traditional Navajo religious ceremonies; and

c. An understanding of the traditional Navajo lifestyle.

6. Health. Each applicant shall produce a current statement from a licensed physician indicating that the applicant is in good mental health.

7. Driver's License. Each applicant shall possess a valid driver's license.

8. No Substance Abuse or Addiction. In addition to the requirement of obtaining a medical statement pursuant to Subsection (A)(6) above, each applicant must attest that he or she does not abuse or have a harmful physical addiction to any mood altering substance.

9. Writing Test. Upon initial screening of applicants by the Judiciary Committee, those applicants selected shall submit to a writing test that illustrates each applicant's organizational, analytical and communicative legal writing abilities.

10. Ethics. Each applicant shall show that he or she has neither present nor past conflicts of interests that give the appearance of partiality or bias in cases brought in the Courts of the Navajo Nation. Each applicant must demonstrate a commitment to judicial independence and an impartial background that will indicate neutrality and fairness for proper decision making. An applicant shall not have been found in violation of:

a. The Navajo Nation Ethics in Government Law;

b. Standards of ethics or professional conduct for lawyers in any jurisdiction; or

c. Standards of ethics for judges or judicial codes of conduct in any jurisdiction;

within a five consecutive year period prior to the date the application is submitted.

11. References. Each applicant must be of good moral character and shall submit a minimum of four current letters of reference specifically regarding his or her application for judicial appointment. At least one letter of reference shall be from a regular member in good standing with the Navajo Nation Bar Association. Such letters shall outline the applicant's legal skills, motivation and employment performance, and the applicant's character and capacity for independence, honesty and impartiality.

12. Management Ability. Each applicant shall possess managerial and independent decision-making skills necessary for the efficient operation of a Court. Information such as the applicant's record of supervising staff, coordinating budget and personnel requirements, verbal communication and writing abilities shall be carefully considered by the Judiciary Committee.

13. Navajo Nation Bar Association. Each applicant shall provide proof in his or her application that he or she is presently a regular or inactive member in good standing with the Navajo Nation Bar Association and shall maintain membership in good standing throughout his or her judicial career.

14. Removal from office. Navajo Nation probationary and permanent judges removed from office for any reason shall not be eligible for subsequent judicial appointment.

B. Supreme Court. The standards and qualifications applicable to judicial appointments to the District Courts of the Navajo Nation shall apply to all judicial appointments to the Supreme Court of the Navajo Nation with the following variations:

1. Education. Each applicant for judicial appointment to the Supreme Court shall have earned, at a minimum, a four-year Bachelor's degree from an accredited institution of higher education. An applicant who has earned a J.D. or LL.M. shall be preferred.

2. Judge Applicants. A sitting Navajo Nation District Court Judge applicant who meets all requirements for appointment to the Supreme Court shall be preferred, in accordance with the following:

a. A Navajo Nation District Court Judge (permanent or probationary) beginning service before the effective date of this Section shall be eligible for appointment to the Supreme Court irrespective of the increased minimum educational qualifications for either District Court Judges or Supreme Court Justices enumerated in this Section. Provided, however, that such District Court Judge applicant shall meet all other minimum qualifications as set forth in this Section.

b. A Navajo Nation District Court Judge (permanent or probationary) beginning service after the effective date of this Section shall not be eligible for appointment to the Supreme Court unless he or

she meets all minimum qualifications for Supreme Court Justices as set forth in this Section.

C. These minimum qualifications and educational requirements shall not affect the status of probationary or permanent Justices or Judges beginning service before the effective date of this Section.

D. Each applicant shall be objectively evaluated, selected, appointed and confirmed based solely on their qualifications for the particular judicial position at issue and without regard to political affiliation or association.

### **History**

CO-72-03, October 24, 2003.

CAP-28-03, April 25, 2003.

CD-94-85, December 4, 1985.

### **Annotations**

#### **1. Application**

"The contents of the application, including the supporting documents, must conform to 7 N.T.C. § 354." *In re: Certified Questions I*, 6 Nav. R. 97, 99 (Nav. Sup. Ct. 1989).

#### **2. Screening of applicants**

"The initial screening of applicants, which includes review of qualifications pursuant to 7 N.T.C. § 354 and interviews, is conducted by the Judiciary Committee of the Navajo Tribal Council. The power of initial screening is given to the Judiciary Committee by 7 N.T.C. §§ 355, 354(a) and 2 N.T.C. § 572(1)." *In re: Certified Questions I*, 6 Nav. R. 97, 99 (Nav. Sup. Ct. 1989).

#### **§ 355. Appointment; term of office**

A. The President of the Navajo Nation shall appoint the Chief Justice, Associate Justices, and District Court Judges with confirmation by the Navajo Nation Council from among those applicants recommended by the Judiciary Committee of the Navajo Nation Council.

B. The Chief Justice and the Associate Justices of the Supreme Court, and all District Court Judges shall be appointed for a probationary period of two years and upon permanent appointment shall serve thereafter during good behavior.

C. A probationary Chief Justice, Associate Justice or Judge shall not be recommended for permanent appointment unless he or she has successfully completed a course of training accredited for judges and he or she has received a satisfactory performance evaluation from the Chief Justice and the Judiciary Committee of the Navajo Nation Council at the conclusion of the probationary Justice's or Judge's two-year probationary term.

D. At any time during the probationary term of any Chief Justice, Associate Justice or Judge, the Judiciary Committee may recommend to the President of the Navajo Nation that the probationary Justice or Judge be removed from office. The President of the Navajo Nation, pursuant to such recommendation, shall remove such probationary Justice or Judge from office. Any Justice or Judge so removed shall not be eligible for the status of retired Judge, shall not be eligible for reappointment as a Justice or Judge, and shall not be called to sit in any case pursuant to 7 N.N.C. § 353(F).

E. At the conclusion of the two-year probationary term, the Judiciary Committee shall review the record and qualifications of each probationary Justice or Judge and shall recommend to the President whether or not each probationary Justice or Judge has satisfactorily completed the probationary term and should be appointed to a permanent position. The President shall not appoint to a permanent position any probationary Justice or Judge not recommended by the Judiciary Committee. The appointments shall be submitted to the Navajo Nation Council for confirmation.

### **History**

CO-72-03, October 24, 2003.

CJY-60-00, July 21, 2000.

CD-94-85, December 4, 1985.

### **Cross References**

Judiciary Committee authority, see 2 N.N.C. § 574.

### **Annotations**

#### **1. Construction and application**

"Different events occur if the Judiciary Committee recommends a probationary judge to a permanent position. [... ] The legislative scheme does not allow the Chairman's denial of permanent appointment to a probationary judge to be final. [... ] The Navajo Tribal Council will make a final decision as to whether to grant permanent status to this type of probationary judge." *In re: Certified Questions II*, 6 Nav. R. 105, 108-110 (Nav. Sup. Ct. 1989).

"If the Judiciary Committee's recommendation is that the probationary judge be denied permanent appointment, the Chairman must deny the appointment. [... ] The Chairman is required to follow the Judiciary Committee's recommendation of denial." *In re: Certified Questions II*, 6 Nav. R. 105, 108 (Nav. Sup. Ct. 1989).

"The process for either appointment to permanent judge or denial of appointment to permanent judge begins with the Chief Justice. [... ] The Chief Justice has first-hand knowledge of the work of the probationary judge during the probationary term. The Chief Justice's recommendation will be based upon the training requirement and the performance evaluation required under 7 N.T.C. § 355(c)." *In re: Certified Questions II*, 6 Nav. R. 105, 107-108 (Nav. Sup. Ct. 1989).

"At the conclusion of the probationary period, the judge is evaluated and recommended for or against permanent appointment." *In re: Certified Questions II*, 6 Nav. R. 105, 107 (Nav. Sup. Ct. 1989).

"The above cited statute providing for removal of probationary judge is not discretionary because the statute gives the public an overwhelming and compelling interest in ensuring that only qualified and ethics-conscious individuals become judges. The Navajo public has an interest in a strong and independent judiciary. Navajo sovereignty is strengthened by a strong and independent judiciary. For these reasons, a probationary judge who has been determined to be unfit for office by the Judiciary Committee must be removed by the Chairman. The public is protected by the removal of the judge." *In re: Certified Questions II*, 6 Nav. R. 105, 107 (Nav. Sup. Ct. 1989).

"The Navajo Tribal Council also has the power to deny a judgeship to any person that the Chairman appoints as a judge. Any judge appointment made by the Chairman or the Advisory Committee without following the laws contained in the Navajo Tribal Code is illegal and shall not be recognized as valid." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

"The Chairman [President] has no independent authority to appoint a person as judge who has not been screened and recommended by the Judiciary Committee. As a collateral matter, the Advisory Committee has absolutely no authority to either recommend, not recommend, confirm, or on its own appoint a person as judge of the Navajo Nation. All recommendations for appointment of judges are initiated by the Judiciary Committee." *In re: Certified Questions I*, 6 Nav. R. 97, 99 (Nav. Sup. Ct. 1989).

"The initial screening of applicants, which includes review of qualifications pursuant to 7 N.T.C. § 354 and interviews, is conducted by the Judiciary Committee of the Navajo Tribal Council. The power of initial screening is given to the Judiciary Committee by 7 N.T.C. §§ 355, 354(a) and 2 N.T.C. § 572(1)." *In re: Certified Questions I*, 6 Nav. R. 97, 99 (Nav. Sup. Ct. 1989).

"The appointment of judges to the Navajo Nation bench is governed by the Navajo Tribal Code." *In re: Certified Questions I*, 6 Nav. R. 97, 99 (Nav. Sup. Ct. 1989).

## **2. Confirmation of judges**

"Confirmation by the Navajo Tribal Council is complete when the judge receives a majority vote from those delegates voting during a duly called session of the Navajo Tribal Council." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

"The confirmation of judges now rests exclusively with the Navajo Tribal Council pursuant to the [Judicial Reform] Act [of 1985]." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

## **3. Removed judges**

"A probationary judge who has been removed by the Chairman upon recommendation of the Judiciary Committee also has no status as a retired judge and cannot be

recalled to service." *In re: Certified Questions I*, 6 Nav. R. 97, 100 (Nav. Sup. Ct. 1989).

#### **4. Termination**

"If a probationary judge is to be removed prior to the expiration of his probationary period, the Judiciary Committee must make a recommendation of removal to the Chairman. Pursuant to such recommendation, the Chairman *must* remove the probationary judge. No further removal proceeding is required. The removal is final." *In re: Certified Questions II*, 6 Nav. R. 105, 106 (Nav. Sup. Ct. 1989).

"The Chairman of the Navajo Tribal Council is not empowered to act alone in either removing a probationary judge or denying a permanent appointment to a probationary judge. The Navajo Tribal Code laws on the Judicial Branch provide for two ways by which a probationary judge can be terminated. The first is by removal and the second is by denial of permanent appointment. In either case the Chairman cannot act until after the Judiciary Committee of the Navajo Tribal Council has formally acted by recommendation." *In re: Certified Questions II*, 6 Nav. R. 105, 106 (Nav. Sup. Ct. 1989).

#### **5. Evaluation of judges**

"The Committee makes an independent determination of the training requirement and whether the probationary judge has performed satisfactorily over the two-year probationary term." *In re: Certified Questions II*, 6 Nav. R. 105, 108 (Nav. Sup. Ct. 1989).

#### **§ 356. Probationary term**

A. The probationary term for District Court Judges, the Chief Justice and Associate Justices shall be two years from the date of confirmation by the Navajo Nation Council.

B. A permanent District Court Judge subsequently appointed as Chief Justice or Associate Justice shall also be subject to a two-year probationary term as described in Subsection (A) of this Section.

#### **History**

CO-72-03, October 24, 2003.

#### **§ 357. Evaluation**

Permanent Justices and Judges shall be subject to periodic objective evaluations in accordance with Judicial Performance Evaluation Policies and Procedures approved by the Judiciary Committee of the Navajo Nation Council.

#### **History**

CO-72-03, October 24, 2003.

#### **Cross References**

Judiciary Committee authority, see 2 N.N.C. § 574.

## **Article 2. Chief Justice**

### **§ 371. Administrative duties**

In addition to his or her judicial duties, the Chief Justice of the Navajo Nation shall supervise all Justices and Judges of the Navajo Nation and administer the Judicial Branch in accordance with applicable standards, rules, policies or procedures. The Chief Justice shall also exercise such duties that are consistent with the Office of Chief Justice.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

#### **Annotations**

##### **1. Construction and application**

"All the parties to a case have a basic right to a fair and impartial judge. If the Chief Justice, acting alone and using his administrative powers, can remove district judges, there is the risk that parties may attempt to use political influence to decide cases." *In re: Excusal of Judge Ferguson*, 7 Nav. R. 320, 323 (Nav. Sup. Ct. 1998).

"The Chief Justice is the administrative as well as the judicial head of the Judicial Branch." *In the Matter of Contempt of Sells*, 5 Nav. R. 37, 38 (Nav. Ct. App. 1985).

##### **2. Construction with other laws**

"There is clearly no need for the Chief Justice to create an extra-judicial remedy and unilaterally remove a district judge from a case when we have abundant procedures, rules, and decisional law available to handle to process." *In re: Excusal of Judge Ferguson*, 7 Nav. R. 320, 323 (Nav. Sup. Ct. 1998).

### **§ 372. Acting Chief Justice**

A. The Chief Justice of the Navajo Nation shall designate in writing one Associate Justice of the Supreme Court to act as Chief Justice whenever the Chief Justice is absent from the territorial jurisdiction of the Navajo Nation, is on vacation, ill or otherwise unable to perform the duties of the Chief Justice. The Chief Justice shall delegate to the acting Chief Justice some or all of the powers of the office of Chief Justice. The Chief Justice may at any time change his or her written designation of the Associate Justice empowered to act as Chief Justice.

B. The Chief Justice may designate in writing one permanent District Court Judge to carry out the administrative duties of the Office of Chief Justice whenever the Chief Justice and both Associate Justices are absent from the territorial jurisdiction of the Navajo Nation, ill or otherwise unable to perform the duties of the Chief Justice. The designation shall expire at a time designated by the Chief Justice or whenever withdrawn in a separate writing by the Chief Justice and, in any event, shall automatically expire in five working days after the date of designation unless renewed in writing by the Chief Justice.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

#### **Annotations**

##### **1. Review**

"In considering the provisions of Title 7 as a whole, the Court holds that the appointment of Honorable Dean Wilson, a retired judge, as Acting Chief Justice or Special Presiding Justice in this proceeding is authorized by Navajo Tribal law and is therefore proper." *Chief Justice McCabe v. Hon. Walters*, 5 Nav. R. 43, 46 (Nav. Ct. App. 1985).

##### **§ 373. Residence**

A residence shall be furnished in Window Rock, Navajo Nation (Arizona), together with the cost of water, sewer, refuse disposal, electricity and natural gas, without charge to the sitting Chief Justice. The Navajo Nation shall not be responsible or liable for any costs or expenses associated with an alternative residence if the sitting Chief Justice declines to reside in the specific residence provided by the Navajo Nation as set forth in this Section.

#### **History**

CO-72-03, October 24, 2003.

##### **§ 374. Oath of Office**

The Chief Justice of the Navajo Nation shall administer the oath of office to the President, Vice President, Navajo Nation Council Delegates, and all other elected officials as provided by law. The Chief Justice may designate another Justice or Judge of the Navajo Nation to administer the oath.

#### **History**

CO-72-03, October 24, 2003.

## **Subchapter 9. Judicial Branch Personnel Policies**

### **§ 401. Judicial Branch personnel policies and procedures**

All employment positions, including judicial appointments, within the Judicial Branch shall be governed by Judicial Branch personnel policies and procedures and Justices' and Judges' personnel policies and procedures approved by the Judiciary Committee of the Navajo Nation Council.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

#### **Cross References**

Judiciary Committee authority to approve policies, see 2 N.N.C. § 574(L).

## **Subchapter 10. Navajo Nation Peacemaking Program (Hózh==jí Naat'áanii)**

### **§ 409. Establishment**

It is hereby recognized and affirmed that there is a Navajo Nation Peacemaking Program (Hózh==jí Naat'áanii) within the Judicial Branch of the Navajo Nation. The Peacemaking Program shall be the central point of peacemaking information and coordination with the Navajo Nation Judicial Branch.

#### **History**

CO-72-03, October 24, 2003.

CO-76-01, October 17, 2001.

### **§ 410. Purposes**

The purposes of the Navajo Nation Peacemaking Program include: to promote a non-adversarial forum for solving disputes where the parties to the dispute voluntarily agree or are referred to peacemaking; to promote peacemaking counseling services to clients of the Navajo Nation Courts; to promote peacemaking support and assistance to Navajo Nation Courts when requested to make recommendations on sentencing; to provide education and training on Navajo culture, traditions and other Navajo accepted beliefs to individuals, organizations, and communities; to provide support and technical assistance to peacemakers; to promote the research, development, and learning of Navajo culture, traditions, and other Navajo accepted beliefs in support of judicial and community programs; and provide problem solving assistance to peacemakers, Judges, Court staff, and others concerning the peacemaking process. Peacemaking is intended to promote healing and reestablish harmony among those persons participating in peacemaking.

#### **History**

CO-72-03, October 24, 2003.

CO-76-01, October 17, 2001.

**§ 411. Responsibility and authority**

The Navajo Nation Peacemaking Program shall have the authority and power to undertake the following functions and duties:

A. To conform the procedures of Hózh==jí Naat'áanii to traditional Hózh==jí Naat'áanii concepts, including K'é, clanship, and other principles of Navajo culture, traditions, and other Navajo accepted beliefs, establish standards and procedures for that process, and otherwise develop standards, principles, and procedures for the development of Hózh==jí Naat'áanii in accordance with Navajo culture, traditions, and other Navajo accepted beliefs and the laws of the Navajo Nation.

B. To maintain a list of peacemakers and provide technical support to peacemakers to facilitate the conduct of peacemaking.

C. To periodically evaluate the techniques of peacemakers and the peacemaking process.

D. To authorize peacemakers to enter into funding agreements with the Judicial Branch for mileage and training.

E. To perform such other functions and duties that are in accordance with Navajo Nation law and purposes of the Navajo Nation Peacemaking Program and that will promote the practice of peacemaking.

**History**

CO-72-03, October 24, 2003.

CO-76-01, October 17, 2001.

**§ 412. Personnel**

The Navajo Nation Peacemaking Program shall be administered by a Peacemaking Program Coordinator. All personnel, including the coordinator, shall be subject to Navajo Nation Judicial Branch personnel policies and procedures approved by the Judiciary Committee of the Navajo Nation Council.

**History**

CO-72-03, October 24, 2003.

CO-76-01, October 17, 2001.

**§ 413. Legislative oversight**

The Navajo Nation Peacemaking Program shall operate under the legislative

oversight of the Judiciary Committee of the Navajo Nation Council pursuant to the powers granted that Committee in 2 N.N.C. § 571 *et seq.* The Navajo Nation Peacemaking Program shall operate pursuant to a Plan of Operation approved by the Judiciary Committee of the Navajo Nation Council.

#### **History**

CO-72-03, October 24, 2003.

CO-76-01, October 17, 2001.

### **Subchapter 11. Judicial Conduct Commission**

#### **§ 421. Establishment**

The Judicial Conduct Commission is established as an independent commission receiving administrative support and assistance from the Judicial Branch of the Navajo Nation.

#### **History**

CO-72-03, October 24, 2003.

#### **§ 422. Purposes and powers**

A. The purposes and powers of the Judicial Conduct Commission are:

1. To enhance public confidence in the Navajo Nation Judiciary by providing a fair, impartial and expeditious forum to hear complaints and grievances against Navajo Nation Justices and Judges involving alleged violations of the Code of Judicial Conduct, personnel policies for Justices and Judges, and any other Navajo Nation laws or policies that set standards of ethics and conduct for Justices and Judges.

2. To investigate or direct the investigation of complaints or grievances against Justices and Judges;

3. To make findings and recommend sanctions, as appropriate; and

4. To forward recommendations for suspension or removal of Justices and Judges to the Judiciary Committee and to the Chief Justice.

B. The Judicial Conduct Commission shall refer all complaints not properly before the Judicial Conduct Commission to the proper authorities, such as the Chief Prosecutor, the Ethics and Rules Office, or the Disciplinary Committee of the Navajo Nation Bar Association, as necessary.

C. The Judicial Conduct Commission shall develop and recommend its Plan of Operation, rules, policies and procedures, and operating budget, for approval by the Judiciary Committee, the Budget and Finance Committee, and the Navajo Nation Council, as necessary.

#### **History**

CO-72-03, October 24, 2003.

**§ 423. Composition and personnel**

A. Composition. The Judicial Conduct Commission shall consist of five members serving staggered four year terms.

1. One member shall be a sitting or retired federal or state court Justice or Judge in good standing in their respective jurisdiction selected by the Justices and Judges of the Navajo Nation Courts.

2. One member shall be a retired Navajo Nation Justice or Judge in good standing with the Navajo Nation Bar Association selected by the Justices and Judges of the Navajo Nation Courts.

3. Two members shall be regular or inactive members of the Navajo Nation Bar Association in good standing with no pending disciplinary proceedings against them and who have not been formally reprimanded or suspended within a four consecutive year period prior to their selection, selected by the voting membership of the Navajo Nation Bar Association. The NNBA-selected members shall not be retired or removed Justices or Judges of the Navajo Nation Courts.

4. One member shall be a member of the Navajo Nation public selected by the Judiciary Committee of the Navajo Nation Council from among applicants submitting letters of interest and resumes to the Judiciary Committee. The Judiciary Committee selected member shall not be a current NNBA member, nor a sitting, retired, or removed Justice or Judge of the Navajo Nation or any other jurisdiction.

B. Personnel. The Judicial Conduct Commission shall receive administrative support and assistance from the Judicial Branch of the Navajo Nation and shall hire personnel and approve Commission expenditures as provided for in the Judicial Conduct Commission Plan of Operation and the Navajo Nation operating budget.

**History**

CO-72-03, October 24, 2003.

**§ 424. Legislative oversight**

The Judicial Conduct Commission shall operate pursuant to a Plan of Operation and policies and procedures recommended by the Judicial Conduct Commission and approved by the Judiciary Committee of the Navajo Nation Council.

**History**

CO-72-03, October 24, 2003.

**Chapter 5. Procedure**

## **Subchapter 1. Generally**

### **§ 601. Court rules; authority to adopt**

A. The Supreme Court of the Navajo Nation shall, after providing reasonable public notice and a meaningful opportunity to respond, adopt rules of pleading, practice, and procedure applicable to all proceedings in the Courts of the Navajo Nation. The Supreme Court shall specifically consult with the Attorney General of the Navajo Nation, the Chief Legislative Counsel, and the President of the Navajo Nation Bar Association prior to adopting any proposed rules of pleading, practice and procedure.

B. The Supreme Court shall, after providing reasonable public notice and a meaningful opportunity to respond, adopt uniform rules for the admission of evidence in Navajo Nation Courts. The Supreme Court shall specifically consult with the Attorney General of the Navajo Nation, the Chief Legislative Counsel, and the President of the Navajo Nation Bar Association prior to adopting any proposed uniform rules for the admission of evidence.

C. The Supreme Court may independently adopt standard forms for pleadings, motions and other papers filed in Navajo Nation Courts by litigants.

D. The Supreme Court may independently adopt standard forms for Navajo Nation District Court and Supreme Court judgments, writs, orders and opinions.

E. No rule adopted by the Supreme Court shall be effective unless adopted in strict compliance with the requirements of this Section.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **Annotations**

#### **1. Construction and application**

"Consistent with the principle of *íishjáńí ádooníí*[, in which our laws and rules should be clear, this Court, pursuant to 7 N.N.C. § 601 (as amended by the Navajo Nation Council Resolution No. CO-72-03 (October 24, 2003)) will amend the domestic violence rules to address this issue." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 4 (Nav. Sup. Ct. July 18, 2005).

"In a direct conflict between a statute passed by the Navajo Nation Council and a rule approved by this Court, the statute must prevail. This Court has already stated that the statute requires filing of the notice of appeal within five (5) days. *Benally*. Our rule purports to extend that period to thirty

(30) days. This Court may set our own rules when specifically authorized in the Navajo Nation Code. See 7 N.N.C. § 601. However, the doctrine of separation of powers in our Navajo form of government prevents this Court from setting rules that directly contradict a clear mandate of the Council." *Fort Defiance Housing Corporation v. Allen*, No. SC-CV-01-03, slip op. at 4 (Nav. Sup. Ct. June 7, 2004).

"The Navajo Nation Supreme Court has the power to adopt rules of 'pleading, practice, and procedure,' with the approval of the Judiciary Committee of the Navajo Nation Council." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4 (Nav. Sup. Ct. August 2, 2001).

#### **§ 602. Limitation of actions**

A. There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following civil actions:

1. For personal injuries. When death ensues from such injuries, such action for wrongful death shall be considered as accruing at the death of the party injured except as otherwise provided for in Section 602(A) (4) and (5).

2. For trespass or property damage, or for detaining and converting the personal property of another to one's own use.

3. For malicious prosecution, or for false imprisonment, or for injuries done to the character or reputation of another for libel or slander.

4. No cause of action accrues for personal injury or wrongful death until the party having the right to sue has discovered the nature of the injury, the cause of the injury, and the identity of the party whose action or inaction caused the injury, or until, in the exercise of reasonable diligence, in light of available knowledge and resources, the party should have discovered these facts, whichever is earlier. This Subsection applies to and revives all injured parties' claims, regardless of whether the claim may have been barred in the absence of this Subsection.

5. Notwithstanding any provision of law to the contrary, an action to recover damages for property damage, personal injury or wrongful death caused by contact with, or exposure to, any substance causing injury resulting from the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within the property shall be commenced and prosecuted:

a. Within three years of the date when the party having the right to sue has discovered the injury, the cause of the injury, and the identity of the person liable for the injury, or within three years of the time when, in light of the knowledge and resources available and of reasonable diligence, the party should have discovered these facts, whichever is earlier.

b. This Subsection applies to and revives all injured

parties' claims, regardless of whether the claims may have become barred in the absence of this Subsection, provided further, that no claim to recover such damages for injury prior to the date of this amendment will be barred on the basis of any law, until two years after the date of this amendment.

B. There shall be commenced and prosecuted within three years after the cause of action accrues, and not afterward, the following actions:

1. For debt where the indebtedness is not evidenced by a contract in writing.

2. Upon stated or open accounts other than mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents, but no item of a stated or open account shall be barred so long as any item thereof has been incurred within three years immediately prior to the bringing of an action thereon.

3. For relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

C. There shall be commenced and prosecuted within four years after the cause of action accrues, and not afterward, actions by one partner against a co-partner or co-partners for settlement of the partnership account, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents, and the cause of action shall be considered as having accrued upon a cessation of the dealings in which they were interested together.

D. There shall be commenced and prosecuted within five years after the cause of action accrues, and not afterward, all probate actions.

E. Civil actions for which no limitation is otherwise prescribed shall be brought within five years after the cause of action accrues, and not afterward.

F. If an action is not barred by existing law, the time fixed in an amendment of such law shall govern the limitation of the action. If an amendment to existing law would bar an action previously not barred by existing law, such action may be brought within one year from the time the amendment takes effect, and not afterward.

G. If a person entitled to bring an action is at the time the cause of action accrues under disability of minority, mental incapacity or imprisonment, the period of disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the time after removal of the disability which is allowed to others. The period of limitation shall not, however, be extended by the tacking or connection of one disability with another already commenced, notwithstanding any supervening disability.

H. When a person dies in whose favor or against whom there is a cause of action, the limitation of the action ceases to run until 12 months after the death, unless a personal representative of the deceased person's estate is

sooner qualified, in which case the limitation shall cease to run only until such qualification.

I. When an action is barred by limitation, no acknowledgment of the justness of the claim or of liability therefor made subsequent to the time it becomes due shall be admitted in evidence to take the action out of the operation of the law, unless the acknowledgment is in writing and signed by the party to be charged hereby.

### **History**

CO-72-03, October 24, 2003.

CAP-40-01, April 20, 2001.

CD-94-85, December 4, 1985.

CF-1-82, February 2, 1982.

CJ-51-56, July 19, 1956.

### **Annotations**

#### **1. Construction and application**

" ... [W]e will read the statute of limitations in conjunction with the computation of time rule." *Jensen v. Giant Industries, Arizona, Inc.*, No. SC-CV-51-99, slip op. at 3 (Nav. Sup. Ct. January 22, 2002).

" ... [A]pplying Rule 6(A) principles to statutes of limitation." *Jensen v. Giant Industries, Arizona, Inc.*, No. SC-CV-51-99, slip op. at 3 (Nav. Sup. Ct. January 22, 2002).

"Both the statute of limitations at 7 N.N.C. § 602(1)(1995) and Rule 6(A) of the Nav. R.Civ.P. on the computation of time are derived from general American civil procedure. Therefore ... we ... apply them, if they are in accord with Navajo Nation statutory intent and Navajo commonlaw." *Jensen v. Giant Industries, Arizona, Inc.*, No. SC-CV-51-99, slip op. at 2 (Nav. Sup. Ct. January 22, 2002).

#### **2. Exempt actions**

" ... [O]rders providing for child support payments, or for payment of arrearage resulting from delinquent child support payments, cannot be barred by the statute of limitations, the doctrine of laches, or any reliance by the father on the mother's previous failure to act to enforce the father's obligation." *Notah v. Francis*, 5 Nav. R. 147, 149 (Nav. Sup. Ct. 1987).

#### **§ 603. Action in name of Navajo Nation; authority to bring**

A. All actions or the defense of all actions in the name of the Navajo Nation shall be brought by the Attorney General of the Navajo Nation or his or her designee.

B. The attorney for any party claiming to sue or defend in the name of the Navajo Nation or on behalf of the Navajo Nation shall be required to submit proof of his or her authority.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-19-80, February 13, 1980.

CJ-51-56, July 19, 1956.

#### **Cross References**

Attorney General's authority, see 2 N.N.C. § 1964(F).

#### **§ 604. Notice and opportunity to appear**

No judgment shall be given on any suit unless the defendant has been served notice in accordance with the applicable Court rules of such suit and given ample opportunity to appear in Court in his/her defense. Evidence of the provision and receipt of notice shall be kept as part of the record in the case.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

#### **Cross References**

Navajo Nation Bill of Rights, see 1 N.N.C. § 3.

#### **Annotations**

##### **1. Notice**

Fact that natural mother received notice of pending adoption proceeding because she was told of it by a relative and acknowledged knowledge of it to relatives did not satisfy requirements of this Section nor the requirements of due process because it was not reliable notice. *In the Matter of the Adoption of Four Children*, 4 Nav. R. 9 (Nav. Ct. App. 1983).

There must be evidence in writing of proper notice to persons in a law suit. *In the Matter of the Adoption of Four Children*, 4 Nav. R. 9 (Nav. Ct. App. 1983).

##### **2. Voidable actions**

Where there was a lack of proof in the case file showing proper publication of notice in the termination of parental rights action, the subsequent adoption was voidable. *Navajo Nation, ex rel. Division of Social Welfare in the Interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

#### **§ 605. Witnesses**

A. The Judges of the Courts of the Navajo Nation shall have the power to issue subpoenas for the attendance of witnesses either on their own motion or upon motion of any of the parties to the case, which subpoena shall bear the signature of the clerk of the Court issuing it. Failure to obey such subpoena shall be deemed to be a contempt and punishable according to applicable laws. Service of such subpoenas shall be by a regular commissioned Navajo Nation Police Officer or by a person appointed by the Court for that purpose.

B. Witnesses who testify voluntarily may be paid by the party calling them. If the Court so orders, their actual expenses incurred in the performance of their function shall be assessed as a cost awarded to the prevailing party.

C. Witnesses attending Court under subpoenas shall be entitled to the same fees as jurors.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

Uniform act to secure attendance of witnesses from without a state in criminal proceedings, 440 A.L.R.2d 732 (1955).

Generally, 81 Am. Jur. 2d Witnesses, § 34.

#### **§ 606. Legal counsel; right of representation; unauthorized practice of law**

A. Legal counsel shall be allowed to appear in any proceedings before the Courts of the Navajo Nation provided that the legal counsel is a member in active status and in good standing of the Navajo Nation Bar Association. Every defendant in a criminal case shall have the right to representation by legal counsel and in the event he has no such representation, he may proceed without legal counsel or a legal counsel may be appointed by the Judge.

B. Only persons who are members in good standing of the Navajo Nation Bar Association shall provide legal representation in the Courts of the Navajo Nation, quasi-judicial, legislative, and administrative law forums, and other legal services within the territorial jurisdiction of the Navajo Nation. Persons who are not members in active status and in good standing of the Navajo Nation Bar Association and who provide legal representation or other legal services within the territorial jurisdiction of the Navajo Nation, and who are

not duly associated with members in good standing of the Navajo Nation Bar Association, shall be deemed to be conducting the unauthorized practice of law, and shall be subject to civil and/or criminal sanctions under Navajo Nation law.

C. Persons conducting the unauthorized practice of law shall be subject to civil penalties, including triple the amount of all legal fees, costs, and other funds paid to them by persons to whom they have purported to provide legal representation or other legal services, a civil fine in the amount of five hundred dollars (\$500) per occurrence, and, if not a member of the Navajo Nation, will be subject to exclusion from the Navajo Nation.

D. Judges of the Navajo Nation Courts, administrative law judges, hearing officers, and the presiding officials of quasi-judicial or legislative bodies shall have the authority to determine, relative to matters heard before them, whether a person is a member in active status and in good standing of the Navajo Nation Bar Association, or duly associated with members in active status and in good standing of the Navajo Nation Bar Association, and the power to impose any of the civil sanctions set forth in Subsection (C) above.

E. Persons conducting the unauthorized practice of law shall be liable for both actual and consequential damages suffered by persons with whom they have contracted for the provision of legal representation or other legal services. Civil actions alleging the unauthorized practice of law shall be brought in the District Courts of the Navajo Nation.

#### **History**

CO-72-03, October 24, 2003.

CAP-38-00, April 20, 2000.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

#### **Cross References**

Criminal Offense of "Unauthorized Practice of Law," see 17 N.N.C. § 377.

#### **Annotations**

##### **1. Construction and application**

"We have cited two statutes enacted by the Navajo Tribal Council that govern appointment of attorneys in criminal cases." *Boos v. Yazzie*, 6 Nav. R. 211, 216 (Nav. Sup. Ct. 1990).

##### **2. Unauthorized practice of law**

"As expressed by the Navajo Nation Council through the provision of civil and criminal sanctions, the unauthorized practice of law undermines the integrity of our legal system." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 5 (Nav. Sup. Ct. August 7, 2006).

"Through the Title 7 provision, the Council guides the Judicial Branch in maintaining the integrity of the Diné legal system by restricting who may appear before Navajo Nation courts and tribunals to members of the Navajo Nation Bar Association or those 'duly associated' with Bar Association members." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 8 (Nav. Sup. Ct. August 7, 2006).

"While the resulting corporation is treated as a 'person' for various purposes, the Court holds it has a separate legal existence from its officers and staff and is therefore a separate 'person' for purposes of the prohibition against the unauthorized practice of law. The choice to incorporate carries benefits but also, importantly, consequences. Among the consequences of incorporation is the inability of its agents to represent the corporate entity 'pro se'." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 11 (Nav. Sup. Ct. August 7, 2006).

#### **§ 607. Extradition**

Any person lawfully arrested for violating Navajo Nation criminal law(s) or detained by Navajo Nation Court order shall not be released to any other jurisdiction, including the federal government, except pursuant to formal extradition procedures as set forth in 17 N.N.C. § 1951 *et seq.*

#### **History**

CO-72-03, October 24, 2003.

**Note.** Previous Section 607 was revised and relocated to Section 621.

### **Subchapter 2. Statutory Causes of Action**

#### **Article 1. Repossession**

#### **§ 621. Repossession of consumer goods**

A. The consumer goods (goods regularly used or bought for use for personal, family or household purposes, including vehicles and mobile homes) of individuals possessed under credit agreements shall not be taken by any person, or agent of any person, except in strict compliance with this Section. Self-help repossession is prohibited on the Navajo Nation. Unsuccessful attempts to repossess in violation of this Section shall also constitute a violation of this Section.

B. Any person desiring to repossess consumer goods pursuant to any credit agreement where the goods are security for a debt, or other arrangement involving credit, must first obtain the written and informed consent of the debtor at the time the repossession is sought. The written consent must be retained by the creditor or the creditor's agent and exhibited to any law enforcement or other Navajo Nation official upon demand. No written consent obtained by fraud shall be deemed valid, and no repossession obtained by the enticement of the debtor or individual in possession to a place where self-help repossession is permitted shall be valid. Only the debtor can give a valid

consent to repossession.

C. Where a debtor under this Section fails or refuses to give informed and written consent to a repossession, repossession may be effected only by a judgment of a Navajo Nation District Court in an appropriate proceeding.

D. Transactions between merchants properly secured under the Navajo Uniform Commercial Code (5A N.N.C. § 9-101 et seq.) are not transactions for consumer goods. Transactions between merchants are exempt from the process set forth in Subsections (A), (B) and (C). Neither consent to repossession nor judicial process are required to repossess goods obtained in a transaction between merchants.

E. For purposes of this Section, the term "merchant" is defined in the Navajo Uniform Commercial Code, 5A N.N.C. § 2-104, as may be amended.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-26-68, February 7, 1968.

**Note.** This Section was previously located at Section 607.

#### **Cross References**

Navajo Uniform Commercial Code, see 5A N.N.C. § 9-503.

Applicability to territories and Indian nations, 16B Am. Jur. 2d Constitutional Law, § 977.

#### **Annotations**

##### **1. Validity**

Navajo regulations governing self-help vehicle repossessions on the reservation and providing that written consent was required for repossession from either owner of vehicle or tribal court, that any party who willfully violated the written consent requirement could be excluded from the reservation, and that liquidated damages could be granted to an owner whose personalty was repossessed on reservation in violation of the written consent requirement, were a valid exercise of tribal jurisdiction, because the regulations were a necessary exercise of tribal self-government, they were designed to keep reservation peace and protect the health and safety of the tribal members, and regulating conduct of non-Indians repossessing automobiles on reservation land was a valid exercise of tribe's power to exclude nonmembers from the reservation. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, (9th Cir.(Ariz.) 1983), cert. denied 466 U.S. 926. Indians <KEY> 223

##### **2. In general**

RE: *Repossession statute*. "In essence, the law permits the repossession of personal property only with the written consent of the purchaser at the time of repossession, or repossession pursuant to a court order." *Nelson v. Basin Motor Company*, 6 Nav. R. 399, 400 (Nav. Sup. Ct. 1991).

### **3. Applicability**

Non-Indian, off-reservation automobile dealer could not avoid application of Indian tribe's civil laws regulating the conduct of non-Indians attempting to repossess vehicles on tribal land on ground that contracts for the sales of the vehicles were entered into off the reservation land or on the ground that the tribe's repossession laws were inapplicable because the sales contracts gave dealer the right to enter reservation land to conduct repossessions, because the mere existence of a lawful property right to be on Indian land does not immunize non-Indians from tribe's power to place other conditions on non-Indian's conduct or continued presence on Indian land. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, (9th Cir.(Ariz.) 1983), cert. denied 466 U.S. 926. Indians <KEY> 223

### **4. Jurisdiction**

"Here, we hold that because Basin did not initiate the act of repossession and did not commit any wrongful act within the Navajo Nation, the district court properly found that the repossession took place outside our territorial jurisdiction. The Navajo Nation repossession law does not apply under the facts of this case." *Nelson v. Basin Motor Company*, 6 Nav. R. 399, 401 (Nav. Sup. Ct. 1991).

Navajo court has subject matter jurisdiction over a wrongful repossession action claiming noncompliance with this Section, under code section giving court jurisdiction over certain actions and also over all other matters over which jurisdiction has vested or may vest in the future. *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Nav. R. 282 (Nav. Ct. App. 1978).

The Navajo Nation has the power to grant its courts personal jurisdiction over foreign corporations as a consequence of such corporations' acts in Navajo territory, such as wrongful repossession alleged in the instant case, according to modern expansions of the "minimum contacts" due process standard. *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Nav. R. 282 (Nav. Ct. App. 1978).

Court has jurisdiction over a non-Indian, non-resident business or individual which is alleged to have wrongfully repossessed personal property on Navajo land. *Thompson v. Wayne Lovelady's Frontier Ford*, 1 Nav. R. 282 (Nav. Ct. App. 1978).

### **5. Purpose**

"The Navajo repossession laws are the result of a necessary exercise of tribal sovereign powers and are designed to protect the health, safety, and welfare of Navajo Nation citizens." *Amigo Chevrolet v. Lee*, 6 Nav. R. 31, 32 (Nav. Sup. Ct. 1988) citing *Babbitt Ford, Inc. v. The Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. (Ariz.) 1983), cert. denied 466 U.S. 926.

## **6. Waivers, generally**

"A release of claims under the Navajo repossession laws made as part of a settlement agreement after an illegal repossession has occurred does not further infringe on the public interest, but any such waiver of claims under the Navajo repossession laws will be scrutinized closely by the Navajo courts to ensure that the agreements were made openly and fairly. Such close scrutiny is necessary in order to ensure the same protection of consumers which the Navajo repossession laws seek." *Amigo Chevrolet v. Lee*, 6 Nav. R. 31, 33 (Nav. Sup. Ct. 1988).

### **§ 622. Violation—Penalty**

A. Any nonmember of the Navajo Nation found to be in willful violation of 7 N.N.C. § 621 may be excluded from the territorial jurisdiction of the Navajo Nation in accordance with the procedure set forth in 17 N.N.C. §§ 1901-1906.

B. Any business whose employees are found to be in willful violation of 7 N.N.C. § 621 may be denied the privilege of doing business within the territorial jurisdiction of the Navajo Nation. Any business that uses agents or others to repossess property in willful violation of § 621 and avoids entering the Navajo Nation may be denied the privilege of advertising in Navajo Nation media, including newspapers, radio stations, and television channels, and no such business shall have the privilege of enforcing any contract within the Navajo Nation. No state judgment obtained by such a business may be enforced in the Navajo Nation. It shall be an affirmative defense to any action in debt or contract or to enforce a foreign judgment that the plaintiff was in willful violation of § 621 or has engaged in a pattern or practice of violations of that Section.

C. Any person who violates any provision of 7 N.N.C. § 621 shall be subject to a fine of not less than five thousand dollars (\$5,000). In addition, the person found in violation of this Subsection shall pay the fine set forth in 7 N.N.C. § 623, or a minimum of five thousand dollars (\$5,000) in liquidated damages as restitution to the debtor. The restitution shall be paid at the same time or before the fine.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CF-26-68, February 7, 1968.

**Note.** This Section was previously located at Section 608.

### **Annotations**

#### **1. Construction and application**

"The Navajo repossession laws are the result of a necessary exercise of tribal sovereign powers and are designed to protect the health, safety, and welfare of Navajo Nation citizens." *Amigo Chevrolet v. Lee*, 6 Nav. R. 31, 32 (Nav. Sup.

Ct. 1988) citing *Babbit Ford, Inc. v. The Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983), cert. denied 466 U.S. 926.

### **§ 623. Civil liability**

A. Any person who violates 7 N.N.C. § 621 and any business whose employee violates such section is deemed to have breached the peace of the Navajo Nation, and shall be civilly liable to the debtor for any loss caused by the failure to comply with 7 N.N.C. §§ 621-623.

B. The debtor has the right to recover an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price.

C. Debtor means the person who owes payment or other performance of an obligation secured by consumer goods, whether or not the debtor owns or has rights in the consumer goods.

D. A Court may award punitive damages for any repossession that is willful, fraudulent, or unconscionable.

E. No foreign judgment may be enforced permitting a repossession or replevin in substantial violation of 7 N.N.C. § 621 or obtained to evade its provisions.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJN-53-69, June 4, 1969.

**Note.** This Section was previously located at Section 609.

### **Annotations**

#### **1. Construction and application**

"The Navajo repossession laws are the result of a necessary exercise of tribal sovereign powers and are designed to protect the health, safety, and welfare of Navajo Nation citizens." *Amigo Chevrolet v. Lee*, 6 Nav. R. 31, 32 (Nav. Sup. Ct. 1988) citing *Babbit Ford, Inc. v. The Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983), cert. denied 466 U.S. 926.

### **§ 624. Severability**

If any provision or clause of 7 N.N.C. §§ 621, 622 or 623, or application thereof to any person or any business or circumstances is held invalid, such invalidity shall not affect other provisions or applications thereof which can be given effect without the invalid provision, and to this end, the provisions of the sections are declared to be severable.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJN-53-69, June 4, 1969.

**Note.** This Section was previously located at Section 610.

## **Article 2. Action against provider of an alcoholic beverage**

### **§ 631. Action against provider of an alcoholic beverage**

A. Any person who directly gives, sells, or otherwise provides liquor or any alcoholic beverage to any other person shall be strictly liable for any personal injuries, property damage, means of support to any third person (or to the spouse, child(ren) or parent(s) of that third person), or to a person who may bring an action for wrongful death where:

1. The person who obtained the liquor or alcoholic beverage consumed the same; and

2. The consumption of the liquor or alcoholic beverage was a proximate cause of the injury, death or property damage.

B. For the purposes of this Section, if it is found that the person who obtained the liquor or alcoholic beverage causes injuries or property damage as a result of the consumption of the liquor or alcoholic beverage within a reasonable period of time following his or her first obtaining the liquor or alcoholic beverage, it shall create a rebuttable presumption that the person consumed the liquor or alcoholic beverage provided to him or her by the person who gave, sold or otherwise provided the liquor or alcoholic beverage.

C. If a person having rights or liabilities under this Section dies, the rights or liabilities provided by this Section survive to or against that person's estate.

D. An action based upon a cause of action under this Section shall be commenced within five years after the date of injury or property damage.

E. Nothing in this Section precludes any cause of action or additional recovery against the person causing the injury.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-10-78, January 24, 1978.

**Note.** This Section was previously located at Section 207.

### **Cross References**

Manufacture or Delivery of Liquor, see 17 N.N.C. § 411 (E) and (F).

#### **Annotations**

##### **1. Construction and application**

"Through clear provisions of the Navajo Nation Code, the Council has outlawed alcohol on the Nation, 17 N.N.C. §§ 410-412 (2005), has made providers of liquor liable for injuries arising out of consumption of their liquor, 7 N.N.C. § 207 (1995) [now § 631], and, most importantly for this case, asserts personal jurisdiction over liquor sellers located outside the Navajo Nation when their liquor causes injuries on the Nation, 7 N.N.C. § 253a(C)(8) (2005)." *Navajo Transport Services, et al. v. Schroeder, et al.*, No. SC-CV-44-06, slip op. at 5-6 (Nav. Sup. Ct. April 30, 2007).

#### **Subchapter 3. Jury**

##### **§ 651. Right to jury trial**

In any criminal or civil case, but not in any domestic relations, decedent's estate, equitable proceeding, or miscellaneous case, as set out in 7 N.N.C. § 253, any party shall, upon demand, be entitled to jury trial on any issue of fact.

#### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

Tribal Council Resolution 1921-1951, Res. p. 212, December 19, 1945.

#### **Annotations**

##### **1. Waiver of right**

"The court merely stated to Morgan's co-defendant, but not to Morgan, that he could plead guilty, not guilty, or no contest, with no explanation of what these terms mean. The Court concludes this omission is inconsistent with *házhó'ógo*, as, in the absence of some explanation, a defendant may not know the meaning of these technical legal terms, and therefore his or her choice to forego trial cannot be 'knowing' and 'intelligent'." *Navajo Nation v. Morgan*, No. SC-CR-02-05, slip op. at 3-4 (Nav. Sup. Ct. November 8, 2005).

"Second, the transcript shows that the Crownpoint District Court did not accurately state the possible sentence Morgan faced." *Navajo Nation v. Morgan*, No. SC-CR-02-05, slip op. at 4 (Nav. Sup. Ct. November 8, 2005).

"Third, the Crownpoint District Court did not assure itself that the guilty plea had a factual basis by reviewing the allegations of the complaint with

Morgan. Defendants have the right to know what a plea of guilty means, and therefore judges must review the complaint with the defendant and discuss the elements of the crime and the facts supporting them." *Navajo Nation v. Morgan*, No. SC-CR-02-05, slip op. at 4 (Nav. Sup. Ct. November 8, 2005).

## **2. Prepayment of jury costs**

"Fairness requires that parties not be denied their right to a jury trial merely because they cannot immediately afford the costs of holding one. However, the Court holds that the requirement to prepay jury costs is not, in and of itself, a violation of a party's right to a jury trial." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 9 (Nav. Sup. Ct. November 7, 2007).

### **§ 652. Lists of jurors; preparation**

The Judicial Branch shall prepare lists of eligible jurors from time to time. Such lists shall constitute a fair cross-section of the Judicial District where jury trials will be held.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **§ 653. Number of jurors**

In any case, a jury shall consist of six residents of the Judicial District in which the trial is held, selected from the list of eligible jurors.

#### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **§ 654. Eligibility of jurors**

Any person residing within the territorial jurisdiction of the Navajo Nation over the age of 18 years, of at least ordinary intelligence, and not under judicial restraint, shall be eligible to be a juror.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

#### **Annotations**

##### **1. Construction and application**

" ... 1) juries must be drawn from a source which is fairly representative of the community, but need not mirror it; 2) all defendants may assert the right, including people who are not members of an excluded group (i.e. Indians can challenge the exclusion of non-Indians from juries); and 3) a defendant can prevail by showing a systematic exclusion of distinctive groups of people; but not an occasional mistaken exclusion." *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 434 (Nav. Sup. Ct. 1991).

##### **§ 655. Challenges to jury**

Any party to the case may exercise no more than three peremptory challenges, and shall have an unlimited number of challenges for cause.

#### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

**Note.** Slightly reworded.

#### **Annotations**

##### **1. Challenges**

" ... Navajo trial judges may not require parties to exhaust their peremptory challenges first, before permitting a challenge for cause." *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 435 (Nav. Sup. Ct. 1991).

##### **§ 656. Instructions to jury**

The judge shall instruct the jury in the law governing the case. Jury instructions may be selected by the judge from instructions prepared and presented by the parties.

#### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **§ 657. Verdict of jury**

The jury shall bring a verdict for the plaintiff or the defendant. In civil cases, a verdict may be rendered by a majority vote of the jury. In criminal cases, a verdict shall be by a unanimous vote of the jury.

### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **§ 658. Jurors' fees**

A. Every person who is required to attend Court for selection or service as a juror shall be entitled to a reasonable fee not to exceed actual expenses incurred for attendance and reasonable compensation for mileage to and from his home to Court not to exceed the rate established for Navajo Nation employees for each separate day he is required to be present in court provided funds therefore are appropriated by the Navajo Nation Council.

B. The party demanding a jury trial in a civil action may be required to prepay the mileage and compensation of jurors, and other costs of a jury trial. Prepayment of such costs shall not be required if the party is proceeding in forma pauperis or if prepayment would deny that person the right to a trial by jury.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **Annotations**

#### **1. Prepayment of jury costs**

"Fairness requires that parties not be denied their right to a jury trial merely because they cannot immediately afford the costs of holding one. However, the Court holds that the requirement to prepay jury costs is not, in and of itself, a violation of a party's right to a jury trial." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 9 (Nav. Sup. Ct. November 7, 2007).

## **Subchapter 5. Judgment and Execution**

### **§ 701. Judgment—Form and contents**

A. The judgment in all civil cases shall be an order of the Court awarding money damages to the injured party, directing the surrender of certain property to the injured party, directing the performance of an act for the benefit of the injured party, directing that a party refrain from taking action with regard to the injured party, or a declaration of rights of the parties.

B. Where the injury was inflicted as the result of negligence, the judgment shall fairly compensate the injured party for his or her injuries or loss. The Court shall consider the comparative fault of the parties in making an award of damages.

C. Where the injury was inflicted deliberately, intentionally, willfully, wantonly, recklessly, unconscionably, or as the result of gross negligence, the judgment may impose additional penalties in the form of punitive damages in favor of the injured party . Where punitive damages are awarded, there may be additional award of damages to the Navajo Nation for patterns and practices of conduct in violation of public policy or egregious conduct contrary to clear public policy.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

### **Annotations**

#### **1. Compulsory award of damages**

Under Subsection (D) of this Section, even though it may be said that the injury is the result of an "accident", the court need not award a reasonable part of the loss suffered, where there is no just or equitable consideration to cause it to do so. *Mann v. Navajo Tribe*, 4 Nav. R. 83 (Nav. Ct. App. 1983).

#### **2. Garnishment**

Under the powers outlined in 7 N.N.C. §§ 255, 701(a) and 706, the Navajo Courts have the statutory authority to utilize garnishment procedures. *Navajo Tribal Utility Authority v. Foster*, 4 Nav. R. 86 (Nav. Ct. App. 1983).

#### **3. Definitions**

" ... [O]ur judgment statute ... requires the court to determine whether an injury was the result of carelessness, deliberate infliction, or accident, with varying degrees of damages, depending upon the nature of the injury." *Jensen v. Giant Industries, Arizona, Inc.*, No. SC-CV-51-99, slip op. at 5 (Nav. Sup. Ct. January 22, 2002).

" ... [F]ailure to exercise ordinary care in avoiding foreseeable harm to others constitutes negligence. [ ] Thus, the duty of care owed by an individual is closely related to the foreseeability that another individual will be

harmed. [ ] The extent of the duty depends on the circumstances. [ ] Where the danger of injury to others is greater, so is the duty to exercise care." *Wilson v. Begay*, 6 Nav. R. 1, 4 (Nav. Sup. Ct. 1988).

"In determining whether a party was negligent, a court must determine whether that party owed a duty of care to the individual who was injured." *Wilson v. Begay*, 6 Nav. R. 1, 3 (Nav. Sup. Ct. 1988), citing *Mann v. Navajo Tribe*, 4 Nav. R. 83, 85 (1983).

"This Court has held that, " '[c]arelessness' is actually the same legal standard as 'negligence'.... ' " *Wilson v. Begay*, 6 Nav. R. 1, 3 (Nav. Sup. Ct. 1988), citing *Mann v. Navajo Tribe*, 4 Nav. R. 83, 85 (1983).

#### **4. Damage awards**

"Courts must carefully scrutinize claims for damages even after the defendant's liability has been proven, and the record must contain a reasonable justification for the amount of damages awarded." *Wilson v. Begay*, 6 Nav. R. 1, 7 (Nav. Sup. Ct. 1988).

"The plaintiff has the burden of proving damages. The plaintiff must first establish with reasonable certainty that the defendant's conduct caused the plaintiff damages. The plaintiff must then establish the amount of his damages with reasonable certainty. The rule within the Navajo Nation is that an award of damages must be based upon proof and not speculation." *Wilson v. Begay*, 6 Nav. R. 1, 5 (Nav. Sup. Ct. 1988), citing *Hall v. Arthur*, 3 Nav. R. 35, 40 (1980).

"The legal basis for awarding compensatory damages in Navajo law is 7 N.T.C. § 701.... " *Wilson v. Begay*, 6 Nav. R. 1, 3 (Nav. Sup. Ct. 1988).

#### **5. Compensation**

"To clarify these questions, we hold that 7 N.N.C § 701 (1995), which addresses judgments, permits all causes of action generally recognized by law to compensate an 'injured party,' including survival and wrongful death actions. Our holding is reinforced by the provisions of 7 N.N.C. § 255 (1995), which provides that '[t]he district courts shall have the power to issue any writs or orders necessary and proper to the complete exercise of their jurisdiction.' " *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 5 (Nav. Sup. Ct. January 31, 2001).

#### **6. Jurisdiction**

"The drafters of our judicial code had the foresight to provide that all actions involving an 'injured party' require the compensation outlined in 7 N.N.C. § 701 and to provide that once a Navajo Nation court has jurisdiction over the person, there is general subject matter jurisdiction to provide relief based upon any generally-recognized legal theory. As we have said before, the Navajo Nation courts are courts of general jurisdiction, and all actions which are generally recognized in the United States are available in the Navajo Nation." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 5 (Nav. Sup. Ct. January 31, 2001).

## 7. Interest

"We therefore amend our previous holding and set the time at which Allstate's responsibility to pay pre-judgment interest ended at the time of its request to deposit the funds. In this case, that was at the filing of its complaint." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 9 (Nav. Sup. Ct. May 20, 2005).

"We decline to reverse our previous ruling, and state again that pre-judgment interest must be paid by the insurance company, regardless of contractual provisions capping liability. Our conclusion is consistent with other jurisdictions that have recognized an obligation by an insurance company to pay pre-judgment interest to an injured party regardless of contractual caps." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 8 (Nav. Sup. Ct. May 20, 2005).

"Strong public policy considerations compel us to award pre-judgment interest against the insurance company regardless of the contractual cap, particularly, as in this case, where the insurance company controls settlement discussions and any subsequent litigation." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 8 (Nav. Sup. Ct. May 20, 2005).

"On remand, the Kayenta District Court must hold a hearing concerning the interest rate. The main question is what rate is reasonable during the time period between the date of the first claim submitted by the Blackgoats to when Allstate requested that the court allow it to submit the funds." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 10 (Nav. Sup. Ct. May 20, 2005).

"On further review of the approach announced in *Singer*, we modify our previous opinion in one significant way. In *Singer*, we suggested use of insurance company return rates based on a theory of pre-judgment interest that emphasized punishment for the insurance company's delay in paying the claim: [ ... ] However, as our previous opinion in this case makes clear, pre-judgment interest is not awarded to punish the holder of the money, but to fully compensate the injured." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 10-11 (Nav. Sup. Ct. May 20, 2005).

"Therefore, as punishment is not the basis for the award, the rate earned by the insurance company is not the absolute measure of what the injured should receive. Instead, the correct focus is the interest rate the injured would have received had he or she had use of the money. The actual rate of return on Allstate's different funds therefore does not define the rate in this matter." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 11 (Nav. Sup. Ct. May 20, 2005).

"Based on Navajo statutory law and the Navajo Common Law doctrine of *nályééh*, we do not apply the parties' bad faith approach to this case, but hold that pre-judgment interest is an element of damages regardless of the conduct of the party responsible for compensation or the liquidated or unliquidated nature of the claim." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 5 (Nav. Sup. Ct. January 12, 2005).

"While *Singer* emphasized the procedural aspect of *nályééh* to recognize

prejudgment interest, the award of interest is consistent with the substantive result as well, as it is an element of complete compensation designed to make whole an injured person." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 6 (Nav. Sup. Ct. January 12, 2005).

"We therefore conclude that prejudgment interest is not dependent on the conduct of the parties (except to the extent that the responsible party continues to delay payment) or whether the amount of damages may be known with certainty, but is a central element of full compensation that makes sure that an injured party has no hard feelings. The Kayenta District Court therefore abused its discretion when it declined to award pre-judgment interest under *nályééh*, as prejudgment interest is a mandatory substantive element of full compensation." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 7 (Nav. Sup. Ct. January 12, 2005).

"While pre-judgment interest is required and therefore not in the discretion of the district court to deny, the interest rate depends on the circumstances of the case, and is within the discretion of the district court to calculate and apply. The rate of pre-judgment interest as an element of *nályééh* is affected by the ability of the party responsible for compensating the injured to pay. [ ... ] The rate is also affected by outside economic factors concerning the interest rate available at the time that the interest accrues, as it is that rate of return which is lost when compensation is delayed." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 8 (Nav. Sup. Ct. January 12, 2005).

"The time period within which to apply interest also depends on the circumstances of the case. We follow *Singer* to hold that in tort cases the date the interest begins accruing is the date the request for compensation is received by the party responsible for payment. [ ... ] Here, in the context of interpleader, we hold that the period for calculating interest ends when the insurance company actually deposits the money in the court, and therefore ends its control over the funds. In non-interpleader cases, the date is the date judgment on damages is rendered by the court." *Allstate Indemnity Co. v. Blackgoat*, No. SC-CV-15-01, slip op. at 8 (Nav. Sup. Ct. January 12, 2005).

"... [W]hen a plaintiff claiming prejudgment interest proposes an interest rate, it is up to the defendant to show that it is unreasonable." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 9 (Nav. Sup. Ct. July 16, 2001).

"An award of prejudgment interest as compensatory damages should be computed by establishing the past loss or economic damage, the period of time between the events recited above and the date of judgment in terms of years or months, and the appropriate interest rate." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 9 (Nav. Sup. Ct. July 16, 2001).

"There should be an offer made to the person who committed the injury ... with a discussion of the facts of liability, proof of the loss and a showing of the injury actually suffered. If that offer is rejected in objective bad faith, or a counter-offer which is unreasonable is made, then that is the point when prejudgment interest should begin accruing. Otherwise, prejudgment interest will begin accruing from the date the complaint is filed. Prejudgment interest must be claimed in a prayer for relief, although the plaintiff need not plead the circumstances which justify the award." *Singer v. Nez*, No. SC-CV-04-99,

slip op. at 7 (Nav. Sup. Ct. July 16, 2001).

"The purpose of prejudgment interest is to place the injured person in as good a position as he otherwise would have been, because damages also include 'the foregone use of the money.' *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-656 (1983).... 'Prejudgment interest is an element of complete compensation.' *West Virginia v. United States*, 479 U.S. 305, 310 (1987).... Another way of putting it is, prejudgment interest is designed to 'make whole' an injured person." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 6 (Nav. Sup. Ct. July 16, 2001).

#### **8. Discretion**

"The trial court's discretion is limited by 'custom.' *Little v. Begay*, 7 Nav. R. at 354 ..... We have said that *nalyeeh* is based upon the effects of the injury, and it should be enough so that there are no hard feelings." *Benalli v. First Nat'l Ins. Co. of America*, 7 Nav. R. 329, 338 (1998).

#### **9. Insurance**

"We compared insurance to a bag with monies available to see to the plaintiff's needs.... There are procedures for arriving at *nalyeeh* that involve the respectful talking out of a dispute. The person requesting *nalyeeh* should be willing to lay out all the facts of the problem and the injury, and the listener should acknowledge the request to talk out the problem and then participate in good faith." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 8 (Nav. Sup. Ct. July 16, 2001).

#### **10. Comparative negligence**

"The District Court erred, as there is no absolute prohibition on hearing a comparative negligence/*nályééh* case against a tortfeasor if other tortfeasors cannot be joined in the action." *Joe v. Black*, No. SC-CV-62-06, slip op. at 5 (Nav. Sup. Ct. November 29, 2007).

"The Court holds that the evidentiary rule barring evidence of settlements does not bar consideration of settlements in comparative negligence cases, when necessary to consider the proper amount of damages the plaintiff is due under *nályééh*." *Joe v. Black*, No. SC-CV-62-06, slip op. at 7 (Nav. Sup. Ct. November 29, 2007).

"Even if these prior opinions did not exist, there is no conflict between comparative negligence and *nályééh*." *Joe v. Black*, No. SC-CV-62-06, slip op. at 9 (Nav. Sup. Ct. November 29, 2007).

"This Court therefore holds that the Navajo Nation is a pure comparative negligence jurisdiction, and any award to Benally, if Mobil is found liable, should be reduced to reflect only Mobil's portion of responsibility for the injury. The doctrine of *t'aash shi akwiisdzaa* is consistent with comparative negligence, as reduction of the award makes certain Benally takes responsibility for his own actions, but still compensates him for that part of injury caused by Mobil." *Benally v. Mobil Oil Corporation, nka ExxonMobil Corporation*, No. SC-CV-05-01 slip op. at 8 (Nav. Sup. Ct. November 24, 2003).

## **§ 702. Rendition**

The judge shall render judgment in accordance with the verdict of the jury and existing law.

### **History**

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

## **§ 703. Lawful debt in proceedings to distribute decedents' estates**

A judgment shall be considered a lawful debt in all proceedings held by the Department of the Interior or by a Court of the Navajo Nation to distribute decedents' estates.

### **History**

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

## **§ 704. [Reserved]**

## **§ 705. Writs of execution—Generally**

The party in whose favor a money judgment is given by the Courts of the Navajo Nation may at any time within five years after entry thereof have a writ of execution issued for its enforcement. Provided, however, there shall be no limitation to the issuance of writs of execution for judgments for the payment of child support. No execution, however, shall issue after the death of the judgment debtor, with the exception that judgments for the payment of child support shall survive against the estate of the judgment debtor. A judgment creditor may have as many writs of execution as are necessary to effect collection of the entire amount of the judgment.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

### **Annotations**

#### **1. Purpose**

The obvious purpose of this Section is to prevent stale judgments and to require judgment creditors to be diligent in seeking to collect on their judgments. *Becenti v. Laughlin*, 4 Nav. R. 147 (Nav. Ct. App. 1983).

## **2. Limitations period**

" ... [T]he statute of limitations at 7 N.T.C. § 705, is tolled during the periods that a stay of execution is in effect." *The Navajo Housing Authority v. Dana and Associates*, 5 Nav. R. 157, 159 (Nav. Sup. Ct. 1987).

Partial satisfaction of the judgment and legitimate attempts to collect by execution or otherwise toll the five-year limitation on executions under this Section. *Becenti v. Laughlin*, 4 Nav. R. 147 (Nav. Ct. App. 1983).

## **3. Garnishment**

Pursuant to this Section and 7 N.N.C. § 255 coupled with Rule 23, Rules of Navajo Civil Procedure, garnishment is permitted. *Tracey v. Heredia*, 4 Nav. R. 149 (Nav. Ct. App. 1983).

## **4. Scope of court's power**

" ... [G]iven the difficulty in framing a general rule, we will restrict our focus to the question of whether a judgment debtor who fails to pay a civil judgment on a contract for a loan may be incarcerated for failure to pay the judgment, whether the judgment debtor is indigent or not." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 3-4 (Nav. Sup. Ct. May 4, 2001).

## **5. Construction with other laws**

"We hold that Section 3 of the Navajo Nation Bill of Rights prohibited her incarceration for failure to pay the judgment on a contract as an unreasonable deprivation of liberty." *Pelt v. Shiprock District Court*, No. SC-CV-37-99, slip op. at 7 (Nav. Sup. Ct. May 4, 2001).

## **§ 706. Issuance; contents**

A writ of execution shall be issued by the Clerk of Court and addressed to any regular commissioned Navajo Nation Police Officer and shall direct him to seize and deliver to the Clerk of Court sufficient unrestricted and nonexempt personal property of the debtor to pay the judgment and costs of sale. The writ shall specify the particular unrestricted and nonexempt property to be seized.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

### **Annotations**

#### **1. Garnishment**

Under the powers outlined in 7 N.N.C. §§ 255, 701(A) and this Section, the

Navajo Courts have the statutory authority to utilize garnishment procedures. *Navajo Tribal Utility Authority v. Foster*, 4 Nav. R. 86 (Nav. Ct. App. 1983).

## **2. Property subject to garnishment**

"We coalesce Navajo concepts of property (Navajo common law) and English common law, and apply it to modern situations, to hold that bank accounts in the name of a judgment debtor are personal property subject to execution under Sections 706 and 711." *Billie v. Nez*, 7 Nav. R. 253, 255 (Nav. Sup. Ct. 1996).

## **3. Notice**

"We hold that the statutory execution provisions and the existence of a final judgment in the court record are sufficient notice to a judgment debtor that a court clerk may issue a writ of execution." *Billie v. Nez*, 7 Nav. R. 253, 256 (Nav. Sup. Ct. 1996).

## **§ 707. Return**

Within 90 days of his receipt of the writ of execution, the police officer shall return it to the Clerk of Court with the property seized, or with a written explanation of why the property cannot be delivered.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

## **§ 708. Appraisal of property seized**

Immediately upon receipt of the property seized under a writ of execution, the Clerk of Court shall cause it to be appraised item by item by an appraiser selected by the plaintiff and defendant to make an impartial appraisal. If the plaintiff and defendant fail to agree on an appraiser, the Clerk shall make the selection. The appraiser shall submit the appraisal to the Clerk of Court and send copies of the same to the plaintiff and defendant.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

## **§ 709. Notice and public sale of property seized; proceeds; bill of sale**

A. Within seven days of appraisal of property seized under a writ of execution, the Clerk of Court shall post in public places at least two notices

of sale containing a full description of the property to be sold, together with the appraised value of each item and the time and place of sale. The clerk shall also notify the judgment debtor of the time and place of sale, by means of first class mail if the judgment debtor's address is known, or by means of publication if such address is not known.

B. The sale shall be held within a reasonable time after posting, in the same Judicial District in which the Court rendering the judgment of foreclosure is located.

C. The Clerk shall sell the property publicly, to the highest bidder for cash, but for not less than the appraised price. The clerk may sell the property by item or in bulk, at his or her discretion.

D. The Clerk shall pay into court the expenses of sale and any unpaid court costs of either party from the proceeds of sale, and shall pay the balance up to the full amount of the judgment (less unpaid court costs of plaintiff) to the plaintiff. Any excess shall be paid to the defendant.

E. The Clerk shall deliver a bill of sale to the buyer upon request.

F. Procedures for execution, storage and sale shall be in accordance with Court rules.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

#### **§ 710. Private sale of property seized; delivery of unsold property to plaintiff or return to defendant**

A. If the Clerk is unable to sell the property seized under a writ of execution for its appraised value, he or she may hold it for 14 days after the date of the attempted sale, during which time he or she shall sell it to the first person offering the appraised value in cash.

B. The Clerk may at any time, however, after an unsuccessful attempted public sale and before an actual sale, upon request of the plaintiff and payment of all costs, deliver the property to the plaintiff and credit the appraised value thereof against the judgment debt. If the appraised value is greater than the debt the Clerk shall not deliver the property to the plaintiff until the plaintiff pays the defendant in cash for such excess value.

C. At the end of 14 days if the property remains unsold and unclaimed by the plaintiff the Clerk shall return it to the defendant.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

**§ 711. Property subject to execution and property exempt from execution**

A. The following property shall be exempt from execution:

1. One motor vehicle;
2. Personal effects and clothing of a reasonable value as determined by the Court;
3. Tools or equipment for a trade or profession of a reasonable value as determined by the Court;
4. Health or medical equipment required by the judgment debtor to maintain health;
5. An interest in a home where the judgment debtor resides of a reasonable value as determined by the Court;
6. A reasonable subsistence amount of livestock as determined by the Court;
7. Bona fide religious, ceremonial or sacred items and paraphernalia, and family heirlooms, as agreed to by the parties or determined by the Court.

B. All other property shall be subject to execution and sale.

C. A court may issue writs of garnishment upon the wages or monies of a judgment debtor held by third parties, subject to adoption of a Navajo Nation garnishment statute and associated rules, and further subject to limitations upon wage executions in federal law.

D. A judgment debtor may challenge the seizure of property for sale as being exempt under Subsections (A) (2), (3), (4), (5), (6) or (7) in objections filed with the Court following the seizure of that property under § 706.

**History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

**Annotations**

**1. Exemption**

Land interests within the Navajo Nation are exempt from execution under this Section. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).

Even though outrageous inflation rates have existed since this statute was passed, the Appeals Court had no jurisdiction to enlarge the provisions of this Section; it is up to the Navajo Tribal Council to make more liberal exemption provisions if it so chooses. *Johnson v. Dixon*, 4 Nav. R. 108 (Nav. Ct. App. 1983).

## **2. Bank accounts**

"We coalesce Navajo concepts of property (Navajo common law) and English common law, and apply it to modern situations, to hold that bank accounts in the name of a judgment debtor are personal property subject to execution under Sections 706 and 711." *Billie v. Nez*, 7 Nav. R. 253, 255 (Nav. Sup. Ct. 1996).

### **§ 712. Execution prior to judgment**

A. Prejudgment attachments are prohibited.

B. Despite the prohibition in § 712(A), a Court may, upon notice and an opportunity to be heard by the person who possesses the property, enter appropriate orders to prevent the destruction, removal, transfer, or disposition of the property which is the subject of the suit or the property which may be subject to a writ of execution.

C. Where the action involves the ongoing payment of monies to the plaintiff or defendant making a cross or counterclaim, the court may require the payment of such monies to the Court pending the outcome of the action.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJ-51-56, July 19, 1956.

## **Subchapter 7. Costs, Fees and Fines**

### **§ 751. Security for costs**

In all civil suits a party may be required to deposit with the Clerk of the Court a fee or other security in a reasonable amount to cover costs and other disbursements in the case, such amount to be determined by Court rules.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

### **§ 752. Assessment of costs**

The court may assess the costs of the case against the party or parties against whom judgment is given. Such costs may consist of the expenses of voluntary witnesses and witnesses attending court under subpoenas, fees of jurors in those cases where a jury trial is had, and any further incidental expenses connected with the proceeding as the court may order.

#### **History**

CD-94-85, December 4, 1985.

CJA-1-59, January 6, 1959.

#### **Annotations**

##### **1. Discretion of court**

"This Court holds that actions for dissolution of marriage are special circumstances in which the judge may order one party to pay a reasonable amount toward the attorney fees of the other party. It is within the discretion of the judge to determine what is a reasonable amount." *Morgan v. Morgan*, 5 Nav. R. 64, 65 (Nav. Sup. Ct. 1985).

##### **§ 753. Fees and fines; collection and disposition**

A. Fees, fines, and assessments (as permitted by law) shall be collected by the Courts of the Navajo Nation, in amounts set by Court rules.

B. Fees, fines, and assessments (as permitted by law) shall be regularly deposited into the the Unreserved, Undesignated Fund Balance of the Navajo Nation.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

### **Subchapter 9. Appeals**

##### **§ 801. Appeal from final judgment or order**

Every person aggrieved by a final judgment or order of a District Court, or the order of an administrative agency where the law provides for an appeal to the Supreme Court, shall file a notice of appeal in accordance with the applicable rules of appellate procedure within 30 days from the date of the judgment or order, or as otherwise provided by law.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

CJA-5-59, January 9, 1959.

## **Annotations**

### **1. In general**

"No sanctions were imposed, and the attorney did not take an appeal. The finding of contempt was personal to the attorney, collateral to the action, and neither party has any rights as a result of the contempt finding which are part of this appeal." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 9 (Nav. Sup. Ct. July 25, 2001).

"7 N.T.C. § 801(a) is not the Supreme Court's jurisdictional statute. 7 N.T.C. § 801(a) establishes the time limits and the requirements for filing a notice of appeal. Instead, the basis of the Supreme Court's appellate jurisdiction is located at 7 N.T.C. § 302." *Navajo Nation Division of Resources v. Spencer*, 5 Nav. R. 109, 110 (Nav. Sup. Ct. 1986).

### **2. Prosecution**

"There is no express statutory right for the prosecution to take an appeal in the Navajo Nation." *Navajo Nation v. Yellow*, ACR-03-93, slip op. at 5 (Nav. S. Ct. January 18, 1994).

### **3. Time to file**

"With regard to the first issue, an appeal is not deemed filed unless a Notice of Appeal is filed with the Supreme Court 'in accordance with the applicable rules of appellate procedure within 30 days from the date of the judgment or order, or as otherwise provided by law.' 7 N.N.C. § 801 (2005). Rule 8(a) of the Navajo Rules of Civil Appellate Procedure is very explicit on the prescribed time frame if a party wishes to appeal a trial court's decision; the Appellant must file a Notice of Appeal with the Supreme Court within thirty (30) days after the entry of the judgment lest the appeal be dismissed. This rule has been consistently and strictly enforced by this Court. *Riverview Service Station*, 5 Nav. R. 135. This requirement of timely filing is so fundamental that in order for this Court to assume jurisdiction over the matter, the Appellant must comply with Rule 8(a)." *Begay v. Alonzo*, No. SC-CV-40-08, slip op. at 3 (Nav. Sup. Ct. November 7, 2008).

"The trust duty of a Navajo leader as expressed in the *Thinn* case cannot be stretched to allow for a flexible time period of filing appeals." *Begay v. Alonzo*, No. SC-CV-40-08, slip op. at 5 (Nav. Sup. Ct. November 7, 2008).

"The right to file an appeal is granted and fixed by 7 N.T.C. § 801(a). [....] A party may appeal only a final judgment or order, and interlocutory appeals are not allowed." *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 206, 207 (Nav. Sup. Ct. 1990).

" ... Appellant assumed the risk of delay when he decided to file his appeal by mail. The time limits set forth in 7 N.T.C. § 801(a) will not be enlarged for mail filings." *Riverview Service Station v. Eddie*, 5 Nav. R. 135, 136 (Nav. Sup. Ct. 1987).

"7 N.T.C. § 801(a) is a jurisdictional statute, [... ] We will always dismiss an appeal which has not been filed within thirty (30) days of entry of the final judgment by the district court. Entry of final judgment means the day the judgment is signed by the district judge. The thirty (30) days appeal period begins to run the day after the judgment is signed by the district judge." *The Navajo Tribe of Indians v. Yellowhorse, Inc.*, 5 Nav. R. 133, 134 (Nav. Sup. Ct. 1987).

#### **4. Final orders**

"The record shows that at the time the Interlocutory Divorce Decree was issued, the only matter remaining between the parties was the distribution of their community property and debt. This Court holds that the divorce between Ms. Hall and Mr. Watson became effective on July 5, 2005 as the case was decided on the merits, the substantial rights of the party in regards to their marriage was determined and there were no further proceedings remaining in the Family Court on the question of the marriage. The Interlocutory Divorce Decree was a *final* order for the purpose of terminating the marriage between the parties; this order was affirmed by a second order in which the issue of the distribution of property was dismissed so that the matter of the marital property and debt could proceed in probate." *Hall v. Watson*, No. SC-CV-52-07, slip op. at 5-6 (Nav. Sup. Ct. February 24, 2009).

"Here, Ms. Ward's request that this Court determine the rightful personal representative of Ms. Hall's estate is best characterized as an improper interlocutory appeal of the probate action, which is prohibited by law. See *Johnson v. Tuba City*, No. SC-CV-12-07 slip op. at 4 (Nav. Sup. Ct. November 7, 2007). In other words, Ms. Ward's challenge of the personal representative is a matter to be adjudicated first by the Family Court—that is the remedy still available to her. This Court will not decide upon the validity of the appointment of Mr. Hall as personal representative to the estate and instead, remands the question to the Family Court." *Hall v. Watson*, No. SC-CV-52-07, slip op. at 7 (Nav. Sup. Ct. February 24, 2009).

"In the case of *Chuska Energy Co. v. Navajo Tax Comm'n*, we construed the word 'final' in our appellate jurisdiction statute ... to mean the procedural stage where 'all the substantial rights of the parties have been determined in the lower tribunal.' 5 Nav. R. 98, 102 (1986)." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 3 (Nav. Sup. Ct. July 25, 2001).

"Thus, a final order will generally show on its face that the case has been decided on the merits, the substantial rights of the parties have been determined, and there are no further proceedings remaining in the lower court on the merits of the case." *Tsosie v. Charlee*, 6 Nav. R. 280, 282 (Nav. Sup. Ct. 1990).

#### **5. Sufficiency of notice**

"Deposit in the mail is not the equivalent of filing a notice of appeal for

purposes of the rule governing time within which a notice of appeal must be filed." *Pioche, Sr. v. Begay*, 6 Nav. R. 403, 404 (Nav. Sup. Ct. 1991).

## **6. Meaningful judicial review**

"Findings of fact and conclusions of law by the trial courts are required by this Court and matters will be remanded when this requirement is not complied with. See *Help v. Silvers*, 4 Nav. R. 46, 47 (Nav. Ct. App. 1983) and *Navajo Transport Services v. Schroeder*, No. SC-CV-44-06, slip op. at 5 (Nav. Sup. Ct. April 30, 2007). Meaningful judicial review also cannot occur if the lower quasi-judicial tribunal does not provide reasons why it decided a certain way and not another." *Charley and Looking Glass v. Benally, et al.*, No. SC-CV-19-07, slip op. at 7-8 (Nav. Sup. Ct. December 10, 2008).

## **7. Motion for reconsideration**

"In other words, there is no time limit on when the motion must be filed after the judgment. However, a motion for reconsideration is deemed automatically denied if the trial court fails to rule on the motion within 5 days of its filing. *NN v. Morgan*, 8 Nav. R. 732, 737 (citing *Help* at 47). Furthermore, we glean from the discussion in *Help* about jurisdiction between the trial court and the appellate court that the notice of appeal can only be considered by this Court after the 5-day period for the district court to act has expired. We therefore hold there are two prerequisites to perfect [sic] an appeal: 1) the notice of appeal shall be filed within 30 days of the judgment and 2) the 5-day ruling period for a district court to act upon a motion for reconsideration must have expired." *Navajo Nation v. John*, No. SC-CR-01-09, slip op. at 2 (Nav. Sup. Ct. October 30, 2009).

## **§ 802. [Reserved]**

## **§ 803. Scope of the appeal**

Appeals shall be limited to the issues of law raised in the record on appeal.

### **History**

CD-94-85, December 4, 1985.

### **Annotations**

#### **1. Construction and application**

"This Court's review on appeal is limited to questions of law. [ ] Thus, this Court may set aside a finding of fact only if evidence in the record is insufficient, as a matter of law, to support the finding. This Court must uphold the district court's finding of negligence if the evidence most favorable to that finding is sufficient to establish the defendant's negligence." *Wilson v. Begay*, 6 Nav. R. 1, 3 (Nav. Sup. Ct. 1988).

#### **2. Standard of review**

"The parameters of discretion are whether the district court acted within the

rules, principles and customs applicable to the facts of the case. We will not overturn a discretionary decision unless the record shows that there was an actual abuse of discretion. *Little v. Begay*, 7 Nav. R. 353, 354 (1998)." *Singer v. Nez*, No. SC-CV-04-99, slip op. at 4 (Nav. Sup. Ct. July 16, 2001).

"This Court will review evidentiary rulings of the district court under the abuse of discretion standard. If this Court holds an evidentiary ruling incorrect, we must still accept the factual finding it supports, unless the incorrect evidentiary ruling affects the substantial rights of the parties." *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313, 317 (Nav. Sup. Ct. 1998).

"Generally, this Court reviews questions of law decided by the district courts *de novo*. [.... ] We give no deference to the district court's determination on questions of law." *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313, 316 (Nav. Sup. Ct. 1998).

"As a general principle, we will give considerable deference to a district court's exercise of discretion." *Higdon v. Nelson*, 7 Nav. R. 158, 159 (1995).

#### **§ 804. Proceedings on appeal**

A. The Chief Justice of the Supreme Court shall preside at all proceedings before the Supreme Court. If the Chief Justice is unable to preside for whatever reason, he or she shall designate in writing a presiding Justice from the Associate Justices.

B. The Chief Justice of the Supreme Court may designate in writing any District Court Judge of the Courts of the Navajo Nation to sit on an appeal panel if the Chief Justice or an Associate Justice is unable to serve for whatever reason.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

### **Subchapter 11. Rules of General Construction**

#### **§ 851. Construction**

This Title shall be so construed as to effectuate its general purposes and in such a manner as to assure judicial independence, the right of access to fair and independent remedies, the observance of Diné bi beenahaz'áanii, and the protection of the rights guaranteed by the Navajo Nation Bill of Rights.

#### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

## **§ 852. Amendment**

This Title may be amended by two-thirds (2/3) vote of the full membership of the Navajo Nation Council at a regular session of the Navajo Nation Council, upon favorable recommendation by the Judiciary Committee of the Navajo Nation Council.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

## **§ 853. Severability**

If any provision of this title or the application thereof to any person, court or circumstances is held invalid by a Navajo Nation or federal court, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application and to this end, the provisions of this title are severable.

### **History**

CO-72-03, October 24, 2003.

CD-94-85, December 4, 1985.

## **Chapter 7. Navajo Nation Arbitration Act**

### **§ 1101. Short title**

This Act may be cited as the Navajo Nation Arbitration Act.

### **History**

CJY-26-04, July 20, 2004.

### **Annotations**

#### **1. Unconscionable arbitration clause**

"Considering all of these principles together, the Court holds that the specific arbitration clause in the financing contract is unenforceable. Though arbitration generally is encouraged, clauses that mandate arbitration are not immune from scrutiny for unconscionability or consistency with Fundamental Law." *Green Tree Servicing, LLC v. Duncan*, No. SC-CV-46-05, slip op. at 12 (Nav. Sup. Ct. August 18, 2008).

### **§ 1102. Jurisdiction**

An agreement providing for arbitration in the Navajo Nation may be enforced by the Navajo Nation district court in the judicial district where the parties to the controversy reside or may be personally served.

### History

CJY-26-04, July 20, 2004.

### § 1103. Written agreement to submit controversy to arbitration is valid

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract.

### History

CJY-26-04, July 20, 2004.

### Annotations

#### 1. Unconscionable arbitration clause

"Considering all of these principles together, the Court holds that the specific arbitration clause in the financing contract is unenforceable. Though arbitration generally is encouraged, clauses that mandate arbitration are not immune from scrutiny for unconscionability or consistency with Fundamental Law." *Green Tree Servicing, LLC v. Duncan*, No. SC-CV-46-05, slip op. at 12 (Nav. Sup. Ct. August 18, 2008).

### § 1104. Duty of court on application of party to arbitrate

A. On application of a party showing an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine the issue raised and shall order or deny arbitration accordingly.

B. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications to compel arbitration, the application shall be made therein. Otherwise, the application shall be made in the court of proper venue.

C. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

D. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or because any fault or grounds for the claim sought to be arbitrated has not been shown.

### History

CJY-26-04, July 20, 2004.

### § 1105. When court may appoint arbitrators

If the arbitration agreement provides a method of appointment of arbitrators this method shall be followed. In the absence thereof, or if the agreed method fails or cannot be followed, or when an arbitrator fails or is unable to act and his successor has not been appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1106. Qualification of arbitrators**

The qualifications of a person allowed to serve as an arbitrator, under this Act shall be set by the Navajo Nation Judicial Branch.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1107. Powers of arbitrators**

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by law.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1108. Notice and hearing**

A. Whenever the Navajo Nation is a party to an arbitration, notice of intent to invoke arbitration shall be filed in compliance with 1 N.N.C. § 555.

B. The arbitrators shall appoint a time and place for the hearing and serve the parties with notice either personally or by registered mail not less than 10 days before the hearing. Appearance at the hearing waives the notice. The arbitrators may adjourn the hearing from time to time as necessary, and on request of a party or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award, unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

C. The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

D. The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If during the course of the hearing an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy.

### **History**

CJA-05-07, January 24, 2007. Added a new Subsection A.

CJY-26-04, July 20, 2004.

### **§ 1109. Right to be represented by attorney or Navajo tribal court advocate; effect of waiver**

A party may be represented by a member in good standing of the Navajo Nation Bar Association at any arbitration proceeding or hearing. A waiver of representation at an arbitration proceeding made prior to the proceeding is ineffective.

### **History**

CJY-26-04, July 20, 2004.

### **§ 1110. Authority of arbitrators to issue subpoenas and administer oaths; service of subpoenas; depositions; compelling person to testify**

A. The arbitrators may issue subpoenas for the attendance of witnesses, for the production of books, records, documents and other evidence and may administer oaths. Subpoenas shall be served, and upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

B. On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend the hearing, in the manner designated by the arbitrators.

C. All provisions of law compelling a person under subpoena to testify are applicable.

### **History**

CJY-26-04, July 20, 2004.

### **§ 1111. Award of arbitrators**

A. The award shall be in writing and signed by the arbitrators joining in the decision. A copy shall be delivered to each party personally, or by registered mail or as provided in the agreement.

B. An award shall be made within the time fixed by the agreement, or if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

C. An award against the Navajo Nation shall be in conformance with the provisions of 1 N.N.C. § 554(K).

### **History**

CJA-05-07, January 24, 2007. Amended Subsection C.

CJY-26-04, July 20, 2004.

### **§ 1112. Modification of award**

A. On application of a party or an order of the court, the arbitrators may modify the award:

1. When there was an evident miscalculation of figures or description of a person or property referred to in the award;

2. When the award is imperfect as to form not affecting the merits of the controversy; or

3. For the purpose of clarifying the award.

B. The application shall be made within 20 days after delivery of the award to the applicant. Written notice shall be given promptly to the opposing party, stating he must serve his objections within 10 days from receipt of the notice.

### **History**

CJY-26-04, July 20, 2004.

### **§ 1113. Expenses and fees for arbitrators**

A. The arbitrators' fees shall be set by regulation adopted by the Navajo Nation Supreme Court in accord with 7 N.N.C. § 601.

B. The arbitrators' expenses, fees and other costs, not including counsel fees, incurred in the arbitration shall be paid as provided in the award, unless otherwise provided in the arbitration agreement.

### **History**

CJY-26-04, July 20, 2004.

### **§ 1114. Confirmation of an arbitration award by court**

Upon application of a party the court shall confirm the award unless within the time limits allowed grounds are urged for vacating or modifying the award.

### **History**

CJY-26-04, July 20, 2004.

### **§ 1115. When court may vacate award**

A. Upon application of a party the court shall vacate an award where:

1. The award was procured by corruption, fraud or other undue means;

2. There was evident partiality by an arbitrator appointed as a neutral, or corruption of any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown, or refused to hear evidence material to the controversy or otherwise conducted the hearing as to substantially prejudice the rights of a party; or

5. There was no arbitration agreement, the issue was not adversely determined by a court as provided by law and the applicant did not participate in the arbitration hearing without raising the objection. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

B. An application for vacating an award shall be made within 90 days after delivery of a copy of the award to the applicant, or if predicated upon corruption, fraud or other undue means it shall be made within 90 days after the grounds are known or should have been known.

C. In vacating the award on grounds other than stated in Subsection (A)(5) the court may order a rehearing before new arbitrators chosen as provided in the agreement or by the court. If the award is vacated on grounds set forth in Paragraph (A)(3) or (4) of this Section the court may order a rehearing before the arbitrators who made the award or their successors appointed. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

D. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1116. When court may modify or correct award**

A. Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person or property referred to in the award;

2. The arbitrators awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision

upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

B. If the application is granted, the court shall modify and correct the award as to intent and shall confirm the award as so modified and corrected. Otherwise the court shall confirm the award as made.

C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1117. Judgment upon granting order confirming, modifying or correcting award; costs and disbursements**

Upon the granting of an order confirming, modifying or correcting an award, the judgment shall conform and be enforced as any other judgment. Costs of the application, proceedings and disbursements may be awarded by the court.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1118. Application to court to be by motion; notice and hearing to be in manner provided by law**

An application to the court for relief shall be by motion and shall be heard in the manner provided by law or rule of court. Notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in a civil action unless otherwise specified by the parties.

#### **History**

CJY-26-04, July 20, 2004.

#### **§ 1119. Appeals**

An appeal to the Navajo Nation Supreme Court may be taken from:

- A. An order denying the application to compel arbitration;
- B. An order granting an application to stay arbitration;
- C. An order confirming or denying confirmation of an award;
- D. An order modifying or correcting an award;
- E. An order vacating an award without directing a rehearing; or

F. A final judgment or decree entered by the court.

#### **History**

CJY-26-04, July 20, 2004.

### **Title 8**

#### **Decedents' Estates**

##### **Chapter 1. Descent and Distribution**

###### **§ 1. Jurisdiction**

The Family Court of the Navajo Nation shall have original jurisdiction over all cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the Court.

#### **History**

CJA-5-59, January 9, 1959.

CO-69-58, October 16, 1958.

**Revision note.** "Tribal" changed to "Family", and "Tribe" changed to "Nation". See 7 N.N.C. § 253(B).

#### **Cross References**

Descent and distribution of grazing permits, see 3 N.N.C. § 785.

Disposition of land use permit, personal property and improvements on death of assignee, see 3 N.N.C. §§ 154 and 217.

#### **United States Code**

Descent and distribution of property, see 25 U.S.C. §§ 348, 371-379.

#### **Code of Federal Regulations**

Issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands, see 25 CFR § 152.1 *et seq.*

Probate of Indian estates, see 25 CFR § 15.1 *et seq.*

#### **Annotations**

##### **1. Construction and application**

"The family court has original jurisdiction over the descent and distribution of 'deceased Indians' unrestricted property' (probate jurisdiction)." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4 (Nav. Sup. Ct. August 2, 2001).

## **2. Wrongful death actions**

"[I]n a wrongful death action, the claims and damages are those of the survivors and the proceeds are not part of the decedent's estates." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 9 (Nav. Sup. Ct. January 31, 2001).

"For future guidance, we hold that it is not necessary to open a probate case to appoint an administrator or administratrix for wrongful death claims. Any person who has a claim can bring his or her own claim. There is the special case of actions on behalf of children." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 7 (Nav. Sup. Ct. January 31, 2001).

### **§ 2. Determination of heirs**

A. When any member of the Navajo Nation dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be an heir of the decedent may bring a suit in a Family Court of the Navajo Nation to have the court determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of heirs shall be made unless all the possible heirs known to the court, to the President of the Navajo Nation, and to the claimant have been notified of the suit and given full opportunity to come before the court and defend their interests. Possible heirs who are not residents of the Navajo Nation under the jurisdiction of the court must be notified by mail and a copy of the notice must be preserved in the record of the case.

B. In the determination of heirs the court shall apply the custom of the Navajo Nation as to inheritance if such custom is proved. Otherwise the court shall apply state law in deciding what relatives of the decedent are entitled to be heirs.

C. Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the examiner of inheritance would have jurisdiction, the Family Court of the Navajo Nation may distribute only such property as does not come under the jurisdiction of the examiner of inheritance, and the determination of heirs by the court may be reviewed, on appeal, and the judgment of the court modified or set aside by the said examiner of inheritance, with the approval of the President of the Navajo Nation, if law and justice so require.

### **History**

CJA-1-59, January 6, 1959.

**Revision note.** Slightly reworded for purposes of statutory form.

### **Annotations**

#### **1. Custom; Fundamental laws**

"While the Navajo Probate Code states that state law should apply unless custom

is 'proved,' 8 N.N.C. § 2(B) (2005), the subsequent passage of the statute affirming the Fundamental Laws of the Diné, 1 N.N.C. § 201, et seq. (2005) (passed by Navajo Nation Council Resolution No. CO-72-03, (October 24, 2003)), means that a trial court may take judicial notice of *Diné bi beenahaz'áanii*." *In the Matter of the Estate of Amy Kindle*, No. SC-CV-40-05, slip op. at 7 (Nav. Sup. Ct. May 18, 2006).

"This Court's previous decision in this case, that state law applies if custom is not proven, see *Kindle*, No. SC-CV-38-99, slip op. at 4, predates these statutory changes. In light of these new statutory developments, the choice of law provision in the probate Code cannot be reconciled with the clear mandate to apply *Diné bi beenahaz'áanii* first, and state law only in the absence of Navajo law, and must therefore yield." *In the Matter of the Estate of Amy Kindle*, No. SC-CV-40-05, slip op. at 7 (Nav. Sup. Ct. May 18, 2006).

"The choice of law statute in our short probate code requires the application of Navajo inheritance customs, but if a custom is not 'proved,' the court may apply state law to determine the heirs of a decedent." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 4 (Nav. Sup. Ct. August 2, 2001).

"Enacted in 1959 and never amended, Section 2(b) provides that the court shall apply the Navajo custom as to inheritance, if such custom is proven, in order to determine the heirs." *In re: Estate of Thomas*, 6 Nav. R. 51, 52 (Nav. Sup. Ct. 1988).

"The word 'custom' for the purposes of this Section not only includes customs which may be testified to, judicially noticed, proved by expert testimony or otherwise shown by evidence, but it includes recorded opinions and decisions of the Navajo Courts not dealing with statutory interpretation or the application of principles of state or general Anglo-European law, and some learned treatises on Navajo ways." *In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178 (Nav. Ct. App. 1983).

## **2. Wrongful death actions**

"A personal representative who brings a wrongful death action on behalf of heirs is a nominal party and that person holds the recovery in trust for the named beneficiaries." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 9 (Nav. Sup. Ct. January 31, 2001).

"For future guidance, we hold that it is not necessary to open a probate case to appoint an administrator or administratrix for wrongful death claims. Any person who has a claim can bring his or her own claim. There is the special case of actions on behalf of children." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 7 (Nav. Sup. Ct. January 31, 2001).

"The confusion over what cause of action applies and who the beneficiaries of that action should be arises because the Navajo Nation does not have wrongful death or survivor's action statutes." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 4 (Nav. Sup. Ct. January 31, 2001).

### **3. Standing to petition**

"The dismissal was an error, as the Navajo Probate Code only requires 'a person claiming to be an heir' to bring a petition." *In the Matter of the Estate of Amy Kindle*, No. SC-CV-40-05, slip op. at 8 (Nav. Sup. Ct. May 18, 2006).

"Our probate code, at 8 N.N.C. § 2(A) (1995 ed.), permits 'any member claiming to be an heir' to petition the family court to determine heirs and divide property. We [Navajo Supreme Court] assume that 'member' relates back to the term 'member of the Navajo Nation' in the first part of the statute." *In the Matter of the Estate of Kindle*, No. SC-CV-38-99, slip op. at 6 (Nav. Sup. Ct. August 2, 2001).

### **4. Oral wills**

"In following *Estate of Lee* [1 Nav. R. at 31], the Navajo courts recognized the validity of an oral will when it is made by the testator in the presence of all of his or her immediate family and all members of the immediate family agree that the testator orally made known his or her last will before them. We hold today that the immediate family includes all of the children of the testator and the spouse if alive." *In re: Estate of Thomas*, 6 Nav. R. 51, 53 (Nav. Sup. Ct. 1988).

### **5. Immediate family**

"In the present case, the immediate family of Joe Thomas includes all of his eight children, whether or not they resided with him at his homesite. Because not all of those children were present at the time the alleged oral will was made, there is not valid oral will." *In re: Estate of Thomas*, 6 Nav. R. 51, 54 (Nav. Sup. Ct. 1988).

### **§ 3. Approval of wills**

When any member of the Navajo Nation dies, leaving a will disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Family Court of the Navajo Nation shall, at the request of any member of the Navajo Nation named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent, as under 8 N.N.C. § 2. A will shall be deemed to be valid if the decedent had a sane mind and understood what he or she was doing when he or she made the will and was not subject to any undue influence of any kind from another person, and if the will was made in accordance with a proved Navajo custom or made in writing and signed by the decedent in the presence of two witnesses who also signed the will. If the court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs; but no distribution of property shall be made in violation of a proved Navajo custom which restricts the privilege of Navajo Nation members to distribute property by will.

### **History**

CJA-1-59, January 6, 1959.

**Revision note.** Slightly reworded for purposes of statutory form.

## **Annotations**

### **1. Authority of state court**

Where will had been admitted to probate in Navajo Tribal Court of Indian Offenses, Arizona Superior Court, on petition to admit will to probate, did not have authority to inquire into execution of will, and should have admitted it to probate. *In re Lynch's Estate*, 9 Ariz. 354, 377 P.2d 199 (1962).

### **2. Oral dispositions**

If all of his immediate family are present and agree that his wishes will be honored after his death, a Navajo may, under custom, orally state who shall have his property after his death. *In re Estate of Lee*, 1 Nav. R. 27 (Nav. Ct. App. 1971).

### **3. Wrongful death actions**

"For future guidance, we hold that it is not necessary to open a probate case to appoint an administrator or administratrix for wrongful death claims. Any person who has a claim can bring his or her own claim. There is the special case of actions on behalf of children." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 7 (Nav. Sup. Ct. January 31, 2001).

### **4. Custom**

"The family court applied a rule of Navajo common law that insurance proceeds should be distributed to the 'immediate family.' This rule, as it is applied to distribution of an estate without a will, under Navajo custom, states that non-producing property (i.e., money) should go to the 'immediate family.' *In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 182-183 (Window Rock Dist. Ct. 1983)." *In the Matter of the Estate of Tsinahnajinnie*, No. SC-CV-80-98, slip op. at 7-8 (Nav. Sup. Ct. January 31, 2001).

### **5. Generally**

*In the Matter of the Estate of Howard*, 7 Nav. R. 262 (Nav. Sup. Ct. 1997).

## **Title 9**

### **Domestic Relations**

#### **Chapter 1. Marriage**

##### **§ 1. Validity generally**

A. Marriages contracted outside of the Navajo Nation are valid within the Navajo Nation if valid by the laws of the place where contracted, with the exception of marriages that are void and prohibited by Section 2 of this Title.

B. Marriages may be validly contracted within Navajo Indian Country by meeting the requirements of 9 N.N.C. §§ 4 and 5.

#### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CO-54-56, October 29, 1956.

CF-2-54, February 11, 1954.

1922-1951 Res. p. 84, July 8, 1944.

CJ-2-40, June 3, 1940.

#### **§ 2. Plural marriages void**

A. All plural marriages contracted, whether or not in accordance with Navajo custom, shall be void and prohibited.

B. Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of one-half degree, as well as whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.

C. Marriage between persons of the same sex is void and prohibited.

#### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

1922-1951 Res. p. 86, July 12, 1945.

**Note.** Former § 2, "Mixed marriages", was rescinded by CAP-36-93. § 2 was formerly codified at § 3 and reenacted at § 2.

**Revision note.** Slightly reworded for purposes of statutory form.

#### **Cross References**

Bigamy, see 17 N.N.C. § 451.

#### **§ 3. Purposes**

The purposes of marriage on the Navajo Nation are to promote strong families and to preserve and strengthen family values.

## **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

### **§ 4. Methods of contracting marriage**

A marriage may be contracted within the Navajo Nation by any of the following procedures:

A. The parties may contract marriage by signing a Navajo Nation marriage license in the presence of two witnesses. The witnesses shall also sign the license to acknowledge that the license was signed by the parties. In such cases the marriage shall be valid regardless of whether or not a ceremony is held; or

B. The contracting parties may marry according to the rites of any church, in which case they, the officiating clergyman, and two witnesses shall sign in the places provided on the face of the marriage license. The authority to officiate at marriages of any person signing a Navajo Nation marriage license as a clergyman shall not be questioned; or

C. The contracting parties may be married by any judge of the Navajo Nation Courts where the parties have first signed and completed a marriage license; or

D. The contracting parties engage in a traditional Navajo wedding ceremony which shall have substantially the following features:

1. The parties to the proposed marriage shall have met and agreed to marry;

2. The parents of the man shall ask the parents of the woman for her hand in marriage;

3. The bride and bridegroom eat cornmeal mush out of a sacred basket;

4. Those assembled at the ceremony give advice for a happy marriage to the bride and groom;

5. Gifts may or may not be exchanged;

6. The person officiating or conducting the traditional wedding ceremony shall be authorized to sign the marriage license, or

E. The contracting parties establish a common-law marriage having the following features:

1. Present intention of the parties to be husband and wife;

2. Present consent between the parties to be husband and wife;

3. Actual cohabitation;

4. Actual holding out of the parties within their community to be married.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CO-54-56, October 29, 1956.

**Note.** Previously codified at § 3.

**Revision note.** Slightly reworded for purposes of statutory form.

### **Annotations**

#### **1. Common law marriage**

"As established by the Navajo Nation Code, a 'common-law' marriage is a marriage that includes four necessary elements: 1) a present intention of the parties to be husband and wife, 2) a present consent between the parties to be husband and wife, 3) actual cohabitation, and 4) an actual holding out of the parties within their community to be married." *In the Matter of the Marriage of Lilirae Smith*, No. SC-CV-45-05, slip op. at 3 (Nav. Sup. Ct. July 19, 2006).

"A 'common law' marriage under the Navajo Nation Code is different than one arising out [of] a traditional wedding ceremony. See 9 N.N.C. § 3(D), (E) [Now 9 N.N.C. § 4(D), (E)]. A 'common law' marriage is defined as a marriage, other than through the signing of a marriage license before witnesses or the performing of a church, civil, or Navajo traditional ceremony, that includes four necessary elements: 1) a present intention of the parties to be husband and wife, 2) a present consent between the parties to be husband and wife, and 3) actual cohabitation, and 4) an actual holding out of the parties within their community to be married. 9 N.N.C. § 3(E) [Now 9 N.N.C. § 4(E)]." *Begay v. Chief*, No. SC-CV-08-03, slip op. at 2 (Nav. Sup. Ct. May 18, 2005).

"There cannot be a marriage without a voluntary agreement or consent between the parties to be married. And a husband cannot be a mere boyfriend. Ms. Medina, defendant's alleged spouse, has testified to her belief that the defendant is her boyfriend, therefore the mutual present consent to be husband and wife is lacking." *Navajo Nation v. Murphy*, 6 Nav. R. 10, 13 (Nav. Sup. Ct. 1988).

#### **2. Evidence of marriage**

"The parties must carry out their agreement to be husband and wife by actual cohabitation. In other words, they must openly live together in the same place as husband and wife." *Navajo Nation v. Murphy*, 6 Nav. R. 10, 13 (Nav. Sup. Ct.

1988).

## **§ 5. Requirements generally**

In order to contract a Navajo Nation marriage, the following requirements must be fulfilled:

A. Both parties must be unmarried. If either party has been previously married, the marriage must have been dissolved by death of the spouse or by a valid decree of divorce.

B. Both parties must be at least 18 years of age.

C. In cases where the female is pregnant, the Courts of the Navajo Nation may authorize the marriage of minors with consent of the parents or legal guardian of the minors.

D. Parties who are Navajo Nation members, or who are eligible for enrollment, may not be of the same maternal clan or biological paternal clan. The provisions of this Subsection shall not affect the validity of any marriages legally contracted and validated under prior law.

E. Parties may not be related within the third degree of affinity. The provisions of this Subsection shall not affect the validity of any marriage legally contracted and validated under prior law.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CO-54-56, October 29, 1956.

**Note.** Previously codified at § 4.

### **Annotations**

#### **1. Intention to be married**

"There cannot be a marriage without a voluntary agreement or consent between the parties to be married. And a husband cannot be a mere boyfriend. Ms. Medina, defendant's alleged spouse, has testified to her belief that the defendant is her boyfriend, therefore the mutual present consent to be husband and wife is lacking." *Navajo Nation v. Murphy*, 6 Nav. R. 10, 13 (Nav. Sup. Ct. 1988).

#### **2. Jurisdiction**

"[R]equires a jurisdictional foundation in the judicial district where the cause of action is held." *In the Matter of Validation of Marriage of: Whitehorse and Bekis*, No. SC-CR-30-00, slip op. at 2, fn 1, (Nav. Sup. Ct.

March 17, 2003).

### **3. Necessity of divorce**

"Section 4(A) [Now 9 N.N.C. § 5(A)] states that to contract a marriage within the Navajo Nation, both parties must be unmarried. 9 N.N.C. § 4(A) (1995). When, as here, either party has been previously married, that Section requires that 'the marriage must have been dissolved by ... a valid decree of divorce.' " *Begay v. Chief*, No. SC-CV-08-03, slip op. at 4 (Nav. Sup. Ct. May 18, 2005).

"Absent any reference to other rules of statutory interpretation, we take our discussion in *Slowman* to be a plain language analysis. However, even assuming *Slowman* is not a plain language case, and therefore not binding, Section 407 is directly on point, and states clearly that parties who were married through a traditional ceremony must receive a court decree for any alleged divorce to be recognized. Nothing in § 4(A) [Now 9 N.N.C. § 5(A)] contradicts this, the only difference being that the word 'court' does not appear before 'decree.' The absence of 'court', without more, does not make the word 'decree' unclear. When read together, the Council clearly intended that divorces must have a court decree to be valid." *Begay v. Chief*, No. SC-CV-08-03, slip op. at 6 (Nav. Sup. Ct. May 18, 2005).

### **4. Common law marriage**

"The court erred in rejecting the common-law marriage due to the alleged violation of traditional law. As 'common-law' marriage exists only by statute, the elements to fulfill and the prohibitions that may invalidate a common-law marriage are defined exclusively by statute. The Code includes several reasons for rejecting a marriage, including prohibitions deriving from traditional law, such as being the same clan." *In the Matter of the Marriage of Lilirae Smith*, No. SC-CV-45-05, slip op. at 4-5 (Nav. Sup. Ct. July 19, 2006).

### **§ 6. Marriage licenses--Issuance**

A. The Navajo Office of Vital Records shall issue Navajo Nation marriage licenses and shall keep a record of such. Licenses are not required in order to establish a marriage under the provisions of this part.

B. Before issuing any marriage license, the Navajo Office of Vital Records shall ascertain by questioning the applicants, by requiring them to fill out a form, that they meet all the requirements of 9 N.N.C. § 5.

C. Any person authorized to issue Navajo Nation marriage licenses may issue such licenses to qualified applicants regardless of their places of residence.

D. A fee of fifteen dollars (\$15.00) shall be paid upon the issuance of a license.

E. No license shall be issued by the Navajo Office of Vital Records until three days after the parties first apply for a license and only after the parties submit the results of a blood test.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CO-54-56, October 29, 1956.

**Note.** Previously codified at § 5.

**§ 7. Form**

The form of Navajo Nation marriage licenses shall be substantially as follows:

NAVAJO NATION

MARRIAGE LICENSE

Authority is hereby given for the marriage of the following named persons:

<COL>Man<COL> <COL>Woman

<COL>\_\_\_\_\_ <COL>Name<COL>\_\_\_\_\_

<COL>\_\_\_\_\_ <COL>Census Number<COL>\_\_\_\_\_

<COL>\_\_\_\_\_ <COL>Residence<COL>\_\_\_\_\_

<COL>\_\_\_\_\_ <COL>Age<COL>\_\_\_\_\_

<COL>\_\_\_\_\_ <COL>Mother's Clan<COL>\_\_\_\_\_

<COL>\_\_\_\_\_ <COL>Father's Clan<COL>\_\_\_\_\_

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_

\_\_\_\_\_

Title

MARRIAGE CERTIFICATE

I, the man named above, hereby take the woman named above for my lawful wife; and I, the woman named above, hereby take the man named above for my lawful husband.

I hereby certify that the man and woman named above were married this day in a ceremony at which I officiated. (This Paragraph may be crossed out if the

parties are not married before a clergyman, medicineman, or traditionalist.)

IN WITNESS WHEREOF, we have hereunto set our hands this \_\_\_ day of \_\_\_\_\_  
in the presence of the witnesses whose names appear below.

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL>Witness<COL>Contracting party

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL>Address of Witness<COL> \_\_\_\_\_

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL>Witness<COL>Contracting party

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL>Address of Witness<COL> \_\_\_\_\_

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> <COL> \_\_\_\_\_

<COL> <COL>Clergyman/Medicineman

<COL> <COL>Traditionalist

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> <COL> \_\_\_\_\_

<COL> <COL>Address of Clergyman

<COL> <COL>Medicineman/Traditionalist

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

RETURNED AND FILED FOR RECORD this \_\_\_ day of \_\_\_\_\_, and recorded in  
Book \_\_\_\_\_ of Marriage Licenses and Certificates on page \_\_\_, Number  
\_\_\_\_\_.

<COL> \_\_\_\_\_ <COL> \_\_\_\_\_

<COL> <COL> \_\_\_\_\_

<COL> <COL>Navajo Agency Census Clerk

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CO-54-56, October 29, 1956.

CJ-59-57, July 29, 1957, validated marriages which might have been invalid because the wrong form of license was returned to the Navajo Agency Census Office between January 1, 1957, and January 1, 1958, inclusive.

**Note.** Previously codified at § 6.

### **§ 8. Return**

A. Persons obtaining a Navajo Nation marriage license must return the same to the Navajo Office of Vital Records within 30 days, whether or not they go through with the contemplated marriage.

B. Failure to return the license shall not affect the validity of any marriage.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993. CJA-1-59, January 6, 1959, adopted the Law and Order regulations of the Department of the Interior contained in 25 CFR, Part 11.

CO-54-56, October 29, 1956.

**Note.** Previously codified at § 7.

### **§ 9. Validation of marriage**

All purported marriages contracted within the territorial jurisdiction of the Navajo Nation, wherein the parties were or are recognized as man and wife in their community, may be validated and recognized as valid marriages from the date of their inception. The Family Courts of the Navajo Nation shall have subject matter jurisdiction pursuant to this Section to make a judicial determination that a marriage meets the requirements of §§ 4 and 5 for contracting of a marriage, and to cure any defect in a ceremony which does not exactly conform to the requirements for a ceremony set forth in § 4. The Peacemaker Courts may also make this determination upon referral from the Family Court. Marriages need not be solemnized by church, state, or Navajo custom ceremony to be recognized as valid under § 4(D) of this part.

## History

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CF-2-54, February 11, 1954.

**Tribal Council Res.** 1922-1951 Res. p. 84, July 18, 1944.

**Note.** Previously codified at § 8.

**Revision note.** Slightly reworded for purposes of statutory form.

## Cross References

Validation of marriages where wrong form of license returned, see note under § 7 of this Title.

## Annotations

### 1. Intent

The intent of this Section seems to be to cure defects in form and procedure in otherwise lawful marriages. *In re Daw*, 1 Nav. R. 1 (1969).

### 2. Common law marriages

Marriages in which the partners were recognized as being married prior to February 1, 1954 are clearly validated but the Tribal Council did not specifically outlaw common law marriages after that date. *In re Daw*, 1 Nav. R. 1 (1969).

## § 10. Procedure for judgment of validity

A. Any person, claiming that his or her marriage may be validated pursuant to 9 N.N.C. § 9, may file a petition in the Family Court or Peacemaker Court of the Navajo Nation for a judgment declaring that such marriage be validated. If the petitioner's spouse in such alleged marriage is known to the petitioner to be living, such spouse must also sign the petition, or be named as defendant and notified of the suit. If the petitioner's spouse in such alleged marriage is not known to the petitioner to be living, the petitioner must prove to the satisfaction of the court that such spouse is dead or has been absent for five successive years, without being known to the petitioner within that time to be living, or the petition shall be dismissed.

B. If the petitioner, having complied with Subsection (A) of this Section, proves to the satisfaction of the court that he or she and his or her alleged spouse were recognized as man and wife in their community, the court shall issue a judgment that such petitioner and spouse were validly married. if feasible, the Court shall also ascertain the date of inception of such marriage and shall recite such date in the judgment.

C. Any judgment of validity of marriage issued by a Court of the Navajo Nation in accordance with Subsection (B) of this Section may be forwarded to the Navajo Office of Vital Records which may then cause the marriage to be recorded and a certificate of marriage to be issued to the petitioner.

D. In cases where a child whose parents are deceased contends that such parents' marriage may be validated by 9 N.N.C. § 9, such child may file a petition in the Family Court or Peacemaker Court of the Navajo Nation for a judgment that such marriage be so validated. If such petitioner proves to the satisfaction of the court that his parents are deceased and that they were recognized as man and wife in their community, the court shall issue a judgment that such parents were validly married on such date. If feasible, the court shall also ascertain the date of inception of such marriage and shall recite such date in the judgment. Such judgment may be forwarded to the Navajo Office of Vital Records for recording and issuance of a certificate of marriage.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

CF-14-57, February 4, 1957.

**Note.** Previously codified at § 9.

### **Annotations**

#### **1. Construction and application**

"The statute only states that the petition must prove 'to the satisfaction of the court that he or she and his or her alleged spouse were recognized as man and wife in their community.' 9 N.N.C. § 10(B) (2005). The statute is then silent on what standard should apply, requiring this Court to establish a standard." *In the Matter of the Marriage of Lilirae Smith*, No. SC-CV-45-05, slip op. at 6 (Nav. Sup. Ct. July 19, 2006).

#### **2. Common law marriage**

"As common-law marriage is not recognized under Navajo tradition, for such marriages to be validated under the statute, the Court concludes that each statutory element must be supported by substantial evidence." *In the Matter of the Marriage of Lilirae Smith*, No. SC-CV-45-05, slip op. at 7 (Nav. Sup. Ct. July 19, 2006).

### **§ 11. Governmental determinations**

All marriages recorded on any official document of the Navajo Office of Vital Records or any Navajo Nation Tribal Enrollment Office shall be deemed to be valid marriages under Navajo law, whether these marriages are contracted by Navajo custom, or pursuant to a Navajo Nation or state license. These

documents shall be deemed to constitute a governmental determination of the Navajo Nation as to the existence and validity of the marriage noted in the record. This Section shall apply retroactively and prospectively to all marriages recorded in official documents of the Navajo Nation.

### **History**

CJN-34-05, June 3, 2005, Override of Presidential Veto, CAP-29-05, April 22, 2005, Enacting the Diné Marriage Act of 2005; Amending Title 9 of the Navajo Nation Code.

CAP-36-93, April 23, 1993.

**Note.** Previously codified at § 10.

## **Chapter 3. Husband and Wife**

### **United States Code**

Evidence of marriage of white men and Indian women, see 25 U.S.C. § 183.

Rights of Indian women marrying white men; Tribal property, see 25 U.S.C. § 182.

Rights of white men marrying Indian women; Tribal property, see 25 U.S.C. § 181.

### **§ 201. Antenuptial agreements**

A. Parties intending to marry may enter into agreements not contrary to good morals or law. They shall not enter into an agreement or make a renunciation the object of which is to alter the law of descent of property, either with respect to themselves or inheritance by their children or posterity which either may have by another person, or with respect to their common children.

B. A minor capable of contracting matrimony may enter into an agreement authorized by Subsection (A) of this Section with the written consent of both parents if both are living, and if not, with the consent of the survivor. If both parents are dead, the minor may enter such agreements with the written consent of his/her guardian.

C. A matrimonial agreement must be acknowledged before an officer authorized to acknowledge deeds.

D. No matrimonial agreement shall be altered after the solemnization of the marriage.

### **History**

CJ-42-56, July 18, 1956.

**Revision note.** In Subsection (A) "good morals of law" was changed to "good

morals or law" for purpose of clarity (1978).

#### **§ 202. Separate property-Definitions**

A. All property, real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is his separate property.

B. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is her separate property.

C. The earnings and accumulations of the wife and the minor children in her custody while she lives separate and apart from her husband are the separate property of the wife.

#### **History**

CJ-42-56, July 18, 1956.

#### **§ 203. Liability for debts**

The separate property of the husband or wife is not liable for the debts of the other contracted before marriage.

#### **History**

CJ-42-56, July 18, 1956.

#### **§ 204. Married women**

Married women have the sole and exclusive control of their separate property. The separate property of a married woman is not liable for the debts or obligations of the husband, and it may be sold, mortgaged, conveyed or bequeathed by the woman who owns it as if she were not married.

#### **History**

CJ-42-56, July 18, 1956.

#### **§ 205. Community property-Definition**

All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife.

#### **History**

CJ-42-56, July 18, 1956.

#### **Annotations**

## **1. Construction and application**

"We do not believe that Section 205 plays no role in the division of marital property pursuant to Section 404. We believe that Section 205 means that the trial court shall distribute the property based on a preference for equal division of community property." *Begay v. Begay*, 6 Nav. R. 160, 162 (Nav. Sup. Ct. 1989).

"Property acquired during the marriage is presumed to be community property unless shown to be separate. [... ] Inherited property is separate, even if acquired during the marriage. [... ] Separate property comingled with community property is still separate if it can be clearly traced and identified." *In the Matter of the Estate of Benally*, 5 Nav. R. 174, 177 (Nav. Sup. Ct. 1987).

## **2. Community property, generally**

"The Begays' [Mutual Help Housing] 'lease purchase' agreement is community property, and its disposition is not governed by the agreement; therefore, it is subject to Navajo Nation laws controlling disposition of community property." *Begay v. Begay*, 6 Nav. R. 160, 161 (Nav. Sup. Ct. 1989).

### **§ 206. Capacity of persons under age of majority**

A. Lawfully married men and women 18 years of age or over shall not be under legal disability by reason of their minority with regard to any transaction affecting their real or personal community property, and they shall as to such property possess all the rights and liabilities in estates and property usually attached to and assumed by persons of the age of 21 years and over.

B. A dissolution of marriage shall not deprive either party who is 18 years of age or over at the time of dissolution of authority to enter into transactions affecting the community property acquired during coverture and which may be vested in either or both of them as the result of dissolution of the marriage.

#### **History**

CJ-42-56, July 18, 1956.

### **§ 207. Personal property; disposition**

During coverture, community personal property may be disposed of by the husband only.

#### **History**

CJ-42-56, July 18, 1956.

**Revision note.** Word "community" was inserted before the word "personal" for the purpose of clarity (1978).

**§ 208. Liability for community debts**

The community property of the husband and wife is liable for the community debts contracted by the husband during marriage unless specially excepted by law.

**History**

CJ-42-56, July 18, 1956.

**§ 209. Legal capacity of married women—Generally**

Married women of the age of 21 years and upwards have the same legal rights and are subject to the same legal liabilities as men of the age of 21 years and upwards except the right to make contracts binding the common property of the husband and wife.

**History**

CJ-42-56, July 18, 1956.

**§ 210. Necessaries—Power of wife to contract debts**

The wife may contract debts for necessaries for herself and her children upon the credit of her husband.

**History**

CJ-42-56, July 18, 1956.

**§ 211. Action to collect debt; order of execution**

In an action to collect a debt for necessaries for the wife and her children, the wife and her husband shall be sued jointly and the court shall decree that execution be levied first upon the common property, second upon the separate property of the husband and third upon the separate property of the wife.

**History**

CJ-42-56, July 18, 1956.

**Cross References**

Execution generally, see 7 N.N.C. § 705.

**§ 212. Marital rights in property acquired after moving into Navajo Indian Country**

Marital rights in property acquired in Navajo Indian Country during marriage by Navajo Indians shall be controlled by the laws of the Navajo Nation.

**History**

CJ-42-56, July 18, 1956.

## Chapter 5. Divorce

### History

**Revision note.** Jurisdiction in Domestic relation matters now rests with the "Family Courts" pursuant to CAP-36-93, April 23, 1993, and CAU-46-89, August 16, 1989. Within this Chapter the necessary additions have been made for clarity (1994). See 7 N.N.C. § 252.

### § 401. Grounds for divorce

The Family Courts of the Navajo Nation are authorized to dissolve all marriages, whether consummated by Tribal custom, church, or state ceremony upon any of the following grounds:

A. That the party in whose behalf it is sought to have the divorce granted was under the legal age for marriage, unless after attaining the legal age such party for any time freely cohabited with the other as husband and wife.

B. That the former husband or wife of either party under a Tribal custom or other ceremony was living and the marriage with such former husband or wife was not properly dissolved.

C. Unlawful voluntary sexual intercourse of a married person with one of the opposite sex.

D. When either party has willfully abandoned the other, or caused the complaining party to leave against his or her wishes, for the term of six months preceding commencement of the action.

E. When one of the parties uses intoxicating drinks, or narcotics habitually to the mental anguish of the other.

F. When one party inflicts grievous bodily injury or grievous mental suffering upon the other.

G. Neglect on the part of the husband to support his family according to his means, station in life, and ability.

H. Inability to live together in agreement and harmony.

I. In favor of the husband when the wife was pregnant at the time of marriage by other than her husband, husband having been ignorant thereof, provided action is commenced within a reasonable time after the fact is known to the husband.

J. Voluntary separation of husband and wife for a period of one year or more.

## History

**Tribal Council Res.** 1922-1951 Res. p. 82, July 17, 1944.

**Revision note.** Slightly reworded for purposes of statutory form. Words "under authority contained in Section 161.28, Title 25, CFR" were omitted as unnecessary (1978).

## Cross References

Jurisdiction of Family Courts of the Navajo Nation in divorce cases, see 7 N.N.C. § 252.

## Annotations

### 1. Jurisdiction

"Under the foregoing the Court holds that dissolution of marriage is an action affecting the status of marriage and that the Navajo Tribal Courts have jurisdiction to grant a dissolution of marriage when one of the spouses is domiciled within the territorial jurisdiction of the Navajo Nation if the complaining party has met the residency requirements even though the other spouse is domiciled outside the Navajo Nation." *Yazzie v. Yazzie*, 5 Nav. R. 66, 70 (Nav. Sup. Ct. 1985).

### § 402. Residence

The complaining party shall have resided on the Navajo Nation or on any lands allotted, Tribally purchased, public domain, land leased by the Navajo Service, or otherwise set aside for administration by the Bureau of Indian Affairs for the benefit of the Navajo Nation, at least 90 days prior to the commencing of any action for the dissolution of any marriage before the Courts of the Navajo Nation will entertain the action.

## History

**Tribal Council Res.** 1922-1951 Res. p. 82, July 17, 1944.

**Revision note.** Slightly reworded for purposes of statutory form.

## Annotations

### 1. Residency requirement

"Under the foregoing the Court holds that dissolution of marriage is an action affecting the status of marriage and that the Navajo Tribal Courts have jurisdiction to grant a dissolution of marriage when one of the spouses is domiciled within the territorial jurisdiction of the Navajo Nation if the complaining party has met the residency requirements even though the other spouse is domiciled outside the Navajo Nation." *Yazzie v. Yazzie*, 5 Nav. R. 66, 70 (Nav. Sup. Ct. 1985).

### 2. Jurisdiction over counterclaim

"The Family Court incorrectly dismissed the counterclaim, as, assuming Respondent fulfilled the residency requirement, there was independent jurisdiction over the counterclaim. A counterclaim is a separate claim from the original petition, though plead in response to the petition. The Court must have jurisdiction over both the original petition and the counterclaim; there is no jurisdiction over the counterclaim merely because it is plead in response to the petition." *Begay v. Begay*, No. SC-CV-65-05, slip op. at 3 (Nav. Sup. Ct. May 11, 2006).

#### **§ 403. Filing fee**

A filing fee of ten dollars (\$10.00) must be paid to the Family Courts of the Navajo Nation before such Courts will entertain an action for the dissolution of any marriage.

#### **History**

**Tribal Council Res.** 1922-1951 Res. p. 82, July 17, 1944.

#### **§ 404. Settlement of property rights; custody and care of children**

Each divorce decree shall provide for a fair and just settlement of property rights between the parties, and also for the custody and proper care of the minor children.

#### **History**

CJ-3-40, June 4, 1940.

#### **Cross References**

Navajo Nation Child Support Enforcement Act, see 9 N.N.C. § 1701 *et seq.*

#### **Annotations**

##### **1. Construction with other law**

Since nothing is specifically stated in the Navajo Nation Code as to how community property is to be divided upon divorce, 7 N.N.C. § 204 of the Navajo Tribal Code is controlling in the matter. *Johnson v. Johnson* 3 Nav. R. 5 (1980).

##### **2. Particular cases**

Under Navajo tradition, a land use permit given from a father to a son cannot be characterized as his separate property, nor as community property since land use permits belong to the entire family and are used for the benefit of the family. The District Court therefore properly applied Navajo tradition and custom in awarding land use permits, grazing permits and all other property connected with a farm to wife in divorce proceedings; the award and distribution of the property rights between the parties was a fair and just settlement pursuant to the Navajo Tribal Code. *Johnson v. Johnson* 3 Nav. R. 5 (1980).

### **3. Purpose**

"Through the implementation of this statute, it is now established law that it is the moral duty and legal obligation of a parent to provide and care for the minor children and the court's duty is to ensure that the obligation is enforced." *Watson v. Watson*, No. SC-CV-40-07, slip op. at 4 (Nav. Sup. Ct. December 14, 2009).

"The purpose of equitable distribution statutes such as Section 404 is to award property to spouses such as to reflect their contributions of material and labor to the marriage and to put them on an equal footing, not to penalize or reward them for their acts during the marriage." *Begay v. Begay*, 6 Nav. R. 160, 164 (Nav. Sup. Ct. 1989).

"Section 404 does not mandate equal division of community property. It grants the trial court discretion to make unequal divisions of community property." *Begay v. Begay*, 6 Nav. R. 160, 162 (Nav. Sup. Ct. 1989).

"In most instances, community property is to be divided equally. [... ] Where property is divided pursuant to a divorce, however, the Tribal Code directs the trial court to 'provide for a fair and just settlement of the property rights between the parties.' " *Begay v. Begay*, 6 Nav. R. 160, 162 (Nav. Sup. Ct. 1989).

"The Court agrees that an equal division of marital property is not mandated. This does not mean, however, that there is not be a balancing of all the circumstances of the parties. In fact, this balancing of circumstances is precisely why an equal division of property is not required in most jurisdictions. Under the flexibility thus allowed a court may, for example, offset one party's lower earning capacity by a larger share of the property. The desired end result is for the parties to start divorced life on some sort of equitable basis." *Livingston v. Livingston*, 5 Nav. R. 35, 36 (Nav. Ct. App. 1985).

### **4. Community property**

"The Begays' [Mutual Help Housing] 'lease purchase' agreement is community property, and its disposition is not governed by the agreement; therefore, it is subject to Navajo Nation laws controlling disposition of community property." *Begay v. Begay*, 6 Nav. R. 160, 161 (Nav. Sup. Ct. 1989).

### **5. Child support**

"Back child support obligations may be satisfied as part of the process of making a 'fair and just settlement of property rights' pursuant to 9 N.T.C. § 404." *Alonzo v. Martine*, 6 Nav. R. 395, 398 (Nav. Sup. Ct. 1991).

### **6. Intervention by children**

"There is no question that Navajo common law grants a child ... a right to be heard, considering his maturity, in a case involving that child's custody." *In the Matter of the Custody of T.M.; Davis v. Means*, No. SC-CV-58-98, slip op. at 8 (Nav. Sup. Ct. March 5, 2001).

"[I]n our courts, under proper circumstances a child may intervene in an action between his or her parents where that child's rights or interests are affected. Whether intervention is proper is within the sound discretion of the trial court and that determination should be made after examining the child's best interests and whether the child's interests are adequately represented by the existing parties." *In the Matter of the Custody of T.M.; Davis v. Means*, No. SC-CV-58-98, slip op. at 7 (Nav. Sup. Ct. March 5, 2001).

#### **7. Guardian ad litem**

"Another option is to appoint a spokesperson for the Appellant. This is more in line with Navajo common law where an adult usually makes the child's wishes known." *In the Matter of the Custody of T.M.; Davis v. Means*, No. SC-CV-58-98, slip op. at 9 (Nav. Sup. Ct. March 5, 2001).

"Just like many jurisdictions, the role and duties of our guardians ad litem are undefined. We want a guardian who will do a thorough review of the case, including witness interviews and a complete examination of all documentation on the child, and then give an independent, accurate and reliable report to the court as a commentator, but not an advocate. We are leery of situations where a court gives too much weight to a guardian's report, without the court making its own independent judgment of the child's best interests." *In the Matter of the Custody of T.M.; Davis v. Means*, No. SC-CV-58-98, slip op. at 9 (Nav. Sup. Ct. March 5, 2001).

#### **§ 405. Certificate of divorce; issuance**

A certificate of divorce shall be issued by the Family Courts of the Navajo Nation when a divorce is granted.

#### **History**

CJ-3-40, June 4, 1940.

#### **Annotations**

##### **1. Valid divorce—court decree necessary**

"The discussion herein does not overrule this Court's long established precedent that a court decree is necessary for a divorce to be valid." *Hall v. Watson*, No. SC-CV-52-07, slip op. at 6 (Nav. Sup. Ct. Amending February 24, 2009 Opinion April 22, 2009).

##### **2. Interlocutory divorce decree**

"The record shows that at the time the Interlocutory Divorce Decree was issued, the only matter remaining between the parties was the distribution of their community property and debt. This Court holds that the divorce between Ms. Hall and Mr. Watson became effective on July 5, 2005 as the case was decided on the merits, the substantial rights of the party in regards to their marriage was determined and there were no further proceedings remaining in the Family Court on the question of the marriage. The Interlocutory Divorce Decree was a *final* order for the purpose of terminating the marriage between the parties; this order was affirmed by a second order in which the issue of the distribution of

property was dismissed so that the matter of the marital property and debt could proceed in probate." *Hall v. Watson*, No. SC-CV-52-07, slip op. at 5-6 (Nav. Sup. Ct. Amending February 24, 2009 Opinion April 22, 2009).

#### **§ 406. Record of divorces**

All divorces granted by the Family Courts of the Navajo Nation must be recorded in the agency office.

#### **History**

CJ-3-40, June 4, 1940.

#### **§ 407. Remarriage**

No person, married by Tribal custom, who claims to have been divorced shall be free to remarry until a certificate of divorce has been issued by the Courts of the Navajo Nation.

#### **History**

CJ-3-40, June 4, 1940.

#### **Annotations**

##### **1. Necessity of divorce**

"The discussion herein does not overrule this Court's long established precedent that a court decree is necessary for a divorce to be valid." *Hall v. Watson*, No. SC-CV-52-07, slip op. at 6 (Nav. Sup. Ct. Amending February 24, 2009 Opinion April 22, 2009).

"Section 407, appearing in a separate chapter specifically covering divorce, states that '[n]o person, married by Tribal custom, who claims to have been divorced shall be free to remarry until a certificate of divorce has been issued by the Courts of the Navajo Nation.' 9 N.N.C. § 407 (1995) (emphasis added)." *Begay v. Chief*, No. SC-CV-08-03, slip op. at 4 (Nav. Sup. Ct. May 18, 2005).

"The language of Section 407 is not ambiguous, as the clear meaning of the statute means that a person must receive a court decree of divorce from a traditional marriage before he or she may marry within the Navajo Nation." *Begay v. Chief*, No. SC-CV-08-03, slip op. at 5 (Nav. Sup. Ct. May 18, 2005).

"Absent any reference to other rules of statutory interpretation, we take our discussion in *Slowman* to be a plain language analysis. However, even assuming *Slowman* is not a plain language case, and therefore not binding, Section 407 is directly on point, and states clearly that parties who were married through a traditional ceremony must receive a court decree for any alleged divorce to be recognized. Nothing in Section 4(A) [Now 9 N.N.C. § 5(A)] contradicts this, the only difference being that the word 'court' does not appear before 'decree'. The absence of 'court', without more, does not make the word 'decree' unclear. When read together, the Council clearly intended that divorces must have a court decree to be valid." *Begay v. Chief*, No. SC-CV-08-

03, slip op. at 6 (Nav. Sup. Ct. May 18, 2005).

## **Chapter 7. Adoption**

### **History**

**Revision note.** Jurisdiction in domestic relation matters now rests with the "Family Courts" pursuant to CAP-36-93, April 23, 1993, and CAU-46-89, August 16, 1989. Within this Chapter the necessary additions have been made for clarity (1994). See 7 N.N.C. § 252.

### **§ 601. Who may be adopted**

Any minor who is a member of the Navajo Nation and is brought in person before any Navajo Nation Court may be adopted, irrespective of place of birth or place of residence.

### **History**

CN-63-60, November 18, 1960.

**Uniformity of interpretation.** CN-63-60, § 14, provided: "This resolution shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those jurisdictions which enact it."

CF-12-57, which established a procedure for the adoption of members of the Tribe, was repealed by CN-63-60, § 15.

**Tribal Council Res.** 1922-1951 Res. p. 85, July 19, 1944, which gave the Court of Indian Offenses jurisdiction of adoption proceedings, was repealed by CF-12-57, § 15.

CN-9-39, November 21, 1939, provided procedure under which persons who were not Navajos could be adopted.

### **Cross References**

Jurisdiction of Family Courts of the Navajo Nation in adoption cases, see 7 N.N.C. § 252.

Navajo Nation policy on adoption of children, see 9 N.N.C. § 615.

### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

### **§ 602. Who may adopt**

The following persons are eligible to adopt a child:

A. A husband and wife jointly, or either the husband or wife, if the other spouse is a parent of the child to be adopted.

B. An unmarried person who is at least 21 years of age.

C. A married person at least 21 years of age who is legally separated from his or her spouse.

D. In the case of a child whose parents are not married, the child's unmarried father.

#### **History**

CN-63-60, November 18, 1960.

**Revision note.** Slightly reworded for purposes of statutory form.

#### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

#### **§ 603. Consent to adoption—Parents**

A. The adoption of a child may be ordered when there have been filed written consents to the adoption executed by the parents if living, or the surviving parent if one is dead.

B. The consents required by Subsection (A) of this Section shall be signed in the presence of the judge or clerk of the court or acknowledged before a notary public.

C. The minority of the parents shall not be a bar to the right of consent nor shall it invalidate such consent.

D. The Navajo Nation Court shall have the authority to approve adoptions without a parent's consent where:

1. The parent is dead; or

2. The court finds after a hearing that the parent has abandoned the child for more than one year or is unfit to have custody.

#### **History**

CN-63-60, November 18, 1960.

#### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

#### **Annotations**

##### **1. Consent required**

"A valid consent to an adoption is a jurisdictional requirement for an adoption ... " *In the Matter of Adoption of J.L.B.*, 6 Nav. R. 314, 316 (Nav. Sup. Ct. 1990).

#### **§ 604. Child**

The consent of the child, if 12 years of age or over, shall be required for adoption. Such consent shall be in writing and shall be signed in the presence of the judge or clerk of court or acknowledged before a notary public.

##### **History**

CN-63-60, November 18, 1960.

##### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

#### **§ 605. Withdrawal**

A consent to adoption may not be withdrawn except by permission of the court given before entry of the final judgment of adoption.

##### **History**

CN-63-60, November 18, 1960.

##### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

#### **§ 606. Petition for adoption**

A. A petition for adoption shall be substantially in the form shown in 9 N.N.C. § 607 and shall be filed with the Court in duplicate.

B. One copy of the petition shall be retained by the Court. The other shall be sent to the Agency Branch of Welfare.

C. Any written consents required by these regulations must be attached to the petition.

D. Upon filing of a petition, the Court shall order a date for hearing not more than 90 days from the date of filing of the petition.

##### **History**

CN-63-60, November 18, 1960.

##### **Annotations**

#### **1. Signature**

The petitioners themselves must actually sign the petition for adoption, not the counsel for the petitioners. *In the Matter of the Adoption of S.C.M.*, 4 Nav. R. 167 (1983).

§ 607. Form

IN THE FAMILY COURT OF THE NAVAJO  
NATION HELD AT \_\_\_\_\_

PETITION FOR ADOPTION

In the Matter of the adoption of, \_\_\_\_\_

Census No. \_\_\_\_\_ a Minor.

To the Family Court of the Navajo Nation:

This petition for the adoption of the above-named minor respectfully shows:

<COL>(1)<COL>The names and addresses of the petitioners are:

<COL> <COL>(give full name, age, and address)

<COL>(2)<COL>Check the proper statement:

<COL> <COL>(a)<COL>The petitioners are husband and wife<COL>[ ]

<COL> <COL>(b)<COL>The petitioner is married to the natural father or mother of the child<COL>[ ]

<COL> <COL>(c)<COL>The petitioner is an unmarried person or a person legally separated from his or her spouse, and is over the age of 21 years<COL>[ ]

<COL> <COL>(d)<COL>The petitioner is the unmarried natural father of the child<COL>

<COL>(3)<COL>The above-named minor was born on \_\_\_\_\_

<COL> <COL>(date of birth, if known)

<COL> <COL>and is a member of the Navajo Nation. If the child is 12 years of age or over, the child's written consent to adoption is attached hereto.

<COL>(4)<COL>The mother and father of said child give their consent to the adoption of said child by the petitioners, a copy of said consent being attached hereto, or the following facts exist which excuse consent on the part of the parent(s) to the adoption:

<COL>(5)<COL>A full description and statement of value of all the property owned or possessed by said minor child is as follows:

WHEREFORE, the petitioner(s) pray that the court set a time for hearing this matter and thereafter adjudge that the said child may be adopted by the petitioner(s).

The undersigned hereby declare that all facts represented in the above petition are true.

Date:

#### **History**

CN-63-60, November 18, 1960.

**Revision note.** Slightly reworded for purposes of statutory form.

#### **§ 608. Transfer of case**

If the judge believes the convenience of the parties and the welfare of the child would be served, he/she may order any adoption case transferred to another Family Court of the Navajo Nation.

#### **History**

CN-63-60, November 18, 1960.

#### **§ 609. Investigation**

A. Upon filing of a petition for adoption the court shall request the Agency Branch of Welfare, with the technical assistance of the state and other government branches of welfare, to make an investigation. Such investigation shall include the history of the child; appropriate inquiry to determine whether the proposed home is a suitable one for the child; and any other circumstances and conditions which may have bearing on the adoption or custody and of which the court should have knowledge.

B. The report of the investigation shall be a part of the file in the case and shall contain a definite recommendation for or against the proposed adoption stating the reasons therefor.

#### **History**

CN-63-60, November 18, 1960.

#### **Annotations**

##### **1. Failure to comply with section**

In absence of the investigation, report and recommendation required by this Section, an adoption decree cannot be upheld. *In re Adoption of Tsosie*, 1 Nav. R. 112 (Nav. Ct. App. 1977).

##### **2. Investigation**

Petitioner may not have an adoption investigation waived. *In the Matter of the Adoption of S.C.M.* 4 Nav. R. 167 (1983).

#### **§ 610. Temporary order; final judgment**

A. Upon examination of the report required in 9 N.N.C. § 609 and after hearing, the court may issue a temporary order giving the care and custody of

the child to the petitioner(s) or any suitable person or persons, pending the further order of the court; provided, that if the child is a close blood relative of one of the petitioners, or is the stepchild of a petitioner, or has been living in the home of a petitioner for more than one year preceding the date of filing the petition for adoption, the court may waive the entry of a temporary order and immediately enter a final judgment of adoption. Where a temporary order is entered, the Agency Branch of Welfare may observe the child in his foster home and report to the court within six months on any circumstances or conditions which may have a bearing on his adoption or custody.

B. Upon application by the petitioner after six months from the date of the temporary order, or upon the court's own motion at any time, the court may set a time and place for additional hearing. Notice of the time and place of the hearing shall be served on the Agency Branch of Welfare. The Agency Branch of Welfare may file with the court a written report of its findings and recommendations and certify that the required investigation has been made since the granting of the temporary order. After such hearing, the court may enter a final judgment of adoption, if satisfied that the adoption is for the best interest of the child, or may make such other order as it sees fit.

#### **History**

CN-63-60, November 18, 1960.

#### **§ 611. Effect of final judgment**

A. After the final judgment of adoption is entered, the relations of parent and child and the rights, duties, and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the adoptive parents. The status of the child as a member of the Navajo Nation shall not be affected by any adoption, and such child shall not forfeit his rights to inherit from his natural parents by descent or distribution, or otherwise.

B. After the final decree of adoption is entered, the natural parents of the adoptive child, except a natural parent who is also an adoptive parent or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for such child and have no rights over such child or to his property by descent or distribution or otherwise.

#### **History**

CN-63-60, November 18, 1960.

#### **Cross References**

Membership in Navajo Nation by adoption as not possible, see 1 N.N.C. § 702.

#### **§ 612. Registration of final judgment; amendment of records; inspection**

A. Upon entry of the final judgment of adoption the court shall forward a copy thereof to the Agency Census Office for its records.

B. The order of the court shall direct the Census Office at the Navajo Agency and all Agency Branch Offices located at the subagencies to so amend family listings, and other records, to properly reflect the final judgment of adoption entered by the Navajo Nation Court. These amended records which contain the names and addresses or other information concerning the adopted child and the adopting parents shall cease to be available for public inspection. Only those persons obtaining permission from the Assistant Superintendent (Community Services) of the Navajo Agency or his authorized representative shall be given access to such records. No such permission shall be given unless the best interests of the child will be served thereby. The intent of this Subsection is that any information concerning the whereabouts of the adopting parents and adopted child will not be available to the natural parents or parent or other unauthorized persons after final judgment of adoption is decreed by the Navajo Nation Court.

#### **History**

CN-63-60, November 18, 1960.

#### **Cross References**

Confidential nature of proceedings and record generally, see 9 N.N.C. § 613.

#### **§ 613. Confidential nature of proceedings and record**

Unless the court shall otherwise order, all hearings held in proceedings under this Chapter shall be confidential and shall be held in closed court without admittance of any person other than interested parties and witnesses. Further, all papers, records or files pertaining to proceedings under this Chapter, except the final judgment of adoption, kept by the court or by the Agency Branch of Welfare shall be confidential and withheld from inspection except upon order of the court for good cause shown.

#### **History**

CN-63-60, November 18, 1960.

#### **§ 614. Adoption of adults**

A. An adult person may be adopted by any other adult person with the consent of the person to be adopted or his guardian, and with the consent of the spouse, if any, of a sole adoptive parent, filed in writing with the court. The provisions of 9 N.N.C. §§ 601-610 shall not apply to the adoption of an adult person.

B. After a hearing and after such investigation as the court deems advisable, if the court finds that it is to the best interests of the persons involved, a decree of adoption may be entered which shall have the legal consequences stated in 9 N.N.C. § 611.

#### **History**

CN-63-60, November 18, 1960.

## **§ 615. Policy on adoption of children**

A. The Navajo Nation Council favors the formal adoption of Navajo children in accordance with the provisions of this Chapter in an cases where the parents of such children are dead or where such children are being regularly and continuously neglected by their parents, or where the parents have abandoned such children. The Navajo Nation Council looks with disfavor upon informal arrangements for the custody of such children except for temporary periods pending their formal adoption.

B. In the cases referred to in Subsection A of this Section, the Navajo Nation neither favors nor disfavors adoption of Navajo children by persons who are not members of the Navajo Nation, but states as its policy that each case shall be considered individually on its own merits by the Family Court of the Navajo Nation.

C. The Navajo Nation looks with disfavor upon the adoption of Navajo children by nonmembers of the Nation in cases where the parents of the children are living, in good health, and have not abandoned or continuously neglected said children.

### **History**

CN-64-60, November 18, 1960.

### **United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

## **Chapter 9. Guardians**

### **§ 801. Petition for appointment**

Any person may petition to the Courts of the Navajo Nation for the appointment of a guardian of the person or estate of any minor or insane Navajo or other Navajo mentally incompetent to manage his property.

### **History**

**Tribal Council Res.** 1922-1951 Res. p. 87, December 19, 1945.

### **§ 802. Investigation of petition**

The petition for the appointment of a guardian shall be referred by the Court to a Navajo Service social worker for investigation, study and report back to the Court.

### **History**

**Tribal Council Res.** 1922-1951 Res. p. 87, December 19, 1945.

### **§ 803. Appointment**

If, after a hearing upon a petition for the appointment of a guardian, it appears to the Court that the person is incapable of taking care of himself and managing his property, the Court shall appoint a guardian of his person and estate, a copy of which shall be filed at the Agency.

#### **History**

**Tribal Council Res.** 1922-1951 Res. p. 87, December 19, 1945.

#### **§ 804. Responsibility**

The guardian appointed by the Court has the care and custody of the person of his ward, and the care and management of his estate until such guardian is legally discharged.

#### **History**

**Tribal Council Res.** 1922-1951 Res. p. 87, December 19, 1945.

#### **§ 805. Faithful execution of duties; bond**

The guardian must meet all requirements as may be described by the court for the faithful execution of his duties, including furnishing bond, if deemed necessary by the court.

#### **History**

**Tribal Council Res.** 1922-1951 Res. p. 87, December 19, 1945.

### **Chapter 11. Navajo Nation Children's Code**

#### **History**

CF-14-85, February 8, 1985.

**Revision note.** References throughout this Code to "Children's Court" changed to "Family Court" pursuant to CAU-46-89, August 16, 1989.

#### **Subchapter 1. General Provisions**

#### **§ 1001. Purpose**

The Children's Code shall be liberally construed and interpreted to effectuate the following legislative purposes:

A. To preserve and restore the unity of the family whenever possible to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code;

B. Consistent with the protection of the Navajo community, to prevent children from committing delinquent acts and to offer a program of supervision, care and rehabilitation;

C. To achieve the purposes of the Children's Code in a family environment whenever possible, separating the child from parents and extended family only when necessary for the child's welfare or in the interest of public safety;

D. To separate clearly in judicial and other processes affecting children under the Children's Code the dependent child, the child in need of supervision and the delinquent child, and to provide appropriate options for treatment and rehabilitation of these children;

E. To provide a judicial division separate from the District Courts of the Navajo Nation with procedures through which the provisions of the Children's Code may be executed and enforced, in which the parties are assured of a fair hearing, and their constitutional and other legal rights recognized and enforced; and

F. To provide a forum in which Navajo children charged to be delinquent or in need of supervision in other jurisdictions may be referred for adjudication and disposition, or for disposition alone.

### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **Annotations**

#### **1. Juvenile custody**

"We hold that the Navajo Children's Courts must carefully follow the procedural guidelines as set forth in the Navajo Children's Code. Specifically, that the detention of juveniles must be in a facility designated and certified by the Children's Court, that a detained juvenile has the right to a detention hearing as set forth in the Children's Code, and that the child and parent or guardian must have all their rights explained to them at all phases of the juvenile proceeding, especially the juvenile's right against self-incrimination. In addition, we hold that a juvenile in a delinquency proceeding has the right to representation by an attorney, that Navajo customary due process applies in juvenile proceedings to the same extent as it is applied in adult proceedings, and that customary Navajo practice demands a parent or guardian be notified of and be allowed to speak for the child in juvenile proceedings or to assist the attorney in preparing the child's case." *In the Matter of A.W.*, 6 Nav. R. 38, 43-44 (Nav. Sup. Ct. 1988).

"Juveniles who are taken into custody experience a gamut of emotions from fear to embarrassment to anger. They have not developed the maturity needed to deal with these emotions and all too often suicide is the result. We, as a Nation, must fulfill our duty to protect our children; therefore, this Court will carefully scrutinize any questions regarding the detention of a juvenile." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

"The protective custody of juveniles must be humane and must provide for 'the care, protection and wholesome mental and physical development' of those children who are detained." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup.

Ct. 1988).

## **2. Non Indian children**

"The term 'child' is defined as 'an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen (18) years.' 9 N.N.C. § 1001(F) (1995) (emphasis added). Under these provisions, the Children's Code does not prohibit jurisdiction over non-Indian children, but such jurisdiction is co-extensive with the Nation's general authority, presumably as established by the Treaty and general principles of federal Indian law discussed above. Therefore, we hold that under Navajo statutory law, family courts general have delinquency jurisdiction over non-Indian children." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

### **§ 1002. Definitions**

The laws under this Subchapter shall be referred to as the Navajo Nation Children's Code, unless the context otherwise requires:

A. "Abandoned" means the failure of the parent to provide reasonable support and maintain regular contact with the child, including the provision of adequate supervision. Failure to maintain a normal parental relationship with the child without just cause for a period of six months shall constitute prima facie evidence of abandonment. Custody with extended family members or voluntary consent to placement does not constitute abandonment.

B. "Abuse" means the infliction of physical, emotional or mental injury on a child and shall include failing to maintain reasonable care and treatment or exploiting or overworking a child to such an extent that his or her health, morals, or emotional well-being is endangered.

C. "Adjudicatory Hearing" means a proceeding in the Family Court to determine whether a child has committed a specific delinquent act as set forth in a petition.

D. "Adult" means a person 18 years of age or older, or a person who is otherwise emancipated by order of a court of competent jurisdiction.

E. "Agency" means an organization licensed by the Division for adoption or for the provision of foster care.

F. "Child" means an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of 18 years.

G. "Child in Need of Supervision" means a child who:

1. Being subject to compulsory school attendance, is habitually absent from school; or

2. Habitually disobeys the reasonable and lawful demands of his or

her parents, guardian or custodian and is ungovernable and beyond control; or

3. Has committed an offense not classified as criminal or one applicable only to children; and

4. In any of the foregoing situations is in need of care or rehabilitation.

H. "Family Court" means the division of the District Court of the Navajo Nation exercising jurisdiction under this Code.

I. "Family Court Judge" means any duly appointed judge of the Family Court division of the Navajo Nation District Court exercising jurisdiction under this Code.

J. "Counsel" means a person who is a member of the Navajo Nation Bar Association.

K. "Court" when used without further qualification, means the Family Court division of the Navajo Nation District Court.

L. "Custodian" means a person other than a parent or legal guardian to whom legal custody of a child has been given by order of the Family Court, but does not include a person who has only physical custody.

M. "Delinquent Act" means an act committed by a child which would be designated as a crime pursuant to Title 17 of the Navajo Nation Code and the following offenses within Title 14 of the Navajo Nation Code:

1. Driving while under the influence of intoxicating liquors or drugs;

2. Failure to stop in the event of an accident causing death, personal injuries or damage to property, and

3. Reckless driving.

N. "Delinquent child" means a child who is adjudicated to have committed a delinquent act.

O. "Dependent Child" means a child:

1. Who has been abandoned by his or her parents, guardian or custodian; or

2. Who is without proper parental care and control, or whose subsistence, education, medical or other care or control necessary for his or her well-being is inadequate because of the faults or habits of his parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them; or

3. Whose parent(s), guardian or custodian is unable to discharge his or her responsibilities to and for the child because of

incarceration, hospitalization or other physical or mental incapacity;  
or

4. Who has been placed for care or adoption in violation of Navajo law, the federal Indian Child Welfare Act,<sup>1</sup> or other federal law;  
or

5. Who has been physically, emotionally, psychologically or sexually abused by his or her parent, guardian or custodian; or

6. Who has been sexually exploited by his or her parent(s), guardian or custodian; or

7. Whose parent(s), guardian or custodian has knowingly, intentionally or negligently:

a. Placed the child in a situation that may endanger his or her life or health; or

b. Tortured, cruelly confined or cruelly punished him or her.

P. "Detention" means the temporary placement of a child alleged to have committed a delinquent act who requires custody in physically restricting facilities for the protection of the child or the Navajo Nation pending court disposition.

Q. "Detention Facility" means a place where a child alleged to have committed a delinquent act may be detained under the Children's Code pending a court hearing.

R. "Division" means the Navajo Division of Social Services.

S. "Domicile" includes a child who physically resides within "Navajo Indian Country" in the custody of his or her parents or custodians. The domicile of a child is that of the custodial parent. The domicile of a child born out of wedlock is that of the natural mother unless otherwise established in the father. Domicile includes the intent to establish a permanent home or where the parents or custodians consider to be their permanent home. Domicile for purposes of jurisdiction is established at the time of the alleged act(s).

T. "Judge", when used without further qualification, means the judge of the Family Court.

U. "Guardian" means a person assigned by a court of law, other than a parent, having the duty and authority to provide care and control of a child. A person shall not be a guardian except pursuant to an order of a court.

V. "Law Enforcement Officer" means a peace officer, sheriff, deputy sheriff, municipal police officer, or constable.

W. "Legal Custody" refers to the legal status created by the order of a court or tribunal of competent jurisdiction that vests in a person the right to have physical custody of the child, the right to determine where and with whom

he or she shall live, the right and duty to protect, train, and discipline the child and to provide him or her with food, shelter, education and ordinary medical care, all subject to the powers, rights, duties and responsibilities of the guardian of the child and subject to any existing parental rights and responsibilities; an individual granted legal custody of a child shall exercise his or her rights and responsibilities as custodian personally unless otherwise authorized by the court or tribunal entering the order.

X. "Parent" includes a natural or adoptive parent but does not include any person whose parental rights have been terminated.

Y. "Protective Services" means a program of identifiable and specialized child welfare which seeks to prevent dependency, abuse and exploitation of children by reaching out with social services to stabilize family life, and help preserve the family unit by focusing on families where unresolved problems have produced visible signs of dependency or abuse and the home situation may present actual and potential hazards to the physical or emotional well-being of children.

Z. "Protective Services Worker" means a person who has been selected by and trained pursuant to the requirements established by the Division and assists in carrying out the provisions of this Subchapter.

AA. "Protective Supervision" refers to the legal status created by court order under which the child is permitted to remain in his or her own home, or is placed with a relative or other suitable individual with supervision and assistance is provided by the court, a health and social services agency or some other agency designated by the court.

BB. "Shelter Care" means the care of a child placed in a foster home or institution maintained by individuals or organizations to receive and care for children pending court disposition or transfer to another jurisdiction.

### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **Annotations**

#### **1. Child in Need of Supervision**

"As defined by the Children's Code, children in need of supervision have not committed a criminal offense, but are in need [of] care or rehabilitation." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 3 (Nav. Sup. Ct. March 14, 2007).

#### **2. Dependent child-k'é**

"While Title 9, generally and 9 N.N.C. § 1002 specifically, enumerates factors to be considered for determining dependency, the Court holds that there are instances when certain traditional concepts are so core to basic values of Navajo tradition, culture and family values that broader consideration beyond

the statute is required. The Navajo concept of *k'é* is such a core value." *Baldwin v. Chinle Family Court, and concerning Carroll and the Navajo Nation*, No. SC-CV-37-08, slip op. at 4 (Nav. Sup. Ct. October 30, 2008).

"The Navajo concept of *k'é* requires that families be properly protected from nonexistent or faulty conclusions that do not meet the standard of clear and convincing evidence." *Baldwin v. Chinle Family Court, and concerning Carroll and the Navajo Nation*, No. SC-CV-37-08, slip op. at 6 (Nav. Sup. Ct. October 30, 2008).

### **3. Dependent child—disclosure of diagnosis**

"If the law is interpreted so that upon disclosure of certain circumstances such as a parent's past efforts to obtain mental health treatment shifts the burden of proof to the parent to prove their fitness, the likely result is to encourage non-disclosure. Further, when a parent's psychological diagnosis is disclosed in laymen's terms to a worker without the appropriate clinical training and experience in diagnosis there is a danger that the disclosure will be inadequate for the purpose of finding that the child is without parental care and control. The Navajo concept of *k'é* requires that families be properly protected from nonexistent or faulty conclusions that do not meet the standard of clear and convincing evidence." *Baldwin v. Chinle Family Court, and concerning Carroll and the Navajo Nation*, No. SC-CV-37-08, slip op. at 5-6 (Nav. Sup. Ct. October 30, 2008).

### **§ 1003. Family Courts**

The Family Courts of the Navajo Nation shall have original exclusive jurisdiction over all matters arising under the Navajo Nation Children's Code.

#### **History**

CAU-46-89, August 16, 1989.

**Revision note.** The sentences "References in this title to the Children's Court shall be deemed to mean Family Courts. References to Children's Courts or Children's Court judges which describe, define, or mandate procedure, responsibility, qualifications, or which impose standards or requirements shall be deemed to apply only to matters arising under the Children's Code but shall not be deemed to abolish nor diminish any requirements, standards, or mandates as to matters arising under the Children's Code" have been deleted. All such references have been changed pursuant to CAU-46-89, August 16, 1989.

#### **1. Non Indian children**

"In juvenile cases, the 'criminal' nature of the proceeding arises out of the possibility of detention, the functional equivalent of adult incarceration, as the child's liberty is taken away. As we prohibited detention for A.P. as beyond the authority of the Tuba City Family Court in our previous Order of Release, the current proceeding is 'civil' in nature. Under general principles of federal Indian law, as interpreted by this Court, we hold that the Navajo Nation has civil jurisdiction to adjudicate non-Indian children in a

delinquency proceeding for activity on tribal lands, as long as detention is not a possible disposition." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

"Though principles of federal Indian law do not prohibit the Nation's delinquency jurisdiction over non-Indian children, the Navajo Nation Council may still bar such jurisdiction. The Children's Code establishes family court exclusive jurisdiction over 'all proceedings ... in which a child is alleged to be ... a delinquent child'." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

"The term 'child' is defined as 'an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen (18) years.' 9 N.N.C. § 1001(F) (1995) (emphasis added). Under these provisions, the Children's Code does not prohibit jurisdiction over non-Indian children, but such jurisdiction is co-extensive with the Nation's general authority, presumably as established by the Treaty and general principles of federal Indian law discussed above. Therefore, we hold that under Navajo statutory law, family courts general have delinquency jurisdiction over non-Indian children." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

### **Subchapter 3. Establishment of Family Court and Probation Office**

#### **§ 1051. The Family Court**

A. There is established for each Judicial District of the Navajo Nation a division to be known as the Family Court.

B. The procedures in a Family Court shall be governed by the rules of procedure for the district court which are not in conflict with the Children's Code.

C. The Family Court is authorized to cooperate fully with any federal, state, Navajo Nation, public or private agency to participate in any diversion, rehabilitation or training programs and to receive grants in-aid to carry out the purposes of this Code.

D. The Family Court, in the exercise of its duties and in exercise of any duties to be performed by other offices under its supervision or control, shall utilize such social services as may be available through the Navajo Nation, federal, or state government.

E. The Family Court may accept or decline state court transfers of child custody proceedings; however, it shall be the policy of the Navajo Nation that, absent good cause, child custody proceedings involving Navajo children should be heard in the Navajo Family Court.

#### **History**

CF-14-85, February 8, 1985.

**United States Code**

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

**§ 1052. Court personnel—Appointment, certification, qualifications, duties**

A. Family Court Judge.

1. A Family Court judge shall be appointed in each judicial district in the manner and with the same qualifications as provided for in appointment of judges of the district courts. A judge of the district court may be appointed by the Chief Justice of the Navajo Nation to serve as a Family Court judge as the need requires. A judge so appointed shall serve as the Family Court judge during good behavior. The Navajo Nation Council shall have the power to remove a judge for cause and may appoint additional judges if necessity requires.

2. No Family Court judge shall hear a case which he or she has previously participated in as an advocate or in which he or she has a personal interest. The Code of Judicial Conduct of the American Bar Association shall control where conflict of interest exists. No person shall serve as Family Court judge within six months from the time they have been responsible for juvenile legal matters while employed with the Navajo Nation government.

B. Presenting Officer.

1. The office of the Family Court presenting officer is established in each judicial district. The district prosecutor of the Navajo Nation is *ex-officio* presenting officer for the judicial district.

2. The Chief Prosecutor of the Navajo Nation, after consulting with and upon recommendation of the Family Court judges, shall certify to the Judiciary Committee annually the number of qualified presenting officers needed to carry out the purposes of this Code. The Chief Prosecutor of the Navajo Nation shall be the appointing authority for all presenting officers.

3. The presenting officer shall represent the people of the Navajo Nation in all proceedings under this Code.

4. The presenting officers' qualifications shall be the same as the qualifications of the district prosecutors of the Navajo Nation.

C. Probation Officer.

1. The Probation Office of the Family Court is hereby established. The number of probation officers shall be determined according to Subdivision (2).

2. The probation officers of the Family Court shall carry out the duties and responsibilities set forth in this title. The Chief Justice

of the Navajo Nation, after consultation with and upon recommendation of the Family Court judges, shall certify annually to the judiciary Committee of the Navajo Nation Council the number of qualified probation officers for the Family Court needed to carry out the objectives of this title.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **Cross References**

Family Courts, 7 N.N.C. § 252.

Judiciary Committee of the Navajo Nation Council, 2 N.N.C. § 571 *et seq.*

#### **§ 1053. Probation office; establishment; reporting**

A. The Chief Justice of the Navajo Nation may establish juvenile probation offices at each of the agencies comprising the Navajo Nation. The Chief Justice of the Navajo Nation shall be the appointing authority for all probation office personnel. If probation officers are established by the Chief Justice of the Navajo Nation, he or she shall also establish a classification and compensation plan for all positions in the service in accordance with the personnel rules of the Courts of the Navajo Nation.

B. The Probation Offices shall provide the Chief Justice of the Navajo Nation and the Judiciary Committee of the Navajo Nation Council such information as is requested about children coming into contact with the probation offices or the court under the provisions of the Children's Code.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1054. Powers and duties of probation officers**

A. Probation officers shall have the power and duty to carry out the objectives and provisions of the Children's Code, and shall:

1. Make appropriate referrals of cases presented to them to other agencies if other assistance appears to be needed or desirable.

2. Make predisposition studies and submit reports and recommendations to the Court.

3. Supervise and assist a child placed on probation or under his or her supervision by court order;

4. Perform any other functions designated by the Court.

B. A probation officer does not have the powers of a law enforcement officer. A probation officer may take into custody and place in detention a child who is under his or her supervision as a delinquent child when the probation officer has reasonable cause to believe that the child has violated the conditions of his or her probation or that the child may leave the jurisdiction of the court. A probation officer taking a child into custody under this Subsection is subject to and shall proceed in accordance with the provisions of the Children's Code relating to custody and detention procedures and criteria.

C. Probation officers shall not act as prosecutors or presenting officers in presenting juvenile matters to the Family Court.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1055. Jurisdiction of the Family Court**

A. The Family Court shall have exclusive original jurisdiction over all proceedings under the Family Court in which a child is alleged to be a child in need of supervision, dependent child, or a delinquent child.

B. The Family Court shall have exclusive original jurisdiction of the following proceedings:

1. For the termination of parental rights;
2. For the adoption of a child;
3. To determine custody of, or to appoint a custodian or guardian for a child;
4. For the commitment of a mentally retarded or mentally ill child;
5. To authorize the marriage of a minor who does not have a parent or guardian, or when a parent or guardian refuses to consent, when the law requires consent to the marriage by a parent or guardian.

C. Jurisdiction obtained by a Family Court over a child is retained until terminated by any of the following situations:

1. The child becomes an adult, except where a child becomes an adult during the pendency of proceedings in the Family Court.
2. The case is transferred by the court to the district court pursuant to § 1114 of this Code.
3. When the Family Court enters an order terminating jurisdiction.

D. Territorial jurisdiction. The Family Court may hear child custody

matters involving Navajo children wherever they may arise. The Court may decline jurisdiction in appropriate circumstances where a forum with concurrent jurisdiction is exercising its authority. The Family Court shall have jurisdiction over non-Navajo child custody matters arising within the boundaries of Navajo Indian Country when the parties submit to the jurisdiction of the Court or when the best interests of the child require such an arrangement. The Family Court shall have exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country, or who is a ward of the Family Court.

### **History**

CF-14-85, February 8, 1985.

Previously codified at 9 N.N.C. § 1053 by CJN-52-69, June 4, 1969.

### **Cross References**

Family Court, 7 N.N.C. § 252.

### **Annotations**

#### **1. Jurisdiction**

"Under the plain language of the Children's Code, Navajo Courts have jurisdiction to decide custody of Navajo children regardless of residency within the Nation." *Miles v. Chinle Family Court, and concerning Miles*, No. SC-CV-04-08, slip op. at 5 (Nav. Sup. Ct. February 21, 2008).

"It is then the child's status as a Navajo, and not her presence within the territory of the Navajo Nation that allows jurisdiction." *Miles v. Chinle Family Court, and concerning Miles*, No. SC-CV-04-08, slip op. at 5 (Nav. Sup. Ct. February 21, 2008).

"In a dependent child case under the Navajo Nation Children's Code, if any of the factors (residence, domicile, ward of the court) in 9 N.T.C. § 1055(4), is proven by a preponderance of the evidence, then the Children's Court has jurisdiction over the Navajo child, even where the alleged conduct giving rise to the petition occurred outside the exterior boundaries of the Navajo Indian Reservation." *In the Matter of: A.O.*, 5 Nav. R. 121, 123 (Nav. Sup. Ct. 1987).

#### **2. Non Indian children**

"Though principles of federal Indian law do not prohibit the Nation's delinquency jurisdiction over non-Indian children, the Navajo Nation Council may still bar such jurisdiction. The Children's Code establishes family court exclusive jurisdiction over 'all proceedings ... in which a child is alleged to be ... a delinquent child'." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

### **§ 1056. Shelter care and detention facilities—Standards—Reports**

A. The Office of the Chief Justice of the Navajo Nation, in conjunction

with the Division, shall develop a Navajo Nation-wide plan for the establishment of district or agency detention and shelter care facilities, or alternatives thereto, for children alleged to be delinquent and detained under the provisions of the Children's Code. The plan shall be completed within one year after the effective date of the Children's Code. The plan shall include provisions for transportation services. The plan shall take into consideration existing detention and shelter care facilities and shall be developed in a manner that makes the best use of these facilities. It shall also provide an accurate projection of costs, alternatives for implementation and a cost effectiveness analysis. The plan shall be reviewed and updated every three years.

B. The Navajo Division of Public Safety, in conjunction with the Division, shall seek funds from state, federal, Tribal and other available sources, to construct and operate detention facilities and shelter care and may contract for detention and shelter care facilities, and services to be provided to the Family Court by other persons.

C. The Division of Health shall promulgate rules concerning health and safety issues for all detention and shelter care facilities which shall include: standards for the sites, design, construction, equipment, care, program, personnel and clinical services. The Division of Health shall license and approve all detention and shelter care facilities within the Navajo Nation meeting the promulgated standards. The Division may establish by rule appropriate procedures for provisional licensure and the waiving of any standards for facilities in existence at the time of adoption of the standards, except it shall not allow waiver of standards pertaining to adequate health and safety protection of residents and staff of the facility. The Division of Health may request assistance from the Division of Social Services for review of care, personnel and clinical services components. No child shall be detained in a detention or shelter care facility unless it is licensed as approved by the Division. Licensure shall be renewed upon full review every two years.

D. The Division of Health shall inspect all detention and shelter care facilities within the Navajo Nation at least every six months and shall require those reports it deems necessary from detention and shelter care facilities. If, as a result of an inspection, a licensed detention or shelter care facility is determined as failing the required standards, its license shall be subject to revocation after a hearing by the Division of Health, but only if alternative detention or shelter care facilities are available within the Navajo Nation. If no other facilities are available, a schedule of compliance shall be drafted. Failure to comply with the schedule shall result in revocation of the facility's license.

E. Any person aggrieved by an administrative decision of the Division of Health rendered under the provisions of this Section may petition for the review of the administrative decision by filing a petition requesting judicial review in the Family Court for the district in which the detention or shelter care facility is located.

The District Court's review shall be of the written transcript of the administrative hearing and the decision of the Division. The District Court shall uphold the decision of the Division of Health unless it finds that

decision to be:

1. Illegal or in violation of the Indian Civil Rights Act<sup>1</sup> or the Navajo Nation Bill of Rights;
2. The result of arbitrary or capricious action by the Division of Health; or
3. Not supported by substantial evidence; in which case it shall reverse the decision of the Division of Health and remand the manner for appropriate action or further review by the Division of Health.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **Subchapter 5. Procedure in the Family Court**

#### **§ 1101. Commencement of proceedings by petition**

A. Proceedings in the Family Court shall be initiated by the filing of a petition signed by the presenting officer or other member of the Navajo Nation Bar Association.

B. Any person who has knowledge of the facts alleged or is informed of them and believes that they are true, or a law enforcement official upon information and belief, may cause a petition to be initiated by the presenting officer.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1102. Venue**

A. The venue for Children's Code proceedings shall be determined by the residence or domicile of the child, or the judicial district where the alleged delinquency, dependency or neglect is committed. Venue exists concurrently in the Window Rock District for Navajo children who reside outside Navajo Indian Country.

B. Where the residence of the child and the situs of the alleged delinquency, dependency, or neglect are in different judicial districts, initiating proceedings in one judicial district shall bar the institution of proceedings in the other judicial districts.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Revision note.** Slightly reworded.

### **§ 1103. Preliminary inquiry and referral**

A. Allegations that a child is a child offender or a child in need of supervision shall be referred to the presenting officer, who shall conduct a preliminary investigation to determine the best interest of the child and the Navajo Nation with regard to any action to be taken. Petitions alleging neglect or abuse may be referred to a probation officer who shall refer them to the appropriate agency for preliminary inquiry to determine the best interest of the child with regard to any action to be taken.

B. During the preliminary inquiry on the petition, the matter may be referred to another appropriate agency and conferences may be conducted for the purpose of affecting adjustments that will obviate the necessity for filing a petition. At the commencement of the preliminary inquiry, the parties shall be advised of their basic rights under Subsections (A)-(E) of this Section and no person may be compelled to appear at any conferences, to produce any papers, or to visit any place. Voluntary agreements for the disposition of a child custody matter may be arranged with the agreement of the parties. A copy of such agreement shall be filed with the Family Court.

C. After completion of the preliminary inquiry on a petition, the presenting officer shall either authorize the filing of a petition or refuse to authorize the filing of a petition.

D. When a child is in detention or custody, and the filing of a petition is not authorized by the presenting officer, the petition shall be dismissed and the child shall be released immediately.

E. On motion by or on behalf of a child, a petition alleging delinquency or need of supervision shall be dismissed with prejudice if it was not filed within 30 days from the date the petition is referred to the presenting officer.

### **History**

CF-14-85, February 8, 1985.

### **Annotations**

#### **1. Construction and application**

"Thus, we hold the juvenile was illegally detained when a petition is filed 31 days after a referral where the Children's Code requires dismissal with prejudice if it is not filed within 30 days from the date of referral." *In the Matter of L.R. v. Greyeyes*, No. SC-CV-39-07, slip op. at 4 (Nav. Sup. Ct. November 21, 2007).

"Under the circumstances of this case, the Court will vacate a conviction where the statute clearly mandates a dismissal with prejudice if the petition

alleging the delinquency is untimely filed. This Court will not send the matter back to the Family Court for dismissal. The burden will not be placed upon a child to petition the court for dismissal or incur additional legal costs where the statute mandates a specific remedy. Under the circumstances, the Court hereby vacates the findings of delinquency for disorderly conduct and battery pursuant to Section 1103(E)." *In the Matter of L.R. v. Greyeyes*, No. SC-CV-39-07, slip op. at 4-5 (Nav. Sup. Ct. November 21, 2007).

#### **§ 1104. Petition—Form and content**

A petition initiating any proceeding under the Children's Code shall be captioned "In the Children's Court of the Navajo District Court \_\_\_\_\_ (judicial district)", and entitled, "In the Matter of \_\_\_\_\_ a child, census number: \_\_\_\_\_ DOB: \_\_\_\_\_" and shall set forth with specificity:

A. The facts necessary to invoke the jurisdiction of the Family Court.

B. A statement that the child is in need of supervision, care or rehabilitation.

C. If the child is alleged to be a juvenile offender, a citation to the appropriate section of the Criminal Code or Motor Vehicle Code which the child is alleged to have violated.

D. A plain and concise statement of facts upon which the allegations are based, including the date, time and location at which the alleged act(s) occurred.

E. The name, birth date, residence and address of the child.

F. The names and residence addresses of parents, guardians, custodians and spouse, if any, of the child; and if none of the parents, guardians, custodians or spouse, if any, reside or can be found within the Navajo Nation, or if their residence or addresses are unknown, the name of any known adult relative residing within the Navajo Nation, or if none, the known adult relative living nearest to the court.

G. The name of the officer presenting the petition and the date and time presented.

H. Whether the child is in custody, and, if so, the place of detention and the time he was taken into custody.

I. If any matters required to be set forth by this Section are not known, a statement that they are not known should be made.

#### **History**

CF-14-85, February 8, 1985.

**Revision note.** Slightly reworded.

#### **§ 1105. Filing and dismissal of petition**

A. The petition shall be filed with the clerk of the Family Court.

B. A petition alleging that a child is in need of supervision or is a child offender shall be dismissed with prejudice if a preliminary hearing is not held within:

1. Ten days from the date of the petition is filed when a child is in custody.

2. Twenty days from the date of the petition is filed when a child is not in custody or is released.

3. Unless the hearing is continued upon motion of the presenting officer by reason of the unavailability of material evidence and/or witnesses. Such motion must include information regarding the nature of the material evidence presently unavailable and/or the names and addresses of the unavailable witnesses. A continuance not to exceed 10 days, if a child is in custody, or 20 days, if said child is not in custody, will be granted only upon a showing by the presenting officer that he has exercised due diligence in his attempts to secure the evidence and/or attendance of witnesses. If a proper showing of diligence is not made, the petition must be dismissed with prejudice.

C. The petition shall not be dismissed for violation of this Section if the child is participating in a court ordered diversion.

#### **History**

CF-14-85, February 8, 1985.

#### **Annotations**

##### **1. Time of hearing**

"We hold that, in accordance with the Navajo Children's Code, a preliminary hearing must be held in a juvenile proceeding of delinquency within 10 days after a petition is filed if the child is in detention." *In the Matter of A.W.*, 6 Nav. R. 38, 42 (Nav. Sup. Ct. 1988).

##### **§ 1106. Summons; service**

A. After a petition is filed, the court shall set a time for a hearing and direct the issuance of summons by the court clerk.

B. A summons shall be issued to a child alleged to be a delinquent child or a child in need of supervision if the child is 14 years of age or older and to the child's parents or guardian and to such other persons as the court considers proper or necessary parties.

C. The form of service shall conform to the requirements of the Rules of Civil Procedure of the Navajo Nation.

#### **History**

CF-14-85, February 8, 1985.

**§ 1107. Basic rights**

A. A child alleged to be a delinquent child or a child in need of supervision shall, from the time of being taken into custody, be accorded and advised of the privilege against self-incrimination and from the time of detention in a detention facility shall not be questioned except to determine identity and to determine the name of the child's parents or legal custodian.

B. In a proceeding on a petition alleging delinquency or in need of supervision:

1. An extra-judicial statement that would be inadmissible in a criminal matter shall not be received in evidence over objection.

2. Evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition against a child over objection.

3. An extra-judicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence.

C. A child in custody shall not be fingerprinted or photographed for criminal identification purposes except by order of the court. If an order of the court is given, the fingerprints or photographs, shall be used only as specified by the court. Any person who willfully violates the provisions of this Subsection is guilty of a misdemeanor.

D. In all proceedings on a petition alleging delinquency or need of supervision, and in those instances specified under other provisions of the Children's Code, the Court shall make a preliminary finding on the issue of whether the child's interests are represented by the parties to the proceeding. If the Court determines that the child's interests are not adequately represented by the parties to the proceeding, the Court shall appoint a guardian ad litem to represent the interests of the child.

E. In proceedings on a petition alleging dependency or abuse, the parents, guardian and custodian of the child shall be informed of available legal services and that they have the right to be represented by counsel.

F. The Court, at any stage of a proceeding on a petition under the Children's Code, may appoint a guardian ad litem for a child who is a party if the child has no parent, guardian or custodian appearing on behalf of the child or if his interests conflict with those of his parent, guardian or custodian. A party to the proceedings or an employee or representative of a party shall not be appointed as guardian ad litem.

G. The court shall appoint a guardian for a child if the court determines that the child does not have a parent or a legally appointed guardian in a position to exercise effective guardianship. No officer or employee of an agency that is vested with the legal custody of the child shall be appointed

guardian of the child except when parental rights have been terminated and the agency is authorized to place the child for adoption.

H. Criminal proceedings, actions and other proceedings in the District Court based upon an offense alleged in a petition under the Children's Code, or an offense based upon the conduct alleged in the petition, are barred if the Family Court has initiated separate proceedings or has accepted a child's admission of the allegations of a petition. A proceeding may be subsequently initiated in District Court if the Family Court does not dispose of all relevant issues.

I. In a proceeding on a petition, a party is entitled to the opportunity to introduce evidence and be heard, and to confront and cross-examine witnesses testifying against him, and to admit or deny the allegations in a petition. Provided, in cases transferred to Navajo Nation Courts pursuant to the federal Indian Child Welfare Act<sup>1</sup> where the Family Court petition would be subject to dismissal due to the unavailability of witnesses or the unwillingness of state personnel to testify in Navajo Nation Courts, the Family Court may accept as evidence reports and other public records generated beyond Navajo Indian Country where the best interests of the child require.

J. Where appointment of counsel for the child is made, the Court shall appoint counsel from the members of the Navajo Nation Bar Association and those appointed shall serve the child without compensation, unless compensation is authorized by the Court.

### **History**

CF-14-85, February 8, 1985.

**Revision note.** Slightly reworded.

### **Annotations**

#### **1. Duty to inform**

" ... [T]he person taking the child into custody for an alleged delinquent act must inform him or her or his or her Miranda rights. [... ] All during the detention procedure, the child shall not be questioned except to determine the child's identity and to determine the name of the child's parents or legal guardian." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

#### **2. Right to counsel**

"If the child or the child's parents or guardian cannot afford an attorney, the court will appoint one to represent the child." *In the Matter of A.W.*, 6 Nav. R. 38, 42 (Nav. Sup. Ct. 1988).

"We further hold that in a proceeding alleging the delinquency of a child under the Navajo Children's Code, the child has the right to be represented by an attorney." *In the Matter of A.W.*, 6 Nav. R. 38, 42 (Nav. Sup. Ct. 1988).

#### **3. Guardian ad litem**

"While the Navajo Nation Code anticipates the appointment of a GAL in Children's Code cases, see 9 N.N.C. §§ 1107(D), (F) (for child), 1303(D) (for incompetent parent) (2005), nothing explicitly authorizes a district court to appoint a GAL for an alleged victim in a criminal case." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 7 (Nav. Sup. Ct. March 28, 2006).

"Just like many jurisdictions, the role and duties of our guardians ad litem are undefined. We want a guardian who will do a thorough review of the case, including witness interviews and a complete examination of all documentation on the child, and then give an independent, accurate and reliable report to the court as a commentator, but not an advocate. We are leery of situations where a court gives too much weight to a guardian's report, without the court making its own independent judgment of the child's best interests." *In the Matter of the Custody of T.M.; Davis v. Means*, No. SC-CV-58-98, slip op. at 9 (Nav. Sup. Ct. March 5, 2001).

#### **§ 1108. Taking into temporary custody**

A. A child may be taken into temporary custody:

1. Pursuant to an order of the Court issued because a parent, guardian or custodian failed when requested to bring the child before the Court after having promised to do so at the time the child was released from custody.

2. By a law enforcement officer or protective services worker when he has reasonable grounds to believe that the child has run away from his parents, guardian or custodian.

3. By law enforcement officer or protective services worker if there exist reasonable grounds to believe that the child requires immediate care or medical attention or has been abandoned or is in immediate danger from his/her surroundings and removal from those surroundings is necessary.

4. Pursuant to the laws of arrest, without a warrant, when there exists probable cause to believe that the child committed a delinquent act.

B. Any law enforcement officer or protective services worker having a child in temporary custody for reasons other than the commission of a delinquent act may place the child in a shelter care facility.

#### **History**

CF-14-85, February 8, 1985.

#### **§ 1109. Release or delivery from temporary custody**

A. A person taking a child into temporary custody shall, with all reasonable speed:

1. Release the child to the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate; or

2. In the case of an alleged delinquent or child in need of supervision, release the child to the child's parent, guardian or custodian upon a written promise to bring the child before the court when requested by the court. If the parent, guardian or custodian fails when requested, to bring the child before the court as promised, the court may order the child taken into custody and brought before the court; or

3. In the case of the alleged delinquent or child in need of supervision, deliver the child to the probation office or to a place of detention designated by the court.

4. In the case of an alleged neglected or abused child, deliver the child to the Division or to an appropriate shelter care facility; or for an alleged delinquent, child in need of supervision or neglected or abused child, to a medical facility if the child is believed to be suffering from a serious physical or mental condition or illness which requires either prompt treatment or prompt diagnosis.

B. When an alleged delinquent or child in need of supervision is delivered to the probation office or to a place of detention designated by the Court, a probation officer, prior to placing the child in detention, shall review the need for detention and shall release the child from custody unless detention is appropriate under the criteria established by the Children's Code, or has been ordered by the Court. If detention appears inappropriate, the probation officer shall request the presenting officer to petition the Court for a review of its decision.

C. When an alleged neglected or abused child is delivered to the Division, a Division caseworker, prior to placing the child in custody, shall review the need for doing so and shall release the child from custody unless retention is appropriate under the criteria established by the Children's Code, or has been ordered by the Court.

D. When a child is delivered to an appropriate shelter care facility, a Division caseworker shall review the need for retention of custody within a reasonable time after delivery of the child to the facility and shall release the child from custody unless retention is appropriate under the criteria established by the Children's Code or has been ordered by the Court.

E. If a child is taken into custody and is not released to the child's parent, guardian or custodian, the person taking the child into custody shall give written notice thereof as soon as possible, and in no case later than 72 hours, to the child's parent, guardian or custodian and to the Court together with a statement providing the reason for taking the child into custody.

F. In all cases when a child is taken into custody, he shall be released to his parent, guardian or custodian in accordance with the conditions and time limits set forth in the Rules of Procedure for the Family Court.

#### **History**

CF-14-85, February 8, 1985.

**Revision note.** Slightly reworded for purposes of statutory form; Subsection added for clarity.

### **Annotations**

#### **1. Release of juvenile**

"Once the child is delivered to the probation office or to a place of detention designated by the court, the second step is that the probation officer must review the need for detention before the child is actually placed in detention. [... ] If the probation officer views the detention as unnecessary under the criteria set forth in 9 N.T.C. § 1110 91985 Cumm. Supp., then the child shall be released from custody." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

"We hold that according to 9 N.T.C. § 1109(a)(2), the police should have first attempted to release the appellant to his parent. If the appellant's parent was not available, the police should have followed 9 N.T.C. § 1109(a)(3) and delivered the appellant 'to the probation office or to a place of detention designated by the court'." *In the Matter of A.W.*, 6 Nav. R. 38, 40 (Nav. Sup. Ct. 1988).

#### **2. Notice of detention**

"Third, the person taking the child into custody must give written notice to the child's parent, guardian or custodian, and to the court 'as soon as possible, and in no case later than seventy-two (72) hours,' after the child is taken into custody. [... ] This notice shall also contain a statement of the reasons for taking the child into custody." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

#### **§ 1110. Criteria for detention of children**

A. Unless ordered by the Court pursuant to the Children's Code, a child taken into custody shall not be placed in detention prior to the Court's disposition unless:

1. Probable cause exists to believe that if not detained, the child will commit injury to persons or property of others, or cause injury to himself or be subject to injury by others; or

2. Probable cause exists to believe that the child has no parent, guardian, custodian or other person able to provide adequate supervision and care for the child; or

3. Probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the Court or its officers.

B. This Subchapter shall govern the decision of all persons responsible for determining whether detention is appropriate prior to the Court's disposition.

### **History**

CF-14-85, February 8, 1985.

**§ 1111. Place of detention or shelter care**

A. A child alleged to be a delinquent child may be detained pending a court hearing in any of the following places:

1. A licensed foster home, or a home otherwise authorized under the law and certified to provide foster or group care; or

2. A facility operated by a licensed child welfare services agency; or

3. A detention facility approved by the Family Court for children alleged to be delinquent children; or

4. In any other suitable place designated by the Family Court and certified under § 1056, and which meets the standards for detention facilities under the Children's Code.

B. A child alleged to be a child in need of supervision or a dependent child shall not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent, but shall be detained in the following shelter care facilities:

1. A licensed foster home, or a home otherwise authorized under the law and certified to provide foster or group care; or

2. A facility operated by a licensed child welfare services agency; or

3. Any other suitable place, other than a facility designated for care and rehabilitation of delinquent children, designated by the Family Court and certified by the appropriate authority.

C. The official in charge of a jail or other facility for the incarceration of adult offenders or persons charged with crimes and the arresting law enforcement officer shall inform the probation officers within four working hours and the Court within four working hours or 48 consecutive hours if on a weekend, whichever is the shorter time, when an individual, who is or appears to be under the age of 18 years, is received at the facility, and upon request shall deliver him to the court or the probation officer or transfer him to a facility designated by the Court.

**History**

CF-14-85, February 8, 1985.

**Revision note.** Previous reference to "§ 1102" in Subsection (A)(4) of this Section has been changed to "§ 1056".

**Annotations**

## **1. Child in Need of Supervision**

"The Navajo Nation Children's Code prohibits a family court from placing a child in need of supervision 'in a jail or other facility intended or used for the detention of children alleged to be delinquent'." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 2 (Nav. Sup. Ct. March 14, 2007).

"The Code limits the disposition of a child in need of supervision to, among other things, the transfer of legal custody 'to an agency responsible for the care of children in need of supervision, but not to one which is designed for custody of delinquent children'." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 2-3 (Nav. Sup. Ct. March 14, 2007).

"The Court holds a family court cannot use contempt to accomplish the incarceration of a CHINS child when it could not have incarcerated that child in the original CHINS order. The Children's Code reflects the clear intent of the Navajo Nation Council that CHINS children are a distinct group from juvenile delinquents and require a different type of treatment. As defined by the Children's Code, children in need of supervision have not committed a criminal offense, but are in need [of] care or rehabilitation." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 3 (Nav. Sup. Ct. March 14, 2007).

"The use of contempt to incarcerate a CHINS child improperly treats that child as delinquent, violates the Council's clear prohibition on incarceration of such children, and amounts to cruel and unusual punishment under the Navajo Bill of Rights." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 4 (Nav. Sup. Ct. March 14, 2007).

### **§ 1112. Place of temporary custody**

A child alleged to be neglected or abused shall not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be delinquent children, but may be detained in the following community-based shelter care facilities:

A. A licensed foster home or a home otherwise authorized under the law to provide foster care, group care, protective residence; or

B. A facility operated by a licensed child welfare services agency; or

C. With a relative of the child who is willing to guarantee to the Court that the child will not be returned to the alleged abusive or neglectful parent, guardian or custodian without the prior approval of the Court; or

D. Any other suitable place, other than a facility for the care and rehabilitation of delinquent children to which children adjudicated as delinquent children may be confined and which meets the standards for shelter care facilities established by the Division.

### **History**

CF-14-85, February 8, 1985.

**§ 1113. Detention hearing required for detained child, court determination and disposition**

A. Where a child who has been taken into custody is not released but is detained:

1. A petition shall be filed by the presenting officer with the Court within 48 hours excluding Saturdays, Sundays and legal holidays, and, if not filed within the stated time, the child shall be released.

2. A detention hearing shall be held within 24 hours, excluding Saturdays, Sundays and legal holidays of the filing of a petition to determine whether continued detention is required pursuant to criteria established by the Children's Code.

B. The judge may appoint one or more persons to serve as referees on a full or part-time basis for the purpose of holding detention hearings. The Chief Justice of the Navajo Nation shall approve all contracts with the referees and shall fix their hourly compensation pursuant to the Personnel Policies and Procedures of the Navajo Nation.

C. Written notice of the detention hearing stating the time, place and purposes of the hearing shall be given by the person designated by the Court to the child's parent(s), guardian or custodian, if they can be found, and to the child if the petition alleges that the child is delinquent or in need of supervision.

D. At the commencement of the detention hearing, the judge or referee shall advise the parties of their basic rights provided in the Children's Code, and shall appoint counsel, guardians and custodians, if appropriate.

E. If the judge or referee finds the child's detention is appropriate under the criteria established by the Children's Code, he shall order the detention in an appropriate facility in accordance with the Children's Code.

F. If the judge or referee finds that detention of the child is not appropriate under the criteria established by the Children's Code, he shall order the release of the child, but, in so doing, may order one or more of the following conditions:

1. The child be placed in the custody of a parent, guardian or custodian or relative, or under the supervision of an agency agreeing to supervise the child.

2. Place restrictions on the child's travel, association with other persons or place of abode during the time of release.

3. Impose any other condition deemed reasonably necessary and consistent with the Children's Code, including a condition requiring that the child return to custody if required.

G. An order releasing a child on any conditions specified in this Section may at any time be amended to impose additional or different conditions of release or to return the child to custody or detention for failure to conform to the conditions originally imposed.

H. At the detention hearing all relevant and material evidence helpful in determining the need for detention may be admitted by the judge or referee even though it would be otherwise inadmissible in a hearing on the petition.

I. If the child is not released at the detention hearing, and a parent, guardian, or custodian or a relative was not notified of the hearing and did not appear or waive appearance at the detention hearing, the judge or referee shall rehear the detention matter without unnecessary delay upon the filing of a motion for rehearing and an affidavit stating the relevant facts.

### **History**

CF-14-85, February 8, 1985.

### **Annotations**

#### **1. Rights of juvenile**

"Pursuant to Section 1113(A)(1), the filing of a petition within 48 hours or release the child was required. This requirement is not optional, but statutorily mandated by the Children's Code. Thus, the Court holds the juvenile was illegally detained when the child was taken into custody and not released, where the Children's Code required a petition to be filed within 48 hours, and mandated release if petition was not filed within that stated time." *In the Matter of L.R. v. Greyeyes*, No. SC-CV-39-07, slip op. at 5 (Nav. Sup. Ct. November 21, 2007).

"Section 1113(A)(2) is meant to be applied hand-in-hand with Section 1113(A)(1). Thus, by failing to meet the timeline of Section 1113(A)(1), the Juvenile Presenting Officer also failed to meet Section 1113(A)(2). Thus, the Court holds a finding of delinquency should be vacated where an untimely filing of a petition results in the illegal detention of a juvenile." *In the Matter of L.R. v. Greyeyes*, No. SC-CV-39-07, slip op. at 6 (Nav. Sup. Ct. November 21, 2007).

"Fourth, the presenting officer must file a petition within 48 hours from the time the child is taken into custody. [.... ] Fifth, the court shall hold a detention hearing within 24 hours of the filing of the petition to determine whether continued detention is required. [.... ] The court must give written notification of the detention hearing to the child's parents, legal guardian or custodian. [.... ] If the petition alleges that the child is a delinquent child or in need of supervision, the court must also give notice to the child himself. [.... ] And last, the judge must advise all parties of their basic rights provided for in the Children's Code and shall appoint counsel, guardians and custodians if appropriate." *In the Matter of A.W.*, 6 Nav. R. 38, 41-42 (Nav. Sup. Ct. 1988).

#### **2. Hearing required**

" ... [I]t is not within the court's discretion to hold a detention hearing, but rather that '[a] detention hearing shall be held.... ' The court's failure to hold a detention hearing, along with the other violations, constitutes a clear denial of the appellant's basic right to proper adjudication as set forth in the Navajo Children's Code." *In the Matter of A.W.*, 6 Nav. R. 38, 42 (Nav. Sup. Ct. 1988).

### **3. Right to counsel**

"We further hold that in a proceeding alleging the delinquency of a child under the Navajo Children's Code, the child has the right to be represented by an attorney." *In the Matter of A.W.*, 6 Nav. R. 38, 42 (Nav. Sup. Ct. 1988).

### **4. Due process**

"We hold that due process in juvenile proceedings must be followed as in adult criminal and civil proceedings. However, in juvenile proceedings the Navajo courts must respect the customary role of the parents in defending their child's rights. Therefore, the Navajo Children's Courts must afford notice and an opportunity to present and defend their child's position to the child's parent or guardian. [... ] As such, the parent or guardian must be available to represent the child or to assist the child's counsel in a delinquency proceeding." *In the Matter of A.W.*, 6 Nav. R. 38, 43 (Nav. Sup. Ct. 1988).

### **5. Non Indian children**

"In juvenile cases, the 'criminal' nature of the proceeding arises out of the possibility of detention, the functional equivalent of adult incarceration, as the child's liberty is taken away. As we prohibited detention for A.P. as beyond the authority of the Tuba City Family Court in our previous Order of Release, the current proceeding is 'civil' in nature. Under general principles of federal Indian law, as interpreted by this Court, we hold that the Navajo Nation has civil jurisdiction to adjudicate non-Indian children in a delinquency proceeding for activity on tribal lands, as long as detention is not a possible disposition." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 7 (Nav. Sup. Ct. May 26, 2005).

### **§ 1114. Transfer to District Court-Hearing**

A. After a petition has been filed alleging a delinquent act, the court may, before a hearing on the merits, transfer the matter for prosecution in the District Court, if:

1. The child was 16 years of age or older at the time the conduct alleged to be a delinquent act was committed and the alleged delinquent act would be a crime if committed by an adult; and

2. A hearing on whether the transfer should be made is held in conformity with the rules for a hearing on a petition alleging a delinquent act, except the hearing will be to the Court without a jury; and

3. Written notice of the time, place and purpose of the hearing is given to the child, parents, guardian or custodian at least three days

before the hearing; and

4. The Court at the hearing finds there are reasonable grounds to believe that:

a. The child committed the delinquent act alleged; and

b. The child is not amenable to treatment or rehabilitation as a child through available facilities; and

c. The child is not committable to an institution for the mentally retarded or mentally ill; and

d. The interests of the Navajo Nation require that the child be placed under legal restraint or detention.

B. Prior to the hearing, the Juvenile Representative shall prepare for the Court and make available copies to the child, his counsel, or his parents, guardian or custodian, a predispositional report relevant to the issues described in Subparagraphs (b), (c), and (d) of Paragraph (A) (4) of this Section and the court shall hear evidence on Subsection (A) and make specific findings in regards thereto.

C. A written transfer order containing specific findings and reasons for the order terminates the jurisdiction of the Family Court over the child with respect to the delinquent acts alleged in the petition. No child shall be prosecuted in the District Court for a criminal offense originally subject to the jurisdiction of the Family Court unless the case has been transferred as provided in this Subsection.

#### **History**

CF-14-85, February 8, 1985.

**Note.** Note that Subsection (B) refers to a "Juvenile Representative" although "Presenting Officer" is the term used at Section 1052(B) herein.

#### **§ 1115. Adjudicatory hearings; findings; dismissal; disposition**

A. Hearing on petitions shall be conducted by the Court separate from other proceedings. A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense alleged would be triable by jury if committed by an adult. If a jury is demanded and the child is entitled to a jury trial, the jury's function is limited to that of trier of the factual issue of whether or not the child committed the alleged delinquent act(s). If no jury is demanded, the hearing will be by the Court without a jury. All hearings on petitions other than those alleging delinquency will be without a jury. The proceedings shall be recorded by stenographic notes or by electronic, mechanical or other appropriate means. The Court shall advise persons before the court of their basic rights under the Children's Code and other laws at each separate appearance.

B. All hearings on petitions alleging delinquency of a child shall be

open to the general public except after a finding of exceptional circumstances the Court, in its discretion, deems it appropriate to conduct a closed delinquency hearing.

1. All dependency and child-in-need-of-supervision hearings shall be closed to the general public. Only the parties, their counsel, witnesses and other persons requested by a party. and approved by the Court may be present at a closed hearing.

2. Persons the Court finds to have a proper interest in the case or in the work of the Court, including members of the Bar, may be admitted by the Court to closed hearings on the condition that they respect the confidentiality of the proceeding. Accredited representatives of the news media may be allowed to attend closed hearings at the discretion of the Family Court judge subject to the condition that they refrain from divulging information that would identify any child involved in the proceedings or the parent or guardian of that child, and subject to such regulations as the Court deems necessary for the maintenance of order, decorum and for the furtherance of the purposes of the Children's Code.

3. If the Court finds that it is in the best interest of the child, the child may be temporarily excluded from a neglect or abuse hearing and during the taking of evidence on the issues of need for treatment and rehabilitation in delinquency and need-of-supervision hearings. A child may be temporarily excluded by the Court during a hearing on dispositional issues under the same method.

C. Those persons or parties who intentionally divulge information in violation of Subsection (B) of this Section shall be guilty of an offense. Persons found guilty of violating the provisions of this Section shall be subject to imprisonment for a term not to exceed 90 days and be ordered to pay a fine not to exceed two hundred fifty dollars (\$250.00).

D. The Court shall determine if the allegations of the petition are admitted or denied. If the allegations are denied, the Court shall proceed to hear evidence on the petition. The Court, after hearing all of the evidence bearing on the allegations of dependency, delinquency or need of supervision shall make and record its findings on whether or not the child is a dependent child or whether or not the acts subscribed to the child were committed by the child. If the Court finds that the allegations on the petition have not been established, it shall dismiss the petition and order the child released from any detention or legal custody imposed in connection with the proceedings, unless the best interests of the child require otherwise.

E. If the Court finds, on the basis of valid admission to the allegations of the petition, or on the basis of proof beyond a reasonable doubt based upon competent, material and relevant evidence, that the child committed the acts by reasons of which he is alleged to be delinquent or in need of supervision, it may, in the absence of objection, proceed immediately to hear evidence on whether or not the child is in need of care or rehabilitation and file its findings thereon. In the absence of evidence to the contrary, evidence, of the commission of an act which constitutes a felony is sufficient to sustain a finding that the child is in need of care or rehabilitation. If the Court finds that a child alleged to be delinquent or in need of supervision is not in

need of care or rehabilitation, it shall dismiss the petition and order the child released from any detention or legal custody imposed in the proceedings, or make such other order as it deems proper.

F. If the Court finds on the basis of a valid admission of the allegations of the petition, or on the basis of clear and convincing evidence that the child is dependent or is in need of care or rehabilitation as a delinquent child or child in need of supervision, the Court may proceed immediately or at a continued hearing to dispose of the case.

G. In the dispositional hearing, the Family Court may consider all relevant and material evidence helpful in determining the questions presented, including oral and written reports, and may rely on such evidence to the extent of its probative value even though not otherwise competent.

H. By motion of a party or by its own authority, the Court may continue the hearing on the petition for a reasonable time to receive reports and other evidence bearing on the need for care or rehabilitation or in connection with disposition. The Court shall continue the hearing pending the receipt of the predisposition study and report if that document has not been prepared and received. During any continuance under this Subsection, the Court shall make an appropriate order for detention or legal custody.

I. Evaluations, assessments, dispositional reports and other material to be considered by the Court in a juvenile hearing shall be submitted to the Court no later than five days before the scheduled hearing date. An affidavit including reasons why a report has not been completed shall be filed with the Court no later than five days before the scheduled hearing date, if the report will not be submitted before the deadline. The Court may in its discretion dismiss a petition if the necessary reports, evaluations or other material have not been timely submitted.

#### **History**

CF-14-85, February 8, 1985.

**Revision note.** Slightly reworded.

#### **Annotations**

##### **1. Generally**

"The Navajo Nation Code prohibits court staff from distributing certain types of court information, requires certain proceedings to be closed to the public, and prohibits certain people from revealing information concerning specific types of cases." *Johnson et al. v. Tuba City District Court, and concerning Yellowman*, No. SC-CV-12-07, slip op. at 7 (Nav. Sup. Ct. November 7, 2007).

##### **§ 1116. Predisposition studies; reports and examination**

A. After a petition has been filed and the allegations of the petition have been established by admission or after a hearing, the Court shall direct that a predisposition study and report be made in writing by the Division caseworker or other appropriate officer designated by the Court concerning the

child, the family of the child, the environment of the child and any other matters relevant to the need for treatment or to appropriate disposition of the case.

B. Where there is indication that the child may be mentally ill or mentally retarded, the Court, on motion by the presenting officer or that of other counsel may order the child to be examined by a psychiatrist or psychologist prior to a hearing on the merits of the petition. An examination made prior to the hearing, or as part of the predisposition study and report, shall be conducted on an out-patient basis unless the Court finds that placement in a hospital or other appropriate facility is necessary.

C. The Court, after hearing, may order examination by a physician, psychiatrist or psychologist, of a parent whose ability to care for or supervise a child is an issue before the Court. The parent or custodian may refuse to be examined, but such refusal may be considered by the judge or jury.

D. The Court may order that a child adjudicated as a delinquent child or a child in need of supervision be transferred to an appropriate facility for a period of not more than 30 days for purposes of diagnosis with direction that the Court be given a written report at the end of that period indicating the disposition which appears most suitable.

#### **History**

CF-14-85, February 8, 1985.

#### **Annotations**

##### **1. Due process**

"At oral argument, counsel for the Family Court conceded that due process was not followed in issuing the exclusion order without a hearing. That is enough to justify a permanent writ. The Children's Code and the Navajo Children's Code Rules of Procedure require that a family court hold a dispositional hearing." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 9 (Nav. Sup. Ct. May 26, 2005).

"We therefore hold that a non-Indian child must have a dispositional hearing before the court may exclude him or her. As no hearing was held, the family court violated A.P.'s due process rights, and we must bar it from excluding her from the Navajo Nation." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 10 (Nav. Sup. Ct. May 26, 2005).

##### **§ 1117. Dependency predisposition studies, reports and examinations**

A. Prior to holding a dispositional hearing, the Court shall direct that a predisposition study and report be made in writing to the Court by the Division.

B. The predisposition study required under Subsection (A) shall contain the following information:

1. A statement of the specific harm to the child that intervention

is designed to alleviate;

2. If removal from or continued residence outside the home is recommended, a statement of the likely harm the child will suffer as a result of removal, including emotional harm resulting from separation from his parents;

3. A treatment plan consisting of:

a. A description of the specific progress needed to be made by both the parent and the child in order to prevent further harm to the child, a specific plan setting out the steps to be taken by the parents and caseworker and a timetable for their completion, the reasons why such a program is likely to be-useful, the availability of any proposed services and the Division's overall plan for insuring that the services will be delivered;

b. If removal from the home or continued residence outside the home is recommended, a description of any previous efforts to work with the parent and the child in the home and the in-home treatment programs which have been considered and rejected;

c. A description of the steps that will be taken to minimize any harm to the child that may result if separation from his parent occurs or continues; and

d. A description of the behavior that will be expected before a determination is made that supervision of the family or placement is no longer necessary.

C. A copy of the predisposition report shall be provided by the Division to counsel for all parties at least five days before the dispositional hearing.

#### **History**

CF-14-85, February 8, 1985.

**Revision note.** Slightly reworded.

#### **§ 1118. Social and legal records—Inspection**

A. Social, medical, psychiatric and psychological records of the Court concerning a child and produced or recorded by requirement or authority contained in the Children's Code, including reports of preliminary inquiries, predisposition studies and supervision records of probationers shall be open to inspection only by the following:

1. The judge, Division caseworkers, probation officers and Court personnel;

2. Representatives of any agency providing supervision and having legal custody of the child;

3. Representatives of the Division;

4. Any other person, by order of the Court, having a legitimate interest in the particular case or the work of the Court.

B. All or any part of records or information secured from records listed in Subsection (A), when presented to the Court in a proceeding under the Children's Code, shall be made available to the parties to the proceedings and their counsel. The Court may refuse to disclose the identity of informants only after finding that such disclosure will place the informant in danger or that disclosure would not be in the child's best interests.

C. Except as permitted by this Section, whoever discloses, makes use or knowingly permits the use of information concerning a child before the Court, directly or indirectly derived from the records listed in Subsection (A), or acquired in the course of official duties, shall be subject to 90 days in jail or a two hundred fifty dollars (\$250.00) fine, or both.

### **History**

CF-14-85, February 8, 1985.

### **§ 1119. Sealing of records**

A. On motion by or on behalf of an individual who has been the subject of a petition filed under the Children's Code or on the Court's own motion, the Court may vacate its findings, orders and judgments on the petition and order the legal and social files and records of the Court, probation services and of any other agency in the case sealed. If requested in the motion, the Court shall also order law enforcement files and records sealed. An order sealing records and files may be entered if the Court finds that:

1. Two years have lapsed since the final release of the individual from legal custody and supervision, or two years have lapsed since the entry of any other judgment not involving legal custody or supervision.

2. The individual has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor or found delinquent or in need of supervision by a court, and no proceeding is pending seeking such a conviction or finding.

B. Reasonable notice of the motion shall be given to:

1. The Family Court presenting officer;

2. The authority granting the release, if the final release was from a parole or probation agency,

3. The law enforcement officer, department and central records depository having custody of the law enforcement files and records if such records are included in the motion;

4. Any other agency having custody of records or files subject to the sealing order.

C. Upon entry of the sealing order, the proceedings in the case shall be expunged and all index references shall be deleted; the Court, law enforcement officers and departments and agencies shall reply, and the individual may reply to an inquiry that records with respect to such person have been expunged. Copies of the sealing order shall be sent to each agency or official named herein.

D. Inspection of the files and records or the release of information in the records included in the sealing order may thereafter be permitted by the Court only:

1. Upon motion by the individual who is the subject of the records and only to those persons named in the motion;

2. In its discretion, in an individual case, to any clinic, hospital or agency that has the individual under care or treatment, or to persons engaged in fact-finding or research in work related to the child's welfare.

E. Any finding or allegation of delinquency or need of supervision subsequent to the sealing order may by Court order be used as a basis to set aside the sealing order.

F. A person who has been the subject of a petition filed under the Children's Code shall be notified of the right to have records sealed by the Court at the end of the dispositional stage.

#### **History**

CF-14-85, February 8, 1985.

#### **§ 1120. Damages to or destruction of property by child; parents liable; costs and attorney's fees; provisions for damages and restitution**

A. Any person may recover damages, not to exceed five thousand dollars (\$5,000), in a civil action in a court or tribunal of competent jurisdiction, from the parent, guardian or custodian of a child upon proof by clear and convincing evidence that the child maliciously or willfully injured a person(s) or damaged or destroyed property, real or personal, belonging to the person bringing the action and that the parent, guardian or custodian failed to provide adequate supervision of the child.

B. Recovery of damages under this Section is limited to actual damages proved in the action, taxable Court costs, and, in the discretion of the Court, reasonable attorney's fees to be fixed by the Court or tribunal.

C. Nothing contained in this Section limits the discretion of the Court to issue an order requiring damages or restitution to be paid by a child who has been found to be within the provisions of the Children's Code.

#### **History**

CF-14-85, February 8, 1985.

**§ 1121. Motor Vehicle Code violations**

A. The District Court of the Navajo Nation shall have original exclusive jurisdiction of the following Motor Vehicle Code violations involving a child when the person alleged to have committed the violation is a child who has reached his fifteenth birth date:

1. Driving while under the influence of intoxicating liquor or drugs;
2. Failure to stop or leaving the scene in the event of an accident causing death or personal injuries;
3. Reckless driving.

B. If a child is charged with any of the violations specified in Subsection (A) of this Section, the child may be transferred to the Family Court at the discretion of the District judge. Upon transfer, the child shall be proceeded against in the same manner as a child alleged to be a delinquent child.

C. Any Motor Vehicle Code violation by a child, including those specified in Subsection (A) of this Section, shall be subject to the reporting requirements and the suspension and revocation provisions of the Motor Vehicle Code, and shall not be subject to confidentiality provisions of the Children's Code.

D. No court may incarcerate a child who has been found guilty of any Motor Vehicle Code violation without first securing the approval of the Family Court.

**History**

CF-14-85, February 8, 1985.

**Cross References**

Navajo Nation Motor Vehicle Code, 14 N.N.C. § 100 *et seq.*

**§ 1122. Court costs and expenses**

A. The following expenses shall be a charge upon the funds of the Court upon their certification by the Court:

1. The expenses of service of summons, notices, subpoenas and other like expenses incurred in any proceeding under the Children's Code;
2. Reasonable compensation of a guardian ad litem appointed by the Court.

B. If, after due notice to the parents or other persons legally obligated to care for and support the child, and after a hearing, the Court finds that they are financially able to pay all or part of the costs and expenses in Subsection (A) of this Section, the court shall order them to pay the costs and

expenses and may prescribe the manner of payment. Unless otherwise ordered, payment shall be made to the Court for remittance to those to whom compensation is due, or if costs and expenses have been paid by the Court, to the Court.

C. Whenever legal custody of a dependent child or a child in need of supervision is vested in someone other than the child's parents, the Court, after notice to the parents or other persons legally obligated to support the child and after a hearing and a finding that they are financially able to afford all or part of the costs and expenses of the support and treatment, may order such parents or other legally obligated persons to pay to the court for remittance to the custodian in the matter a reasonable sum that will cover all or part of the expenses of the support and treatment of the child.

D. If the parent or other legally obligated person willfully fails or refuses to pay the sum ordered, the Court may proceed with contempt charges. An order for payment may be filed, and, if filed, shall have the effect of a civil judgment.

#### **History**

CF-14-85, February 8, 1985.

#### **§ 1123. Duty to report child abuse; penalty for failure to report**

A. Any licensed physician, resident or intern examining, attending or treating a child, any law enforcement official, registered nurse, visiting nurse, school teacher or social worker acting in his or her official capacity, or any other person having reason to believe that serious injury or injuries have been inflicted upon the child as a result of abuse, neglect or starvation, shall report the matter immediately to:

1. The appropriate Navajo Nation, state or federal health and social service department in the agency where the child resides; or
2. The presenting officer of the judicial District where the child resides.

B. An oral report shall be made promptly by the recipient of the report under Paragraph (1) or (2) of Subsection (A) of this Section to the presenting officer by telephone or in person and a written report shall be submitted to the presenting officer as soon thereafter as possible. The written report shall contain the names and addresses of the child and his or her parents, guardian or custodian, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries and other information that might be helpful in establishing the cause of injuries and the identity of the person or persons responsible for the injuries, and where the child has been referred or can be found.

C. Any person failing, neglecting or refusing to report a suspected case of child abuse, neglect or starvation shall be guilty of a misdemeanor and shall be punished by fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

#### **History**

CF-14-85, February 8, 1985.

**§ 1124. Admissibility of report in evidence; immunity of person reporting**

A. In any proceeding alleging child abuse or neglect under the Children's Code resulting from a report submitted under § 1123, or in any proceeding in which the report or any part of its contents is sought to be introduced in evidence, the report or its contents or any facts related thereto or to the condition of the child who is the subject of the report shall not be subject to a physician-patient privilege or similar privilege or rule against disclosure.

B. Any person reporting an instance of suspected child abuse, neglect or starvation, or participating in a judicial proceeding brought as a result of a report submitted under § 1123 shall be presumed to be acting in good faith and shall be immune from civil or criminal liability that might otherwise be incurred or imposed by law, unless a finding is made that the person acted in bad faith or with malicious purpose.

**History**

CF-14-85, February 8, 1985.

**Subchapter 7. Disposition**

**§ 1151. Disposition of a dependent child**

A. In the disposition phase of every case under this Code, the Court shall give priority to placement of the child with the closest relative who is found qualified to receive and care for the child by the Court after investigation by the Court counselor or an agency designated by the Court.

B. If a child is found to be dependent, the Court may in its judgment make any of the following dispositions in the best interests of the child:

1. Permit the child to remain with his parents, guardian or custodian subject to conditions and limitations prescribed by the Court;
2. Place the child under protective supervision of the Division;
3. Transfer legal custody of the child to any of the following:
  - a. An agency responsible for the care of dependent children;
  - b. A child-placing agency able to assume responsibility for the education, care and maintenance of the child and which is licensed or otherwise authorized by law to receive a child for placement into foster care, including a child care institution or a family home; or
  - c. A relative or other individual who, after study by the Family Court counselor or agency designated by the Court, is found by the Court to be qualified to receive and care for the child; or

4. Make such other disposition as may be necessary to serve the best interests of the child.

C. Any parent, guardian or custodian of a child who is placed in the legal custody of the Division or other person shall have reasonable rights of visitation with the child as determined by the Court unless the Court finds that the best interests of the child preclude any such visitation.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1152. Disposition of adjudicated delinquent child or a child in need of supervision**

A. If a child is found to be delinquent, the Court may impose a fine not to exceed the fine which would be imposed if the child were an adult and may enter its judgment making any of the following dispositions for supervision, care and rehabilitation of the child:

1. Any disposition that is authorized for the disposition of a dependent;
2. Transfer legal custody to an agency responsible for the care and rehabilitation of delinquent children;
3. Place the child on probation under such conditions and limitations as the Court may prescribe.

B. If a child is found to be in need of supervision, the Court may enter its judgment making any of the following dispositions for the supervision, care and rehabilitation of the child:

1. Any disposition that is authorized for the disposition of a dependent child;
2. Transfer legal custody to an agency responsible for the care of children in need of supervision, but not to one which is designed for custody of delinquent children; or
3. Place the child on probation under those conditions and limitations the Court may prescribe.

C. Unless a child found to be dependent or in need of supervision is also found to be delinquent, the child shall not be confined in an institution established for the care and rehabilitation of delinquent children. No child found to be delinquent or in need of supervision shall be committed or transferred to a facility used for execution of sentences of persons convicted of crimes.

D. Whenever the Court vests legal custody in an agency, institution or department it shall transmit with the dispositional order copies of all

clinical reports, predisposition studies and reports and other information in its possession pertinent to care and treatment of the child.

### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **Annotations**

#### **1. Juvenile detention**

"The Court holds that the Family Court cannot incarcerate a juvenile if Title 17 does not authorize incarceration of an adult committing the same offense. Though incarceration of a delinquent minor is mentioned as one option, the Court interprets Section 1152(A)(2) consistent with *Diné bi beenahaz'áanii*." *In the Matter of N.B. v. Greyeyes*, No. SC-CV-03-08, slip op. at 4, (Nav. Sup. Ct. April 16, 2008).

"The Court therefore interprets Section 1152(A)(2) to only allow incarceration when allowed for adults. Incarceration of a minor when unauthorized for an adult is cruel and unusual punishment in violation of the Navajo Bill of Rights." *In the Matter of N.B. v. Greyeyes*, No. SC-CV-03-08, slip op. at 4-5, (Nav. Sup. Ct. April 16, 2008).

"This Court concludes that [17 N.N.C.] Section 483(B)(5) provides no authority to incarcerate a delinquent child for disorderly conduct." *In the Matter of N.B. v. Greyeyes*, No. SC-CV-03-08, slip op. at 6, (Nav. Sup. Ct. April 16, 2008).

"As juvenile proceedings are not criminal but rather civil in nature, juvenile detention must not be viewed as punitive." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

#### **2. Child in Need of Supervision**

"The Navajo Nation Children's Code prohibits a family court from placing a child in need of supervision 'in a jail or other facility intended or used for%AAthe detention of children alleged to be delinquent'." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 2 (Nav. Sup. Ct. March 14, 2007).

"The Code limits the disposition of a child in need of supervision to, among other things, the transfer of legal custody 'to an agency responsible for the care of children in need of supervision, but not to one which is designed for custody of delinquent children'." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 2-3 (Nav. Sup. Ct. March 14, 2007).

"The Court holds a family court cannot use contempt to accomplish the incarceration of a CHINS child when it could not have incarcerated that child in the original CHINS order. The Children's Code reflects the clear intent of the Navajo Nation Council that CHINS children are a distinct group from juvenile delinquents and require a different type of treatment. As defined by

the Children's Code, children in need of supervision have not committed a criminal offense, but are in need [of] care or rehabilitation." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 3 (Nav. Sup. Ct. March 14, 2007).

"The use of contempt to incarcerate a CHINS child improperly treats that child as delinquent, violates the Council's clear prohibition on incarceration of such children, and amounts to cruel and unusual punishment under the Navajo Bill of Rights." *In the Matter of M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. at 4 (Nav. Sup. Ct. March 14, 2007).

#### **§ 1153. Disposition of a mentally ill or mentally retarded child**

If, at any stage of a proceeding under the Children's Code, the evidence indicates that the child is mentally retarded or mentally ill, the Court shall transfer legal custody of the child for a period not exceeding 30 days to an appropriate agency for further study evaluation and a report on the child's condition. The Court may thereafter issue an appropriate decree.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1154. Continuance under supervision without judgment—Consent decree—Disposition**

A. At any time after the filing of a delinquency or in need-of-supervision petition, and before the entry of a judgment, the Court may, on motion of the presenting officer or counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with probation services and agreed to by all the parties affected. The Court order continuing the child under supervision pursuant to this Section shall be known as a "consent decree".

B. If the child objects to a consent decree, the Court shall proceed to findings, adjudication and disposition of the case. If the child does not object, but an objection is made by the presenting officer after consultation with probation services, the Court shall consider the objections and the reasons therefore, and may in its discretion enter the consent decree.

C. A consent decree shall remain in force for a period not to exceed six months unless the decree is discharged sooner by probation services. Prior to the expiration of the six months period, and upon the application of probation services or any other agency supervising the child under a consent decree, the Court may extend the decree for an additional six months in the absence of objection to extension by the child. A copy of the application shall be served on the child or his counsel and he shall have 30 days from the date of service to object to the application. If the child objects to the extension, the Court shall hold a hearing on the issue of extension.

D. If, prior to discharge by probation services or the expiration of the consent decree, the child allegedly fails to fulfill the terms of the decree,

the presenting officer may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted in the same, manner as proceedings on petitions to revoke probation. If the child is found to have violated the terms of the consent decree, the Court may:

1. Extend the period of the consent decree; or
2. Make any other disposition which would have been appropriate in the original proceeding.

E. A child who is discharged by probation services or who completes a period under supervision without reinstatement of the original delinquency or need of supervision judgment shall not be in jeopardy again in any court for the same offenses alleged in the petition or an offense based upon the same conduct, and the original petition shall be dismissed with prejudice. Nothing in this Subsection precludes a civil suit against the child and his parents for damages arising from his conduct.

F. A judge who, pursuant to this Section, elicits or examines information or material involving a child that would be inadmissible in a hearing on the allegations of the petition shall not, over the objection of the child, participate in any subsequent proceedings on the delinquency or need of supervision petition if:

1. A consent decree is denied and the allegations in the petition remain to be decided in a hearing where the child denies his guilt; or
2. A consent decree is granted but the delinquency or in-need-of-supervision petition is subsequently reinstated.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Revision note.** Slightly reworded.

#### **§ 1155. Interlocutory disposition order in cases where service is made by publication; effect**

A. If the service of a summons upon any party is made by publication the Court may conduct a provisional hearing upon the allegations of the petition, make findings and enter an interlocutory order of disposition if:

1. The petition alleges that the child is dependent, in need of supervision or delinquent; and
2. The summons served upon parties other than those served by publication, in addition to other requirements:
  - a. States that prior to the final hearing on the petition designated in the summons a provisional hearing thereon will be held at a specified time and place;

b. Requires the party served to appear and, if appropriate, to answer the allegations of the petition at both the provisional and final hearing; and

c. States that findings of fact and orders of disposition made pursuant to the provisional hearing will become final at the final hearing unless the party served by publication appears at the final hearing; and

3. The child is personally before the Court at the provisional hearing on petitions alleging delinquency and in need of supervision, but the Court may waive the presence of the child in dependency cases.

B. All relevant provisions of the Children's Code shall apply to preliminary hearings, but the Court's findings and order of disposition shall have only an interlocutory effect pending the final hearing on the petition.

C. The interlocutory order shall have the following effect on the rights and duties of the party served by publication:

1. If the party served by publication fails to appear at the final hearing on the petition, the findings and interlocutory orders shall become final without further evidence, shall be entered as a judgment and shall have the same effect as if made at the final hearing; or

2. If the party served by publication appears at the final hearing, the interlocutory findings and orders shall be vacated and disregarded, and the hearing shall proceed upon the allegations of the petition as otherwise provided by the Children's Code without regard to this Section.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1156. Limitations on dispositional judgments; modification, termination or extension of court orders**

A. A judgment vesting legal custody of a child in an agency shall remain in force for an undetermined period not exceeding two years from the date entered, except that no child shall be ordered for more than one year to an institution for the housing of delinquent children without further order of the Court. A judgment transferring legal custody of an adjudicated delinquent child to an agency responsible for the custody and rehabilitation of delinquent children divests the Court of jurisdiction at the time of transfer of custody and:

1. The agency to which legal custody is transferred has the exclusive power to parole or release the child;

2. The supervision of a child after release under Paragraph (1) of this Subsection may be conducted by the agency in conjunction with the

Probation Office of the Navajo Nation, or any other suitable agency or under any contractual arrangements deemed appropriate;

3. A child or his guardian may petition the Family Court for review of agency decision denying parole or termination.

B. A judgment vesting legal custody of a child in an individual shall remain in force for two years from the date entered and automatically terminate at the end of the two years unless terminated or extended by order of the Court.

C. A judgment of probation or protective supervision shall remain in force for an undetermined period not exceeding two years from the date entered.

D. A child shall be released by an agency, and probation or supervision shall be determined by probation services or the agency providing supervision when it appears to the probation officer that the purpose of the order has been achieved before the expiration of the two-year period. A release and the reasons therefor shall be reported promptly to the Court in writing by the releasing authority.

E. At any time prior to expiration, a judgment vesting legal custody or granting protective supervision may be modified, revoked or extended on motion by:

1. A child, whose legal custody has been transferred to a person, and who requests the Court for a modification or termination of the judgment alleging that the transfer of legal custody is no longer necessary and that the person has denied application for release of the child or has failed to act upon the application within a reasonable time; or

2. A person vested with legal custody, or responsibility for protective supervision, who requests the Court for an extension of the judgment on the grounds that the requested action is necessary to safeguard the welfare of the child or the public interest.

F. At any time prior to the expiration of a judgment transferring legal custody, the court may extend the judgment for an additional period of one year if it finds that the extension is necessary to safeguard the welfare of the child or the interest of the Navajo Nation.

G. Prior to the expiration of a judgment of probation or protective supervision, the Court may extend the judgment for an additional period of one year if it finds that the extension is necessary to protect the community or to safeguard the welfare of the child.

H. When a child reaches 18 years of age all judgments affecting the child then in force automatically terminate.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**§ 1157. Judgment; noncriminal nature; nonadmissibility**

The Court shall enter a judgment setting forth the Court's findings and disposition in the proceeding. A judgment in proceedings on a petition under the Children's Code shall not be deemed a conviction of a crime nor shall it impose any civil disabilities ordinarily resulting from conviction of a crime, nor shall it operate to disqualify the child from participating in any Navajo Nation program or obtaining Navajo Nation employment. The disposition of a child and any evidence given in a hearing in court shall not be admissible as evidence against the child in any other case or proceeding before or after reaching majority.

**History**

CF-14-86, February 8, 1985.

CJN-52-69, June 4, 1969.

**Annotations**

**1. Construction and application**

"As juvenile proceedings are not criminal but rather civil in nature, juvenile detention must not be viewed as punitive." *In the Matter of A.W.*, 6 Nav. R. 38, 41 (Nav. Sup. Ct. 1988).

**2. Non Indians**

"We believe delinquency jurisdiction over non-Indians, as long as detention is not allowed, is civil in nature, and therefore within the jurisdiction of our courts. Our Children's Code, like those of states, classifies juvenile proceedings as civil." *In the Matter of A.P., a Minor*, No. SC-CV-02-05, slip op. at 6 (Nav. Sup. Ct. May 26, 2005).

**§ 1158. Appeals**

A. Any party may appeal from a final judgment of the Family Court to the Supreme Court of the Navajo Nation in the manner provided by the rules of the Court. The appeal shall be heard by the Supreme Court based on the files, records and transcript of the Family Court proceeding. The name of the child shall not appear in the record on appeal. The case number from the Family Court shall be used on all documents filed with and issued by the Supreme Court.

B. The appeal to the Supreme Court shall not stay the judgment appealed from, but the Supreme Court may order a stay upon an application consistent with the provisions of the Children's Code, if suitable provision is made for the care and custody of the child. If the order appealed from grants the legal custody of the child to or withholds it from one or more of the parties to the appeal, the appeal shall be heard at the earliest practical time.

C. The Supreme Court shall affirm the Family Court's judgment or it shall

modify the Court's judgment and remand the child to the jurisdiction of the Family Court for disposition consistent with the Supreme Court's decision.

D. A child who has filed a notice of appeal shall be furnished an electronically recorded transcript of the proceedings, or as much of it as is requested without cost, upon the filing of an affidavit that the child or the person who is legally responsible for the care and support of the child is not able to pay for the cost thereof.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1159. Procedural matters under the Children's Code**

A. The Court may allow, on its own motion or the motion of the presenting officer or counsel for the child, amendment of a petition or motion to add additional issues, findings or remedies raised during the proceeding.

B. Upon application of a party or on its own motion, the Court shall issue subpoenas requiring attendance and testimony of witnesses and the production of records, documents or other tangible objects.

C. The Court may cite a person for contempt of court for disobeying the Court's order or for obstructing or interfering with the proceedings of the Court or the enforcement of its orders.

D. In any proceeding under the Children's Code, either on motion of a party or on the Court's own motion, the Court may make an order restraining the conduct of any party over whom the Court has obtained jurisdiction.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1160. Purchase of care from private agency by public agency**

When the legal custody of a child is vested in the Division under the provisions of the Children's Code the Division may transfer physical custody of the child to an appropriate private agency and may purchase care and treatment from the private agency if the private agency submits periodic reports to the Division covering the care and treatment the child is receiving. Frequency of reports will be determined by the Division. The Division may see the child with reasonable notice to the private agency.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**§ 1161. Probation revocation; disposition**

A child on probation incident to an adjudication as a delinquent child or a child in need of supervision who violates a term of the probation may be proceeded against in a probation revocation proceeding. Revocation of probation shall be part of the initial proceeding and is begun by filing in the original proceeding a petition styled as a "Petition to Revoke Probation". Petitions to Revoke Probation shall be subject to the same procedures as petitions alleging delinquency. The petition shall state the terms of probation alleged to have been violated and the factual basis for these allegations. The standard of proof in probation revocation proceedings shall be evidence beyond a reasonable doubt. The hearing shall be before the Court without a jury. In all other respects, proceedings to revoke probation shall be governed by the procedures, rights and duties applicable to proceedings on a delinquency petition. If a finding of probation violation is made, the Court may extend the period of probation or make any other judgment or disposition that would have been appropriate in the original disposition of the case.

**History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Subchapter 9. Protective Services**

**§ 1251. Protective services worker; power and duties**

A. Protective services workers shall be employed by the Division.

B. The Division may cooperate with such state and community agencies as are necessary to achieve the purposes of this Chapter. The Division may negotiate working agreements with other jurisdictions. Such agreements shall be subject to ratification by the Navajo Nation Council or its designate.

C. A protective services worker shall:

1. Receive reports of dependent, abused or abandoned children and be prepared to provide temporary foster care for such children on a 24 hour basis.

2. Receive from any source, oral or written information regarding a child who may be in need of protective services.

3. Upon receipt of any report or information pursuant to Paragraph (1) or (2) of this Subsection immediately:

a. Notify the appropriate law enforcement agency;

b. Make a prompt and thorough investigation which shall include a determination of the nature, extent, and cause of any condition which is contrary to the child's best interests and the name, age, and

condition of other children in the home.

4. Take a child into temporary custody if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings and that his removal is necessary. Law enforcement officers shall cooperate with the Division to remove a child from the custody of his parents, guardian, or custodian when necessary.

5. After investigation, evaluate and assess the home environment of the child or children in the same home and the risk to such children if they continue to be subjected to the existing home environment, and all other facts or matters found to be pertinent. He shall determine whether any of such children is a child in need of protective services.

6. Offer to the family of any child found to be a child in need of protective services appropriate services, which services may include, but shall not be restricted to, protective services.

7. Within 30 days after a referral of a potential child in need of protective services, submit a written report of his investigation and evaluation to the presenting officer and to a central registry maintained by the Division.

8. No child shall remain in temporary custody for a period exceeding 72 hours, excluding Saturdays, Sundays and holidays, unless a dependency petition is filed.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1252. Limitations of authority; duty to inform**

A. Before offering protective services to a family, a worker shall inform the family that he has no legal authority to compel the family to receive such services and of his authority to initiate a dependency petition in the Family Court.

B. If the family declines the offered services, the worker may initiate a dependency petition in Family Court alleging a child in need of protective services if he believes it to be in the child's best interest.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1253. Central registry**

A. The Division shall maintain a central registry of reports,

investigations and evaluations made under the Children's Code. The registry shall contain the information furnished by Navajo Nation personnel throughout the Navajo Nation, including protective services workers, probation officers, Division caseworkers and Indian Child Welfare program employees.

B. Data shall be kept in the central registry until the child concerned reaches the age of 18 years.

C. Data and information in the central registry shall be confidential and shall be made available only with the approval of the Director of the Division to the Family Court, social services agencies, public health and law enforcement agencies, licensed health practitioners, and health and educational institutions licensed or regulated by the Navajo Nation. A request for the release of information must be submitted in writing, and such request and its approval shall be made part of the child's file.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1254. Immunity of participants; nonprivileged communications**

Any person making a complaint, providing information or otherwise participating in the child protective services program shall be immune from civil or criminal liability for such action, unless such person acted with malice or unless such person has been charged with or is suspected of abusing, abandoning or neglecting the child in question.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **Subchapter 11. Termination of Parent-Child Relationship**

#### **§ 1301. Petition; who may file; grounds**

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, foster parent, the Division, or a privately licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in Subsection (B). Any person may provide information showing that the parent-child relationship should be terminated to the Presenting Officer, and the Presenting Officer may initiate a petition based on such information.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any of the following grounds; the Court may also consider the best interests of the child:

1. That the parent has abandoned the child or that the parent has

made no effort to maintain a parental relationship with the child.

2. That the parent has seriously neglected or willfully abused the child.

3. That the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

4. That the parent is deprived of his or her civil liberties due to the conviction of a felony, and the offense is of such nature as to show the unfitness of such parent to have custody and control of the child, or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.

5. That the parents have voluntarily relinquished their rights to a child or have consented to adoption.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Revision note.** Slightly reworded.

#### **§ 1302. Contents of petition**

A. A petition for the termination of the parent-child relationship filed pursuant to this Chapter shall include, to the best information or belief of the petitioner:

1. The name and address of the petitioner;
2. The name, sex, date and place of birth, census number and residence of the child;
3. The basis for the Court's jurisdiction;
4. The relationship of the petitioner to the child or the fact that no relationship exists;
5. The names, addresses, and dates of birth, and census numbers of the parents, if known;
6. The names and addresses of the persons having legal custody or guardianship of the person or acting in loco parentis to the child, or the organization or authorized agency having legal custody or providing care for the child;
7. The grounds on which termination of the parent-child relationship is sought; and

8. The names and addresses of persons, or authorized agencies or officers thereof to whom or to which legal custody or guardianship of the person of the child might be transferred.

B. A copy of any relinquishment or consent, if any, previously executed by the parent shall be attached to the petition. Where placement outside Navajo Indian Country is contemplated, a consent or relinquishment shall conform with the provisions of the Indian Child Welfare Act, 25 U.S.C. § 1913.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **§ 1303. Notice; waiver; guardian ad litem**

A. After a petition for termination of parental rights has been filed, the clerk of the Family Court shall set a time and place for hearing. Notice thereof shall be given to the parents of the child, the person having physical custody of the child, the person having legal custody of the child, any individual standing in loco parentis to the child and the guardian ad litem, if any, as provided in the rules for service of process in civil actions.

B. The hearing shall take place no sooner than 10 days after the completion of service of notice.

C. Notice and appearance may be waived by a parent before the Court or in writing and attested to by two or more credible witnesses who are 18 or more years of age subscribing their names thereto in the presence of the person executing the waiver. The waiver shall contain language explaining the meaning and consequences of the waiver and the effect of termination of parental rights. The parent who has executed such a waiver shall not be required to appear, unless the child may be placed outside Navajo Indian Country, in which case the requirements of the Indian Child Welfare Act, 25 U.S.C. § 1913, must be complied with.

D. When termination of the parent-child relationship is sought under § 1301(B)(3), the Court shall appoint a guardian ad litem for the alleged incompetent parent. The Court may otherwise appoint a guardian ad litem as deemed necessary for any party.

E. The presenting officer, upon the request of the Court, the Division, or on his own motion, may intervene in any proceeding under this Subchapter to represent the interest of the child.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

#### **Annotations**

## **1. Guardian ad litem**

"While the Navajo Nation Code anticipates the appointment of a GAL in Children's Code cases, see 9 N.N.C. §§ 1107(D), (F) (for child), 1303(D) (for incompetent parent) (2005), nothing explicitly authorizes a district court to appoint a GAL for an alleged victim in a criminal case." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 7 (Nav. Sup. Ct. March 28, 2006).

### **§ 1304. Social study prior to disposition; contents**

A. Upon the filing of a petition, the Court shall order the Division, an agency or other person selected by the Court to conduct a complete social study. A written report shall be submitted to the Court prior to hearing, except that when an agency is the petitioner, either in its own right or on behalf of a parent, a report in writing of the social study made by such agency shall accompany the petition. The Court may order any additional studies it deems necessary. The social study shall include the circumstances of the petition, the social history, the present condition of the child and parent, proposed plans for the child, and such other facts as may be pertinent to the parent-child relationship. The report submitted shall include a specific recommendation on the termination of the parent-child relationship and the reasons therefor.

B. The Court may waive the requirement of the social study when the Court finds that it is in the best interest of the child.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

### **§ 1305. Hearing**

Cases filed under this Subchapter shall be heard by the Court in a closed hearing. Only such persons whose presence the judge finds to have a direct interest in the case or in the work of the Court shall be admitted provided that such persons shall not disclose any information obtained at the hearing. The Court may require the presence of any parties and witness it deems necessary to the disposition of the petition, except that a parent who has executed a waiver pursuant to § 1303, or has relinquished his rights to the child shall not be required to appear at the hearing unless placement outside Navajo Indian Country is contemplated.

#### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Revision note.** Previous reference to "§ 1304" has been changed to "§ 1303".

### **§ 1306. Court order; form; contents**

A. Every order of the Court terminating the parent-child relationship or transferring legal custody or guardianship of the person of the child or providing for protective supervision of the child shall recite the findings upon which such order is based, including findings pertaining to the Court's jurisdiction. Such order shall be conclusive and binding on all persons from the date of entry.

B. If the Court finds grounds for the termination of the parent-child relationship it shall terminate such relationship and take one of the following courses of action:

1. Appoint an individual as guardian of the child's person;
2. Appoint an individual as guardian of the child's person and vest legal custody in another individual or in an authorized agency; or
3. Place the child for adoption or order that an adoptive placement for the child be found.

C. The Court shall also make an order fixing responsibility for the child's support. The parent-child relationship may be terminated with respect to one parent without affecting the relationship of the other parent.

D. Where the Court does not order termination of the parent-child relationship, it shall dismiss the petition, provided that where the Court finds that the best interests of the child require substitution or supplementation of parental care and supervision, the Court shall make such orders as are necessary.

#### **History**

CF-14-85, February 8, 1985.

#### **§ 1307. Effect of court order**

An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other except the right of the child to inherit and receive support from the parent. This right of inheritance and support shall be terminated by a final order of adoption.

#### **History**

CF-14-85, February 8, 1985.

### **Subchapter 13. Indian Child Welfare Act Provisions**

#### **Code of Federal Regulations**

Tribal resumption of jurisdiction over child custody proceedings, see 25 CFR § 13.1 *et seq.*

## **§ 1401. Application of the Indian Child Welfare Act in Family Court**

The Family Court may apply the policies of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, where they do not conflict with the provisions of this Chapter. The procedures for state courts in the Indian Child Welfare Act shall not apply in the Family Court unless specifically provided for in this Chapter.

### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**Revision note.** Previous references to "Children's Court" in this Subchapter have been changed to "Family Court" pursuant to CAU-46-89, August 16, 1989.

## **§ 1402. Full faith and credit; conflict of laws**

A. State child custody orders involving Navajo children may be recognized by the Family Court only after a full independent review of such state proceeding has determined:

1. The state court had jurisdiction over the Navajo child;
2. The provisions of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, were properly followed;
3. Due process was provided to all interested persons participating in the state proceeding; and
4. The state court proceeding does not violate the public policies, customs, or common law of the Navajo Nation.

B. Tribal child custody orders involving Navajo children shall be recognized by the Family Court after the Court has determined:

1. That the Tribal court exercised proper subject matter and personal jurisdiction over the Navajo parties; and
2. Due process was accorded to all interested parties participating in the Tribal court proceeding.

C. Because of the vital interest of the Navajo Nation in its children and those children who may become members of the Navajo Nation, the statutes, regulations, public policies, customs and common law of the Navajo Nation shall control in any proceeding involving a Navajo child.

### **History**

CF-14-85, February 8, 1985.

CJN-52-69, June 4, 1969.

**§ 1403. [Reserved]**

**§ 1404. Voluntary placement**

The Family Court shall have exclusive jurisdiction over voluntary placements, both temporary and permanent, of Navajo children who are domiciled or reside within Navajo Indian Country. Parental consent to temporary placement, adoptive placement or relinquishment of parental rights shall be approved by and filed with the Family Court. The Family Court may require that the voluntary placement provisions of the Indian Child Welfare Act, 25 U.S.C. § 1913, be followed where the child is to be placed outside of Navajo Indian Country and the best interests of the child require.

**History**

CF-14-85, February 8, 1985.

**§ 1405. Family Court wardship**

Any Navajo child who is domiciled or resides within Navajo Indian Country and is voluntarily placed outside of Navajo Indian Country shall be made a ward of the Family Court. A copy of any consent executed by the parents of such Navajo child and the location of the placement shall be filed with the Family Court. A report on the location of the child shall be filed annually with the Family Court. Wardship attaches to the child when he or she physically leaves Navajo Indian Country. Any placement of a Navajo child in violation of this Section may be invalidated upon petition to the Family Court and the Court shall make such orders at that time as will protect the Court's wardship over the child's best interests.

**History**

CF-14-85, February 8, 1985.

Chapter 13. Domestic Abuse Protection Act

**History**

CJY-53-93, July 23, 1993.

**Note.** Sample forms and instructions for this Act are available at each District Court as well as those agencies specified at § 1657(c).

**Subchapter 1. General Provisions**

**§ 1601. Short title**

This Act may be cited as the "Domestic Abuse Protection Act".

**History**

CJY-53-93, July 23, 1993.

## **§ 1602. Policy**

It is the policy of the Navajo Nation to demonstrate respect for members of the Navajo family and clan. This respect has long been a tradition of the People, and is reflected throughout Navajo history and culture. Abuse against persons in a domestic setting has a lasting and detrimental effect on: (1) the individuals who directly experience the abuse; (2) the entire family and clan, as members indirectly experience the abuse; and (3) the Navajo Nation, as the victims and abusers carry the adverse effects of domestic abuse out of the family and into society itself. It is in the Nation's best interest to protect family and clan members from abuse. Accordingly, the Navajo Nation will not tolerate domestic abuse perpetrated against any person.

### **History**

CJY-53-93, July 23, 1993.

## **§ 1603. Findings**

The legislature of the Navajo Nation finds that:

A. Many persons are beaten, raped, harassed, or otherwise subjected to abuse within the family and clan setting;

B. Some persons are killed as a result of abuse within the family and clan setting;

C. Children suffer lasting emotional damage as direct targets of domestic abuse, and by witnessing the infliction of domestic abuse on other family and clan members;

D. The increase in the population of elderly Navajo citizens, the lack of services available for these citizens, and the changing family structure indicates that laws are necessary to insure the protection of elders within the family and clan setting, and in their caretaking settings;

E. All persons have the right to live free from violence, abuse, or harassment;

F. Domestic abuse in all its forms poses a major health and law enforcement problem to the Nation;

G. Domestic abuse can be prevented, reduced, and deterred through the intervention of law;

H. The legal system's efforts to prevent abuse in the family and clan setting will result in a reduction of violent behavior outside of the family and clan setting;

I. Abuse among family and clan members is not a "family matter," which justifies inaction by law enforcement personnel, prosecutors, or courts, but an illegal encounter which requires full application of protective laws and remedies;

J. An increased awareness of domestic abuse, and a need for its prevention, gives rise to the legislature's intent to provide maximum protection to victims of abuse in the family and clan setting; and

K. The integrity of the family, clan and of Navajo culture and society will be maintained by legislative efforts to remedy domestic abuse.

### **History**

CJY-53-93, July 23, 1993.

### **§ 1604. Purpose**

A. The purpose of this Act is to protect all persons: men, women, children, elders, disabled persons, and other vulnerable persons, who are within the jurisdiction of the Navajo Nation, from all forms of domestic abuse as defined by this Act and by Navajo Nation law. The Act shall be liberally construed and interpreted in order to achieve its purposes.

B. The Act embodies the intent of the legislature to promote the following goals:

1. To recognize the illegal nature of domestic abuse;
2. To provide victims of domestic abuse with the maximum protection from abuse that can be made available under the law;
3. To establish an efficient and flexible remedy that discourages violence against and harassment of persons within a family or clan setting, or others with whom the abuser has continuing contact;
4. To expand the ability of law enforcement officers to assist victims, to enforce existing laws, and to prevent subsequent incidents of abuse;
5. To facilitate the reporting of domestic abuse;
6. To develop a greater understanding of the incidence and causes of domestic abuse by encouraging data collection and evaluation; and
7. To reduce the incidence of domestic abuse, which has a detrimental and lasting effect on the individual, the family, culture, and society.

C. Nothing in this Act shall be construed to alter or diminish the existing authority of the courts of the Navajo Nation to provide remedies to address domestic abuse and prevent tortious conduct, including remedies provided by American common law, the law of equity, and Navajo common law.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

## **1. Purpose**

"The purpose of the act is to protect persons from all forms of domestic abuse." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4 (Nav. Sup. Ct. January 7, 2004).

## **2. Construction and application**

"The act limits the authority of the family courts to addressing violent and abusive conduct." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4 (Nav. Sup. Ct. January 7, 2004).

## **3. Family court**

"These sections do not give the court authority to divest another party of a homesite lease or a home attached to land granted to him or her by a previous court order." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4-5 (Nav. Sup. Ct. January 7, 2004).

"The court can grant exclusive possession of a place of residence as well as give temporary possession of personal property to a victim, each for a specified and limited period." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4 (Nav. Sup. Ct. January 7, 2004).

"Therefore, a family court cannot in a DAPA proceeding decide land dispute issues, including homesite leases and ownership of structures attached to the land." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4 (Nav. Sup. Ct. January 7, 2004).

## **4. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a temporary custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

## **§ 1605. Definitions**

These definitions shall be liberally construed so as to protect all persons who are subjected to domestic abuse. As used in this Act:

### **A. Domestic abuse**

1. "Domestic abuse" means the infliction of any of the following acts upon a victim as defined in § 1605(B):

a. "Assault"—an attempt to cause bodily harm to another through the use of force, or the creation in another of a reasonable fear

of imminent bodily harm;

b. "Battery"—application of force to the person of another resulting in bodily harm or an offensive touching;

c. "Threatening"—words or conduct which place another in fear of bodily harm or property damage;

d. "Coercion"—compelling an unwilling person, through force or threat of force, to:

(1) Engage in conduct which the person has a right to abstain from; or

(2) Abstain from conduct which the person has a right to engage in;

e. "Confinement"—compelling a person to go where the person does not wish to go or to remain where the person does not wish to remain;

f. "Damage to property"—damaging the property of another;

g. "Emotional abuse"—using threats, intimidation, or extreme ridicule to inflict humiliation and emotional suffering upon another;

h. "Harassment"—conduct which causes emotional alarm and distress to another by shaming, degrading, humiliating, placing in fear, or otherwise abusing personal dignity. Examples of harassing conduct include, but are not limited to the following:

(1) Unwelcome visiting or following of a person;

(2) Unwelcome sexual propositioning, reference to body functions or attributes, or other comments of a sexual nature;

(3) Unwelcome communications, made by phone or by other methods, containing intimidating, taunting, insulting, berating, humiliating, offensive, threatening, or violent language; or

(4) Unwelcome lingering around the home, school, or work place of a person.

i. "Sexual abuse"—any physical contact of a sexual nature, or attempted physical contact of a sexual nature, with a person, made without that person's consent. Consent cannot be obtained through means such as force, intimidation, duress, fraud, or from a minor under any circumstance; and

j. "Other conduct"—any other conduct that constitutes an offense or a tort under the law of the Navajo Nation.

2. Domestic abuse does not mean a victim's act of self-defense made in reasonable response to an abuser's act of domestic abuse.

B. "Victim" means any of the following persons who have been directly affected by domestic abuse as defined in § 1605(A):

1. Any member or former member of the abuser's household or immediate residence areas;

2. Any person involved in, or formerly involved in, an intimate relationship with the abuser;

3. Any person who interacts with the abuser in an employment, academic, recreational, religious, social or other setting;

4. Any offspring of the abuser;

5. Any relative or clan member of the abuser;

6. Any elderly person; or

7. Any vulnerable person. Examples of vulnerability which give rise to the protection of this Act include, but are not limited to, emotional and physical disabilities and impairments.

C. "Abuser" means any person who engages in conduct defined as domestic abuse under § 1605(A) against any of the persons defined as victims under § 1605(B).

D. "Protection order" means a court order that restrains the abuser from doing certain acts upon threat of penalty or sanction. Such an order may contain requirements to adjust the relationship of the parties and prevent further abuse. The term includes any emergency, temporary or domestic abuse protection orders issued by the Court.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Domestic abuse**

"The term 'domestic abuse' covers many kinds of misconduct, including harassment and damage to property." *Morris v. Williams*, 7 Nav. R. 426, 427 (Nav. Sup. Ct. 1999).

#### **2. Scope of court's authority**

"The clear thrust of the Act is to protect people from harm. It is not designed to be used to argue land dispute matters. While disputes over land may trigger conduct arising to the level of domestic abuse, the Navajo Nation courts are only empowered to deal with the conduct. They cannot decide land titles or boundaries under the Act." *Morris v. Williams*, 7 Nav. R. 426, 427-428 (Nav. Sup. Ct. 1999).

### 3. Child custody

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

### Subchapter 3. Protection Orders

#### United States Code

Grants to tribal governments to combat violent crimes against women, see 42 U.S.C. § 3796gg-10.

#### § 1651. Jurisdiction

##### A. Courts.

1. The Navajo Nation Family Courts shall have jurisdiction over all proceedings under this Chapter, except those proceedings initiated under § 1663(A).

2. A protection order may be sought as an independent civil action, or joined with any other civil action over which the Family Courts have jurisdiction.

3. Any person within the territorial jurisdiction of the Navajo Nation may seek remedies for protection within such jurisdiction, regardless of where the abuse occurred. The Court may provide remedies to protect victims within the Navajo Nation and to prevent future conduct.

4. Acts of domestic abuse which violate an existing Navajo Nation court order but which occur beyond the territorial jurisdiction of the Navajo Nation remain subject to the jurisdiction of the Court.

5. Provisions of this Act which call for criminal penalties apply only to those persons over which the Navajo Nation has criminal jurisdiction.

B. Venue. A petition for a protection order may be filed in any district in which:

1. The petitioner resides;
2. The respondent resides;
3. The alleged abuse occurred; or

4. The victim is temporarily located.

C. Non-exclusive relief.

1. The remedies and procedures provided in this Act are in addition to, and not in lieu of, any other available civil or criminal remedies. A petitioner shall not be barred from relief under this Act because of other pending proceedings or existing judgments.

2. Relief shall be available under this Act without regard to whether the petitioner has initiated divorce proceedings or sought other legal remedies.

3. As to domestic relations proceedings, if custody or support have already been adjudicated, the terms of a previous court order may be incorporated into a protection order. Custody or visitation arrangements specified in an existing order may be modified in a protection order upon a showing of changed circumstances and for the purpose of preventing further domestic abuse.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Scope of court's authority**

"The best interests of a child are paramount in custody decisions and a determination of paternity. We decide today that a Navajo court lacks jurisdiction to grant a putative father custody of minors in a temporary protection order without a legal determination establishing paternity and a parent-child relationship. In this regard, not even a putative father has standing to request custody. A paternity determination is a legal precondition in granting custody to a putative parent." *Davis v. Crownpoint Family Court*, No. SC-CV-46-01, slip op. at 6 (Nav. Sup. Ct. March 11, 2003).

#### **2. Paternity required**

"In *Davis*, we stated that (1) a putative father has no standing to request custody or visitation until a legal determination of paternity is made, (2) in the best interests of the child, a further inquiry must be made to ensure a wholesome child-parent relationship exists and (3) the legal determination of paternity can be made in a DAPA proceeding, even at the *ex parte* stage ... The family court erred when it granted custody and visitation without first making the jurisdictional determination concerning Crank's paternity." *Sombrero v. Keahnie-Sanford*, No. SC-CV-41-02 slip op. at 4 (Nav. Sup. Ct. September 15, 2003).

#### **3. Jurisdiction**

"The family court however lacks jurisdiction to hear a criminal case, meaning the prosecutor is required to file the criminal complaint in the district

court." *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 6 (Nav. Sup. Ct. May 24, 2004).

#### **4. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

#### **§ 1652. Peacemaker Court**

The Supreme Court of the Navajo Nation may allocate authority to the Navajo Peacemaker Court to provide for remedies to address domestic abuse, as defined in 9 N.N.C. § 1605(A). The following conditions shall apply to any grant of authority made to the Navajo Peacemaker Court under the Act:

A. The victim shall be given the option of having her or his petition heard by a qualified peacemaker or by the Family Court. If the victim consents to go before a peacemaker, any such consent shall be in writing, read to the victim in her or his primary language, and signed by the victim.

B. The written consent shall also advise the victim that, if at anytime during the proceeding the victim expresses the desire to have the petition heard by a Navajo Nation Family Court, the proceeding shall be removed to the Family Court.

C. Only peacemakers who have received specialized training in their primary language on the causes, symptoms and dynamics of domestic abuse shall be qualified to hear domestic abuse cases.

#### **History**

CJY-53-93, July 23, 1993.

#### **§ 1653. Who may file a petition**

A person may seek a protection order:

A. For herself or himself;

B. On behalf of a minor child;

C. On behalf of any person prevented by a physical or mental incapacity, or by hospitalization, from seeking a protection order;

D. On behalf of a client in the case of social service, housing, health, legal or law enforcement personnel; or

E. As a next friend of a victim.

#### **History**

CJY-53-93, July 23, 1993.

#### **§ 1654. Standard of proof, defenses**

A. The civil standard of proof shall apply to proceedings under this Act, except for proceedings under § 1663(A) and § 1663(B)(3). A court shall grant a protection order when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur. The order's purpose shall be to prevent the occurrence or recurrence of abuse.

B. A petitioner shall not be denied relief under this Act because:

1. The petitioner used reasonable force in self defense against the respondent;
2. The petitioner has previously filed for a protection order and subsequently reconciled with the respondent;
3. The petitioner has not filed for a divorce; or
4. The petitioner or the respondent is a minor.

C. The following shall not be considered a defense in a proceeding for the issuance or enforcement of a protection order under this Act:

1. Intoxication;
2. Spousal immunity; or
3. Provocation.

#### **History**

CJY-53-93, July 23, 1993.

#### **Annotations**

##### **1. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

**§ 1655. Temporary protection orders, ex parte**

A. Petition, motion and order.

1. Upon the filing of a Petition for Domestic Abuse Protection Order and Motion for Temporary Protection Order the court shall immediately grant or deny the petitioner's Motion for Temporary Protection Order without a hearing or notice to the respondent. The court shall grant the motion if it determines that an emergency exists.

a. A petitioner shall demonstrate an emergency by showing that:

(1) The respondent recently committed acts of domestic abuse resulting in physical or emotional injury to the petitioner or another victim, or damage to property; or

(2) The petitioner or another victim is likely to suffer harm if the respondent is given notice before the issuance of a protection order.

b. Evidence proving an emergency situation may be based on the petition and motion, police reports, affidavits, medical records, other written submissions, or the victim's statement.

c. The Temporary Protection Order may include any relief permitted by § 1660(B) of this Act and any other relief necessary to prevent further domestic abuse.

d. The Temporary Protection Order shall direct the respondent to appear at a hearing to show cause why the court should not issue a Domestic Abuse Protection Order.

e. Upon issuing the Temporary Protection Order, the Court shall immediately provide for notice to the respondent and notify law enforcement of the order under § 1661 of this Act.

2. If the Court finds that an emergency does not exist, the Court shall deny the petitioner's Motion for a Temporary Protection Order and schedule a hearing on the Petition for Domestic Abuse Protection Order.

a. The Court shall schedule the hearing within 15 days of the petition's filing.

b. The Court shall provide for notice to the Respondent according to § 1661(A) (1) of this Act.

3. The Court shall give a Motion for Temporary Protection Order priority over all other docketed matters and shall issue an order granting or denying the motion on the day it is filed.

B. Hearing, Domestic Abuse Protection Order.

1. The Court shall schedule a full hearing within 15 days after

granting or denying a Temporary Protection Order.

a. The respondent may move the Court to dissolve or modify any Temporary Protection Order within those 15 days.

b. The respondent must give at least five days notice of the motion to the petitioner. The Court shall give priority to such motions.

2. If the petitioner fails to appear at the hearing, the Court may continue the hearing for up to 15 days, or dismiss the petition without prejudice. Any Temporary Protection Order shall remain in effect during the continuance.

3. If the respondent fails to appear after receiving notice, the hearing shall go forward.

4. If, after a hearing, the Court finds by a preponderance of the evidence that the alleged domestic abuse occurred, the Court shall issue a Domestic Abuse Protection Order. The order may include the relief granted in any Temporary Protection Order and any additional relief that the Court deems necessary.

5. No Domestic Abuse Protection Order shall be issued without notice to the respondent and a hearing.

#### **History**

CJY-53-93, July 23, 1993.

#### **§ 1656. Telephonic or facsimile applications and orders**

An official of the Office of the Prosecutor, of a Navajo Nation chapter, or an officer of the Navajo Nation Police may apply for an Emergency Protection Order by telephone or facsimile ("fax").

A. The official or officer shall fill out an Application for Emergency Protection Order, specifying his or her reasonable grounds to believe that a victim is in immediate and present danger of domestic abuse.

B. The official or officer shall then contact a judge of the Navajo Nation courts by telephone or fax.

C. Any Navajo Nation Family Court judge may receive and act upon such applications.

D. A judge may issue an Emergency Protection Order by telephone or fax upon finding that:

1. A reasonable person would believe that an immediate and present danger of domestic abuse exists; and

2. An Emergency Protection Order is necessary to prevent the occurrence or recurrence of domestic abuse.

E. The Emergency Protection Order may include any relief permitted by § 1660(B) of this Act and any other relief necessary to prevent further domestic abuse.

F. The official or officer shall record the order on an Emergency Protection Order form and, by his or her signature, certify that the writing is a verbatim transcription of the judge's order. The certification of any such official or officer shall be prima facie evidence of the validity of the order.

G. The official or officer shall then give a copy of the order to the protected party, and serve a copy of the order on the restrained person.

H. The originals of the Application and Emergency Protection Order shall be filed with the Court no later than 9 a.m. the next court day.

I. The Emergency Protection Order shall expire no later than the close of judicial business the next court day after its issuance, unless the issuing judge indicates otherwise.

### **History**

CJY-53-93, July 23, 1993.

### **§ 1657. Pro se petitioners**

A. A victim of domestic abuse may petition the Court for protection without the assistance of legal counsel.

B. The petition and any accompanying documents may be handwritten or typed.

C. The following agencies shall keep and make available standard forms approved by the Navajo Nation courts for use in domestic abuse proceedings:

1. Navajo Nation Family and District Courts;
2. Navajo Nation Offices of the Prosecutor; and
3. Navajo Nation Police Departments.

D. The above-named agencies shall:

1. Provide information concerning:
  - a. The availability of protection orders;
  - b. Procedures for obtaining protection orders;
  - c. How to proceed without legal representation; and
  - d. The right of the petitioner to have her or his place of residence remain secret;
2. Prohibit non-legal staff from rendering advice or services that

call for the professional judgment of a lawyer or advocate;

3. Provide timely, free assistance to victims of domestic abuse in filing for protective relief,

4. Train their employees to aid victims of domestic abuse in filling out the necessary forms;

5. Keep the addresses of victims confidential; and

6. Keep a record of each case in which they assist a victim in filing for a protection order. The record shall include the following information:

a. A copy of the papers filed with the Court;

b. Names, genders, and relationship of the parties;

c. A description of the domestic abuse, any weapons involved and any resulting injuries;

d. Dates of the domestic abuse and dates of filing for protective relief, and

e. The source(s) of all information obtained.

E. The above-named agencies shall make the standard forms available to other community organizations which may interact with victims such as shelters, chapters, schools, hospitals, and offices of the Navajo Housing Authority.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

#### **§ 1658. Confidentiality**

A petitioner seeking protection shall not be required to reveal her or his address or place of residence except to the judge, in chambers, for the purpose of determining jurisdiction and venue.

### **History**

CJY-53-93, July 23, 1993.

### **§ 1659. Evidence, hearsay exception**

A court shall admit into evidence as an exception to the hearsay rule learned treatises or other reliable materials which describe and explain the "battered women's syndrome" or otherwise examine the impact of violence upon victims.

### **History**

CJY-53-93, July 23, 1993.

### **§ 1660. Available relief**

A. In any proceeding in which a petition for a protection order is filed, once the petitioner has met the burden of proof, the Court shall grant any relief necessary to prevent further abuse. Available relief includes but is not limited to the following:

1. No further abuse. The Court may order the respondent to refrain from further threatening, harassing, or harming the victim or committing any act of domestic abuse;

2. Exclusive possession. The Court may grant exclusive possession of the residence or household to the victim regardless of whether the residence is owned jointly, or owned solely by the abuser. The Court may order the respondent to vacate the residence;

3. Stay away. The Court may order the respondent:

a. To stay away from the victim and others who may be endangered;

b. Not to enter or linger outside of petitioner's or any family or clan member's residence, place of work, or school; or

c. To leave and remain away from any reasonably-defined geographic area;

4. No contact. The Court may order the respondent not to initiate contact with the petitioner in person, in writing, by phone, or through others unless otherwise specified by the Court;

5. Rent and mortgage payments. The Court may order the respondent to pay rent or make mortgage payments on a residence occupied by the petitioner if the respondent is found to have a duty to support the victim or other members of the household;

6. Alternative housing. The Court may order the respondent to pay for shelter or temporary housing for the victim if the victim cannot remain in her or his home due to the danger of recurrence of domestic

abuse;

7. Child custody.

a. The Court may award either party immediate, temporary custody of any minor children of the parties until further order of the Court, or the Court may enter a permanent custody order;

b. In determining custody, the Court shall presume that an abusive parent is unfit to have custody of the minor children. The respondent may rebut the presumption by showing that he or she is not abusive of the children and his or her abuse of others does not adversely affect the children.

8. Visitation. The Court may grant the non-custodial parent visitation with any minor children of the parties.

a. If disclosing the victim's address for purposes of visitation may endanger the victim, the Court may order alternative arrangements. Example: The petitioner drops the children off and the respondent picks them up at a pre-arranged neutral place such as a relative's home;

b. If there is evidence that the abuser may endanger the children, the Court may order supervised visitation in a public location or may deny visitation entirely,

9. Payment of support. The Court may order the non-custodial parent to pay child support if that parent is found to have a duty to pay such support;

10. Monetary compensation. The Court may order the respondent to compensate the petitioner for the losses suffered as a direct result of the respondent's acts of domestic abuse, including, but not limited to, medical expenses, loss of earnings or other income, cost of repair or replacement of real or personal property, moving or other travel expenses, and attorney's fees;

11. Possession of personal property. The Court may order the respondent to give temporary possession of personal property to the petitioner or victim including automobiles, checkbooks, keys, documents, and other personal property;

12. Nondisposition of property. The Court may order either party or both parties not to transfer, encumber, or otherwise dispose of specified property mutually owned or leased by the parties;

13. Counseling. The Court may order either or both parties to attend any counseling which the Court finds will address the problems underlying the parties' domestic abuse;

14. Substance abuse counseling. If the Court finds that substance abuse was a factor in the domestic abuse, the Court may order either or both parties to attend counseling or enter a rehabilitation program for

substance abuse;

15. Payment of costs of counseling. The Court may order the respondent to pay for the costs of any counseling ordered under §§ 1660(A) (13) and (14);

16. Law enforcement supervision of return to residence. The Court may order the police to accompany the victim to a residence to collect her or his personal belongings, to take physical custody of the children, and/or to take physical possession of the residence;

17. Court costs and fees. The Court may order the respondent to pay to the Court the costs of the proceeding, including filing fees, fees for service of process, and photocopy costs.

18. Security or bond. To assure compliance with any court order, the Court may require the respondent to post a bond, deposit money with the Court, or pledge property as security. Upon determining that the respondent has violated the order, the Court may require payment or transfer of the bond, money, or property to the petitioner or to the Navajo Nation.

19. Other relief. The Court may grant such other relief as it deems necessary.

B. Ex parte relief. Any Emergency Protection Order or Temporary Protection Order granted without a hearing may include the following relief described above: (1) No further abuse; (2) Exclusive possession; (3) Stay away; (4) No contact; (7) Immediate temporary custody; (11) Possession of personal property; (12) Nondisposition of property; (16) Law enforcement supervision of return to residence; (19) Other relief.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Defendant's rights**

"Davis, the mother, must be given the opportunity to defend herself against the allegations of violent acts, which presumably placed her children in danger. Should Holloway, the putative father, satisfy his burden of proof that the mother did indeed commit acts of violence, 9 N.N.C. § 1660 (A) of the DAPA authorizes the granting of child custody once the mother fails to rebut the presumption." *Davis v. Crownpoint Family Court*, No. SC-CV-46-01, slip op. at 5-6 (Nav. Sup. Ct. March 11, 2003).

#### **2. Burden of proof**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for

a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

"First, for this Section to operate, the mother must be found abusive in a hearing and the father has the burden to prove his case. Secondly, once found abusive, the inference that the mother is unfit can be rebutted by the mother to show that she is not abusive of the children and that her abuse of others does not adversely affect them." *Davis v. Crownpoint Family Court*, No. SC-CV-46-01, slip op. at 5 (Nav. Sup. Ct. March 11, 2003).

### **3. Due process rights**

"The finding by the court that Davis, the mother, is unfit without a hearing or without proof to the satisfaction of the court by the putative father that she committed acts of abuse, violates her due process rights. For these reasons, we conclude that the Crownpoint Family Court violated the mother's due process rights by misapplying Section 1660 (A) (7) (b) of the *Domestic Abuse Protection Act*." *Davis v. Crownpoint Family Court*, No. SC-CV-46-01, slip op. at 6 (Nav. Sup. Ct. March 11, 2003).

### **4. Court's authority**

"A court can prohibit by a DAPA order the transfers, encumbrances or dispositions of specified property mutually owned or leased by the parties." *In the Matter of Sheppard v. Dayzie*, No. SC-CV-66-00, slip op. at 4 (Nav. Sup. Ct. January 7, 2004).

### **5. Fees**

"While Section 1665 appears in isolation to give the family court the discretion to assess the fee on any respondent, the actual practice, as described above, is that the respondent is always required by the fee. This practice is contrary to DAPA. DAPA forbids the assessment against a prevailing respondent. Section 1665 must be read together with other sections of DAPA, in particular Section 1660, which sets out the possible relief a court may award a petitioner in a protection order. Section 1660 states that in any protection order proceeding, 'once the petitioner has met the burden of proof,' the Court must grant any relief necessary to prevent further abuse." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 3 (Nav. Sup. Ct. July 18, 2005).

"Taken together, the plain language of Sections 1660 and 1665 anticipate the assessment of fees, including the commissioner fee. Only when the need for a protection order has been proven, and not automatically whenever a commissioner holds a hearing. To interpret these provisions otherwise would punish an innocent respondent. It is patently unfair to impose a fee on a person who did not bring the action and was found not to have committed abuse. This Court therefore holds that the assessment of a fee in this case was contrary to the provisions of DAPA." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 4 (Nav. Sup. Ct. July 18, 2005).

### **6. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

#### **§ 1661. Service of process**

A. Upon entering a protection order under this Act, the Court shall immediately:

1. Provide for notice to the respondent.

a. The court clerk shall hand-deliver any protection order, petition, motion, summons, notice of hearing, or other documents filed with the Court, to the proper person(s) for service upon the respondent.

b. Any officer of the Navajo Police, court official, member of the Office of the Prosecutor or court-appointed process server may serve process within the Navajo Nation in a proceeding under this Act.

c. Service outside of the Navajo Nation shall be completed according to Rule 4(e)(2) of the Navajo Rules of Civil Procedure.

d. If personal service cannot be made, the Court may serve the respondent by certified mail, return receipt requested. The return receipt, when received by the Court, shall constitute prima facie evidence that the respondent received notice of the proceedings.

2. Notify law enforcement. The court clerk shall provide a copy of the protection order to the police department(s) with jurisdiction over the residence of the petitioner, and over any other addresses listed in the order.

B. The Navajo Nation Police Department shall:

1. Upon receipt of documents pursuant to § 1661(A)(1), personally serve the documents upon the respondent immediately. Service of protection orders shall take priority over all routine police business.

2. Upon receipt of a protection order pursuant to § 1661(A)(2), file the order in a protection order registry. Each Navajo Nation Police Department shall maintain a registry of all protection orders. The orders shall be indexed by the names of both the petitioner and the respondent.

#### **History**

CJY-53-93, July 23, 1993.

## **§ 1662. Duration of protection orders**

A. A protection order shall be effective upon the respondent as soon as he or she has knowledge of the order. Verbal communication of the existence of a protection order shall constitute sufficient notice.

B. A Temporary Protection Order shall remain in effect until the Court holds a hearing and issues a Domestic Abuse Protection Order, or until the Court dismisses the petition.

C. A Domestic Abuse Protection Order shall remain in effect for five years, unless otherwise specified by the judge.

D. Renewal, extension or modification of protective orders.

1. The petitioner may petition the Court to renew or extend a protection order at any time before its expiration. In an emergency, the Court may issue an extension or renewal *ex parte* pursuant to the provisions for *ex parte* relief set forth in § 1655 of this Act.

2. The Court may modify a protection order upon showing by either party of unanticipated problems or changed circumstances.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Child custody**

"Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. 9 N.N.C. § 1654(A) (2005). This low burden of proof is insufficient for a permanent determination of child custody. Protection orders are intended to prevent abuse—not to determine permanent custody. In a DAPO the trial court may make only a *temporary* custody assignment based on a preponderance of the evidence." *Smith v. Kasper*, No. SC-CV-30-07, slip op. at 4-5 (Nav. Sup. Ct. December 2, 2009).

## **§ 1663. Violation of protection orders**

A. Criminal violations.

1. If, after receiving notice of a protection order, the respondent disobeys the order, he or she commits the offense of interfering with judicial proceedings. The Court may refer such violations to the Office of the Prosecutor for prosecution.

2. A police officer with knowledge of the violation shall immediately arrest the respondent if there exists probable cause to believe that he or she has violated a protection order. The respondent

shall be arrested whether or not such violation occurred in the presence of the officer. The violation shall then be referred to the Office of the Prosecutor for prosecution.

3. The respondent shall then be criminally prosecuted.

B. Contempt of court, forfeiture of bond, money, or property.

1. Any person who has reason to believe that the respondent has violated a protection order or has refused to carry out a judgment, order, or condition imposed by the Court may move the Court for an Order to Show Cause, pro se.

2. The Court shall hold a hearing within 15 days to determine whether the respondent violated the protection order or refused to carry out any judgment, order, or condition.

3. If the Court finds, beyond a reasonable doubt, that the respondent violated the protection order, the Court shall hold the respondent in criminal contempt of court. The Court may punish the respondent with imprisonment of up to 180 days, a fine of up to two hundred fifty dollars (\$250.00), or both. Further, the Court may require forfeiture of any bond posted, money deposited, or property pledged as security to assure compliance with the order under § 1660(A)(18).

4. If the Court finds, by a preponderance of the evidence, that an individual has refused to carry out a judgment, order, or condition imposed by the Court, the Court may hold that person in civil contempt of court. To compel the person to carry out the judgment, order, or condition, the Court may incarcerate that individual for up to 180 days, or impose such other penalties as the Court deems necessary to compel compliance.

C. Hearings on alleged violations of protection orders shall be expedited.

### **History**

CJY-53-93, July 23, 1993.

### **Annotations**

#### **1. Construction and application**

"The law requires a finding that a person violated a term of a protection order before jail becomes an option. The courts are prohibited from imposing a jail sentence on a person simply on the basis of the person's admission to an allegation in a domestic abuse protection petition." *In re: Petition of Austin, Sr. For Habeas Corpus*, 7 Nav. R. 346, 348 (Nav. Sup. Ct. 1998).

#### **2. Procedure**

"After a hearing, held 15 days after the order to show cause is issued, the family court can hold the respondent in criminal contempt upon a finding beyond

a reasonable doubt that he or she violated the order." *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 7 (Nav. Sup. Ct. May 24, 2004).

"There is an alternative procedure, whereby any 'person' who believes the respondent has violated a protection order can move the family court for an order to show cause." *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 6-7 (Nav. Sup. Ct. May 24, 2004).

"If a respondent in a Domestic Abuse Protection Act (DAPA) case violates a protection order, the family court or the police department may refer the incident to the prosecutor for criminal prosecution." *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 6 (Nav. Sup. Ct. May 24, 2004).

### **3. Penalties**

"DAPA authorizes the family court to incarcerate the respondent for up to one hundred and eighty days and/or fine him or her two hundred fifty dollars (\$250.00)." *Thompson v. Greyeyes*, No. SC-CV-29-04, slip op. at 7 (Nav. Sup. Ct. May 24, 2004).

### **4. Expired orders**

"As a general rule, there can be no enforcement of an order which has expired. Furthermore, to maintain the focus of the DAPO on actual protection against immediate harm, this Court also holds that a Family Court may not issue a bench warrant, a temporary commitment order, or conduct an OSC hearing on ancillary matters of an expired DAPO." *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. at 6-7 (Nav. Sup. Ct. February 27, 2009).

### **§ 1664. Vacation of protection orders**

A. A party who wishes to have a protection order vacated must move the Court for an order.

B. A protection order shall be vacated only by court order.

C. In determining whether or not to vacate a protection order, the Court shall consider the following factors:

1. Whether either or both of the parties have attended counseling and for how long;

2. Whether the respondent has attended substance abuse counseling and for how long;

3. Whether the circumstances have changes so as to remove the danger to the petitioner from the respondent; and

4. Any other factors the Court deems relevant.

D. The court clerk shall provide a copy of any subsequent order to all police departments to whom a copy of the original protection order was delivered under § 1661(A) (2).

E. All Navajo enforcement agencies shall enforce any protection order that has neither expired nor been vacated, regardless of the current status of the parties' relationship.

#### **History**

CJY-53-93, July 23, 1993.

#### **§ 1665. Fees; filing, service, copies**

The Court shall not charge the petitioner any fee for filing, copies, forms, service of process, or any other services associated with petitioning for a protection order. The Court may order the respondent to pay costs and fees.

#### **History**

CJY-53-93, July 23, 1993.

#### **Annotations**

##### **1. Court authority**

"While Section 1665 appears in isolation to give the family court the discretion to assess the fee on any respondent, the actual practice, as described above, is that the respondent is always required by the fee. This practice is contrary to DAPA. DAPA forbids the assessment against a prevailing respondent. Section 1665 must be read together with other sections of DAPA, in particular Section 1660, which sets out the possible relief a court may award a petitioner in a protection order. Section 1660 states that in any protection order proceeding, 'once the petitioner has met the burden of proof,' the Court must grant any relief necessary to prevent further abuse." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 3 (Nav. Sup. Ct. July 18, 2005).

"Taken together, the plain language of Sections 1660 and 1665 anticipate the assessment of fees, including the commissioner fee. Only when the need for a protection order has been proven, and not automatically whenever a commissioner holds a hearing. To interpret these provisions otherwise would punish an innocent respondent. It is patently unfair to impose a fee on a person who did not bring the action and was found not to have committed abuse. This Court therefore holds that the assessment of a fee in this case was contrary to the provisions of DAPA." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 4 (Nav. Sup. Ct. July 18, 2005).

##### **2. Court rules**

"Consistent with the principle of *íishjání ádoonií*[, in which our laws and rules should be clear, this Court, pursuant to 7 N.N.C. § 601 (as amended by the Navajo Nation Council Resolution No. CO-72-03 (October 24, 2003)) will amend the domestic violence rules to address this issue." *Yazzie v. Thompson*, No. SC-CV-69-04, slip op. at 4 (Nav. Sup. Ct. July 18, 2005).

#### **§ 1666. Comity**

A. Any protection order issued pursuant to this Act shall be effective throughout the Navajo Nation.

B. Upon determining that a foreign court had jurisdiction to enter a protection order, a Navajo Nation court may issue an order recognizing that protection order and according it comity. Once recognized, a protection order shall be enforced as if it were an order of a court of the Navajo Nation.

#### **History**

CJY-53-93, July 23, 1993.

#### **§ 1667. Mutual protection orders**

Mutual protection orders shall not be granted unless the respondent files a petition for protection and makes a separate showing of domestic abuse pursuant to this Act.

#### **History**

CJY-53-93, July 23, 1993.

### **Chapter 17. Child Support Enforcement Act**

#### **§ 1701. Short Title**

This Act shall be known as the Navajo Nation Child Support Enforcement Act.

#### **History**

CD-111-94, December 14, 1994.

#### **United States Code**

Title IV(D) of the Social Security Act, Child Support and Establishment of Paternity, 42 U.S.C. § 651, et seq., 42 U.S.C. § 654.

#### **Annotations**

##### **1. Construction of federal law**

"Title IV-D of Social Security Act, dealing with child support enforcement, conferred private cause of action under § 1983 upon recipients of Aid to Families with Dependent Children (AFDC) to challenge state's refusal to assist them in obtaining child support enforcement from absent parents living on Indian reservations. *Howe v. Ellenbecker*, C.A.8 (S.D.) 1993, 8 F.3d 1258, certiorari denied 114 S.Ct. 1373, 511 U.S. 1005, 128 L.Ed.2d 49." Civil Rights <KEY> 1330(6)

"Any interpretation of Title IV-D of Social Security Act, dealing with child support enforcement, that results in exclusion of large percentage of Indian children and their parents from its benefits is unreasonable and contrary to

language and purposes of the Act. *Howe v. Ellenbecker*, D.S.D.1991, 774 F.Supp. 1224, affirmed 8 F.3d 1258, certiorari denied 114 S.Ct. 1373, 511 U.S. 1005, 128 L.Ed.2d 49." Social Security And Public Welfare <KEY> 194

#### **§ 1702. Statement of Policy**

A. It is the public policy of the Navajo Nation to implement the values of Navajo common law regarding parentage and children. Children are the most valuable gift of creation. They must be loved and receive care. There is a parental duty to establish a child's parentage for identity in family and clan relations. Parents and relations have a duty to nourish and support children. Where there is disharmony in the family, parents will subordinate their interests in favor of their children.

B. Children shall be maintained, as completely as possible, from the resources of their parents. This Act establishes an administrative process for the establishment of parentage; the establishment, modification and enforcement of child support obligations; and adds remedies to those already existing for child support enforcement. This Act shall be liberally construed to effectuate the policy stated herein; and these remedies shall be in addition to, and not in lieu of, those in existing law.

C. The state agencies within the States of Arizona, New Mexico, and Utah which are charged with the statewide provision of services to individuals under Title IV(D) of the Social Security Act<sup>1</sup> may utilize the administrative and judicial review processes provided for in this Act, to the extent that they negotiate agreements with the Navajo Nation for the performance of administrative functions by the Navajo Nation. Absent such agreements, the Navajo Nation shall have no obligation to provide services under this Act to state Title IV(D) agencies. In no manner is this Act intended, nor is it to be deemed, to relieve the States of Arizona, New Mexico and Utah from providing equal protection of the laws of their respective states and the United States to their citizens.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1703. Definitions**

For purposes of this Act:

A. "Absent Parent" means a parent of (a) child(ren) either during the course of marriage or outside of marriage who is not providing the custodial parent with child support for the benefit of the child(ren), or who is bound by an administrative or court order to pay a child support obligation.

B. "Administrative Order" unless otherwise indicated means an order issued by the Office of Hearings and Appeals establishing and/or modifying parentage of and/or liability for public debt and/or child support for any child(ren).

C. "Child" means any person under the age of 18 who is not emancipated according to the laws of the Navajo Nation who is alleged to be the natural or

adopted offspring of an absent or custodial parent.

D. "Child Support" means the financial obligation an absent parent has towards his or her child(ren), whether such obligation is established through judicial or administrative process, by stipulation of the absent parent, or by parentage of any child(ren). The financial obligation of an absent parent shall be met through the payment of monies and/or through the provision of other goods and/or services, as ordered by the Office of Hearings and Appeals, or the courts.

E. "Court" shall mean any family court of the Navajo Nation or a court of another state or territory having jurisdiction to determine an absent parent's liability for child support.

F. "Court Order" means any order, judgment, or decree of a court establishing or modifying parentage for (a) child(ren) and/or liability for public debt and/or child support for any child(ren).

G. "Custodial Parent" means the parent who holds legal custody of the child(ren) pursuant to a court order, or who exercises physical custody of the child(ren) on the basis of agreement between the parents or the absence of one parent. The term custodial parent shall also include a guardian or custodian appointed by a court of competent jurisdiction.

H. "Division" unless otherwise indicated means the Navajo Nation Division of Human Resources, or its successor.

I. "Garnishment" means the process whereby an order is directed to an employer, bank or agent, holding monies or property of an absent parent, to make payments or deliver property to satisfy a child support obligation in accordance with the order.

J. "Gross Income" is income from any source, including but not limited to, salaries, wages, commissions, bonuses, dividends, severance or retirement pay, pensions, interest, trust income, annuities, capital gains, unemployment compensation, worker's compensation, disability insurance benefits, tips, gifts, prizes, and alimony. It includes in-kind and non-cash income, calculated at reasonable market value.

K. "Income Tax Refund Interception" is a remedy whereby any income tax refund of an absent parent shall be intercepted directly from the United States, state, Navajo Nation, or other Indian Nation for the payment of public and/or support debt.

L. "Parent" means the natural or adoptive mother or father of a child.

M. "Parentage" means the condition of being the natural or adoptive mother or father of any child(ren) and includes both the paternity and maternity of any child(ren).

N. "Public Assignment of Child Support Rights" means the assignment of child support rights by the custodial parent to the Navajo Nation, or any state or federal agency. Such assignment may be in connection with the payment of benefits under the federal Aid to Families with Dependent Children (AFDC) to or

for the benefit of any child(ren) by the Navajo Nation, or any state or federal agency, as a consequence of the failure of an absent parent to provide child support to any child(ren).

O. "State Lottery and Indian Gaming Winnings" means any and all monies and/or goods and/or services which are awarded to an individual as a consequence of a state and/or Indian Nation gaming operation.

P. "Child Support Rights" means the rights of a custodial parent to receive child support from an absent parent as determined under the law of the Navajo Nation or comparable laws of any other jurisdiction or territory.

Q. "Wage Assignment" means a voluntary written assignment of earned wages which is submitted by an employee to an employer, authorizing the employer to pay the earned wages of the employee to or for the benefit of a child.

R. "Wage Execution" is a remedy which can be included in an administrative or court order directing an employer to make payments to or for the benefit of a child from the earned wages of any employee.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1704. Public Assignment of Child Support Rights, Establishment and Amount of Obligation**

A. Assignment. A public assignment of child support rights constitutes an obligation owed by the absent parent to the Navajo Nation, or any state or federal agency. The assignment may be connected to the payment of AFDC benefits to, or for the benefit of, the child(ren).

1. A custodial parent who receives AFDC benefits in his or her own behalf or for the benefit of a child shall assign all accrued child support rights for the AFDC beneficiary child(ren), to the Navajo Nation, or other federal or state agency which made AFDC payments to the custodial parent.

2. A custodial parent who does not receive AFDC benefits may apply for services from the Division under this Act upon their voluntary assignment of all accrued child support rights to the Navajo Nation. Provided, that the Division may charge non-AFDC recipient custodial parents fees for services provided under this Act, in accord with the fee schedule established pursuant to § 1711 of this Act.

3. The assignment of child support rights includes the right to prosecute any action to establish parentage, and to establish, modify, and/or enforce the amount of child support obligation, pursuant to this Act or any other provision of applicable Navajo Nation law. All such actions shall be brought in the name of the Navajo Nation, or such other federal or state agency which made AFDC payments to the custodial parents.

4. The custodial parent shall have the right to refuse to assign

support rights to the Navajo Nation, or other federal or state agency, for good cause, based upon the best interests of the child(ren).

B. Obligation. The absent parent's child support obligation shall be established through the administrative process provided in this Act, or by a voluntary agreement which meets the requirements of § 1716 of this Act.

1. The obligation shall commence at the time of the entry of the administrative order which establishes the amount of the child support payable by the absent parent, or on the date on which the absent parent signs the voluntary agreement.

2. If there is an administrative order, the amount of the child support obligation shall be the amount set in the administrative order.

3. Until there is an administrative order entered, the amount of the child support obligation shall be presumed to be the amount determined in writing by the Division as part of the administrative process established under this Act, in accordance with the Navajo Nation Child Support Guidelines.

#### **History**

CD-111-94, December 14, 1994.

#### **Annotations**

##### **1. Construction and application**

"Section 4(A) (III) does not provide OHA with authority to modify child support beyond that in Section 8(F). The Act does not grant OHA authority to review or modify court-ordered child support." *Bedoni v. Navajo Nation Office of Hearing and Appeals, and Calvin Biakeddy*, No. SC-CV-13-02, slip op. at 2 (Nav. Sup. Ct. September 4, 2003).

##### **2. Interest**

"In *Yazzie v. Yazzie*, 7 Nav. R. 203 (1996), we required a family court to award 10% interest calculated on a month-to-month basis for child support arrearages. Our rationale for awarding interest was 'not to penalize or punish,' but to reach 'an equitable amount to be paid.' *Id.* at 206. The 10% compounded formula [is to] be used as an incentive for the parent paying child support to pay on time." *Watson v. Watson*, No. SC-CV-45-03, slip op. at 3 (Nav. Sup. Ct. March 2, 2005).

#### **§ 1705. Notice of Public Assignment of Child Support Rights**

When the Navajo Nation or any other state and/or federal agency has received an assignment of child support rights, the Division may issue a Notice of Public Assignment of Child Support Rights. Service shall be by certified mail, restricted delivery. Provided, that where an attempt to serve by certified mail is unsuccessful, personal service shall be made by any person designated by the Division who has reached the age of 18 years, and who is neither identified as a child nor a custodial parent under the Notice of

Assignment of Child Support Rights. The notice shall include:

A. A statement providing the name(s) of the child(ren) for whom parentage is alleged and for whom child support is being sought, and the name of the custodial parent;

B. A statement of the child support obligation accrued, and a demand for immediate payment, for those cases wherein a court or administrative order has established the child support obligation; or

C. A statement of the child support obligation which the Division has determined to be appropriate, in accord with the Navajo Nation Child Support Guidelines, for those cases in which no court or administrative order has established the child support obligation;

D. A statement that if the alleged absent parent disagrees with the claim of their parentage of the child(ren), the amount of the child support obligation or the periodic payment required thereon, the alleged absent parent must file a written answer and request for hearing, within 30 days of service, with the Division, which shall immediately transmit the written answer and request for hearing to the Office of Hearings and Appeals;

E. A statement that if no timely written answer is received, the Office of Hearings and Appeals shall enter an order in accord with the Notice of Public Assignment of Child Support Rights;

F. A statement that as soon as an administrative order is entered, the absent parent's property, without further notice or hearing, will be subject to collection action, including but not limited to wage execution, garnishment, income tax refund interception, state and Indian gaming winnings interception, attachment and execution on real property held in fee simple, whether located within or outside the boundaries of Navajo Indian Country and personal property wheresoever located;

G. A statement that the absent parent is responsible for notifying the Division of any change of address or employment;

H. A statement of all fees associated with the administrative child support enforcement process which may be charged against the absent parent;

I. A statement indicating that the entry of default against the absent parent will result in the entry of a self-executing judgment for wage execution in the amount of the public debt;

J. Such other information as the Division deems appropriate.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1706. Navajo Nation Child Support Guidelines**

The Navajo Nation Supreme Court shall, following public hearings conducted by the Division and in accord with the requirements of 7 N.N.C. §

601, establish a scale of minimum child support contributions. This scale shall be used to determine the amount an absent parent shall pay for support of his or her child(ren) pursuant to this Act.

A. The Navajo Nation Child Support Guidelines must, at a minimum:

1. Take into consideration all gross income of the parents;
2. Be based on specific descriptive and numeric criteria and result in a computation of an amount of child support which is sufficient to meet the basic needs of the child(ren) for housing, clothing, food, education, health care, recreation, and goods and services required by physical and/or mental disability;
3. Provide for the child(ren)'s health care needs, through health insurance coverage which supplements those health care goods and services provided by the Federal Government, where appropriate;
4. The circumstances which may support a written finding on the record of a judicial or administrative proceeding for the award of child support, in reducing support contributions on the basis of hardship to the absent parent or other children while considering the best interest of the child(ren) who are the subject of the judicial or administrative proceeding; and
5. Provide for review and revision, where appropriate, of the child support guidelines at least once every four years to ensure that the amounts provided for in the guidelines are periodically adjusted for increases or decreases in the costs associated with the care and support of children within the Navajo Nation.

B. The Supreme Court of the Navajo Nation shall accept and compile pertinent and reliable information from any available source in order to establish a scale of minimum support contributions. Copies of the scale shall be made available to the Division, the Office of Hearings and Appeals, courts, prosecutors, and persons admitted to the practice of law in the Navajo Nation, and shall be considered public records of the Navajo Nation.

### **History**

CD-111-94, December 14, 1994.

### **Annotations**

#### **1. Arrearages; interest rate**

"While the [Child Support Enforcement Act] provides for current or prospective support, it does not address how arrearages are to be handled." *Watson v. Watson*, No. SC-CV-40-07, slip op. at 5 (Nav. Sup. Ct. December 14, 2009).

"This Court hereby holds that setting a default interest rate for arrearages is a role reserved to the legislature; it is lawmaking. The Navajo judiciary cannot, in effect, legislate such a default rate by mandating a single, specific rate for all cases." *Watson v. Watson*, No. SC-CV-40-07, slip op. at 6

(Nav. Sup. Ct. December 14, 2009).

"The Court thereby holds that the *Yazzie* Court and the *Watson I* Court both exceeded its authority by mandating a 10% compound interest rate. We therefore reverse *Watson I* in the imposition of a 10% compound interest rate and affirm the trial court's denial of interest on both arrearages." *Watson v. Watson*, No. SC-CV-40-07, slip op. at 6-7 (Nav. Sup. Ct. December 14, 2009).

#### **§ 1707. Adjustments to Gross Income**

A. When calculating the gross income of a parent for purposes of this Act, the following adjustments to gross income shall be made as deductions from gross income:

1. Amounts of court-ordered alimony and child support actually paid; and
2. Amounts necessary for minimal costs of food, shelter, clothing, and transportation in maintenance of the parent; and
3. Amounts paid in mandatory taxes and social security deductions.

B. The provisions of § 1707, Subsection (A) notwithstanding, the best interests of the child(ren) shall take precedence. Child support amounts shall be sufficient to provide for the basic needs of the child(ren). In cases wherein adjustments to gross income of a parent under § 1707, Subsection (A)(ii), would result in insufficient child support to any of the children of the absent parent, the needs of the child(ren) shall take precedence over the needs of the absent parent.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1708. Administrative Hearings**

A. Scheduling of Hearing. Upon receipt of a written answer from the alleged absent parent pursuant to § 1705 of this Act, the Office of Hearings and Appeals shall schedule a hearing before a hearing officer. The administrative hearing shall be held within the judicial district in which the custodial parent resides, unless another venue is agreed upon by the parties. Telephonic administrative hearings are permitted as well as the telephonic administration of oaths. The administrative hearing shall be scheduled within 30 days of the receipt of the written answer, unless continued for cause by the hearing officer.

B. Issues for Determination in Administrative Hearing

1. Parentage. Unless the alleged absent parent has stipulated to his or her parentage of the child(ren), the hearing officer shall determine whether the alleged absent parent is the parent of the child(ren). The hearing officer shall make a specific finding of fact regarding whether the alleged absent parent is the parent of the child(ren). The standard for proof of parentage shall be by clear and

convincing evidence.

2. Amount of Child Support Obligation. The hearing officer shall establish the amount of the child support obligation of the absent parent by using the Navajo Nation Child Support Guidelines provided in § 1706. The hearing officer shall make a specific finding of fact regarding the amount of the child support obligation. The standard of proof for establishment of the amount of the child support obligation shall be by preponderance of the evidence.

C. Procedures. The hearing shall be conducted according to procedures established by the Office of Hearings and Appeals. These procedures shall provide due process to the parties and shall, at a minimum, authorize:

1. The inspection of property, examination and production of pertinent records, books, information, or evidence;

2. The subpoena of any person for testimony under oath concerning all matters related to the establishment of parentage and child support;

3. The admission of pertinent testimony and evidence upon which the issues of parentage and child support shall be determined; and

4. The making of a permanent record of the proceedings, through electronic recording or other method.

D. Default. If the alleged absent parent fails to appear at the hearing, upon a showing of valid service, the hearing officer shall enter a decision and order of parentage, and child support obligation pursuant to the notice. Within 20 days of the administrative hearing, the hearing officer shall enter an order stating the establishment of parentage, and the child support obligation of the absent parent.

E. Miscellaneous Content of Order

1. Each order for child support or maintenance payments shall include an order that the absent parent and custodial parent notify the Office of Hearings and Appeals of any change of employer or change of address within 10 days of such change.

2. In the event the order contains a determination of child support obligation, the order shall be in favor of the child through its custodial parent or guardian when the Navajo Nation, or other federal or state agency, is not making AFDC payments in behalf of the child.

3. In the event the order contains a determination of child support payments, the order shall provide for garnishment, wage execution, state and Indian gaming winnings and income tax refund interception as means for execution on any unpaid child support obligation.

F. Modification of Order. The child support obligation of an absent parent may, after entry of an administrative order, be modified prospectively upon entry of an order by the Office of Hearings and Appeals. Either parent may petition the hearing officer for an order based on a showing of a change of

circumstances requiring the other parent to appear and show cause why the decision previously entered should not be prospectively modified. The order to appear and show cause together with a copy of the affidavit upon which the order is based shall be served by the petitioning parent on the other parent in the same manner as the notice under § 1705 of this Act. A hearing shall be set not more than 30 days from the date of service.

### **History**

CD-111-94, December 14, 1994.

### **Annotations**

#### **1. Retroactive modifications**

"Even if the OHA had the authority to change a court-ordered child support payment, it may not retroactively change a child support order. The Act grants OHA authority to change its administrative orders prospectively. Section 8(F). It is notably silent on retroactive changes, thereby excluding them from OHA's powers. OHA should not have more power to change court orders than it has to change its own administrative orders." *Bedoni v. Navajo Nation Office of Hearing and Appeals, and Calvin Biakeddy*, No. SC-CV-13-02, slip op. at 2 (Nav. Sup. Ct. September 4, 2003).

#### **§ 1709. Judicial Review**

##### **A. Appeal.**

1. The Navajo Nation Supreme Court shall hear appeals on the record from administrative decisions made by the Office of Hearings and Appeals pursuant to this Act.

2. Any party may secure judicial review of an administrative order made pursuant to this Act by filing an appeal with the Navajo Nation Supreme Court within 20 days after the administrative decision is filed in the Office of Hearings and Appeals.

**B. Appeal on Record.** The appeal to the Navajo Nation Supreme Court shall be an appeal on the record established before the Office of Hearings and Appeals and shall be strictly limited to the issues of the parentage of the child(ren), the amount of public debt and child support liability of the absent parent.

**C. Standard of Review.** The Navajo Nation Supreme Court shall not reconsider questions of fact which have been determined by the Office of Hearings and Appeals. The Navajo Supreme Court may reverse or modify the decision of the Office of Hearings and Appeals if the administrative findings, conclusions or decisions are, as a matter of law:

1. Clearly erroneous in view of the reliable, probative, and substantial evidence in the record, when viewed in its entirety; or

2. Arbitrary and capricious or characterized by abuse of discretion.

## History

CD-111-94, December 14, 1994.

## Annotations

### 1. Construction and application

"Unlike the audit sanction provision, the Court has explicit authority to review the decisions of OHA under the Navajo Nation Child Support Enforcement Act." *Budget and Finance Committee v. Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 6 (Nav. Sup. Ct. January 4, 2006).

### § 1710. Docketing of Order

A true copy of any administrative order made pursuant to § 1705 or § 1708 of this Act may be filed with the clerk of any Court in the Navajo Nation. The clerk shall docket the order in the judgment docket. Upon docketing, the order shall have all the force and effect of a docketed order of the Family court, including but not limited to the ability to enforce such an order pursuant to the Navajo Rules of Civil Procedure and the laws of the Navajo Nation.

## History

CD-111-94, December 14, 1994.

### § 1711. Powers of the Division

A. Except where otherwise indicated, the Division shall have the power to promulgate rules and regulations necessary to carry out the provisions of this Act.

B. The Division shall have the authority to conduct a child support enforcement program under this Act, including the authority to investigate claims of parentage and child support obligation, to locate absent parents, and to establish and modify child support obligations through the administrative process contained in this Act.

C. Except where otherwise indicated, the Division shall have the power to certify to official acts.

D. The Division shall have the power to require alleged absent parents to undergo blood testing and/or DNA testing, in accordance with rules and regulations promulgated by the Division, for the purpose of obtaining evidence relevant to the parentage of child(ren). Navajo traditional and customary objections to blood testing and/or DNA testing shall not be a basis for refusal to undergo such testing. The Division may require the alleged absent parent to reimburse the Division for the costs of such blood testing and/or DNA testing.

E. The Division shall be exempt from any filing fees required of individuals in the courts of the Navajo Nation.

F. The Division shall have the authority to report the names and social

security numbers of absent parents and the amounts of unpaid public and/or support debt to credit reporting bureaus, and professional licensing agencies.

G. The Division shall have the power to set or reset the schedule of fees required on the establishment and enforcement of public debt and child support, including application fees, filing and other fees associated with the administrative process.

H. The Division shall have the power to utilize funds which it collects pursuant to this Act through a revolving cost account for the operation of child support enforcement services, subject to appropriation of such funds by the Navajo Nation Council. Provided, that state and federal funds shall not be supplanted by fees collected by the Division.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1712. Wage Execution and Garnishment**

A. The Office of Hearings and Appeals may order wage execution in any order issued pursuant to § 1705 or § 1708 of this Act. Wage execution shall be utilized in all cases wherein an employer of an absent parent can be identified.

B. The Office of Hearings and Appeals may require garnishment of earnings to enforce a child support order pursuant to this Act in cases wherein wage execution may not be an available remedy, due to the lack of an identified employer, or for other reasons.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1713. Wage assignments**

An absent parent may execute a wage assignment as will be sufficient to meet the child support obligation calculated by reference to the order of the Office of Hearings and Appeals, or a voluntary agreement entered into pursuant to § 1716 of this Act.

No employer shall refuse to honor a wage assignment executed pursuant to this Act. An assignment made pursuant to this Section shall be binding upon the employer one week after service upon the employer of a true copy of the assignment. Payment of monies pursuant to a wage assignment shall serve as payment of all such wages assigned under any contract of employment. No employer may discharge or prejudice any employee because his wages have been subjected to an assignment for child support.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1714. Exemption from limitation—Statute of limitations not applicable**

No support lien, wage assignment, or garnishment shall be deemed invalid or nonactionable due to the expiration of the statute of limitations on any action for failure to provide child support or maintenance for any child(ren). No statute of limitations shall be effective to prevent the establishment, modification and/or enforcement of parentage and/or child support for any child from birth until the child reaches the age of 18.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1715. Government records**

A. The Division may request and shall receive information from the records of all divisions, departments, boards, bureaus or other agencies of the Navajo Nation, and the same are authorized to provide such information as is necessary for this purpose.

B. The Division may make such information available only to those officials of the Navajo Nation which are authorized to locate parents who have failed to provide child support for their child(ren) to establish, modify, or enforce court orders for child support, or to establish parentage. This information may be given to them only upon their assurance that it will be used in connection with their official duties under the child support enforcement program.

C. Disclosure of information under this Subsection shall comply with § 402(a)(9) of the Social Security Act. In all support proceedings before the Office of Hearings and Appeals, there shall be compulsory disclosure by both parties of their respective financial status.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1716. Enforceable voluntary agreement**

A. Content of Agreement. A custodial parent may enter into an agreement with the alleged absent parent.

1. At a minimum, the agreement shall establish the parentage of the child(ren) and the amount of child support which shall be paid by the absent parent to the custodial parent. In no circumstance will an agreement be approved or enforced which provides for a level of child support which is less than that provided for by the Navajo Nation Child Support Guidelines established pursuant to § 1706 of this Act.

2. By the terms of the agreement, the absent parent must submit personally to the jurisdiction of the Office of Hearings and Appeals for enforcement and modification of the agreement, and consent to entry of an administrative order in accordance with the terms of the agreement. The agreement may be obtained by the parties through their own actions, or utilizing the services of the Navajo Nation Peacemaker.

## B. Submission and Filing of Agreement

1. In the event that no request for hearing has been filed with the Office of Hearings and Appeals under § 1705 of this Act, and no action has been filed before a court, the voluntary agreement shall be submitted to the Division for approval and filed with the Division, which shall maintain the voluntary agreement in its records for possible modification and/or enforcement under the provisions of this Act.

2. In the event that an administrative hearing has been requested from the Office of Hearings and Appeals, the voluntary agreement shall be submitted to the Office of Hearings and Appeals for its approval and enforcement under the provisions of this Act.

## C. Timing of Agreement

1. Such agreement may be entered into at any time prior to the issuance of a final administrative order establishing or modifying parentage, or child support obligation, either before or after service of process, or at any time while said order is still in effect. No agreement shall be entered into before the birth of the child unless the Office of Hearings and Appeals finds that there are special circumstances making it advisable to do so.

2. The voluntary agreement shall be submitted to the Division or the Office of Hearings and Appeals for approval and enforcement. After said agreement is approved by the Division or the Office of Hearings and Appeals, it shall be filed but judgment shall not be rendered unless there is a default of the child support payments agreed upon, when, upon motion of the Division judgment shall be rendered and entered forthwith.

## **History**

CD-111-94, December 14, 1994.

## **§ 1717. Writs of Assistance, Specific Performance, and Bonds**

A. Upon application by the Division, The Navajo Nation Family court may issue a writ of assistance to enforce any court or administrative order issued pursuant to this Act. Administrative and court orders recognized through comity have res judicata authority.

B. The Navajo Nation Family court may specifically enforce any agreement made pursuant to this Act and approved by the Division, Office of Hearings and Appeals, or the Navajo Peacemaker.

C. The Navajo Nation Family court may require a party to submit a commercial, personal surety, or other bond to satisfy the terms of an order issued pursuant to this Act, and enforce such bond in proceedings against the principal and sureties.

D. The Navajo Nation Family court, upon a showing that an absent parent has failed to obey an administrative or court order to pay a support or public

debt, will issue an order to show cause against the absent parent.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1718. Foreign Orders and Comity**

A. Court and administrative orders, judgments or decrees of other Indian nations, states or federal agencies, which relate to child support enforcement are enforced in the Navajo Nation under the doctrine of comity. Authentic foreign orders will be enforced as an order of the Navajo Nation where the foreign tribunal had personal jurisdiction over the person claimed to be bound by the foreign order, personal service of process was made on such person, the administrative or court proceedings offered substantial justice to such person, and the order does not violate Navajo Nation public policy. For purposes of this Act, the Office of Hearings and Appeals shall have the authority to consider court and administrative orders, judgments or decrees of a foreign jurisdiction for comity recognition.

B. A foreign order is authenticated by reasonable proof that the document tendered to the Office of Hearings and Appeals is a true copy of the foreign order as it is recorded in the agency or court of the issuing jurisdiction. An authentication stamp issued by a clerk of court or custodian of records, or a court seal, is sufficient evidence of authenticity.

C. Unless defects in jurisdiction or public policy are apparent on the face of the foreign order, the burden is upon the person against whom it is to be enforced to contest the validity of the order. Upon a failure to respond to notice and the opportunity to contest the order, the Office of Hearings and Appeals may enforce it as a Navajo Nation order.

D. Where a foreign order is invalid by reason of a lack of personal jurisdiction in the agency or court of the issuing jurisdiction, the Office of Hearings and Appeals may adopt some or all of its provisions as an original order of the Office of Hearings and Appeals.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1719. Request for Peacemaker Assistance**

The Division may request the assistance of the Navajo Peacemaker in resolving parentage and child support issues, if agreed to by both the custodial parent and alleged absent parent.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1720. Coordination of Peacemaker Courts**

Peacemakers must coordinate their activities with the Division.

Agreements reached through the peacemaking process must meet the requirements of § 1716 of this Act.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1721. Temporary Support Orders**

In any action under the Domestic Violence Protection Act, any action affecting dissolution of marriage, or in any other action provided for under Navajo Nation law, wherein the Navajo Nation Family Court has made a temporary order concerning the care, custody, and suitable support or maintenance of the child(ren), the Division shall have the authority to enforce such order as set forth by the Navajo Nation Family Court.

#### **History**

CD-111-94, December 14, 1994.

#### **§ 1722. Amendments**

This Act may be amended from time to time by the Navajo Nation Council upon recommendation of the Division of Human Resources, and the Human Services, Health and Social Services, and Judiciary Committees of the Navajo Nation Council.

#### **History**

CD-111-94, December 14, 1994.

### **Chapter 18. Elder Protection Act**

#### **§ 1801. Short title**

This Act will be known and cited as the "Diné Elder Protection Act."

#### **History**

CO-70-96, October 25, 1996, Approving the Diné Elder Protection Act.

#### **§ 1802. Statement of Policy**

It is the policy of the Navajo Nation to continue the traditional respect which members of the Navajo Nation have for Diné elders. Elders are valuable resources to the Nation because they are repositories and custodians of Navajo history, culture, language, and tradition; vested in Diné elders is the hope of the Navajo Nation to retain its tribal history, culture, language and tradition. Navajo elders provide stability by being role models for their children and grandchildren to whom they demonstrate long-standing commitment to family, marriage, employment, profession and other social institutions. Based upon these premises, it is in the Nation's best interest and welfare to protect its elders from abuse, neglect, mistreatment, exploitation, and other

mistreatment.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1803. Purpose**

The purpose of the Diné Elder Protection Act is to protect elders within the jurisdiction of the Navajo Nation from abuse and neglect. The Act will be liberally interpreted in order to achieve this purpose. This Act is not intended to abrogate any existing civil or criminal laws of the Navajo Nation.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1804. Definitions**

These definitions will be liberally construed so as to protect all elders. As used in this Act:

##### **A. Abuse includes:**

1. Assault, an attempt to cause bodily harm to another person through the use of force, or the creation in another of a reasonable fear of imminent bodily harm.
2. Battery, application of force to the person of another resulting in bodily harm or an offensive touching.
3. Threatening, words or conduct which place another in fear of physical or other harm on any person or on property.
4. Coercion, compelling and unwilling person, through force or threat of force to engage in or abstain from conduct which the person has a right to abstain from or engage in.
5. Unreasonable confinement, intimidation or cruelty, acts which result in physical harm or pain or mental anguish of an elder by any person, particularly anyone such as a spouse, a child, other family members, caregiver(s) or other persons recognized by Navajo statutory or common law as having a special relationship with the elder.
6. Sexual abuse, any physical contact with an elder for emotional or physical gratification of the person making the contact and to which the elder does not give informed consent or for which the consent is obtained by intimidation or fraud.
7. Emotional abuse, infliction of threats, humiliation, or intimidation.
8. Intimidation, willfully placing another in fear of harm by coercion, extortion or duress.

9. Exploitation, the use of funds, property (including grazing permits, livestock and homesites) or other resources of an elder for personal gain without the informed or true consent of the elder, or the gaining of funds, property (including grazing permits, livestock and homesites) or other resources of an elder by threat, humiliation, intimidation, or other coercion. Exploitation is also failure to use the funds, property, or other resources of any elder for the elder's benefit or according to the elder's wish.

10. Abandonment, desertion of an elder by the elder's family or caregiver(s), which includes refusing or neglecting to provide for an elder when there is a duty to do so.

11. Breach of a fiduciary duty, breach by a family member or caregiver of his or her fiduciary duties toward an elder.

B. Caregiver includes:

1. A person who is required by Navajo statutory or common law to provide services or resources to an elder; or

2. A person who has undertaken to provide care or resources to an elder; or

3. An institution or agency or employees or agents of an institution or agency which provides or is required by Navajo statutory or common law, or state or federal law or tribal-state agreement to provide services or resources to an elder.

C. Elder for the purposes of this Act, is a person subject to the jurisdiction of the Navajo Nation and who is at least 55 years of age or older.

D. Emergency is a situation in which an elder is immediately at risk of death or injury.

E. Family is the immediate circle of relatives, including spouse, biological/clan/adopted children, grandchildren, in-laws, siblings, aunts, uncles, nieces, nephews, first, second and third cousins, biological, clan and adopted parents.

F. Good faith means an honest belief or purpose and the lack of intent to defraud.

G. Incapacity means the current functional inability of a person to sufficiently understand, make and communicate informed decisions as a result of mental illness, mental deficiency, physical illness, or disability, or chronic use of drugs or liquor, as determined by the Navajo Nation Family Courts. Incapacity may vary in degree and duration.

H. Least restrictive alternative is an approach which allows an elder the most independence and freedom from intrusion, consistent with the elder's needs, by requiring that the least drastic method of intervention is used to protect the elder from harm.

I. Neglect occurs when any person fails to provide basic needs, supervision, services, or resources necessary to maintain the minimum physical and mental health of an elder as required by Navajo law. Neglect also includes:

1. Preventing or interfering with delivery of necessary services and resources to an elder.

2. Failing to report abuse, neglect, or exploitation of an elder when there is reasonable suspicion.

3. Failing to provide services or resources essential to the elder's practice of customs, traditions, or religion.

4. Leaving of child(ren) for indefinite periods of time by parents/legal guardians in the care of elders who may resort to using their limited resources in meeting needs of the child(ren).

J. Retaliation consists of threatening, harming, or otherwise interfering with an individual reporting elder abuse, including threats or injury to a person's family, property, and employment status of the reporter or the reporter's family in any way.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1805. Elder Protection Services**

A. Consistent with available resources, the Navajo Area Agency on Aging will have a duty to provide necessary protection services to an elder who has been or is being abused, neglected or exploited. Any protection services provided shall be the least restrictive alternative available and necessary to meet the needs of the elder, the elder's family and caregiver(s). When possible, the affected elder and the elder's family and caregiver(s) shall be consulted in determining what services shall be provided.

B. Consistent with § 1815, the Navajo Division of Health or any other interested person or party may file a petition seeking an Elder Protection Order when good cause exists to believe that an elder is abused, neglected, exploited or incapacitated and is therefore suffering harm.

C. The elder, the elder's family or caregiver(s), if financially able to do so, will pay for some or all of the cost of services or resources provided to the elder pursuant to this Act.

D. Before providing any services, the Navajo Division of Health will inform the elder to the protections services which will be provided and possible alternatives to these services, if any.

#### **History**

CO-70-96, October 25, 1996.

## **§ 1806. Regulations**

The Navajo Division of Health may adopt and issue regulations establishing criteria and procedures which comply with the policy and requirements of this Act for:

- A. Receiving reports of suspected elder abuse or neglect.
- B. Investigating all reports or suspected abuse or neglect.
- C. Initiating petitions for failure to report, for making bad faith reports or elder abuse and neglect, for interference or retaliation for an elder abuse or neglect investigation, and for confidentiality violations.
- D. Seeking and securing elder protection warrants.
- E. Determining whether an incident is an emergency and necessitating immediate removal or the elder from the home where abuse is reported.
- F. Making referral for criminal investigation.
- G. Establishing and providing elder protective services.
- H. Initiating procedures for determining incapacity of the elder.
- I. Implementing and ensuring confidentiality requirements.

### **History**

CO-70-96, October 25, 1996.

## **§ 1807. Duty to Report Abuse or Neglect of an Elder**

Suspected abuse or neglect of an elder will be reported to the Navajo Division of Health by any person who has good reason to suspect that an elder has been or is being abused or neglected.

### **History**

CO-70-96, October 25, 1996.

## **§ 1808. Immunity of Reporting**

A person who in good faith makes a report pursuant to § 1807 of this Act is immune from civil or criminal liability.

### **History**

CO-70-96, October 25, 1996.

## **§ 1809. Bad Faith Report; Civil Penalty; Damages; Criminal Liability**

Any person who knowingly makes a false report of a suspected elder abuse

is subject to a civil penalty of up to seven hundred fifty dollars (\$750.00). The Navajo Nation Family Court will assess the penalty after petition, notice, an opportunity for hearing, and a determination that the reporter made the report knowing it to be false. Further, the false reporter will be subject to any civil suit brought by or on behalf of the person(s) named as the suspected abusers in the false report for damages suffered as a result of the false report. The person is also subject to any criminal penalties as set forth in the Navajo Nation Code or as allowed by this Act.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1810. Receiving Reports; Report Content; Retention of Report**

A. The Division of Health will receive all reports of elder abuse or neglect.

B. The report may be oral or in writing and to the extent possible it will contain:

1. The elder's name, address and location of home, telephone number, census (if applicable) and social security number.
2. Name, address, location, telephone number of person(s) or agency which is suspected to abusing or neglecting elder.
3. The nature and degree of incapacity of the elder, if any.
4. The name, address, location, telephone number of witnesses.
5. The name, address, location, telephone number of the elder's caregiver(s).
6. A description of the acts which are alleged to be abuse or neglect.
7. Any other information that the reporter believes might be helpful in establishing the cause of the abuse or neglect.
8. If possible, the reporter will sign the report. However, a report may be made anonymously.

C. All reports will remain on file for a period of seven years, even if it is determined that there is insufficient evidence to pursue any legal action. In the event that the Navajo Division of Health determines that the report was made in bad faith, the report will so indicate.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1811. Investigations**

A. Within the limits of available resource, the Navajo Division of Health will investigate the report within 72 hours, including weekends and holidays, and prepare a written report of the investigation which will include the information as set forth in Paragraph (B) of § 1810, as well as the results of interviews, observations, assessments and other fact-finding information. If possible, the investigator will conduct personal interviews with the elder, elder's family and caregiver(s), persons suspected of having committed the acts complained of, employees of agencies or institutions with knowledge of the elder's circumstances, and any other person the investigator believes has pertinent information. The existence and contents of medical records and other reports of abuse or neglect will be ascertained. The investigator will personally assess the elder's living conditions, with assistance of the Office of Environmental Health and the Navajo Department of Law Enforcement, as necessary.

B. An elder, the elder's family and caregiver(s) will be informed about an elder abuse investigation before it begins unless an emergency exists, in which case, they will be informed as soon as possible, but not later than 48 hours after an investigation begins.

C. An elder may refuse to accept elder protection services, even if there is good cause to believe that the elder has been or is being abused, provided that he/she is able to care for him/herself and has the capacity to understand the nature of the services offered.

D. The elder's family or caregiver(s) may refuse for themselves, but not for the elder, elder protection services offered pursuant to this Act, unless the elder cannot take care for him/herself or lacks the capacity to understand the nature of the services offered.

E. An elder, the elder's family or caregiver(s) may refuse to allow an investigator into their home and the investigator will so inform the elder, the elder's family and caregiver(s) of this right.

F. The investigator will inform the elder's family and caregiver(s) or their rights as allowed by the Navajo Nation Bill of Rights, whenever it appears that the investigation may lead to criminal charges being filed under Navajo Nation law.

G. The elder, elder's family and caregiver(s) will be served personally with a petition filed pursuant to this Act.

H. The elder, elder's family and caregiver(s) have the right to personally attend any hearing pertaining the determination of the elder's capacity.

I. The elder, elder's family and caregiver(s) have the right to be represented by counsel at all hearings.

J. The elder, elder's family and caregiver(s) have the right to seek independent medical, psychological, or other evaluations at their own expense.

#### **History**

CO-70-96, October 25, 1996.

**§ 1812. Elder Protection Investigation Warrant**

A. The investigator may petition the Navajo Nation Family Court for an Elder Protection Investigation Warrant.

B. The Navajo Nation Family Court may issue an Elder Protection Investigation Warrant upon a showing of probable cause by the investigator that elder abuse or neglect has occurred and that the family, caregiver(s) of the elder, or the elder has refused the investigator access. The Elder Protection Investigation Warrant is enforceable through contempt proceedings as provided under the Navajo Rules of Civil Procedure.

C. The warrant allows the investigator to assess the elder's living conditions and interview the elder without the family's, the caregiver's or the elder's consent. The purpose of the interview is to determine whether or not reasonable grounds exist to believe that the elder is incapacitated or has been subjected to abuse or neglect.

**History**

CO-70-96, October 25, 1996.

**§ 1813. Referral for Criminal Investigation**

A report of suspected elder abuse or neglect will be referred to appropriate law enforcement officers if the investigation indicates that the criminal laws of the Navajo Nation or applicable federal criminal laws have been violated.

**History**

CO-70-96, October 25, 1996.

**§ 1814. Emergency Procedures and Protection Order**

If, after investigation, the investigator has reasonable cause to believe that an emergency exists, the investigator will act immediately to protect the elder, including transporting the elder for medical treatment, placement in a group home or emergency shelter. Within 72 hours of such action, the Navajo Division of Health will petition the Navajo Nation Family Court for an Elder Protection Order as provided for in § 1815 of this Act.

**History**

CO-70-96, October 25, 1996.

**§ 1815. Elder Protection Order**

A. The Navajo Division of Health or any other person or party may petition the Navajo Nation Family Court for an Elder Protection Order. This petition will contain allegations that elder abuse, neglect or exploitation has occurred or that the elder is incapacitated and cannot appropriately care for

him or herself.

B. The Navajo Nation Family Court may issue an Elder Protection Order after affording notice to all affected parties and holding a hearing which demonstrates by clear and convincing evidence that the elder is incapacitated and that elder abuse, neglect or exploitation has occurred.

C. If the Navajo Nation Family Court determines that an elder is abused, neglected, exploited or incapacitated and cannot care for him or herself, the Family Court may issue an Elder Protection Order which provides appropriate protective services for the elder. Such protective services, subject to available resources, may include, but are not limited to, the following:

1. Removing the elder from the abusive or neglectful situation for not longer than 14 days.

2. Removing the person or persons who have abused or neglected an elder from the elder's home.

3. Restraining the person or persons who have abused or neglected an elder from continuing such acts.

4. Requiring an elder's family or caregiver(s) or any other person(s) with a fiduciary duty to the elder to account for the elder's funds and property.

5. Requiring any person who has abused or neglected an elder to pay restitution to the elder for any damages which occurred as a result of that person's wrongdoing.

6. Appointing, pursuant to 9 N.N.C. § 801, *et seq.*, a representative or guardian for the elder or the elder's estate, in the event that the Family Court determines that the elder is incapable of taking care of him or herself or managing his or her property.

7. Naming a representative payee.

8. Ordering the Navajo Division of Health to prepare a plan to deliver elder protection services which provides the least restrictive alternatives for services, care, treatment, or placement consistent with the elder's needs.

D. An Elder Protection Order will be issued for a period not to exceed six months, unless the Family Court determines that the elder is incapacitated and as a result is incapable of taking care of him or herself, in which case the Elder Protection Order may be indefinite.

E. An Elder Protection Order may be extended as many times as necessary to protect the elder, but only after notice and opportunity for hearing is given and a determination is made based on clear and convincing evidence that such an order is necessary for the protection of the elder. Each extension will be for a period not to exceed 30 days.

F. Whenever the Family Court determines that an Elder Protection Order

should be issued, it may refer the case to the Peacemaker Division, unless it makes a determination that a referral to the Peacemaker Division is infeasible, inappropriate or futile. Such referral may be part of an Elder Protection Order. Upon referral, the Peacemaker Division will attempt to resolve conflicts between the elder and the elder's family and/or caregiver(s) using traditional methods and in accordance with Peacemaker Division rules.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1816. Confidentiality of Reporter, Records, Hearing**

A. The name of the person who makes a report of abuse or neglect as required by § 1807 of this Act is confidential and may not be released to any person unless the reporter consents to the release or such release is ordered by the Navajo Nation Family Court. The Navajo Nation Family Court may release the reporter's name only after notice to the reporter is given, a closed evidentiary hearing is held, and the Navajo Nation Court finds that disclosure is needed to protect the elder. The reporter's name will be released only to the extent that the Family Court determines necessary to protect the elder.

B. Any record of an investigation of elder abuse or of a Navajo Nation Court hearing regarding elder abuse will be kept confidential. Such records shall be available to the elder, the elder's family or caregiver, and others who require these records in order to provide services to the elder.

C. A hearing held pursuant to this Act will be closed and confidential. Only person essential to the matter before the court may attend the hearing. No person who attends or testifies at such a hearing will reveal information about the hearing unless ordered to do so by the Navajo Nation Family Court.

#### **History**

CO-70-96, October 25, 1996.

#### **§ 1817. Severability**

Should any provision of this Act or its applicability be found to be invalid by the Courts of the Navajo Nation, the remaining provisions which can be implemented without the invalid provision will be given full force and effect. To this extent, the provisions of this Act are severable.

#### **History**

CO-70-96, October 25, 1996.

### **Title 10**

#### **Education**

Contracts for Education of Indians, see 25 U.S.C. § 458e.

Education of Indians, see 25 U.S.C. § 271 *et seq.*

Treaties. Education and schools, see Art. 6 of Treaty of 1868.

#### **Code of Federal Regulations**

Education contracts under Johnson-O'Malley Act, see 25 CFR § 273.1 *et seq.*

Federal schools for Indians, see 25 CFR § 31.0 *et seq.*

Indian education policies, see 25 CFR § 32.1 *et seq.*

Student rights and due process procedures, see 25 CFR § 42.1 *et seq.*

### Chapter 1. Policy and Planning

#### Subchapter 1. Miscellaneous Provisions

#### Article 1. Navajo Nation Education—Generally

### **§ 1. Responsibility and authority of the Navajo Nation**

A. The Navajo Nation has the authority and an inherent right to exercise its responsibility to the Navajo people for their education by prescribing and implementing educational laws and policies applicable to all schools serving the Navajo Nation and all educational programs receiving significant funding for the education of Navajo youth or adults. At the same time, the Navajo Nation recognizes the legitimate authority of the actual education provider, whether state, federal, community controlled, charter, or private. The Navajo Nation commits itself, whenever possible, to work cooperatively with all education providers serving Navajo youth or adults or with responsibilities for serving Navajo students to assure the achievement of the educational goals of the Navajo Nation established through these policies and applicable Navajo Nation laws.

B. The Education Committee of the Navajo Nation Council has oversight authority over the Navajo Nation Board of Education, Department of Diné Education, and over the implementation of education legislation. The Committee exercises such powers and responsibilities over Navajo education as are prescribed by its plan of operation (2 N.N.C. § 481 *et seq.*) and in other Navajo Nation laws. The Education Committee exercises oversight responsibility regarding the recruitment and operation of post-secondary education programs within the Navajo Nation.

C. The laws and policies of the Navajo Nation are applicable to the maximum extent of the jurisdiction of the Navajo Nation in the operation of all local schools.

D. The Navajo Nation specifically claims for its people and holds the government of the United States responsible for the education of the Navajo people, based upon the Treaty of 1868 and the trust responsibility of the

federal government toward Indian tribes. The Navajo people also claim their rights as citizens of the states within which they reside to a non-discriminatory public education. In exercising its responsibility and authority for the education of the Navajo people, the Navajo Nation does not sanction or bring about any abrogation of the rights of the Navajo Nation or the Navajo people based upon treaty, trust or citizenship, nor does it diminish the obligation of the federal government or of any state or local political subdivision of a state.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 1 amends and renumbers the previous § 104. CN-61-84, November 14, 1984, adopted the previous § 104, now § 1.

**Note.** Previous § 1, Compliance with requirements of Navajo Nation law, deleted and replaced by CJY-37-05, July 19, 2005. For History of previous § 1, See, CN-61-84, November 14, 1984 and 1922-1951 Res. p. 114, February 20, 1947.

#### **Annotations**

##### **1. Consent to policies**

"We note, for example, that there are 'Navajo Education Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

##### **§ 2. Mission statement**

It is the educational mission of the Navajo Nation to promote and foster lifelong learning for the Navajo people, and to protect the culture, integrity and sovereignty of the Navajo Nation.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 2 amends and renumbers the previous § 102. CN-61-84, November 14, 1984, adopted the previous § 102, now § 2.

**Note.** Previous § 2, Changes in educational program or operation; discussion; approval, deleted and replaced by CJY-37-05, July 19, 2005. For History of previous § 2, See, CN-61-84, November 14, 1984 and CS-78-57, September 17, 1957.

#### **Annotations**

## **1. Consent to policies**

"We note, for example, that there are 'Navajo Education Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

## **§ 3. Definitions**

Subject to the additional definitions contained in the subsequent sections of this Subchapter, and unless the context otherwise requires, in this Subchapter, the following definitions shall apply:

A. "Accountability" means being held responsible for any action, inaction, decision, or conduct which involves public trust or requires sound reasoning, good judgment and the ability to act, that is exercised by any individual in a position to render decisions or cause action or conduct to be made.

B. "Career Education" consists of efforts aimed at focusing education and supportive actions of the community in ways that will help individuals acquire and utilize the knowledge, skills, abilities, choices, resources and attitudes necessary for each to make work a meaningful, productive and satisfying part of his or her way of life. Career education is not taught as a separate school subject. Rather, it is integrated into all subject areas at all levels, using activities that encourage students to acquire basic skills and make career decisions based upon what they learn about themselves and the world of work.

C. "Charter School" means a school that operates under a state charter law.

D. "Cognitive Skills" are skills involved in the process of knowing, in the broadest sense, including perception, memory, judgment, analysis, conception, deduction, induction and thinking.

E. "Community Controlled Schools" means those schools that are funded by the Bureau of Indian Affairs and sanctioned by the Navajo Nation to operate under the authority and provisions of Public Law 93-638 and Public Law 100-297.

F. "Culture" means a set of shared patterns of behavior developed by a group of people in response to the requirements of survival. These sets include: established patterns of relationships (interpersonal and kinship, K'é); values (behavior, material possessions, individual characteristics, attitudes); language; technology; acquisition and use of knowledge; planning for the future; governing structure; education; economics; and spiritual relationships.

G. "Curriculum" means a comprehensive curriculum which reflects excellence, and which is planned, ongoing and systematically used; in which goals and objectives are clearly articulated; which brings about a match among (1) what the teacher teaches, (2) what content should be taught in each subject area at every grade level, and (3) what students actually learn as determined by academic testing instruments that test achievement against the prescribed

content in each subject area at every grade level.

H. "Early Childhood Programs" are those developmental and educational programs operated for children ages 0-5 at the preschool level. The term can include kindergarten programs that are operated independently of and apart from any local school.

I. "Early Childhood Intervention Programs" are those programs that provide early childhood intervention services to Navajo children with disabilities from birth to age five and their families.

J. "Educational Standards" means the established criterion and/or specified requirement which must be met and maintained.

K. "Indian Preference" means that in employment, preference is given to a qualified Native American applicant over non-Indian applicants for a given position.

L. "Local Community Schools" are all schools serving kindergarten through 12th grade, or any part of that grade span, located within the Navajo Nation or serving the Navajo Nation and funded by the Bureau of Indian Affairs. The term includes both BIA-operated and community controlled schools and shall include border-town residential facilities operated to facilitate attendance at public schools when the subject matter of a policy statement is applicable to residential facilities and the governing boards of residential facilities. The meaning of "local school" in regard to Navajo Nation school board elections shall be determined by the Navajo Nation laws regarding school board elections, rather than by this Section.

M. "Navajo Nation" includes the Navajo Reservation and the Navajo people as a whole, considered as a distinct cultural, ethnic, geographical and political entity.

N. "Navajo Nation" also means the government of the Navajo Nation, or signifies that some power or attribute of the Navajo Nation as a government is intended.

O. "Navajo Preference" means that in the recruitment, employment, retention and promotion of personnel, preference is given to an applicant in accordance with the provisions of the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*

P. "Public Schools" means those schools that are part of the state public school system, including those schools identified as state funded charter schools.

Q. A "School" is a place or institution for teaching and learning.

R. "Schools Serving the Navajo Nation" are all schools within the Navajo Nation and all schools established on or near Navajo Indian Country for the education of Navajo students or receiving significant funding for the education of Navajo students such as public schools receiving Impact Aid funds.

S. "School Governing Boards" or "Local School Boards" are the governing

boards with responsibility for establishing policy and overseeing the operation of a local school.

T. "Superintendent of Schools" means the chief administrative officer of the Department of Diné Education.

U. "Tribal Governing Body" means the Navajo Nation Council.

V. "Vocational Education" is an area of instruction with appropriate academics designed to prepare high school students to enter into the job market. Vocational education programs shall include vocational exploration, vocational core skill development, remedial education, work skills and entry-level training.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 3 amends and renumbers the previous § 103. CN-61-84, November 14, 1984, adopted the previous § 103, now § 3.

**Note.** Previous § 3, [Reserved], replaced by CJY-37-05, July 19, 2005. For History of previous § 3, See, CN-61-84, November 14, 1984 and ACA-15-54, April 8, 1954.

**Note.** Previous § 4, Size and location of facilities, and § 5, Vocational training, deleted by CJY-37-05, July 19, 2005. For History of deleted §§ 4 and 5, See, CN-61-84, November 14, 1984 and CJA-6-60, January 14, 1960, and CN-61-84, November 14, 1984 and CA-48-58, August 27, 1958, respectively.

### **Annotations**

#### **1. Consent to policies**

"We note, for example, that there are 'Navajo Education Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

## **Article 2. Early Childhood Programs**

### **§ 50. Early childhood programs**

Parents and persons having custody of Navajo children of preschool age are encouraged to enroll them in programs of early childhood. Early childhood programs should employ a comprehensive developmental approach to help children achieve the social competence and pre-academic skills which are associated with positive school performance and healthy psycho-social adjustment, including children with disabilities from birth to five years of age and their families. Early childhood programs shall work closely with parents, parent policy council and local communities in developing and implementing their program plans.

Administrative entities within the Navajo Nation with responsibility for education, child development, licensed day care, and related areas shall coordinate to assure that early childhood and early childhood intervention programs serving Navajo children are competently and compassionately administered in accordance with Navajo Nation laws and policies.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 50 amends and renumbers the previous § 127. CN-61-84, November 14, 1984, adopted the previous § 127, now § 50.

### **United States Code**

Educational assistance of children with disabilities, see 20 U.S.C. § 1411 *et seq.*

Early childhood development programs, regulations and rules of general applicability, see 25 U.S.C. § 2019.

Infants and toddlers with disabilities, see 20 U.S.C. § 1431 *et seq.*

### **§ 51. Early Childhood Development Services (Head Start Program)**

A. The Navajo Nation recognizes the need for development services to support the growth of young Navajo children within the family and the viability of the family within the community. The Department of Diné Education shall assure participation of the Navajo Nation in the National Head Start program to meet the needs of children from birth to five years old.

B. The Head Start programs shall establish a positive and supportive learning environment for children, parents, and staff, which offer family members opportunities and support for growth and change.

C. The Head Start programs shall focus on the child and family in addressing early childhood developmental needs; including medical, dental, mental health, nutrition, and parental involvement. In addition, early childhood services should be appropriate and responsive to each child and the family's cultural and language background.

D. The Head Start programs shall foster the role of parents as the primary educators and nurturers of their children. Parents should be encouraged to become involved in all aspects of their child's development from participation in the Center's child-based activities to direct involvement in policy and program.

E. Each Head Start Center is encouraged to establish partnerships with community resources in the effort to maximize the benefits to the children served.

F. Each Head Start Center shall employ qualified staff who have the knowledge, skills, competence and sensitivity necessary to provide quality and

comprehensive services to young children.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

### **Article 3. Navajo Nation Diné Language Act**

#### **§ 52. Establishment**

The Navajo Nation Diné Language Act (hereinafter referred to as the "Act") is hereby established to ensure the preservation and education of the Navajo (Diné) language. The Navajo (Diné) language is an essential element of the life, culture, tradition and identity of the Navajo (Diné) people. The Navajo (Diné) people recognize the importance of continuing and perpetuating the Navajo (Diné) language to the survival of the Navajo Nation. Instruction in the Navajo (Diné) language shall include to the greatest extent practicable, thinking, speaking, comprehending, reading, writing and the study of the formal grammar of the Navajo (Diné) language.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 52 renumbers the previous § 2201. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2201, now § 52.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

#### **§ 53. Purpose**

The Navajo (Diné) language shall be the instrument of educating, and reinforcing the importance of the continuation, comprehension and communication of the Navajo (Diné) language within the Navajo Nation Department of Head Start. The purpose of having the Navajo (Diné) language as an instrument of instruction within the Navajo Head Start program is to enable children to communicate freely and effectively through the Navajo (Diné) language, not as a second or foreign language but the language of the Navajo (Diné) people. The Navajo Nation is committed to ensure that the Navajo (Diné) language will survive and prosper. The Navajo (Diné) language must be used to ensure the survival of the Navajo (Diné) people and their future, to maintain the Navajo (Diné) way of life, and to preserve and perpetuate the Navajo Nation as a sovereign nation.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005

generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 53 renumbers the previous § 2202. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2202, now § 53.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

#### **§ 54. Definitions**

A. "Navajo Head Start Programs"—Programs inclusive of all Navajo Early Head Start and Head Start Programs.

B. "Staff Members" or "Staff"—Paid or unpaid individuals who have responsibilities related to children and their families who are enrolled in Navajo Head Start programs.

C. "Navajo Immersion"—All communication, interaction, and instruction is conducted in the Navajo (Diné) language throughout the Navajo Head Start programs.

D. "Level"—There are three different levels of Navajo immersion. Each requires that a greater portion of the day be all in the Navajo (Diné) language. The following are the levels of "Situational Immersion", "Partial Immersion", and "Full Immersion."

1. "Situational Immersion"—The specific language that is used is specific, recurring situations almost everyday are conducted in the Navajo (Diné) language.

2. "Partial Immersion"—A level of Navajo (Diné) language in which the first hour or more of each day is conducted in the Navajo (Diné) language. This applies to Head Start programs operating as Partial Immersion classrooms.

3. "Full Immersion"—A level of Navajo (Diné) language in which all instruction, communication, and interaction is conducted in the Navajo (Diné) language. This applies to Head Start programs operating as Full Immersion classrooms.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 54 renumbers the previous § 2203. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2203, now § 54.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

## **§ 55. Implementation**

A. The Navajo (Diné) Immersion section shall be responsible for providing education and technical assistance to Head Start staff to infuse the Navajo (Diné) language into the daily instruction of the Head Start children at all centers and Homebase programs. The Navajo Immersion shall develop and implement policies and procedures for the implementation of Navajo (Diné) language into the curriculum of the Navajo Head Start programs. The Navajo (Diné) language shall be the primary language of instruction, communication, and interaction in all Navajo Head Start programs. Navajo Nation Head Start employees will interact and be responsible to develop, implement, and participate in the children's social and cognitive abilities in the Navajo (Diné) language. The English language shall be utilized as a secondary language and shall be provided as an additional instrument of instruction, communication and interaction in all of the Navajo Head Start programs.

1. The Navajo Nation Department of Head Start shall develop and implement policies and procedures for the continuation of the Navajo (Diné) language in the curriculum of the Navajo Head Start program in accordance with this Act.

2. The Navajo Nation Department of Head Start shall ensure the Navajo Immersion Program's participation in all classroom activities tailored around the Navajo (Diné) language's implementation process using the three levels of immersion. These levels will accomplish the transition into Full Immersion.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 55 renumbers the previous § 2204. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2204, now § 55.

### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

## **§ 56. Program procedures**

The Navajo Head Start program will utilize all resources necessary to comply with this Act. The Navajo Immersion program shall establish an appropriate Navajo (Diné) language curriculum to ensure the full implementation of the Navajo (Diné) language within all Navajo Head Start programs.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 56 renumbers the previous § 2205. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2205, now § 56.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

#### **§ 57. Amendments**

This Act shall not be amended unless such amendments are approved by 2/3 of the full membership of the Navajo Nation Council.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 57 renumbers the previous § 2206. CJY-52-01, July 17, 2001, Approving and Adopting the Diné Language Head Start Act, adopted the previous § 2206, now § 57.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

### **Subchapter 2. Diné Education**

#### **§ 101. [Reserved]**

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 101, Short title, adopted by CN-61-84, November 14, 1984. *See also,* previous Navajo Education Policy Statement, adopted by CAU-43-61, August 29, 1961.

#### **§ 102. [Reserved]**

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 102, Mission statement, adopted by CN-61-84, November 14, 1984; amended and renumbered to § 2 by CJY-37-05, July 19, 2005.

#### **§ 103. [Reserved]**

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 103, Definitions, adopted by CN-61-84, November 14, 1984; amended and renumbered to § 3 by CJY-37-05, July 19, 2005.

**§ 104. [Reserved]**

**History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 104, Responsibility and authority of the Navajo Nation, adopted by CN-61-84, November 14, 1984; amended and renumbered to § 1 by CJY-37-05, July 19, 2005.

**§ 105. [Reserved]**

**History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 105, Education Agency of Navajo Nation, adopted by CN-61-84, November 14, 1984.

**§ 106. Navajo Nation Board of Education**

A. Establishment-Navajo Nation Board of Education.

There is hereby established the Navajo Nation Board of Education (hereinafter, "the Board"), with the Executive Branch of the Navajo Nation government for the specialized purpose of overseeing the operation of all schools serving the Navajo Nation, either directly if under the immediate jurisdiction of the Navajo Nation, or if operated by another government, by joint powers agreements, memoranda of understanding/agreement, cooperative agreements or other appropriate intergovernmental instruments.

B. Membership.

1. The Board shall consist of 11 members.

2. Five Board members shall be elected to four year terms, one at-large from each of the following agencies: Western, Chinle, Fort Defiance, Shiprock and Eastern. If vacancies occur in any of the five elected Board positions, for any reason, the vacancies shall be filled in the same manner as provided in the Navajo Election Code for school board members in 11 N.N.C. § 161(E).

3. Six Board members shall be appointed to six year terms by the President of the Navajo Nation and confirmed by the Education Committee of the Navajo Nation Council. These members will be appointed in order

to ensure that a variety of experience and knowledge is present on the Board.

4. The six appointed members of the Board shall serve as the Board from the time of the confirmation of all six appointed members by the Education Committee until the five elected Board members are elected in the 2006 Navajo Nation General Election.

5. If vacancies occur in any of the six appointed Board positions, for any reason, the President of the Navajo Nation shall make appointments to fill such vacancies for the unexpired remainders of the vacant Board position term, subject to confirmation by the Education Committee.

C. Qualifications of appointed/elected Board members.

1. The six appointed Board members shall meet the following qualifications:

a. Two appointed Board members will be individuals who are recognized for their knowledge of traditional Navajo culture;

b. One appointed Board member will be a school administrator working on the Navajo Nation;

c. Two appointed Board member will be parents of at least one child enrolled in a Kindergarten, elementary, or secondary program on the Navajo Nation;

d. One appointed Board member will be a teacher employed in a Bureau of Indian Affairs funded or state public school operating on the Navajo Nation.

2. The five elected Board members shall have at least a four year academic degree from an accredited college or university.

D. Qualifications of all Board members.

All Board members shall meet the following qualifications:

1. All Board members shall be enrolled members of the Navajo Nation;

2. All Board members shall be at least 25 years of age;

3. All Board members shall not be delegates to the Navajo Nation Council, a member of a school board of a school operating on the Navajo Nation, or an employee of the Department of Diné Education.

4. All Board members shall not have been convicted of a felony or of any crime involving child abuse or neglect.

E. Meetings.

1. All meetings of the Board shall be public, and shall be held at a variety of locations either on or in immediate proximity to the Navajo Nation so as to make it possible for interested Navajo public and Navajo educators to attend.

2. The Board shall meet on such schedule as is necessary to carry out its responsibilities, or at the call of its presiding officer.

3. An electronic record of the procedures of the Board shall be kept, and shall be made available to the public in accord with the Navajo Nation Privacy and Access to Information Act.

4. During meetings of the Board an opportunity shall be made available for the public to speak on any issue before the Board.

#### F. Compensation.

Board members shall receive payment for discharging their duties at rates set by the Education Committee of the Navajo Nation Council.

#### G. Powers and duties.

1. The Board shall have general power to monitor the activities of all Bureau of Indian Affairs funded schools and local community school boards serving the Navajo Nation, including the authority:

a. To assume control of local community controlled schools from the local community school board in situations wherein:

i. The Navajo Nation has received written notice of the intent of the Bureau of Indian Affairs to reassume any of the programs, or portions of programs, which the local community school is managing and operating under authorization from the Navajo Nation, pursuant to Public Law 93-638 or Public Law 100-297, as amended; or

ii. The Navajo Nation has sent written notice to the local community school board that the Navajo Nation has made a request for retrocession of the programs, or portions of programs, which the local community school is managing and operating under authorization from the Navajo Nation, pursuant to Public Law 93-638 or Public Law 100-297, as amended; or

iii. The Navajo Nation Board of Education has provided the local community school board with a written notice of its opportunity for a due process hearing held pursuant to regulations adopted by the Education Committee of the Navajo Nation Council, at which the local community school board may appear and show cause why the programs, or portions of programs, which the local community school is managing and operating under authorization from the Navajo Nation pursuant to Public Law 93-638, as amended, or Public Law 100-297, as amended, should not be assumed by the Department of Diné Education;

b. To report at least quarterly to the Education Committee of the Navajo Nation Council, and annually to the Navajo Nation Council.

c. To report to the Education Committee of the Navajo Nation Council any instance where the Board has assumed control of community controlled schools.

d. To provide guidance for the school accreditation activities of the Navajo Nation North Central Accreditation Office.

2. Subject to Navajo Nation law, the Board is authorized to solicit funds, propose budgets and plans of operation, create positions, and establish organization relationships, and employ and supervise personnel through a chain of command. Provided, that the Board is not authorized to represent the Navajo Nation in consultation with federal, state, and local officials regarding any proposed changes in federal education legislation or educational programs, including new schools (including charter schools), school closures, consolidations, education budget initiatives and the like. These authorities are delegated specifically to the Education Committee of the Navajo Nation Council, as set forth in 2 N.N.C. § 484(B) (6).

a. The chief administrative officer of the Board shall be the "Navajo Nation Superintendent of Schools," who shall be appointed by the Navajo Nation Board of Education, subject to confirmation by the Navajo Nation Council, and shall be empowered to do all things necessary and proper to carry out the responsibilities of the Board.

b. Within budgetary constraints, and consistent with the Department Plan of Operation, the Board may establish such subordinate offices, staff, and advisory bodies, as necessary to carry out its duties and responsibilities.

3. The Board shall carry out the following duties and responsibilities through the Navajo Nation Department of Education:

a. Establish instructional content and achievement standards and customized criterion referenced achievement testing instruments for schools serving the Navajo Nation, including consolidation of the standards of the three states overlapping the Navajo Nation with those of the Navajo Nation for Navajo language and cultural knowledge.

b. Establish policies and procedures for carrying out the accountability provisions of the federal education laws with regard to all Bureau of Indian Affairs funded schools serving the Navajo Nation.

c. Establish procedures and criteria for licensing administrators for Bureau of Indian Affairs funded schools operated under contracts or grants authorized by the Navajo Nation governing body.

d. Establish procedures and criteria for endorsing Navajo language and cultural knowledge programs, and for certifying the competency of instructional personnel to deliver them.

e. Receive monitoring and evaluation reports on all elementary and secondary educational programs serving the Navajo Nation.

Provide for technical assistance as necessary and desired by such programs within available resources.

f. In cooperation with the Education Committee of the Navajo Nation Council, develop procedures to enforce the Navajo Nation school attendance laws.

g. Review and endorse or decline to endorse existing elementary and secondary school curricula, teaching and criterion referenced test materials for consistency with the unique needs of Navajo students in all schools serving the Navajo Nation, and make recommendations thereon to the state agencies controlling curricula in the public schools.

h. Direct the creation and publication of curricula, teaching, and criterion referenced test materials as needed for instruction in Navajo language and cultural knowledge.

i. Negotiate and recommend to the appropriate Navajo Nation officials joint powers agreements or memoranda of understanding/agreement or other intergovernmental agreements as necessary to coordinate the activities of the Department of Diné Education with the Bureau of Indian Affairs and the departments of education of the states overlapping the Navajo Nation.

j. In cooperation with the Education Committee of the Navajo Nation Council, oversee research on the educational achievement, problems, and needs of Navajo Nation students and school systems.

k. Propose needed Navajo Nation education legislation to the Education Committee of the Navajo Nation Council.

l. Actively pursue funding to support the activities of Navajo Nation education programs.

m. Implement the procedures established under the Grant/Contract Conversion/Maintenance Handbook and recommend such revisions to the Manual as are deemed necessary. Implement the process for reauthorization of school contracts/grants.

n. Establish procedures for the enforcement of Navajo Nation educational laws and implement such laws to the full extent of Navajo Nation jurisdiction.

### **History**

CD-42-08, December 23, 2008. Overrode Presidential veto of CO-38-08, October 22, 2008. Amended Section 106(G)(2).

CO-48-06, October 20, 2006. Amended § 106(D)(2) by lowering the age qualification from 30 to 25 years of age.

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 106, School boards-Local control of schools, adopted by CN-61-84, November 14, 1984.

#### **§ 107. Department of Diné Education**

A. The Department of Diné Education ("Department") is the administrative agency within the Navajo Nation with responsibility and authority for implementing and enforcing the educational laws of the Navajo Nation. The Department is subject to and carries out the laws adopted by the Navajo Nation Council. In exercising its responsibilities, the Department shall seek to work cooperatively with schools serving the Navajo Nation.

B. The Department is under the immediate direction of the Navajo Nation Superintendent of Schools, subject to the overall direction of the Navajo Nation Board of Education. In carrying out its responsibilities the Department, through the Superintendent of Schools, is authorized and directed to:

1. Establish cooperative arrangements with other divisions and programs within the Navajo Nation and with education organizations and entities;

2. Negotiate cooperative arrangements and intergovernmental agreements with local, state and federal agencies and governmental bodies, subject where required, to the approval of the Navajo Nation Council or designated standing committee.

3. Inquire into the educational situation of Navajo students in any school or educational program serving the Navajo Nation or receiving program funds for the education of Navajo youth or adults. The authority to make inquiries granted to the Department in this Subsection extends to all affected school sites.

4. Determine the impact of educational programs on Navajo students by inquiring into areas of concern, such as achievement data, test results, budgets, language proficiency, special educational programs, supplemental programs, staffing, social and economic variables, curriculum, health and safety, adequacy and accessibility of facilities, and other areas of inquiry relevant to the educational situation of Navajo students.

5. Comply with federal and, where appropriate, state requirements regarding confidentiality or records.

6. Report the results of its inquiries to the Education Committee of the Navajo Nation Council and to the Navajo Nation Board of Education ("Board") and local community school boards, school board association, communities and other entities serving the Navajo Nation affected by the subject matter of these inquiries.

7. Make recommendations in its reports for the improvement of Navajo education.

8. Upon a directive from the Board, assume control of community controlled schools in situations where the Board exercises its authority under § 106(G) (1) (a).

9. Report quarterly to the Board on the state of Navajo education.

10. Shall implement the procedures, policies, directives and guidance as approved by the Board related to the education of Navajo children and the enforcement of Navajo Nation laws.

11. The Department shall be available to work with schools, school districts, governing boards, local communities and other appropriate entities to develop plans for the implementation of Navajo educational laws, to coordinate utilization of available resources and to assist in the development of new resources. The Department shall assure that its staff have and receive appropriate professional training in order to keep informed of current educational methodologies, laws, regulations, and research.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 107 amends and renumbers the previous § 105, Education Agency of the Navajo Nation, adopted by CN-61-84, November 14, 1984.

#### **§ 108. Parental involvement**

A. The Navajo Nation promotes maximum parental involvement in all schools serving Navajo communities. Parents have a right to know of their children's academic achievement and progress. All schools shall be required to disclose to parents information about the quality of their children's teachers, and their children's school performance as defined and required by the Navajo Nation, federal and state laws. Every parent should be afforded the opportunity to fully participate in upgrading the quality of the local education plan.

B. Every school serving Navajo students shall jointly develop with and distribute to parents a written parental involvement policy that shall describe the strategies for carrying out parental activities necessary to improve the quality of teaching and learning.

C. Every school shall provide technical assistance, parental training, and resources necessary to coordinate parent programs.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 108 amends and renumbers the previous § 107, adopted by CN-61-84, November 14, 1984.

**Note.** Previous § 108, Navajo preference and Indian preference, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 124 by CJY-37-05, July 19, 2005.

#### **United States Code**

Sending child to school out of State without consent, see 25 U.S.C. §§ 286, 287.

School boundaries, see 25 U.S.C. § 2004.

#### **§ 109. Education standards and accreditation**

A. The Board shall coordinate with other governmental entities and education providers in developing and implementing appropriate educational and residential standards for schools and school systems serving the Navajo Nation, including the teaching of Navajo language and culture.

B. Upon the formal approval of Navajo Nation standards, the Department of Diné Education shall implement an accreditation process based upon such standards and implement this process on the schools over which it assumes regulatory jurisdiction. The Board will provide general oversight for school accreditation activities of the Navajo Nation North Central Accreditation office until regulatory jurisdiction has been assumed for the schools affected.

C. Each school serving the Navajo Nation shall approve and adopt academic content standards that are challenging and promote student academic achievement. The academic standards shall also be aligned with the applicable academic content standards or the Navajo educational standards when they are developed.

D. The Board shall require all schools within the jurisdiction of the Navajo Nation to develop and implement a school-wide accountability system that is effective in meeting and making adequate yearly progress as defined by the Navajo Nation.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **Annotations**

##### **1. Consent to policies**

"We note, for example, that there are 'Navajo Educational Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

## **§ 110. Curriculum**

A. Each school serving the Navajo Nation shall have a written curriculum that is scoped and sequenced in grades K-12 or any part of that grade span offered by the school. The curriculum must be based on the needs of the students served, the cultural values and individual interests of Navajo students. The curriculum shall be aligned with the Navajo Nation adopted education standards for high academic achievement and shall address the assessment necessary to meet adequate yearly progress as required by federal legislation and the Navajo Nation.

B. The instruction program shall foster competence in both the English language and Navajo language skills and knowledge of both American and Navajo culture.

C. The instruction program shall assist the students to acquire full knowledge of basic skills, including science, computer science, mathematics, social studies, reading, writing and language skills and cognitive skills. The instruction program shall address character development based upon the Diné K'é concept and shall be implemented at appropriate grade levels at all schools serving the Navajo Nation.

D. The curriculum shall be standards-based, with instructional strategies that reflect scientific research and evidence based practices, providing students with the opportunity to acquire full knowledge of basic skills, including but not limited to science, mathematics, social studies, reading, writing, language skills and cognitive skills.

E. Career education should be integrated into the basic curriculum at all grade levels; the goal of career education will be to establish a relationship between what is taught in the classroom and what is needed on the job and in professional occupation. At the secondary and post-secondary levels, the curriculum should incorporate career exploration, career guidance, and awareness of vocational and occupational career opportunities.

F. Special programs shall be provided for students with disabilities, gifted or talented students and for students requiring remedial instruction or alternative method of instruction.

G. Each school shall periodically review the content of the school curriculum. The review should utilize student assessment data, achievement test scores, student progress reports, teacher input, and related school evaluation reports.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

## **§ 111. Education in Navajo language**

A. The Navajo language is an essential element of the life, culture and identity of the Navajo people. The Navajo Nation recognizes the importance of revitalizing and perpetuating that language to the survival of the Nation.

B. Instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation. Such Navajo language instruction shall include to the greatest extent practicable: thinking, speaking, comprehension, reading and writing skills and study of the formal grammar of the language.

C. Spoken or written Navajo language shall be used as a medium of instruction to teach academic content to Navajo speaking students who are not fully proficient in English, or who wish to improve their Navajo language proficiency by active use of the language as a learning tool. Such use of the Navajo language as a medium of instruction shall be carried out by Navajo speaking instructors who are qualified to teach the academic subject matter involved.

D. Intensive English language development shall be made available to serve students who have been identified, based upon a recognized language assessment, as "limited English proficient", with the exception of students enrolled in Navajo language immersion programs.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **§ 112. Education in Navajo culture and social studies**

The survival of the Navajo Nation as a unique group of people growing and developing socially, educationally, economically and politically within the larger American Nation requires that the Navajo people and those who reside with the Navajo people retain and/or develop an understanding, knowledge and respect for Navajo culture, history, civics and social studies. Courses or course content that develops knowledge, understanding and respect for Navajo culture, history, civics and social studies shall be included in the curriculum of every school serving the Navajo Nation. The local school governing board, in consultation with parents, students and the local community, shall assist in determining the appropriate course content for the Navajo culture component of the curriculum.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **United States Code**

Native American Languages Act, see 25 U.S.C. § 2901 *et seq.*

### **§ 113. Professional training for educators**

A. The Navajo Nation recognizes the need for specialized training and credentialing for the administrators of Bureau of Indian Affairs funded schools. The local governing board, with an opportunity for input by parents and students, shall assist in determining the appropriate course content for the Navajo culture component of the curriculum.

B. It is the responsibility of the local schools and school districts serving the Navajo Nation to employ professional Navajo educators, to recruit those who are most qualified and competent to work with the Navajo student population, and to create incentives to improve staff performance. Local school boards and administrators shall take leadership to provide professional training opportunities for their personnel and to encourage and provide both opportunities and guidance for those individuals who desire to advance themselves in the education field, obtain or expand their professional certification, or obtain training in their specialized areas. Staff development shall include both certified and non-certified personnel. Educators of Navajo children have the responsibility to upgrade their teaching and administrative skills to maintain relevant, coherent instructional techniques at all levels of formal education.

C. All schools and school districts serving the Navajo Nation shall develop appropriate Navajo culture awareness and sensitivity programs as an integral part of their in-service training programs for all personnel. The Navajo Nation through its Education Committee shall establish general guidelines for the implementation of these programs.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

### **United States Code**

Indian education personnel, see 25 U.S.C. § 2012.

### **§ 114. Special education**

A. Local schools and educational programs serving the Navajo Nation shall assure that Navajo students with disabilities and gifted Navajo students receive educational and support services and resources that are adequate to meet their special educational needs and that are both appropriate and non-discriminatory in terms of Navajo language, learning styles and culture. The Navajo Nation supports the essential policies made explicit within the Individuals with Disabilities Education Act ("IDEA"), as amended, concerning the provision of a free, appropriate public education in the least restrictive environment and the procedural rights and safeguards afforded students with disabilities and their parents. No school or educational program shall discriminate against any student or applicant for services on the basis of disability.

B. The Navajo Nation shall coordinate with other agencies to provide personnel preparation services for special education and related service needs to increase the availability of qualified Navajo special education personnel.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **United States Code**

Educational assistance of children with disabilities, see 20 U.S.C. § 1411 et seq.

Early childhood development programs regulations and rules of general applicability, see 25 U.S.C. § 2019.

Infants and toddlers with disabilities, see 20 U.S.C. § 1431 *et seq.*

#### **§ 115. Education of Navajo gifted, talented and highly motivated students**

A. All local schools serving the Navajo Nation shall identify the strengths of gifted, talented and highly motivated students and shall provide appropriate educational planning which will challenge and nurture each student's level of development to its highest potential. Students shall be provided an opportunity to work at their appropriate developmental level of ability rather than being limited to a normative level.

B. All schools shall provide special programs to recognize and encourage students who are gifted, talented, highly motivated, and those who demonstrate substantial academic improvement.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **§ 116. School counseling services**

All schools serving the Navajo Nation shall maintain competent, appropriately staffed counseling programs. Counseling staff shall have an awareness of Navajo culture and tradition, particularly as these relate to the individual needs and life circumstances of the students and their families. The counseling program shall be concerned with the physical, cultural, intellectual, vocational and emotional growth of each student.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005

generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **§ 117. Student code**

Under the guidance of the local community school boards, parent committees and parents, a written code of student conduct, rights and responsibilities shall be developed and maintained by each school serving the Navajo Nation. The student code must be consistent with applicable Navajo Nation, federal and state laws. School disciplinary procedures should be corrective, based upon a disciplinary action plan incorporated into the code of student conduct. The disciplinary action plan should provide for notification and involvement of parents from the earliest stages of the disciplinary process.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984

#### **§ 118. School attendance**

A. Every person who has a Navajo child or Navajo children under his or her care between the ages of five and 18 years shall assure the attendance of the child or children in school. For purposes of this Section, a child shall be deemed to be five years old only if he or she has a fifth birthday prior to September first of the school year to which this policy is applied. In the event that the funding agency of a school has a different requirement, that requirement shall apply. This policy applies to attendance by children who have not yet graduated from high school. Local school governing boards shall develop programs to improve regular school attendance in compliance with this policy.

B. Any adult residing in the Navajo Nation who violates the provisions of this Section shall be subject to the penalties prescribed in 17 N.N.C. §§ 222 and 223 for petty misdemeanors. Any Navajo minor residing in the Navajo Nation who violates the provisions of this Section shall be subject to the jurisdiction of the Family Courts of the Navajo Nation.

C. The Board, in cooperation with the Education Committee of the Navajo Nation Council shall develop regulations and procedures to enforce the compulsory attendance laws. The Department of Diné Education shall work with appropriate agencies within the Navajo Nation, school boards, schools, school districts, chapters, parent committees and state and federal governmental entities to develop appropriate and innovative measures and educational programs to decrease the dropout rate, reduce absenteeism and to meet the educational needs of students who have been unable to function effectively in the regular school setting.

D. The Navajo Nation discourages transfers from one school to another, particularly transfers which occur during the school year and jeopardize the

student's academic progress. The Department of Diné Education is directed to work cooperatively with all schools and school systems serving Navajo students to develop procedures to minimize excessive and inappropriate student movement between schools.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

### **United States Code**

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

### **§ 119. Substance and alcohol abuse**

Navajo Nation law prohibits the possession or consumption of alcohol and illegal drugs on the Navajo Nation. 17 N.N.C. §§ 390-395, §§ 410-412. All schools serving the Navajo Nation shall discourage the consumption of alcohol and illegal drugs through education awareness, prevention and guidance programs for all Navajo youth. Schools along with other community resources shall encourage a positive self-concept, provide factual information and encourage personal responsibility. Schools shall work with other community service providers to seek and develop programs and resources to assist students addicted to the use of alcohol and other illegal drugs so that they may fully participate in the school program.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

### **§ 120. Bus routes and transportation**

Adequate bus transportation is of vital importance to the Navajo Nation to improve school attendance and increase the day attendance opportunities for Navajo students. Adequate bus transportation systems for students shall be established to ensure safe transport of Navajo students to and from school. Local school board policy governing the transportation of pupils shall meet or exceed all applicable state and federal safety regulations. The Navajo Nation, through the Education Committee and the Transportation and Community Development Committee, shall work in a joint and cooperative effort with the states in which the Navajo Nation is located and the Bureau of Indian Affairs to adopt adequate school bus routes, to avoid excessively long bus travel and to develop a comprehensive school transportation plan. The Navajo Nation may enter into agreements with the federal government, states, counties, local schools and school districts within and bordering the Navajo Nation to implement school transportation plans. In apportioning funds for road construction and maintenance, the Navajo Nation, federal, state and local

(county) government shall consider school transportation needs for day attendance as a priority consideration. This Section shall not justify the closure of any school nor the denial of day attendance opportunities to students within a school's day attendance area.

### **History**

CN-61-84, November 14, 1984.

**Revision note.** Reference to the "Tribal Roads and Transportation Committee" changed to the "Transportation and Community Development Committee". See 2 N.N.C. § 420 *et seq.*

### **United States Code**

School boundaries, see 25 U.S.C. § 2004.

### **§ 121. School facilities and operations**

A. All educational programs located within the Navajo Nation or serving significant numbers of Navajo students shall be housed in facilities that are accessible, appropriate to the purposes for which they are used, and maintained in good repair. The Bureau of Indian Affairs is responsible, either directly or through contract, to maintain in good repair, all educational facilities owned or operated by the Bureau or operated with funding from the Bureau. This Subsection shall not be interpreted to justify the closure of any school facility in a manner contrary to the provisions of Subsection (B) of this policy or in violation of any Navajo Nation, state or federal law, regarding school closures.

B. The Department of Diné Education shall establish joint planning efforts with schools and school systems serving the Navajo Nation and with those educational institutions receiving federal funding to educate Navajo students to accomplish the following provisions:

1. When planning construction, expansion, consolidation, or closure of any school or school residential unit serving the Navajo Nation, the decision-making entity shall, from the initial stages, consult with the affected school boards and school board organizations, the Education Committee of the Navajo Nation Council, the Department of Diné Education, affected chapters and local communities and with those students, parents, and staff who use the facility, and shall incorporate the desires of these parties into their plans to the greatest extent feasible.

2. The construction, expansion, and renovation of any school facility shall conform to all applicable Navajo Nation, state and federal health and safety regulations, to established safety and building codes and to laws regarding environmental assessments, environmental impact and accessibility for persons with disabilities.

3. In planning for the construction of any new educational facility, consideration shall be given to the development of an appropriate physical environment including but not limited to considerations of location, size, alternate use, and the extent to which

the proposed facility will benefit unserved and underserved populations, including day students who travel daily on the bus for an excessive amount of time.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

### **United States Code**

Suspension or discontinuance of schools, see 25 U.S.C. §§ 292, 292a.

Sale or conveyance of lands purchased for day school or other Indian administrative uses, see 25 U.S.C. §§ 293, 293a.

### **Annotations**

#### **1. Consent to policies**

"We note, for example, that there are 'Navajo Educational Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

#### **§ 122. Vocational education and career education**

A. The Navajo People have a right to education in basic, technical, employability, managerial, and entrepreneurial skills. The Navajo Nation shall advocate with federal, state and private sources for adequate funding of vocational and career education programs. The Navajo Nation shall integrate educational planning with economic planning and develop agreements and joint efforts for the sharing of vocational educational costs, facilities and programs. In order to increase the vocational opportunities available to Navajo youth and adults and to make the most efficient use of existing vocational educational resources, the Education Committee and the Human Services Committee of the Navajo Nation Council shall coordinate, with other entities, the development of comprehensive vocational educational planning.

B. Career education shall be integrated into the basic curriculum of all schools in all appropriate content areas and at all grade levels.

C. Vocational education programs shall be realistically designed to serve the needs of adults in secondary education including those who have academic, socioeconomic, cultural, physical, and mental disabilities who need or can profit from, the instruction. Vocational education programs should include instruction-in basic skills, communication, social interaction, occupationally specific skills and responsibility skills that are required for employment. Vocational education programs should be determined according to identified needs, employment statistics, current occupational surveys, and local, state and national labor market demands, including the demands of new and emerging

occupations. They should reflect the skills needed to develop the Navajo economy.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

#### **§ 123. Accountability and academic assessment**

A. The Board shall establish and maintain a Navajo Education Information System (NEIS) that will provide a comprehensive database on the schools and students. Through the database stored in NEIS, the Navajo Nation will be able to track academic performance of students in all school systems.

B. The Department of Diné Education shall collaborate with all schools and educational entities serving the Navajo Nation to develop and implement an educational accountability system. The educational accountability system will be based upon academic standards and the Navajo Nation-adopted academic assessment, and other relevant academic indicators.

C. The Department of Diné Education shall establish a level of standard or academic achievement for each grade level that students will meet to demonstrate mastery in order to make satisfactory academic progress.

D. To assure an effective educational accountability system, each school serving the Navajo Nation shall provide academic test scores on each individual student to the Department of Diné Education. The Department of Diné Education will use student test data to create Navajo achievement profiles. The achievement profiles will be shared with each school to assist them in improving academic achievement. On an annual basis, the Department of Diné Education will publish an Accountability Report on student achievement and related information for public dissemination.

E. The Department of Diné Education shall comply with the confidentiality and student privacy provisions of the Family Educational Rights and Privacy Act ("FERPA") in the use of student information for reports and research purposes.

F. The Department of Diné Education shall collaborate and guide a span of educational research with research organizations, post-secondary institutions, and the Navajo Nation Institutional Research Review Board.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** Previous § 123, Vocational rehabilitation and opportunities for the handicapped, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 1402.

#### **United States Code**

Family Educational Rights and Privacy Act, (FERPA), see 20 U.S.C. § 1232g.

#### **§ 124. Navajo preference and Indian preference**

A. The ultimate goal of the Navajo Nation is self-determination. In order to assure the survival and growth of the Navajo Nation as a people of distinct language and culture and with a domestic economic base, the Navajo Nation requires Navajo preference in employment of school and educational personnel in all schools serving the Navajo Nation. In addition, whenever application of the Navajo preference policy does not result in the selection of a Navajo applicant or candidate, a policy of Indian preference shall be applied to the remaining applicants of candidates. Local school governing boards and education administrators responsible for hiring shall comply with the requirements of this policy in regard to the recruitment, employment, promotion and retention of all personnel.

B. All schools and school systems operating within the Navajo Nation shall seek the professional services of qualified Navajo professionals as educators, counselors, administrators and support personnel to adequately serve the linguistically and culturally unique children of the Navajo people. In addition, all affected schools and school districts shall give preference to Navajo personnel in providing professional training opportunities, subject to the needs of the schools to obtain specialized training opportunities for staff serving particular functions. In seeking educational and support personnel, schools and school districts shall include within the position description, as a preferred qualification, a knowledge and familiarity with the Navajo language, culture and people.

C. Notwithstanding any other provision of law, including the Navajo Preference in Employment Act, 15 N.N.C. § 601, *et seq.*, as amended, the local governing board of a school or school district may waive the requirements of this Section by a formal vote of the board. Such waiver may apply only to individual employment, retention or promotion decisions, as determined by the board on a case-by-case basis. In each case where a waiver of Navajo preference-based hiring, retention or promotion occurs, the local governing board shall make a written record of the occurrence for inclusion in the official minutes of the board.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 124 amends and renumbers previous § 108 adopted by CN-61-84, November 14, 1984.

**Note.** Previous § 124, Post secondary education, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 910.

#### **Cross References**

Navajo Preference in Employment Act, see 15 N.N.C. § 601 *et seq.*

## United States Code

Operation and financial support of the Bureau of Indian Affairs funded school system, see 25 U.S.C. § 2001 *et seq.*

### Annotations

#### 1. Consent to policies

"We note, for example, that there are 'Navajo Educational Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

#### § 125. [Reserved]

#### History

**Note.** CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code; and deleted previous § 125, Navajo Community College, adopted by CN-61-84, November 14, 1984. See, Diné College at § 2001 *et seq.*

#### § 126. [Reserved]

#### History

**Note.** CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code. Previous § 126, Adult education, adopted by CN-61-84, November 14, 1984, renumbered to § 1401.

#### § 127. [Reserved]

#### History

**Note.** CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code. Previous § 127, Early childhood programs, adopted by CN-61-84, November 14, 1984, amended and renumbered to § 50.

## Chapter 3. School Boards

### Cross References

School Boards—Local Control of Schools, 10 N.N.C. § 106.

School Board Elections, Navajo Election Code, 11 N.N.C. § 1 *et seq.*

### Subchapter 1. Local Community School Boards

#### § 200. Local control of schools

A. The Navajo Nation encourages and supports local control of Navajo education. Administration of a local school shall be under the guidance and direction of the local governing board.

B. All local community school board operating developmental and educational schools within the Navajo Nation are subject to its educational laws to the full extent of the jurisdiction of the Navajo Nation and with applicable federal regulations. Such local school boards are to be held accountable to the Navajo Nation for ensuring that their students make adequate yearly progress in meeting applicable, measurable academic achievement standards, including any such standards established by the Navajo Nation.

C. Local community school boards are responsible for assuring the implementation of the Navajo educational and developmental policies at the local level. In addition, local school boards are responsible for establishing local educational policies and priorities to meet the needs of all students, with reasonable accommodations for students with disabilities.

D. Local community school boards shall comply fully with all applicable Navajo Nation, federal and state laws and regulations regarding the prevention, treatment and reporting of incidents of child abuse and neglect, and the elimination from any school employment of individuals with a history of such abuse and neglect.

E. In administering the schools under their charge, local community school boards shall give timely notice of their meetings and conduct their meetings at times and places convenient to the public, especially parents, and shall carry out their deliberations and decision-making in open meetings, except in such cases as disciplinary matters, personnel matters, discussion of litigation, where the need for privacy clearly outweighs the public's right to know.

F. School boards shall develop written policies regarding school governance, personnel matters, staff conduct, student conduct, teacher evaluation, parental involvement, residential policies, fiscal and budget management policies, graduation requirements, academic policies and related topics, and shall assure that these policies are communicated to administration, staff, students and parents. School board policies shall be implemented in a consistent and impartial manner.

G. School boards shall not utilize any funding received from federal grants or contracts or from Navajo Nation general funds based upon their establishment under this Chapter, to bring litigation or administrative proceedings against the Navajo Nation, its officials, employees, or entities.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 200 amends and renumbers previous § 106, adopted by CN-61-84, November 14, 1984.

#### **Annotations**

## **1. Construction and application**

It is therefore obvious that while the schools remain minimally self-sufficient, they have been inextricably intertwined with the Navajo Nation government and their local Navajo communities from their inception. The Appellant schools have characteristics of both public and private schools; therefore, we agree with the District Court that the schools are "local community schools," or "other schools" under the meaning of Section 2(EE) of the Election Code. We hold that the Election Code applies to the Appellants. *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 171-172 (1996).

## **2. Consent to policies**

"We note, for example, that there are 'Navajo Educational Policies' which apply to all schools within the Navajo Nation, and to which the School District agreed in its lease." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-13-98, slip op. at 8 (Nav. Sup. Ct. June 5, 2000).

## **§ 201. Establishment**

The Chapters of the Navajo Nation are authorized to establish such local Navajo Community School Boards as are suitable for their respective areas. Such local community school boards shall govern the schools funded by the Bureau of Indian Affairs for the education of Navajo students. The elections of such local community school board members shall be conducted in accordance with the Navajo Nation Election Code, Title 11 of the Navajo Nation Code.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

CAU-87-69, August 8, 1969.

### **Cross References**

Qualifications for office, see 11 N.N.C. § 8(D)(4).

### **United States Code**

Self-determination and Education Assistance, see 25 U.S.C. § 450 *et seq.*

Tribally Controlled School Grants, see 25 U.S.C. § 2501 *et seq.*

### **Annotations**

## **1. Construction and application**

It is therefore obvious that while the schools remain minimally

self-sufficient, they have been inextricably intertwined with the Navajo Nation government and their local Navajo communities from their inception. The Appellant schools have characteristics of both public and private schools; therefore, we agree with the District Court that the schools are "local community schools," or "other schools" under the meaning of Section 2(EE) of the Election Code. We hold that the Election Code applies to the Appellants. *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 171-172 (1996).

## **§ 202. Membership**

A. Any enrolled member of the Navajo Nation may serve as a member of a Local Community School Board, provided that he/she meets the qualifications established under the Navajo Nation Election Code.

B. School board members are subject to removal pursuant to the rules and procedures regarding removal of elected officials, established in the Navajo Nation Election Code.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

### **Cross References**

Navajo Election Code, 11 N.N.C. § 1 *et seq.*

## **§ 203. Composition**

Each local community school board shall be composed of not less than three nor more than seven members, as established by the Local Community School Board Apportionment Plan adopted by the Education Committee of the Navajo Nation Council, pursuant to the Navajo Nation Election Code.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

### **Cross References**

Composition of School Board; apportionment for School Board Elections, see 11 N.N.C. § 11.

### **Annotations**

#### **1. Apportionment**

It is clear that the Navajo Nation Council has delegated the Education

Committee as the appropriate body to finally approve all school board apportionment plans. *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 175 (1996).

#### **§ 204. Compensation**

All local Navajo Community School Board members shall receive payment for discharging their duties at rates set by the Education Committee of the Navajo Nation Council in consultation with the school boards, in accordance with regulations developed pursuant to Public Law 95-561.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-38-79, November 27, 1979.

CAU-87-69, August 8, 1969.

**Note.** This § 204 slightly amends and renumbers the previous § 206.

#### **§ 205. Powers, authority and duties**

A. Local community school boards shall function in accordance with the specific legal authorization under which they are operating.

B. All local community school boards shall abide by all applicable laws, rules, policies, and guidelines of the Navajo Nation.

C. The local community school boards are authorized to solicit outside funds for the benefit of the schools they serve, and such school boards may disburse these funds in any legal manner related to the performance of their duties and functions. The school boards shall file annual statements identifying any funds received from outside sources and a brief description of the purposes for which such funds were used or are to be used with the Department of Diné Education.

D. School boards shall report any disagreements at the school level which are disruptive to the education of the students they serve to the appropriate Education Line Office, in the case of Bureau-operated schools, or the Department of Diné Education, for all other schools.

E. Each local community school board shall send a representative to its respective Agency School Board and participate in its meetings and functions.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

**Note.** This § 205 amends and renumbers the previous § 207.

#### **Cross References**

Powers of Education Committee, see 2 N.N.C. § 484.

Responsibility and authority of the Navajo Nation, see 10 N.N.C. § 1.

Composition of School Board; apportionment for School Board Elections, see 11 N.N.C. § 11.

#### **§ 206. Officials**

Each Local Navajo Community School Board shall elect a President, Vice-President, and a Treasurer, and such other officials as are deemed necessary.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

**Note.** This § 206 renumbers the previous § 208.

#### **§ 207. Meetings**

Meetings shall be held at least once per calendar month during the school term, and at such other times as the President of the School Boards shall deem advisable. The President, in calling any meetings of the Board, shall give a minimum of three days notice to each member of the Board.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

**Note.** This § 207 renumbers the previous § 209.

[§§ 208, 209. Renumbered §§ 206, 207 by CJY-37-05, July 19, 2005]

### **Subchapter 3. Agency School Boards**

#### **§ 251. Establishment**

A. The Navajo Nation hereby establishes Agency School Boards to represent local community school boards at each of the BIA Agency Education Line offices within the Navajo Nation.

B. As changes occur in the number of line offices within the Navajo Nation, the number of Agency School Boards shall change also to reflect changes in the overall Bureau funded school system.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

#### **§ 252. Composition**

Each Agency School Board shall be composed of members elected or appointed by the Local Boards within the Agency. Each Local Board shall appoint or elect one person to serve on the Agency Board. In no event shall an Agency Board have more members than the total number of schools within the Agency.

#### **History**

CAU-87-69, August 8, 1969.

#### **§ 253. Powers; duties**

A. The Agency School Board shall carry out its functions in accordance with the provisions of Public Law 95-561, including making selection determinations concerning Agency staff, making determinations on contract renewal of Agency staff, providing input and making decisions on the agency education financial plan, and making Agency-wide administrative policies.

B. The Agency Board shall serve as a conduit of information to and from the Diné Bi Ólta' School Board Association Executive Board and the BIA's Office of Indian Education Programs (OIEP) headquarters to the local school level.

C. The Agency School Board shall receive reports of conflicts and disputes at the local level and work with the Agency Education Line Officer, the Department of Diné Education, and the Diné Bi Ó%DEta' School Board Association Executive Board in the resolution of such conflicts and disputes.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CAU-87-69, August 8, 1969.

#### **§ 254. Officials**

Each Agency School Board shall elect a President, a Vice-President, and a Treasurer, and other officials as necessary.

#### **History**

CAU-87-69, August 8, 1969.

**§ 255. Meetings**

Agency School Boards shall meet either monthly or at such intervals as established, but in no event shall meet less than four times per year.

**History**

CAU-87-69, August 8, 1969.

**Revision note.** Slightly reworded for purposes of statutory form.

**Subchapter 5. Diné Bi Ó[ta' School Board Association**

**History**

**2005 amendment.** The name "Navajo Area School Board Association" as adopted by CF-25-74, February 14, 1974 was changed to "Diné Bi Ó[ta' School Board Association" by CJY-37-05, July 19, 2005.

**1974 amendment.** The name "InterAgency School Boards" as adopted by CAU-87-69, August 8, 1969, was changed to "Navajo Area School Board Association" by CF-25-74, February 14, 1974.

**§ 301. Establishment of Diné Bi Ó[ta' School Board Association—Executive board**

A. The Navajo Nation hereby establishes the Diné Bi Ó[ta' School Board Association to represent and be comprised of the local community school boards at the Navajo Nation. Each local community school board shall have one vote in the Association. This association is the only school board association recognized by the Navajo Nation to represent local community school boards.

B. The Executive Board of the Diné Bi Ó[ta' School Board Association shall be comprised of seven members selected in the following manner:

1. The community controlled school boards of the Navajo Nation shall appoint four persons to serve on the Executive Board, each of whom must be an elected member of a community controlled school board.

2. The school boards of schools operated by the Bureau of Indian Affairs on the Navajo Nation shall appoint three persons to serve on the Executive Board, each of whom must be an elected member of a school operated by the Bureau of Indian Affairs on the Navajo Nation.

3. The Executive Board shall elect as its Chairperson one of its members appointed by the community controlled school boards.

4. The Executive Board shall elect as its Vice Chairperson one of its members appointed by the school boards operated by the Bureau of Indian Affairs on the Navajo Nation.

## **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CF-25-74, 5, February 14, 1974.

CAU-87-69, August 8, 1969.

### **§ 302. Powers and duties of the Diné Bi Ó[ta' School Board Association**

In cooperation with the Education Committee of the Navajo Nation Council, the Navajo Nation Board of Education, and the Department of Diné Education, the Diné Bi Ó[ta' School Board Association shall have the following powers and duties:

A. The Diné Bi Ó[ta' School Board Association shall consider educational programs, problems and issues of a Navajo Nation-wide significance.

B. The Diné Bi Ó[ta' School Board Association shall make recommendations to the Navajo Nation Board of Education and the Education Committee of the Navajo Nation Council concerning all BIA-funded schools and local community school boards. In order to fully address the views and situations of both community controlled school boards and school boards of the schools operated by the Bureau of Indian Affairs, the Association shall establish a procedure that enables both categories of the school boards to fully air their views before the Association and to attempt to reach a joint recommendation. If a joint recommendation is not reached, a minority report may be included with the recommendation sent to the Committee and the Board.

C. The Diné Bi Ó[ta' School Board Association shall plan such activities, including comprehensive school board training programs appropriate for the needs of both Navajo BIA operated schools and community controlled school boards, in order that all such school boards may effectuate the purposes of this Chapter.

D. The Diné Bi Ó[ta' School Board Association shall take all actions necessary to provide opportunities for local community school boards to share educational problems of mutual concern and to assist them in developing solutions to these problems.

E. The Diné Bi Ó[ta' School Board Association will from time to time meet with the Education Committee of the Navajo Nation Council to review progress of education on the Navajo Nation, and make any proposals, which in the opinion of the Association would improve education in the Navajo Nation. In making such proposals, the Association shall use a procedure that enables community controlled school boards and school boards of BIA operated schools to fully air their views before the Association and to attempt to achieve a joint proposal. If a joint proposal is not achieved, a minority report may be included with the proposal sent to the Committee.

F. The Diné Bi Ó[ta' School Board Association shall recommend to the Education Committee of the Navajo Nation Council and the Navajo Nation Board of

Education such policies, procedures, goals, and aims or such workshops as are required to implement the intent of this Chapter, using a procedure that enables community controlled school boards and school boards of BIA operated schools to fully air their views before the Association and to attempt to reach a joint recommendation. If a joint recommendation is not recommended, a minority report may be included with the recommendation sent to the Committee and the Board.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CF-25-74, February 14, 1974.

CAU-87-69, August 8, 1969.

#### **§ 303. Officers**

The Diné Bi Ó[ta' School Board Association shall establish a President and a Vice-President, and such other officers as are required.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CF-25-74, February 14, 1974.

CAU-87-69, August 8, 1969.

#### **§ 304. Meetings**

The full membership of the Diné Bi Ó[ta' School Board Association shall meet not less than once per year. The Executive Board of the Diné Bi Ó[ta' School Board Association shall meet monthly or at such intervals as established but in no event less than four times per year.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CF-25-74, February 14, 1974.

CAU-87-69, August 8, 1969.

#### **§ 305. Funding**

The Diné Bi Ó[ta' School Board Association in cooperation with the Education Committee of the Navajo Nation Council shall solicit funds as are necessary to support its activities, and any activities of Local or Area School Boards, from available sources. Any funds procured by the Diné Bi Ó[ta' School

Board Association in excess of cost requirements for their respective activities shall be used on behalf of local community school boards in a manner established by the Diné Bi Ó[ta' School Board Association.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CF-25-74, February 14, 1974

CAU-87-69, August 8, 1969.

### **Chapter 4. Programs and Facilities**

#### **§ 496. Compliance with requirements of Navajo Nation law**

All educational programs in operation on the Navajo Nation will comply with all of the applicable requirements of the Navajo Nation education laws as well as applicable state and federal requirements.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 496 amends and renumbers previous § 1 adopted by CN-61-84, November 14, 1984. See also, 1922-1951 Res. p. 114, February 20, 1947.

#### **§ 497. Changes in educational program or operation; discussion; approval**

A. It shall be the policy of the Navajo Nation that any agency, organization, or group proposing and planning a new school facility, expansion or change-over of an existing facility, including post secondary institutions, a change in school site, a transfer from Bureau to public school operation, a change from boarding school to day school, grant or contract operations, a creation of a charter school or other schools, closure or consolidation of schools, establishment or changes of bus routes, or any other change in educational policy or operation, which may affect the lives of local citizens and Navajo students, shall consult with the Navajo Nation for full discussion of such proposed changes.

B. Further, any agency, organization or group proposing such changes shall consult and discuss such plans with the Navajo Nation Superintendent of Schools, the Bureau of Indian Affairs, the Education Committee of the Navajo Nation Council, the people of the communities to be affected, either directly or indirectly, and with local school boards.

C. It shall also be the policy of the Navajo Nation that official endorsement of such changes or proposals by the Navajo Nation shall be withheld until every effort has been made by the responsible agency, organization, or group to obtain the approval and endorsement of the Navajo people affected, and

such Navajo Nation laws regarding the planning and undertaking of such change or proposal have been complied with. Such endorsement of proposed plans or changes shall be obtained prior to the implementation of such educational programs.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 497 amends and renumbers previous § 2 adopted by CN-61-84, November 14, 1984. See also, 1922-1951 Res. p. 114, February 20, 1947.

#### **§ 498. Size and locations of facilities**

A. It is the declared policy of the Navajo Nation, in every instance and to the fullest extent possible, for the Education Committee of the Navajo Nation Council, the Navajo Nation Board of Education, and the Department of Diné Education to work closely with all appropriate education providers and governmental entities on the size and location of all educational facilities to be constructed for Navajo students in order that maximum benefit can be obtained from them by the Navajo people.

B. The Education Committee is authorized to approve and recommend to the appropriate standing committee(s) of the Navajo Nation Council, the approval of site locations on the Navajo Nation for any educational facilities, including school houses or buildings, residential facilities, teacher and faculty quarters including areas sufficient for power and light, gas, sewers, and other necessary facilities. All facilities shall be in compliance with and meet the handicapped accessible specifications and codes.

C. All education facilities constructed on the Navajo Nation or for the education of Navajo students shall be constructed in compliance with the laws of the Navajo Nation and Americans with Disabilities Act regarding school facilities, including 10 N.N.C. § 121, "School Facilities and Operations".

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 498 amends and renumbers previous § 4 adopted by CN-61-84, November 14, 1984. See also, CJA-6-60, January 14, 1960.

#### **§ 499. Withdrawal of land for school purposes; leases and permits—Authority**

A. Withdrawals of Navajo Nation land, and the issuance of leases and permits for the use of such land for school or other legitimate educational purposes are authorized and subject to applicable Navajo Nation law.

B. All such withdrawals, leases and permits shall provide for cancellation in case the land embraced ceases to be used primarily for school

or other legitimate educational purposes for an uninterrupted period of two years or for interrupted periods of six months or more totaling two years.

C. Such withdrawals, permits, and leases may provide for use of the land for teachers' housing, and other noncommercial uses reasonable connected with education, in addition to the primary use as a site for a school or other educational facility.

D. All lessees receiving leases pursuant to the Chapter are subject to the laws of the Navajo Nation in regard to the occupation of an activities conducted upon the leased premises.

### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 499 renumbers previous § 1201 adopted by CN-61-84, November 14, 1984. See also, CJ-37-58, July 21, 1958; and CN-76-53, November 6, 1953.

### **Cross References**

Education Committee authority, see 2 N.N.C. § 481 *et seq.*

Resources Committee authority, see 2 N.N.C. § 691 *et seq.*

Transportation and Community Development Committee authority, see 2 N.N.C. § 420 *et seq.*

### **Annotations**

#### **1. Tribal boundaries**

Exception to general rule under *Montana* that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers on non-Indian fee land located within reservation boundaries, which permits a tribe to exercise civil authority over conduct of nonmembers on fee lands within reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of tribe, grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations. *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825 (2001).

While as a general proposition the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers on non-Indian fee land located within reservation boundaries, under *Montana* rule, two possible bases exist for tribal jurisdiction over non-Indian fee land: first, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealings, contracts, leases, or other arrangements, and second, a tribe may exercise civil authority over conduct of nonmembers on fee lands within reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of tribe. *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825 (2001).

Exception to Montana rule, that absent Congressional direction, Indian tribes lack civil authority over conduct of nonmembers on non-Indian land within a reservation, exists for activities of nonmembers who enter consensual relationships with tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997).

When accident occurred on a portion of public highway maintained by state under federally granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver and driver's employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question; such a case fell within state or federal regulatory and adjudicatory governance. *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997).

#### **§ 500. Rent**

A. No rent shall ever be charged or accepted for withdrawals, permits, or leases of tax exempt Navajo Nation land used primarily for school or other legitimate educational purposes, provided that Navajo children or adults be admitted without discrimination to schools or other educational activities conducted on such lands.

B. Such withdrawals, permits or leases shall expressly provide that they are rent-free in consideration of the tax-exempt status of the land embraced within them and other Navajo Nation land in the same state, and that rent on the land embraced must be paid at the reasonable appraised rental value, but at not less than \$10 per acre, annually, whenever any Navajo Nation land in the same state as withdrawal, permit, or lease ceases to be tax exempt.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 500 rennumbers previous § 1202 adopted by CJ-37-58, July 21, 1958.

### **Chapter 5. School Attendance**

#### **§ 501. Annual enrollment and school attendance**

A. An annual enrollment and school attendance "drive" shall be conducted between the first of August and the fifteenth of November of each year.

B. The goal of the "drive" shall be to insure the enrollment and continued attendance of all Navajo children between the ages of six and 16 in available schools.

C. The Education Committee and the President of the Navajo Nation shall be responsible for detailed planning, coordination and stimulation of this "drive".

D. All Navajo Nation Council members and Chapter officers shall be responsible for disseminating information regarding the "drive" in their local communities.

#### **History**

CO-38-55, October 13, 1955.

#### **§ 502. Compulsory school attendance—Generally**

Education in Navajo schools shall be compulsory as to children between the ages of five and 18 years as prescribed and defined in 10 N.N.C. § 118 of the Navajo Education Policies.

#### **History**

CN-61-84, November 14, 1984.

1922-1951 Res. p. 114, February 20, 1947.

#### **United States Code**

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

#### **§ 503. Application of state laws and Navajo Nation laws**

The Navajo Nation Council consents to the application of state compulsory school attendance laws to the Indians of the Navajo Nation and their enforcement on Indian lands of the Navajo Nation wherever an established public school district lies or extends within the Navajo Nation. In addition, 10 N.N.C. § 118 of the Navajo Education Policies regarding compulsory attendance shall apply to all Navajo minors between the ages of five and 18 and to all persons having care and custody of such minors who are within the civil or criminal jurisdiction of the Navajo Nation.

#### **History**

CN-61-84, November 14, 1984.

CA-39-52, August 11, 1952.

**Revision note.** Slightly reworded.

#### **United States Code**

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

#### **§ 504. Plans and procedures for enforcement**

A. The Education Committee of the Navajo Nation Council, after consultation with the President of the Navajo Nation, is authorized and

directed to develop plans and procedures in conjunction with local schools, communities, parents and other governmental entities for the enforcement of the compulsory school attendance laws among the Navajo Nation, including, but not limited to, provision for bringing action against responsible parents in Navajo Nation Courts.

B. The Education Committee is further authorized to designate areas where such plans and procedures shall be implemented.

C. The Education Committee is directed to continue to encourage regular school attendance through all means available.

#### **History**

CN-61-84, November 14, 1984.

CO-66-58, October 17, 1958.

**Revision note.** Slightly reworded.

#### **United States Code**

Regulations by Secretary of the Interior to secure attendance at school, see 25 U.S.C. § 282.

#### **Chapter 7. [Reserved]**

#### **Chapter 9. Loans and Scholarships**

#### **History**

**Note.** Subchapter 5, "Scholarship and Financial Assistance Programs" repealed by CJY-56-94, July 20, 1994, subject to adoption of the Navajo Nation Scholarship and Financial Assistance Policies and Procedures and the Navajo Education Appeals Committee Plan of Operation.

#### **Code of Federal Regulations**

Administration of educational loans, grants and other assistance for higher education, see 25 CFR § 40.1 *et seq.*

#### **Subchapter 1. Loans**

#### **§ 901. Condition precedent**

A. Applicants for educational loans must first seek all available assistance on a non-reimbursable basis.

B. Procedures and requirements for the granting of student loans shall comply with 10 N.N.C. § 910 of the Navajo Education Policies.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

CN-61-84, November 14, 1984.

ACMA-45-60, March 10, 1960.

#### **§ 902. Purposes**

Educational loans shall be considered for the following purposes only:

A. To supplement scholarship grants, personal funds and/or family assistance in order to meet required and necessary expenses.

B. To make full loans to students who for justifiable reasons cannot obtain assistance in accordance with Subsection (A) of this Section, and who are otherwise eligible for a loan.

#### **History**

ACMA-45-60, March 10, 1960.

#### **§ 903. Scholastic requirements**

A student attending college shall comply with the requirements of the Office of Navajo Nation Scholarship and Financial Assistance Programs for eligibility for student loans in regard to credit hours and grade point average.

#### **History**

CN-61-84, November 14, 1984.

ACMA-45-60, March 10, 1960.

**Revision note.** The Office of Navajo Nation Scholarship and Financial Assistance Programs replaced the former Higher Education Department.

#### **§ 904. Amount**

The Office of Navajo Nation Scholarship and Financial Assistance Programs shall determine the maximum amount of student loans authorized by this Subchapter.

#### **History**

CN-61-84, November 14, 1984.

ACMA-45-60, March 10, 1960.

**Revision note.** The Office of Navajo Nation Scholarship and Financial Assistance Programs replaced the former Higher Education Department.

#### **§ 905. Repayment**

A. Repayment of educational loans shall be scheduled for not less than twenty-five dollars (\$25.00) per month, payments to begin not later than six months after completion of the course.

B. In the event a student drops out of school before his course is completed, for reasons other than health or military service, the repayment of the loan shall begin not later than six months from the date of separation.

#### **History**

ACMA-45-60, March 10, 1960.

### **Subchapter 3. Scholarships**

#### **History**

**Note.** For current information regarding the status of Navajo Nation Scholarships and Scholarship Trust Funds, contact the Office of Navajo Nation Scholarship and Financial Assistance Programs within the Navajo Division of Education.

#### **§ 910. Post-secondary education**

A. The future development of the Navajo Nation depends upon the education and skills of the Navajo people. In exercising its responsibilities in regard to financial assistance and post-secondary program oversight, the Navajo Nation shall give attention to the social, educational, economic and other developmental needs of the Navajo Nation, as well as to the welfare and personal needs of the individual student.

B. In providing financial assistance to students in post-secondary programs, the Office of Navajo Nation Scholarship and Financial Assistance Program ("ONNSFA") shall develop policies and procedures which:

1. Foster academic excellence and encourage scholarship recipients to pursue academically rigorous fields of study;
2. Encourage Navajo students to remain within their post-secondary educational programs until the completion of their degrees and to return and provide service to the Navajo Nation;
3. Provide academic scholarships for students with high academic achievement;
4. Enable students to prepare, retrain and upgrade their skills for new and changing professions and occupations on a full-time or part-time basis;
5. Encourage pursuit of graduate level degrees, particularly in fields which support the developmental goals of the Navajo Nation; and
6. Provide a range of financial assistance resources including

academic scholarships, grants based on need, student loans and privately-endowed grants and scholarships.

C. Navajo Nation financial aid funds should be utilized in combination with state, federal and private resources, such as Pell grants, loans, college work study, tuition waivers, endowments, special grants and scholarships and innovative programs so that adequate financial assistance may be made to as many qualified post-secondary students as possible.

D. Diné Scholarship Annual Fund ("DSAF") shall be established within the Department of Diné Education. The Office shall:

1. Assist ONNSFA as an endowment by generating revenue exclusively for Navajo student scholarships and financial assistance; and
2. Conduct fund raisers and solicit funds and initiate investment projects to generate future revenue; and
3. Provide for the development and administration of endowed programs of academic scholarships, fellowships and grants.

E. Post-secondary educational programs which recruit and/or serve students within the Navajo Nation shall be realistically designed to serve the educational needs of Navajo students and shall comply with the laws of the Navajo Nation.

F. The Navajo Nation Teacher Education Consortium, ("NNTEC") project is established within the Office of Navajo Nation Scholarship and Financial Assistance. The NNTEC shall:

1. Recruit and retain the participation of post secondary institutions to actively serve as members on the NNTEC project;
2. Recruit and retain secondary level Navajo teachers who will instruct students in science and math;
3. Coordinate services to Navajo and non-Navajo teacher candidates;
4. Facilitate, collaborate and coordinate with Diné College and the Department of Diné Education in the preparation of teachers to practice and serve on the Navajo Nation;
5. Collaborate with the Navajo Nation and other educational organizations to seek and acquire funding for early childhood, elementary and secondary teacher education;
6. To support and advocate for the development and implementation of a Navajo Professional Education Certificate Program;
7. To assist Navajo educators and scholars, Diné College and/or other higher education post secondary institutions to facilitate the integration of Navajo (Diné) language, culture, history, and government subjects into the Navajo Nation; and

8. To facilitate, coordinate, and assist the consortium with the development of essential services and projects to address essential Navajo teacher issues.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Sovereignty in Education Act of 2005 generally amended Title 10 of the Navajo Nation Code.

**Note.** This § 910 amends and renumbers previous § 124 adopted by CN-61-84, November 14, 1984.

#### **§ 951. Scholarship Trust Fund-Establishment**

There is established a Scholarship Trust Fund in order to provide a permanent source of income to pay for the college and higher education of Navajos and, insofar as surplus income may be available, for their secondary education and vocational training.

#### **History**

CF-36-57, February 15, 1957.

#### **§ 952. Trust or non-profit educational foundation; establishment**

A trust or a non-profit educational foundation, or both, shall be established for a period of not less than 20 years to administer the scholarship funds.

#### **History**

CM-53-57, May 28, 1957.

#### **§ 953. Investment**

The President of the Navajo Nation, with the consent and approval of the Budget and Finance Committee and the Navajo Nation Council, is authorized to proceed with the investment of the Scholarship Fund in a manner consistent with prudent investment practices for funds of this nature, and to enter into such contracts as may be required in connection therewith, taking into consideration, but not limited to, the forces of inflation which may greatly reduce the real value of the fund over a period of years, the immediate cash return required, the safety of principal, and the availability of funds when required.

#### **History**

CM-53-57, May 28, 1957.

**Revision note.** Reference to the "Advisory Committee" replaced by the "Budget and Finance Committee and the Navajo Nation Council". See 2 N.N.C. § 374(B) (1).

## **Subchapter 5. [Reserved]**

### **History**

**Note.** Subchapter 5, "Scholarship and Financial Assistance Programs" repealed by CJY-56-94, July 20, 1994 subject to adoption of the Navajo Nation Scholarship and Financial Assistance Policies and Procedures and the Navajo Education Appeals Committee Plan of Operation.

CJY-56-94, July 20, 1994.

ACAP-78-85, April 29, 1985.

ACS-322-71, September 28, 1971.

ACO-136-65, October 18, 1965.

CAU-58-65, August 3, 1965.

CAU-53-61, August 29, 1961.

## **Subchapter 7. Navajo Education and Scholarship Foundation**

### **§ 1101. Navajo Education and Scholarship Foundation**

The Navajo Education and Scholarship Foundation is a nonprofit corporation chartered under the authority of the Navajo Nation.

### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

### **Annotations**

#### **1. Validity**

"The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was described earlier in this opinion, the Court generally will not examine the motives behind a legislative act of the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so." *Benally v. Gorman*, 5 N. Rep. 272, 283 (W.R.D.C. 1987).

"The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to the NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

**§ 1102. Name; place; duration**

A. The name of the corporation shall be Navajo Education and Scholarship Foundation, Inc.

B. The principal place of business of this corporation shall be at Window Rock, Navajo Nation (Arizona).

C. The duration of the corporation shall be perpetual.

**History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Annotations**

**1. Validity**

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**2. Construction and application**

"The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to the NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

**§ 1103. Status**

This corporation is a non-profit, nonmembership corporation organized exclusively for educational and charitable purposes.

**History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Annotations**

**1. Validity**

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#### **§ 1104. Purposes and powers**

A. This corporation is organized, and shall at all times be operated, exclusively to benefit the Navajo Nation and to carry out the educational purposes thereof; provided that it shall do so through activities themselves qualifying as charitable or educational within the meaning of § 501(C)(3) of the Internal Revenue Code of the United States (or the corresponding provision of any future United States Internal Revenue Law), including but not necessarily limited to the advancement of education.

B. In furtherance of these activities the corporation shall solicit funds from private and public sources for the support of broad educational goals and programs benefitting Navajo People. It shall use what funds it acquires for some or all of the following activities and for other activities not inconsistent with the purposes set forth herein as from time to time may be directed by the Board of Trustees:

1. To provide financial assistance to Navajo students enrolled in academic and vocational educational institutions, and institutions and activities which provide the training and develop the skills necessary to the survival and well-being of Navajos and the Navajo Nation.

2. To provide financial assistance and support to academic and vocational educational institutions, and to other institutions and activities, judged suitable to provide the training and to develop the skills necessary to the survival and well-being of Navajos and the Navajo Nation.

C. The corporation shall have the power to receive and administer funds for educational and charitable purposes, consistent with the provisions of articles of incorporation and applicable law. To that end, and only in furtherance of said purposes, the corporation may take and hold by bequest, devise, gift, grant, purchase, or otherwise, either absolutely or jointly with another, any property, real, personal, tangible, or intangible, or any interest therein, without limitation as to amount or value; to sell, convey, or otherwise dispose of such property, and to invest, reinvest, or deal with the principal or income thereof in such a manner as, in the judgment of the directors, will best promote the purposes of the corporation, without

limitation except such as may be contained in the instrument under which such property is received, these articles of incorporation, the bylaws of the corporation, or any laws applicable thereto.

D. The corporation shall be empowered to enter contracts, and also to incur debts and liabilities not in excess of the value of its uncommitted assets.

E. The corporation shall enjoy all powers necessary or convenient to achieve the purposes for which it is organized, including the power to sue and be sued in its corporate name and capacity.

F. The corporation shall have the power, in general, to do any and all acts and things, within or without the Navajo Nation, and to exercise any and all powers which may now or hereafter be lawful for the corporation to do or exercise, under and pursuant to the laws of the Navajo Nation and any other applicable law, provided, however, that it is not empowered to engage in any activity which is not in furtherance of its purposes above-described.

G. No substantial part of the activities of the corporation shall be the carrying on of propaganda or otherwise attempting to influence legislation. The corporation shall not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

H. No part of the income of the corporation shall inure to the benefit of any trustee, or officer of the corporation, or of any other private person, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of its purposes above-described.

I. The corporation shall utilize a fund accounting system. Income to the corporation shall be accounted for in such a manner as to permit tracking of the use of such income from receipt to authorized expenditure.

J. Notwithstanding any other provisions of these articles of incorporation, the corporation shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income tax under § 501 (C) (3) of the Internal Revenue Code of 1954<sup>1</sup> (or the corresponding provision of any future United States Internal Revenue Law); or by a corporation, contributions to which are tax-deductible under § 170(C) (2) of the Internal Revenue Code of 1954<sup>2</sup> (or the corresponding provision of any future United States Internal Revenue Law).

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

#### **Annotations**

##### **1. Validity**

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"The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to the NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

### **§ 1105. Dissolution of the Corporation**

In the event of the liquidation or dissolution of the corporation, whether voluntary or involuntary, no director, trustee, officer of the corporation, or any other private person shall be entitled to any distribution or division of its assets. Any assets remaining to the corporation at dissolution or liquidation, after paying or providing for its liabilities, shall be distributed to one or more non-profit, charitable organizations which are tax-exempt under § 501 (C) (3) of the Internal Revenue Code<sup>1</sup> or its successors.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

#### **Annotations**

##### **1. Validity**

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##### **2. Construction and application**

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**§ 1106. Board of Trustees**

A. There shall be a board of trustees with a membership of nine, each of whom shall be an enrolled member of the Navajo Nation. Members of the board of trustees shall be educators and other representatives of the Navajo people with a known concern for the quality of Navajo education and its effect on the life of Navajos; the culture and traditions of the Diné; and the development of Navajo institutions.

B. The board of trustees shall elect a chairperson, a secretary, and five members of the Executive Committee. The Chairman of the Board of Trustees shall serve as Chairperson of the Executive Committee.

C. The executive committee shall be empowered to act for the board of trustees in the absence of the board, and in all matters delegated to the executive committee by the full board either through the bylaws or by resolution. The executive committee shall not act contrary to an adopted policy or resolution of the board of trustees. Actions of the executive committee shall have full legal effect when executed consistent with these articles, the bylaws, and the resolutions of the board of trustees, and where no legal obligation is impaired, may be superseded by subsequent board action, provided that no action of the executive committee may compromise or otherwise infringe upon the authority and responsibilities vested in the officers of the corporation.

D. The board of trustees shall establish policy and general directions for the corporation; shall elect the principal officers of the corporation who shall manage the affairs of the corporation under the policies and directions established by the board; and shall elect the members of the advisory council.

E. The nine members of the board of trustees shall as directed by the presently existing board of trustees serve in groups of three for staggered periods of one, two and three years commencing with the adoption of these articles of incorporation by the board of trustees of the Navajo Education and Scholarship Foundation, Inc., at the time then serving.

F. Successor members of the board of trustees shall be elected by a majority vote of a quorum of the board of trustees then serving.

G. The nine members of the board of trustees shall serve for their designated term and until the election of their successor except when that designated term shall be abbreviated by resignation or by vote of a two-thirds majority of the members of the board of trustees then serving.

H. The board of trustees shall meet annually in October on the Navajo Nation; and at such other times and places as may be directed by the executive committee.

I. A majority of those members present and voting at a duly called meeting of the board of trustees at which a quorum is present shall be sufficient to determine all matters before the board of trustees except where otherwise provided in these articles of incorporation or by-laws duly adopted pursuant thereto.

J. By direction of the executive committee of the board of trustees, matters including election of members of the board of trustees may be submitted by mail ballot. A majority of the board in such case shall consist of the vote of five of the nine members of the Board. The executive director shall conduct such ballot on behalf of the board and of the executive committee and shall certify in writing the results of any such mail or telephone ballot to the appropriate body.

### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Revision note.** Slightly reworded for statutory consistency.

### **Annotations**

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### **§ 1107. Officers of the Corporation**

A. The officers of the corporation shall be an executive director, a secretary, and a treasurer; provided, however, that the board of trustees may direct that the secretary and treasurer be the same person in which event the officer shall be known as the secretary-treasurer.

B. Officers shall be elected by a majority vote of the Board of Trustees, except that if the secretary and treasurer are employees of the corporation, the executive director shall recruit them, negotiate their terms of employment, employ and train them, and direct their activities.

C. The executive director shall not be a member of the board of trustees, but shall attend all meetings of the board and of its committees and have full floor privileges without vote. The executive director shall be a full time

employees of the corporation under contract. The contract may be renegotiated at any time during its term by mutual agreement in writing of the executive director and the board of trustees as evidenced by a majority vote of the board.

D. The secretary and treasurer of the corporation may be a member of the board of trustees. If not a member, the secretary and treasurer shall attend meetings of the board of trustees and its committees as directed by the executive director. If employees of the corporation, the secretary and treasurer shall be under contract subject to the same provisions for renegotiation and termination as provided for the executive director.

E. The executive director, secretary, and treasurer shall serve during the term of their contract and successor contracts thereto, and until the election and qualification of their successors.

F. A vacancy occurring in any office shall be filled for the unexpired term by a person elected by a majority of the executive committee of the board of trustees, subject to ratification by a majority vote of the full voting membership of the board of trustees at its next meeting thereafter.

G. The executive director shall act for the corporation and in its name as chief executive officer, in conformity with its articles of incorporation and bylaws, and with the policies, budgets and general or special authorities established by resolution of the Board, to:

1. Manage the affairs of the organization as its chief executive officer;
2. Establish and, from time to time, amend tables of organization and administrative practices and procedures of the corporation for its efficient and effective operation;
3. Arrange through purchase, lease, grant or otherwise for offices, furniture, facilities, equipment;
4. Recruit, employ, fix the compensation and benefits of, and remove, employees of the corporation, including the secretary and treasurer of the corporation if such are employees of the corporation;
5. Select and contract with consultants and professional services contractors;
6. Negotiate and execute contracts, grants and other agreements committing the organization to the receipt or disposition of cash or to the acquisition, holding, or disposition of property;
7. Complain for or defend the corporation, or otherwise represent its interests, in any judicial, administrative, or legislative proceedings;
8. Settle, adjust, and compromise any claim, demand, right of, by or for or against the organization;

9. Exercise such other authority as may be necessary and proper to carry out the authorities granted herein;

10. Delegate and redelegate any or all of such authorities to other employees provided that monetary commitments are limited to five hundred dollars (\$500.00) or such other amount as the Executive Committee may from time to time establish.

H. The secretary of the corporation shall record the minutes of all meetings of the corporation, and subject to election or appointment for such purpose, of the board of trustees and of the executive committee; and shall perform such other duties as are delegated to him by the executive director. The minutes of the corporation, the board, and of the executive committee shall be kept available at all times at the principal place of business for inspection by any trustee or the executive director.

I. The treasurer of the corporation shall have custody of all funds of the corporation; shall keep a full and accurate account of receipts and expenditures as directed by the executive director; shall make disbursements in accordance with the approved budget and as authorized by the executive director; shall present a financial statement at every meeting of the corporation and at other times when requested to do so by the chairperson of the board of trustees or the executive director; and shall make a full report at the annual meeting of the corporation. The treasurer shall be responsible for the maintenance of such books of account and records as conform to the requirements of the articles and bylaws. All such books of account and records shall be kept available for examination at the principal office by any trustee or the executive director.

J. The books of account and records shall be examined and audited annually by an independent auditor hired by the board of trustees for that purpose who, satisfied that the treasurer's annual report is correct shall sign a statement of that fact.

K. All official records of the corporation shall be safely maintained at the principal place of business by the officers of the corporation. Upon demand by any member of the board, the executive director, or the duly elected and qualified successor of an officer of the corporation, shall make available the appropriate corporate books of account and records at the principal place of business of the corporation for immediate inspection of and delivery to the successor to any officer of the corporation.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Revision note.** Slightly reworded for statutory consistency.

#### **Annotations**

##### **1. Validity**

"The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was described earlier in this opinion, the Court generally will not examine the motives behind a legislative act of the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so." *Benally v. Gorman*, 5 N. Rep. 272, 283 (W.R.D.C. 1987).

## **2. Construction and application**

"The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to the NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

### **§ 1108. Advisory Council of the Navajo Education and Scholarship Foundation, Inc.**

A. There shall be an advisory council of no more than 40 persons in equal classes of one, two, and three years appointed at the time of the effective date of these articles of incorporation by the board of trustees. The advisory council shall have the right to attend all meetings of the corporation and the board of trustees, to have floor privileges at those meetings, and to be notified of those meetings and the agenda therefor. Members of the advisory council shall not have a right to vote at meetings of the corporation or the board of trustees, nor for their ballots to be counted for other than advisory purposes on matters before the corporation, board of trustees, or executive committee, whether ballots are taken at a meeting or by mail or telephone.

B. Successors to advisory council members appointed as provided above and additions to that membership shall be elected without restriction by the board of trustees of the corporation upon nomination to the board by the advisory council, by members of the board of trustees, and by the executive director. Members may be removed without cause by a majority vote of the members of the board of trustees.

C. The chairperson of the advisory council and such other officers of the council as may be determined by the council to be appropriate shall be elected by a majority vote of those present and voting at any meeting of the advisory council, to serve for a term of one year or until a successor has been qualified and seated. The chairperson of the advisory council shall be an ex officio member without vote of the board of trustees of the corporation.

D. At each annual and special meeting of the board of trustees and of the corporation the chairperson of the advisory council shall report to the board and corporation such matters as that chairperson may deem appropriate. The board of trustees and corporation shall by resolution respond to each matter for which the chairperson of the advisory council requests a response.

E. The organizing meeting of the advisory council shall be at the time and place designated by the presently existing board of trustees for the

organizing meeting of the board of trustees and of the corporation. The chairperson of the board of trustees shall serve as chairpersons pro tem of the advisory council until such time as the council shall have elected its officers. Thereafter, the advisory council shall meet at the call of the chairperson of the advisory council, the chairperson of the board of trustees, or the executive director.

F. The executive director shall be an ex officio member without vote of the advisory council. The executive director shall have full floor privileges at any meeting and at each meeting of the Council shall report to the council concerning the affairs of the corporation.

### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

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**Revision note.** Slightly reworded for statutory consistency.

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### **§ 1109. Indemnification of officers and directors**

A. Each elected trustee and officer of the corporation now or hereafter serving as such shall be indemnified by the corporation against any and all claims and liabilities to which he or she has or shall become subject by reason of serving or having served as such trustee or officer or by reason of any action alleged to have been taken, omitted, or neglected by him or her as such trustee or officer; and the corporation shall reimburse each such person for all expenses including legal expenses, actually and reasonably incurred by him or her in connection with such claim or liability, provided, however that no such person shall be indemnified against, or be reimbursed for any expense incurred in connection with any claim or liability arising out of his or her

own wilful misconduct or gross negligence.

B. The right of indemnification herein above provided for shall not be exclusive of any rights to which any director or officer of the corporation may otherwise be entitled by law.

C. The bylaws may contain further provisions as to indemnification, not inconsistent with the foregoing.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

#### **Annotations**

##### **1. Validity**

"The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was described earlier in this opinion, the Court generally will not examine the motives behind a legislative act of the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so." *Benally v. Gorman*, 5 N. Rep. 272, 283 (W.R.D.C. 1987).

##### **2. Construction and application**

"The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to the NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

#### **§ 1110. Amendment of Articles**

These articles of incorporation may be amended by a majority vote of the Board of Trustees. Prior written notice of at least two weeks shall be given to all members of the Board of Trustees of any proposed change in the articles.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Revision note.** Slightly reworded.

#### **Annotations**

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## **§ 1111. Bylaws**

The Board of Trustees shall adopt bylaws for the corporation by majority vote of the members of the board with vote, and the same may be and the same, may be taken by mail ballot. Bylaws may be amended by the board by majority vote of the members of the board with vote, and the same may be taken by mail ballot.

### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Revision note.** Slightly reworded.

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abolish tribal entities. It does not have the power to grant corporate charters." *Benally v. Gorman*, 5 N. Rep. 272, 282 (W.R.D.C. 1987).

#### **§ 1112. Agent for service of process**

The executive director of the foundation, is appointed the agent for service of process for the corporation. The mailing address to which any notice required by law may be mailed is: Executive Director, Navajo Education and Scholarship Foundation, Inc., PO Box 2360, Window Rock, Arizona, 86515.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

**Revision note.** Slightly reworded.

#### **Annotations**

##### **1. Validity**

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#### **§ 1113. Jurisdiction**

The Courts of the Navajo Nation shall have jurisdiction over all causes of action brought against the corporation and all causes of action involving the corporation which arise within the jurisdiction of the Navajo Nation.

#### **History**

ACO-171-83, October 12, 1983, Established Navajo Educational Scholarship Foundation (NESF).

ACN-183-86, November 13, 1986, Amended NESF Articles of Incorporation.

#### **Annotations**

## **1. Validity**

"The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was described earlier in this opinion, the Court generally will not examine the motives behind a legislative act of the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so." *Benally v. Gorman*, 5 N. Rep. 272, 283 (W.R.D.C. 1987).

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## **Chapter 11. [Reserved]**

### **History**

**Note.** Previous Sections 1201 and 1202 renumbered to Sections 499 and 500, respectively.

## **Chapter 13. Adult Education**

### **§ 1401. Adult education**

The Navajo adult population has a right to educational programs that meet their education needs and aspirations, and that are accessible to them in terms of proximity to home and work, time of day and expense. The Navajo Nation recognizes the importance of adult education and encourages public and private entities to develop and offer programs of adult education including, but not limited to adult basic education, pre-GED and GED education, basic vocational education, community education, consumer education, health education and related adult programs. The Navajo Nation shall include adult education as a permanent component within its educational planning. All administrative entities within the Navajo Nation with responsibilities for education, training, community health, and related areas shall coordinate to assure that adult education opportunities are afforded to the Navajo population consistent with Navajo Nation laws and policies, and shall seek ways of improving the number, quality and availability of adult educational offerings.

### **History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

**Note.** This § 1401 renumbered previous § 126 by CJY-37-05, July 19, 2005.

CN-61-84, November 14, 1984.

**§ 1402. Vocational rehabilitation and opportunities for persons with disabilities**

A. All Navajo people are entitled to participate fully in the economic, social, cultural and political life of the Navajo Nation regardless of the person's disability. All public and private entities within the Navajo Nation shall cooperate with the Navajo Nation Advisory Council on the HANDI-Capable in implementing this policy. Every public and private entity within the Navajo Nation shall:

1. Recognize Navajo people with disabilities as potentially productive members of society;
2. Encourage the Navajo population with disabilities to reach optimum levels of economic independence and political, societal and cultural participation; and
3. Make reasonable accommodation to the special needs of persons with disabilities, including the need to site accessibility, in regard to employment, housing, public accommodations, social services, transportation, recreation, educational and training opportunities, and community services and assure the availability of these services on an equitable, non-discriminatory basis.

B. The Navajo Nation Advisory Council on the HANDI-Capable is responsible for assuring that all Navajo people have the opportunity to realize their potential to the extent of their physical and mental capabilities. The Council has such powers and responsibilities as are prescribed in its Plan of Operation and in other applicable Navajo Nation law. The Council shall work with other appropriate Navajo Nation governmental entities and with all service providers, public and private, to:

1. Establish coordination and joint planning for delivery of services to Navajo persons with disabilities from birth through adulthood as close to home as possible;
2. Establish a continuum of appropriate services for all degrees of disability and all stages of the life cycle;
3. Eliminate service gaps and avoid duplication of services; and
4. Maximize available resources.

**History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

**Note.** This § 1402 renumbered previous § 123 by CJY-37-05, July 19, 2005.

CN-61-84, November 14, 1984.

## United States Code

Vocational rehabilitation services grants, see 29 U.S.C. § 741.

### § 1403. Vocational training

A. It is the policy of the Navajo Nation to cooperate and collaborate with any unions desiring to participate in similar training programs which they may maintain to the end that the classification of Navajo workers in a representative number of skills, crafts, and trades becomes a reality before they become members of a union rather than to have them join unions first as common laborers and thereafter attempt to improve their classifications within the framework of the unions.

B. All programs providing vocational training in the Navajo Nation or for the benefit of Navajo students shall cooperate with the Navajo Nation in implementing 10 N.N.C. § 122, "Vocational Education and Career Education."

### History

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

**Note.** This § 1403 renumbered previous § 5 by CJY-37-05, July 19, 2005.

CN-61-84, November 14, 1984.

CA-48-58, August 27, 1958.

## United States Code

Vocational training program, see 29 U.S.C. § 309.

### Code of Federal Regulations

Vocational training for adult Indians, see 25 CFR § 27.1 *et seq.*

### § 1404. Adult education planning; program; development; purpose

A. The Navajo Nation, through the Education Committee of the Navajo Nation Council, shall develop plans for the improvement of adult education opportunities so that all Navajo People residing on or near the Navajo Nation, who desire and can profit from additional training, will be provided with opportunities therefor. The Education Committee shall work with all educational providers, private sources and governmental entities concerned with adult education in the planning process.

B. The adult education plans shall have for their purpose the improvement of the minds, interests and living conditions of the greatest possible number of adult Navajos.

### History

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of

2005.

**Note.** This § 1404 renumbered previous § 1405 by CJY-37-05, July 19, 2005.

CN-61-84, November 14, 1984.

CF-12-61, February 14, 1961.

[§ 1405. Renumbered § 1404 by CJY-37-05, July 14, 2005]

§§ 1406 to 1407. [Reserved]

**Chapter 15. [Reserved]**

**Chapter 17. [Reserved]**

**Chapter 19. Diné College**

**History**

Chapter 20, §§ 2101-2123 redesignated as Chapter 19, §§ 2001-2023.

ACO-90-79, October 16, 1979.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

**Note.** Former Chapter 19, "Community College", §§ 2001-2010 and §§ 2051-2063 superseded by ACO-90-79, October 16, 1979.

See generally, ACO-333-71, CJN-60-70, ACJN-144-70, CN-96-68, CN-95-68, and CJY-87-68.

**United States Code**

Navajo Community College, see 25 U.S.C. §§ 640a to 640c-3.

**Code of Federal Regulations**

Grants to Navajo Community College, see 25 CFR § 41.20 *et seq.*

**§ 2001. Establishment; charter**

Diné College is chartered and established as a nonprofit educational institution wholly owned by the Navajo Nation, to act for and on behalf of the Navajo Nation Council within its areas of responsibility as defined by this Chapter. The charter previously granted by Resolution CN-95-68 of the Navajo Nation Council is hereby amended. Diné College shall have the authority as a distinct and semi-independent agency of the Navajo Nation Council, within the limits and guidelines set forth in this Chapter, to conduct its activities anywhere within the Navajo Nation or elsewhere.

## **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

## **United States Code**

Navajo Community College, see 25 U.S.C. § 640a *et seq.*

### **§ 2002. Purposes**

Diné College is created by the Navajo Nation Council for the following purposes:

A. To provide educational opportunities to the Navajo People and others in areas important to the economic and social development of the Navajo Nation through:

1. College Degree Program: which provides students with certificate programs, associate, baccalaureate, graduate. And post-graduate degrees when such degree programs are accredited.

2. Technical Skills Program: which provides students with technical training and skills in fields that allow direct employment opportunities.

3. Navajo and Native American Studies Program: which provides learning experiences enabling students to develop a clear sense of identity, learn the Navajo language and develop unique skills useful to Navajo and Native American communities.

4. Creating and enforcing student respect for the rights of others and preservation of orderly, democratic and traditional values.

B. To provide services to Navajo communities by:

1. Assessing and identifying community needs;

2. Developing programs and working with other agencies to meet community educational needs; and

3. Providing other services to the communities related to the educational process.

C. To provide the following additional services related to the effective operation of the college facility and programs:

1. Continually study and inventory the educational needs of the Navajo Nation, and develop long-range plans to meet these needs, including implementation of a plan to obtain accreditation for the Diné College as a baccalaureate and postgraduate institution.

2. Provide a research and technical assistance to the Navajo Nation Council and its committees, the Navajo Nation and its departments and agencies, and other organizations and enterprises.

3. Extend and offer educational opportunities by establishing multiple remote campuses and distributive learning centers.

4. Offer students career counseling and placement services.

5. Evaluate and improve the effectiveness of Diné College programs by maintaining communication with former students.

6. Provide effective administrative support and student services to assure full utilization of the educational programs and maximum efficient use of budgeted funds.

7. Encourage educational excellence in Diné College students by developing high scholastic standards to measure accomplishment and award degrees to students meeting such standards.

D. Diné College shall formulate and deliver land-grant institution programs in natural and rural development, classroom instruction, extension and research consistent with the Equity in Educational Land Grant Status of 1994,<sup>1</sup> and thereby participate and collaborate fully with entities of the Navajo Nation and with other land grant colleges and universities to meet the human resource development needs of the Navajo people and others.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2003. Board of Regents; selection**

A. The full authority and control over Diné College, and responsibility for accomplishment of its purposes, is delegated to a Board of Regents. Subject to other applicable laws, employees and officials of the Navajo Nation and candidates for Navajo Nation offices, shall not interfere with or interrupt the day-to-day activities of the Board of Regents or Diné College employees carrying out college education programs.

B. The Board of Regents shall consist of eight members, including the Chairperson of the Education Committee or the committee's designee, the Navajo Nation Superintendent of Schools, and the President of the Diné College Student Body who shall be full official members. Five shall be enrolled members of the Navajo Nation and subject to confirmation and removal by the Government Services Committee of the Navajo Nation Council to each of the five agencies of the Navajo Nation. In the event that the Government Services Committee within 30 days declines or fails for any reason to pass a resolution confirming an appointment made by the President, the appointee shall not sit as a Regent and the President shall submit an alternative appointee within two weeks of the Government Services Committee action declining to confirm the appointment, or

the expiration of the 30 day period for confirmation.

C. Qualifications for Diné College Board of Regents Candidates:

1. All appointed members of the Board of Regents must meet the following qualifications:

a. Must maintain continuous residence and voter registration within a chapter within the Agency of the Navajo Nation which they are appointed to represent, during the period of their term; and

b. Must be at least 18 years of age at the time of the appointment; and

c. Must not be an employee of the Diné College; and

d. Must not have a conflict of interest arising from any Navajo Nation, state, or federal laws regarding his or her appointment; and

e. Must not have been convicted of a felony within the five years preceding the date of appointment.

**History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Revision note.** Slightly reworded for purposes of statutory form.

**§ 2004. Tenure**

A. The Chairperson of the Education Committee, the Navajo Nation Superintendent of Schools, and the President of the Student Body shall serve while they hold their respective offices.

B. Appointed members shall serve six year terms. Each of the five appointed members shall serve staggered terms, to be determined by lot at the time of the first meeting of the Board of Regents following confirmation of the first set of appointed members seated under the provisions of § 2003. At the initial meeting of this Board, the members shall determine by lot which agency representative shall serve a six, five, four, three and two year term. The terms for future appointed agency representatives shall continue to be staggered in accord with the results of this lot. Each of the appointed members shall serve with full rights and privileges until his successor has been duly appointed, qualified and seated.

C. Members may be reappointed for no more than two successive terms.

### **History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2005. Resignation and removal**

Any Regent, except the Chairperson of the Education Committee, the Navajo Nation Superintendent of Schools, and the President of the Student Body, may resign at any time by giving written notice to the President of the Board of Regents. Such resignation shall take effect at the time specified in the notice without the necessity of acceptance. Any appointed member may be removed by the Government Services Committee when, in their judgment, the best interests of Diné College will be served thereby.

### **History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2006. Vacancies**

Vacancies on the Board of Regents that occur for any reason shall be filled by appointment in accordance with § 2003 and confirmed by the Government Services Committee for the balance of that member's term.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2007. Meetings, special meetings; notice; meeting items; executive session**

A. The Board of Regents shall have an annual meeting on the first Wednesday of October each year at 10:00 A.M. at the Diné College campus at Tsaile, Navajo Nation (Arizona), and such other regular meetings at such time and place as established by the Board, but not less than one meeting each quarter.

B. Special meetings may be called upon at least 24 hours actual notice to all Regents by the President or the Vice-President of the Board of Regents or by any three Regents acting in concert.

C. Any matter pertaining to Diné College may be discussed and acted upon by the Board at any regular or special meeting at which a quorum is present and notice requirements were met.

D. The Board may vote to declare all or any part of any meeting involving personnel matters, litigation or other confidential matters to be an executive session and closed to everyone except Regents, and such other persons as are expressly requested to attend. No resolutions shall be passed or formal action taken in executive session.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

#### **§ 2008. Quorum**

A quorum for any meeting of the Board shall be five members, and no formal action of the Board shall be valid unless a quorum is present. The quorum requirement shall be met only by actual physical presence of Regents and not by any other representation or proxy, except that the chairperson of the Education Committee of the Navajo Nation Council may send the Vice Chairperson or a member of the Education Committee.

#### **History**

ACO-90-79, October 16, 1979.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACAU-10 1-84, August 23, 1984.

#### **§ 2009. Faculty representative**

The faculty of Diné College shall select a representative to attend all regularly scheduled open meetings of the board, to serve as a liaison and promote direct and open communications about the concerns and opinions of the faculty. When present, the representative shall be extended an opportunity to address the board and participate in board discussion.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

#### **§ 2010. Officers and support personnel**

Any Regent may serve in any office, but each officer must be a current

member of the Board of Regents. At the annual meeting, the Board of Regents shall select the following officers to perform the following duties:

A. President. The President of the Board of Regents shall preside at all meetings during which he or she is present, except as he may voluntarily delegate such function to another. He or she shall have the authority to call special meetings of the Board and certify resolutions as provided in this Chapter, and in general perform all duties incident to the office of Board President, including such duties as may be described in the Bylaws or policies and regulations or assigned to him or her by the Board of Regents.

B. Vice-President. The Vice-President of the Board of Regents shall preside at all meetings of the Board in the absence of the President, and shall discharge any other duties assigned by the President or the Board.

C. Secretary. The Secretary shall have overall responsibility to maintain complete and accurate minutes of all meetings, and all resolutions or other formal Board action to be properly recorded, indexed and retained for future reference, and shall see that all required notices are duly given. The Secretary shall have authority to attest to official records of Diné College and the Board of Regents, to certify resolutions as provided in this Chapter.

D. Treasurer. The Treasurer shall have overall responsibility for proper control and accounting of Diné College funds in an advisory capacity. He or she shall maintain liaison between the Board of Regents and the Controller and Business Manager of Diné College and bring appropriate financial information and recommended action to the attention of the Board. The Treasurer shall have no direct authority over the expenditure or investment of Diné College funds except as may be expressly granted by formal Board resolution, and may be required by the Board to give a bond for his or her faithful performance.

E. Support Personnel. The Board may request the College President, through administrative staff, to provide secretarial or other assistance to the Board.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2011. Board action**

All official action of the Board shall require formal motion, a second and an affirmative vote of a majority of those Regents present, and voting at duly called regular or special meetings of the Board with a quorum present or a duly formed committee, and shall be reduced to writing and certified by the presiding officer or secretary. The written form may be a separate and distinct resolution or may be contained in the official minutes of the meeting, in which event the minutes shall be properly certified. No individual power or authority to act for or on behalf of Diné College shall attach to any Regent by virtue of that office, except as may be expressly given by this Chapter, the Bylaws, or resolution of the Board.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2012. Bylaws**

The Board may adopt, and amend from time to time, Bylaws to govern the conduct of its meetings and establish procedures for the orderly transaction of business. Such Bylaws may further define the duties, authority and responsibility of officers of the Board, and cover such other matters as are normal and appropriate to similar corporate Bylaws. The Bylaws shall be effective to the extent they are not repugnant to this Chapter or the applicable laws and regulations of the Navajo Nation and the United States. Whenever adopted or amended, a copy of the Bylaws will be transmitted to the President of the Navajo Nation and to the Education Committee.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Revision note.** Reference to the "Advisory Committee" has been changed to the "Education Committee". See 2 N.N.C. § 484(B)(4).

### **§ 2013. Committees**

The Board may select such committees as it deems appropriate from among its members to work in general or specialized areas of responsibility, and may empower such committees to act for and on behalf of the Board to the extent it desires.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

### **§ 2014. Compensation**

By formal resolution, the Board may establish rates of compensation and procedures for payment and reimbursement of expenses of Board members, consistent with applicable policies and regulations of the Navajo Nation. The Board shall have discretionary authority to provide different rates for officers and committee members as it sees fit, or for any Regent assigned a special responsibility. A copy of any resolution establishing or amending any financial benefit to the Board, or any member of the Board, shall be promptly transmitted to the President of the Navajo Nation and to the Education

Committee.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Revision note.** Reference to the "Advisory Committee" has been changed to the "Educational Committee". See 2 N.N.C. § 484(B)(4).

#### **§ 2015. Conflicts of Interest**

A. No contract or other transaction between Diné College and any one of the Regents, or between Diné College and any corporation, partnership, firm or legal entity in which one or more of the Regents has an interest, directly or indirectly, shall be valid for any purpose, unless the entire interest of the Regent or Regents has been fully disclosed as required by the Ethics in Government Law, and the proposed contract or transaction is approved by the affirmative vote of at least a majority of the Board members who are not so interested. The discussion and vote shall take place while the interested Regent or Regents remove themselves from the meeting.

B. In its discretion, the Board of Regents may submit questions of conflicts of interest to the Ethics and Rules Committee of the Navajo Nation Council for review and an advisory opinion.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Revision note.** Slightly reworded for purposes of statutory form.

#### **Cross References**

Navajo Nation Ethics in Government Law, see 2 N.N.C. § 3741 *et seq.*

#### **§ 2016. Responsibility of the Board of Regents**

The Board of Regents shall have overall responsibility to the Navajo Nation Council for the accomplishment of the purposes of Diné College as stated in this Chapter, and more specifically shall:

A. Report and be responsible to the Navajo Nation Council and its Education Committee for progress towards the fulfillment of the purposes of Diné College. The Board of Regents shall prepare and submit a written Annual Report to the Navajo Nation Council, or as otherwise requested by the Council or the Education Committee, to be delivered verbally by the President of the Board or such other representative designated by the Board, when requested.

B. Maintain and safeguard the funds of Diné College according to reasonable and prudent financial accounting standards and practices, and utilize such funds for the long range accomplishment of the purposes of Diné College. The Board of Regents shall be accountable for all Navajo Nation, federal and other funds entrusted to it, which accountability shall include retaining a reputable and accountable independent firm of certified public accountants to examine the books and accounts of Diné College, and to prepare and deliver an opinion and report of said accounts and financial procedures to the Board of Regents and to the Navajo Nation Council at least annually. However, no individual Regents shall be held personally liable, and shall be indemnified against liability by Diné College, for any action or decision made by that Regent in good faith belief that the action or decision was in the best interests of Diné College and within the scope of his authority. The Controller of the Navajo Nation, the Budget and Finance Committee and the Education Committee shall be advised what accounting firm is selected to perform the annual examination and audit.

C. Establish the policies and procedures to be followed by Diné College in its pursuit of the purposes stated in this Chapter, and employ or retain qualified personnel or outside assistance as necessary to define proper and effective policies and procedures.

D. Administer the routine and special affairs of Diné College through employment of qualified and competent staff of educational and administrative personnel, extending an employment preference to qualified members of the Navajo Nation.

E. Conduct the business of Diné College in an authorized and lawful manner, and subject to applicable laws retain qualified and competent attorneys for consultation with the Board and preserving and defending the legal rights and interests of Diné College.

F. Communicate with appropriate committees and representatives of the Navajo Nation Council, United States Congress, and federal, state and private agencies in a position of responsibility and authority to support the mission and objectives of Diné College, and submit appropriate proposals and applications for financial, technical and other assistance as may be available and consistent with the purposes of Diné College.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Revision note.** Slightly reworded for purposes of statutory form. References to the "Advisory Committee" have been changed to the "Education Committee". See 2 N.N.C. § 484(B) (4).

#### **§ 2017. Powers and authority of the Board of Regents**

A. Diné College is a creation of the Navajo Nation Council, shall be under the control of the Navajo Nation Council and shall be governed by laws,

rules, regulations and policies duly enacted by the Navajo Nation Council or the Education Committee pursuant to its delegated authorities; it shall have perpetual succession.

B. Diné College, through its Board of Regents, shall have the following powers which it may exercise consistent with the purposes for which it is established:

1. To adopt and use an official seal by causing it, or a facsimile thereof, to be impressed or affixed or in other manner reproduced.

2. To make agreements and incur liabilities which may be appropriate to enable Diné College to accomplish any or all of its purposes, to borrow money for such purposes at such rates of interest as Diné College may determine, to issue notes, bonds and other obligations subject to the provisions hereof concerning the issuance of its obligations, and to secure any of its obligations by mortgage, pledge, or deed of trust of all or any of its property and income with the approval of the Navajo Nation Council. Diné College shall not have power to mortgage, pledge, or encumber any real estate or tangible property of the Navajo Nation, nor any such property in which the Navajo Nation has an interest.

3. To make agreements with and to borrow money to a maximum single transaction limit of two million dollars (\$2,000,000), from any governmental agency (federal, state or local), the Navajo Nation or any other legal entity or bank, or organization, and to agree to and perform any conditions attached thereto. Any loan in excess of two million dollars (\$2,000,000) must have prior approval by the Budget and Finance Committee of the Navajo Nation Council.

4. To take and hold by purchase, lease, gift, devise or bequest, or otherwise; to own, hold, use, and otherwise deal in and with any real or personal property, or any interest therein; and to sell, convey, mortgage, pledge, create a security interest in, lease or otherwise dispose of all or any part of its property and assets. Diné College shall not have power to sell, convey, mortgage, pledge or encumber any real estate or tangible property of the Navajo Nation, nor any such property in which the Navajo Nation has an interest, and any leases or subleases of Diné College shall require approval by the Resources Committee of the Navajo Nation Council.

5. To invest its funds from time to time in any certificates of deposit or similar investments, tangible or intangible personal property, or real property located within Navajo Country, to lend money for its lawful purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned. Investment in real property outside Navajo Country may only be made with the prior approval of the Budget and Finance Committee of the Navajo Nation Council.

6. To purchase insurance for any property or against any risks or hazards.

7. To establish and maintain such bank accounts as may be necessary and proper.

8. To hire employees, including all necessary administration and instructional personnel and other educational assistants and such officers, agents, and employees, permanent or temporary, as it may require, and to delegate to such officers and employees such powers or duties as the Board of Regents shall deem proper and to fix their compensation, all in accordance with this Chapter.

9. To adopt such rules, regulations and Bylaws as the Board of Regents deems necessary and proper.

10. To establish standards for graduation, admission and attendance and to prescribe the course of study to be followed, to charge tuition, board charges, rent, student union fees or such other fees and charges necessary to operate the College.

11. To issue, upon the recommendation of the faculty, diplomas to such persons as have satisfactorily completed the required programs of studies of the Diné College and to confer appropriate degrees.

12. To acquire, by purchase or otherwise construct, enlarge, improve, equip, complete, operate, control, maintain, and operate any property suitable for use as an educational facility, including but not limited to the following types of buildings: classrooms, dormitories, dining halls, and offices.

13. To promulgate rules and regulations for the protection of both private and Diné College property, and persons on the campus. Specifically the Board of Regents may adopt reasonable rules regarding use of Diné College facilities, parking on campus, and conduct of visitors and residents on College property. The Board may adopt a schedule of fines to enforce its rules, and shall also have authority to expel persons from the campus for repeated violations.

14. To establish and operate, on a continual basis, a campus police and security force in order to enforce applicable Diné College, Navajo Nation, federal and state laws and regulations and to handle other duties relating to public safety on Diné College property. Employees of the campus police and security force who hold valid current commissions as police officers of the Navajo Nation shall be entitled to exercise all powers of a commissioned police officer of the Navajo Nation while on Diné College property.

15. To have and exercise all powers necessary or convenient to effect any or all of the purposes for which this charter and chapter is granted, and to discharge the responsibilities placed upon the Board of Regents herein.

#### **History**

CJY-37-05, July 19, 2005. The Navajo Nation Sovereignty in Education Act of 2005.

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

CN-61-84, November 14, 1984.

ACAU-99-84, August 22, 1984.

ACO-90-79, October 16, 1979.

**Revision note.** Slightly reworded for purposes of statutory form. All references to the "Advisory Committee" have been changed to the "Navajo Nation Council". See 2 N.N.C. § 102(B).

**Note.** All powers and authority of the Diné College Board of Regents are subject to applicable Navajo Nation law.

### **§ 2018. Bonds**

A. The College may, with the review of the Navajo Nation Controller and the approval of the Budget and Finance Committee of the Navajo Nation Council, issue bonds from time to time in its discretion for any of its lawful purposes. Bonds, including the terms, conditions and covenants contained in the resolution authorizing such bonds, shall evidence claims against and obligations of the College which are justiciable in the Navajo Nation Courts. Any resolution authorizing bonds to which revenues are pledged may contain such covenants with the future holder or holders of the bonds as to the management and operation of the affected facilities, the imposition and collection of fees and charges for commodities and services furnished thereby, the disposition of such fees and revenues, the issuance of future bonds, the creation of future liens and encumbrances against such facilities, the carrying of insurance, the keeping of books and records, the deposit and paying out of revenues and bond proceeds, the appointment and duties of a trustee, and other pertinent matters as may be deemed proper by the Board of Regents.

B. The College may issue such types of bonds as it may determine, including bonds on which the principal and interest are payable:

1. Exclusively from the income and revenues of the project financed with the proceeds of such bonds, or with such income and revenues together with a grant from the federal, state or local government in aid of such project;

2. Exclusively from the income and revenues of certain designated projects whether or not they were financed in whole or in part with the proceeds of such bonds; or

3. From its revenues generally. Any of such bonds may be additionally secured by a pledge of any revenues of any project, projects or other property of the Diné College.

C. The bonds and other obligations of the Diné College shall not be considered to be obligations general, special or otherwise of the Navajo Nation, nor to be securities or a debt of the Navajo Nation and shall not be

enforceable against the Navajo Nation, and the bonds and obligations shall so state on their face. However, the Navajo Nation Council may by separate action guarantee such bonds on behalf of the Navajo Nation.

D. Any coupons shall be signed by the Treasurer of the Diné College. Any authorized officer may execute or cause the bonds to be executed with a facsimile signature in lieu of his or her manual signature, provided at least one signature on such bonds shall be manual. The seal of the Diné College may be printed, stamped, engraved, or photographed on the bonds in lieu of impressing the seal thereon. Facsimile signatures may be used on any coupons.

E. Bonds shall be issued and sold in the following manner:

1. Bonds of the Diné College shall be authorized by resolution adopted by the vote of an absolute majority of the Board of Regents, and may be issued in one or more series.

2. The bonds shall bear such dates, mature at such times, bear interest at such rates, be in such denominations, be in such form, either coupon or registered, carry such conversion or registration privileges, have such rank or priority, be payable in such medium of payments at such places and be subject to such terms of redemption, with or without premium, as such resolution may provide.

3. The bonds may be sold at public or private sale at not less than par.

4. Bonds issued hereunder shall be executed in the name of the Diné College, shall be signed by the President or the Vice-President of the Board of Regents under the official seal of the Diné College and shall be attested by the Secretary of the Board of Regents.

5. The bonds, any coupons pertaining thereto, and other securities, bearing the signatures of the officers in office at the time of the signing thereof, shall be the valid and binding obligations of the Diné College, notwithstanding that before the delivery thereof and payment therefor, any and all of the persons whose signatures appear thereon have ceased to fill their respective offices.

6. Any officer authorized or permitted to sign any bonds, any coupons, or any other securities, at the time of their execution and of a signature certificate pertaining thereto, may adopt as and for his own facsimile signature, the facsimile signature of his predecessor in office in the event that such facsimile signature appears upon the bonds, coupons and other securities pertaining thereto, or any combination thereof.

7. The Board of Regents, in any resolution authorizing the issuance of bonds or other securities hereunder or in any instrument or other proceedings pertaining thereto, may create special funds and accounts for the payment of the cost of a project, of operation and maintenance expenses, of the securities, including the accumulation and maintenance of reserves therefor, of improvements, including the accumulation and maintenance of reserves therefor, and of other obligations pertaining to

the securities, any project or otherwise in connection with the College.

8. The Diné College may employ legal, fiscal, engineering, and other expert services in connection with any project or otherwise appertaining to the Diné College and the authorization, sale and issuance of bonds and other securities hereunder. Employment of legal counsel shall be subject to applicable laws of the Navajo Nation.

9. The Diné College is authorized to enter into any contracts or arrangements, not inconsistent with the provisions hereof, with respect to the sale of bonds or other securities hereunder, the employment of bond counsel, and other matters as the Board of Regents may determine to be necessary or desirable in accomplishing the purposes hereof.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

**Note.** The issuance of bonds is subject to applicable Navajo Nation law.

#### **Cross References**

Issuance of bonds for capital improvement projects, see 12 N.N.C. § 1300 et seq.

#### **§ 2019. Planning, zoning, sanitary and building regulations**

All property of the Diné College shall be subject to the planning, zoning, sanitary and building laws and regulations applicable to the locality in which the Diné College property is situated.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

#### **§ 2020. Tax exemption**

The property and funds of the Diné College are declared to be public property used for essential public and governmental purposes and such property and the Diné College are exempt from all taxes and special assessments of the Navajo Nation and other authorities.

#### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, October 16, 1979.

## **§ 2021. Sovereign Immunity**

The Navajo Nation Sovereign Immunity Act shall be applicable to the Diné College and the Diné College Board of Regents.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

ACO-90-79, Plan, § VIIIIC, October 16, 1979.

**Revision note.** Slightly reworded for purposes of statutory form.

### **Cross References**

Navajo Sovereign Immunity Act, see 1 N.N.C. § 551 *et seq.*

## **§ 2022. Amendments**

The Navajo Nation Council is authorized to consider and grant final approval on behalf of the Navajo Nation to any amendments or modifications to this Chapter. This authority, however, is subject to and limited by the continuing integrity of the portions of this Chapter entitled "Bonds" and any other portion justifiably relied upon by any purchaser of bonds or holder of bonds issued by Diné College or any other evidences of indebtedness issued by Diné College, to the extent that any modifications or amendments hereafter approved by the Navajo Nation Council may not have the effect of prejudicing the rights of such purchasers or holders, or detract from the validity of such bonds or evidences of indebtedness and their enforcement.

### **History**

CAP-35-97, April 24, 1997.

ACO-90-79, October 16, 1979.

## **§ 2023. Relation to Navajo Nation government**

The Diné College is subject to the laws of the Navajo Nation.

### **History**

CAP-35-97, April 24, 1997. Adopting Amendments of the Navajo Community College Charter.

CN-61-84, November 14, 1984.

**Revision note.** Slightly reworded.

### **Cross References**

Crownpoint Institute of Technology (previously known as "Navajo Skill Center"),

see 15 N.N.C. § 1201 *et seq.*

## **Chapter 20. [Reserved]**

### **History**

**Note.** The Navajo Nation Diné Language Act enacted by CJY-52-01, July 17, 2001, and previously located at 10 N.N.C. §§ 2201-2206 was renumbered to 10 N.N.C. §§ 52-57 by CJY-37-05, July 19, 2005.

## **Chapter 21. [Reserved]**

### **History**

**Note.** CJY-37-05, July 19, 2005 deleted previous Chapter 21, American Indian School of Medicine, 10 N.N.C. §§ 2301-2312, which had been enacted by CF-8-77, February 24, 1977.

## **Chapter 23. [Reserved]**

## **Chapter 26. [Reserved]**

### **History**

**Note.** CJY-37-05, July 19, 2005 deleted previous Chapter 26, Navajo Education Appeals Committee, 10 N.N.C. §§ 2601-2614 which had been enacted by CO-87-94, October 19, 1994.

## **Title 11**

### **Elections**

#### **Chapter 1. Navajo Election Code of 1990**

### **History**

*See also,* notes under individual sections of the Code and applicable rules and regulations separately enacted by the Navajo Board of Election Supervisors.

CAP-13-08, April 25, 2008.

CJA-05-08, January 31, 2008.

CJA-04-08, January 31, 2008.

CO-39-07, October 17, 2007.

CJY-19-07, July 19, 2007.

CAP-15-07, April 19, 2007.

CAP-13-07, April 19, 2007.

CAP-12-07, April 19, 2007.

CF-13-06, February 3, 2006. The Navajo Nation Board of Education Election Act of 2006.

CJA-12-06, January 27, 2006.

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CAP-31-05, April 22, 2005.

CAP-30-05, April 22, 2005.

CJA-05-05, January 28, 2005.

CO-51-04, October 18, 2004.

CO-56-04, October 10, 2004.

CMY-24-04, May 21, 2004.

CAP-15-04, April 22, 2004.

CJY-41-03, July 24, 2003.

CMY-30-03, May 2, 2003.

CAP-12-02, April 8, 2002.

CJA-05-01, January 24, 2001.

CJA-06-01, January 24, 2001.

CAP-41-00, April 21, 2000.

CAP-38-98, April 27, 1998.

CO-64-90, October 19, 1990.

CAP-23-90, April 6, 1990. See Parallel Tables attached to CAP-23-90 to compare prior law with the new Election Code. Also, the 1990 Navajo Nation Election Code contained numerous amendments. In the absence of any underscoring and/or striking of these changes, all prior law and amendment references have been deleted. See CAP-23-90 and attachments to review these notes.

CMY-60-66, May 16, 1966.

## **Subchapter 1. General Provisions**

### **§ 1. Application of Election Code**

"The Navajo Election Code" shall apply to all elections designated by the Navajo Nation Council, or the Navajo Board of Election Supervisors, pursuant to

its authority set out herein.

### **History**

**Note (2005).** The 1995 publication of the Election Code contained an error in the use of the term "actions." The term was changed to "elections" as it correctly appeared in the 1990 version of the Code.

CAP-23-90, April 6, 1990.

### **§ 2. Definitions**

A. "Board"—The Navajo Board of Election Supervisors, a general description of which appears in Subchapter 17 hereof and 2 N.N.C. § 871 et seq.

B. "Candidate application"—A document upon which one seeks candidacy status for an elective office.

C. "Canvass"—Examining and counting of results at an election.

D. "Challenge"—A challenge to the procedures of an election or signature of a person who purports to be a registered voter and who has signed a nominating petition.

E. "Chapter elections"—Elections held for the purpose of electing Chapter officers, other elected officials, school board members, and/or for voting on a referendum.

F. "Chapter Officials"—The President, Vice-President and Secretary/Treasurer of a certified Chapter, or other officials who may be locally elected based on governing models adopted by the Transportation and Community Development Committee of the Navajo Nation Council pursuant to the Navajo Nation Local Governance Act, 26 N.N.C. § 1 et seq.

G. "Code"—The Election Code of 1990.

H. "Consultation" as used in 11 N.N.C. § 11 shall mean notice of the proposed school board apportionment plan, and an opportunity to comment on the proposed apportionment plan. The Education Committee of the Navajo Nation Council shall allow at least 60 days for person interested to provide comments. Comments received shall be in writing, and maintained by the Division of Diné Education. The Education Committee may, but is not required to, hold hearings at the schools, chapters, communities or agencies affected by the proposed reapportionment plan. To the extent the Education Committee holds hearings on any proposed reapportionment plan, the Education Committee may impose reasonable restrictions including, but not limited to, the length of time witnesses may present testimony.

I. "Continually present"—Being actually physically present within the Navajo Nation or living on Navajo Country in a fixed and permanent home without any significant interruption. An extended absence from Navajo Country in the course of employment or pursuit of trade or business or for purposes as attending school and serving in the military service, is not significant interruption.

J. "Council"—The Navajo Nation Council.

K. "Date of Filing"—See "Filing Date."

L. "Delegate"—The office of or person holding the office of Delegate to or member of the Navajo Nation Council.

M. "District Grazing Committee Member"—A member of the district grazing committee as defined at 3 N.N.C. § 171 et seq.

N. "Elected Officials"—Those officials holding offices of the President of the Navajo Nation, Vice-President of the Navajo Nation, Delegate of the Navajo Nation Council, Chapter officers, other elected officials, the elected members of the Navajo Nation Board of Education and school board members that have been elected or appointed pursuant to this Election Code.

O. "Election Administration"—The Navajo Election Administration which is the administrative office for the Board.

P. "Employer"—Any natural person, association of natural persons, Navajo Nation enterprise, independent contractor, corporation, or other entity, employing one or more members of the Navajo Nation or engaging their services under contract, and any person acting as agent for such person, association of persons, Navajo Nation enterprise, corporation, or other entity.

Q. "Farm Board Member"—A member of a farm board as defined at 3 N.N.C. § 61 et seq.

R. "Felony"—Any offense in any jurisdiction punishable by imprisonment for a term exceeding one year and by forfeiture of individual rights.

S. "Filing"—The act of submitting one's name as a candidate for an election.

T. "Filing Date"—The last day on which one may file as a candidate for an election.

U. "Financial Agent"—A person authorized by a candidate to act for him or her to manage, solicit, accept, disburse, and obligate funds or its equivalent in connection with a political campaign.

V. "General Elections"—Elections held for the purpose of electing the President of the Navajo Nation, Vice-President of the Navajo Nation, elected members of the Navajo Nation Board of Education, and Delegates of the Navajo Nation Council, and/or for voting on a referendum.

W. "Land Board Member"—A member of the board elected for the purpose of administering grazing and resolving problems attendant thereto, and representing one of the Land Management Districts in the Eastern Agency as set out at 3 N.N.C. § 231 et seq.

X. "Local Community School Board"—Members of a Local Community School Board who are elected pursuant to the Navajo Nation Election Code. Local

Community School board members include those members elected to the governing boards of schools operated or funded by the Bureau of Indian Affairs for the education of Navajo children within the Navajo Nation, but does not include members of the school boards for private, parochial and state public schools.

Y. "Member"—Delegate to the Navajo Nation Council.

Z. "Navajo Nation Officials"—The President of the Navajo Nation, Vice-President of the Navajo Nation and Delegates of the Navajo Nation Council.

AA. "Other Elected Officials"—This is the collective term used to designate Land Board, Farm Board, and District Grazing Committee members in each precinct or Chapter.

BB. "Officials"—As used in subchapter 13 hereof this term is used to designate those holding the Offices of President of the Navajo Nation, Vice-President of the Navajo Nation, Delegate of the Navajo Nation Council, Chapter officers, other elected officials, and school board members.

CC. "Permanent Residence"—The place where a person physically lives with the intent to remain for an indefinite period of time. The permanent residence is a person's fixed and permanent home. Permanent means lasting, fixed, stable and not temporary, part-time, or transient. A person cannot have more than one permanent residence at the same time.

DD. "Precincts"—Those polling places designated by § 10 hereof.

EE. "President"—The chief executive officer of the Navajo Nation.

FF. "Primary Candidate"—A qualified candidate who has filed a candidate application and the necessary filing fee to place himself or herself on the ballot of a primary election.

GG. "Primary elections"—Elections held for the purpose of deciding the candidates who will be placed on the ballots of general and chapter elections.

HH. "Speaker of the Navajo Nation"—The presiding chair of the Navajo Nation Council.

II. "Special elections"—Elections called by the Board in the event of a sufficient recall or referendum petition or to fill a vacancy in accord with this Title.

JJ. "Time"—In computing any period of time prescribed or allowed by this Code, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday recognized by the Navajo Nation. Computations shall be in calendar days.

KK. "Vice-President"—The Vice-President of the Navajo Nation or the Office of the Vice-President of the Navajo Nation.

LL. "Voter"—A voter who is registered on the Navajo Nation roll of registered voters.

MM. "Window Rock"—The community of Window Rock, Navajo Nation (Arizona).

### **History**

CF-13-06, February 3, 2006. The Navajo Nation Board of Education Election Act of 2006. Amended the definitions of Elected Officials at § 2(N) and General Elections at § 2(V).

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005 generally amended the Election Code. Originally, the definition of Special elections was originally erroneously designated as § 2(JJ), but was corrected and placed at § 2(II) to maintain statutory format.

CO-51-04, October 18, 2004. Amended the definition of Chapter Officials at Section 2(F) along with amendments to the Navajo Nation Local Governance Act at 26 N.N.C. §§ 2, 1003 and 2001.

CJY-41-03, July 24, 2003. Terms "Consultation" and "Local Community School Board" added. Beginning at "H," Subsections redesignated. Term "School Board Members" deleted.

**Note** (2005). Beginning at Subsection "B", all Subsections were properly redesignated pursuant to amendments of CJA-06-01. Also, at Subsection "Q", for grammatical and statutory format purposes, the term "the" was changed to "a".

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

### **Cross References**

**Chapter Officials.** See also, Navajo Nation Local Governance Act, 26 N.N.C. §§ 2, 1003 and 2001.

**Waiver.** By Resolution CO-41-07, October 17, 2007, the Navajo Nation Council waived 11 N.N.C. §§ 2(H), 11(B) and 22(A) for purposes of extending the deadline for Education Committee approval of an apportionment plan for local community school boards to December 31, 2007.

### **Annotations**

#### **1. Continually present or permanent residence**

"Regarding the terms '*continually present*' and '*permanent residence*,' " see *Begay v. Navajo Board of Election Supervisors*, SC-CV-27-02 (decided July 31, 2002) (*slip op.*).

#### **2. Local schools**

"It is therefore obvious that while the schools remain minimally self-sufficient, they have been inextricably intertwined with the Navajo Nation government and their local Navajo communities from their inception. The Appellant schools have characteristics of both public and private schools;

therefore, we agree with the District Court that the schools are 'local community schools,' or 'other schools' under the meaning of section 2(EE) [now § 2(X)] of the Election Code. We hold that the Election Code applies to the Appellants." *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 171-172 (Nav. Sup. Ct. 1995).

### **§ 3. Elections; election dates**

A. General elections shall be held on the first Tuesday of November 2006 and every fourth year thereafter on the Tuesday after the first Monday in November.

B. Chapter elections shall be held on the first Tuesday of November 2004 and every fourth year thereafter on the Tuesday after the first Monday in November.

C. Primary elections shall be held on the first Tuesday which precedes the date of the general election or chapter election by a minimum of 90 days.

D. Special elections shall be held when required.

E. The Board of Election Supervisors is authorized to postpone for a maximum of 60 days any Navajo election for the purpose of printing new ballots required because of changed circumstances.

### **History**

CMY-24-04, May 21, 2004.

CJA-06-01, January 24, 2001.

CO-64-90, October 19, 1990. Section (E) was added by CO-64-90.

CAP-23-90, April 6, 1990

CAP-24-87, April 29, 1987

### **Annotations**

#### **1. Postponement of Elections; resolution review**

The Navajo Nation Supreme Court, in *Navajo Nation v. Redhouse*, 6 Nav. R. 305 (1990) declared void an action of the Navajo Nation Council which attempted to amend Subsection (E) in the following manner: "*The Board of Election Supervisors is hereby directed to postpone for a minimum of thirty (30) and a maximum of sixty (60) days any Navajo election for the purpose of printing new ballots required because of changed circumstances*" In *Redhouse*, the Court found that the particular resolution amending this Subsection was not properly reviewed. The Court held that 2 N.N.C. § 164, the provision of Navajo Nation law addressing the review process for proposed resolutions, was "*clearly mandatory rather than directive, and its procedures a condition precedent to the enactment of valid legislation.*"

### **§ 4. Voting; number of votes**

A. Voting shall be by secret pictorial ballot. If a candidate fails to comply with the provisions of 11 N.N.C. § 27, *Ballot Picture*, his or her picture will be deleted from the ballot.

B. Each registered voter shall be entitled to cast one vote for each position that his or her precinct is entitled to elect in the primary, general, and chapter elections; provided, however, that no voter may cast more than one vote for any one candidate.

#### **History**

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 11 N.N.C. § 81(E) on appeals.

#### **§ 5. Ballots; official; sample**

A. Ballots shall be printed for all elections after all candidates have been certified by the Election Administration to the Board. Ballots shall reflect the names and pictures of certified candidates running for office. Ballots shall be numbered consecutively and provided in blocks to each precinct. A space shall be provided below or on the side of each picture which each voter must fill in or "blacken" to indicate his or her choice.

B. An adequate supply of ballots plainly marked "SAMPLE BALLOT" and printed on a paper of different color from that of the official ballot shall be widely distributed and shall be posted in public places in each precinct in order to acquaint voters with the ballots and with voting procedures.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 11 N.N.C. § 27.

#### **§ 6. Terms of office; oath**

A. The term of office for all offices filled by the general and/or chapter elections shall be four years. The first half of the term of office shall be the first 24 months following the oath of office for that position. The second half of the term of office shall be the remaining term prior to the next oath of office for that position.

B. At each general election all persons elected to the offices of President of the Navajo Nation, Vice-President of the Navajo Nation and Delegate of the Navajo Nation Council shall be installed in office at noon on the second Tuesday after the first Monday of January following their election

and their predecessors' term of office shall expire upon their installation in office.

C. Candidates elected to office in chapter elections shall be installed in office upon taking the oath of office, which shall be administered at the direction of the Board during the first week following the first Saturday in January, and their predecessors term of office shall expire upon their installation.

D. Local Community School Board members shall serve only two consecutive terms.

E. All elected and appointed officials of the Navajo Nation, shall subscribe and swear to the Oath of Office (see Appendix to CAP-23-90). No individual shall serve as an elected official or be permitted to act as an elected official until after certification by the Election Board and an oath of office is taken or administered as prescribed by law. By virtue of an appointment shall not constitute a full term of an appointed member.

### **History**

**Note (2005).** At Subsection "E", for purposes of clarity and due to several amendments to the Election Code since 1990, "see Appendix to this Code, CAP-23-90" was changed to "see Appendix to CAP-23-90."

CMY-24-04, May 21, 2004.

CJY-41-03, July 24, 2003.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

CF-29-98, February 10, 1998. Resolve clause portion of this resolution provides: "1. The Navajo Nation Council hereby affirms the current apportionment of the Navajo local community controlled school boards, the Navajo community controlled school boards elected in 1992, 1994 and 1996, and that the 1998 Navajo Nation primary and general elections for school board members shall be conducted based on the current apportionment of the Navajo local community controlled schools, notwithstanding the January 09, 1998, decision of the Supreme Court of the Navajo Nation in case of Rough Rock Community School Board, Inc. v. Navajo Nation, SC-CV-06-94, and the procedures set forth in 11 N. N. C. § 11. 2. The Navajo Nation Council further determines that the terms of the Navajo local community school board members elected in 1998 shall be for a two-year term to allow all school board terms to end in the Year 2000 and in order to allow implementation of a new school board apportionment plan in the Year 2000, notwithstanding the provisions of 11 N. N. C. § 6 (A)."

### **§ 7. Number of Terms**

A. Except as otherwise provided by law, the number of terms a person may hold a Navajo elective office shall be unlimited.

B. Section 7(A) shall become effective in the 1990 general election and 1992 for chapter elections.

#### **History**

CAP-41-00, April 26, 2000.

CAP-23-90, April 6, 1990.

#### **Cross References**

Regarding Council Delegates, *see also*, 2 N.N.C. § 105(B).

Regarding Office of President and Vice President, *see also*, 2 N.N.C. § 1002(D).

Regarding School Board Members, *see also*, § 6(D) herein.

#### **§ 8. Qualifications for office**

A. Qualifications for President and Vice-President are:

1. Must have permanent residence and have been continually physically present within the Navajo Nation as defined in 7 N.N.C. § 254 for at least three years prior to the time of election;

2. Must be a registered voter, a member of the Navajo Nation, and be on the agency census roll of the Bureau of Indian Affairs;

3. Must be at least 30 years of age at the time of general election;

4. Must fluently speak and understand Navajo and read and write English;

5. Must have served in an elected Navajo Nation office, other than the office of school board member, or must have been employed within the Navajo Nation organization;

6. Must not have been convicted of a felony within the last five years;

7. Must not have been convicted of any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws;

8. Must have unswerving loyalty to the Navajo Nation and must be competent and capable of upholding the oath of office;

9. Candidates elected, who are employed by the Navajo Nation, must resign from such employment before taking the oath of office and shall not be employed by the Navajo Nation during their term of office;

10. Must not have been indicted by a federal grand jury at the time of filing of the candidate application. Any candidate for the Office of the President or Vice-President who is indicted by a federal grand jury subsequent to the filing of the candidate application shall be disqualified; and,

11. Must not if elected, be in the permanent employment of the United States or any state or subdivision thereof; nor be an elected official of the United States or any state or subdivision thereof.

B. Qualifications for Delegate to the Navajo Nation Council:

1. Must be at least 25 years of age on or before the date of the general election;

2. Must be an enrolled member of the Navajo Nation on the Agency Census roll of the Bureau of Indian Affairs;

3. Must not have been convicted of a felony within the last five years;

4. Must not have been convicted of any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws;

5. Must maintain unswerving loyalty to the Navajo Nation and must be competent and capable of upholding the oath of office;

6. Must be a registered voter in the chapter or precinct from which elected;

7. Candidates elected, who are employed by the Navajo Nation, must resign from such employment before taking the oath of office and shall not be employed by the Navajo Nation during their term of office;

8. Must be able to speak and understand Navajo and/or English;

9. Must not, if elected, serve in any other elected Navajo Nation Office with the exception of the office(s) of the school board(s);

10. Must have permanent residence and been continually physically present within the Navajo Nation as defined in 7 N.N.C. § 254 at least three years prior to the time of election; and

11. Must not be in the permanent employment of the United States or any state or subdivision thereof, or be an elected official of the United States or any state or subdivision thereof, with the exception of service on a school board or elective county office.

C. Qualifications for Chapter Officers

1. Must be a registered voter of the Chapter they seek to represent and be on the census roll of the Bureau of Indian Affairs;

2. Must be 21 years of age at the time of the election;

3. Must not have been convicted of a felony within the last five years;

4. Must not have been convicted of any misdemeanor in any courts involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws;

5. Must have permanent residence and been continually physically present within the Navajo Nation as defined in 7 N.N.C. § 254 at least three years prior to the time of election;

6. Must have an understanding of the Navajo Nation governmental affairs;

7. Must not have been removed from a chapter office within the five years preceding the date of his or her filing for candidacy;

8. Must not, if elected, serve in any other Navajo Nation elective offices, with the exception of the office(s) of school board member(s);

9. Must be a high school graduate or must have a GED Certificate, if the candidate seeks the office of Secretary/Treasurer;

10. Must not allow employment with the Navajo Nation, federal or state governments, or any private organization to interfere with performance of Chapter officer duties; and

11. If a candidate is an employee of the Bureau of Indian Affairs or the Indian Health Services, prior to filing, the candidate shall obtain written clearance from the BIA or IHS stating that there is no conflict of interest for the candidate in the event the candidate is elected as Chapter officer. Clearance shall be provided to Election Administration Office.

D. Qualifications for Other Elected Officials:

1. Qualifications for the Land Board Candidates:

a. Must be a registered voter of the Chapter which the candidate seeks to represent and be on the census roll of the Navajo Nation;

b. Must be at least 21 years of age at the time of filing;

c. Must not have been convicted of a felony within the last five years;

d. Must not have been convicted of any misdemeanor in any court involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within five years preceding the date of the elections. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws;

e. Must be knowledgeable in the maintenance and management of livestock operations;

f. Must be able to speak the Navajo language fluently, and to read and write the English language;

g. Must own transportation for use in carrying out the duties and responsibilities of a Land Board member;

h. Must have a valid driver's license;

i. Must have experience with and knowledge of the complex land status in the Eastern Navajo Area as well as being familiar with the land use policies and procedures of the Navajo Nation and federal and state governments; and

j. Must not, if elected, serve in any other Navajo Nation elective offices, with the exception of the office(s) of the School Board(s). An elected official may run for Land Board if his or her elected office expires prior to his or her taking office as a Land Board member.

2. Qualifications for Farm Board Candidates:

a. Must be an enrolled member of the Navajo Nation;

b. Must be a registered voter of the Chapter to be represented;

c. Must be fluent in the Navajo and English language;

d. Must be at least 21 years old at the time of filing;

e. Must have knowledge and experience of agricultural land use policies and rules and regulations;

f. Must not hold either the Office of Delegate or any Chapter office, unless the term of the office held expires prior to taking office as a Farm Board member;

g. Must not, if elected, serve in any other Navajo Nation elective offices with the exception of the office(s) of the School Board(s);

h. Must not have been convicted of a felony within the last five years; and

i. Must not have been convicted of any misdemeanor in any court involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election laws.

3. Qualifications for District Grazing Committee Candidates:

a. Must be a member of the Navajo Nation;

b. Must be a registered voter of the Chapter which candidate seeks to represent;

c. Must be at least 21 years of age at the time of filing;

d. Should be able to read, write and speak the English language;

e. Must be able to converse fluently in the Navajo language;

f. Must have demonstrated interest or experience in livestock and range management;

g. Must have knowledge of grazing rules and regulations;

h. Must not, if elected, serve in any other Navajo Nation elective offices, including a Navajo Nation Council seat or appointment to any commission, board, committee or office that is an entity of the Navajo Nation or the United States government, with the exception of the office(s) of school board(s);

i. Must not have been convicted of a felony within the last five years; and

j. Must not have been convicted of any misdemeanor in any court involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery within the last five years. Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws.

4. Qualifications for Candidates for School Board:

a. Must not be a member of the Navajo Nation Council.

b. Must be an enrolled member of the Navajo Nation and be on the Agency Census roll of the Navajo Nation Office of Vital Records.

c. Must be a registered voter of the Chapter or Agency he or she will represent, and certify that he or she will remain so registered for the duration of his or her term of office.

d. Must be at least 21 years of age at the time of the election.

e. Must not be an employee or the spouse of an employee of the School on whose board he or she would serve.

f. Must not have a conflict of interest arising from any tribal, state or federal laws regarding his or her employment.

g. Must not have been convicted of a felony.

h. Must not have been convicted of the following misdemeanor crimes:

(1) Any crimes involving elements of deceit, untruthfulness and dishonesty, including but not limited to extortion, bribery, forgery, fraud, theft, embezzlement, perjury, misrepresentation, false pretense, conversion, or misuse of public funds or property;

(2) Any crimes involving the welfare of children, child abuse, or child neglect;

(3) Aggravated Assault or Aggravated Battery;

(4) Any crimes involving the use of intoxicating alcohol or illegal substance abuse including unlawful transport, sales or distribution of controlled substances.

i. Must have fully complied with all orders or sanctions imposed by the Ethics and Rules Committee of the Navajo Nation Council or Courts of the Navajo Nation for any violations of the Navajo Nation Ethics in Government Law.

j. School Board members shall maintain the qualifications stated herein throughout their terms of office.

k. If elected or appointed, the candidate shall serve on no more than one Local Community School Board.

5. Navajo Nation Board of Education.

All candidates for elected membership on the Navajo Nation Board of Education shall meet the following qualifications at the time of filing, and shall maintain all qualifications during their term of elected office:

a. All candidates shall be enrolled members of the Navajo Nation;

b. All candidates shall be at least 25 years of age, at the time of filing;

c. All candidates shall not be delegates to the Navajo Nation Council or a member of a school board of a school operating on the Navajo Nation, or an employee of the Department of Diné Education;

d. All candidates shall have at least a four year academic degree from an accredited college or university;

e. All candidates shall not have been convicted of a felony or of any crime involving child abuse or neglect.

#### **History**

CF-13-06, February 3, 2006. The Navajo Nation Board of Education Elections Act of 2006.

**Note (2005).** For grammatical purposes, the term "*Courts*" changed to "*court*" at Subsections (D) (1) (d), (D) (2) (i), and (D) (3) (j).

CJY-41-03, July 24, 2003.

CJA-06-01, January 24, 2001.

CAP-38-98, April 27, 1998.

CO-64-90, October 19, 1990.

CAP-23-90, April 6, 1990.

#### **Cross References**

District Grazing Committees, *see also*, 3 N.N.C. § 871 *et seq.* and 11 N.N.C. § 240 (CAP-38-98).

Duties and responsibilities of chapter officials, *see also* 26 N.N.C. § 1001.

Eligibility for Chapter Officer positions, see also, 11 N.N.C. § 247.

Qualifications for Council Delegates, see also, 2 N.N.C. §§ 103 and 104.

Qualifications for President, see also, 2 N.N.C. § 1004.

### **Annotations**

#### **1. Due Process and Equal Protection**

"In the present case we decline to find the statute itself void for vagueness. Rather, we follow the approach of the majority in *Howard* and find it vague as applied because the statute could be read in several ways. It was read one way for two candidates, read differently for Appellant, and not read at all for a third candidate. If law is to mean anything, it must be consistent in the way people are treated. In this case, the candidacy definitions were unequally applied." *Begay v. Navajo Nation Election Administration*, No. SC-CV-27-02, slip op. at 10 (Nav. Sup. Ct. July 31, 2002).

The Navajo Supreme Court declared as invalid section 8(D)(4)(i), a statutory provision requiring that school board candidates "[m]ust have demonstrated interest, experience, and ability in Educational Management and must be able to communicate such to the Navajo communities." *Rough Rock Community School et al. vs. Navajo Nation*, 7 Nav. R. 168 (1995). The Court found the term "Educational Management" undefined and declared the section void for vagueness, stating that "statutes which limit political liberty must be based upon reasonable public policy and ... must give the regulating body concrete guidance as to their application." *Rough Rock Community School et al. vs. Navajo Nation*, 7 Nav. R. 168, 174 (Nav. Sup. Ct. 1995).

"[A] statute [11 N.T.C. § 8(A)(5)] limiting elective public office for president and vice president to previously elected officials and employees of the 'Navajo tribal organizations' [is] invalid because it denies due process and equal protection of the law." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319 (Nav. Sup. Ct. 1990).

"A more severe defect in the statute [11 N.T.C. § 8(A)(5)] is it delegates arbitrary authority to the Board of Election Supervisors to exclude candidates and to take the right of judging their qualifications away from Navajo voters. A legislature can set minimum qualifications for public office, particularly those having to do with integrity and honesty, but without a showing of a valid and substantial public interest, arbitrary qualifications are invalid." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 329 (Nav. Sup. Ct. 1990).

"This Section is void for vagueness and denies equal protection of the law." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319 (Nav. Sup. Ct. 1990).

"... [T]he Board of Election Supervisors has selectively applied its powers to decide candidates' qualifications. Had the Board checked all the candidates' qualifications or even a substantial number of the candidates' qualification, this would not be the case." *Deswood v. Navajo Board of Election Supervisors*,

1 Nav. R. 306, 311 (Ct. App. 1978).

"The selective application of the power to disqualify candidates in the Navajo election requires this Court to void any use of the power by the Board of Election Supervisors. To reach any other result would be to take all meaning from the 1968 Indian Civil Rights Act." *Id.*

Note. *Deswood* was decided under previous law wherein the Navajo Board of Election Supervisors held certain powers.

## **2. Criminal Convictions**

"The legislative enactments of which appellant complains are nothing more than an attempt to modernize and streamline Navajo Nation election law, making certain that individuals who judicially are found guilty of corruption in office cannot run for public office." *MacDonald v. Redhouse and Navajo Board of Election Supervisors*, 6 Nav. R. 342, 344 (Nav. Sup. Ct. 1991).

"The Navajo Nation Council chose to make changes in the qualifications of candidates for public office in 1990, and the provisions of the section used to decertify and disqualify MacDonald serve a legitimate Council purpose. That purpose is to assure public confidence in the integrity of the Navajo Nation Government. Thus, the Council 'may decide that persons convicted of certain crimes manifesting moral turpitude are disqualified from holding public office.' Our statutes provide that the disqualification arises upon 'conviction' of one of the listed crimes...." *MacDonald v. Redhouse and Navajo Board of Election Supervisors*, 6 Nav. R. 342, 347 (Nav. Sup. Ct. 1991).

" ... [O]nly individuals who have been convicted of a misdemeanor offense, where neglect, abuse or endangerment of children is an element of the offense, can be disqualified from holding public office as a Navajo Nation Council delegate. Neither the crime of D.U.I., nor that of endangerment, as defined by Arizona law, has injury to a child as an element of the offense." *Howard v. Navajo Board of Election Supervisors*, 6 Nav. R. 380, 383 (Nav. Sup. Ct. 1991).

"The disqualifying offenses against persons in 11 N.T.C. § 8.B.4 are clearly aggravated assault and aggravated battery [not contempt or battery]." *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 364 (Nav. Sup. Ct. 1991).

"The Board's assumption that it has power to decertify elected officials is not supported by a reading of any of the statutory basis for its authority to act." *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 362 (Nav. Sup. Ct. 1991).

## **3. Retrials not Permitted**

Where a candidate for Office of Council Delegate has previously been convicted of "Battery" by a trial court the Navajo Board of Election Supervisors may not look behind the conviction for determining whether an "aggravated assault" occurred justifying disqualification. *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360 (Nav. Sup. Ct. 1991). [Note—*Pioche* was decided under previous law wherein the Board had the authority to conduct quasi-judicial hearings and the authority to disqualify candidates for elective

public office. Now see generally, powers of the Navajo Election Administration and the Office of Hearings and Appeals.]

#### **4. Statutory construction; Judicial Review**

"The statute as written is confusing. However, if a confusing statute is applied in a fair and consistent manner, it may not deny liberty interests. Therefore, we must determine whether the statute was applied fairly and evenly." *Begay v. Navajo Nation Election Administration*, No. SC-CV-27-02, slip op. at 6 (Nav. Sup. Ct. July 31, 2002).

Section 8 (B) concerning certain prior criminal convictions is vague, ambiguous and inconsistent. It is saved from invalidity only because it may be reasonably interpreted within the limits of the facts of this case. The court urges the Navajo Nation Council to undertake a revision of the Election Code to give future candidates fair and understandable notice of the prerequisites to their exercise of their liberty right to run for public office. *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 365 (Nav. Sup. Ct. 1991).

"In sum, the law of the Navajo Nation has evolved to recognize the full independence of the courts of the Navajo Nation as a separate branch of the Navajo Nation Government. Navajo law has self-imposed limitations upon the legislative and executive branches, and it recognizes basic and enforceable Navajo human rights. This Court, the Navajo Nation Supreme Court, has been empowered to enforce all these organic laws through the application of the rules of law, equity, and tradition. Following over thirty years of legal evolution, there is now a fully-developed principle of judicial review of Council actions." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 323 (Nav. Sup. Ct. 1990).

"The Navajo word for 'law' is *beehaz'aanii*. While we hear that word popularly used in the sense of laws enacted by the Navajo Nation Council or the United States.... , it actually refers to a higher law. It means something which is 'way at the top'; something written in stone so to speak; something which is absolutely there; and, something like the Anglo concept of natural law. In other words, Navajos believe in a higher law, and as it is expressed in Navajo, there is a concept similar to the idea of unwritten constitutional law." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 324 (Nav. Sup. Ct. 1990).

"Statutes which confer rights grounded upon Navajo Liberties must contain ascertainable standards. That is, they must sufficiently describe standards and requirements for the exercise of the right so that the ordinary person will know what they are and be able to satisfy them." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 327 (Nav. Sup. Ct. 1990).

#### **5. Crimes involving Children**

The plain meaning of the statute is that individuals who have been convicted of misdemeanors "involving the welfare of children" for example, "child abuse" or "child neglect," are disqualified. This means at a minimum, that the criminal statute used to charge a defendant must have injury to a child as an element of the offense. The criminal statute must be designed to promote the welfare of children by providing that actions which endanger or compromise a child's

welfare are offenses. The terms of the Election Code clearly do not include situations where children may happen to be present. *Howard v. Navajo Board of Election Supervisors*, 6 Nav. R 380, 382 (Nav. Sup. Ct. 1991).

## **6. Ethics law violation**

"Since the language at issue [*'Must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Ethics in Government or Election Laws; ... '*] was neither in the Election Code [§ 8(B)(4)] as proposed to the Navajo Nation Council nor added during the debate on the Code, as a matter of Navajo law, it simply has no validity. The Board cannot use that language to disqualify candidates from elective office." *Bennett v. Navajo Board of Election Supervisors and Begay v. Navajo Board of Election Supervisors*, 7 Nav. R. 161, 165 (Nav. Sup. Ct. 1995).

## **7. Residency**

"The Court holds that the residency requirement is not a justifiable limitation, and therefore is in irreconcilable conflict with the fundamental rights of voters and candidates." *In the Matter of the Appeal of Vern Lee*, No. SC-CV-32-06, slip op. at 7 (Nav. Sup. Ct. August 11, 2006).

"Furthermore, the use of the definition of the Navajo Nation's modern territorial jurisdiction, 7 N.N.C. § 254, to demarcate the land upon which one must reside if he or she desires to run in an election is itself unreasonable." *In the Matter of the Appeal of Vern Lee*, No. SC-CV-32-06, slip op. at 7 (Nav. Sup. Ct. August 11, 2006).

"Based on the above, the Court struck the residency provision, and allowed Mr. Lee to run for Navajo Nation President. The effect of that ruling is that the Election Administration may no longer enforce the residency provisions." *In the Matter of the Appeal of Vern Lee*, No. SC-CV-32-06, slip op. at 8 (Nav. Sup. Ct. August 11, 2006).

"[I]f the election laws were applied equally as set out in 11 N.N.C. § 8(A), the NNEA should have disqualified all the candidates who do not reside within the Navajo Nation as defined by 7 N.N.C. § 254." *Begay v. Navajo Nation Election Administration*, No. SC-CV-27-02, slip op. at 18 (Nav. Sup. Ct. July 31, 2002) (Concurring Opinion, Justice King-Ben).

Regarding the requirement of *residency* for elective office, see *Begay v. Navajo Board of Election Supervisors*, SC-CV-27-02 (decided July 31, 2002) (*slip op.*) (Office of Navajo Nation President and Vice President).

## **8. Validity**

"We hold that section 8(D)(4)(I) of the 1990 Election Code is an unreasonable restriction which denies Navajos the right to seek election to Navajo school boards. The Navajo Nation has not shown to this Court that the 'Educational Management' restriction is a reasonable restriction on the Nation's Peoples' political liberty." *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 172 (Nav. Sup. Ct. 1995).

"Our review of the official minutes of the Navajo Nation Council session when

the Election Code was adopted shows that the language at issue was not included as part of proposed section 8(B)(4). ...It is clear that no delegate proposed to enact the actual language at issue, but it was nonetheless published by the Board as part of Section 8(B)(4). Since the language at issue was neither in the Election Code as proposed to the Navajo Nation Council nor added during the debate on the Code, as a matter of Navajo law, it simply has no validity. The Board cannot use that language to disqualify candidates from elective office." *Bennett, et al. v. Navajo Board of Election Supervisors*, 7 Nav. R. 161, 164-165 (Nav. Sup. Ct. 1995).

"The election reforms of 1989 and 1990 are not ex post facto laws, made to punish MacDonald, but laws which are well within the competence of the Council and are designed to promote the integrity of public office." *MacDonald v. Redhouse and Navajo Board of Election Supervisors*, 6 Nav. R. 342, 346 (Nav. Sup. Ct. 1991).

#### **9. Disqualification of candidate**

"... [T]here was no 'punishment' and thus, there was no bill of attainder in violation of 1 N.T.C. § 3, in the disqualification of MacDonald as a candidate." *MacDonald v. Redhouse and Navajo Board of Election Supervisors*, 6 Nav. R. 342, 345 (Nav. Sup. Ct. 1991).

#### **10. Elected official of the states**

"In Navajo thinking, the selection of a person by voters is one of two requirements for a candidate to become a *naat'áanii*. That person must also accept the position, and, to accept, must take an oath to serve the laws of the sovereign government within whose system he or she will serve the people- '*naat'áanii ádee hadidziih.*' Only when a person accepts through an oath will all of the Navajo people say that a person has been properly installed as a *naat'áanii*- '*naat'áanii idl9 bee bitsoosz99.*' In other words, '*Diné binant'ái bee bi'doosz99d.*' or '*Diné binaat'áanii bee bi'doosz99d.*' [ ... ] The oath is absolute, and allows no conflict in loyalty. This requirement of absolute loyalty is reiterated in the Election Code itself, as one of the qualifications for a council delegate is that he or she must 'maintain unswerving loyalty to the Navajo Nation.' 11 N.N.C. § 8(B)(5) (2005). Under these principles, a person may not swear allegiance to obey and serve simultaneously the laws of the Nation and the State of New Mexico. The prohibition is then consistent with our Fundamental Law, and it is not improper for the Election Code to require Tsosie to serve only one government." *In the Matter of the Grievance of: Wagner, and concerning, Tsosie*, SC-CV-01-07, slip op. at 7-8 (Nav. Sup. Ct. May 14, 2007).

#### **§ 9. Apportionment**

On or before the first Monday of May, 1975, and every 10 years thereafter, the Navajo Nation Council, with the recommendation of the Navajo Board of Election Supervisors, shall designate the number and location of precincts. All such precincts shall be approximately equal in population.

#### **History**

CAP-23-90, April 6, 1990.

**§ 10. Election precincts; polling places; delegates**

A. The election precincts, polling places and delegates for each election community are designated as follows:

Lechee<COL>1844<COL>1 delegate

K'ai'bii'tó<COL>1936<COL>1 delegate

Ts'ah Bii' Kin/Navajo Mountain<COL>1130/589<COL>1 delegate

Coppermine/Bodaway-Gap/Cameron<COL>629/1733/1162<COL>2 delegates

Tónaneesdizí/Coalmine Canyon<COL>7447/357<COL>4 delegates

Leupp/Tolani Lake/Birdsprings<COL>1534/731/795<COL>2 delegates

Shonto<COL>2229<COL>1 delegate

Oljato<COL>2161<COL>1 delegate

Kayenta/Chilchinbeto<COL>5574/1264<COL>3 delegates

Dennehotso<COL>1512<COL>1 delegate

Tonalea<COL>2347<COL>1 delegate

Hardrock/Pinon<COL>1149/2832<COL>2 delegates

Tachee-Blue Gap/Whippoorwill<COL>1355/1436<COL>2 delegates

Forest Lake/Black Mesa/Tsé Ch'izhí<COL>549/373/866<COL>1 delegate

Chinle<COL>7976<COL>4 delegates

Tselani-Cottonwood/Nazlini<COL>1307/1101<COL>1 delegate

Many Farms/Round Rock<COL>2496/1265<COL>2 delegates

Lukachukai/Tsaile-Wheatfields<COL>1896/1907<COL>2 delegates

Dilcon/Teesto<COL>2115/902<COL>2 delegates

Whitecone/Indian Wells<COL>1288/929<COL>1 delegate

Jeddito/Low Mountain/Steamboat<COL>1210/892/1533<COL>2 delegates

Ganado/Kinlichee<COL>2641/1331<COL>2 delegates

Klagetoh/Wide Ruins/Greasewood Springs/Cornfields<COL>996/1177/1358/811<COL>2 delegates

Houck/Nahat'ádziil/Lupton<COL>1461/1340/918<COL>2 delegates  
Oak Springs/St. Michaels<COL>594/5499<COL>3 delegates  
Fort Defiance<COL>5203<COL>3 delegates  
Sawmill/Red Lake/Crystal<COL>855/2295/760<COL>2 delegates  
Naschitti/Tohatchi<COL>1651/1925<COL>2 delegates  
Twin Lakes<COL>2187<COL>1 delegate  
Coyote Canyon/Mexican Springs<COL>896/1290<COL>1 delegate  
Aneth/Red Mesa/Mexican Water<COL>2165/1062/774<COL>2 delegates  
Rock Point<COL>1333<COL>1 delegate  
Tó {ikan<COL>1238<COL>1 delegate  
Beclabito/Gadíí'áhi/Tó K- 'í<COL>804/1050<COL>1 delegate  
Teecnospos<COL>1201<COL>1 delegate  
Red Valley/Cove<COL>1163/475<COL>1 delegate  
Shiprock<COL>7703<COL>3 delegates  
Tsé a[náozt'i'i'í<COL>1857<COL>1 delegate  
Tsé Daak'áán<COL>1280<COL>1 delegate  
San Juan/Nenahnezad/T'iistsoh Sikaad<COL>533/1082/235<COL>1 delegate  
Upper Fruitland<COL>2750<COL>1 delegate  
Toadlena-Two Grey Hills/Newcomb/Sheepsprings<COL>1037/636/802<COL>1 delegate  
Crownpoint/Nahodishgish<COL>2453/379<COL>1 delegate  
Standing Rock/Whiterock/Lake Valley Becenti<COL>617/245/215/489<COL>1 delegate  
Nageezi/Counselor/Ojo Encino<COL>884/923/670<COL>1 delegate  
Huerfano<COL>2172<COL>1 delegate  
Pueblo Pintado/Torreón/Whitehorse Lake<COL>412/1727/520<COL>2 delegates  
Rock Springs/Tsayatoh/Manuelito<COL>877/690/311<COL>1 delegate  
Red Rock<COL>1870<COL>1 delegate  
Chichiltah<COL>1607<COL>1 delegate

Churchrock/Bááháál9<COL>2618/949<COL>2 delegates

Iyanbito/Pinedale<COL>1000/1048<COL>1 delegate

Mariano Lake/Smith Lake<COL>846/1027<COL>1 delegate

Littlewater/Casamero Lake/Baca-Prewitt<COL>565/544/853<COL>1 delegate

Thoreau<COL>1309<COL>1 delegate

Ramah<COL>1503<COL>1 delegate

Alamo<COL>1927<COL>1 delegate

Tohajiilee<COL>1559<COL>1 delegate

B. Conflict between Navajo Nation and federal and state polling place

1. General Election—Where a conflict exists between the Navajo Nation and federal or state polling places, the Board shall designate an alternate polling place.

2. Other Elections—Polling places for other Navajo Nation elections shall be in the Chapter Houses pursuant to 11 N.N.C. § 10(A) or as designated by the Board.

**History**

CJA-08-09, January 29, 2009. Changed the name of Sanostee Chapter to Tsé a[náozt'i'i Chapter.

CAP-13-08, April 25, 2008. Changed the name of Rough Rock Chapter to Tsé Ch'izhí Chapter.

CJA-05-08, January 31, 2008. Changed the name of Kaibeto Chapter to K'ai'bii'tó Chapter.

CJA-04-08, January 31, 2008. Changed the name of Sweetwater Chapter to Tó {ikan Chapter.

CJY-19-07, July 19, 2007. Added the name Tó K- 'í to Gadíí'áhi Chapter to become Gadíí'áhi/Tó K- 'í Chapter.

CAP-15-07, April 20, 2007. Changed the name of Burnham Chapter to T'iistsoh Sikaad Chapter.

CAP-13-07, April 19, 2007. Changed the name of Breadsprings Chapter to Bááháál9 Chapter.

CAP-12-07, April 19, 2007. Changed the name of Inscription House Chapter to Ts'ah Bii' Kin Chapter.

CN-59-06, November 1, 2006. Changed the name of Hogback Chapter to Tsé Daak'áán Chapter.

CJN-50-02, June 5, 2002. The 2002 Navajo Nation Reapportionment Plan utilized 2000 census data compiled by the U.S. Census Bureau. In addition to this census, the 2002 Reapportionment Plan took into account the number of registered Navajo voters residing outside the Navajo Nation. In total, the Plan was based on an apportionment base figure of 171, 289.

CO-66-90, October 23, 1990, added Nahat'ádziil Chapter.

CAP-23-90, April 6, 1990.

#### **§ 11. Composition of School Board; Apportionment for School Board Elections**

A. A Local Community School Board shall consist of not less than three nor more than seven members based upon the current adopted apportionment plan.

B. On or before the first Monday of November 2003 and every four years thereafter, the Education Committee of the Navajo Nation Council shall set the size of each Local Community School Board and shall apportion the number of school board seats among the Chapter or Chapters represented in each Local Community School Board. This apportionment shall establish election precincts for each Local Community School Board containing approximately equal numbers of students attending the Local Community School at the time of the apportionment.

C. The apportionment plan shall be developed by the Education Committee with the opportunity for input provided to the Navajo Board of Election Supervisors, parents, local school boards, chapters, school board organizations such as agency school boards, and the Navajo Division of Diné Education, pursuant to 11 N.N.C. § 2(H). The Education Committee may receive input either in writing or through oral testimony.

D. The apportionment plan shall be based at a minimum on the number of students attending from one or more Chapters. Each Local Community School Board shall provide to the Education Committee and the Division of Diné Education current and accurate information regarding the number of students attending the Local Community School for use in development of the apportionment plan by October 2003 and every four years thereafter.

E. The Education Committee shall adopt the apportionment plan and provide the plan to the Navajo Board of Election Supervisors for use in school board elections.

F. A school board member shall be permitted to serve the entire remaining period of his or her duly elected term prior to application of an apportionment plan which would eliminate the school board position held by that school board member.

#### **History**

CJY-41-03, July 24, 2003.

CAP-23-90, April 6, 1990.

## **Cross References**

**Waiver.** By Resolution CO-41-07, October 17, 2007, the Navajo Nation Council waived 11 N.N.C. §§ 2(H), 11(B) and 22(A) for purposes of extending the deadline for Education Committee approval of an apportionment plan for local community school boards to December 31, 2007.

## **Annotations**

### **1. Consultation**

"The concept of consultation requires both a physical presence and an open mind. Because of the lack of discussion in an arena of equality and mutual respect, consultation did not occur." *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313, 318 (Nav. Sup. Ct. 1998).

"Navajo common law speaks to consultation as giving participants ample freedom to speak, be heard, and opportunity to present written comments. The Navajo doctrine of *k'e* underlies all transactions between and among Navajos, and it likewise frames our view of consultation under the Election Code. Consultation is far more than giving unilateral testimony under oath for a limited number of minutes. It must encompass complete discussion of Navajo values, concepts, and diversity of opinion in an atmosphere of *k'e* (including equality and respect), ultimately leading to a consensual solution." *Rough Rock Community School v. Navajo Nation*, 7 Nav. R. 313, 317-318 (Nav. Sup. Ct. 1998).

### **2. Judicial review**

" ... [S]ince the apportionment plan was invalid, the District Court had to do something when it was made aware that the Navajo Nation was attempting to conduct elections under a plan that we had declared invalid. In addition, a new event (passage of Navajo Nation Council Resolution No. CF-29-98) affecting the case arose. In light of these events, the District Court correctly ruled that it had the inherent authority to conduct a status review of the case and to grant relief based on the status of the case. That is part of the District Court's inherent power to implement adjudication." *Ramah Navajo Community School v. Navajo Nation*, No. SC-CV-17-99, slip op. at 4 (Nav. Sup. Ct. July 25, 2001).

### **3. Approval of plans**

"It is clear that the Navajo Nation Council has delegated the Education Committee as the appropriate body to finally approve all school board apportionment plans." *Rough Rock Community School Board, Inc. v. Navajo Nation*, 7 Nav. R. 168, 175 (Nav. Sup. Ct. 1995).

## **§ 12. Rules and Regulations**

A. Except for hearing rules of the Office of Hearings and Appeals, the Navajo Nation Board of Election Supervisors shall promulgate rules and regulations necessary and proper to carry out the purposes of the Election Code and shall publish and/or distribute rules and regulations for posting at public places pursuant to Subsection (E) below.

B. Rules and regulations to be considered by Board shall be consistent with the Election Code and other Navajo Nation laws.

C. Rules and regulations shall provide for efficient and consistent administration of Election Code and conduct of elections.

D. Format of rules; filing; distribution:

1. Rules and regulations shall be considered and approved by Board resolutions. Proposed rules and/or regulations shall be clearly stated.

2. Upon adoption copies shall be delivered to the following:

a. The Office of the Attorney General.

b. Office of Legislative Services for distribution to members of the Navajo Nation Council and posting.

c. The Chapter Support Services to be distributed to all Chapters for posting.

d. The President of the Navajo Nation.

E. The adopted rules and regulations shall be filed at the Election Administration Office and this office shall note the hour and date of filing.

F. The rules and regulations shall be available to the public during office hours and upon a payment of a fee.

G. The Election Administration Office shall prepare and publish a listing and index of all current rules and regulations. All rules repealed or rescinded shall be noted.

H. Except for the need to make rules and regulations at the polls on election day, this section shall apply to all rules and regulations developed and approved by the Board.

#### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 2 N.N.C. § 873(B) (6) and 11 N.N.C. §§ 321(A) (6) and 322.

#### **Annotations**

##### **1. Construction and application**

"The Board has power to promulgate rules to implement the Election Code." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340,

344 (Nav. Sup. Ct. 1998).

## **2. Rules**

See generally, *Begay v. Wero*, 4 Nav. R. 104 (Nav. Ct. App. 1983).

**§§ 13 to 20. [Reserved]**

### **Subchapter 2. Filing for Elections**

#### **§ 21. Candidacy application**

A. Candidates for general and chapter elections who meet the applicable qualifications set forth in 11 N.N.C. § 8 must file a candidacy application with the Election Administration. The candidacy application shall include a filing fee. A candidate shall file a candidate application for only one office unless that other office is that of a school board member.

B. The candidate application form shall be in the form specified by the Board and shall contain:

1. The name of candidate as it will appear on the official ballot;

2. A notarized, sworn statement by the candidate that (a) he or she is legally qualified to hold the office; (b) that he or she meets the qualifications set forth in 11 N.N.C. § 8; (c) that his or her candidate application is in the form and manner prescribed by law, and (d) that he or she may be removed as a candidate in the event his or her application contains a false statement;

3. Any convictions for felonies and misdemeanors pursuant to § 8 (A), (B), (C), and (D) within the last five years and the place, date, law violated and circumstances surrounding those convictions; and

4. The name and address of the financial agent of record for the candidate.

C. A candidate application shall be considered public record which shall be kept on file with the Election Administration and copies may be provided at a nominal fee to the public.

#### **History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

11 N.N.C. § 8(D)(4)(a), Council Delegates and School Board qualifications.

11 N.N.C. § 8(D)(4)(g) and (h), Criminal Convictions and School Board qualifications..

11 N.N.C. § 201, financial agents.

## **§ 22. Time of filing**

A. There shall be a 90-day filing period beginning 180 days prior to a primary election and ending 90 days thereafter. However, for those elective positions which lack a candidate after a primary election has been conducted, candidate applications shall be filed within the filing period set by the Navajo Board of Election Supervisors.

B. For special elections, candidate applications shall be filed pursuant to the special election provisions of this Title.

### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CJA-05-05, January 28, 2005.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

### **Cross References**

Filing extensions, see also 11 N.N.C. § 22.

**Waiver.** By Resolution CO-41-07, October 17, 2007, the Navajo Nation Council waived 11 N.N.C. §§ 2(H), 11(B) and 22(A) for purposes of extending the deadline for Education Committee approval of an apportionment plan for local community school boards to December 31, 2007.

## **§ 23. Review of Candidate Application; notice**

A. Within 30 days of receipt of a candidate application, the Election Administration shall review, verify and determine, on the face of the candidate application, the qualifications for candidacy. The Navajo Election Administration shall have the authority to determine ineligible any individual who does not meet the qualifications for the office sought.

B. If the Election Administration determines that an individual is not qualified for the position sought, it shall deny the application for candidacy as ineligible. Within 30 days of the submitted application, the Administration shall notify the applicant in writing of the reason for his or her ineligibility and the right to file an appeal to the Office of Hearings and Appeals pursuant to 11 N.N.C. § 341.

### **History**

**Note (2005).** For purposes of statutory consistency, at Subsection "B," the reference to *"the right to file an appeal to the Board pursuant to 11 N.N.C. § 321(B)"* was changed to *"the right to file an appeal with the Office of Hearings and Appeals pursuant to 11 N.N.C. § 341."* By resolution CJA-06-01, the

responsibility for conducting administrative hearings involving Election Code complaints was transferred to Office of Hearings and Appeals.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **§ 24. Challenges; appeals**

A. The Navajo Election Administration shall hold the candidate applications of all candidates it has certified as eligible for a period of 10 days during which sworn challenges may be filed with the Office of Hearings and Appeals by other applicants for the same position, whether or not such applicants are certified.

B. The form for challenges shall be in the size and style specified by the Office of Hearings and Appeals and shall state the reasons for the challenge.

C. Within five days of the date of filing, the Office of Hearings and Appeals shall review and determine whether or not the challenge meets the requirements of § 24 (B) and whether or not the challenge, if true, would affect the initial determination of eligibility of the candidate challenged.

1.<sup>1</sup> If the challenge, on its face will not change the eligibility of the candidate challenged, the challenge shall be dismissed.

D. If the Office of Hearings and Appeals determines that the challenge meets the requirements of § 24(B) and (C), it shall hold a hearing not less than three nor more than 10 days after its determination that the challenge is valid on its face. The Election Administration shall forthwith mail to the candidate, the party initiating the challenge, and others the Office of Hearings and Appeals may require for a hearing, a copy of the challenge along with notice of time and place of hearing. The notice shall also contain a warning to the candidate that failure to appear at the hearing may constitute just cause for disqualification.

E. Hearings shall be conducted pursuant to such rule and regulations promulgated by the Office of Hearings and Appeals.

F. The party initiating the challenge shall have the burden of proving the allegations contained in the challenge by clear and convincing evidence.

G. The decision of the Office of Hearings and Appeals shall be issued to the party initiating the challenge and the candidate within 10 days of the hearing. Appeal may be made by either party to the Navajo Nation Supreme Court within 10 days of the date of decision. The Supreme Court shall review the appeal no later than 15 days from the date of filing. Review by the Supreme Court shall be limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record.

#### **History**

CJA-06-01, January 24, 2001.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

### **Annotations**

#### **1. Standard of review**

"The Court's standard of review in OHA's decision is set by statute. Review is limited to 'whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record.'" *In the Matter of the Appeal of Vern Lee*, No. SC-CV-32-06, slip op. at 2 (Nav. Sup. Ct. August 11, 2006).

#### **§ 25. Unopposed candidates; candidate withdrawal**

A. In the event only one candidate files for a Navajo Nation elective office, he or she shall be placed on the ballot as an unopposed candidate.

B. A candidate who withdraws from the election at any time prior to the printing of the ballots, shall have his or her name removed from the ballot. Any votes cast for the candidate who has withdrawn shall not be tallied.

C. A candidate who withdraws from the election after the ballots have already been printed, but before the election occurs, shall have his or her name remain on the ballot, but the Navajo Election Administration shall inform voters at the polling site that the candidate has withdrawn. Any votes cast for the candidate who has withdrawn shall not be tallied.

### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **§ 26. Filing Fee**

A. Candidates shall remit a filing fee pursuant to the schedule set forth below at the time they file their candidate application:

President.....	\$1,500.00
Vice-President.....	\$1,500.00
Navajo Nation Council Delegate.....	..\$500.00
Chapter Officers.....	..\$200.00
Other Elected Officials.....	..\$200.00
School Board Members.....	..\$200.00

Kayenta Township Commission.....\$200.00  
Navajo Board of Election Supervisors.....\$200.00  
Board of Education (elected positions.....\$200.00

B. Filing fees shall be non-refundable.

**History**

BOESD-076-06, December 7, 2006. Navajo Board of Election Supervisors resolution certifying referendum election results increasing election filing fees by amendment to 11 N.N.C. § 26(A).

CAP-22-06, April 20, 2006. Proposed increase in election filing fees referred for referendum vote.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

**§ 27. Ballot picture**

A. On date of filing, candidates must present themselves to the Election Administration for the purpose of having a ballot picture taken.

B. Only the photo taken by the Election Administration shall be used on the ballot.

**History**

CAP-23-90, April 6, 1990.

**Cross Reference**

See also, 11 N.N.C. § 4(A).

**§ 28. Filing; extensions**

If no candidate has filed within the time required for filing under this Code, the Board may extend the time for filing for such period as it deems appropriate.

**History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

§§ 29 to 40. [Reserved]

**Subchapter 3. Primary Elections**

**§ 41. Primary elections; selection of candidates**

A. The primary election ballots for each precinct shall list the candidates for the offices of the President of the Navajo Nation, Navajo Nation Council Delegates, Chapter Offices, and Other Elected Offices and School Board members.

B. If a primary election results in a tie vote among two or more candidates with the highest votes, all candidates with the tie votes shall be placed on the general election ballot.

C. The primary candidates receiving the highest and next highest number of votes for the Office of President, Chapter Officers and other Elected Officers shall be candidates for those offices in the general election.

D. In each election precinct represented in the Council by one delegate, the two candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election. In each election precinct represented in the Council by two Delegates, the four candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election. In each election precinct represented in the Council by three Delegates, the six candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election. In each election precinct represented in the Council by four Delegates, the eight candidates receiving the highest number of votes in the primary election shall be candidates for Delegate in the general election.

E. In each election precinct represented on a school board by one member, the two candidates receiving the highest number of votes in the primary election shall be candidates for the one school board member position in the general election. In each election precinct represented on a school board by two members, the four candidates receiving the highest number of votes in the primary election shall be candidates for the two school board member positions in the general election. In each election precinct represented on a school board by three members, the six candidates receiving the highest number of votes in the primary election shall be candidates for the three school board member positions in the general election, and so forth.

F. The Board shall determine by regulations the number of votes a voter may cast for each of the above offices and positions in the primary and general, or chapter elections.

**History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

**§ 42. No primary in special election; write-in candidacies not allowed**

A. There shall be no primary election in a special election.

B. All candidates determined eligible by the Navajo Election Administration following review of candidate applications shall be placed on the special election ballot.

C. Notwithstanding authorization in other elections, write-in candidacies shall not be allowed in special elections.

D. The candidate receiving the highest number of votes shall be certified pursuant to provisions herein.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

#### **§ 43. Selection of candidates for Office of Vice-President**

A. Candidates for the Office of President chosen in the primary election shall within five days after the primary election each name a running mate for the Office of Vice-President. The names of the candidates for President together with each candidate's selection of a candidate for Vice-President shall be placed on the general election ballot and be voted upon as a single ticket.

B. In the event of the death, resignation, removal or disqualification of the newly-elected President occurring after the General Election and before inauguration, the newly-elected Vice-President shall be deemed the President and be given the oath as such on the day set forth in 11 N.N.C. § 6. The new President shall then appoint a Vice-President pursuant to 11 N.N.C. § 142(A).

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CO-64-90, October 19, 1990, added Subsection (B).

CAP-23-90, April 6, 1990.

#### **§ 44. Death, resignation or disqualification of candidate after primary election**

In the event of death, resignation or disqualification of any candidate, who by virtue of the primary election was placed on the general election ballot, except the candidates for the Office of the Vice-President of the Navajo Nation, the candidate who received the next highest votes in the primary election preceding the general election shall automatically be placed as the new candidate on the official ballot in the general election following said primary election.

#### **History**

CO-64-90, October 19, 1990.

#### **Cross References**

See also, 11 N.N.C. § 208.

**§ 45. Death, resignation, removal/disqualification after general election**

In the event of the death, resignation, removal or disqualification after the general election of an elected person, a vacancy shall be declared.

**History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CJA-06-01, January 24, 2001.

CO-64-90, October 19, 1990.

**§§ 46 to 60. [Reserved]**

**Subchapter 4. [Reserved]**

**§§ 61 to 80. [Reserved]**

**Subchapter 5. Conduct of Elections**

**§ 81. Polling place supervision; appeal by person not allowed to vote**

A. The day before the date of an election, the Chairman of the Board shall call in all chief poll judges for necessary instructions, swearing in, the dissemination of ballots and ballot boxes and/or voting machines to be taken to the polling places for each community in the election precinct.

B. Poll judges shall guard the polls, maintain order, and instruct voters in the techniques of balloting. Poll clerks shall enter each voter in the poll books and shall issue ballots.

C. One poll judge shall be designated by the Board as the chief poll judge for each polling place, and it shall be his or her duty and responsibility to keep custody of and account for all ballots, the ballot box, and the poll books. He or she shall supervise and have supervisory authority over the other judges and poll clerks in guarding the polls, maintaining order and instructing voters.

D. A voter shall vote at the polling place where he or she is registered to vote.

E. Any person who is not allowed to vote may appeal to the Director, Navajo Election Administration immediately.

F. A Navajo Nation police officer shall be present at each polling place during voting hours.

G. Upon an execution of an affidavit for assistance pursuant to § 128(B), a voter may choose any person to assist him or her in marking the ballot. The

assistant shall not attempt to influence the voter in favor of any candidate.

#### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

Absentee Voting, *see* 11 N.N.C. § 121 *et seq.*

*See also*, 11 N.N.C. § 328.

#### **§ 82. Voting hours**

Voting shall begin at 6:00 a.m. and end at 7:00 p.m. All voters present at the polling place and in line to vote at 7:00 p.m. will be allowed to vote.

#### **History**

CO-56-04, October 19, 2004.

CAP-23-90, April 6, 1990.

#### **§ 83. Counting of votes**

At the close of the election, the poll judges at each polling place shall tabulate the results of the balloting, seal and lock the ballots, poll books and keys in the ballot boxes, and transmit the results of the balloting to the Election Administration at Window Rock by telephone or radio communication. Every candidate whose name appears on the ballot in the election may have one poll watcher present at all times during the balloting and during the counting of the votes.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 84. Canvass of votes; recount**

A. Sealed ballot boxes containing all of the ballots cast in the election, all unused or spoiled ballots, data packs, keys, a written statement of the election results, on a form provided by the Board certified by the poll judges at each polling place, and the list of registered voters shall be forwarded to the Election Administration at Window Rock by each chief poll judge.

B. The Board shall canvass the written statements of election results from each polling place and shall then total the election results.

C. No recount of the ballots of any polling place shall be made unless a candidate whose name appears on the ballot at any such polling place objects. Within 10 days after the election, the candidate must pay to the Navajo Nation

the sum of fifty dollars (\$50.00) for the cost of recounting the election results for the one position in which the candidate was listed on the ballot. The Board may, on its own initiative, conduct a recount of any polling place in which it believes that there may have been substantial irregularity in the voting or counting of the ballots. The Board shall use the chief poll judge to assist in canvassing and recounting ballots.

#### **History**

**Note (2005).** At Subsection (A), for grammatical purposes, "casted" changed to "cast."

CAP-23-90, April 6, 1990.

#### **Annotations**

##### **1. Recounts**

See generally, *Leslie Tex Begay v. Navajo Board of Election Supervisors*, 2 Nav. R. 120 (Nav. Ct. App. 1979).

#### **§ 85. Certification of election; vote required for election**

Not less than 10 days following each election, and at a regular meeting, the Board shall certify the names of all candidates elected in such election.

#### **History**

CJA-06-01, January 24, 2001. "[A]nd at a regular meeting" was inserted after the word "election."

CAP-23-90, April 6, 1990.

#### **Cross Reference**

See also, 11 N.N.C. § 203(A).

#### **§ 86. Appeal of disputed elections**

Disputed elections by any candidate may be appealed to the Office of Hearings and Appeals pursuant to 11 N.N.C. § 341.

#### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

11 N.N.C. § 341.

#### **Annotations**

For annotations on disputes, see annotations noted under 11 N.N.C. § 341.

### **1. "Standing" to File Grievance Limited to Candidates**

"In *Fulton v. Redhouse* we held that dissatisfied voters lack standing to bring suit under the election code, because the law limits claims to aggrieved citizens." *Judy, et al. v. White. et al.*, No. SC-CV-35-02, slip op. at 8 (Nav. Sup. Ct. August 2, 2004).

Non-candidates. It [is] clear that a voter does not have standing to complain of a lack of a candidate's qualification. *Tommy C. Begay v. Navajo Board of Election Supervisors & Navajo Election Administration*, 7 Nav. R. 139, 141 (Nav. Sup. Ct. 1995), citing *Fulton*.

"The statute, [...], limits the right to bring challenges to an election that has taken place to aggrieved candidates, and thus excludes an individual voter's right to challenge election results." *Fulton v. Redhouse*, 6 Nav. R. 333, 334 (Nav. Sup. Ct. 1991).

"... [T]he Navajo Nation Council specifically restricted the right to challenge election results to candidates who can show aggrievement, injury or a denial of clear rights." *Fulton v. Redhouse*, 6 Nav. R. 333, 334 (Nav. Sup. Ct. 1991).

The Navajo Nation Council specifically restricted the right to challenge election results to candidates who can show aggrievement, injury, or a denial of clear rights. *Fulton v. Redhouse & Navajo Board of Election Supervisors*, 6 Nav. R. 333, 334 (Nav. Sup. Ct. 1991).

### **2. Mandatory Procedural Requirements in Election Disputes**

Procedure Defects. See *Haskie v. Navajo Board of Election Supervisors*, 6 Nav. R. 336 (Nav. Sup. Ct. 1991).

The procedures established for resolution of election contests and disputes were not intended to be discretionary with the Board. The Tribal Council, for reasons of due process and speeding resolutions of election contests and disputes, intended that these procedures be followed. *Mustach v. Navajo Board of Election Supervisors*, 5 Nav. R. 115, 118 (Nav. Sup. Ct. 1987).

### **3. Time Computation**

See generally, *In The Matter of the Removal of Karl Katenay*, 6 Nav. R. 81. (Nav. Sup. Ct. 1989).

### **4. Standard of Review in Election Disputes**

"After the Board [now the Office of Hearings and Appeals] has held a hearing, it must use a two-step test to reach a decision. The first step is whether the aggrieved party proved the allegations in his or her statement of grievance with clear and convincing evidence. The second step is whether the aggrieved party has overcome the presumption of a valid and proper election, as delineated in the *Johnson* principles. Irregularities that do not affect the

election results or impeach the fairness will not succeed in overcoming the presumption." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76-77 (Nav. Sup. Ct. 1993).

"1. Election results are presumed to be regular and proper; 2. Irregularities or misconduct in an election which does not tend to affect the results or impeach the fairness of the result will not be considered; 3. Elections will not be set aside unless the facts definitely show such fraud and that there was no fair election; 4. After the election, election provisions are to be seen as directions unless the violations obstructed a free and intelligent vote, affected an essential element of a valid election or an omission of a direction voids the election." *Johnson v. June*, 4 Nav. R. 79, 82 (Nav. Ct. App. 1983). See also, *Navajo Election Commission v. Lancer*, 5 Nav. R. 59 (Nav. Ct. App. 1985).

#### **5. Court Review of Board Decisions Summarily Dismissing Complaint**

"This Court cannot determine whether the various claims of the appellant are supported by the facts; nor can it decide whether the recall election was irregular and should be invalidated, as the appellants request. Rather, the sole question before this Court is whether the Board properly determined that the appellants' Statements of Grievance, on their faces, were insufficient for further proceedings." *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 387 (Nav. Sup. Ct. 1991).

#### **6. Complaint Review by the Board for "Sufficiency"**

"The words 'on its face' indicate that the preliminary review for sufficiency must be confined to the allegations made by a grievant on the Statement. If the Board is unable, upon such a review, to determine that those allegations necessarily fall short of providing a basis for relief, a summary dismissal of the Statement is inappropriate. That is, if the Board must look to evidence beyond what is proffered by a grievant on the Statement to determine that his or her Statement is insufficient, it clearly does not meet the criteria for dismissal as being a Statement 'insufficient on its face.'" *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 389 (Nav. Sup. Ct. 1991).

Similarities with Motion to Dismiss. See *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 388-389 (Nav. Sup. Ct. 1991).

"Not only is there no authorization in the Election Code for an investigation before a hearing on a grievance, but the 1990 amendments to the Election Code eliminated the authorization for an independent investigation at any point in the grievance review process." *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 390 (Nav. Sup. Ct. 1991).

"A Statement [of grievance] will be sufficient on its face if it specifies which election law was violated, and if it contains enough facts to raise the issue that the election results were not regular and proper. These facts, as they appear in the Statement, must support the allegation that an election law was violated. Finally, the Statement taken as a whole, which shall include all attached documents, must raise a possibility that the election results will be impeached." *Brown v. Navajo Board of Election Supervisors*, 5 Nav. R. 139, 140

(Nav. Sup. Ct. 1987). See also, *Williams v. Navajo Election Commission*, 5 Nav. R. 25, 28 (Nav. Ct. App. 1985).

"The Board has considerable discretion in determining whether a statement is sufficient on its face. Absent a clear abuse of that discretion this Court will not disturb the Board's decision." *Brown v. Navajo Board of Election Supervisors*, 5 Nav. R. 139 (Nav. Sup. Ct. 1987), citing *Johnson v. June*, 79 (Nav. Ct. App. 1983).

"The Commission determines whether the Statement of Grievance sufficiently states a violation of the election law. This means that the grievance must specify what election law was violated. It must also contain sufficient facts that if proven to be true would indeed constitute a violation of the law. Further, under *Johnson* these facts must tend to rebut the presumption that the election was fair and show that but for the violation of the election law the result would have been different." *Williams v. Navajo Election Commission and Board of Election Supervisors*, 5 Nav. R. 25, 28 (Nav. Ct. App. 1985).

#### **7. Frivolous Appeals**

"An appeal is 'frivolous' when it is not filed within the time permitted for an appeal; when the appeal is not perfected by the filing of the record or briefs; or when an appeal clearly lacks probable cause. An appeal lacks 'probable cause' when simple legal research discloses that points of law for the appeal are settled under our law or when a party does not have the right to take the appeal." *Tommy C. Begay v. Navajo Board of Election Supervisors & Navajo Election Administration*, 7 Nav. R. 139, 140 (Nav. Sup. Ct. 1995).

#### **8. Recounts**

"This Court does not believe that a request for a recount is a dispute contemplated by 11 N.T.C. § 51 [former provision on election disputes]." *Leslie Tex Begay v. Navajo Board of Election Supervisors*, 2 Nav. R. 120, 123 (Nav. Ct. App. 1979).

#### **§ 87. Tie votes in a general election; determination by lot**

In the event of a tie vote among two or more candidates in a general or chapter election, upon a recount of votes, the Board shall, in the presence of the candidates, declare by random lot which candidate shall be declared elected.

#### **History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

§§ 88 to 100. [Reserved]

#### **Subchapter 6. [Reserved]**

§§ 101 to 120. [Reserved]

## **Subchapter 7. Absentee Voting**

### **§ 121. Request for application for absentee ballot**

A. Requests for applications for absentee ballots may be made with the Navajo Election Administration.

B. The purpose of absentee voting is to encourage every eligible voter to exercise his or her voting right.

#### **History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 11 N.N.C. § 81(G), and applicable rules of the Navajo Board of Election Supervisors.

### **§ 122. Application; time of filing**

A. The form of application for an absentee ballot shall be approved by the Navajo Board of Election Supervisors. This form shall contain and require the name and signature of the applicant, his or her chapter registration, census or social security number and any other information deemed necessary by the Board.

B. Pursuant to rules and regulations of the Board, the application for an absentee ballot shall be witnessed.

C. Applications for absentee ballots made by mail must be physically delivered to the Election Administration not less than 15 days before the election.

D. Where mailed applications are accepted, absentee ballots shall be mailed by Election Administration staff no less than 10 days before the election.

E. Where an applicant delivers an application in person and the application is accepted, delivery of the absentee ballot may be immediate and cast in person up to the Friday before the election.

F. Except as otherwise provided herein, the review and processing of mailed applications for absentee ballot shall be done in accordance with rules and regulations of the Navajo Board of Election Supervisors.

#### **History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

Regarding Subsection (C) above, *see also*, 11 N.N.C. § 124(E).

#### **§ 123. Delivery in person or mailing of ballot**

A. Unless it is evident that applicant is not registered, the Election Administration shall immediately cause the following papers to be delivered in person or mailed to such applicant:

1. A ballot for the proposed absentee voter's chapter;
2. An envelope labeled "Official Ballot Envelope" for the ballot to be put into after the voter has marked it;
3. An envelope with the address of the Board printed on its front, and the envelope containing the ballot shall be placed and mailed or delivered in person to the Office of the Election Administration.

B. No absentee ballot shall be delivered or mailed to any person other than the applicant who is an eligible qualified voter. Each qualified applicant is allowed a ballot. Once an absentee ballot is sent out to applicants, applicant shall not be allowed to vote at his or her polling place. All absentee ballots shall be returned to the Election Administration.

#### **History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

#### **§ 124. Marking ballot; envelope**

A. A voter voting by absentee ballot in person shall mark the absentee ballot in a special voting area designated by the Election Administration, and shall fold and seal it in the "Official Ballot Envelope." No person shall watch how the voter marks his or her ballot, unless the voter is marking his or her ballot pursuant to § 128. No person shall attempt to influence the voter in favor of any candidate. The voter shall then place the sealed envelope containing the ballot into the ballot box.

B. Where a voter has received a ballot by mail, a witness shall assure that the person marking the ballot is the eligible qualified voter to whom the absentee ballot is addressed. The witness shall further assure that the voter marked his or her ballot, folded it up and sealed it in the "Official Ballot Envelope." The witness shall not watch how the voter marks his or her ballot, unless the voter requests assistance pursuant to § 128. The witness and/or assistant shall not attempt to influence the voter in favor of any candidate. The voter shall hand the sealed "Official Ballot Envelope" containing the ballot to the witness along with the large envelope.

C. The "Official Ballot Envelope" shall state on its outer side the

chapter of the voter, the Agency, and a statement of the witness that the envelope contains an absentee ballot for a certain polling place and that the vote was cast before such witness on a specified day by the voter requesting and receiving the absentee ballot.

D. The witness before whom the absentee voter voted shall sign his or her name on the envelope. He or she shall then place the envelope in the large envelope and shall seal the same and hand it back to the voter to deliver to the Election Administration. Absentee ballots mailed to the Election Administration Office shall be counted if received by the Friday before the election date at the Election office.

E. Absentee ballots may be cast in person beginning 30 days before election up to the Friday before election date during regular hours at 8 a.m. to 5 p.m. of each business day at any Election Administration Office, or during other hours and days designated by the Board.

F. Subject to approval by the Board, the Election Administration Office may designate polling places, within or outside the Navajo Nation, for absentee voting as a convenience to voters.

G. During absentee ballot voting, it shall be unlawful for candidates or anyone to solicit votes, display or otherwise make accessible any posters, signs, literature, or other forms of campaign whatsoever.

#### **History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

**Note (2005).** At Subsection (B) above, the term "*marked*" changed to "*marks*" for grammatical purposes and consistency.

#### **§ 125. Duty of Election Administration on receipt of official mailing envelopes**

A. Upon receiving an official mailing envelope containing a sealed absentee ballot, the Election Administration shall ensure that the name of the voter, as provided on the outer envelope, is logged as accepted in the absentee ballot registry. If the voter's name appears in the absentee ballot registry as accepted, the Election Administration staff shall immediately deposit the sealed envelope in the designated ballot box. If the registry shows that the application was rejected, the ballot shall be invalidated.

B. The Election Administration shall accept completed official mailing envelopes until 5:00 p.m. on the Friday before the Election day. Any completed official mailing envelope received after that time shall not be honored and shall be invalidated by the Navajo Election Administration.

#### **History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

**§ 126. Absentee voter may not vote in person in his or her own precinct**

Any person who has voted by an absentee ballot shall not be permitted to vote in person in the election for which he or she has cast an absentee ballot.

**History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

**§ 127. Counting absentee ballots**

Poll officials shall open ballot envelopes and tabulate the absentee ballots with the rest of the ballots cast.

**History**

CAP-15-04, April 22, 2004.

CAP-23-90, April 6, 1990.

**§ 128. Assistance to voter**

A. A voter may choose another to assist him or her in marking the ballot upon execution of an affidavit for assistance.

B. The affidavit shall state that the voter seeking assistance is:

1. blind; or
2. physically disabled; or
3. unable to read or write.

**History**

CAP-23-90, April 6, 1990.

**Cross Reference**

*See also*, 11 N.N.C. § 181(G).

**§§ 129 to 139. [Reserved]**

**Subchapter 8. Vacancies**

**§ 140. Vacancies**

A. Subject to provisions of this Section, the Navajo Election Administration is authorized to declare vacancies for elective positions.

B. In the event of the removal or disqualification of an elected official

pursuant to Navajo Nation law or the automatic forfeiture of office by an elected official, pursuant to the *Ethics in Government Law*, the Navajo Election Administration is authorized to declare a vacancy upon receipt of a duly adopted legislation by the Navajo Nation Council or the Ethics and Rules Committee, respectively.

C. In the event of the recall of an elected official, the Navajo Election Administration is authorized to declare a vacancy upon the final certification of the recall petition.

D. In the event of the death of an elected official, the Navajo Election Administration is authorized to declare a vacancy. The Election Administration shall be authorized to obtain a death certificate from an appropriate entity and declare an official vacancy, if deemed necessary.

1. Determination of death may be made upon any of the following:

a. When a death of an elected official is not genuinely disputed in the community he or she represented and that such death is generally known within the community; or,

b. A copy of a death certificate obtained by the Navajo Election Administration; or,

c. A public obituary notice; or,

d. Other reliable and verifiable source of information.

2. Vacancy declarations in the event of death of an elected official shall not be unreasonably withheld.

3. The Navajo Board of Election Supervisors is authorized to enact rules governing vacancy declarations in the event of death.

E. All elected officials and School Board members voluntarily resigning shall submit a notice of resignation in writing to the Navajo Election Administration. Upon receipt of such notice, the resignation shall be effective and the Navajo Election Administration shall be authorized to declare a vacancy.

F. In the event of removal, death, disqualification or resignation of an individual prior to his or her oath of office for a position he or she was elected to, a vacancy shall be declared for such position.

1. If the elected official whose position becomes vacant pursuant to Section 140(F) above was an unopposed candidate, a vacancy shall be declared and the position shall be filled by appointment pursuant to applicable provisions for the particular position.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

**Note (2008).** This Section on "Vacancies" was moved to § 140 from its original

codification at § 141.

CAP-30-05, April 22, 2005.

**Note.** For purposes of statutory format, the previous reference to "Section 140(E) above" at § 140(F)(1) was corrected to refer to "Section 140(F) above."

CJA-06-01, January 24, 2001.

**§ 141. Vacancy in the Office of the Navajo Nation President/Vice President; succession**

A. Should the Office of the Navajo Nation President be declared vacant, the Vice President shall assume the position of President regardless of his or her status as an elected or appointed Vice President. The new successor President shall appoint a new Vice President within 30 days.

B. Should the Office of the Navajo Nation Vice President be declared vacant, the President shall, no later than 30 days after the date of vacancy appoint a new Vice President. Within 10 days of appointment, the Navajo Election Administration shall review the qualifications and certify the new Vice President provided he or she is qualified.

C. If both Navajo Nation President and Vice President positions become vacant simultaneously, resulting in the absence of a Vice President to succeed the position of President, a special election shall be conducted to fill the vacancies whether such vacancies occur within the first or second half of the terms of office. However, if a Navajo Nation General Election is scheduled within 90 days of vacancies being declared, the Speaker of the Navajo Nation Council shall serve as Navajo Nation President and shall complete such term of office. Service by the Speaker as President as provided herein shall not create a vacancy in the Office of the Speaker.

**History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

**Note (2008).** This Section on "Vacancy in the Office of the Navajo Nation President/Vice President; succession" was moved to § 141 from its original codification at § 142.

**Cross Reference**

11 N.N.C. §§ 45, 161 and 208, vacancies generally.

3 N.N.C. § 873, District Grazing Committee.

11 N.N.C. § 241 *et seq.*, recall.

**§ 142. Forfeiture of office of Navajo local community school board members**

A. Navajo local community school board members who fail, without just cause, to attend three consecutive school board meetings, regardless of whether such meetings are regular or special meetings, shall be deemed to have

abandoned their office and such office shall be automatically forfeited, by operation of law.

B. A notarized document certifying the failure of a Navajo local community school board member to attend three consecutive school board meetings shall be filed with the Navajo Election Administration. This written document shall be signed before a notary public by any other member of the same Navajo local community school board, and shall be accompanied by copies of the written notices of the Navajo local community school board meetings not attended. The Navajo Election Administration shall send copies of these documents by first class mail to the Navajo local community school board against whom the forfeiture is imposed along with a notice of the forfeiture, and notice of the right of the Navajo local community school board member to file an election grievance relative to the forfeiture.

C. Upon the filing of the documents referenced in subsection (B), the Navajo Election Administration shall immediately declare a vacancy in the forfeited office of the Navajo local community school board.

D. The vacancy in the office of the Navajo local community school board created by the automatic forfeiture shall be filled in the manner set forth within the Navajo Election Code.

CO-39-07, October 17, 2007. Navajo Nation Local Community School Board Act of 2007.

**Note.** Previous § 142, entitled, "Vacancy in the Office of the Navajo Nation President/Vice President; succession" was moved to 11 N.N.C. § 141, above.

### **Subchapter 9. Special Elections**

*Former Subchapter 9, relating to Appointments and consisting of §§ 161 to 163, was renumbered as Subchapter 10 by CS-55-05, September 2, 2005.*

#### **§ 143. Special elections for vacancies during first half of term**

Whenever a vacancy is declared for an elected office during the first half of a term of office, with the exception of a vacancy involving the Office of the Navajo Nation President or the Navajo Nation Vice President, the remaining term of the vacant office shall be filled pursuant to special election provisions of this Code.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

#### **§ 144. Temporary appointments pending special elections**

A. Whenever there is a vacancy in a Council Delegate position during the

first half of the term of office, at the request of the affected Chapter or Chapters within a precinct, the Speaker of the Navajo Nation Council may select and appoint an interim Delegate from the precinct until the vacancy is filled by special election and the new Delegate takes office. Prior to appointment by the Speaker, the qualifications of the individual recommended shall be reviewed by the Navajo Election Administration and the individual shall be certified only if he or she is qualified.

B. In the event of vacancies and a special election called for the Navajo Nation President and Vice President, the Speaker of the Navajo Nation Council shall serve as Interim President of the Navajo Nation until the vacancies are filled by such election and the new President and Vice President take office. Service by the Speaker as the Interim President shall not create a vacancy in the Office of the Speaker.

### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

### **§ 145. Conduct of special elections**

Special elections shall be conducted in the same manner as other elections except as follows:

A. There shall be a 14-day filing period upon a declaration of vacancy.

B. Candidate applications for the Offices of the Navajo Nation President and Vice President shall be filed at the same time.

C. Upon the expiration of a filing period, the Navajo Election Administration shall, within five days, review applications filed and determine whether applicants should be certified as eligible for candidacy. An applicant disqualified or otherwise deemed ineligible for office may file a grievance pursuant to 11 N.N.C. § 341.

D. Challenge provisions of 11 N.N.C. § 24 shall apply, except that such challenges, if any, shall be filed within five days of certification of a candidate.

E. In the event of a challenge or a grievance, a special election date shall not be set until after the challenge or grievance is addressed and resolved in accordance with applicable provisions of the Election Code. Once applicable administrative and judicial remedies of the Election Code have been exhausted, the special election, upon public notice, shall be conducted within 60 days thereafter.

F. If there is no challenge or grievance, a special election, upon public notice, shall be conducted within 60 days of the conclusion of the challenge or grievance period.

G. The Navajo Board of Election Supervisors shall adopt rules and regulations on the selection of poll clerks and poll judges for the conduct of special elections.

## **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

**§§ 146 to 160. [Reserved]**

### **Subchapter 10. Appointments**

*Renumbered from Subchapter 9 by CS-55-05, September 2, 2005.*

#### **§ 161. Appointments**

A. With the exception of a vacancy resulting from recall or involving the President or Vice President, and subject to certification by the Navajo Election Administration, when a vacancy occurs during the second half of an elective term of office, the remaining term shall be filled by appointment as follows:

1. Whenever there is a vacancy in a Council Delegate position, the Speaker of the Navajo Nation Council shall select and appoint a Delegate from the community to complete the remaining term of office. The selection shall be made from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for Council Delegate, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Speaker in writing of whether the recommended person meets the qualifications for Council Delegate. The Speaker shall review the candidates for appointment and shall make his or her determination out of those qualified persons recommended. The appointed Council Delegate shall complete the unexpired term.

2. Those vacancies in Chapter Officer positions which have been declared vacant by the Navajo Election Administration, as distinguished from those one time vacancies contemplated by 26 N.N.C. § 1003, shall be filled by appointment by the affected chapter, in the form of a duly adopted chapter resolution. The chapter resolution shall include reference to all those individuals nominated for appointment, in addition to the individual formally recommended. Officials appointed by the Chapter shall complete the unexpired term.

3. Those vacancies in Grazing Committee positions which have been declared vacant by the Navajo Election Administration shall be filled by appointment by the affected chapter, in the form of a duly adopted chapter resolution. The chapter resolution shall include reference to all those individuals nominated for appointment, in addition to the individual formally recommended. Officials appointed by the Chapter shall complete the unexpired term.

4. Those vacancies in School Board member positions which have been declared vacant by the Navajo Election Administration shall be filled by appointment in one of the following ways:

a. By majority vote of the School Board. The selection shall be made by the existing quorum of the school board from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for school board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the school board in writing of whether the recommended person meets the qualifications for school board membership. The School Board shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed school board member shall complete the unexpired term.

b. By the Navajo Board of Election Supervisors. In the event that no quorum of the school board is elected in the chapter election, or if the number of vacancies occurring for any reason results in no quorum of the school board, then the Navajo Board of Election Supervisors shall make the selection from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for school board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter

and the Navajo Board of Election Supervisors in writing of whether the recommended person meets the qualifications for school board membership. The Navajo Board of Election Supervisors shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed school board member shall complete the unexpired term.

5. Those vacancies in Land Board positions which have been declared vacant by the Navajo Election Administration shall be filled by appointment in one of the following ways:

a. By majority vote of the Land Board. The selection shall be made by the existing quorum of the Land Board from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for Land Board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Land Board in writing of whether the recommended person meets the qualifications for Land Board membership. The Land Board shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed Land Board member shall complete the unexpired term.

b. By the Navajo Board of Election Supervisors. In the event that no quorum of the Land Board is elected in the chapter election, or if the number of vacancies occurring for any reason results in no quorum of the Land Board, then the Navajo Board of Election Supervisors shall make the selection from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for Land Board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Navajo Board of Election Supervisors in writing of whether the

recommended person meets the qualifications for Land Board membership. The Navajo Board of Election Supervisors shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed Land Board member shall complete the unexpired term.

6. Those vacancies in Kayenta Township Commission positions which have been declared vacant by the Navajo Election Administration shall be filled by appointment in one of the following ways:

a. By majority vote of the Commission. The selection shall be made by the existing quorum of the Kayenta Commission from recommendations by Kayenta Chapter which shall recommend three candidates for appointment, in the form of a duly adopted chapter resolution. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for Commission membership. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Commission in writing of whether the recommended person meets the qualifications for Commission membership. The Commission shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed official shall meet all the qualifications of the position vacated, including residential requirements, and he or she shall complete the unexpired term.

b. By the Navajo Board of Election Supervisors. In the event that no quorum of the Commission is elected in an election, or if the number of vacancies occurring for any reason results in no quorum of the Commission, then the Navajo Board of Election Supervisors shall make the selection from recommendations of the Kayenta chapter, in the form of a duly adopted chapter resolution. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for Commission membership. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Navajo Board of Election Supervisors in writing of whether the recommended person meets the qualifications for Commission membership. The Navajo Board of Election Supervisors shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed Commission member shall complete the unexpired term.

7. Those Farm Board member positions which have been declared vacant by the Navajo Election Administration shall be filled by appointment in one of the following ways:

a. By majority vote of the Farm Board. The selection shall be made by the existing quorum of the farm board from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided proper posting is made of all vacated positions at all affected chapters and; that if no duly adopted chapter resolution is

received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for farm board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the farm board in writing of whether the recommended person meets the qualifications for farm board membership. The Farm Board shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed Farm Board member shall complete the unexpired term.

b. By the Navajo Board of Election Supervisors. In the event that no quorum of the farm board is elected in the chapter election, or if the number of vacancies occurring for any reason results in no quorum of the farm board, then the Navajo Board of Election Supervisors shall make the selection from recommendations by the chapter(s) affected, in the form of a duly adopted chapter resolution. Provided; that if no duly adopted chapter resolution is received from any affected chapter within 45 days of the declaration of the vacancy, only those recommendations made by a duly adopted chapter resolution need be considered. Those affected chapters that have not made a recommendation by a duly adopted chapter resolution shall be deemed to have waived their opportunity to make a recommendation. Each affected chapter shall have the opportunity to recommend one candidate for appointment. Upon passage of the chapter resolution, the chapter shall immediately transmit a copy of the resolution to the Navajo Election Administration, along with documents which show that the recommended person meets the qualifications for farm board membership, as set forth in the Navajo Election Code. The Navajo Election Administration shall within five calendar days review the qualifications of the recommended person and advise both the chapter and the Navajo Board of Election Supervisors in writing of whether the recommended person meets the qualifications for farm board membership. The Navajo Board of Election Supervisors shall review the candidates for appointment and shall make its determination out of those qualified persons recommended. The appointed farm board member shall complete the unexpired term.

8. Those vacancies in Navajo Nation Board of Education positions which have been declared vacant by the Navajo Election Administration shall be filled in the same manner as provided herein for school board members.

B. All officials appointed pursuant to this section shall be required to meet the qualifications for that position as set forth by Navajo Nation law.

C. In the event no chapter resolution recommending an appointment is

submitted to the Navajo Election Administration within time periods established for the submission of such resolutions as provided herein, the Navajo Board of Election Supervisors is authorized to extend, as necessary, such time periods until a vacant position is filled.

D. The Navajo Board of Election Supervisors is authorized to establish, by rules and regulations, reasonable time frames, other than those specified herein, for purposes of implementing the intent of this section.

#### **History**

CF-13-06, February 3, 2006. The Navajo Nation Board of Education Election Act of 2006. Added § 161(A) (8).

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CJN-36-05, June 3, 2005.

CAP-31-05, April 22, 2005.

CAP-12-02, April 8, 2002.

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 11 N.N.C. §§ 45, 208 and 245.

#### **§ 162. Certification of Appointments**

A. Those appointed or recommended for appointment shall complete and submit as appropriate all necessary documents required for determining qualifications for office.

B. For an appointment made by a chapter, the chapter shall immediately transmit a copy of its resolution to the Navajo Election Administration, along with documents which show that the appointed individual meets the qualifications for the office he or she is appointed to. The Navajo Election Administration shall within five calendar days review the qualifications of the appointed individual in writing of whether the appropriate qualifications for office are met. If the appointed individual is deemed ineligible for office, he or she shall be notified by the Election Administration. The notice shall include the right to file a Statement of Grievance pursuant to 11 N.N.C. § 341(A).

C. Upon certification, an Oath of Office shall be administered pursuant to 11 N.N.C. § 6(E).

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005.

CJA-06-01, January 24, 2001.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

**§ 163. Challenges; appeals**

Challenges may be filed with the Navajo Election Administration regarding the qualifications of an appointed official by other candidates considered for appointment to the same position. Such challenges must comply with the requirements 11 N.N.C. § 24 herein.

**History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

**Subchapter 11. Campaign Expenses; Contributions**

**§ 201. Report of designated financial agent; filing; penalty**

A. Before any election each candidate, including the candidate for Vice-President, shall file with the Board a report containing the names and addresses of every person authorized as his or her financial agent by or through whom such candidate has expended or proposed to expend money in defraying the expenses of his or her campaign, or a statement that he or she has not authorized and will not authorize any person to act for him or her, but that he or she will in person account for all money or other things of value expended in the interest of his or her candidacy.

B. The candidate shall file with the Board the designation of an agent by the filing date and will be allowed to amend the designation any time prior to the opening of the polls on the day set for the election.

C. Should he or she fail to file such report, he or she is guilty of an offense and shall be assessed a fine of not less than twenty-five dollars (\$25.00) and not more than five hundred dollars (\$500.00).

**History**

CAP-23-90, April 6, 1990.

**Cross Reference**

Regarding Subsection (B) above, *see also*, 11 N.N.C. § 21(B)(4).

**§ 202. Statement of receipts and expenses; time of filing; preparation and distribution of forms**

A. Each candidate whose name appears upon the official ballot in any Navajo Nation election shall, not more than 10 days after the election, file

with the Board a sworn and signed itemized statement of receipts and expenses. The Board shall give the candidate an opportunity to correct any deficiency or error in his or her report. Thereafter the report shall be filed in the Central Records Department of the Navajo Nation and shall be preserved in said office for at least five years during which time it shall be a public record available for inspection and copying.

B. The statement of receipts and expenses shall set forth in detail a complete record of the candidate's receipts and expenditures in money or other things of value and cost thereof, including promises to pay, treats, presents, and favors, either present or future, intended for the purpose of aiding or which could have a tendency to aid his or her success in such election and shall include a like statement for each of the persons named by the candidate in any report filed under 11 N.N.C. § 201, and for any person not so named whom the candidate knows to have made any receipt or expenditure on behalf of his or her candidacy. Actual receipts for expenses shall accompany the statement.

C. A candidate shall not be required to report his or her filing fee.

D. The statement of expenses and the report shall be made upon forms approved by the Board. The Board shall deliver in person or by certified mail a reasonable number of such forms to each candidate.

#### **History**

CJA-12-06, January 27, 2006. Amended § 202(A) reducing the filing period from 30 days to 10 days.

**Note (2005).** At Subsection (A) above, due to a previous typographical error in publication, the term "*Therefore*" was changed to "*Thereafter*." For the same reason, at Subsection (B), the term "*case*" was changed to "*success*."

CJA-06-01, January 24, 2001. By this resolution, the terms "*either general, chapter, or special*" after the word "*election*" in Subsection (A) were deleted.

CAP-23-90, April 6, 1990.

#### **§ 203. Failure to file statement of receipts and expenses; penalty**

A. The candidate receiving the highest number of votes in any Navajo Nation election shall not receive a certification of election and shall not be eligible to take office until the statement required by 11 N.N.C. § 202 is filed.

B. A candidate, whether elected to an office or not, who refuses or fails to file the statement required by 11 N.N.C. § 202 is guilty of an offense and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than five hundred dollars (\$500.00).

#### **History**

CAP-23-90, April 6, 1990.

#### **Cross Reference**

See also, 11 N.N.C. § 85.

**§ 204. Report by persons not authorized to expend money for expenses of candidate's campaign; time of filing; form; penalty for failure or refusal to file**

A. If any person not named in the candidate's report required by 11 N.N.C. § 201 collects or expends any money or things of value in connection with the candidacy of such candidate in any Navajo election, such person shall within 30 days after such election file with the Board a full and complete report showing all money or other things of value collected and expended by him or her.

B. The form of the report shall be approved by the Board and shall be similar in form to that required of candidates.

C. A person who fails or refuses to sign or to file a report required by this section is guilty of an offense and upon conviction thereof shall be punished by fine of not less than three hundred dollars (\$300.00) nor more than five hundred dollars (\$500.00). If such person is not subject to the jurisdiction of the Court of the Navajo Nation, he or she may be fined or expelled from Navajo Nation land (17 N.N.C. § 1901 *et seq.*).

**History**

CAP-23-90, April 6, 1990.

**§ 205. Limitation on expenditure by or on behalf of candidates; radio or television time**

A. The following sums shall be the maximum amounts for both the primary and general elections combined which may be expended by or on behalf of any candidate in a primary and general, or special recall or referendum election. When anything of value other than money is expended or used by or on behalf of any candidate, it shall be considered as equivalent to money as its fair cash value. Necessary personal travel or subsistence expenses of candidate and provided by candidate shall not be included in the limitation and need not be reported.

1. For the Office of the President and Vice-President (combined sum) one dollar and fifty cents (\$1.50) for each registered voter.

2. For the offices of Delegate, Chapter Officer, Other Elected Officials and School Board members, four dollars (\$4.00) for each registered voter within the election precinct.

B. Where radio and television time is donated or offered on an equal basis to all qualified candidates for any particular office, the value of such time shall not be included in the above limitation on expenditures but shall be reported by or on behalf of each candidate receiving the same, without assigning any cash value thereof.

**History**

CJA-12-06, January 27, 2006. Amended § 205(A)(2) increasing the expenditure limit from \$1.50 to \$4.00.

CJA-06-01, January 24, 2001. Subsection (A) amended slightly to reflect that *special elections*, generally, are no longer required for filling vacancies occurring during a term of office. Since this change, vacancies are now filled by an *appointment* process. See generally, 11 N.N.C. § 161 *et seq.*

CAP-23-90, April 6, 1990.

## **Annotations**

### **1. Federal Law**

Regarding federal case law on contributions and expenditures concerning candidates for federal elective office, see generally, *Buckley v. Valeo*, 424 US 1 (1976).

### **§ 206. Penalty for exceeding campaign expenditure limit**

A candidate who expends more money or other things of value than is permitted by 11 N.N.C. § 205 either in person or through agents, or who knowingly permits any other person to expend a sum which when added to the sum expended by such candidates and his or her agents exceeds said limits, is guilty of an offense and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000), or by imprisonment for not more than six months, or by both such fine and prison term; and in addition he or she shall be barred for five years from holding any elective office of the Navajo Nation.

## **History**

CAP-23-90, April 6, 1990.

**Federal Law.** The Indian Bill of Rights, 25 U.S.C. § 1302 (7), provides that an Indian Tribe may in no event impose a punishment of more than six (6) months in prison, or five hundred dollars (\$500.00), or both. Section 1302 (7) was amended by Public Law 99-570, § 4217, to allow tribes to impose punishment of up to one (1) year imprisonment or a fine up to five thousand dollars (\$5,000), or both. The Navajo Nation, by *CJA-08-00* has generally amended the general Criminal Code (Title 17) provisions to include the increased penalties allowed.

### **§ 207. Fraudulent reports; penalty**

A candidate who makes any statement or report required by this ordinance and therein knowingly misstates the amount of money given or expended, or fails knowingly to fully disclose the facts as to any gift, promise, treat, reward, favor, or any valuable thing given or expended, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000) or by imprisonment for not more than six months, or by both fine and prison term; and if such person received the highest number of votes in the election, he or she shall not hold the office, and shall be barred for a period of five years

from holding any elective office of the Navajo Nation.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 208. Filling vacancy in office due to disqualification**

A. Where any person who has received the highest number of votes for any office is disqualified from holding said office by 11 N.N.C. §§ 206 and 207, prior to the oath of office, the candidate who received the next highest votes shall be sworn in as the elected official for that position pursuant to 11 N.N.C. § 141(E).

B. Where any person who has received the highest number of votes for any office is disqualified from holding said office by 11 N.N.C. §§ 206 and 207, after the oath of office, a vacancy shall be declared by the Navajo Election Administration, and the position shall be filled by appointment pursuant to applicable provisions for the particular position.

#### **History**

**Note (2005).** At Subsection (A) above, for purposes of correcting a typographical error in publication, reference to "section 141(F)" was changed to "§ 141(E)."

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

See also, 11 N.N.C. §§ 45 and 141(E).

#### **§ 209. Contribution by corporations and nonmembers of Navajo Nation; penalty**

A. It is unlawful for any corporation or nonmember of the Navajo Nation to make any contribution of money or anything of value for the purpose of campaigning or influencing a Navajo election or for any member of the Navajo Nation to receive such a contribution for such purposes, provided, however, that it shall not be unlawful for a radio or television station to make free time available to any candidate for Navajo Nation Office, provided equal time is made available to all other candidates for the same office.

B. Any person or any non-Navajo Indian married to a Navajo who violates this section shall be guilty of an offense and upon conviction shall be punished by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000), or by imprisonment for not more than six months or by both such fine and prison term.

C. Any non-Indian who violates this section, shall be fined or expelled from Navajo Nation land by the Government Services Committee according to the procedure set out in 17 N.N.C. § 1901, as amended.

D. Any corporation or nonmember of the Navajo Nation violating this section may upon application of the Attorney General be ordered to show cause before the appropriate Navajo Nation Committee as to why it or he or she should not be barred from receiving any lease, right-of-way, contract, franchise, concession of any character whatsoever thereafter from the Navajo Nation, or excluded from the Navajo Nation. If, upon hearing of such order to show cause, it appears to the appropriate Navajo Nation Committee that the said corporation or person is guilty of violating this section, said corporation or person shall be barred for a period of not less than one year nor more than five years from receiving any lease, right-of-way, contract, franchise, or concession of any character whatsoever from the Navajo Nation.

E. It is the intent of this section to prohibit contribution being made for the purpose of influencing a Navajo election from any source other than members of the Navajo Nation. Violators shall be prosecuted.

#### **History**

CAP-23-90, April 6, 1990.

§§ 210 to 220. [Reserved]

#### **Subchapter 12. [Reserved]**

§§ 221 to 239. [Reserved]

#### **Subchapter 13. Removal of Officials; Placement of Officials on Administrative Leave; Recall; Filling Vacancy**

#### **§ 240. Removal and placement on administrative leave**

A. The President, Vice-President and delegate to the Navajo Nation Council are subject to removal for just cause.

1. Just cause include, but shall not be necessarily limited to:

- a. Insanity, when judicially or medically determined.
- b. Conviction by any court of any felony.
- c. Council members failing to attend Council meeting as required by law.
- d. President or Vice-President absent for three consecutive months without permission of the Navajo Nation Council.
- e. Habitual indulgence in alcoholic beverages.
- f. Conviction of any misdemeanor involving deceit, untruthfulness, and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse,

child neglect, aggravated assault and aggravated battery.

g. Breach of fiduciary trust duties to the Navajo People.

h. Malfeasance or misfeasance of office.

2. Such official can be removed by at least two-thirds (2/3) vote of the Navajo Nation Council.

B. The District Grazing Committee Members are subject to removal for just cause.

1. Just cause shall include, but shall not be necessarily limited to:

a. Insanity, when judicially or medically determined.

b. Conviction by any court of any felony.

c. Failure to attend three consecutive District Grazing Committee meetings.

d. Absence for three consecutive months without permission of the District Grazing Committee.

e. Habitual indulgence in alcoholic beverage.

f. Conviction of any misdemeanor involving deceit, untruthfulness, and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery.

g. Breach of fiduciary trust duties to the Navajo People.

h. Malfeasance or misfeasance of office.

2. Such official can be removed by at least two-thirds (2/3) vote of the Navajo Nation Council.

C. The Navajo Nation Council may by majority vote of the Council, place the President, Vice-President or any of its members on administrative leave, with or without pay, where there are reasonable grounds to believe that such official has seriously breached his or her fiduciary trust to the Navajo People and such leave will serve the best interests of the Navajo People.

D. The Navajo Election Administration shall, upon notice and opportunity for response, remove school board members no longer possessing the necessary qualifications for office. Regarding his or her removal, an individual may within 10 calendar days file with the Office of Hearings and Appeals a statement of grievance pursuant to 11 N.N.C. § 341.

E. The Navajo Election Administration shall, upon notice and opportunity

for response, remove Navajo Nation Board of Education members no longer possessing the necessary qualifications for office. Regarding his or her removal, an individual may within 10 calendar days file with the Office of Hearings and Appeals a statement of grievance pursuant to 11 N.N.C. § 341.

### **History**

CF-13-06, February 3, 2006. The Navajo Nation Board of Education Election Act of 2006. Added § 240(E).

CJY-41-03, July 24, 2003.

**Note (2005).** At Subsection (B)(1)(d), "absensence" changed to "absence" for purposes of statutory consistency.

Also, due to an omission in the 1998 amendments at Subsection (B)(1)(d), and for purposes of clarity, the words "of the" were inserted between "permission" and "District Grazing Committee."

CAP-38-98, April 22, 1998. Subsection on *District Grazing Committee members* was added. The same resolution also provided amendments to 3 N.N.C. § 871 *et seq.* and 11 N.N.C. § 8(B)(4).

CAP-23-90, April 6, 1990.

See also, 3 N.N.C. § 871 *et seq.* and 11 N.N.C. § 8(D)(3).

### **Annotations**

#### **1. Grounds for removal**

"Serious allegations of any of the factors given in 11 N.T.C. § 211 [1984-1985 Supp.], combined with some evidence of those allegations, are also grounds for placing a Chairman or Vice Chairman on administrative leave." *In re: Certified Questions II*, 6 Nav. R. 105, 118 (Nav. Sup. Ct. 1989).

#### **§ 241. Officials subject to recall; recall affidavit; recall petition**

A. All elected officials may be removed from office if sixty percent (60%) of the registered voters who voted in the last election for the office in question file a petition seeking the official's removal.

B. Any five or more registered voters may begin recall by filing a notarized affidavit constituting themselves as a petitioner's committee which shall be responsible for circulating and filing a recall petition. For recall of a President, Vice-President, Delegate, Chapter Officer, Other Elected Official, or school board member, members of the petitioners' committee shall be registered voters of the Chapter or Chapters, which are represented by the elected official. A single petition is required for each elected official to be removed.

C. The petitioners' affidavit shall contain the names and addresses of

the members of the petitioners' committee, one address to which notices to the committee shall be sent, and the name of the elected official subject of recall.

D. No petition of recall may be circulated or signed until such affidavit is filed with the Election Administration.

E. The petition shall be in the form specified by the Board, and shall allow voter to sign only that portion of the petition designated for the Chapter in which the voter is registered, and shall contain:

1. A general statement of not more than two hundred words setting forth the ground or grounds on which the recall is sought;
2. The name of the official whose recall is sought;
3. The signature, the chapter, and census number of each registered voter who voted in the last election for the office in question; and
4. In the event the voter signs the petition with a thumbprint, the signature of two persons who witnessed the signing, along with the chapter and census number information for each witness.

F. The ground or grounds for recall is for the signing voters, who shall be the sole and exclusive judges of the legality, reasonableness, and sufficiency of the ground or grounds assigned for the recall. The ground or grounds shall not be subject to review.

G. When filed, the petition shall have attached a notarized affidavit of each circulator which shall state that:

1. The circulator personally circulated the petition copy;
2. All signatures were affixed in his or her presence and are to the best of his or her knowledge genuine signatures of registered voters; and
3. Each voter read, or had to read to him or her, and/or translated for him or her the full statement of the grounds or grounds for recall.

H. The payment of, or promise to pay, anything of value for the circulation of a petition or for procurement of any signature shall invalidate the entire petition.

#### **History**

CAP-23-90, April 6, 1990.

#### **Cross Reference**

11 N.N.C. § 246(A).

#### **Annotations**

## **1. Requisites of recall petition**

Responsibility for following requirements in circulation of recall petition rests with recall committee. *Arthur et al. vs. Navajo Board of Election Supervisors, and Thomas*, 7 Nav. R. 340 (Nav. Sup. Ct. 1998).

## **2. Removal of chapter officials**

Under prior statutory provision, it was held that "the procedures established at 2 NTC § 4005 for removal of chapter officials were not intended to be followed at the Board's discretion. [*Mustach vs. Navajo Board of Election Supervisors*, 5 Nav. R. 115, 118.] They function to protect the due process rights of signatories of a removal petition and affected chapter officials." *In re Removal of Katenay*, 6 Nav. R. 81, 84-85 (Nav. Sup. Ct. 1989).

## **3. Purpose of recall**

"Recall provisions are a means through which the public voice their dissatisfaction with their elected officials who are subjected to removal from their elected offices." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 1 (Nav. Sup. Ct. December 21, 2001).

## **4. Procedures**

"Noncompliance with these and other requirements may serve as grounds for challenges, 11 N.N.C. § 243." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 2 (Nav. Sup. Ct. December 21, 2001).

"The procedures in 11 N.N.C. § 241, *et seq.*, require strict adherence to a process free from fraud, misrepresentation, and other improprieties. Assurances are built into the procedures to protect the integrity of the process." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 1 (Nav. Sup. Ct. December 21, 2001).

## **5. Recall committee**

"The burden of knowing and following the laws and rules on the recall process rests with a validly formed recall committee. After all, it is common Diné knowledge that one does not undertake a monumental task, such as the recall of a naat'aanii, without preparation, planning, and understanding the process to accomplish that end." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340, 345 (Nav. Sup. Ct. 1998).

## **§ 242. Filing of petition; sufficiency**

A. A petition for recall shall be filed with the Navajo Election Administration no later than 180 days after the filing of the affidavit of the committee initiating recall proceedings. Failure to file a petition within this period shall render the recall null and void.

B. After signatures have been obtained, the committee shall file the completed petition with the Election Administration which shall review the petition for sufficiency within not more than 30 days. A petition shall be deemed sufficient when it appears to be signed by the requisite number of

registered voters as set out in 11 N.N.C. § 241(A) and each signatory has complied with the requirements of 11 N.N.C. § 241(E)(3). A petition which is found to be sufficient shall be certified by the Navajo Election Administration.

C. In the event a petition is insufficient, the director shall notify the petitioner's committee of his or her findings and the reasons why the petition is insufficient. The committee may withdraw the petition and within 15 days thereafter, refile the amended petition as an original petition. The 15 day period shall be in addition to the 180-day period set out at 11 N.N.C. § 242(A).

### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

### **Annotations**

#### **1. Construction and application**

"NEA's sole responsibility is to certify that 'it appears' that sixty percent of the registered voters who voted in the last election signed the recall petition." *In the Matter of the Recall Challenge by Anderson H. Morgan, Sr.*, No. SC-CV-11-06, slip op. at 3 (Nav. Sup. Ct. May 25, 2006).

"The Election Administration does not have the discretionary function of accepting more than two recall petitions and permitting a recall committee to file names in segments." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340, 344 (Nav. Sup. Ct. 1998).

"The Election Code and its implementing rules clearly state that a recall committee has only one opportunity to submit additional names upon a finding of insufficiency." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340, 343 (Nav. Sup. Ct. 1998).

"The law is clear that the first filing of a recall petition is the initial petition and a subsequent filing is an amended petition." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340, 343 (Nav. Sup. Ct. 1998).

#### **2. Petition defects**

"After the Election Administration completes verification of signatures on the initial petition, finds the petition insufficient, and informs the recall committee, the committee has 15 days to cure the defects in the initial petition or refile the petition with additional names." *Arthur, et al. v. Navajo Board of Election Supervisors, et al.*, 7 Nav. R. 340, 343 (Nav. Sup. Ct. 1998).

#### **3. Sufficiency of petition**

"A person's attitude is one of subjective interpretation and for an attitude to

ever rise to the level of being judicially reviewable, there must be specific instances of conduct demonstrating the alleged 'attitude'. Appellant's Statements of Grievance do not contain those specific instances and do not show that even one voter failed to cast a ballot because of an election official's improper attitude, much less that the result of the election was changed." *Williams v. Navajo Election Commission and Board of Election Supervisors*, 5 Nav. R. 25, 27 (Nav. Ct. App. 1985).

"Nowhere in the Statements of Grievance filed by the appellant is there any connection made between the publication of the wrong time for the polls to close and failure of any registered voter to vote for appellant. Even more telling, there is not a showing that a single registered voter failed to vote for either candidate because of a belief that the polls closed at 5:00 p.m. rather than 7:00 p.m. Appellant has not overcome the presumption that the election results were regular and proper." *Williams v. Navajo Election Commission and Board of Election Supervisors*, 5 Nav. R. 25, 27 (Nav. Ct. App. 1985).

#### **§ 243. Petition challenges; hearings**

A. The Navajo Election Administration shall hold all petitions which have been certified sufficient for a period of 10 days during which time a challenge under oath and notarized may be filed with the Office of Hearings and Appeals by a registered voter.

B. The challenge shall be in a form specified by the Office of Hearings and Appeals and shall state:

1. The names of the signing voters against whom the challenge is lodged; and

2. The ground or grounds of the challenge, which may specifically include violations of 11 N.N.C. § 241(H), and a short statement explaining the ground or grounds of the challenge.

C. Within five days of the date of filing, the Office of Hearings and Appeals shall review the challenge to determine whether or not it meets the requirements of 11 N.N.C. § 243(B) and whether or not the challenge, if true, would cause a change in the sufficiency of the recall petition.

D. If the Office of Hearings and Appeals determines that the challenge meets the requirements of 11 N.N.C. § 243(C), it shall hold a hearing on the challenge not less than three nor more than 10 days after its finding that the challenge is sufficient. The Election Administration shall forthwith mail to the committee, the challenged signing voter, the party or parties initiating the challenge, and others the Office of Hearings and Appeals may require for the hearing, a copy of the challenge along with notice of the time and place of hearing, which notice shall also contain a warning that failure to appear at the hearing shall constitute just cause for removal of the signature(s) from the recall petition.

E. Challenge hearings regarding recall petitions shall be conducted pursuant to rules and regulations established by the Office of Hearings and Appeals.

F. The party or parties initiating the challenge shall have the burden of proving the allegations contained therein by clear and convincing evidence.

G. The hearing decision shall be certified to the party or parties initiating the challenge and the committee within 10 days of the hearing. Appeal may be made by either the committee or the party or parties initiating the challenge to the Navajo Nation Supreme Court within 10 days of the date of decision. A transcript of the hearing shall be filed within 30 days of the filing of Notice of Appeal. The Supreme Court shall review the appeal no later than 30 days from the date of filing of the transcript. Review by the Supreme Court shall be limited to: (1) the sufficiency of the recall petition, exclusive of the ground or grounds of the petition; and (2) whether or not the decision of the Office of Hearings and Appeals is supported by sufficient evidence.

### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

### **Annotations**

#### **1. Procedures**

"It cannot inquire into alleged fraud or other improprieties. If the elected official believes improprieties occurred, it is his or her responsibility to file a challenge to specific signatures on the petition." *In the Matter of the Recall Challenge by Anderson H. Morgan, Sr.*, No. SC-CV-11-06, slip op. at 3 (Nav. Sup. Ct. May 25, 2006).

"If the official challenges the petition, NEA holds it pending the outcome of the challenge, and the official must present evidence to OHA." *In the Matter of the Recall Challenge by Anderson H. Morgan, Sr.*, No. SC-CV-11-06, slip op. at 3 (Nav. Sup. Ct. May 25, 2006).

"Once this Court is authorized by statute to review administrative matters, (NRCAP) [Navajo Rules of Civil Appellate Procedure] is applicable so long as these rules comply with the intent of the recall provisions of the [E]lection [C]ode. For example, once it is determined by a party to appeal to this court, he or she is held to not only the recall provisions requirements, but also to applicable sections of the NRCAP, such as Rule 7 as well as other sections of the NRCAP, i.e. Rule 5(b) or Rule 9." (Footnotes omitted) *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 5 (Nav. Sup. Ct. December 21, 2001).

"The procedures in 11 N.N.C. § 241, et seq., require strict adherence to a process free from fraud, misrepresentation, and other improprieties. Assurances are built into the procedures to protect the integrity of the process." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 1 (Nav. Sup. Ct. December 21, 2001).

#### **2. Grounds for challenges**

"Noncompliance with these and other requirements may serve as grounds for challenges, 11 N.N.C. § 243." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 2 (Nav. Sup. Ct. December 21, 2001).

### **3. Time considerations**

"We have a duty to point out the importance of complying with statutory timelines. In this case, regardless of the stringent timelines, the (OHA) [Office of Hearings and Appeals] scheduled a hearing six days beyond the required maximum time of 10 days. The hearing should have occurred on or before June 23, 2001. Instead, it was held on June 29, 2001, and not completed for another seven days. The OHA recessed and reconvened on July 6, 2001. The hearing was completed 15 days beyond the time it should have been heard and completed. The recall provisions require that the hearings must be held and completed no later than 10 days from the date of the determination. It is mandatory that the OHA comply with the strict timelines." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 6 (Nav. Sup. Ct. December 21, 2001).

" ... [T]he recall provisions require this court to hear appeals within 30 days. We interpret that to mean a decision must be made within the 30 days when all else is complied with in a timely manner. Here, this Court was convinced that more time was needed by the Appellants to submit the transcripts due to circumstances not in their control. Rule 5(b) of (NRCAP) [Navajo Rules of Civil Appellate Procedure] is applicable here and this court in its application is required to use reasonable discretion. *In Re: Estate of Wauneka*, 6 Nav. R. 63, 64 (1988). While we have discretion to extend timelines in the submission of transcripts, Rule 7, NRCAP, requires this court to give priority to election cases. Given the circumstances of the case, we believe we have met that requirement." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 5-6 (Nav. Sup. Ct. December 21, 2001).

"Sections of the recall provisions set out stringent timelines including when this Court can hear this matter. However, statutory timelines may be waived.... Records submitted to the Court reflect that NEA [the Navajo Election Administration] was unable to submit transcripts to the Appellants so they could meet the time requirements. Appellants, as a consequence, requested of this Court, an extension for submission of the transcripts. ...The Court granted the request.... The extension was fair and reasonable given the circumstances. In addition, neither NEA nor the committee objected or insisted upon a shorter extension. This court concludes that all parties involved, including the NEA, waived their rights to adhere to strict timelines set out in the recall process." *Barton, et al. v. Dilkon Recall Committee*, No. SC-CV-30-01, slip op. at 5 (Nav. Sup. Ct. December 21, 2001).

### **4. Law governing**

"The Navajo Election Code (Title Eleven) governs all appeals of decisions filed by the Navajo Board of Election Supervisors." *Secatero, et al. v. Redhouse, et al.*, 6 Nav. R. 312 (Nav. Sup. Ct. 1990).

### **5. Standards of review**

"The statute places a high burden on the elected official to present to OHA clear and convincing evidence that the petition is insufficient." 11 N.N.C. § 243(F). NEA and OHA do not have that burden. *In the Matter of the Recall Challenge by Anderson H. Morgan, Sr.*, No. SC-CV-11-06, slip op. at 3-4 (Nav. Sup. Ct. May 25, 2006).

"*Johnson [v. June]*, 4 Nav. R. 79 (1983)] sets forth standards for the court to apply when reviewing the actions of the Board in matters of election dispute. These standards follow the theories that election results are presumed to be regular and proper and that the contestant must overcome that presumption by showing that the alleged misconduct or irregularity was of such a nature that the outcome of the election was changed or fair election prevented." *Williams v. Navajo Election Commission and Board of Election Supervisors*, 5 Nav. R. 25, 27 (Nav. Ct. App. 1985).

#### **§ 244. Special recall elections; resignation; ballot**

A. When a petition is certified sufficient by the Navajo Election Administration or in the event of a challenge, the Office of Hearings and Appeals' decision is sustained by the Navajo Nation Supreme Court, the Administration shall set a date for the special recall election and shall notify the committee and the official whose recall is sought that the petition has been certified and that it has set the date for a special recall election to be held not less than 30 days from the date of final certification. If a general or chapter election is set within 90 days of date the petition is finally certified, the special recall election shall be held during the general or chapter election.

B. Except in a recall involving the President or the Vice-President of the Navajo Nation, if the official whose recall is sought offers his or her resignation prior to the recall election, the election shall be canceled and a vacancy shall be announced.

C. Special elections arising from a recall petition or a vacancy caused by a resignation resulting from a recall petition shall be conducted pursuant to the provisions herein and rules and regulations of the Board. Resignations resulting from recall shall be official when accepted by the Navajo Election Administration. The name and picture of the official sought to be recalled shall be printed on the official recall election ballot.

D. A vacancy in office sought to be recalled shall be deemed to exist on final certification of the recall petition. Candidates, other than the official sought to be recalled, shall, within 14 days of certification of the recall petition, file their candidate applications and filing fees. The Election Administration shall determine the qualifications of each candidate within five days of filing and certify those qualified.

E. Special recall elections shall be determined by plurality votes; there shall be no run-off elections.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act of 2005. Amended § 244(B).

CJA-06-01, January 24, 2001.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

**§ 245. Officials pro tem**

A. If the date is set for a recall election for the Office of President of the Navajo Nation, he or she shall relinquish his or her Office and the Vice-President shall assume and exercise the office of the President.

B. If a recall special election is set for any other elective office, such offices shall be filled or remain vacant pursuant to the provisions of § 161(B) and (C).

**History**

CAP-23-90, April 6, 1990.

**§ 246. Limitation on recall petition**

A. No recall affidavit shall be filed against any official until he or she had held office for a minimum of 180 days.

B. If an official subject to recall wins the recall election, he or she shall continue to serve throughout the term for which he or she was elected.

**History**

CAP-23-90, April 6, 1990.

**§ 247. Ineligibility of removed official**

Any official who resigns or is removed pursuant to this subchapter shall be ineligible to run for any Navajo Nation elective office for a minimum of eight years from the date of resignation or the date of the recall election.

**History**

CAP-23-90, April 6, 1990.

**Cross Reference**

See also, 11 N.N.C. § 8(C) (7), qualifications for Chapter Officer positions.

**§§ 248 to 260. [Reserved]**

**Subchapter 14. [Reserved]**

**§§ 261 to 280. [Reserved]**

## **Subchapter 15. Voter Registration**

### **§ 281. Eligibility of voters; residency; change in voter registration**

A. All persons who are enrolled on the Agency Census roll of the Bureau of Indian Affairs as members of the Navajo Nation shall be eligible to vote in Navajo Nation elections after they have reached the age of 18 years, provided they comply with the voter registration requirements set forth in 11 N.N.C. § 282.

B. A voter's residence shall be determined as that place in which a person's habitation is fixed and to which, whenever he or she is absent, he or she has the intention to return.

C. Any Navajo person living outside the Navajo Nation shall be considered a resident eligible for registration and voting if he or she is a member of a Chapter or is otherwise eligible for absentee voting under 11 N.N.C. § 121.

D. A change in registration from one Chapter to another can only be made by transfer of registration from the old Chapter to the new Chapter using the form specified by the Board. No transfer of registration will be allowed within 30 days before any election.

1.<sup>1</sup> Upon registering within a new chapter, one is not qualified to vote or be a candidate for any office in a particular chapter until the Election Code provisions have been fully complied with.

E. All members of the Navajo Nation who have relocated as a result of the Navajo-Hopi Land Dispute shall remain eligible to vote in Navajo Nation elections in accordance with the provisions of this Code. Such persons upon presenting adequate proof of relocation to the Board may vote by absentee voting procedure before election or by appearance in person on the designated election day at the Election Administration in Window Rock. Until relocation, Navajo persons residing upon Hopi Partitioned Lands shall be eligible to vote at their designated Chapter.

### **History**

CAP-23-90, April 6, 1990.

### **§ 282. Registration form; appeal**

A. A voter registration roll listing each registered voter by Chapter shall be maintained by the Board at the Election Administration in Window Rock. The Board shall keep the register open, subject to the provisions of Subsection (A)(1) below, during regular business hours, beginning 10 days after each general, chapter or special election and continuing until 30 days prior to the next primary, general or chapter election or in the event of a special election, until the date the Board declares a vacancy.

1.<sup>1</sup> In the event of a disputed election, the Board may extend the number of days during which voter registration is closed following an election from 10 days to no more than 30 days. The Board may apply its

discretion regarding this period during which voter registration is closed to any one, some, or all Chapters, depending upon the number of Chapters affected by the election dispute.

B. While the register is open, any unregistered member of the Navajo Nation, upon proving to the Election Administration and any registrar that he or she possesses the qualifications specified in 11 N.N.C. § 281 shall be permitted to register.

C. Such registrar shall issue to those registered in the above period a copy of the registration bearing the name of voter, voter's date of birth, home address, polling place at which they will be permitted to vote and other pertinent information.

D. The voter's registration form shall be in triplicates, each bearing identical information. Registrars shall retain two copies, and one shall be given to the voter. At the close of the registration period, an alphabetically arranged list of all persons registered to vote in each Chapter shall be prepared and processed by computer and shall be certified by the Board.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 283. Cancellation of registration**

The Board shall examine the poll lists containing the names of all Navajo voters who voted in the last general and chapter elections. Any registered voter who did not vote in the general and chapter elections consecutively shall be notified by the Election Administration that he or she will be removed from the poll if he or she does not respond by card provided to him or her within 30 days. The registration of persons so notified who do not respond within the 30 days provided will be canceled and their names shall be removed from the roll of registered voters. The Chairperson of the Board shall indicate on the canceled registration the date of cancellation and the reason for cancellation. Notice by regular mail shall be sent to every voter who has had his or her name canceled from the register of voters. All voters whose registration has been canceled must re-register as set forth in 11 N.N.C. § 282 in order to vote in a primary, a general and chapter election.

#### **History**

**Note (2005).** *"Chairman"* changed to *"Chairperson."*

CAP-23-90, April 6, 1990.

**§§ 284 to 300. [Reserved]**

#### **Subchapter 16. [Reserved]**

**§§ 301 to 320. [Reserved]**

#### **Subchapter 17. Election Officials**

**§ 321. Board of Election Supervisors—Powers and duties**

A.<sup>1</sup> The general powers and duties of the Board of Election Supervisors are:

1. To administer, implement and enforce the Navajo Election Code.
2. To supervise generally all tribal elections.
3. To compile information regarding elections, and distribute and educate the Navajo public to include printing and publishing the election Code and procedures in pamphlet form and distribution to all certified chapter officials, candidates, poll officials, and registrars.
4. To hear all election disputes to include the powers to subpoena witnesses.
5. To make Board and Administration policy decisions.
6. To establish rules and regulations, and interpret the Election Code consistent with Navajo Nation laws.
7. To obtain and maintain uniformity in the application of the Election Code and operation of the Election Office.
8. To develop and recommend to the Navajo Nation Council all apportionment plans for election purposes, with the exception of school board apportionment plans, which shall be developed and adopted by the Education Committee of the Navajo Nation Council for use in school board elections.
9. To hire and maintain direct authority over the Director of the Election Administration Office and confirm the hiring of the Deputy Director and maintain general supervision over all election staff to carry out authority vested in the Board.
10. To develop and submit separate annual budget for the Board and the Election Administration to include devising and managing a revolving account utilizing filing, penalty and resignation fees for special election costs in addition to the annual appropriation for this category.
11. To coordinate with the county, state and federal election agencies efforts, including seeking and obtaining from various governmental entities and private organizations funding and support to carry out the duties and responsibilities set out in the Election Code.
12. To establish subcommittees and delegate to them the authority to certify elections, and to make rules and regulations not inconsistent with the Election Code.
13. To initiate recounts of ballots, where necessary.
14. To maintain the Election Administration Office and staff

independent under its supervision with the Intergovernmental Relations Committee.

15. To maintain such staff and consultants including legal counsel as may be provided for in the annual Navajo Nation Budget of the Board.

16. To recommend the withdrawal of land for the establishment of a building facility which is to be separate from other entities and convenient to the public and to request funding from the Navajo Nation to erect such a public building for the operation of the Election Office.

17. To procure necessary supplies, services, equipment and furniture purchases and to enter contracts through the tribal process.

18. To delegate authority to the Election Office not inconsistent with the Election Code.

19. To bring action as deemed necessary and proper for the enforcement of the Election Code through the Attorney General and report said violations/offenses to the Ethics and Rules Committee, where necessary.

20. To prepare instructions for registration drive and conduct Navajo Nation elections.

21. To instruct and advise the chapter officers, poll officials and chapter registrars as to the proper methods of performing their duties as prescribed by the Election Code.

22. To report possible Navajo Election Code offenses to the Attorney General and the Ethics Office of the Navajo Nation and recommend such action as is deemed necessary and proper for the enforcement of the Election Code.

#### **History**

CJY-41-03, July 24, 2003.

**Note (2005).** Regarding Subsection (A)(4) above, the Navajo Board of Elections Supervisors no longer possesses the authority to hear and decide election disputes. CJA-05-01. Also, concerning Subsection (A)(11), "organization" changed to "organizations" for purposes of statutory format.

CJA-06-01, January 24, 2001.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

See also, 2 N.N.C. § 871 et seq.

With respect to the Board's authority over the Director, Navajo Election

Administration, as referenced above at Subsection (A)(9), *see also*, 2 N.N.C. § 877 (powers and duties of Director and staff).

### **§ 322. Authority to make rules and regulations**

Except for hearing rules of the Office of Hearings and Appeals, the Board of Election Supervisors shall have the authority to make and enforce rules and regulations not inconsistent with this chapter concerning any matter within the jurisdiction of such board. Such regulations shall have the force and effect of laws of the Navajo Nation.

#### **History**

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

*See also*, 2 N.N.C. 873(B)(6) and 11 N.N.C. § 12.

### **§ 323. Composition; election**

A. The Navajo Board of Election Supervisors shall consist of ten members, all of whom shall be elected pursuant to Subsection (B) below. All members shall be residents of the Agency they seek to represent.

B. Candidates for the Board of Election Supervisors shall file candidate applications on an Agency-wide basis pursuant to a procedure not inconsistent with §§ 21-42. In addition, each candidate:

1. Shall meet qualification requirements under this section.

2. Must not hold the position of any Navajo Nation elective office, as covered by the Election Code, including a School Board member position nor be a candidate for an elected office other than the position of a Board of Election Supervisors. Winners at the Primary Election shall consist of candidates receiving the four or two highest votes from the District(s) within an Agency. These four or two top candidates shall be placed on the General Election Ballot for Agency election. The two or one candidate(s) receiving the highest votes shall be the winner(s) and shall represent the Agency on the Board of Election Supervisors.

C. The Chairman of the Navajo Board of Election Supervisors shall be selected by the Board from among the members of the Board.

D. The Officers will be selected by members of the Board.

#### **History**

**Note (2005).** At Subsection (B), for grammatical purposes, "a" changed to "an."

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

Concerning Subsection (A) above, *see also*, 2 N.N.C. § 872(A).

#### **§ 324. Qualifications**

A. Board members shall not have been convicted of a felony or any misdemeanor involving crimes of deceit, untruthfulness and dishonesty, including but not limited to extortion, embezzlement, bribery, perjury, forgery, fraud, misrepresentation, false pretense, theft, conversion, or misuse of Navajo Nation funds and property, and crimes involving the welfare of children, child abuse, child neglect, aggravated assault and aggravated battery. Board members must not have been found in violation by a trial court or the Ethics and Rules Committee of the Navajo Nation Council of the Navajo Nation Ethics in Government or Election Laws.

B. Board members must not be biased and shall be in a position to initiate nonpartisan measures to urge and facilitate each person's right to vote for his or her choice of candidate.

C. Must be 30 years of age.

D. Must be a registered voter of a chapter within the agency that he or she will represent.

E. Must be able to understand and speak Navajo and English and write the English language.

F. Must be aware of the Navajo Nation government.

#### **History**

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **§ 325. Term of office**

A. The terms of office of the members of the Navajo Board of Election Supervisors shall be for four years from date of installation. Elected Board members shall be entitled to take office 10 days after certification of the election.

B. The Board members shall serve until their terms expire, they resign, or are removed. The terms shall be staggered consistent with term expiration periods in 1990 and 1992.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 326. Vacancies within second half of term of office**

A. A vacancy occurring on the Board of Election Supervisors within the second half of a term of office shall be filled by appointment by majority vote of the Agency Council for the agency within which the vacancy exists. The selection shall be made from recommendations by the chapters within the agency affected, in the form of duly adopted chapter resolutions. Each chapter may recommend one candidate for appointment. The Agency Council shall review the candidates for appointment and shall make its determination out of those recommended. The person appointed to fill any such vacancy must be a registered voter of a chapter from within the same agency of his or her predecessor, and shall serve until the normal expiration date of the term he or she has filled.

B. All Board members appointed pursuant to this section shall be required to meet the qualifications for the position as set forth at 11 N.N.C. § 324 herein and he or she must be a registered voter of a chapter from within the same agency of his or her predecessor.

C. Appointments pursuant to this section are subject to certification by the Navajo Election Administration as set forth at 11 N.N.C. § 162.

#### **History**

CS-55-05, September 2, 2005. The Navajo Nation Special Elections Act. Amended § 326(A).

CJA-06-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **§ 327. Removal**

Members of the Board of Election Supervisors may be removed from office only in accordance with section 241 *et seq.*, except where a Board member has accumulated four consecutive unexcused absences, in which case, the Board may request his or her resignation or recommend his or her removal in accordance with section 241.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 328. Registrars; poll clerks; poll judges**

A. The Board of Election Supervisors, acting upon the recommendation of the Chapter organization, shall appoint such registrars, poll clerks, and poll judges to conduct elections at the various chapters.

1. There shall be at least two poll clerks at each poll who shall receive a sixty-five dollars (\$65.00) per day stipend during elections and forty dollars (\$40.00) per day for training sessions.

2. There shall be at least two poll judges at each poll, one of whom shall be designated as the chief judge. Each poll judge shall

receive sixty-five dollars (\$65.00) per day stipend during elections and forty dollars (\$40.00) per day for training sessions.

3. When deemed necessary by the Board of Election Supervisors, the number of poll clerks and judges may be increased for any polling site.

B. No person whose spouse, parent, child, brother, sister, or grandparent is a candidate on the ballot shall serve as poll clerk or poll judge within that precinct or chapter. At the discretion of the Board, a poll clerk or poll judge may be disqualified or transferred to another precinct to avoid any disputes.

C. A chapter's recommendation for appointment of poll judges and poll clerks must be in the office of the Board of Election Supervisors at least 30 days before a general or chapter election.

#### **History**

CO-56-04, October 19, 2004.

CAP-23-90, April 6, 1990.

#### **Cross Reference**

See also, 11 N.N.C. § 81.

§§ 329 to 340. [Reserved]

### **Subchapter 18. Administrative Election Code Complaints and Hearings**

#### **§ 341. Office of Hearings and Appeals**

A.<sup>1</sup> The Office of Hearings and Appeals shall have the authority to implement procedures in resolving disputes pertaining to elections as follows:

1. Within 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with. If, on its face, the complaint is insufficient under the Election Code, the complaint shall be dismissed by the Office of Hearings and Appeals.

2. If the complaint is not dismissed, the Office of Hearings and Appeals shall conduct a hearing within 15 days thereafter to determine if the allegations in the complaint are true and are supported by the law. At the hearing, the complainant and respondent may appear in person or through legal counsel. Except otherwise provided by law, the complainant shall have the burden of proving the allegations contained in the statement of dispute by clear and convincing evidence.

3. The Office of Hearings and Appeals shall issue a written determination within 10 days after the hearing on each complaint. At the conclusion of a hearing, the Office of Hearings and Appeals may issue a

preliminary oral determination or request briefs from the parties by a specified date.

4. A party who wishes to appeal from a decision of the Office of Hearings and Appeals must file a Notice of Appeal with the Supreme Court of the Navajo Nation within 10 days after the decision is made. Review by the Supreme Court shall be limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record.

### **History**

CJA-05-01, January 24, 2001.

### **Cross References**

Appeals generally, see 7 N.N.C. § 801 *et seq.* and the *Navajo Rules of Civil Appellate Procedure*.

### **Annotations**

#### **1. "Standing"**

Non-Candidates. "It [is] clear that a voter does not have standing to complain of a lack of a candidate's qualification." *Tommy C. Begay v. Navajo Board of Election Supervisors & Navajo Election Administration*, 7 Nav. R. 139, 141 (Nav. Sup. Ct. 1995), citing *Fulton*.

"[T]he Navajo Nation Council specifically restricted the right to challenge election results to candidates who can show aggrievement, injury, or a denial of clear rights." *Fulton v. Redhouse and Navajo Board of Election Supervisors*, 6 Nav. R. 333, 334 (Nav. Sup. Ct. 1991).

"By the terms of the statute, the Board cannot be 'a party' who can appeal its own decision." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 303 (Nav. Sup. Ct. 1990).

#### **2. Mandatory Procedural Requirement In Election Disputes**

"Because we require that final appealable decisions be written on paper, it is not possible to file an unwritten court or administrative agency final decision with this Court. It necessarily follows that it is not possible to have a tape recording of an oral decision 'certified' to meet the requirements of Rule 7. [... ] The April 8, 1999 oral decision given from the bench does not satisfy Rule 7 of the Navajo Rules of Civil Appellate Procedure. Therefore, it cannot be used for computing the time period for filing this notice of appeal. [... ] ... [T]he written final Board decision was signed on April 12, 1999. The time for appeal started to run from that date." *Gishey v. Begay, Jr.*, 7 Nav. R. 403, 405 (Nav. Sup. Ct. 1999).

"Given the principle of law that election requirements are mandatory prior to an election but 'directory only' following one, candidates must immediately assert their complaints within the ten (10) day period allowed by the statute or waive them." *Haskie v. Navajo Board of Election Supervisors*, 6 Nav. R. 336,

340 (Nav. Sup. Ct. 1991).

"We therefore hold that under 11 N.T.C. § 407 [now amended], if the tenth calendar day falls on a weekend or a holiday, then the appeal can be filed on the next working day which is not a weekend or holiday." *In re: Removal of Katenay*, 6 Nav. R. 81, 83 (Nav. Sup. Ct. 1989).

In a case decided prior to the Office of Hearings and Appeals assuming Election Code hearing functions, the Navajo Supreme Court held: "[T]he procedures established for resolution of election contests and disputes were not intended to be discretionary with the Board. The Tribal Council, for reasons of due process and speeding resolutions of election contests and disputes, intended that these procedures be followed." *Mustach v. Navajo Board of Election Supervisors*, 5 Nav. R. 115, 118 (Nav. Sup. Ct. 1987).

### **3. Pre-Election complaints; rule-making authority**

"The Board has interpreted this statute [11 N.N.C. § 321(B)(1) now 11 N.N.C. § 341(A)(1)] to mean that if a candidate knows of an Election Code violation before an election, he or she must take action within 10 days of such an incident rather than do so after the election. Given the reasons behind the rules on statutory interpretation of election laws, the Board's interpretation makes sense. 2 N.N.C. § 873(B)(6) and 11 N.N.C. § 321(A)(6) both empower the Board to interpret the Navajo Election Code consistent with Tribal laws." *Haskie v. Navajo Board of Election Supervisors*, 6 Nav. R. 336, 339 (Nav. Sup. Ct. 1991).

### **4. "Sufficiency" review**

"The words 'on its face' indicate that the preliminary review for sufficiency must be confined to the allegations made by the grievant on the Statement. If the Board is unable, upon such a review, to determine that those allegations necessarily fall short of providing a basis for relief, a summary dismissal of the Statement is inappropriate." *Secatero v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 389 (Nav. Sup. Ct. 1991).

"In a case decided prior to the Office of Hearings and Appeals assuming Election Code hearing functions, the Navajo Supreme Court held: 'This Court cannot determine whether the various claims of the appellants are supported by the facts; nor can it decide whether the recall election was irregular and should be invalidated, as the appellants request. Rather, the sole question before this Court is whether the Board properly determined that the appellants' Statement of Grievance, on their faces, were insufficient for further proceedings.'" *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 387 (1991).

"Review of Complaint. Concerning 11 N.N.C. § 321(B)(1) [now 11 N.N.C. § 341(A)(1)], the words 'on its face' indicate that the preliminary review for sufficiency must be confined to the allegations made by a grievant on a Statement. If the Board [now the Office of Hearings and Appeals] is unable, upon such a review, to determine that those allegations necessarily fall short of providing a basis for relief, a summary dismissal of the Statement is inappropriate. That is, if the Board [now the Office of Hearings and Appeals] must look to evidence beyond what is proffered by a grievant on the Statement

to determined that his or her Statement is insufficient, it clearly does not meet the criteria for dismissal as being a Statement 'insufficient on its face.' " *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 389 (Nav. Sup. Ct. 1991).

"Similarities with Motion to Dismiss. For similarities between the 'sufficiency' requirement of 11 N.N.C. § 341(A)(1) and those to be considered by a court when approached with a motion to dismiss," see *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 388-389 (Nav. Sup. Ct. 1991).

"Investigations. Not only is there no authorization in the Election Code for an investigation before a hearing on a grievance, but the 1990 amendments to the Election Code eliminated the authorization for an independent investigation at any point in the grievance review process." *Secetaro et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 390 (Nav. Sup. Ct. 1991).

Discretion of the Board. In a case decided prior to the Office of Hearings and Appeals assuming Election Code hearing functions, the Navajo Supreme Court held: "The [Election] Board has considerable discretion in determining whether a statement is sufficient on its face. Absent a clear abuse of that discretion this Court will not disturb the Board's decision." *Brown v. Navajo Board Election Supervisors*, 5 Nav. R. 139, 140 (Nav. Sup. Ct. 1987).

"A Statement [of grievance] will be sufficient on its face if it specifies which election law was violated, and if it contains enough facts to raise the issue that the election results were not regular and proper. These facts, as they appear in the Statement, must support the allegation that an election law was violated. Finally, the Statement taken as a whole, which shall include all attached documents, must raise a possibility that the election results will be impeached." *Brown v. Navajo Board of Election Supervisors*, 5 Nav. R. 139, 140 (Nav. Sup. Ct. 1987). See also, *Williams v. Navajo Election Commission*, 5 Nav. R. 25, 28 (Nav. Sup. Ct. 1985).

## **5. Statutory Construction**

"Both of these statutes [2 N.T.C. § 873(B)(6) and 11 N.T.C. § 321(A)(6) (now amended)] limit the Board discretion to interpret the Navajo Election Code of 1990 by requiring that such interpretations be consistent with Navajo Nation law." *Howard v. Navajo Board of Election Supervisors*, 6 Nav. R. 380, 381 (Nav. Sup. Ct. 1991).

"The statute assumes that the board [now the Office of Hearings and Appeals] has not exceeded its powers in interpreting the Election Code, and that the facts are sufficient to support a legally correct decision." *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 365 (Nav. Sup. Ct. 1991).

## **6. Standard of Review in Election Disputes; Burden of Proof**

"After the Board [now the Office of Hearings and Appeals] has held a hearing, it must use a two-step test to reach a decision. The first step is whether the aggrieved party has proved the allegations in his or her statement of grievance with clear and convincing evidence. The second step is whether the aggrieved party has overcome the presumption of a valid and proper election, as

delineated in the *Johnson* principles. Irregularities that do not affect the election results or impeach the fairness will not succeed in overcoming the presumption." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76-77 (Nav. Sup. Ct. 1993).

"The Board is guided in its decision-making process by the burden of proof and must use a two-step test to reach a decision. The first step is whether the aggrieved party has proved the allegations in his or her statement of grievance with clear and convincing evidence. The second step is whether the aggrieved party overcame the presumption of a valid and proper election. Irregularities that do not affect the election results or impeach the fairness will not succeed in overcoming the presumption." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76 (Nav. Sup. Ct. 1993).

"The 1990 Election Code also imposes a burden of proof on the aggrieved party, which is to present clear and convincing evidence to prove the allegations in his or her statement of grievance." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76 (Nav. Sup. Ct. 1993).

"[T]his court applies the following standards to election disputes: 1. Election results are presumed to be regular and proper; 2. Irregularities or misconduct in an election which does not tend to affect the results or impeach the fairness of the result will not be considered; 3. Elections will not be set aside unless the facts definitely show such fraud and that there was no fair election; 4. After an election, election provisions are to be seen as directions unless the violations obstructed a free and intelligent vote, affected an essential element of a valid election or an omission of a direction voids the election." *Johnson v. June*, 4 Nav. R. 79, 82 (Nav. Ct. App. 1983).

## **7. Supreme Court jurisdiction and review**

"The Navajo Nation Supreme Court has jurisdiction over appeals from decisions of the Navajo Board of Election Supervisors." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 75 (Nav. Sup. Ct. 1993).

"The 1990 Election Code limits this Court's scope of review to whether the Board's decision is supported by sufficient evidence in the record." *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76 (Nav. Sup. Ct. 1993).

In a case decided prior to the Office of Hearings and Appeals assuming Election Code hearing functions, the Navajo Supreme Court held: "This Court cannot determine whether the various claims of the appellants are supported by the facts; nor can it decide whether the recall election was irregular and should be invalidated, as the appellants request. Rather, the sole question before this Court is whether the Board properly determined that the appellants' Statement of Grievance, on their faces, were insufficient for further proceedings." *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 387 (Nav. Sup. Ct. 1991).

The statute assumes that the board has not exceeded its powers in interpreting the Election Code, and that the facts are sufficient to support a legally correct decision. *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 365 (1991).

"While the Board does have statutory discretion to interpret election laws, such discretion is limited, and the Navajo Nation Supreme Court has appellate jurisdiction to review whether the Board acted within its statutory discretion." *Pioche v. Navajo Board of Election Supervisors*, 6 Nav. R. 360, 364 (Nav. Sup. Ct. 1991).

"... [T]his Court will refrain from deciding issues that are properly within the authority of the Board to decide. This Court can only review the Board's decision on a properly filed appeal." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 304 (Nav. Sup. Ct. 1990).

"An administrative agency cannot certify a question to this Court because that would violate separation of powers principles as well as their own powers." *In re: Navajo Board of Election Supervisors*, 6 Nav. R. 304 (Nav. Sup. Ct. 1990).

### **8. Frivolous Appeals**

"An appeal is 'frivolous' when it is not filed within the time permitted for an appeal; when the appeal is not perfected by the filing of the record or briefs; or when an appeal clearly lacks probable cause. An appeal lacks 'probable cause' when simple legal research discloses that points of law for the appeal are settled under our law or when a party does not have the right to take the appeal." *Tommy C. Begay v. Navajo Board of Election Supervisors & Navajo Election Administration*, 7 Nav. R. 139, 140 (Nav. Sup. Ct. 1995).

§§ 342 to 360. [Reserved]

## **Subchapter 19. Penal Provisions**

### **§ 361. Bribery of electors**

It is unlawful to give or promise any money or other thing of value to any person for the purpose of influencing said person to vote or refrain from voting at any Navajo Nation election or to vote for any particular candidate at such election; or to give, cause to give, or promise to be given, any money or other thing of value to any person with intent that any part of said money or thing of value shall be used for bribery in connection with any Navajo Nation election; or to knowingly give or cause to be given, any money to any person as reimbursement for money or other things of value expended by such person in whole or in part for bribery at any Navajo Nation election; provided, however, that it shall not be unlawful for any candidate personally or by agent to provide transportation to the polls to any voter.

#### **History**

CAP-23-90, April 6, 1990.

### **§ 362. Coercion of elector**

It is unlawful to make use of force, or to request another person to use or threaten force, in order to influence any person's vote in any Navajo Nation election or to prevent any person from voting in any Navajo Nation election.

### **History**

CAP-23-90, April 6, 1990.

### **§ 363. Intimidation of Navajo employees by employer**

A. It is unlawful for any employer to threaten a Navajo employee with dismissal from employment, reduction of pay, loss of seniority, transfer, or less favorable working conditions, for the purpose of influencing such employee to vote or to refrain from voting or to vote for any particular person, in any Navajo Nation election.

B. It is unlawful for any employer to attempt by any means whatever upon his or her place of business to influence the vote of any Navajo employee beyond the employer's personnel policies.

C. It is unlawful for any employer to attempt to prohibit, limit or restrict the political activities of any Navajo employee beyond the employer's personnel policies.

D. As used in this section, the term "employer" means any natural person, association of natural persons, Navajo Nation enterprise, independent contractor, corporation, or other entity, employing one or more members of the Navajo Nation or engaging their services under contract, and any person acting as agent for such person, association of persons, Navajo Nation enterprise, corporation, or other entity.

E. No Navajo Nation employee shall utilize Navajo Nation work time, Navajo Nation funds, Navajo Nation property and other Navajo Nation employees for campaign purposes. A person running for any elected office shall do so on his or her own time. Violation shall warrant an investigation and appropriate action.

### **History**

CAP-23-90, April 6, 1990.

### **§ 364. Interference with or corruption of election officer**

It is unlawful for any person to offer to give a bribe to the Chairman or any member of the Board of Election Supervisors of the Navajo Nation or to any registrar appointed by the Board of Election Supervisors of the Navajo Nation or any poll judge or any poll clerk or Special Election Supervisor; or to influence or attempt to influence any of said officers in the performance of their official duties by means of force, or threat, or promise of any nature.

### **History**

CAP-23-90, April 6, 1990.

### **§ 365. Violation of duty by election officers**

It is unlawful for any Chairman or members of the Navajo Board of Election Supervisors, any registrar appointed by the Board of Election

Supervisors or any poll judge or poll clerk or Special Election Supervisors to knowingly and willfully fail or neglect to perform any duty under any part of this chapter in the manner prescribed by this chapter or to accept any money or other thing of value from any candidate or from anyone acting or purporting to act on behalf of any candidate.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 366. Illegal registration or voting**

It is unlawful for any person, knowing he or she does not possess the qualifications for eligibility to vote in Navajo Nation election, to register or attempt to register to vote in such Navajo Nation election, or to vote in such election; or for any person who is not registered as a voter of the Navajo Nation to vote or attempt to vote in any Navajo Nation election; or for any registered voter to vote in any precinct except the one he or she is registered as belonging to.

#### **History**

CAP-23-90, April 5, 1990.

#### **§ 367. Penalties**

A. Any Navajo or non-Navajo Indian married to a Navajo who shall violate any section of this subchapter shall be guilty of a misdemeanor as an offense against the Navajo Nation and upon conviction hereof shall be sentenced to imprisonment for not more than six months or to a fine of not more than one thousand two hundred dollars (\$1,200), or to both such imprisonment and fine.

B. Any non-Navajo who shall violate any section of this subchapter may be fined or expelled from Navajo Nation land by the Government Services Committee according to the procedure set by 17 N.N.C. § 1901, as amended, provided, however, that if any person is charged with an offense under this subchapter on the ground that he or she is not a Navajo Indian, the Court shall receive any evidence offered on behalf of the Nation that such person has registered to vote or has voted in a Navajo Nation election, and if the Court finds that such person has so registered or has voted, he or she shall be conclusively presumed to be a Navajo Indian, and the Court shall have jurisdiction to try his or her case and to execute its sentence upon him or her.

C. Any association, corporation, or other entity which shall violate any section of this subchapter shall be ordered to show cause before the Economic Development Committee and the Transportation and Community Development Committee why it should not be barred from receiving any lease, right-of-way, contract, franchise, or concession of any character whatsoever thereafter from the Navajo Nation. If, upon hearing of such other to show cause, it appears to the Economic Development Committee and the Transportation and Community Development Committee that the said corporation is guilty of violating such section, said association, corporation or other entity shall be barred for a period of not less than one year nor more than five years from receiving any lease, right-of-way, contract, franchise, or concession of any character

whatsoever from the Navajo Nation.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 368. Severability**

If any provision of this Code or any rule and regulation adopted hereunder or the application thereof to any person or circumstance is held invalid, the remainder of this Act and of the rules and regulations adopted hereunder or the application of such provision to other persons or circumstances shall not be affected thereby.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 369. Effective date**

The effective date of the Code shall be immediately upon approval of the Code by the Navajo Nation Council unless specific effective dates are set out in specific provisions of the Code.

#### **History**

CAP-23-90, April 6, 1990.

#### **§ 370. [Reserved]**

### **Chapter 2. Referendum/Initiative**

#### **§ 401. Referendum/initiative matters, exemptions**

A. The referendum/initiative procedure which is provided for herein shall apply to matters which are strictly legislative and shall not include matters administrative or executive. Laws preserving peace, public health or safety and any laws determined and declared by the Navajo Nation Council to be of emergency nature shall be excluded from the referendum/initiative process. Yearly appropriations for a fiscal year budget shall also be exempt from the referendum/initiative process.

B. Use of trust funds, issuance of bonds, acquisition of property, acquisition of public utilities, the granting, extension, or enlargement of public utility franchise and rate regulation, tax measures against the Navajo Public for support of the government and public institutions, and ordinances or comprehensive plans for zoning shall not be exempted from the referendum / initiative process.

#### **History**

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

#### **§ 402. General**

A. Referendum measures may be referred to the people by the Navajo Nation Council where the Council determines by resolution that the people should decide the referendum measure.

B. Referendum measures may be referred by a Chapter Resolution to the registered voters of the Chapter within that Chapter Area. Such measure must affect that Chapter only.

C. Initiatives may be placed on a ballot by petition of the registered voters.

1. Registered voters may petition to place a Navajo Nation initiative on the ballot of a general or special election.

2. Registered voters of a particular chapter may petition to place a chapter initiative on the ballot of that particular chapter's chapter election or special chapter election called specifically for an election on the initiative.

D. A referendum measure/initiative cannot be legally adopted except in conformity with the requirements of the Election Code set forth herein.

#### **History**

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

#### **§ 403. Referendum measures referred by the Navajo Nation Council and Chapters**

A. The Navajo Nation Council shall, by resolution, refer a referendum measure for public vote. The resolution shall place timelines for the election which shall be held at the next regularly scheduled Navajo Nation election (primary, general or Navajo Nation-wide chapter election) if such election is scheduled no sooner than 60 days following the adoption of the resolution OR at a special election to be held no sooner than 60 days and not later than 90 days from the date of the passage of the resolution referring the enactment. The resolution shall provide the language to be placed on the ballot in accordance with 11 N.N.C. § 407(A). Where the language is not clear, the Board of Election Supervisors shall, by resolution, amend the language for clarification

purposes only, with language provided or recommended by the Office of Legislative Counsel and the Office of the Attorney General. The Board shall also review the measure to ensure that the measure is not exempt pursuant to § 401. The Council shall direct that funding be identified and made available to conduct the election.

B. A chapter may by resolution refer a measure for vote of registered voters within the chapter(s) which fall within the scope of the measure. The resolution shall place timelines on the election of the measure which shall be at the next regularly scheduled chapter election if such election is scheduled no sooner than 60 days following adoption of the resolution OR at a special chapter election to be held no sooner than 60 days and no later than 90 days from the date of the passage of the resolution referring the enactment. The resolution shall provide the language to be placed on the ballot in accordance with 11 N.N.C. § 407(A). Where the language is not clear, the Board of Election Supervisors shall, by resolution, amend the language for clarification purposes only, with language provided or recommended by the Office of Legislative Counsel and the Office of the Attorney General. The Board shall also review the measure to ensure that it is not exempt pursuant to § 401. The chapter shall make funding available to conduct the election.

C. Where a resolution refers to a future referendum election based upon a specific event, the Navajo Nation Council shall upon a foreseen or planned event refer the measure by resolution.

#### **History**

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

#### **§ 404. Initiatives by petition of registered voters**

A. Registered voters may petition to place an initiative on a Navajo Nation general or special election ballot where the scope of the initiative affects the entire Navajo Nation and is not limited to a chapter or chapters. Registered voters may petition to place an initiative on a chapter OR special chapter election ballot where the initiative's scope is limited to the chapter or chapters. An initiative election shall be at the next regularly scheduled Navajo Nation or chapter election if scheduled no sooner than 60 days from the date of the Board's final certification of the initiative petition or at a special initiative election to be held no sooner than 60 days and not later than 120 days from the date of the Board's final certification of the initiative petition, subject to the conditions on special initiative elections set forth herein.

1. Where the registered voters, through a Petition Committee, seek to conduct an initiative election as a special election, independent of any regularly scheduled Navajo Nation or chapter election, the Petition

Committee shall provide the Election Administration with a non-refundable cashier's check in the amount of five hundred dollars (\$500.00), in the case of a chapter initiative, or two thousand five hundred dollars (\$2,500), in the case of a Navajo Nation initiative, to cover costs of conducting the special initiative election. The non-refundable cashier's check shall be provided to the Election Administration just prior to final certification of the petition and prior to the election being called by the Board of Election Supervisors pursuant to 11 N.N.C. § 404(B)(14)(c). The Election Administration shall deposit the cashier's check with the Navajo Nation Controller.

2. The Board of Election Supervisors shall not certify any petition nor call for any special initiative election where the Petition Committee fails or refuses to provide the special initiative election funds required by 11 N.N.C. § 404(A)(1).

3. Funds received by the Petition Committee to cover costs of conducting a special initiative election are subject to the restrictions on contributions by corporations and nonmembers of the Navajo Nation set forth at 11 N.N.C. § 209.

4. Each Petition Committee whose initiative appears upon the official ballot in any special initiative election shall, not more than 30 days after the initiative election, file with the Election Administration a sworn and signed itemized statement of receipts in a similar manner to that set forth for candidate expenses in 11 N.N.C. § 202.

5. Legislation adopted by a successful special initiative election shall not take effect until the statement of receipts required by 11 N.N.C. § 404(A)(4) is filed.

B. Petition requirements are as follows:

1. Any eligible registered voter may petition for an election on an initiative consistent with provisions herein.

2. A Petition Committee shall designate itself to draft, circulate, and file the petition. A listing of the name, address, chapter registration, and census number of each member of the Petition Committee and its designated representative shall be filed with the Election Administration prior to circulation of the petition. Only this Committee shall have the power to withdraw the petition.

3. A copy of the petition shall be filed with the Election Administration office before it is circulated for signatures.

4. This filed copy shall be verified by the Petition Committee that the language is the form of language to be used in the petitions thereafter circulated and the Election Administration shall review the scope of the initiative to determine whether it is exempt from the referendum/initiative process pursuant to 11 N.N.C. § 401.

5. Before the petition is circulated for signatures, the Election

Administration shall review the petition for sufficiency. Petitions shall be found sufficient where:

a. Each petition page has the official title of the initiative and a summary of the nature and purpose of the initiative proposed;

b. The petition has attached the full text of the initiative proposed so signers may read the contents. The Election Administration shall notify the filing party that each petition circulated for signature shall have said attachment;

c. Each petition page is numbered;

d. Each page of the petition states a warning clause "*liability may be incurred by unauthorized signing*"; and

e. Each petition must require of the signer, name (in printed form), chapter, census number or social security number, and date.

6. Each proposed initiative must be submitted to the voters as an individual proposal. Two or more proposals addressing separate and distinct legislation shall not be joined in a single petition.

7. The Petition Committee shall be informed that, for verification purposes, petitions must be kept separate according to the five agencies when the initiative is to be addressed to the whole Navajo Nation.

8. The Election Administration Office shall inform the Petition Committee of requirements set forth above.

9. The circulator upon obtaining signatures shall verify by making an oath and subscribing on each page that the signature, mark, or thumbprint obtained are the genuine signature, mark or thumbprint of the person whose name it purports to be and that he or she in fact has witnessed the execution of all the signatures on the page of the petition.

10. Those signatories who cannot write their names shall place their mark or thumbprint in the appropriate place and it shall be signed by a witness who shall also sign his/her name and state chapter registration and census number or social security number.

11. Fifteen percent (15%) of all eligible registered voters shall have signed the petition for an initiative to be placed on a ballot. For purposes of determining the fifteen percent (15%) signature requirement, the total number of eligible registered voters shall be the official number of registered voters, Navajo Nation-wide or for the particular chapter if a chapter initiative, as of the date the petition is first submitted to the Navajo Election Administration.

12. Filing requirements:

a. Petitions for the initiative to be voted upon shall be

filed no later than 90 days before the scheduled election. Filing shall be at the Election Administration office.

b. Where the petition is in response to an enactment by the Navajo Nation Council, petitions shall be filed no sooner than 30 days after enactment and no later than 90 days before the election.

c. A petition must be filed with the Election Administration within 180 days of the date of the Election Administration's determination that the petition was sufficient for circulation pursuant to 11 N.N.C. § 404(B)(3), (4) and (5).

d. Once the petition is filed with the Election Administration, it may not be removed or withdrawn for the purpose of adding or changing information. Petitions removed after filing with the Election Administration shall be rejected.

### 13. Verification; certification of sufficiency

a. When a petition is filed, the Election Administration Office shall stamp it indicating its receipt, time and a date of receipt, name of person who filed it, names of Petition Committee members and name of official who received it. Once filed and stamped, language and content shall not be changed.

b. The Election Administration staff shall examine, verify and certify the petitions as sufficient before ordering an election. Petitions shall be examined to determine sufficiency as to:

- 1). Name;
- 2). Address;
- 3). Chapter;
- 4). Census number or social security number;
- 5). Registration of voters;
- 6). Authenticity of signatures;
- 7). Witnessing of marks and thumbprint; and
- 8). Whether the requisite number of eligible registered voters signed the petition pursuant to § 404(B)(11).

c. If, within 10 days after the filing, the petition is determined insufficient by the Navajo Election Administration, the examining officers shall set forth reasons for insufficiencies. The Petition Committee representative will be notified by letter within five days of the determination. A hearing shall be granted to determine the validity or sufficiency only if the Petition Committee requests a hearing in writing with the Office of Hearings and Appeals within 10 days of the Election Administration's determination. The Office of Hearings and

Appeals shall set a hearing date to take place within a reasonable time.

d. Upon receipt of a request for hearing and upon a scheduling of a hearing date, all parties shall be notified.

e. The Office of Hearings and Appeals shall have the authority to call witnesses and inquire into the facts to determine authenticity of signatures. Power to call a witness shall include power to subpoena.

f. Notice of Appeal by either party may be made to the Supreme Court within 10 days of a final decision or order issued by the Office of Hearings and Appeals. Review by the Supreme Court is limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record.

14. Petitions determined valid and sufficient; objections and protests.

a. Once filed, the Navajo Election Administration shall hold the petition for 10 days. If no objections or protests are made within these 10 days, the Election Administration shall certify the petition as sufficient.

b. Objections or protests against a petition determined valid and sufficient are allowed under the following conditions:

1). The protesting or objecting party or parties must be eligible registered voters.

2). Protests and objections must address only the validity and sufficiency of the petitions.

3). Protesting or objecting parties who question the content of the measure, or merely believe measure to be unwise or difficult to execute shall not be allowed a hearing.

4). The protest shall be verified.

5). The protest shall be filed with the Office of Hearings and Appeals within 10 days of the Election Administration's determination. A hearing shall be requested by the protesting party.

6). Notices shall be given to all parties involved immediately by parties objecting or protesting parties.

7). Notice of Appeal by either party may be made to the Supreme Court within 10 days. Review is limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record.

c. Upon final certification of a petition, the initiative election shall be called by the Board of Election Supervisors.

## History

**Note (2005).** For grammatical purposes, at Subsection (B) (13) (c), "request" changed to "requests."

CMY-30-03, May 2, 2003.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

## Cross References

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

## Annotations

### 1. Certified Questions

"Therefore, our appellate authority over OHA [referring to 11 N.N.C. § 404(B) (14) (b) (7)] gives this Court the jurisdiction to hear its certified questions, and *Election Supervisors* is overruled." *In the Matter of Two Initiative Petitions Filed by Navajo Nation President Joe Shirley, Jr.*, No. SC-CV-41-08, slip op. at 3 (Nav. Sup. Ct. July 18, 2008)–(Order of Correction entered July 22, 2008). [See, *In re Navajo Board of Election Supervisors*, 6 Nav. R. 302, 303–304 (Nav. Sup. Ct. 1990).]

### 2. Verification of signatures

"We interpret this language [§ 404(B) (13) (b)] to read as an affirmative duty on the part of the NEA. To simply remove signatures that otherwise provide valid information because of an illegible signature or a field left blank or incomplete, denies the People the opportunity to add their voice to the democratic process. We interpret the language of the law to mean that the NEA is compelled to use its regulatory due diligence (examine–ná níl9, verify–t'áásh ákót'é, and certify–bik'int'oót'áá[]) in verifying the identity of questionable signers. We find this especially important to the Navajo People, as some elders may struggle with filling out all of the required information, or may make a mistake. [...] We thus rule that errors, which do not demonstrate an intent to defraud the process or are indicative of malice, should not be fatal to the signer." *In the Matter of the Navajo Nation Election Administration's Determination of Insufficiency Regarding Two Initiative Petitions Filed by Navajo Nation President Dr. Joe Shirley, Jr., The Navajo Election Administration v. Dr. Joe Shirley, Jr.*, No. SC-CV-28-09, slip op. at 12–13 (Nav. Sup. Ct. July 30, 2009).

## § 405. Notice of election on a referendum measure or initiative

A. Once an election is set for a referendum measure/initiative, notice shall be published by the Navajo Election Administration.

B. The notice shall contain the date of the election, the official title,

descriptive summary and brief statement of legal effect of the proposed referendum measure or initiative as it will appear on the ballot pursuant to 11 N.N.C. § 407(A). The notice shall also indicate that copies of the complete text of the referendum measure or initiative are available for inspection or purchase (duplication cost only) at the Navajo Election Administration office.

C. Notice is sufficient if published at least once for two successive weeks in a newspaper of reservation wide distribution. The Election Administration may provide other notice as appropriate.

#### **History**

CMY-30-03, May 2, 2003.

CJA-05-01, January 24, 2001.

CAP-23-90, April 6, 1990.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

#### **§ 406. Vote required**

A. The measure/initiative shall pass if a majority, or other identified amount greater than a majority, of all eligible registered voters who cast a vote, vote for the proposed measure/initiative. Eligible registered voters within this section are not limited to voters who voted in the last election. Only registered voters of the particular chapter conducting a chapter election or special chapter election are eligible to vote on a referendum measure or initiative on that chapter ballot.

B. A resolution or petition shall specifically state that the referendum or initiative must be passed by a majority or other identified amount greater than a majority.

#### **History**

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

#### **§ 407. Form of ballot**

A. The Navajo Board of Election Supervisors shall prepare the official ballot for a referendum or initiative election in the following manner:

1. The official title of the referendum measure or initiative shall

be printed on the official ballot. The official title of the referendum measure to be voted upon shall be the same as the title referred by the Navajo Nation Council or chapter. The official title of the initiative to be voted upon shall be the same as the title on the petition signed by the registered voters as set forth in 11 N.N.C. § 404(B)(5)(a).

2. A descriptive summary of the referendum measure or initiative shall be prepared by the Board of Election Supervisors, upon recommendation of the Office of Legislative Counsel and the Office of the Attorney General, and printed on the official ballot following the official title. The descriptive summary shall provide the registered voters with an objective and unbiased statement of the purpose and principal provisions of the referendum measure or initiative to be voted on.

3. Following the official title and descriptive summary of the referendum measure or initiative, a brief statement of legal effect shall be printed on the ballot. A brief statement of legal effect shall, in a brief and objective phrase, explain the resulting effect a "yes" or "for" and "no" or "against" vote will have on existing law should the measure/initiative receive a majority of votes cast in that particular manner. The brief statement of legal effect shall be prepared by the Office of Legislative Counsel and the Office of the Attorney General and appear on the ballot as follows:

A "YES" (or "FOR") vote shall have the effect of \_\_\_\_\_.

A "NO" (or "AGAINST") vote shall have the effect of \_\_\_\_\_.

4. Below the brief statement of legal effect there shall be printed on the ballot the corresponding words "YES" or "FOR" and "NO" or "AGAINST", as may be appropriate, and a place for the voter to put a mark indicating his/her preference.

5. The Navajo Board of Election Supervisors shall have the final approval authority over the wording of the official title, the descriptive summary and the brief statement of legal effect of the referendum or initiative measures.

B. A minimum of four copies of the complete text of the legislation proposed by the referendum measure or initiative shall be made available in each polling place for the voters to review. Each voter shall be informed by the poll judges and clerks at each polling place that copies of the complete text are available to review in the polling place.

C. Dispute of an official title, descriptive summary or brief statement of legal effect may be determined by hearing before the Office of Hearings and Appeals, pursuant to 11 N.N.C. § 341.

### **History**

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

## **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

### **§ 408. Conduct of elections**

A. Polling place supervision; appeal by persons not allowed to vote.

1. Before the date of an election, the Chairperson of the Board shall call in all chief poll judges for necessary instructions, swearing in, and transport of ballot boxes and voting machines to the polling places for each election community.

2. The poll judges shall guard the polls, maintain order, and instruct voters in the techniques of balloting. The poll clerks shall enter each voter in the poll books and issue ballots.

3. One of the poll judges for each polling place shall be designated by the Board as the chief poll judge for his or her polling place, and it shall be his or her duty and responsibility to keep custody of the account for all ballots, the ballot box and the poll books and he or she shall supervise and have supervisory authority over the other judges and poll clerks in guarding the polls, maintaining order and instructing voters.

4. A voter must vote at the polling place where he or she is registered to vote.

5. Any person who is not allowed to vote may appeal to the Board immediately, whose decision shall be final.

6. There shall be a member of the Navajo Nation Police present at each polling place during voting hours.

B. Voting shall begin at 6:00 a.m. and shall end at 7:00 p.m. All voters present at the poll places and in line to vote at 7:00 p.m. will be allowed to vote.

C. Counting of votes. At the close of the election, the election judges at each polling place shall tabulate the results of the balloting, seal and lock the ballot boxes with the poll books and keys in the ballot boxes, and transmit the results of the balloting to the Election Administration at Window Rock by telephone or radio communication. A poll watcher will be allowed at all times during the balloting and during the counting of the votes.

D. Canvass of votes; recount.

1. Sealed ballot boxes containing all of the ballots cast in the election, all unused or spoiled ballots, data packs, keys, a written statement of the election results on a form provided by the Board and certified by the poll judges at each polling place, and the list of registered voters shall be forwarded to the Election Administration at

Window Rock by the chief poll judge.

2. The Board shall canvass the written statements of election results from each polling place and shall then total the election results.

3. No recount of ballots of any polling place shall be made unless within 10 days after the election, a registered voter who voted on the referendum/initiative objects and the Board sees sufficient reason to recount the election results. The Board may, on its own initiative, conduct a recount of the votes of any polling place if it is believed that there may have been substantial irregularity in the voting or counting of the ballots. The Board may use the chief poll judge to assist in canvassing and recounting ballots.

E. Certification of election. Not less than 10 days following an election, the Board shall certify the election results.

F. Appeal of disputed elections.

1. A disputed election shall be appealed in writing within 10 calendar days following the election to the Office of Hearings and Appeals by an eligible registered voter who voted in the referendum/initiative election.

2. The Office of Hearings and Appeals shall issue rules and regulations for the determination of how such disputes shall be handled, and shall, pursuant to such rules and regulations, issue a decision upholding or vacating the disputed election.

3. A decision of the Office of Hearings and Appeals sustaining or vacating a disputed election may be appealed within 10 calendar days to the Supreme Court of the Navajo Nation. The scope of review is limited to whether the Office of Hearings and Appeals' decision is sustained by sufficient evidence on the record.

#### **History**

CO-56-04, October 19, 2004.

CMY-30-03, May 2, 2003.

CAP-23-90, April 6, 1990.

**Note.** Slightly reworded for purposes of clarity. Also, at Subsection (F)(1), for grammatical purposes, "a" changed to "an."

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

**§ 409. Effect of referendum/initiative elections**

A. The vote on a referendum/initiative election shall be binding and have the effect of law.

B. Legislation adopted by a referendum/initiative election shall be incorporated in, and published as a part of the Navajo Nation Code, or any successor to the Code.

C. Legislation adopted by a referendum/initiative election shall be amended or repealed only:

1. By the outcome of a vote on a subsequent referendum or initiative election concerning the same subject matter as that of the referendum/initiative which originally adopted the legislation; or

2. For a Navajo Nation-wide referendum or initiative election, by three-fourths (3/4) vote of the full membership of the Navajo Nation Council at a regular session of the Navajo Nation Council.

#### **History**

CMY-30-03, May 2, 2003.

#### **Cross References**

Chapter referendum, see 26 N.N.C. §§ 103, 1003 and 2001 of the *Navajo Nation Local Governance Act*.

### **Title 12**

#### **Fiscal Matters**

##### **United States Code**

Care and investment of Indian monies, see 25 U.S.C. § 151 *et seq.*

Disbursement of monies to Indians, see 25 U.S.C. § 111 *et seq.*

Use of Navajo Tribal funds on deposit in United States Treasury, see 25 U.S.C. § 637.

##### **Code of Federal Regulations**

Financial activities, 25 CFR § 101.1 *et seq.*

#### **Chapter 1. Office of the Auditor General**

##### **§ 1. Establishment**

There is established the Office of the Auditor General under the Navajo Nation Council.

#### **History**

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

## **§ 2. Purpose**

A. The purpose of the Office of the Auditor General shall be to provide continuing professional audit and management services to the Navajo Nation government with regard to the adequacy of management and accounting systems, procedures, practices and internal controls, including but not limited to:

1. Conducting financial audits and reviews of financial records of chapters, related Navajo Nation entities and contractors to the Navajo Nation in accordance with government auditing standards;

2. Conducting performance audit reviews of Navajo Nation government programs, departments and divisions;

3. Providing management advisory services to the Navajo Nation;

4. Assisting the Office of the Prosecutor and Ethics and Rules Office in the investigation of possible fraud and/or misappropriation of assets of the Navajo Nation; and

5. Assisting in the building of an effective, responsive, strong and accountable government.

B. The Office of the Auditor General may, from time to time, perform professional services for organizations and entities not accounted for by the Department of Financial Services of the Navajo Nation and obtain revenue therefore, payable to the Navajo Nation government.

## **History**

CD-80-02, December 30, 2002.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

## **§ 3. Staffing, organization and scheduling of work**

A. There are established the positions of the Auditor General, other auditors, systems analysts, support staff and such other positions as may be necessary to carry out the purpose of the Office of the Auditor General.

B. The Auditor General shall be appointed by the Speaker, Navajo Nation Council, at a negotiated salary subject to confirmation by the Navajo Nation Council and shall serve at the pleasure of the Navajo Nation Council. The

Auditor General shall be an actively licensed Certified Public Accountant, Certified Internal Auditor and/or other comparable certification to fulfill the purpose of the office. The Auditor General shall be bound by a professional code of ethics and standards of the accounting and auditing profession as regulated by the Board of Accountancy of the licensing state or other applicable licensing agency. The Auditor General shall be knowledgeable in performance, compliance and financial auditing, public administration, and governmental financial and fiscal policies. The Auditor General may be removed at any time by majority vote of the Navajo Nation Council.

All other personnel shall be hired and compensated pursuant to Navajo Nation policies and procedures relating to qualifications, experience, Navajo preference, salaries, etc., and subject to workload requirements and budgetary constraints.

C. The Speaker, Navajo Nation Council, may appoint an Acting Auditor General to serve during the vacancies of the Auditor General, pending formal action by the Navajo Nation Council. Such Acting Auditor General shall be subject to the same professional requirements required of the Auditor General in § 3(B), above.

D. An organizational chart of the Office of the Auditor General is provided in the office's current Plan of Operation. This chart is subject to future changes in scope and budgetary restrictions.

E. The scheduling of the audits for any fiscal year will be done in accordance with sound professional practice, giving priority, to the extent practicable, where requested or when the interests of the Navajo Nation so require.

#### **History**

CD-80-02, December 30, 2002.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 4. Duties, responsibilities and authority of the Auditor General**

The Auditor General is authorized and directed to:

A. Formulate, implement and maintain continuing audit programs and take such action as may be deemed necessary for the accomplishment of the purpose of the office.

B. Establish and maintain all necessary liaison and communication with the officials of the Navajo Nation government, entities, and chapters, mineral and business lease operators and state and federal agencies for the furtherance and accomplishment of the purpose of the office.

C. Coordinate with the Division of Community Development and the Office of the Controller in the development of accounting, financial-related and audit regulations for use by the chapters; and work with the Office of the Prosecutor and Ethics and Rules Office, if necessary, to secure records necessary for completing chapter audits and in the investigation of possible fraud and/or misappropriation of assets of the Navajo Nation.

D. Be responsive to the requests of management for specific information, review or audit of any aspect of Navajo Nation and chapter operation.

E. Prepare and present to the Budget and Finance Committee of the Navajo Nation Council, and to the appropriate elements of management, clear and concise reports of the results of internal audit reviews and examinations, prepared in accordance with generally accepted auditing standards and governmental auditing standards as promulgated by the Comptroller General of the United States.

F. Serve as one of the principal advisors to the Navajo Nation Council regarding accounting, systems and procedures, program, departmental and divisional operations and financial and business matters.

G. Participate in management decisions when new fiscal procedures are being established or existing fiscal procedures modified and also in various task forces, committees and commissions.

H. Exercise supervisory control and direction of all personnel within the office and maintain the highest standards of audit quality, ethics, independence and confidentiality. Review, modify and approve audit programs, audit reports and recommendations. Schedule and prioritize audits.

I. Represent the Office of the Auditor General in executive and legislative planning.

J. Represent the Navajo Nation government within the areas of responsibility and authority of the office and as authorized by the Office of the Speaker, Navajo Nation Council, in relations with all persons and organizations outside the Navajo Nation, and in matters relating to cooperative activities with state or federal agencies, pertaining to audit. Interface with the Navajo Nation's independent auditors.

K. Provide, to the extent necessary, training programs and library resources for the development of a well-qualified professional audit staff. Maintain a continuing education program designed to qualify staff personnel to meet the governmental auditing standards.

L. Conduct limited examinations of specific financial transactions and provide other administrative support services to the Navajo Nation government as and when requested and as directed by the Navajo Nation Council.

M. Enter into agreements, as deemed necessary with Navajo Nation, state or federal departments or offices for the sole purpose of accomplishing the objectives of the office, subject to review by and approval of the Intergovernmental Relations Committee.

N. Update the Plan of Operation and policy guidelines for the Office of the Auditor General as and when necessary, to implement the objectives and policies of the Navajo Nation administration.

O. Conduct audit follow-ups and take other necessary actions to assist in the implementation of audit recommendations in accordance with requests therefore and the directions of the Navajo Nation Council.

P. While conducting audits (financial, performance and compliance) and operations appraisals of Navajo Nation programs, divisions, or chapters, give emphasis to: effectiveness, accountability, responsiveness to the needs of the Navajo people, adherence to goals and objectives, policies and plans of operation; safeguarding of Navajo Nation assets and properties; proper use of labor, equipment, funds and properties; services to the community; compliance with applicable Navajo Nation, state and federal laws, agreements, policies or procedures; and adequacy and efficiency of personnel.

Q. Conduct, or participate in the conduct of, examinations of financial statements of Navajo Nation affiliated entities, contractors to the Navajo Nation and others, in accordance with generally accepted auditing standards.

R. Conduct operations audits of Navajo Nation programs, divisions, departments and Navajo Nation affiliated entities as requested by such entities or by the Navajo Nation Council.

S. Delegate authority to members of the staff as and when necessary.

T. Report directly to the Speaker, Navajo Nation Council, on all operational issues and be responsible thereto for the accomplishment of the purposes of the office.

U. In general, do everything necessary and convenient and assume such other duties and responsibilities as may be deemed advisable, to accomplish the purpose of this office in the best interest of the Navajo Nation.

V. Serve as the sole authority within the Navajo Nation for issuance of audit reports or reports covering limited examinations of specific financial transactions.

### **History**

CD-80-02, December 30, 2002.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

**Note.** Slightly reworded.

### **§ 5. Disclosure of records**

A. Officials and employees of all Navajo Nation programs, divisions, entities, chapters, and enterprises shall make their books and records available to the staff of Office of the Auditor General upon request and extend every courtesy and cooperation to such representatives while they are performing their official duties.

B. The requested information shall be made available within a reasonable period of time.

#### **History**

CD-80-02, December 30, 2002.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

**Note.** Slightly reworded.

#### **§ 6. Audit reports, actions and follow-ups**

A. The Auditor General shall submit all Navajo Nation program, division, chapter, and enterprise audit reports with findings and recommendations to the Budget and Finance Committee of the Navajo Nation Council for their review. Upon receipt of the reports, review shall begin within a reasonable period of time so as to implement the audit recommendation(s) in a timely manner.

B. The Office of the Auditor General shall conduct such post-audit follow-ups as are deemed necessary. The results of such post-audit follow-ups shall be similarly reported as specified by (A), above.

#### **History**

CO-96-99, October 20, 1999.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

#### **§ 7. Procedures for addressing audit findings and implementing recommendations**

A. Within 10 working days after receipt of the final draft of an audit report from the Office of the Auditor General, the audited program will submit written comments to the Auditor General that present the audited program's overall response to the final draft of the audit report. The audited program may request an extension of up to five working days for justified reasons and approval by the Auditor General. Failure of an audited program to submit a response shall be deemed to constitute an acceptance of the final draft of the audit report by the program. The response should not exceed five pages and should generally describe how audit findings made in the final draft of the

audit report will be corrected. If the audited program disputes any portion of the final draft of the audit report, the response shall state the reasons therefor.

The term "audited program", as used, includes all Navajo Nation programs, divisions, chapters, enterprises, or other entities of Navajo Nation government.

B. A copy of the audited program's response will be published as part of the audit report issued to the Budget and Finance Committee, the standing committee having oversight responsibility for the audited program, the Navajo Nation Council and public.

C. Within 30 calendar days after the release of the audit report, the audited program will submit a corrective action plan to the Auditor General. The corrective action plan will address each finding presented in the report in one of the following ways:

1. Audited program agrees with the audit findings and will immediately implement the recommendations within a stated time period.

2. Audited program agrees with the audit findings but considers that immediate implementation of the recommendation is not feasible. Audited program will state the reasons why implementation should be delayed and the expected time frame for implementation.

D. Upon receipt of the audited program's corrective action plan, the Auditor General shall review the plan to determine its effectiveness. Upon approval of the plan the Auditor General shall present the audit report, and the audited program shall present the corrective action plan to the Budget and Finance Committee for review. The Auditor General will comment and identify any potential deficiencies in the corrective action plan, if warranted. The Budget and Finance Committee will approve the audit report and the corrective action plan by resolution.

E. The standing committee or committees having oversight responsibility for the audited program shall be served with copies of the audit report and the corrective action plan. The oversight committee may request the Auditor General to brief them on the audit report.

F. Six months after the submission of the corrective action plan, the audited program will provide to the Auditor General a written report on the status of all recommendations.

1. The status report shall describe actions taken to implement the corrective action plan and the results of those actions. The report should disclose any problems that have affected the audited program's ability to implement the corrective action plan in a timely manner and state how the audited program plans to address these problems.

2. The Auditor General will review the implementation status report and, if warranted, will conduct test work to verify actions taken and/or problems encountered. The Auditor General will provide a copy of the status report along with the Auditor General's opinion regarding the

success of the audited program's implementation effort to the Budget and Finance Committee and the standing committee or committees having oversight responsibility for the audited program.

G. 12 months after the release of the audit report, the Auditor General will conduct a follow-up review to document the status of the implementation. The audited program shall provide data and information, as requested by the Auditor General, to verify action taken. The Auditor General shall issue a written report on the audited program's progress in implementing the corrective action plan. As part of the follow-up report, the Auditor General shall recommend action to be taken by the Budget and Finance Committee and present the report to the standing committee or committees having oversight responsibility for the audited program.

H. The Auditor General shall report the results of the follow-up review and the status of the correction plan to the Budget and Finance Committee.

I. Based on the follow-up review and any recommendations made by the standing committee having oversight responsibility for the audited program, the Budget and Finance Committee will determine what actions should be taken.

#### **History**

CD-80-02, December 30, 2002.

CO-96-99, October 20, 1999.

**Note.** New § 7, previous § 7 now found at 12 N.N.C. § 10.

#### **§ 8. Duties of audited programs**

Once audit findings and a corrective action plan are approved by the Budget and Finance Committee, the Navajo Nation program, division, chapter, enterprise or entity which is the subject of the corrective action plan shall have a duty to implement the corrective action plan according to the terms of the plan.

#### **History**

CO-96-99, October 20, 1999.

#### **§ 9. Sanctions for failure to implement plan**

A. Whenever the Auditor General determines through the periodic review established in § 6 or § 7 that program, division, chapter, enterprise or entity has failed to implement the corrective action plan approved by the Budget and Finance Committee within the time table set by the corrective action plan or the Auditor General, the Auditor General shall immediately report that failure to the Controller of the Navajo Nation and to the Budget and Finance Committee.

B. As a sanction for failure to implement the corrective action plan, the Controller shall cause ten percent (10%) of monies payable from any governmental fund of the Navajo Nation as defined at 12 N.N.C. § 810(S) to be withheld after the recommended sanction is approved by the Budget and Finance

Committee and issued to the program, division, chapter, enterprise or entity until such time as the program, division, chapter, enterprise or entity demonstrates to the Auditor General that the corrective action plan has been implemented. Once proof of implementation of the corrective action plan has been demonstrated, the Auditor General shall immediately report this compliance to the Controller who shall then release all withheld funds to the program, division, chapter, enterprise or entity.

C. In addition, the director of any program, division, or entity of the Navajo Nation which fails to implement a corrective action plan, as reported by the Auditor General, shall have twenty percent (20%) of their salary withheld by the Controller after the recommended sanction is approved by the Budget and Finance Committee until such time as the program, division, enterprise or entity which is subject to his or her direction demonstrates to the Auditor General that the corrective action plan has been implemented. Whenever the audited program is a chapter of the Navajo Nation, twenty percent (20%) of any payment prospectively due the chapter officials shall be withheld by the Controller and the chapter government. Once proof of implementation of the corrective action plan has been demonstrated, the Auditor General shall immediately report this compliance to the Controller and, where applicable, the chapter government, who shall then release the withheld salary to the director of the program, division, enterprise, or entity or to the chapter official.

D. Any director or chapter official whose salary or other payments are withheld pursuant to § 9(C) shall have the right to have the withholding reviewed by the Navajo Nation Office of Hearings and Appeals. Review shall be limited to a determination of whether the audit recommendation or corrective action plan bears a rational relationship to the audit report, was approved by the Budget and Finance Committee, whether the corrective action plan was implemented within established time tables and whether the time tables for implementation were reasonable. The withholding of salary shall be upheld if there is a preponderance of evidence in support of these factors. The decision of the Office of Hearings and Appeals shall be final and no appeal shall lie to the courts of the Navajo Nation.

### **History**

CD-80-02, December 30, 2002.

**Note.** Previous reference to 12 N.N.C. § 810(R) at Subsection B corrected to 12 N.N.C. § 810(S) to reflect amendments made to 12 N.N.C. § 810 by Resolutions CMY-22-04 and CAP-18-04.

CO-96-99, October 20, 1999.

### **Annotations**

#### **1. Appellate review prohibited**

"As the Council has explicitly prohibited appellate review of the sanctions assessed in this case, there is no appellate jurisdiction to preserve or protect. The Court therefore lacks jurisdiction to issue a writ of prohibition in this case." *Budget and Finance Committee v. Office of Hearings and Appeals*, No. SC-CV-63-05, slip op. at 5 (Nav. Sup. Ct. January 4, 2006).

## **§ 10. Amendment of the Plan of Operation**

This Plan of Operation may be amended from time to time by the Navajo Nation Council upon the recommendation of the Intergovernmental Relations Committee of the Navajo Nation Council. The request for amendment shall be originated by the Auditor General.

### **History**

CO-96-99, October 20, 1999.

CJY-60-91, July 19, 1991.

CF-4-85, February 5, 1985.

ACO-132-84, October 11, 1984.

## **Chapter 2. Office of the Controller**

### **History**

Subchapters 3, 5, 7, 9, and 11 repealed by CF-5-73, February 1, 1973. Repealed sections were derived from CJN-60-71, June 8, 1971, and the 1972 Budget.

## **§ 201. Establishment; purpose; composition**

A. There is established the Office of the Controller within the Executive Branch of the Navajo Nation.

B. The purpose of the Office of the Controller shall be the formulation, implementation and execution of the financial plans and policies of the Navajo Nation in order that accurate and complete accounts and reports be rendered, the assets of the Navajo Nation be properly protected and modern methods of financial management be implemented.

C. There shall be, within the Office of the Controller:

1. Two secretaries;

2. A systems and procedures analyst;

3. Three accounting managers, one of which shall oversee an Accounts Receivable Department and a Budget Control Department; one of which shall oversee an Accounts Payable Department and a General Accounting Department; and one of which shall oversee a Cashier's Department, a Payroll Department and an Office Services Department.

### **History**

CF-5-73, February 1, 1973.

1972 Budget, Div. 4, Dept. 10, §§ I, II, V.

**§ 202. Controller; Acting Controller; other personnel**

A. There is established the position of Controller, and such other positions as may from time to time be budgeted by the Navajo Nation Council, or by any other source acceptable to the President, Navajo Nation.

B. The Controller shall be appointed by the President of the Navajo Nation, at a negotiated salary with the approval of the Navajo Nation Council and shall serve at the pleasure of the Navajo Nation Council. The President of the Navajo Nation, with the consent of the Budget and Finance Committee, may appoint an Acting Controller to serve during vacancies of the Controller pending formal action by the Navajo Nation Council.

C. All other personnel shall be hired and compensated pursuant to usual Navajo Nation policies and procedures.

**History**

1972 Budget, Div. 4, Dept. 10, § III.

**Note.** Slightly reworded for purposes of statutory form. The Advisory Committee is no longer a standing committee of the Navajo Nation Council. The Budget and Finance Committee has been delegated oversight authority for the Division of Finance, including the Office of the Controller. See 2 N.N.C. § 374(B) (16).

**Cross References**

Budget and Finance Committee of the Navajo Nation Council, 2 N.N.C. § 374(B) (16).

**§ 203. Duties, responsibilities and authority of Controller**

The Controller shall:

A. Report directly to the President of the Navajo Nation, on operational matters of the Office of the Controller.

B. Report to the Navajo Nation Council and its committees concerning the financial condition of the Navajo Nation and be solely responsible to the Council and the Budget and Finance Committee concerning the propriety of financial transactions, and compliance with Council or committee directives.

C. Formulate overall financial policy and procedures for the Navajo Nation Council and take such action as is necessary for the accomplishment and enforcement thereof.

D. Exercise supervisory control and direction of all sections and divisions under the Controller.

E. Represent all areas of the Controller's responsibility at executive level planning.

F. Develop and coordinate programs of financial management at all levels within the Navajo Nation government.

G. Represent the Navajo Nation government in the areas of the Controller's responsibility.

H. Delegate authority to subordinates as required for efficient operation.

I. Serve as Chairperson, Investment Committee for the administration of the Navajo Nation's investment programs, and be responsible to the Navajo Nation Council and the Budget and Finance Committee for the proper execution of the investment program.

J. Plan and conduct program and budget development and review.

K. Act as an advisor to the Budget and Finance Committee.

### **History**

1972 Budget, Div. 4, Dept. 10, § IV.

## **Chapter 3. Navajo Nation Procurement Act**

### **Subchapter 1. General Provisions**

#### **§ 301. Purposes, Rules of construction**

A. Interpretation. This Act shall be construed and applied to promote its underlying purposes and policies.

B. Purposes and Policies. The underlying purposes and policies of this Act are:

1. To simplify, clarify, and modernize the law governing procurement by the Navajo Nation, to foster effective broad-based competition within the free enterprise system to the extent consistent with the purposes and provisions of the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*;

2. To permit the continued development of procurement policies and practices;

3. To provide for consistent procurement practices;

4. To provide for increased public confidence in the procedures followed in public procurement;

5. To ensure the fair and equitable treatment of all persons who deal with the procurement system of the Navajo Nation;

6. To provide increased economy in Navajo Nation procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Navajo Nation;

7. To provide safeguards for the maintenance of a procurement system of quality and integrity.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Revision Note.** Slightly reworded for purpose of statutory form.

#### **§ 302. Requirement of good faith**

This Act requires all parties involved in the negotiation, performance, or administration of Navajo Nation contracts to act in good faith.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 303. Application of this Act**

A. General Application. This Act applies only to contracts solicited or entered into after the effective date of this Act unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

B. Application to Navajo Nation Procurement. This Act shall apply to every expenditure of public funds, irrespective of their source, by the Navajo Nation, acting through a division, department, office, or program of the Navajo Nation as defined herein, under any contract. Nothing in this Act or in regulations promulgated hereunder shall prevent any division, department, office, or program of the Navajo Nation or political subdivision of the Navajo Nation from complying with the terms and conditions of any grant, gift, bequest, intergovernmental, joint powers or cooperative agreement. This Act shall not apply to governance certified chapters, who are governed by their own procurement policies.

C. For the purpose of procuring the services of accountants, physicians, dentists, or other licensed professional services, other than attorneys or tribal court advocates, any division, department, office, or program of the Navajo Nation may act as a purchasing agency and contract on its own behalf for such services, subject to this Act and regulations promulgated by the Budget and Finance Committee. The purchasing agency may consult with the Director, Division of Finance, Purchasing Department or authorized designee when procuring such services.

D. Contracts for the services of outside attorneys and tribal court advocates shall be awarded only through the Attorney General of the Navajo Nation. This limitation shall not apply to the employment of attorneys or tribal court advocates by divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, in accord with Navajo Nation law.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 304. Severability**

If any provision of this Act is held invalid, such invalidity shall not affect other provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 305. Construction against implicit repealer**

Since this Act is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 306. Effective date**

This Act shall become effective upon passage by the Navajo Nation Council.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 307. Determinations**

Written determinations required by this Act shall be retained in the appropriate official contract file of the Director, Division of Finance, Purchasing Department or authorized designee or the purchasing agency for the period of three years, unless a different period of time is required by federal or state contract or grant requirements.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 308. Definitions**

A. The words used in this Act shall have their ordinary meanings unless:

1. The context in which they are used clearly requires a different meaning; or

2. A different definition is prescribed for a particular provision.

B. "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws the Navajo Nation, or in the absence of Navajo law, the states in which the professional services are to be performed.

C. "Bid" means an offer to perform a contract for the performance of work and labor and/or the delivery of goods at a specified price.

D. "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

E. "Change Order" means a written order signed by the procurement officer or authorized designee, directing the contractor to make changes as authorized by a contract without the consent of that contractor.

F. "Construction" means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

G. "Contract" means all types of Navajo Nation agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction. The term contract does not include agreements, including prime contracts and grants, between the Navajo Nation and federal, state, and local governments for the provision of governmental services to Navajos and other persons within the Navajo Nation.

H. "Contract Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

I. "Contractor" means any person having a procurement contract with a division, department, office, or program of the Navajo Nation.

J. "Cost-Reimbursement Contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Act, and a fee, if any.

K. "Data" means recorded information, regardless of form or characteristic.

L. "Designee" means a duly authorized representative of a person.

M. "Employee" means an individual drawing a salary from a division, department, office, or program of the Navajo Nation, whether elected or not, and any uncompensated individual performing personal services for any division, department, office, or program of the Navajo Nation.

N. "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that:

1. Is regularly maintained by a manufacturer or contractor;
2. Is either published or otherwise available for inspection by customers; and
3. States prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

O. "Division, department, office, or program of the Navajo Nation" means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean any other governance certified political subdivision of the Navajo Nation, or an enterprise or authority of the Navajo Nation.

P. "Grant" means the receipt or provision of governmental assistance, whether financial or otherwise, under a program authorized by Navajo Nation, state or federal law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

Q. "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

R. "May" denotes the permissive.

S. "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

T. "Political Subdivision" means governmental units of the Navajo Nation which are created by Navajo Nation law and include the chapters and townsites of the Navajo Nation.

U. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any goods and/or services, unless excluded from coverage by some other provision of Navajo Nation law. It also includes all functions that pertain to the obtaining of any goods and/or services, including description of

requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

V. "Procurement Officer or authorized designee" means any person authorized to enter into, make written determinations regarding, and administer contracts. The term also includes an authorized representative acting within the limits of authority.

W. "Proposal" means an offer to perform a contract for the performance of work and labor and/or the delivery of goods sought where it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding.

X. "Purchase description" means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.

Y. "Purchasing agency" means any division, department, office, program, and political subdivisions of the Navajo Nation, other than the Division of Finance, Purchasing Department which is authorized by this Act or its implementing regulations, to enter into contracts.

Z. "Regulation" means, for purposes of this Act, the regulations adopted by the Budget and Finance Committee to regulate the procurement of goods and services by the divisions, departments, programs and offices of the Navajo Nation government.

AA. "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

BB. "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

CC. "Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

DD. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

EE. "Shall" denotes the imperative.

FF. "Supplies" means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 309. Public access to procurement information**

Procurement information shall be available to the public to the extent provided by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 310. Collection of data concerning public procurement**

The Director, Division of Finance, Purchasing Department shall cooperate with the Division of Finance in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and employ such trained personnel as may be necessary to carry out this function. All divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, shall furnish such reports as the Director, Division of Finance, Purchasing Department or authorized designee may require concerning usage, needs, and stocks on hand, and the Director, Division of Finance, Purchasing Department or authorized designee shall have the authority to prescribe forms to be used by the divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, in requisitioning, ordering, and reporting of supplies, services, and construction.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 311. Retention of procurement records**

All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Government Services Committee. Inspection of all retained documents shall be governed by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 312. Reporting of anti-competitive practices**

When for any reason, collusion or other anti-competitive practices are suspected in contracting provided under this Act, a notice of the relevant facts shall be transmitted to the Attorney General.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

## **Subchapter 2. Regulations Required by this Act**

### **§ 320. Navajo Nation Procurement Regulations**

A. Regulations shall be developed by the Division of Finance, Purchasing Department, in consultation with the Business Regulatory Department, Department of Justice and Office of Legislative Counsel, and adopted by the Budget and Finance Committee of the Navajo Nation Council within one year of the passage of this Act, and shall be reviewed for potential revision at least every two years. Navajo Nation procurement regulations shall be consistent with the provisions of the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*

B. The Budget and Finance Committee shall not delegate its power to promulgate procurement regulations.

C. No regulation shall change any commitment, right, or obligation of the Navajo Nation or of a contractor under a contract in existence on the effective date of such regulation.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

## **Subchapter 3. Source Selection and Contract Formation**

### **§ 330. Methods of source selection**

Unless otherwise authorized by law, all Navajo Nation contracts shall be awarded by competitive sealed bidding, pursuant to 12 N.N.C. § 331 (Competitive Sealed Bidding), except as provided in:

- A. 12 N.N.C. § 332 (Competitive Sealed Proposals);
- B. 12 N.N.C. § 333 (Small Purchases);
- C. 12 N.N.C. § 334 (Emergency Procurement);
- D. 12 N.N.C. § 335 (Sole Source Procurement); or
- E. 12 N.N.C. § 346 (Architect-Engineer and Land Surveying Services).

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

### **§ 331. Competitive Sealed Bidding**

Competitive Sealed Bidding shall be the preferred method of source selection, and shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Opportunity Act, 5 N.N.C. § 205.

A. Invitation for bids. An invitation for bids shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive. The invitation for bids shall set forth the criteria to be used in evaluation of bids which are submitted. The invitation for bids shall refer to the preference of Navajo and Indian-owned businesses under the Navajo Nation Business Opportunity Act., 5 N.N.C. § 201 *et seq.*

B. Public Notice. Adequate public notice of the invitation for bids shall be issued a reasonable time prior to the date set for the opening of bids. Certified entities under the Navajo Nation Business Opportunity Act shall be provided such notice as set forth in the Navajo Nation Business Opportunity Act. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening.

C. Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The opening of bids shall be performed a manner consistent with the Navajo Nation Business Opportunity Act. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection, to the extent permitted by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

D. Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized by the Navajo Nation Business Opportunity Act, or other provisions of law. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. The criteria affecting the bid price and considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

E. Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the Budget and Finance Committee. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the Navajo Nation or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Director, Division of Finance, Purchasing Department or authorized designee or head of a purchasing agency.

F. Award. The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids in a procurement exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than five percent (5%), the Director, Division of Finance, Purchasing Department or authorized designee, or the head of a purchasing agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

G. Multi-Step Sealed Bidding. When it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 332. Competitive sealed proposals**

A. Conditions for Use. When, under regulations promulgated by the Budget and Finance Committee, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer determines in writing that the use of competitive scaled bidding is either not practicable or not advantageous to the Navajo Nation, a contract may be entered into by competitive sealed proposals. The Budget and Finance Committee may provide by regulation that it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding. The competitive sealed proposals process shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Opportunity Act, 5 N.N.C. § 205.

B. Request for Proposals. Proposals shall be solicited through a request for proposals. A request for proposals shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive. The request for proposals shall set forth the criteria to be used in evaluation of proposals which are submitted. The request for proposals shall refer to the preference of Navajo and Indian-owned businesses under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*

C. Public Notice. Adequate public notice of the request for proposals shall be given in the same manner as provided in 12 N.N.C. § 331(B) (Competitive Sealed Bidding, Public Notice).

D. Opening of Proposals. The opening of proposals shall be performed in a manner consistent with the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*. Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared in accordance with regulations promulgated by the Budget and Finance Committee, and shall be open for public inspection after contract award, to the extent provided in the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

E. Evaluation Factors. The request for proposals shall state the relative importance of price and other evaluation factors. The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive offeror whose proposal meets the requirements and criteria set forth in the request for proposals. In the event all proposals in a procurement exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible proposal does not exceed such funds by more than five percent (5%), the Director, Division of Finance, Purchasing Department or authorized designee, or the head of a purchasing agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the proposal price, including changes in the proposal requirements, with the low responsive and responsible offeror, in order to bring the proposal within the amount of available funds.

F. Discussion with Responsible Offerors and Revisions to Proposals. As provided in the request for proposals, and under regulations promulgated by the Budget and Finance Committee, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

G. Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Navajo Nation taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made, and shall be made public to the extent provided in the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

### **§ 333. Small purchases**

A. Applicability. Any procurement not exceeding fifty thousand dollars (\$50,000) may be made using small purchase regulations adopted by the Budget

and Finance Committee, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section. Certified entities under the Navajo Nation Business Opportunity Act shall receive preference in small purchases.

B. Review and Signature Requirements. Small purchases shall require only the following signatures and reviews: program director, division director or other procurement officer and appropriate representative of the Attorney General's Office (or Office of Legislative Counsel, for small purchases within the Legislative Branch). No oversight committee approval shall be required for these contracts.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 334. Emergency procurement**

Notwithstanding any other provision of law, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Budget and Finance Committee; provided that such emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of emergency shall be made by the executive director of the affected division, in concert with the Director, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office (or the Office of Legislative Counsel for emergency procurements by the Legislative Branch). To the extent possible, certified entities under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*, shall receive preference in emergency procurement. The written determination and the selection of the particular contractor shall be included in the contract file. No oversight committee approval shall be required for these contracts.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 335. Sole source procurement**

A contract may be awarded for goods and/or services without competition when, under regulations promulgated by the Budget and Finance Committee, the executive director of the affected division or other procurement officer, in concert with the Director, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office, or the Office of Legislative Counsel for procurements by the Legislative Branch, determines in writing that there is only one source for the required goods and/or services. Certified entities under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.* shall receive preference in sole source

procurement. The written determination and the selection of the particular contractor shall be included in the contract file. No oversight committee approval shall be required for these contracts.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 336. Record of small purchases, sole source procurement and emergency procurement**

A. Contents of Record. The Director, Division of Finance, Purchasing Department shall maintain a record listing all contracts made under 12 N.N.C. § 333 (Small Purchases), 12 N.N.C. § 334 (Emergency Procurement) and 12 N.N.C. § 335 (Sole Source Procurement) for a minimum of five years. The record shall contain:

1. Each contractor's name;
2. The amount and type of each contract; and
3. A listing of the supplies, services, or construction procured under each contract.

B. Submission to Navajo Nation Council. A copy of such record shall be submitted to the Navajo Nation Council on an annual basis. The record shall be available for public inspection to the extent provided by the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 337. Cancellation of invitations for bids or requests for proposals**

An invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, or when it is in the best interests of the Navajo Nation in accordance with regulations promulgated by the Budget and Finance Committee. The reasons therefor shall be made part of the contract file.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 338. Responsibility of bidders and offerors**

A. Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the Budget and Finance Committee. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

B. Right of Nondisclosure. Information furnished by a bidder or offeror pursuant to this Section shall only be disclosed in accord with the provisions of the Navajo Nation Privacy and Access to Information Act, 2 N.N.C. § 81 *et seq.*

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 339. Pre-qualification of suppliers**

Prospective suppliers may be pre-qualified for particular types of supplies, services, and construction in accordance with regulations promulgated by the Budget and Finance Committee. Solicitation mailing lists of potential contractors shall include but shall not be limited to such pre-qualified suppliers.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

### **Subchapter 4. Procurement of Construction Services**

#### **§ 340. Responsibility for selection of methods of construction contracting management**

The Budget and Finance Committee, in consultation and coordination with the Transportation and Community Development Committee, shall promulgate regulations providing for as many alternative methods of construction management as it may determine to be feasible. These regulations shall:

A. Set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;

B. Grant to the Director, Division of Finance, Purchasing Department or authorized designee, or the head of the purchasing agency responsible for carrying out the construction project the discretion to select the appropriate method of construction contracting management for a particular project; and

C. Require the procurement officer or authorized designee to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting

management for each project.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 341. Bid security**

A. Requirement for Bid Security. Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the procurement officer or authorized designee to exceed the amount established by regulation of the Budget and Finance Committee. Bid security shall be a bond provided by a surety company authorized to do business within the Navajo Nation, or the equivalent in cash, or otherwise supplied in a form satisfactory to the Navajo Nation. Nothing herein prevents the requirement of such bonds on construction contracts under the amount set by the Budget and Finance Committee when the circumstances warrant.

B. Amount of Bid Security. Bid security shall be in an amount equal to at least ten percent (10%) of the amount of the bid.

C. Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected unless, pursuant to Budget and Finance Committee regulations, it is determined that the bid fails to comply in a insubstantial manner with the security requirements.

D. Withdrawal of Bids. After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, except as provided in 12 N.N.C. § 331 (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards). If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 342. Contract performance and payment bonds**

A. When Required-Amounts. When a construction contract is awarded in excess of fifty thousand dollars (\$50,000), the following bonds or security shall be delivered to the Navajo Nation and shall become binding on the parties upon the execution of the contract:

1. A performance bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, in an amount equal to one hundred percent (100%) of the price specified in the contract; and

2. A payment bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to one hundred percent (100%) of the price specified in the contract.

B. Reduction of Bond Amounts. The Budget and Finance Committee may promulgate regulations that authorize the Director, Division of Finance, Purchasing Department or authorized designee or head of a purchasing agency to reduce the amount of performance and payment bonds to fifty percent (50%) of the contract price for each bond.

C. Authority to Require Additional Bonds. Nothing in this Section shall be construed to limit the authority of the Navajo Nation to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in Subsection (A) of this Section.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 343. Bond forms and copies**

A. Bond Forms. The Budget and Finance Committee shall promulgate by regulation the form of the bonds required by this Act.

B. Certified Copies of Bonds. Any person may request and obtain from the Navajo Nation a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 344. Contract clauses and their administration**

A. Contract Clauses. The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

1. The unilateral right of the Navajo Nation to order in writing:
  - a. Changes in the work within the scope of the contract; and
  - b. Changes in the time of performance of the contract that do

not alter the scope of the contract work;

2. Variations occurring between estimated quantities of work in a contract and actual quantities;

3. Suspension of work ordered by the Navajo Nation; and

4. Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses may be included in a contract:

a. When the site conditions within the contract are specifically negotiated;

b. When the contractor provides the site or design; or

c. When the parties have otherwise agreed with respect to the risk of differing site conditions.

#### B. Price Adjustments.

1. Adjustments in price pursuant to clauses promulgated under Subsection (A) of this Section shall be computed in one or more of the following ways:

a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

b. By unit prices specified in the contract or subsequently agreed upon;

c. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

d. In such other manner as the contracting parties may mutually agree; or

e. In the absence of agreement by the parties, by a unilateral determination by the Navajo Nation of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.

2. A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.

C. Additional Contract Clauses. The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for appropriate remedies and covering the following subjects:

1. Liquidated damages as appropriate;
2. Specified excuses for delay or nonperformance;
3. Termination of the contract for default; and
4. Termination of the contract in whole or in part for the convenience of the Navajo Nation.

D. Modification of Required Clauses. The Director, Division of Finance, Purchasing Department or the head of a purchasing agency may vary the clauses promulgated by the Budget and Finance Committee under Subsection (A) and Subsection (C) of this Section for inclusion in any particular Navajo Nation construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 345. Fiscal responsibility**

Every contract modification, change order, or contract price adjustment under a construction contract with the Navajo Nation in excess of ten percent (10%) of the original contract amount shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the procurement officer or authorized designee shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 346. Architect-engineer and land surveying services**

A. Applicability. Architect-engineer and land surveying services shall be procured as provided in this Section except as authorized by 12 N.N.C. § 333 (Small Purchases), 12 N.N.C. § 334 (Emergency Procurement), and 12 N.N.C. § 335 (Sole Source Procurement).

B. Policy. It is the policy of the Navajo Nation to publicly announce all requirements for architect-engineer and land surveying services and to negotiate contracts for architect engineer and land surveying services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

C. Architect-Engineer Selection Committee. In the procurement of architect-engineer and land surveying services, the Director, Division of Finance, Purchasing Department or the head of a purchasing agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The Director, Division of Finance, Purchasing Department and a representative of Navajo Design and Engineering Services shall comprise the Architect-Engineer Selection Committee for each architect engineer and land surveying services contract over two hundred fifty thousand dollars (\$250,000). The Selection Committee for architect-engineer and land surveying services contracts under this amount shall be established in accordance with regulations promulgated by the Budget and Finance Committee. The Selection Committee shall evaluate current statement of qualifications and performance data on file with the Navajo Nation, together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms (if at least three firms respond to the solicitation) regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms (if at least three firms respond to the solicitation) deemed to be the most highly qualified to provide the services required.

D. Negotiation. The procurement officer shall negotiate a contract with the highest qualified firm for architect-engineer or land surveying services at compensation which the procurement officer or authorized designee determines in writing to be fair and reasonable to the Navajo Nation. In making this decision, the procurement officer or authorized designee shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the procurement officer or authorized designee be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the procurement officer or authorized designee determines to be fair and reasonable to the Navajo Nation, negotiations with that firm shall be formally terminated. The procurement officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the procurement officer or authorized designee shall formally terminate negotiations. The procurement officer or authorized designee shall then undertake negotiations with the third most qualified firm. Should the procurement officer or authorized designee be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the procurement officer or authorized designee shall select

additional firms in order of their competence and qualifications, and the procurement officer or authorized designee shall continue negotiations in accordance with this Section until an agreement is reached.

### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Note.** At Subsection (A), citations to 12 N.N.C. §§ 333-335 corrected.

## **Subchapter 5. Contract Administration**

### **§ 350. Contract clauses and their administration**

A. Contract Clauses. The Budget and Finance Committee may promulgate regulations permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract provisions as appropriate covering the following subjects:

1. The unilateral right of the Navajo Nation to order in writing:

a. Changes in the work within the scope of the contract; and

b. Temporary stopping of the work or delaying performance;

and

2. Variations occurring between estimated quantities of work in a contract and actual quantities.

B. Price Adjustments.

1. Adjustments in price pursuant to clauses promulgated under Subsection (A) of this Section shall be computed in one or more of the following ways:

a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

b. By unit prices specified in the contract or subsequently agreed upon;

c. By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;

d. In such other manner as the contracting parties may mutually agree; or

e. In the absence of agreement by the parties, by a unilateral determination by the Navajo Nation of the costs attributable

to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.

2. A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.

C. Additional Contract Clauses. The Budget and Finance Committee may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in Navajo Nation contracts of clauses providing for appropriate remedies and covering the following subjects:

1. Liquidated damages as appropriate;
2. Specified excuses for delay or nonperformance;
3. Termination of the contract for default; and

4. Termination of the contract in whole or in part for the convenience of the Navajo Nation.

5. Modification of Clauses. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a purchasing agency may vary the clauses promulgated by the Budget and Finance Committee under Subsection (A) and Subsection (C) of this Section for inclusion in any particular Navajo Nation contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the invitation for bids or request for proposals.

D. Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 351. Right to inspect plant**

The Navajo Nation may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the Navajo Nation.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 352. Right to audit records**

A. Audit of Cost or Pricing Data. The Navajo Nation may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

B. Contract Audit. The Navajo Nation shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of five years from the date of final payment under the prime contract and by the subcontractor for a period of five years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 353. Types of contracts**

Subject to the limitations of this Section, any type of contract which will promote the best interests of the Navajo Nation may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 354. Multi-term contracts**

Unless otherwise provided by law, a contract may be entered into for any period of time deemed to be in the best interests of the Navajo Nation provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for completion of the contract.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**§ 355. Cost principles regulations required**

The Budget and Finance Committee shall promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that, such cost principles may be modified by contract.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Subchapter 6. Legal and Contractual Remedies**

**§ 360. Authority to resolve protested solicitations and awards**

A. Right to Protest. Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Director, Division of Finance, Purchasing Department or the head of a purchasing agency. The protest shall be submitted in writing within 14 days after such aggrieved person knows or should have known of the facts giving rise thereto.

B. Authority to Resolve Protests. The Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer, with the approval of the Attorney General's Office, shall have the authority to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract.

C. Decision. If the protest is not resolved by mutual agreement, the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall:

1. State the reasons for the action taken; and
2. Inform the protestant of its right to administrative review as herein provided.

D. Notice of Decision. A copy of the decision under Subsection (C) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

E. Finality of Decision. A decision under Subsection (C) of this Section shall be final and conclusive, unless fraudulent or the person adversely

affected by the decision appeals administratively in accordance with 12 N.N.C. §§ 362 and 363.

F. Stay of Procurement During Protests. In the event of a timely protest under Subsection (A) of this Section, or under 12 N.N.C. §§ 362 and 363, the Navajo Nation shall not proceed further with the solicitation or with the award of the contract until the Director, Division of Finance, Purchasing Department, after consultation with the Attorney General's Office (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) and the head of the using agency or the head of a purchasing Agency, makes a written determination that the award of that contract without delay is necessary to protect substantial interests of the Navajo Nation.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 361. Authority to debar or suspend**

A. Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Director, Division of Finance, Purchasing Department or the head of a purchasing agency, after consultation with the using agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The same officer, after consultation with the using agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the Budget and Finance Committee.

B. Causes for Debarment or Suspension. The causes for debarment or suspension include the following:

1. Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

2. Conviction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Navajo Nation contractor;

3. Conviction under antitrust statutes arising out of the submission of bids or proposals;

4. Violation of contract provisions, as set forth below, of a character which is regarded the Director, Division of Finance, Purchasing

Department or the head of a Purchasing agency, with concurrence of the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) to be so serious as to justify debarment action:

a. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

b. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; and

5. Any other cause which the Director, Division of Finance, Purchasing Department or the head of a purchasing agency, with the approval of the Attorney General, or Office of Legislative Counsel, in the case of a Legislative Branch procurement, determines to be so serious and compelling as to affect responsibility as a Navajo Nation contractor, including debarment by another governmental entity for any cause listed in regulations of the Budget and Finance Committee.

C. Decision. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a purchasing agency shall issue a written decision to debar or suspend. The decision shall:

1. State the reasons for the action taken; and

2. Inform the debarred or suspended person involved of his or her rights to administrative review as provided in this Article.

D. Notice of Decision. A copy of the decision under Subsection (C) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

E. Finality of Decision. A decision under Subsection (C) of this Section shall be final and conclusive, unless fraudulent or the person adversely affected by the decision appeals administratively in accordance with 12 N.N.C. §§ 362 and 363.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

#### **§ 362. Administrative review**

The Office of Hearings and Appeals shall have the jurisdiction to hear and decide appeals of decisions under this Act.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Revision Note.** Slightly reworded for purpose of statutory form.

**§ 363. Scope of administrative review**

A. The Office of Hearings and Appeals shall have jurisdiction to review and determine de novo:

1. Any protest of a solicitation or award of a contract by an aggrieved actual or prospective bidder or offeror, or a contractor; and

2. Any appeal by an aggrieved party from a determination by the Director, Division of Finance, Purchasing Department, the head of a purchasing agency, or a designee of either officer authorized by this Act.

B. Time Limitation on Filing an Appeal. The aggrieved person shall file his or her appeal within 20 days of the receipt of a decision.

C. Decision. The decision of the Office of Hearing and Appeals shall make a determination based on the preponderance of the evidence on the issue of whether the actions of the Division of Finance, Purchasing Department or other purchasing agency were consistent with the provisions of this Act and the procurement regulations promulgated by the Budget and Finance Committee. The solicitation or award of a contract shall be upheld unless it is shown by a preponderance of the evidence that the actions of the Division of Finance, Purchasing Department or other purchasing agency violated a specific provision of this Act or the procurement regulations promulgated by the Budget and Finance Committee.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Revision Note.** Slightly reworded for purpose of statutory form.

**§ 364. Presumed finality of decisions**

Determinations by the Office of Hearings and Appeals shall be final and conclusive.

**History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Subchapter 7. Compliance with Federal Requirements**

### **§ 370. Compliance with federal requirements**

Where a procurement involves the expenditure of federal assistance or contract funds, the Division of Finance, Purchasing Department shall comply with such federal law and authorized regulations which are mandatorily applicable and which are not presently reflected in this Act.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

**Revision Note.** Slightly reworded for purpose of statutory form.

### **Subchapter 8. Amendment**

#### **§ 371. Amendments**

This Act may be amended by the Navajo Nation Council at any time.

#### **History**

CAU-68-01, August 8, 2001.

CJY-54-01, July 19, 2001.

### **Chapter 4. General Provisions**

#### **§ 501. Navajo Nation fiscal year**

The Fiscal Year of the Navajo Nation shall, beginning on October 1, 1996, commence on October 1 of each year and end on September 30 of the following year.

#### **History**

CF-22-96, February 27, 1996.

CS-57-89, September 14, 1989.

CF-17-77, February 8, 1977.

**Note.** Previous reference to "September 31" corrected to "September 30".

### **Chapter 5. Deposit of Funds**

#### **§ 601. Deposit of Navajo Nation funds**

A. Navajo Nation funds in custody of the Navajo Nation may be deposited in an approved depository.

B. The individual depositories shall be subject to the approval of the Budget and Finance Committee of the Navajo Nation Council, the Navajo Nation Council and the General Superintendent.

#### **History**

CO-64-58, October 10, 1958.

**Note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. See 2 N.N.C. § 374(B)(1) for the fiscal management authority of the Budget and Finance Committee and the Navajo Nation Council.

Previously approved depositories. ACJY-194-70, July 14, 1970; ACN-77-53, November 17, 1953.

CS-35-54, September 7, 1954.

1922-1951 Res. p. 368, October 14, 1949.

#### **Cross References**

See generally, Office of the Controller, 12 N.N.C. § 201 *et seq.*

Appropriations Act, 12 N.N.C. § 800 *et seq.*

#### **United States Code**

Deposit of Indian monies, see 25 U.S.C. § 151 *et seq.*

#### **§ 602. Bank balances**

It shall be the policy of the Navajo Nation to maintain bank balances sufficient to provide for the operating requirements of the Navajo Nation in accordance with sound business practices.

#### **History**

CO-64-58, October 10, 1958.

CS-35-54, September 7, 1954; CJ-60-53, July 31, 1953; 1922-1951 Res. p. 642, July 12, 1951; and ACN-77-53, November 17, 1953, limited amount of deposit in any one approved depository.

#### **Cross References**

See generally, Office of the Controller, 12 N.N.C. § 201 *et seq.*

Appropriations Act, 12 N.N.C. § 800 *et seq.*

### **Chapter 7. Appropriations**

#### **History**

CMY-22-04, May 21, 2004.

CAP-18-04, April 23, 2004.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

**Note.** Section 801 was deleted.

#### **§ 800. Purpose**

The Navajo Nation government has a fiduciary responsibility to account for public funds, to manage finances wisely, and to plan for the adequate funding of services desired by the Navajo People, including the provision and maintenance of public facilities. This Act is designed to establish the policies and procedures for the preparation, adoption and implementation of the annual Navajo Nation Comprehensive Budget. In order to achieve this purpose, this Act has the following objectives for the Comprehensive Budget's performance:

A. To fully protect the Navajo Nation government's policy making ability by ensuring that important policy decisions are made in a manner consistent with rational planning.

B. To provide sound principles to guide the important fiscal decisions of the Navajo Nation, including the adoption of Generally Accepted Accounting Principles.

C. To set forth principles to efficiently fund the cost of government within available resources, to the extent consistent with services desired by the public or mandated by Navajo law, and which minimize financial risk.

D. To employ policies which distribute the costs of government services between the branches, divisions, departments, and programs and which provide available funds to operate desired programs.

E. To provide for essential public facilities and provide for the maintenance of the Navajo Nation's existing public facilities.

#### **History**

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

#### **§ 810. Definitions**

For the purposes of this Act and sections of this Act, the following definitions shall apply:

A. "Appropriation" means the legislative act of designating funds, excluding externally restricted funds, for a specific purpose in accordance with the applicable budgeting principles, policies and procedures contained in

this Chapter.

B. "Branch Chief" means the President, Speaker, and Chief Justice of the Navajo Nation.

C. "Budget Impact Analysis" means an assessment by the Office of Management and Budget of the fiscal consequences of funding or failing to fund a particular branch, division, department, program, office, entity or activity.

D. "Budget Reallocation" means the redesignation of appropriated or budgeted funds from one account to another account or to a newly-created account for a different use or purpose.

E. "Capital Budget" means the amounts appropriated for the current year of the Capital Improvement Plan.

F. "Capital Improvement" means a major project undertaken by the Navajo Nation that is generally not recurring on an annual basis and which fits within one or more of the following categories:

1. All projects requiring debt obligation or borrowing;
2. Any acquisition or lease of land;
3. Purchase of major equipment or vehicles, with a life expectancy of five years or more, valued in excess of an amount to be established by the Controller;
4. Major building improvements that are not routine maintenance expenses and that substantially enhance the value or extend the useful life of a structure;
5. Construction of new buildings or facilities including engineering, design, and other pre-construction costs with an estimated cost in excess of an amount to be determined by the Controller; and/or
6. Major equipment or furnishings required to furnish new buildings or other projects, the cost of which is above a certain amount to be established by the Controller.

G. "Capital Improvement Plan" means a recurring multi-year plan for capital improvements identifying each capital improvement project, the expected beginning and ending date for each project, the amount to be expended in each year, and the method of financing those expenditures.

H. "Comprehensive Budget" means a budget which includes a Capital and an Operating Budget covering all governmental proprietary and fiduciary funds for each annual fiscal year.

I. "Condition of Appropriation or Expenditure" means a specific contingency placed on an appropriation by the Navajo Nation Council at the time the appropriation is made creating legal conditions precedent to the expenditure of funds. Appropriated funds or any other funds received by the Navajo Nation on which a condition of appropriation or expenditure is placed

may not be lawfully expended until the condition of appropriation or expenditure is met. It is the responsibility of the Controller to ensure that funds are expended in accordance with the conditions placed on the appropriation or expenditure.

J. "Financing" means the act of identifying and acquiring the funds necessary to accomplish the Capital Improvement Plan. It shall include, among other things, lease/purchase arrangements, multi-year purchase contracts, bond issuance and grants.

K. "Fiscal Year" means the fiscal year of the Navajo Nation as established by the Navajo Nation Council.

L. "Governmental Unit" means any subdivision of the Navajo Nation government, including chapters or other local units of government.

M. "Legislative Concern" means a comment, directive or recommendation made by the Navajo Nation Council, by virtue of its legislative oversight authority and pursuant to its authority as the governing body of the Navajo Nation, raising an issue of concern with respect to the internal functioning of the three Branches. Such concerns are advisory in nature, but do not create legal conditions precedent to the expenditure of appropriated funds. In order for a particular legislative concern to be appended to a budget resolution, it must be voted upon and adopted by a majority of the Navajo Nation Council. Legislative concerns which are not voted upon, will not be appended to the budget resolution, but will be referred to the appropriate Branch Chief in memorandum form by the Speaker of the Navajo Nation Council.

N. "Local Government Projects" means government improvement projects that include, but are not limited to, house wiring, bathroom additions and projects that address individual or community needs but which may not meet the requirements for, or definition of, capital improvement projects.

O. "Object Code Transfer" means the transfer of appropriated funds from one object code to another object code within the same account while still maintaining the original intent of the appropriation account.

P. "Operating Budget" means a plan of financial operation embodying an estimate of proposed expenditures for a fiscal year and the proposed means of financing them (i.e., revenue estimates).

Q. "Program Budget" means an account, designated by the Office of Management and Budget, or series of accounts, related to a specific function, objective, or purpose.

R. "Spending Authority" means the legislative act by the Navajo Nation Council of authorizing the expenditure of appropriated funds which have been accepted by the Navajo Nation through the appropriate approval process.

S. All funds of the Navajo Nation government shall be classified and defined as follows:

1. "Government Fund Types." Governmental funds are those groups of accounts which account for most governmental functions of the Navajo

Nation. The acquisition, use and balances of the Navajo Nation's expendable financial resources and the related liabilities (except those accounted for in proprietary funds and the long-term obligations account group) are accounted for through governmental funds. The measurement focus is based upon determination of changes in financial position, rather than upon net income determination. The following are the Navajo Nation's governmental fund types:

a. "General Fund." This Fund is the general operating fund of the Navajo Nation. It is used to account for all financial resources except those required to be accounted for in another fund.

b. "Special Revenue Fund." This Fund is used to account for the proceeds of specific revenue sources (other than expendable trusts or major capital projects) that are legally restricted to expenditures for specified purposes. This Fund includes externally restricted funds which is defined as funds received by the Navajo Nation from sources other than the Navajo Nation for a specific purpose.

c. "Capital Projects Fund." This Fund is used to account for the financial resources and expenditure for the acquisition or construction of those capital improvements defined in Subsection (F) above (other than those financed by proprietary funds and fiduciary funds).

2. "Proprietary Fund Types." Proprietary funds are used to account for the Navajo Nation's ongoing organizations and activities which are similar to business operations in the private sector. The measurement focus is upon determination of net income and capital maintenance. The following are the Navajo Nation's proprietary fund types:

a. "Enterprise Fund." This Fund is used to account for Navajo Nation operations that are financed and operated in a manner similar to private business enterprises—where the intent is that the costs of providing goods or services to the public be financed or recovered primarily through user charges: or where a periodic determination of revenues earned, expenses incurred, and/or net income is appropriate for accountability purposes.

b. "Internal Service Fund." This Fund is used to account for the financing of goods or services provided (inter and intergovernmental)<sup>1</sup> on a cost-reimbursement basis.

3. "Fiduciary Fund Types." Fiduciary funds are used to account for assets held by the Navajo Nation in a trustee capacity or as an agent for individuals, private organizations, other governmental units, and/or other funds. These funds include but are not limited to expendable and nonexpendable trust funds, and pension trust funds, etc. Expendable trust funds are accounted for in a manner similar to governmental funds. Nonexpendable trust funds and pension trust funds are accounted for in a manner similar to proprietary funds.

4. The foregoing definitions concerning fund types shall not be deemed to create any exceptions to the Navajo Nation Sovereign Immunity

Act.

### **History**

CMY-22-04, May 21, 2004.

CAP-18-04, April 23, 2004.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

### **§ 820. Overall budget policies**

A. Comprehensive Budget. The Navajo Nation government shall operate pursuant to a Comprehensive Budget.

B. Budget Impact Analysis. All requests for appropriation of Navajo Nation funds shall be subject to budget impact analysis, which shall include, but not be limited to, needs and costs evaluations, based on objective criteria.

C. Long Term Fiscal Viability. The Navajo Nation shall prepare each annual budget to ensure the long-term ability to provide services at levels set by the Navajo Nation government.

D. Balanced Budget. The Navajo Nation budget shall balance revenues and expenditures. Appropriations may not exceed available revenues.

E. Recurring Operating Costs Paid From Recurring Revenues. The Nation shall budget all recurring operating expenses, including maintenance of capital facilities, from recurring revenues. Long-term debt shall not be used to finance recurring operating expenses.

F. Non-Recurring Revenues. The Nation shall restrict non-recurring revenues to budget non-recurring expenditures. In addition, non-recurring revenues will be budgeted only after an examination by the Controller to determine whether or not the revenues are subsidizing an imbalance between recurring revenues and expenditures, and expenditures may be authorized only if a long-term (three-to-five year) forecast shows that the operating deficit will not continue. Otherwise, non-recurring revenues will be added to the Unreserved, Undesignated Fund balance. This provision may be amended or waived only by a two-thirds (2/3) vote of the full Council.

G. Matching Requirements. Funds appropriated to match funds from external sources shall be maintained in separate accounts administered by the Controller. If matching funds are not obtained from the external sources, the appropriated funds shall revert to the Unreserved, Undesignated Fund balance.

H. Long-Term Debt. Annual debt service for long-term debt shall not exceed eight percent (8%) of annual recurring revenue and long-term debt shall not be authorized until the impact of annual debt service on the annual operating budget, including sinking fund contributions, has been analyzed and a determination has been made that debt service payments are in compliance with

this Section.

I. Capital Budget. Development of the Capital Budget shall be coordinated with development of the Operating Budget. All budget requests for capital improvements shall be in compliance with an adopted Capital Improvement Plan and shall not be approved unless in compliance with the Plan.

J. Establishment of Reserves. For the General Fund, the Minimum Fund balance for Unreserved, Undesignated Fund balance shall be maintained at not less than ten percent (10%) of the Navajo Nation's General Fund Operating Budget for the prior fiscal year, excluding expenditures for Capital Improvement projects as determined by the Controller. The Minimum Fund balance may be amended only by two-thirds (2/3) vote of the full membership of the Navajo Nation Council. The Controller shall keep the Office of the President, the Office of the Speaker and the Budget and Finance Committee of the Navajo Nation Council advised at least quarterly as to the status of the Minimum Fund balance for Unreserved, Undesignated Fund balance. Further, Unreserved, Undesignated Fund balance shall not be utilized for funding recurring expenditures or operations of the Navajo Nation government.

K. Receipt of Additional Revenues. Funds received in excess of the initial or current revenue projection shall be deposited into the General Fund Unreserved, Undesignated Fund balance unless otherwise designated by the Navajo Nation Council.

L. Supplemental Appropriations. The Navajo Nation Council may adopt and approve supplemental appropriations to the Annual Comprehensive Budget during the fiscal year. Supplemental appropriations of General Funds within the current fiscal year are permitted, if and when additional sources of revenues above and beyond the initial or current revenue projections are projected and which are also in excess of the reserve amount set forth at § 820(J). Upon notification from the Controller of additional projected funds, the Budget and Finance Committee may convene budget hearings for the purpose of hearing and considering requests for supplemental appropriations. Supplemental appropriations to programs or activities with approved fiscal year operating budgets must be supported by additional recurring revenues for the same fiscal year. The Budget and Finance Committee, at the recommendation of the respective oversight standing committee(s), may recommend supplemental appropriations to the Navajo Nation Council. Supplemental appropriations made from non-recurring revenues shall only be made for non-recurring operations or purposes, as set forth at § 820(F). The Controller of the Navajo Nation shall be responsible for designating recurring and non-recurring revenues and purposes.

M. Office of Management and Budget. The Office of Management and Budget, as authorized by its Plan of Operation as amended, shall be responsible for consolidation and preparation of all phases of the Navajo Nation budget. The Office shall coordinate the overall preparation, adoption and implementation of both the annual operating and capital budgets of the Navajo Nation. All requests for annual operating funds and supplemental funds shall be submitted to the Office of Management and Budget for budget impact analysis and other appropriate action.

N. Appropriations Lapse. Appropriations approved by the Navajo Nation

Council will lapse at the end of the fiscal year unless otherwise designated by the Navajo Nation Council. Appropriations to the chapters of the Navajo Nation shall not lapse at the end of the fiscal year provided that the chapters shall budget those funds in the subsequent fiscal year in accordance with the purposes and conditions originally set forth by the Navajo Nation Council in its appropriations.

O. Distributions to Chapter. Where not otherwise prohibited by existing law, any appropriation intended for distribution to all chapters of the Navajo Nation shall be allocated as follows: fifty percent (50%) of the appropriation shall be divided equally among all chapters and the remaining fifty percent (50%) shall be divided proportionately among the chapters using a percentage equal to that figure which the number of registered voters in each chapter bears to the whole of registered Navajo Nation voters as determined by the most current voter registration figures available as of the date of the appropriation.

P. Navajo Nation Grants. Any entity of the Navajo Nation requesting a grant from the Navajo Nation through the submission of a budget request shall first meet the following requirements:

1. The program receiving the grant shall have an approved plan of operation;
2. The budget request shall be a part of a recommended division or branch budget;
3. The respective oversight committee for the division or branch shall have made an affirmative recommendation on the request.

Q. Local Government Funds are used to address the improvement needs of the local governments that may consist of, but are not limited to, house wiring and bathroom additions. An amount equal to the actual cost of proposed projects but not to exceed twenty-five percent (25%) of that year's capital improvement appropriation will be appropriated into the Local Government Improvement Funds for these projects. Additional amounts may be appropriated from time-to-time or may be obtained from other sources.

#### **History**

CJA-07-06, January 27, 2006. Amended § 820(J).

CJY-42-04, July 23, 2004.

CMY-22-04, May 21, 2004.

CAP-18-04, April 23, 2004.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

**§ 830. Budget planning and preparation**

A. Budget Format. Prior to initiation of the annual budget process, the Office of Management and Budget shall identify a budget format (i.e., Line-item, Performance, Program, Zero-base, etc.) that will assist the Navajo Nation in correlating budget costs to alternative services levels and alternative policies that will affect those service levels. The budget format identified shall also include quantitative performance measures (i.e., demand, workload, efficiency and effectiveness).

B. Long Term Revenue Projections. The Controller shall prepare an annual long term revenue projection for use by the Navajo Nation government. This long term revenue projection shall include all sources of funds and revenues available for use by the Navajo Nation government within at least the next three fiscal years. The annual long term revenue projection shall be submitted by the Controller to and be reviewed by the Budget and Finance Committee. The Budget and Finance Committee will present the same to the Branch Chiefs by the end of the second quarter of each fiscal year. A written narrative describing the methodology utilized to estimate revenues and a discussion of key variables affecting the actual revenue, including assumptions made, shall be included in the report. If deemed necessary by the Controller, the long-term revenue projection may be changed as economic circumstances require. Changes to the long-term revenue projection shall be reported in the manner set forth in this Paragraph.

C. Annual Revenue Projection. The Controller shall review and recommend an annual fiscal year revenue projection for all revenue generating sources for all governmental, proprietary and fiduciary funds of the Navajo Nation. The annual fiscal year revenue projection shall be submitted for review by the Budget and Finance Committee of the Navajo Nation Council, and will serve as the official revenue estimate at the beginning of the annual budget process for the next fiscal year. The Budget and Finance Committee will present the annual fiscal year revenue projection to the Branch Chiefs by the end of the second quarter of each fiscal year. A written narrative describing the methodology utilized to estimate revenues and discussion of key variables affecting the actual revenue, including assumptions made, shall be included in the report.

D. External Funding Projection. The Office of Management and Budget shall prepare an estimate of all external funding to be received by the Navajo Nation in the upcoming fiscal year and shall present this information to the Budget and Finance Committee and the Controller by the end of the second quarter of each fiscal year.

E. Long Term Expense Projection. The Office of Management and Budget shall prepare an annual long term expense projection which includes all projected expenditures for at least the next three fiscal years for operations, programs, projects and transfer payment to the Navajo people or to outside non-Navajo Nation government entities. Such report shall be presented to the Branch Chiefs and the Budget and Finance Committee by the end of the second quarter of each fiscal year. This report, along with the long term revenue projection and the annual General Fund revenue projections and the external funding projection is intended to provide guidance to the Branches of the Navajo Nation government in preparation and adoption of the Navajo Nation budget for the next fiscal year.

F. Approval of Revenue Projections. The Budget and Finance Committee

shall review the long-term and the fiscal year revenue projections and may approve them by resolution.

G. President's Budget Preparation Message. The President may prepare an annual budget preparation message. This budget preparation message may include the President's vision of expected goals and objectives and broad priorities for the fiscal year Navajo Nation Comprehensive Budget. This Section does not amend, nor is it in addition to, any powers granted to the President pursuant to 2 N.N.C. § 1005.

H. Budget Instructions and Planning Base Amounts. The Office of Management and Budget shall prepare budget instructions for each fiscal year which shall be approved by the Budget and Finance Committee no later than 30 days after the Controller releases the annual revenue projection as delineated at § 830(C). The budget instructions shall include fiscal, operational, policy guidelines, budget development timelines and planning base amounts for each fiscal year for the Executive Branch, the Judicial Branch and the Legislative Branch.

I. Preparation of the Budget. Based upon the priorities and budget ceilings established by the method described in Subsection (H), each branch, division, department, and program of the Navajo Nation government shall prepare a budget request, which shall be submitted to the Office of Management and Budget pursuant to the time lines established in the annual Budget Instructions Manual. Each division, department and program director shall provide training on the budget process for their program field staff and involve said staff in the development of the budget request upon actual needs and identification of unmet needs. This proposed budget shall state the overall goals and objectives and broad priorities for the entire Navajo Nation budget.

#### **History**

CJA-10-00, January 28, 2000.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

#### **§ 840. Budget approval, adoption and certification**

A. Oversight Committee and Budget and Finance Committee Review and Approval. Each oversight committee shall review and make recommendations to the Budget and Finance Committee concerning the budget in accordance with the annual budget instructions. The oversight committees may hold public hearings at each agency with programs under their oversight and take testimony on the budget. The oversight committees shall make recommendations concerning the budget and pass resolutions recommending appropriations and conditions of appropriations for activities within their respective areas of oversight to the Budget and Finance Committee pursuant to the time-lines established in the Budget Instructions Manual. Oversight committee recommendations shall not exceed the planning base amounts set pursuant to § 830(H). The Budget and Finance Committee shall consult and negotiate with the respective oversight committees if any changes are to be made before making final recommendations to the Navajo Nation Council. Changes made pursuant to this consultation and

negotiation process shall neither increase nor decrease the planning base amount set for the Executive Branch divisions, the Judicial Branch and Legislative Branch, but shall be limited to internal reallocations of the planning base amounts for the entities. The Budget and Finance Committee shall review and make recommendations concerning the budget according to the annual budget instructions. The Budget and Finance Committee shall make recommendations concerning the budget and submit it to the Navajo Nation Council pursuant to the time lines established in the Budget Instructions Manual.

B. Navajo Nation Council Budget Deliberations and Adoption. The Speaker of the Navajo Nation Council shall convene a special budget session each year for the purpose of adopting a comprehensive budget for the next fiscal year and approving the Capital Improvement Plan. The Speaker of the Navajo Nation Council, on behalf of the Navajo Nation Council, is authorized to request the attendance of Navajo Nation government officials to provide information to assist the Navajo Nation Council in its deliberations and may exercise subpoena power in the manner prescribed in 2 N.N.C. § 185. Prior to Navajo Nation Council deliberation of the proposed comprehensive budget, the latest external audit of the combined financial statements of the Navajo Nation will be presented to the Navajo Nation Council by the external auditors. The adoption of the annual Navajo Nation comprehensive budget and any other findings, recommendations, mandates, policies and procedures of the Navajo Nation Council shall be enacted by a formal resolution of the Navajo Nation Council. The Navajo Nation Council shall adopt the comprehensive budget no less than 20 days prior to the expiration of each fiscal year.

C. Budget Certification. The Speaker of the Navajo Nation Council shall certify the resolution of the Navajo Nation Council adopting and approving the annual Navajo Nation comprehensive budget, and shall forward the certified resolution and exhibits to the Navajo Nation President for consideration, pursuant to 2 N.N.C. § 1005(C)(10).

#### **History**

CJA-10-00, January 28, 2000.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

#### **§ 850. Budget implementation, monitoring and control**

A. Budgetary Monitoring and Expenditure Controls. The Controller and Office of Management and Budget shall monitor actual expenditures versus budgeted expenditures and report to the Budget and Finance Committee with respect to the overall budget status of the Navajo Nation; and to the Branch Chiefs with regard to their respective branches. Such reports shall be made on a quarterly basis. The Controller, with the approval of the Navajo Nation Council, may restrict expenditures by selected expense codes or line items in the event that actual revenues fall significantly behind the projected revenues.

B. Budget Performance Measures. The Office of Management and Budget

shall be responsible for developing a system for evaluating whether requirements have been met for all of Navajo Nation branches, divisions, departments, and programs. Evaluation standards will be developed in consultation with the relevant branch, division, department, and program. The Office of Management and Budget shall include the projected performance measures for each branch, division, department and program in the compilation of the annual budget for submission to the Budget and Finance Committee and the Navajo Nation Council.

C. Program Evaluation. The purpose of a program evaluation is to determine and recommend to the appropriate Branch Chief the recommendations for positive program improvement and whether a program warrants continuation at its current level of activity or modified to a new level or should be discontinued. All Navajo Nation branches, divisions, departments, and programs shall be required to develop a detailed annual plan with performance indicators for each ensuing fiscal year.

D. The Branch Chiefs shall establish a system for periodic policy review and evaluation of program performance within their respective branches.

E. All recipients of Navajo Nation funds shall provide, upon request, any information or data necessary to conduct program performance review and evaluation.

### **History**

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

### **§ 860. Capital improvement process**

#### **A. Administrative Framework.**

1. The Capital Improvement Office within the Division of Community Development under the Executive Branch shall be responsible for the administration, coordination and development of the Capital Improvement Plan as defined herein. The Controller and the Office of Management and Budget shall assist the Capital Improvement Office with methods of financing the Capital Improvement Plan.

2. All Capital Improvement funding requests shall be submitted to the Capital Improvement Office, which shall evaluate all requests in accordance with objective criteria approved by the Transportation and Community Development Committee of the Navajo Nation Council.

#### **B. Development of Capital Improvement Plan.**

1. The proposed Capital Improvement Plan shall consist of a multi-year plan for capital expenditures, including a detailed one-year capital improvement budget. The proposed Capital Improvement Plan shall include a listing of projects in order of priority and proposed year of construction or acquisition. Data on each project shall include:

- a. The anticipated capital cost of each project;
- b. The anticipated source of capital funds for each project;
- c. The estimated annual operating cost or savings for each project;
- d. The estimated completion data of each project;
- e. The adopted plan or policy, if any, which each project would help to implement;
- f. The viable alternatives that were considered for each project with the reasons the proposed project is the most cost-effective and practical alternative for meeting the stated objective; and
- g. The project's ranking in whatever sequencing/priority setting system is used as a basis for evaluation of capital improvement project proposals.

2. The Capital Improvement Office shall be responsible for the development of a priority ranking system which takes into consideration factors such as project cost, feasibility, project value and benefit to the community as a whole, which shall be presented to the Transportation and Community Development Committee for approval.

#### C. Approval of the Capital Improvement Plan.

1. The Capital Improvement Plan, as developed by the Capital Improvement Office, is subject to the approval of the Navajo Nation Council upon recommendation of the Transportation and Community Development Committee.

2. The appropriation portion of the Capital Improvement Plan is subject to approval of the Navajo Nation Council upon recommendation of the Budget and Finance Committee. Any modification or amendment affecting the approved Capital Improvement Plan is subject to review and concurrence by the Transportation and Community Development Committee prior to consideration by the Navajo Nation Council.

3. The Transportation and Community Development Committee is authorized to and may convene public hearings for the purpose of obtaining public input with respect to the proposed Capital Improvement Plan. A formal report containing all public comments shall be compiled by the appropriate legislative advisors and made available to the Budget and Finance Committee of the Navajo Nation Council during its deliberations concerning the Capital Improvement Plan.

#### D. Capital Budget Preparation Calendar.

The Capital Improvement Plan and Capital Budget will be developed in accordance with the following chronological sequence of activities:

1. Establish a process for gathering chapter needs to produce a

needs base budget that truly reflects the chapter needs.

2. By 10 months prior to the beginning of the fiscal year, the Capital Improvement Office shall prepare an inventory list of existing tribally owned facilities for the purpose of determining need for renewal, replacement, expansion, or retirement of the same facilities.

3. By nine months prior to the beginning of the fiscal year, the Capital Improvement Office shall prepare a report for all affected officials on the current status of previously approved capital improvement projects. The report shall contain information on which projects are to be continued, the amount of funds required to continue or complete affected projects, determining the amount of remaining funds from projects completed or discontinued, and summaries as to the progress of previously approved capital improvement projects.

4. By eight months prior to the beginning of the fiscal year, the Capital Improvement Office, Office of Management and Budget, and the Controller shall perform financial analysis and financial programming for the purpose of determining the level of capital expenditures the Navajo Nation can safely afford over the term of the Capital Improvement Plan and to determine the selection and scheduling of funding sources to be designated for the Capital Improvement Plan.

5. By seven months prior to the beginning of the fiscal year, the Capital Improvement Office shall compile and objectively evaluate all capital improvement funding requests. In addition to other eligibility requirements provided in the objective criteria, all requests for capital improvement shall include a statement of need and justification for the project, net effect on the Navajo Nation's operating budget, and its proposed scheduling during the term of the Capital Improvement Plan. The Capital Improvement Office shall place emphasis on relative need and cost in evaluating each capital improvement funding request in conjunction with the priority rating system approved by the Transportation and Community Development Committee.

6. By six months prior to the beginning of the fiscal year, the Capital Improvement Office shall have finalized a six year Capital Improvement Plan for consideration and approval by the Transportation and Community Development Committee. Upon review and approval by the Transportation and Community Development Committee, the Capital Improvement Plan will be submitted to the Office of Management and Budget to be incorporated in the recommended capital budget which shall be made a part of the comprehensive budget for purposes of recommending the Capital Improvement Plan to the Navajo Nation Council.

7. By five months prior to the beginning of the fiscal year, the Office of Management and Budget shall submit the appropriation portion of the capital budget to the Budget and Finance Committee for recommendation to the Navajo Nation Council within the recommended comprehensive budget. Any recommended amendments affecting the Capital Improvement Plan shall be reviewed and concurred by the Transportation and Community Development Committee.

E. Capital Budget Monitoring.

1. The Capital Improvement Office shall maintain a current record on all projects within the recommended Capital Improvement Plan for information purposes.

2. The Office shall submit quarterly progress reports on the capital budget to the Transportation and Community Development Committee and the Budget and Finance Committee.

**History**

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

**§ 870. Local government improvement funds**

A. The Local Government Improvement Funds shall be distributed pursuant to rules and regulations adopted and promulgated by the Transportation and Community Development Committee of the Navajo Nation Council. No fund distribution shall occur until 60 days after adoption of these rules and regulations.

B. The rules and regulations to be promulgated under Subsection (A) of this Section must include a provision that funds allocated to a local improvement project must be based on a total projected cost of the project, including, but not limited to, materials, construction cost, fees, clearances, designs and the like.

C. This fund is not subject to the requirements set forth in 12 N.N.C. § 860 for Capital Improvement Projects.

**History**

CMY-22-04, May 21, 2004.

CAP-18-04, April 23, 2004.

**§ 880. Amendments**

This Appropriations Act may be amended from time to time by the Navajo Nation Council upon the recommendation of the Budget and Finance Committee of the Navajo Nation Council; provided that amendments to those sections of this Act related to either Capital Improvement Process or the Local Government Improvement Fund shall be upon the recommendation of the Transportation and Community Development Committee of the Navajo Nation Council.

**History**

CMY-22-04, May 21, 2004.

CAP-18-04, April 23, 2004.

CN-97-98, November 24, 1998.

CO-89-98, October 20, 1998.

## **Chapter 8. Navajo Nation Permanent Fund**

### **§ 901. Establishment**

There is established the "Navajo Nation Permanent Fund" (hereinafter the "Fund"). Each year the Navajo Nation Council shall budget a sum equal to at least twelve percent (12%) of any and all projected revenue of the Navajo Nation including, but not limited to, revenues received from taxes, oil and gas mining/minerals, timber, land rentals, interest/dividends, gain on sale of securities and other revenue producing activities for transfer to the Fund. Additional money may be added to the Fund at any time. Any money deposited into the Fund, plus accrued interest, shall thereafter be used only as provided in this Chapter. In the event actual revenue fails to meet projected revenue, or excess projected revenue, the amount appropriated and transferred shall be adjusted to equal twelve percent (12%) of actual revenue. Transfers may be made in one or more installments.

#### **History**

CJY-53-85, July 25, 1985.

### **§ 902. Investment of the Fund**

All amounts deposited in the Fund shall be invested as soon as is reasonably practical in accordance with the following limitations:

A. The funds shall be invested in accordance with the degree of care exercised by reasonable and prudent managers of large investments intended to produce maximum growth of the investments with a high degree of safety. In addition, the Fund may be invested in any other investments approved by the Budget and Finance Committee of the Navajo Nation Council and the Navajo Nation Council.

B. Management of the investments may be delegated to third parties by written contract recommended by the Navajo Bond Financing and Investment Committee and approved by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CJY-53-85, July 25, 1985.

**Note.** The Budget and Finance Committee is authorized to review and recommend to the Navajo Nation Council the budgeting, appropriation, investment, and management of all funds. See 2 N.N.C. § 374(B)(1).

### **§ 903. Definition of principal and income**

A. "Fund principal" shall consist of all Navajo Nation Council

contributions made pursuant to the twelve percent (12%) yearly commitment of all revenues of the Navajo Nation, including, but not limited to, revenues received from taxes, oil and gas mining/minerals, timber, land rentals, interest/dividends, gain on sale of securities and other revenue producing activities, plus any additional contributions from any source.

B. "Fund income" shall consist of all earnings generated by the principal of the Fund.

#### **History**

CJY-53-85, July 25, 1985.

#### **§ 904. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) majority of those voting in an election open to all registered Navajo voters or as set forth in § 909 of this Chapter. The Navajo Nation Council may place such a referendum on the ballot of any general or special election by a two-thirds (2/3) vote of the Council.

#### **History**

CJY-53-85, July 25, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 905. Expenditure of Fund income**

No Fund income shall be expended, except as set forth in §§ 908 and 909 of this Chapter, for a period of 20 years from date of the first Navajo Nation contribution to the Fund. Thereafter, ninety-five percent (95%) of the Fund income may be expended in accordance with a plan for its use covering at least a five-year period adopted by resolution of the Navajo Nation Council provided that the expenditure of income in any fiscal year shall not exceed the income earned during that year. The remaining five percent (5%) of the Fund income shall be reinvested in the Permanent Fund.

#### **History**

CJY-53-85, July 25, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 906. Annual audited report**

The Fund shall be audited annually by independent outside auditors. Within 90 days of the end of each fiscal year, a report shall be distributed to the Navajo Nation Council and the President of the Navajo Nation. The report shall be written in easily understandable language. The report must include financial statements audited by independent outside auditors, a statement of the amount of money received by the Navajo Nation Permanent Fund from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of fund investment activity during

the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

#### **History**

CJY-53-85, July 25, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 907. Amendments**

This Chapter may be amended by a majority vote of the Navajo Nation Council except as follows:

A. Sections 903 and 904 may only be amended by referendum adopted in the manner prescribed for the expenditure of Fund principal in § 904.

B. Section 905 may be amended only by ninety percent (90%) vote of all of the members of the Navajo Nation Council.

C. Section 907 may not be amended or repealed until after 40 years from the date of enactment of this Chapter.

#### **History**

CJY-53-85, July 25, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 908. Expenses**

All expenses directly associated with the administration and management of the Navajo Nation Permanent Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council and the Navajo Nation Council. Such expenses shall include an investment advisor and management fees, pursuant to a duly approved contract, audit costs, and other related expenses.

#### **History**

CJY-53-85, July 25, 1985.

#### **§ 909. Payment of bond obligation**

In the event of an imminent default of any Navajo Nation bond obligation, the Navajo Nation Permanent Fund income and principal in that order may be used as a source of payment by two-thirds (2/3) vote of the Navajo Nation Council.

#### **History**

CJY-53-85, July 25, 1985.

### **Chapter 9. Navajo Nation Road Fund Management Plan**

### **History**

Previously Reserved.

Previous Chapter 9, "Banking Services" (§ 1001) has been deleted. The deleted section was enacted by CF-6-62, February 16, 1962. See also CAP-29-65, April 8, 1965, CAP-33-65, April 13, 1965.

### **§ 1001. Establishment**

There is hereby established the Navajo Nation Road Fund Management Plan (hereinafter "Fund") for use by the Department of Transportation within the Division of Community Development, and the Transportation and Community Development Committee of the Navajo Nation Council shall provide legislative oversight.

### **History**

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

### **§ 1002. Purpose**

The purpose of this Fund is to establish a special fund account, and its necessary sub-accounts, to defray the cost of government services for the development, construction and maintenance of transportation projects that have not been included in the current short-term construction plans by federal government agencies and programs, state, or county highway maintenance programs.

### **History**

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

### **§ 1003. Administration**

A. Funding source. The funding source of this Fund shall be funds generated from the Navajo Nation Fuel Excise Tax, and other funds appropriated or allocated by the Navajo Nation Council.

B. Legislative oversight. The Transportation and Community Development Committee of the Navajo Nation Council shall be the legislative oversight for funds appropriated under this Fund.

C. Program management. The Navajo Department of Transportation shall have the authority and responsibility to use the funds for eligible road projects and as matching funds in conformance with § 1004 and with concurrence by the Transportation and Community Development Committee of the Navajo Nation Council.

## History

BFAU-43-05, August 16, 2005. Deleted the word Nation in § 1003(C).

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

### § 1004. Fund management

#### A. Fund accounting.

1. The records and books of account for the Fund shall be kept separate from the Navajo Nation General Fund with its own balance sheet and revenue and expenditure statement. The day-to-day Fund accounting shall be performed by the Office of the Controller, in accordance with generally accepted accounting principles.

2. The Navajo Department of Transportation, or any other designated program, shall account for the money spent out of the Fund. Such accounting shall be included as part of the quarterly program reports submitted to the Transportation and Community Development Committee of the Navajo Nation Council and the Navajo Nation Council.

B. Funding eligible projects. The funds shall be used for roads and equipment within the Navajo Nation that cannot be addressed by the federal government agencies, Indian Reservation Roads, state, or county highway or road maintenance programs; and shall be used for eligible matching funds projects.

#### 1. Eligible road maintenance projects:

- a. Pothole repairs;
- b. Blading & graveling of all dirt roads;
- c. Culvert replacement;
- d. Drainage channel maintenance;
- e. Traffic signal & street light maintenance and operation;
- f. Chip sealing; or
- g. Other maintenance required under an interagency agreement.

#### 2. Eligible project development/planning projects:

- a. Feasibility studies including centerline identification;
- b. Survey;
- c. Environmental assessments;
- d. Archaeological assessments; or

e. Planning, engineering & design.

3. Eligible community/economic development access projects:

a. Access roads;

b. Parking lots; or

c. School bus route improvements, school bus stops and shelters.

4. Eligible matching funds projects. The Fund shall be used to meet required matching funds for transportation projects funded by federal, state, or county transportation programs or other public entities, that have not been addressed by the Navajo Nation Capital Improvement Program or other tribal budget programming.

5. Eligible equipment purchases.

a. Motor graders;

b. Sand and gravel crushing equipment;

c. Heavy equipment transport truck; or

d. Equipment to process aggregate materials;

e. Other necessary road maintenance equipment and operating supplies/materials.

C. Funding allocation process.

1. The Navajo Department of Transportation may use the recommendations from any entity in formulating the annual Navajo Nation Road Funding Plan. The Navajo Nation Road Funding Plan shall specify the eligible projects and eligible matching funds projects to be funded.

2. The Navajo Department of Transportation shall submit the Navajo Nation Road Funding Plan to the Transportation and Community Development Committee for annual approval.

3. Expenditures from this Fund shall be budgeted annually in accordance with the annual established Navajo Nation budget policies and procedures.

4. The Navajo Department of Transportation shall have 25% (3% will be utilized for administrative cost, 5% for preliminary studies and 17% for equipment purchases/road maintenance) of total annual Road Fund allocation earmarked for the Navajo Department of Transportation's administration and operation of the Road Management Fund Program to support management, monitoring and evaluation operating expenses, preliminary studies and road maintenance programs.

5. The Navajo Nation Road Fund Management Plan shall not be deemed to waive or amend any requirements of law concerning the recovery of indirect costs, including 2 N.N.C. § 824(B)(9).

6. Equipment ownership: Navajo Department of Transportation shall at all times retain ownership of all equipment purchased under this Fund.

#### **History**

BFO-41-07, October 9, 2007. Amended Subsection C(4).

BFAU-43-05, August 16, 2005.

**Note (2006).** Reference to Navajo Nation Road Inventory was removed from the listing of eligible equipment at § 1004(B)(5)(f) as it appears to have been mistakenly copied from the listing of eligible projects at § 1004(B)(2)(f).

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

#### **§ 1005. Rules and regulations**

The Navajo Department of Transportation, upon approval by the Transportation and Community Development Committee, is authorized to promulgate rules and regulations from time to time as may be necessary to carry out the provisions and policies of this Fund. The effectiveness and enforceability of the provisions of the Act shall not be dependent upon the adoption of regulations pursuant to this Section.

#### **History**

BFAU-43-05, August 16, 2005. Deleted the word Nation.

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

#### **§ 1006. [Reserved]**

#### **§ 1007. [Reserved]**

#### **§ 1008. Effective date**

The effective date of the Fund shall be the beginning of Fiscal Year 2003 and shall remain in effect until the Navajo Nation Council terminates this Fund by resolution.

#### **History**

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

**§ 1009. Audit requirements**

Independent auditors shall annually audit the Fund as part of the overall audit of the Navajo Nation government.

**History**

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

**§ 1010. Amendments**

The Navajo Nation Road Fund Management Plan may be amended from time to time by the Budget and Finance Committee of the Navajo Nation Council upon recommendation of the Transportation and Community Development Committee of the Navajo Nation Council.

**History**

CAU-71-01, August 24, 2001.

CJY-56-01, July 19, 2001.

**Chapter 10. Navajo Nation Trust Funds**

**Subchapter 1. Navajo Nation Trust Fund for Handicapped Services**

**§ 1101. Establishment**

There is established, the "Navajo Nation Trust Fund for Handicapped Services" [hereinafter called the "Fund"], with an initial appropriation of seven million dollars (\$7,000,000) as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue and/or funds are available for appropriation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided hereinafter.

**History**

CD-68-86, December 12, 1986.

**§ 1102. Investment of the Fund**

All amounts of money deposited in the Fund shall be invested as soon as practical in accordance with Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

**History**

CD-68-86, December 12, 1986.

**§ 1103. Definition of principal and income**

A. "Fund principal" shall consist of all Navajo Nation Council appropriations made pursuant to the Navajo Nation Appropriation Processes and Procedures; and any contributions made by any parties or entities.

B. "Fund income" shall consist of all earnings (interest, dividends, etc.) generated by the principal of the Fund.

**History**

CD-68-86, December 12, 1986.

**§ 1104. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of Navajo Nation Council.

**History**

CD-68-86, December 12, 1986.

**§ 1105. Expenditure of Fund income**

A. Ninety-five percent (95%) of the Fund income shall be used as Navajo Nation grants to supplement Navajo Nation government and non-Navajo Nation government programs and projects that provide services to Navajo handicapped citizens. Five percent (5%) of the Fund income shall be reinvested in the Fund to cover the rate of inflation.

B. Navajo Nation grants to Navajo Nation government and non-Navajo Nation government programs and projects shall be awarded in accordance with rules and regulations developed by the Office of the President and Vice-President in consultation with the Health and Social Services Committee and the Education Committee of the Navajo Nation Council and approved by the Government Services Committee of the Navajo Nation Council.

**History**

CMA-16-90, March 29, 1990.

CD-68-86, December 12, 1986.

**Note.** Slightly reworded for purposes of statutory form.

**§ 1106. Annual audited report**

The Fund shall be audited annually by independent outside auditors. Within 90 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council and interested members of the Navajo public. The report shall be written in easily understandable

language. The report shall include financial statements, a statement of the amount of money received by the Navajo Nation Trust Fund for Handicapped Services from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

#### **History**

CD-68-86, December 12, 1986.

#### **§ 1107. Amendments**

Any section(s) herein may be amended by a majority vote of the full membership of the Navajo Nation Council except that § 1104 may only be amended as provided for in § 1104.

#### **History**

CD-68-86, December 12, 1986.

#### **§ 1108. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

#### **History**

CD-68-86, December 12, 1986.

### **Subchapter 2. Navajo Nation Trust Fund for Vocational Education**

#### **§ 1111. Establishment**

There is established, the "Navajo Nation Trust Fund for Vocational Education" [hereinafter called the "Fund"], with an initial appropriation of six million dollars (\$6,000,000) as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue and/or funds are available for appropriation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided hereinafter.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

#### **§ 1112. Investment of the Fund**

All amounts of money deposited in the Fund shall be invested as soon as practical in accordance with Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

#### **§ 1113. Definition of principal and income**

A. "Fund principal" shall consist of all Navajo Nation Council appropriations made pursuant to the Navajo Nation Appropriation Processes and Procedures; and any contributions made by any parties or entities.

B. "Fund income" shall consist of all earnings (interest, dividends, etc.) generated by the principal of the Fund.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

#### **§ 1114. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of Navajo Nation Council.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

#### **§ 1115. Spending policy**

A. Four percent (4%) of the Fund (Market Value) shall be used as Vocational Education Scholarship Grants to Navajo students wishing to attend vocational education institutions and to apprentices and practitioners selected to participate in the Navajo Traditional Apprenticeship Project on an annual basis. The market value to be used in determining the budget amount will be the previous fiscal year end market value of the Fund. The excess of Fund income over expenses shall be reinvested in the Fund to cover the rate of inflation and to provide for reasonable Fund growth.

B. Vocational Education Scholarship Grants to Navajo students wishing to attend vocational education institutions and to apprentices and practitioners wanting to participate in the Navajo Traditional Apprenticeship Project shall

be awarded in accordance with rules and regulations developed by the Division of Dine Education approved by the Education Committee of the Navajo Nation Council.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1116. Annual audited report**

The Fund shall be audited annually by independent, outside auditors. Within 90 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council and interested members of the Navajo public. The report shall be written in easily understandable language. The report shall include financial statements, a statement of the amount of money received by the Navajo Nation Trust Fund for Vocational Education from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1117. Amendments**

Any section(s) herein may be amended by a majority vote of the full membership of the Navajo Nation Council except that § 1114 may only be amended as provided for in § 1114.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

#### **§ 1118. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

#### **History**

CJY-58-98, July 22, 1998.

CD-68-86, December 12, 1986.

### **Subchapter 3. Navajo Nation Trust Fund for Senior Citizens Services**

#### **§ 1121. Establishment**

There is established, the "Navajo Nation Trust Fund for Senior Citizens Services" [hereinafter called the "Fund"], with an initial appropriation of seven million dollars (\$7,000,000) as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue and/or funds are available for appropriation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided hereinafter.

#### **History**

CD-68-86, December 12, 1986.

#### **§ 1122. Investment of the Fund**

All amounts of money deposited in the Fund shall be invested as soon as practical in accordance with Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CD-68-86, December 12, 1986.

#### **§ 1123. Definition of principal and income**

A. "Fund principal" shall consist of all Navajo Nation Council appropriations made pursuant to the Navajo Nation Appropriation Processes and Procedures; and any contributions made by any parties or entities.

B. "Fund income" shall consist of all earnings (interest, dividends, etc.) generated by the principal of the Fund.

#### **History**

CD-68-86, December 12, 1986.

#### **§ 1124. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of Navajo Nation Council.

### **History**

CD-68-86, December 12, 1986.

### **§ 1125. Expenditure of Fund income**

A. Ninety-five percent (95%) of the Fund income shall be used as Navajo Nation Grants to supplement Navajo Nation government and non-Navajo Nation government programs and projects that provide services to Navajo senior (elderly) citizens. Five percent (5%) of the Fund income shall be reinvested in the Fund to cover the rate of inflation and to provide for reasonable Fund growth.

B. Navajo Nation Grants to non-Navajo Nation government programs and projects shall be awarded in accordance with rules and regulations developed by the Office of the President and Vice-President in consultation with the Health and Social Services Committee of the Navajo Nation Council and approved by the Government Services Committee of the Navajo Nation Council.

### **History**

CD-68-86, December 12, 1986.

**Note.** Slightly reworded for purposes of statutory form.

### **§ 1126. Annual audited report**

The Fund shall be audited annually by independent outside auditors. Within 90 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council and interested members of the Navajo public. The report shall be written in easily understandable language. The report shall include financial statements, a statement of the amount of money received by the Navajo Nation Trust Fund for Senior Citizens Services from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

### **History**

CD-68-86, December 12, 1986.

**Note.** Slightly reworded for purposes of statutory form.

### **§ 1127. Amendments**

Any section(s) herein may be amended by a majority vote of the full membership of the Navajo Nation Council except that § 1124 may only be amended as provided for in § 1124.

### **History**

CD-68-86, December 12, 1986.

**§ 1128. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

**History**

CD-68-86, December 12, 1986.

**Subchapter 4. Navajo Nation Trust Fund for Navajo Preparatory School, Inc.**

**§ 1131. Establishment**

There is established and continued, the "Navajo Nation Trust Fund for Navajo Preparatory School, Inc." [hereinafter called the "Fund"], in the amount of three hundred thirty-eight thousand eight hundred twenty-three dollars and ninety cents (\$338,823.90) as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue and/or funds are available for appropriation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided hereinafter.

**History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

**§ 1132. Investment of the Fund**

All amounts of money deposited in the Fund shall be invested as soon as practical in accordance with Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

**History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

**§ 1133. Definition of principal and income**

A. "Fund principal" shall consist of all Navajo Nation Council appropriations made pursuant to the Navajo Nation Appropriation Processes and Procedures; and any contributions made by any parties or entities.

B. "Fund income" shall consist of all earnings (interest, dividends, etc.) generated by the principal of the Fund.

### **History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

### **§ 1134. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of Navajo Nation Council.

### **History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

### **§ 1135. Expenditure of Fund income**

Four percent (4%) of the Fund Market Value shall be used to upgrade classroom equipment and materials, costs associated with the development, operation and maintenance of new educational facilities, and as education scholarships for Navajo Preparatory School high school graduates to pursue post-secondary education. The market value to be used in determining the budget amount will be the previous fiscal year end market value of the fund. The excess of Fund income over expenses shall be reinvested in the fund to cover the rate of inflation and to provide for reasonable Fund growth.

### **History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

### **§ 1136. Annual audited report**

The Fund shall be audited annually by independent outside auditors. Within 90 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council and interested members of the Navajo public. The report shall be written in easily understandable language. The report shall include financial statements, a statement of the amount of money received by the Navajo Nation Trust Fund for Navajo Preparatory School, Inc. from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

### **History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

**§ 1137. Amendments**

Any section(s) herein may be amended by a majority vote of the full membership of the Navajo Nation Council except that § 1134 may only be amended as provided for in § 1134 upon the recommendation of the Education Committee of the Navajo Nation Council.

**History**

CJY-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

**§ 1138. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

**History**

CD-77-99, July 22, 1999.

CD-68-86, December 12, 1986.

**Subchapter 5. 1982 Chapter Claims Fund**

**§ 1141. Establishment**

There is established the 1982 Chapter Claims Fund with an initial contribution of twenty-two million two hundred thousand dollars (\$22,200,000) from the Navajo Nation's Claims Case Settlement, United States Court of Claims, Docket Number 353.

**History**

CD-33-83, December 13, 1983.

**Note.** Language derived from Navajo Nation Council resolution CD-33-83, December 13, 1983, "Approving Plan for Use and Distribution of twenty-two million two hundred thousand dollars (\$22,200,000) received from the Navajo Tribe's Claims Case Settlement, Docket Number 353."

**§ 1142. Investment of the Fund principal/use of interest earnings**

The Navajo Nation shall permanently invest the principal of the claims settlement monies and the chapters shall use interest earnings to finance local projects and programs including assistance to elderly and veterans.

#### **History**

CD-33-83, December 13, 1983.

**Note.** Heading added.

#### **§ 1143. Distribution of interest earnings**

The interest accrued on the principal of the Fund shall be distributed annually to each chapter based on population count.

#### **History**

CD-33-83, December 13, 1983.

**Note.** Heading added.

#### **§ 1144. Chapter use of Fund**

Each chapter shall determine the most appropriate use of all funds received, provided that all Fund uses must be for the common benefit of chapter members and for the general economic development of the local chapters.

#### **History**

CD-33-83, December 13, 1983.

**Note.** Heading added.

#### **§ 1145. Reinvestment into the Fund**

Part of the interest earned shall be put back into the principal before distribution is made to the chapters.

#### **History**

CD-33-83, December 13, 1983.

**Note.** Heading added.

### **Subchapter 6. Trust Fund for Chapter Government Nation Building**

#### **§ 1151. Establishment**

There is established, the "Navajo Nation Trust Fund for Chapter Government Nation Building" [hereinafter called the "Fund"], with an initial contribution of Claims Settlement Funds in the amount of thirty-two million five hundred thousand dollars (\$32,500,000) plus accrued interest, as approved and accepted by the Navajo Nation Council in Resolution CJN-29-86. Additional appropriations may be made from time to time by the Navajo Nation Council; provided, however, additional sources of revenue and/or funds are available for such appropriation. Any money deposited into the Fund, plus accrued interest,

shall thereafter be used only as provided hereinafter.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1152. Investment of the Fund**

All amounts of money deposited in the Fund shall be invested as soon as is reasonably practical in accordance with the following provisions:

A. The Fund shall be invested in accordance with the degree of care exercised by reasonable and prudent managers of large investments and invested to reproduce maximum growth with a reasonably high degree of safety.

B. The management of investments shall be vested with the Budget and Finance Committee of the Navajo Nation Council. The Navajo Bond Financing and Investment Committee shall serve as technical advisors to the Budget and Finance Committee of the Navajo Nation Council. All investment objectives shall be approved by the Budget and Finance Committee of the Navajo Nation Council and appropriate investment agreements or contracts executed accordingly.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1153. Definition of principal and income**

A. "Fund principal" shall consist of the initial deposit of Claims Settlement Funds, any additional Navajo Nation Council appropriations made pursuant to the Navajo Nation Appropriation laws, and any contributions made by any other parties or entities.

B. "Fund income" shall consist of all earnings (interest, dividends, etc.), generated by the principal of the Fund.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1154. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of Navajo Nation Council.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1155. Expenditure of Fund income**

A. Ninety-five percent (95%) of the Fund income may be distributed annually to each certified Navajo chapter based on registered voters. Each chapter shall determine the most appropriate use of all funds received; provided, that all Fund uses must be for the common benefit of chapter members and for the general, social and economic development of the local chapters, and chapter operating and maintenance expenses; and provided that expenditure is pursuant to an annual chapter budget approved by the voting members of the chapter.

B. Five percent (5%) of the Fund income shall be reinvested in the Fund to cover the rate of inflation and to provide for reasonable Fund growth.

C. The Navajo Revenue Sharing Program is hereby continued as a Navajo Nation program and shall henceforth be called the Chapter Government Nation Building Program and delegated administrative responsibility for distribution of the ninety-five percent (95%) share of Fund income to certified chapters.

D. Guidelines for utilization of funds distributed to the certified Navajo chapters will be developed and recommended for approval by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1156. Annual audited report**

The Fund shall be audited annually. Within 90 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council, certified chapters and interested members of the Navajo public. The report shall be written in easily understandable language. The report shall include financial statements, a statement of the amount of money received by the Fund from each investment during the reporting period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1157. Amendments**

Any section(s) herein may be amended by a majority vote of the full membership of the Navajo Nation Council, except that § 1154 may only be amended as provided for within § 1154.

#### **History**

CD-67-86, December 12, 1986.

#### **§ 1158. Expenses**

All annual expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved and executed contract(s) for such services.

#### **History**

CD-67-86, December 12, 1986.

### **Subchapter 7. Navajo Nation Local Governance Trust Fund**

#### **§ 1161. Purpose**

The purpose of the Local Governance Trust Fund is to provide an incentive for chapters to attain governance certification, as well as allow them organizational funding so they can develop programs and services in line with their goals, the Local Governance Act and Navajo Nation policy. Additionally, the Fund will provide a continuing source of revenues to governance-certified chapters.

#### **History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

#### **§ 1162. Establishment**

There is established the "Navajo Nation Local Governance Trust Fund" (Fund) with an initial appropriation as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council.

A. Beginning in Fiscal Year 2002, each year the Navajo Nation Council shall budget a sum equal to at least two percent (2%) of any and all projected revenue of the Navajo Nation, including, but not limited to, revenues received from taxes, oil and gas mining/minerals, timber, land rentals, right-of-way payments, interest/dividends, gain on sale of securities and other revenue producing activities for transfer to the Fund; this provision shall terminate at the end of Fiscal Year 2006.

B. Beginning in Fiscal Year 2007, the Fund shall annually receive fifty percent (50%) of the income available from the Navajo Nation Permanent Fund pursuant to 12 N.N.C. § 905.

C. Any monies deposited into the Fund, plus accrued interest, shall be used only as provided in the Fund plan of operation.

#### **History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

**§ 1163. Fund management**

All amounts of money deposited in the Fund shall be invested as soon as is reasonably practical in accordance with the following provisions:

A. The Fund shall be invested in accordance with the degree of care exercised by reasonable and prudent managers of large investments and invested to produce maximum growth with a reasonably high degree of safety.

B. The management of investments shall be vested with the Investment Committee of the Navajo Nation. All investment objectives shall be approved by the Budget and Finance Committee of the Navajo Nation Council and appropriate investment agreements or contracts executed accordingly.

**History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

**§ 1164. Definition of principal and income**

A. "Fund income" means all earnings (interest, dividends, etc.) generated by the Fund principal.

B. "Fund principal" means the initial deposit of monies by the Council, any additional Navajo Nation Council appropriations, and any contributions made by any other parties or entities.

**History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

**§ 1165. Expenditure of Fund principal**

A. An incentive program is established to assist chapters in becoming governance certified in the manner set forth in 26 N.N.C. § 102. Fund principal and interest may be expended for this program in the following manner:

1. Each chapter which is, or becomes, governance certified, pursuant to 26 N.N.C. § 102 of the Local Governance Act, shall receive a grant of one hundred sixty thousand dollars (\$160,000) at the time of governance certification or, if already governance certified at the time of adoption of the Fund, upon final adoption of the Fund legislation.

2. Incentive monies distributed to the chapters pursuant to this provision shall in no event exceed one hundred sixty thousand dollars

(\$160,000) per chapter as a one-time grant.

B. With the exception of Fund principal designated in Subsection (A) of this Section, Fund principal shall not be expended except pursuant to a referendum adopted by two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place such a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council.

#### **History**

CD-84-00, December 14, 2000.

**Revision Note.** Slightly reworded and renumbered for purpose of statutory form.

#### **§ 1166. Expenditure of Fund income**

Fund income shall be expended as follows:

A. Four percent (4%) of the average annual market value of the Fund shall be distributed annually to governance certified Navajo chapters based upon a formula recommended by the Transportation and Community Development Committee of the Navajo Nation Council and established by the Budget and Finance Committee of the Navajo Nation Council. The amount of funds to be distributed pursuant to this provision shall not exceed the total of Fund income, as determined by § 1163(B), then available in the Fund. In conformity with the Local Governance Act, 26 N.N.C. § 1 *et seq.*, each governance certified chapter shall determine the most appropriate use of all funds received with the following exceptions:

1. Chapters may not use the distributions from this Fund for per capita distributions.

2. Chapters may not use the distributions from this Fund for the purchase of agricultural products for distribution or resale to chapter members.

3. Chapters may not use the distributions from this Fund to pay for training or instructional expenses of chapter officials or chapter employees, including travel expenses incident to training or instruction.

4. Chapters may not use the distributions from this Fund to pay stipends or meeting attendance fees to chapter officials or employees.

5. Chapters may not use the distributions from this Fund to pay travel expenses of any kind to chapter officials or chapter employees.

6. Chapters may not use the distributions from this Fund to purchase motor vehicles for the use of chapter officials or employees.

B. Of the four percent (4%) of the average annual market value to be distributed pursuant to Subsection (A) of this Section, a maximum of ninety-five percent (95%) of the proceeds will be used for distribution to the chapters, as set forth above and a minimum of five percent (5%) will be used

for administrative purposes as set forth in § 1169.

#### **History**

CD-84-00, December 14, 2000.

**Revision Note.** Slightly reworded and renumbered for purpose of statutory form.

#### **§ 1167. Annual audited report**

The Fund shall be audited annually, and the Navajo Nation shall include the Fund in its annual audit and report. The report shall be distributed to the members of the Navajo Nation Council, governance certified chapters and interested members of the Navajo public.

#### **History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

#### **§ 1168. Amendments**

Any section herein may be amended at the recommendation of the Transportation and Community Development Committee and adopted by a two-thirds vote (2/3) of the full membership of the Navajo Nation Council, except that § 1165 may only be amended as provided for in § 1165(B).

#### **History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

#### **§ 1169. Expenses**

All annual expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved and executed contracts for such services.

#### **History**

CD-84-00, December 14, 2000.

**Note.** Renumbered for purposes of statutory form.

### **Subchapter 8. Navajo Nation Veterans Trust Fund**

#### **§ 1171. Establishment**

The "Navajo Nation Veterans Trust Fund" hereinafter the "Trust Fund" is

established with an initial appropriation of six million dollars (\$6,000,000) from revenues from Undesignated Tribal Reserves. Each year, during the appropriation of the Navajo Nation Comprehensive Budget, the Navajo Nation Council shall budget a sum equal to at least four percent (4%) of any and all projected revenues of the Navajo Nation, including, but not limited to revenues received from taxes, oil and gas mining and minerals, timber, land rentals, interest and dividends, gain on sale of securities and other revenue producing activities for transfer to the Fund. Any funds deposited into the Trust Fund, plus accrued interest, shall be used only as provided for as explained hereinafter.

#### **History**

CN-55-06, November 1, 2006.

CJY-46-98, July 20, 1998.

#### **§ 1172. Purpose**

The purpose of the Trust Fund is to provide funding for veterans programs, projects and services or activities which may include, but not limited to program/project development, community/economic development, housing, training and employment opportunities, leveraging or matching funds for exemplary projects, protection and advocacy services, financial assistance of benefits and services, education and scholarship, and survivor's benefits for the surviving spouses of deceased veterans. The Navajo Nation has a clear understanding and responsibility to its Navajo Nation veterans based on Navajo Nation Council Resolution CJ-5-40 which pledged its people the loyalty to the system which recognized minority rights and the Navajo way of life. Many more than 16,000 Navajo veterans have served their country in war or peacetime from World War I, World War II, Korean, Vietnam, Persian Gulf and to the present.

#### **History**

CJY-46-98, July 20, 1998.

**Note.** Slightly reformatted.

#### **§ 1173. Fund investment**

All monies deposited in the Trust Fund shall be invested in accordance with Investment Policies of the Navajo Nation as adopted by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CJY-46-98, July 20, 1998.

#### **§ 1174. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Trust Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote

of the full membership of the Navajo Nation Council.

#### **History**

CJY-46-98, July 20, 1998.

#### **§ 1175. Definition of principal and income**

A. Trust Fund principal shall consist of all Navajo Nation Council appropriations made pursuant to the tribal appropriation processes and procedures; and any contributions made by any parties or entities.

B. Trust Fund income shall consist of all earnings (interest, dividends, etc.) generated by the principal and interests of the Fund.

#### **History**

CJY-46-98, July 20, 1998.

#### **§ 1176. Expenditure of Trust Fund**

The Fund income shall not be expended, except as provided in § 1177, from Fiscal Year 1998 to Fiscal Year 2003. From Fiscal Year 2004, the Fund income shall be expended as follows:

A. Four percent (4%) of the average market value of the Fund covering the past three fiscal years will be used as supplemental funding for programs and services to benefit veterans, as noted under § 1172 on an annual basis. The market value of the Fund at the end of the previous 12 quarters will be used to determine the average market value of the Fund for expenditure (i.e. budget purposes). The excess of the Fund income over expenditures shall be reinvested in the Fund to cover the rate of inflation and to provide for reasonable Fund growth.

B. Tribal grants to non-tribal government programs and projects shall be awarded in accordance with rules and regulations developed by the Department of Navajo Veterans Affairs, in consultation with the Human Services Committee of the Navajo Nation Council and, if required, the Navajo Nation Council.

C. Of the four percent (4%) of the Fund (Market Value), ninety-five percent (95%) of the proceeds will be used for Subsections (A) and (B) of this Section and five percent (5%) will be used for administrative purposes, and this will be reviewed further by the Office of Management and Budget and the Program.

Except as provided at § 1177, all Trust Fund income distribution shall be determined pursuant to all eligible Navajo veterans and distributed among those applicable Navajo Nation chapters to be expended in accordance with § 1172 of this Plan.

#### **History**

CJY-46-98, July 20, 1998.

**Revision Note.** Slightly reworded for purpose of statutory form.

**§ 1177. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Trust Fund income as approved by the Budget and Finance Committee of the Navajo Nation Council prior to the distribution of income under § 1176. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

**History**

CJY-46-98, July 20, 1998.

**§ 1178. Amendments**

Any section or sections herein may be amended upon the recommendation of the Human Services Committee and the Budget and Finance Committee of the Navajo Nation Council by majority vote of the full membership of the Navajo Nation Council except that § 1174 may only be amended as provided herein.

**History**

CJY-46-98, July 20, 1998.

**Subchapter 9. Navajo Engineering and Construction Authority Trust Fund  
for Scholarships and Financial Assistance**

**§ 1181. Establishment**

There is hereby established, the "Navajo Engineering and Construction Authority Trust Fund for Scholarships and Financial Assistance" (Fund), with an initial appropriation of one million dollars (\$1,000,000) as approved by the Navajo Nation Council. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue and/or funds are available for appropriation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided hereinafter. Dividends declared by NECA to the Navajo Nation in accordance with 5 N.N.C. § 1972 shall be designated as a Special Revenue Fund to specifically fund scholarship and financial assistance to eligible Navajo college students.

**History**

CAP-25-03, April 25, 2003.

CJA-5-97, January 21, 1997.

**§ 1182. Investment of the Fund**

A. All amounts of money deposited in the Fund shall be invested as soon as practical in accordance with Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of

the Navajo Nation Council.

B. A Parental Investment Plan shall be established to allow the Navajo people to invest a portion of their salary to be able to financially support their children who wish to attend college.

**History**

CJA-5-97, January 21, 1997.

**§ 1183. Definition of principal and income**

A. Fund principal shall consist of all Navajo Nation appropriations made pursuant to the tribal appropriation process and procedures; and any contributions made by parties or entities.

B. Fund income shall consist of all earnings (interest dividends, etc.) generated by the principal of the Fund.

**History**

CJA-5-97, January 21, 1997.

**§ 1184. Expenditure of Fund principal**

Fund principal shall not be expended except pursuant to a referendum adopted by a two-thirds (2/3) vote of all registered Navajo voters. The Navajo Nation Council may place a "Referendum to Expend Fund Principal" on the ballot of any primary, general or special election by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council.

**History**

CJA-5-97, January 21, 1997.

**§ 1185. Expenditure of Fund income**

A. Ten percent (10%) of the Fund (market value) shall be used as scholarships and financial assistance on an annual basis. The market value to be used in determining the budget amount will be the previous fiscal year end market value of the Fund. The unexpended portion of the Fund (market value) income shall be reinvested in the Fund to cover the rate of inflation and to provide for reasonable Fund growth.

B. Scholarships and financial assistance to Navajo students wishing to attend post-secondary institutions and colleges shall be awarded in accordance with Policies and Procedures of the Office of Navajo Nation Scholarship and Financial Assistance.

**History**

CAP-25-03, April 25, 2003.

CJA-5-97, January 21, 1997.

**§ 1186. Annual Audited Report**

The Fund shall be audited annually by outside external auditors. At the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council and interested members of the Navajo public. The report shall be written in easily understandable language. The report shall include financial statements, a statement of the amount of money received by the Navajo Nation Trust Fund for Undergraduate Scholarships from each investment during the period, a statement of investments of the Fund including an appraisal at market value, a description of Fund investment activity during the period covered by the report, a statement of the Fund performance and other information relevant to the management of the Fund.

**History**

CJA-5-97, January 21, 1997.

**§ 1187. Amendments**

Any section or sections herein may be amended by the majority vote of the full membership of the Navajo Nation Council except that § 1184 may only be amended as provided for in § 1184.

**History**

CJA-5-97, January 21, 1997.

**§ 1188. Expenses**

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund income as approved by the Budget and Finance and Committee of the Navajo Nation Council. Such expenses shall include investment advisory and management fees, audit costs and other related expenses, all pursuant to duly approved contracts for such services.

**History**

CJA-5-97, January 21, 1997.

Chapter 11. Navajo Nation Green Economy Fund

**§ 1190. Establishment**

There is hereby established the Navajo Nation Green Economy Fund ("Fund") for the purposes set out in the Navajo Nation Green Economy Commission ("Commission") at 2 N.N.C. §§ 926-927. Various governmental and private grants and appropriations made from time to time by the Navajo Nation Council will be deposited into the Fund. All money deposited into the Fund, plus accrued interest, shall be used only as provided herein. The Intergovernmental Relations Committee of the Navajo Nation Council shall provide legislative oversight for the Fund.

**History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

**§ 1191. Purpose**

A. The purpose of the Fund is to fund green businesses, industries and community initiatives.

B. The Commission responsibilities in regard to the Fund are:

1. To promote the development of the private sector of the Navajo Nation economy by providing a source of investments, grants and loans for qualified Navajo-owned green businesses and industries and green projects;

2. To protect and maintain the value of the Fund by making quality green investments on the Navajo Nation and assisting in the collection of loans due and owing the Navajo Nation when loans paid through the Fund come owing; and

3. To ensure that investments, grants and loans made from the Fund are made in compliance with these guidelines and applicable Navajo Nation laws.

**History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

**§ 1192. Fund administration**

A. All investments, grants and loans made from the Fund and all associated accounts receivable shall be processed and managed according to these guidelines. Any exceptions must be specifically approved by the Navajo Nation Green Economy Commission upon written recommendation of the Director of the Commission Office. Any such exception must be within the authority of the Commission.

B. It is the policy of the Navajo Nation to operate all investments, grants, and loans programs in a business-like manner, to maintain accurate investments, grants and loans account records so as to protect the assets of the Navajo Nation.

C. It is the policy of the Navajo Nation to consider the special needs of the Navajo business persons in the management of the Funds, to be sensitive to cultural concerns that may arise, and to make a special effort to accommodate qualified Navajo clients on an equal opportunity basis, regardless of age, sex, religion or political affiliation.

**History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

**§ 1193. Fund Management Plan**

A. Investment, grant, or loan request must be made on application forms approved by the Director of the Commission Office for that purpose. The application must be completed with all the required information.

B. Misstatement of facts or knowingly making any false statements on the application shall be grounds for disqualification. Any evidence of fraud may be referred to the Navajo Nation Office of the Prosecutor for appropriate action.

C. No application shall be presented to the Commission without certification of eligibility under the Navajo Business and Procurement Act, 12 N.N.C. § 1501 *et seq.* The Commission shall not consider any application from any individual who is in violation of the Navajo Business and Procurement Act.

D. Applicants must be enrolled members of the Navajo Nation, or associations of Navajo individuals, who are in green business or starting a green business venture. If the ownership of the business venture is structured as a partnership, corporation, or form other than that of a sole proprietorship, the applicant must demonstrate that it is one hundred percent (100%) Navajo-owned and controlled. The owners must be directly involved in the daily operation of the business. Certification as a 100% Navajo-owned business under the Navajo Nation Business Opportunity Act, 5 N.N.C. § 201 *et seq.*, shall be sufficient to demonstrate such Navajo ownership. Green business ventures that are not certified shall show evidence of Navajo ownership. While a Fund loan is outstanding, any transfer of ownership of the business must be approved in advance by the Commission.

E. No investment, grant and/or loan shall be approved for a business activity that is in violation of any provision of the laws of the Navajo Nation. Applicants must demonstrate that investment, grant and loan proceeds will be used for lawful business purposes, including, but not limited to, the purchase of inventory, office furniture, equipment, working capital, the construction of permanent facilities, and the purchase of existing business interests, excluding goodwill. Investment, grant and/or loan proceeds shall not be used for unrelated purposes.

F. Applications for investment, grant, and/or loans shall include the following:

1. A signed and completed investment, grant and loan application form.

2. An executive summary of the business concept, grant and/or loan proposal, description and current estimated market value of collateral supported by appropriate documentation.

3. A detailed business plan which describes the market to be served, expected or existing competition, location of the business to include a map depicting the site, legal form of business organization, management, organizational chart, personnel, operating plans and or service plans, financial plans for the next three years, and expected operating results if the investment, grant, and/or loan is approved.

4. For existing businesses that have a proven, successful track record for three or more years, a brief description of the business may

be submitted in lieu of a full-fledged business plan. Additionally, the applicant must submit its last three years federal personal and business tax returns, a current investment plan, grant and/or business/loan application and a statement of what the investment, grant and/or loan proceeds will be spent for.

5. For existing businesses, the following additional information may be requested:

a. Balance Sheets for all past fiscal (operating) years up to a maximum of three years;

b. Income Statements for all past fiscal (operating) years up to a maximum of three years;

c. Income Statement for the present fiscal year through the month ending prior to the application;

d. Projected Balance Sheet for the immediately succeeding fiscal year;

e. Projected Income Statement by quarter for the immediately succeeding fiscal year;

f. Projected Cash Flow Statement for the immediately succeeding fiscal year;

g. Projected capital expenditures during the term of the investment, grant and/or loan;

h. Projected rates of returns;

i. An accounts receivable aging report; and

j. An accounts payable aging report.

6. Applications for start-up businesses shall provide pro-forma financial projections of the balance sheet, income statement, and cash flow for a period of three years. For purposes of these guidelines and policies, applications from businesses that have been in operation for less than one year will be considered as applications from start-up businesses.

7. All financial statements shall be prepared according to generally accepted accounting principles.

8. All financial projections shall contain full explanations of all assumptions utilized and a break-even analysis.

#### **History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

#### **§ 1194. Audit requirements**

The Fund shall be audited annually by independent auditors as part of the overall audit of the Navajo Nation.

#### **History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

#### **§ 1195. Amendments**

Any section herein may be amended by the Intergovernmental Relations Committee upon recommendation of the Commission.

#### **History**

CJY-22-09, July 22, 2009. Navajo Nation Green Economy Fund Act of 2009.

### **Chapter 12. Investment Program**

#### **History**

**Note.** This Chapter should be read in light of the amendments made to 2 N.N.C. by CD-68-89, December 15, 1989. See 2 N.N.C. § 374(B)(1).

#### **§ 1201. Authorization**

The Navajo Nation Council approves and authorizes an investment program that, within statutory authority and limitations, shall provide maximum flexibility to the Secretary of the Interior as to choice of depositories and securities in which Navajo Nation monies may be deposited and/or invested, with an objective of obtaining optimum interest income and retaining reasonable fluidity in the investment portfolio so as to meet current disbursing needs.

#### **History**

CMY-59-66, May 6, 1966.

#### **§ 1202. Authority and duties of Navajo Nation officials; Budget and Finance Committee**

A. In furtherance of the objectives of 12 N.N.C. § 1201, the Controller of the Navajo Nation is authorized and directed on July 1 and January 1 of each year to prepare estimates of cash requirements and to submit not later than July 10 and January 10, respectively, each year, such estimates, together with recommendations concerning investment maturity dates to a designated investment officer or employee of the Bureau of Indian Affairs.

B. The Controller is directed to report at regular intervals to the Budget and Finance Committee concerning investments made pursuant to the Navajo Nation investment program.

C. The Budget and Finance Committee is authorized and directed to exercise such control as is necessary, incidental or desirable in carrying out

the intent of Resolutions CMY-59-66 and CO-105-66. Such authority of the Budget and Finance Committee shall include, but not be limited to, authority to request reports from the Controller regarding all investments of Navajo Nation funds, authority to request and/or authorize the gathering of such information as is necessary to determine what rates of interest were available, where investments were made, what banks and securities were investigated prior to making such investments, and why a particular bank was selected in any given instance, and such other information as may be pertinent to the investment program.

#### **History**

CO-105-66, October 5, 1966.

CMY-59-66, May 6, 1966.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1203. Authority to initiate and maintain investment program for Navajo Nation funds**

The Navajo Nation Council authorizes the President of the Navajo Nation, with the consent and approval of the Budget and Finance Committee, to initiate and maintain a prudent, well-managed investment program for Navajo Nation funds presently held in trust by the Secretary of the Interior, and the President is authorized to withdraw funds from the U.S. Treasury for this purpose in an amount not to exceed twenty million dollars (\$20,000,000).

#### **History**

CJY-82-68, July 11, 1968.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1204. Authority to enter into contracts in connection with investment of Navajo Nation funds**

The Navajo Nation Council authorizes the President of the Navajo Nation, with the consent and approval of the Budget and Finance Committee, to enter into such contracts as may be required in connection with the investment of Navajo Nation funds, taking into consideration the following:

A. The forces of inflation which may reduce the value of Navajo Nation funds over a period of years;

B. The safety of the funds invested;

C. The return to the Navajo Nation in interest, dividends, and increase in the value of investments;

D. The availability of funds when required; and

E. Other factors consistent with sound investment practices.

### **History**

CJY-82-68, July 11, 1968.

**Note.** Slightly reworded for purposes of statutory form.

### **Cross References**

Budget and Finance Committee of the Navajo Nation Council, 2 N.N.C. § 371 *et seq.*

## **Chapter 13. Bond Financing Act**

### **§ 1300. Purpose**

The Act authorizes the issuance of bonds by the Navajo Nation to finance capital improvement projects included in the Capital Improvement Plan and authorizes other governmental units to issue bonds to finance capital improvements in a manner that is consistent with the policies and procedures set forth in the Act. Notwithstanding the Appropriations Act, or any overlap with other legislation, this Act takes precedence. To achieve this purpose, this Act has the following objectives:

A. To provide financing for capital improvement projects, infrastructure, and capital expenditures, as defined in 12 N.N.C. § 800 *et seq.*

B. To enhance economic development for the Navajo Nation and its peoples by prudent use of tax-exempt and taxable financing and to take advantage of the Indian Governmental Tax Status Act of 1982, as amended.

### **History**

CO-83-01, October 18, 2001.

### **Cross References**

Indian Governmental Tax Status Act of 1982, 26 U.S.C. § 7871.

### **§ 1310. Definitions**

For purposes of this Act and sections of this Act, the following definitions shall apply:

A. "Bond" means any evidence of indebtedness issued or entered into by a governmental unit, including any interest-bearing obligation of a governmental unit that obligates such governmental unit to pay the holder thereof a specified sum of money at specific intervals and to repay the principal amount of the obligation at maturity, together with any bond, note, obligation, loan agreement, financing lease, certificate of participation, bank loan, financing agreement or similar instrument or agreement issued or entered into by a governmental unit. As used in this Chapter, the term "bond" may refer to a general obligation bond, a revenue bond or a refunding bond related to either, as the context so requires.

B. "Bond fund" means any debt service fund, debt service reserve fund, sinking fund, rebate fund, reserve or replacement fund or other special fund or account established in connection with the issuance of any bond.

C. "Bond-related costs" mean:

1. The costs and expenses of issuing, administering and maintaining bonds, including paying bond debt service, paying the costs of credit enhancement devices, paying administrative costs and expenses, including costs of consultants, advisors or other professional service providers appointed, retained or approved by the Navajo Nation or other governmental unit;

2. The cost of funding any bond fund;

3. Capitalized interest on bonds;

4. Rebates, interest or penalties due to the United States in connection with any bond issued as a tax-exempt obligation; and

5. Any other costs or expenses that the Navajo Nation or other governmental unit determines is necessary or desirable in connection with the issuance of any bond.

D. Pursuant to 12 N.N.C. § 810(F), Appropriations Act, "Capital Improvement" means a major project undertaken by the Navajo Nation or other governmental unit that is generally not recurring on an annual basis and which fits within one or more of the following categories:

1. All projects requiring debt obligation or borrowing.

2. Any acquisition or lease of land.

3. Purchase of equipment or vehicles, with a reasonably expected economic life of five years or more, valued in excess of fifty thousand dollars (\$50,000).

4. Major building improvements that are not routine maintenance expenses and that substantially enhance the value or extend the useful life of a structure.

5. Construction or acquisition of buildings or facilities including engineering, design, and other pre-construction costs with an estimated cost in excess of an amount to be determined by the Controller.

6. Acquisition, installation or rehabilitation of equipment or furnishings required to furnish buildings, improvements or other projects, the cost of which is above a certain amount to be established by the Controller.

7. Infrastructure Assets. Are long-lived capital assets that normally are stationary in nature and normally can be preserved for a significantly greater number of years than most capital assets. Examples

of infrastructure assets include roads, bridges, tunnels, drainage systems, water and sewer systems, dams and lighting systems. Buildings, except those that are an ancillary part of a network of infrastructure assets, should not be considered.

E. "Credit enhancement device" means a letter of credit, line of credit, liquidity facility, municipal bond insurance policy or other device or facility used to enhance the creditworthiness or marketability of bonds.

F. "Full faith and credit" means the full taxing power and borrowing power of a governmental unit, plus any other revenue pledged in payment of interest and repayment of principal of a bond issued by the governmental unit.

G. "General obligation bond" means a bond issued by a governmental unit that is backed by the full faith and credit of the governmental unit issuing the general obligation bond. General obligation bonds also may be secured by a pledge of revenues designated by the governmental unit.

H. "Governmental unit" means the Navajo Nation, any enterprise, authority or commission established by the Navajo Nation and any political subdivision of the Navajo Nation, including chapters or any other local units of government created pursuant to the Local Governance Act.

I. "Long-term debt" means the unmatured principal of debt instruments and other forms of noncurrent or long-term general obligation liabilities that were not specific liabilities of any proprietary or trust fund and were not current liabilities properly recorded in the governmental funds.

J. "Navajo Nation" means, for purposes of this Chapter, the Navajo Nation acting through its Council, the Budget and Finance Committee of the Council and the duly authorized officers of its Executive Branch. As used in this Chapter, Navajo Nation does not include any enterprise, authority or commission established by the Navajo Nation or any political subdivision of the Navajo Nation, including chapters and other local units of government.

K. "Refunding bond" means an advance refunding or current refunding bond issued by a governmental unit for the purpose of paying, defeasing, redeeming or retiring a previously issued bond.

L. "Revenues" mean all taxes, oil and gas, mining/minerals, land rentals, interest/dividends, gain on sale of securities and other revenue producing activities and all other income and receipts of whatever kind or character derived by or to which a governmental unit is entitled from the operation, sale or use of facilities, projects, utilities or systems owned or operated by the governmental unit and other revenues legally available to be pledged to secure a bond or to be designated as revenues from which a bond will be payable.

M. "Revenue bond" means a bond issued by a governmental unit, the payment of interest and repayment of principal of which is secured by the revenues pledged or designated to be payable for such purpose by a governmental unit.

### **History**

CO-83-01, October 18, 2001.

### **§ 1320. Long term debt policies**

A. Per 12 N.N.C. § 820(H), Long-term debt limitation. Annual debt service for long-term debt shall not exceed the sum of (i) eight percent (8%) of annual unrestricted recurring revenue, and (ii) projected annual project revenue, as calculated by the Controller, and long-term debt shall not be authorized until the impact of annual debt service on the annual operating budget, including sinking fund contributions, has been analyzed and a determination has been made that debt service payments are in compliance with this Section. For purposes of this Section, "annual debt service" payments for long-term debt shall only include the payment of scheduled principal, interest, costs associated with any credit enhancement device and other bond-related costs reasonably estimated to be or become payable in connection with any long-term debt consisting of a general obligation bond of the Navajo Nation or any other bond backed by the full faith and credit of the Navajo Nation which is not subject to annual appropriation by the Nation. "Projected annual project revenue" shall refer to annual revenues generated by a capital improvement or other project financed with either general obligation bonds of the Navajo Nation or other bonds backed by the full faith and credit of the Navajo Nation, as certified to the Controller on an annual basis by a financial advisor, feasibility consultant, accountant or other appropriate professional service provider acceptable to the Controller.

B. Use of proceeds from long-term debt will be restricted to financing capital improvement projects and will not be used to finance current operations or normal repairs and maintenance.

C. The Navajo Nation normally will rely on internally generated funds and/or grants to finance its capital improvement needs. Bonds will be issued to finance a capital improvement project when it is an appropriate means to achieve a fair allocation of costs between current and future beneficiaries; and when it is determined that the project will be substantially completed within three years from issuance of bonds. Bonds shall not, in general, be issued to fund capital improvement projects solely because insufficient funds are budgeted at the time of acquisition or construction.

### **History**

CO-83-01, October 18, 2001.

### **§ 1330. Financing of capital improvements and related projects**

A. General Obligation Bonds. A governmental unit may issue general obligation bonds upon the adoption of an authorizing resolution or the enactment of an ordinance by its governing body for the financing of specific capital improvements for such governmental unit. Additionally, the Navajo Nation, through its Controller, may issue general obligation bonds for the financing of specific capital improvements for the Navajo Nation or any other governmental unit pursuant to an authorizing resolution or ordinance adopted or enacted by either its Council or the Budget and Finance Committee of the Council, provided that such improvements are part of an approved Capital Improvement Plan. The Controller shall review a request from the Navajo Nation to issue general obligation bonds. If the Controller can certify that funding

is available to pay principal and interest within the limitations of the general revenues of the Navajo Nation and other designated available revenues, the issuance of general obligation bonds by the Navajo Nation to fund the capital improvements may be presented to the full Council or to the Budget and Finance Committee for approval or rejection only. The Controller shall have the responsibility for issuing general obligation bonds on behalf of the Navajo Nation and thereafter shall identify the requirements for payment of interest and principal on such bonds as part of the annual budget planning and preparation process until such time as the bonds are retired. General obligation bonds issued by a governmental unit other than the Navajo Nation shall be subject to all budgetary, approval and other requirements applicable to the governmental unit issuing general obligation bonds. In addition, notwithstanding the provisions of any law applicable to an issuing governmental unit, including without limitation those granting borrowing and other financing authority and powers to the governmental unit, including 26 N.N.C. § 103 of the Local Governance Act, no governmental unit shall issue general obligation bonds unless such governmental unit has made application to the Controller and such application has been reviewed and approved by the Controller and, with respect to legal matters, approved by the Department of Justice. The Office of the Controller shall charge each governmental unit proposing to issue general obligation bonds an application fee in an amount sufficient to pay all costs associated with such review and approvals.

The Controller may, in providing the certification or approval required by the foregoing paragraph, retain the services of financial advisors, accountants, appraisers, feasibility consultants and other appropriate professional service providers and reasonably rely on the opinions, findings, statements and conclusions provided by such persons. Fees and costs associated with such services shall be paid by the Controller from application fees required to be paid to the Controller by the issuing governmental unit, as established by the Controller from time to time. All procurement of services must comply with applicable Navajo Nation laws, including the Navajo Preference in Employment Act, the Navajo Business and Procurement Act, and the Navajo Nation Procurement Act (12 N.N.C. § 301 *et seq.*)

B. Revenue Bonds. A governmental unit may issue revenue bonds upon the adoption of an authorizing resolution or the enactment of an ordinance by its governing body for the financing of specific capital improvements or for any other lawful public purpose identified by such governmental unit. Additionally, the Navajo Nation, through its Controller, may issue revenue bonds for the financing of specific capital improvements, provided that such improvements are part of an approved Capital Improvement Plan, pursuant to an authorizing resolution or ordinance adopted or enacted by either its Council or the Budget and Finance Committee of the Council, and provided further that the specific revenue stream upon which payment of principal and interest on the bonds will be made shall be identified and pledged to the payment of the bonds at the time the bonds are issued. The Controller shall review a request from the Navajo Nation to issue revenue bonds in light of guidelines. If the Controller can certify that funding within any applicable limitations are available from the identified revenue sources, the issuance of revenue bonds by the Navajo Nation to fund the proposed improvements may be presented to the full Council or to the Budget and Finance Committee for approval or rejection only. The Controller shall have the responsibility for issuing revenue bonds on behalf of the Navajo Nation and thereafter shall identify the requirements

for payment of interest and principal on such bonds as part of the annual budget planning and preparation process until such time as the bonds are retired. Revenue bonds issued by a governmental unit other than the Navajo Nation shall be subject to all budgetary, approval and other requirements applicable to the governmental unit issuing revenue bonds. In addition, notwithstanding the provisions of any law applicable to an issuing governmental unit, including without limitation those granting, borrowing and other financing authority and powers to the governmental unit, including 26 N.N.C. § 103 of the Local Governance Act, no governmental unit shall issue revenue bonds unless such governmental unit has made application to the Controller and such application has been reviewed and approved by the Controller and, with respect to legal matters, approved by the Department of Justice. The Office of the Controller shall charge each governmental unit proposing to issue revenue bonds an application fee in an amount sufficient to pay all costs associated with such review and approvals.

The Controller may, in providing the certification or approval required by the foregoing paragraph, retain the services of financial advisors, accountants, appraisers, feasibility consultants and other appropriate professional service providers and reasonably rely on the opinions, findings, statements and conclusions provided by such persons. Fees and costs associated with such services shall be paid by the Controller from application fees required to be paid to the Controller by the issuing governmental unit, as established by the Controller from time to time. All procurement of services must comply with applicable Navajo Nation laws, including the Navajo Preference in Employment Act, the Navajo Business and Procurement Act, and the Navajo Nation Procurement Act (12 N.N.C. § 301 *et seq.*)

A governmental unit issuing a revenue bond may pledge to the payment of such bonds, or may make a revenue bond payable from, all or any portion of:

1. The revenues of any revenue producing facility owned or operated by or providing services to such governmental unit or financed by the revenue bond;
2. The revenues of a public utility or system, or an addition or extension to the public utility or system, where the improvements, projects or facilities financed by the revenue bond are a portion of the public utility or system;
3. All or any portion of any other revenues of the governmental unit, regardless of whether such revenues are related to the improvements, projects or facilities financed by the revenue bond.

If a governmental unit determines that it is necessary to provide additional security for revenue bonds, the governmental unit may mortgage, grant security interests in or otherwise encumber facilities, projects, utilities or systems owned or operated by the governmental unit. Such security may be given in favor of the holders of revenue bonds, a trustee therefor or as security for its obligations arising under any credit enhancement device. A governmental unit may obtain a credit enhancement device for revenue bonds provided that such credit enhancement device shall be payable solely from revenues, the proceeds of revenue bonds, and the other additional security provided for in this Paragraph.

C. Pledge of Nation's Full Faith and Credit. Only a bond issued by the Navajo Nation as a general obligation bond of the Navajo Nation in compliance with all provisions and requirements of this Chapter shall be backed by the full faith and credit of the Navajo Nation. No bond issued by a governmental unit, other than a general obligation bond of the Navajo Nation, shall be backed by the full faith and credit of the Navajo Nation unless the full faith and credit of the Navajo Nation has been specifically pledged to the payment of such bond by the Navajo Nation Council, the Controller has consented to such pledge, and the bond has been issued in compliance with all provisions and requirements of this Chapter for the issuance of a general obligation bond by the Navajo Nation. The Navajo Nation, acting through its Controller, may condition the lending of the full faith and credit of the Navajo Nation to back bonds issued by another governmental unit upon the satisfaction of such terms and conditions and the payment of such fees and charges as the Controller may establish from time to time.

D. Bond Issuance. In issuing bonds, a governmental unit may:

1. Subject to the limitations contained in this Chapter, establish the maturity schedules, interest rates, including fixed, variable or adjustable interest rate terms, tender or redemption provisions, provisions for capitalized interest and other bond terms;

2. Appoint a bond trustee and bond counsel and retain the services of financial advisors, underwriters, paying agents, legal counsel and other professional service providers in connection with the issuance of bonds;

3. Execute and deliver any necessary or appropriate agreement or other document in connection with obtaining a credit enhancement device;

4. Enter into covenants for the benefit of bondholders and the provider of any credit enhancement device to improve the security of bondholders or the provider of a credit enhancement device, or to maintain the tax-exempt status of interest payable on bonds;

5. Establish such bond funds as may be necessary or desirable to pay debt service, to secure bonds and for any other purpose reasonably related thereto; and

6. To apply bond proceeds to pay bond related costs.

E. Limitation on Bond Maturity. All long term debt issued will be repaid within a period not to exceed the expected useful lives of the capital improvement projects financed by the long term debt as certified to the Controller by a financial advisor, feasibility consultant, accountant or other appropriate professional service provider reasonably acceptable to the Controller. For purposes of this Section, the reasonably expected remaining economic life of a bond financed capital improvement shall be determined as of the date on which bonds are issued based on the expected remaining economic life of the equipment and other components of the bond financed improvement. Land shall not be taken into account in determining the economic life of a capital improvement, except that, in the event twenty-five percent (25%) or

more of the proceeds of a bond issue financing such improvement are expended to acquire land, such land shall be treated as having an expected remaining economic life of 30 years, and shall be taken into account in determining the reasonably expected remaining economic life of the bond financed improvement.

F. Investment of Bond Proceeds and Funds. Prior to the expenditure of bond proceeds for the purposes authorized by this Chapter, including the payment of bond related costs, such proceeds and investment earnings thereon, together with all other amounts held in any bond fund. shall be invested at the direction of the issuing governmental unit in accordance with and subject to the limitations of the applicable laws and regulations of the Navajo Nation and the governmental unit and in compliance with the investment policies established by the Controller from time to time for such proceeds and funds.

G. Refunding Bonds. A governmental unit that is authorized to issue general obligation bonds or revenue bonds pursuant to § 1330(A) or § 1330(B) may from time to time in its discretion upon the adoption of an authorizing resolution or the enactment of an ordinance by its governing body issue refunding bonds for the purpose of paying, defeasing, redeeming or retiring bonds previously issued by such governmental unit. Refunding bonds may, however, be issued by a governmental unit, only after such governmental unit has complied fully with the refunding rules applicable to such bonds issued by the Controller from time to time, including the payment of any fees required to be paid by the governmental unit to the Controller.

H. Manner of Sale. Bonds issued pursuant to this Chapter may be sold by a governmental unit pursuant to a public competitive bid or at a private negotiated sale, as determined by the governmental unit in accordance with prudent financial management practices. A governmental unit issuing bonds shall take all reasonable measures directed by the chief financial officer of the governmental unit to assure compliance by the governmental unit with the requirements of all applicable securities laws. In determining an appropriate manner of sale and in making recommendations to comply with applicable securities laws, a governmental unit and its chief financial officer may rely on the advice of its financial advisor or bond counsel, and may in its discretion retain the services of special counsel, financial advisors, investment bankers and other appropriate experts and reasonably rely on the advice and opinions provided by such persons.

I. Execution of Bonds. Bonds issued pursuant to this Chapter shall be signed by the chief executive and the chief financial officer of the governmental unit issuing bonds, by either manual or facsimile signature. For bonds issued by the Navajo Nation, the chief executive and the chief financial officer shall be the President and the Controller of the Navajo Nation, respectively. For bonds issued by a chapter, the chief executive and the chief financial officer shall be the chapter President and its Secretary/Treasurer, respectively. For bonds issued by a governmental unit other than the Navajo Nation or a Chapter, the chief executive and the chief financial officer shall be those persons designated as such for the governmental unit in the charter, legislation, plan of operation or other authority creating such unit. No person executing a bond on behalf of a governmental unit shall be liable personally on the bond by reason of the issuance thereof. In the event that a person whose signature appears on a bond as that of the chief executive or chief financial officer of the governmental unit ceases to hold such office

prior to the delivery of a bond, the signature of such person shall, nevertheless, be valid and sufficient for all purposes, the same as if such person had remained in office until delivery.

J. Severability. If any provision of this Chapter, or its application to any governmental unit or circumstance is held invalid, the remainder of the provisions of this Chapter, and their application to any governmental unit or circumstance, shall not be affected.

K. Changes in Law. No provision of law applicable to a governmental unit issuing bonds hereunder that is enacted or adopted following the issuance of a bond, or any ordinance, resolution, initiative, referendum or other action adopted or taken subsequent to the issuance of a bond shall be given any force or effect if to do so would materially impair any obligation or covenant made with the holder of such bond or the interest of the provider of any credit enhancement device supporting or securing such bonds.

### **History**

CO-83-01, October 18, 2001.

### **§ 1340. Interim financing of capital improvements and related projects**

A. Subject to any applicable limitations imposed by this Act, other applicable laws and regulations of the Navajo Nation or contained in any charter, ordinance or resolution applicable to such governmental unit, a governmental unit may borrow money by entering into a credit agreement, or issuing notes, warrants, short-term promissory notes, commercial paper or other obligations:

1. To provide interim financing for capital improvements to be undertaken by the governmental unit; or
2. To refund outstanding obligations incurred pursuant to this Section.

B. To secure obligations authorized under this Section, a governmental unit may:

1. Pledge its anticipated taxes, grants, other revenues, the proceeds of any bonds, or any combination thereof;
2. Segregate any pledged funds in separate accounts, which may be held by the governmental unit, the Controller or third parties;
3. Enter into contracts with third parties to obtain credit enhancement devices to provide additional security for obligations authorized by this Section;
4. Establish any reserves deemed necessary for the payment of the obligations; and/or
5. Adopt resolutions and enter into agreements containing covenants and provisions for protection and security of the owners of obligations,

which shall constitute enforceable contracts with such owners.

C. Obligations authorized by this Section which are issued in anticipation of taxes or other revenues, and any obligations authorized by this Section which are issued to refund them, shall not be issued prior to the beginning of, and shall mature not later than, the end of the fiscal year of the governmental unit in which the taxes or other revenues are expected to be received. Obligations issued in anticipation of taxes or other revenues shall not be issued in an amount greater than eighty percent (80%) of the amount budgeted by the governmental unit to be received in the fiscal year in which the obligations are issued.

D. Obligations authorized by this Section, which are issued in anticipation of a grant, shall mature not later than one year after the date the grant is estimated to be received. Obligations issued to provide interim financing for capital assets shall mature not later than one year from the estimated completion or acquisition of the capital assets.

E. Refunding obligations issued pursuant to Subsection (A)(1) of this Section shall mature as soon as the issuing governmental unit deems practicable and no later than 18 months after the refunding obligations are issued.

F. Except as provided in this Section, obligations authorized by this Section may be in any form and contain any terms, including provisions for redemption at the option of the holder of the obligation and provisions for the varying of interest rates in accordance with any index, banker's loan rate or other standard.

G. The issuing governmental unit, in the ordinance or resolution authorizing the issuance of obligations under this Section, may delegate to the chief financial officer of the governmental unit or, in the case of the Navajo Nation, the Controller, the authority to determine maturity dates, principal amounts, redemption provisions, interest rates or the method for determining a variable or adjustable interest rate, denominations and other terms and conditions of such obligations which are not appropriately determined at the time of enactment or adoption of the authorizing ordinance or resolution, which delegated authority shall be exercised subject to applicable requirements of law and such limitations and criteria as may be set forth in such ordinance or resolution. Except to the extent of any such delegation, the ordinance or resolution of the governmental unit authorizing the issuance of obligations under this Section shall contain:

1. The maximum effective rate of interest the obligations shall bear;
2. The manner of sale;
3. The discount, if any, the governmental unit may allow;
4. The terms and conditions by which the obligations may be redeemed prior to maturity;
5. The maturities of the obligations;

6. The form and denominations of the notes or other obligations;  
and

7. All other material terms and conditions related to the sale of  
the obligations.

H. The governmental unit may contract with third parties to serve as  
issuing, paying and authenticating agents for any obligations authorized by  
this Section.

I. Obligations authorized by this Section may be sold by a governmental  
unit pursuant to a public competitive bid or at a private negotiated sale upon  
such terms as the governmental unit finds advantageous, with such disclosure or  
other measures to comply with the requirements of applicable securities laws as  
the governmental unit deems appropriate.

J. Notwithstanding the provisions of any law applicable to a governmental  
unit, including without limitation those granting, borrowing and other  
financing authority and powers to the governmental unit, including 26 N.N.C. §  
103 of the Local Governance Act, no governmental unit shall borrow money for  
the purposes permitted by this Section unless such governmental unit has made  
application to the Controller and such application has been reviewed and  
approved by the Controller and, with respect to legal matters, approved by the  
Department of Justice. The Office of the Controller shall charge each  
governmental unit proposing to borrow money pursuant to this Section an  
application fee in an amount sufficient to pay all costs associated with such  
review and approvals.

#### **History**

CO-83-01, October 18, 2001.

**Note.** (A) Slightly reworded for purposes of statutory form.

#### **§ 1350. Amendments**

This Bond Financing Act may be amended by a majority vote of the full  
membership of the Navajo Nation Council upon the recommendation of the Budget  
and Finance Committee of the Navajo Nation Council.

#### **History**

CO-83-01, October 18, 2001.

### **Chapter 14. Contingency Funds**

#### **§ 1401. Approval of expenditures**

A. The Budget and Finance Committee is authorized to approve expenditures  
from contingency funds available in the yearly Navajo Nation budget to meet  
emergent and unusual conditions not more specifically provided for elsewhere in  
the budget.

B. The President of the Navajo Nation is authorized to approve expenditures necessary in his or her discretion from contingency funds available in the Navajo Nation budget, provided that such expenditures shall not exceed five hundred dollars (\$500.00) for any one case.

#### **History**

CAP-10-63, April 24, 1963.

CJ-36-58, July 21, 1958.

**Note.** This Section should be read in light of the amendments made to 2 N.N.C. by CD-68-89, December 15, 1989. See 2 N.N.C. §§ 374(B)(1) and 1005(C)(6) and (7).

### **Chapter 15. Navajo Business and Procurement Act**

#### **§ 1501. Title**

This Act shall be known and cited as the Navajo Business and Procurement Act.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1502. Purpose**

The purpose of this Act is to protect the resources and financial integrity of the Navajo Nation and to promote sound governmental practices. Therefore, compliance with this Act shall be a condition precedent to transacting or granting any business opportunity, contract, procurement activity; or processing any easement, permit, lease transaction; or considering any loan application by or from the Navajo Nation to any individual, business, corporation, partnership, or other entity other than the Navajo Nation.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1503. Definitions**

A. For purposes of this Chapter, "Navajo Nation" shall be defined as:

1. The Navajo Nation Council, its standing committees, and Navajo Nation Council Delegates;

2. The President and Vice-President of the Navajo Nation;

3. All committees, boards, and commissions of the Navajo Nation government;

4. All certified chapters of the Navajo Nation;

5. All grazing committees, land boards, and farm boards of the Navajo Nation;

6. All divisions, departments, and programs operating under the authority of and within the Executive Branch of the Navajo Nation government;

7. All programs under and within the Judicial Branch of the Navajo Nation government;

8. All enterprises of the Navajo Nation; Navajo Community College, Crownpoint Institute of Technology, and any other entity owned in whole or part by the Navajo Nation; and

9. All other programs and entities who receive at least fifty-one percent (51%) of their funding either directly from the Navajo Nation government or are authorized by the Navajo Nation government to receive federal or state grants or other monies on behalf of the Navajo Nation.

B. "Business" shall mean any individual or association of individuals engaged in commerce, trade, or the buying and selling of commodities or services whether or not for profit; and shall include each person associated with such business for eligibility purposes.

C. "Business Opportunity" shall mean:

1. The availability of any opportunity from the Navajo Nation to engage in or provide governmental or administrative services; procurement, business, commerce or trade activities, or the buying and selling of commodities or services; or

2. The receipt of any business certification or advantage pursuant to the Navajo Nation Business Opportunity Act; or

3. The receipt of any contract, lease, easement, permit, loan, monies, or funds from the Navajo Nation not expressly exempted.

D. "Contract" shall include but not be limited to any subcontract; or grant/subgrant of funds for a specific purpose.

E. "Corporation" shall mean any corporate or chartered entity formed under any Navajo Nation, state, or federal law; and shall include for eligibility identification purposes, all of its board of directors, officers, and controlling shareholders (persons owning of record or beneficially at least twenty-five percent (25%) of the issued and outstanding stock or beneficial interest of the corporation).

F. "Delinquent Accounts Receivable" shall mean any monetary amount owed to the Navajo Nation which is not expressly exempted and is at least 30 days past due.

G. "Easement" shall mean any right-of-way or limited right to use Navajo

Nation realty including any transfer, assignment, or extension thereof.

H. "Individual" shall mean any natural person and shall include the person's spouse pursuant to applicable principles of community property law.

I. "Lease" shall mean any lease, sublease or operating agreement (or any transfer, assignment or extension thereof) for the possession and use of Navajo Nation realty excluding homesite leases.

J. "Other Entity" shall mean any other individual, business, company or other organization or entity not covered in Subsections (B), (E), (H), and (K) excluding the federal government and its instrumentalities; and shall include each associated individual for eligibility identification purposes.

K. "Partnership" shall mean any partnership formed under any Navajo Nation or state law or any group of two or more individuals who hold themselves out as a partnership, formally or informally, including but not limited to joint venture partners, brokers, dealers, etc., and shall include each individual partner for eligibility identification purposes.

L. "Permit" shall mean any permit (excluding grazing and land use permits), license or revocable agreement for the temporary use of Navajo Nation realty or personalty or the grant of authority to allow specific acts including any transfer, assignment, or extension thereof.

M. "Procurement" shall mean the purchase or lease of goods and services by the Navajo Nation.

#### **History**

CD-62-86, December 11, 1986.

**Note.** Slightly reworded and reorganized for purposes of statutory form. The "Navajo Skill Center" is now the "Crownpoint Institute of Technology" pursuant to ACJA-7-87, January 2, 1987.

#### **Annotations**

##### **1. Construction and application**

"The ONLR fits under the definition of Navajo Nation in the Procurement Act." *PC & M Construction Company, Inc. v. Navajo Nation, et al.*, 7 Nav. R. 96, 98 (Nav. Sup. Ct. 1994).

##### **§ 1504. Eligibility and compliance under the Act**

A. The determination of eligibility of an applicant for each and every transaction subject to this Act shall be made initially by the appropriate department or entity of the Navajo Nation, as defined in § 1503(A) which receives an applicant's request for consideration for a business opportunity, procurement activity or loan.

B. As a condition precedent to further review and processing by the Navajo Nation, such eligibility of the applicant shall be confirmed by either:

1. Evidence of compliance verifying the initial eligibility of the applicant in that none of the conditions cited in § 1505(A)-(D) below are applicable; or

2. Evidence of clearance verifying that the applicant has since remedied all applicable bases for previous ineligibility cited in § 1505(A)-(D) below and is now eligible as an applicant in conformance with this Act.

### **History**

CD-62-86, December 11, 1986.

### **§ 1505. Ineligibility**

No applicant individual, business, corporation, partnership or other entity shall be eligible to do any business with the Navajo Nation as set forth in § 1502 (i.e., as a contractor, grantee, consultant, broker, dealer, vendor, supplier, permittee, lessee, easement or loan recipient, etc.); or receive any certification or advantage under the Navajo Nation Business Opportunity Act; or receive any contract, purchase order (P.O.), request for direct payment (R.D.P.), or other accounts payable order for procurement from the Navajo Nation; or be granted a Navajo Nation easement, permit or lease, or loan of any type from the Navajo Nation if any one of the following circumstances apply:

A. If there is an outstanding money judgment in favor of the Navajo Nation from a court of competent jurisdiction or a valid delinquent accounts receivable debt which is due and owing to the Navajo Nation from that applicant entity either in its present form or in any other identifiable capacity as an individual, business, corporation, partnership or other entity; or

B. If under any transaction, contract or legal relationship with the Navajo Nation, there has been evidence of default of materially deficient business practices or failure to meet a material contractual or financial obligation to the Navajo Nation or failure to materially comply with applicable laws or material delay by that applicant entity either in its present form or in any other identifiable capacity as an individual, business, corporation, partnership or other entity, resulting in monetary or other detriment to the Nation which remains uncured; or

C. If that applicant entity either in its present form or in any other identifiable capacity as an individual, business, corporation, partnership or other entity, has been found to have engaged in unlawful or criminal actions or other activities which adversely reflects on the honesty and moral character of said party(ies) so as to make any dealings with the Navajo Nation undesirable; or

D. If the individual or any individual(s) of the applicant entity either in its present form or in any other identifiable capacity as an individual, business, corporation, partnership or other entity, has been convicted of a criminal offense within the previous 10 years under any Navajo Nation, state or federal law for embezzlement, theft, forgery, bribery, falsification or

destruction of records, receiving stolen property, or committing a criminal offense relating to obtaining a public/private contract or in the performance of such contract.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1506. Removal of ineligibility**

A. Any individual, business, corporation, partnership or other entity may remove a determination of ineligibility based on § 1505(A) of this Act by paying in full all outstanding amounts owed to the Navajo Nation. Such payment shall not be contingent in any way on the future eligibility of the party(ies) under this Act. Only upon full and complete payment, will the individual, business, corporation, partnership or entity be considered eligible under § 1505(A) for application for business opportunities, procurement activities and loans from the Navajo Nation.

B. Removal of a determination of ineligibility based on § 1505(B), (C) and (D) shall be set forth in rules and regulations promulgated pursuant to § 1511 herein.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1507. Right of offset**

If the applicant entity in its present form or any other identifiable capacity as an individual, business, corporation, partnership or other entity, has an outstanding money judgment against it in favor of the Navajo Nation or a delinquent accounts receivable debt which is due and owing to the Navajo Nation, upon due notice the Navajo Nation may offset its money claim against any amount it owes to or has an account payable to the individual, business, corporation, partnership or other entity.

#### **History**

CD-62-86, December 11, 1986.

#### **Annotations**

##### **1. Construction and application**

"The Navajo Business and Procurement Act permits the Navajo Nation, upon due notice, to offset its money claim against any amount it owes to a business." *PC & M Construction Company, Inc. v. Navajo Nation, et al.*, 7 Nav. R. 58, 59 (Nav. Sup. Ct. 1993).

##### **2. Purpose**

"The Navajo Business and Procurement Act was created to enforce the Navajo Nation Collection System in the best interests of the Navajo Nation." *PC & M*

*Construction Company, Inc. v. Navajo Nation, et al.*, 7 Nav. R. 96, 98 (Nav. Sup. Ct. 1994).

#### **§ 1508. Administrative review process**

A. Any applicant may file a written appeal within seven calendar days of receipt of a determination of ineligibility or notice of intent to offset with a Hearing Officer appointed for this purpose. The Hearing Officer shall act upon and render a final decision within 30 days from the date of receipt of the protest. All final decisions shall include a statement of findings of fact, conclusions and the reasons therefor.

B. The Hearing Officer shall be appointed by the President of the Navajo Nation.

#### **History**

CD-62-86, December 11, 1986.

#### **Annotations**

##### **1. Construction and application**

"The Navajo Business and Procurement Act permits a party to appeal a notice of intent to offset to a hearing officer. That Section also requires the hearing officer to make findings of fact, conclusions of law, and a decision." *PC & M Construction Company, Inc. v. Navajo Nation, et al.*, 7 Nav. R. 58, 59 (Nav. Sup. Ct. 1993).

#### **§ 1509. Final appeal**

A final decision of the Hearing Officer may be appealed to the Navajo Nation courts. Such appeal shall be limited to questions of law and the Hearing Officer's findings of facts shall be sustained, provided there is some basis in the evidence for such findings.

#### **History**

CD-62-86, December 11, 1986.

#### **Annotations**

##### **1. Construction and application**

"The Navajo Business and Procurement Act provides for an appeal of the hearing officer's decision to the Navajo Nation Supreme Court." *PC & M Construction Company, Inc. v. Navajo Nation, et al.*, 7 Nav. R. 58, 59 (Nav. Sup. Ct. 1993).

#### **§ 1510. Construction of the Act**

Eligibility and compliance under this Act shall be construed as an additional requirement which is a condition precedent to the application of other appropriate Navajo Nation laws, rules, regulations and program requirements. Nothing in this Act shall be construed to waive or supersede

such other applicable law, program, or Navajo Nation requirements unless said requirements are inconsistent with this Act, in which event § 1512 shall apply. Any action(s) by employees or officials of the Navajo Nation in violation of this statute shall be null and void.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1511. Delegation of authority/responsibility for monitoring and enforcement**

The Division of Finance, the Division of Economic Development and the Department of Justice in conjunction with the Office of the Attorney General are delegated the authority and responsibility to promulgate rules and regulations as necessary, and to monitor, enforce and implement the intent of this Act. Said rules and regulations shall require the approval of the Government Services Committee of the Navajo Nation Council.

#### **History**

CD-62-86, December 11, 1986.

**Note.** The Advisory Committee is no longer a standing committee of the Navajo Nation Council. See CD-68-89, December 15, 1989 (Resolved Clause #10), and 2 N.N.C. § 341 *et seq.* for the authority of the Government Services Committee.

#### **§ 1512. Prior inconsistent law repealed**

All prior Navajo Nation laws, regulations, rules and provisions of the Navajo Nation Council previously adopted, to the extent they are inconsistent with this Act, are repealed.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1513. Severability of the Act**

If any provision of this Act is held invalid by any court of competent jurisdiction, the remaining provisions of the Act shall have full force and effect.

#### **History**

CD-62-86, December 11, 1986.

#### **§ 1514. Express exceptions under the Act**

The following transactions are expressly exempted from compliance and consideration under this Act: gifts, homesite leases, grazing and land use permits, educational scholarships, educational loans, and water use assessments for Navajo-owned farms and irrigation projects.

#### **History**

CD-62-86, December 11, 1986.

**§ 1515. No waivers or other exceptions**

No waiver of or other exception to any requirement of this Act shall be granted except by valid resolution of the Navajo Nation Council.

**History**

CD-62-86, December 11, 1986.

**Revision Note.** Slightly reworded for purpose of statutory form.

**§ 1516. Effective date and amendment**

The effective date of this Act shall be 30 days after adoption by the Navajo Nation Council and shall remain in effect until modified or repealed by the Navajo Nation Council.

**History**

CD-62-86, December 11, 1986.

Chapter 16. Gaming Development Fund

**§ 1601. Establishment**

A. There is hereby established the Gaming Development Fund (hereinafter referred to as Fund). Revenue from any agreements entered into by the Navajo Nation concerning the lease of gaming machines to any other Indian Nation shall be deposited into this Fund.

B. Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of revenue are available for appropriation. Any money deposited into the Fund shall only be used as provided hereinafter.

**History**

CO-53-06, October 31, 2006.

**§ 1602. Purpose**

The purpose of the Fund is to separately hold gaming revenues from various revenue sources and to provide funding for gaming development within the Navajo Nation.

**History**

CO-53-06, October 31, 2006.

**§ 1603. Investment of the Fund**

All amounts deposited into the Fund shall be invested as soon as practical in accordance with the Navajo Nation's duly adopted Investment Objectives and Investment Policies.

**History**

CO-53-06, October 31, 2006.

**§ 1604. Expenditure of Fund**

The Controller of the Navajo Nation shall have authority to approve fund expenditures pursuant to a budget and operating plan approved by the Budget and Finance Committee. The Office of the Controller shall establish policies and procedures governing the procedure by which parties may make application to the Controller for approval of expenditures.

**History**

CO-53-06, October 31, 2006.

**§ 1605. Annual Audited Report**

The Fund shall be audited annually by independent auditors as part of the overall audit of the Navajo Nation government

**History**

CO-53-06, October 31, 2006.

**§ 1606. Legislative oversight**

The Budget and Finance Committee of the Navajo Nation Council shall provide legislative oversight for the Fund.

**History**

CO-53-06, October 31, 2006.

**§ 1607. Amendments**

This chapter may be amended by the Navajo Nation Council upon the recommendation of the Budget and Finance Committee of the Navajo Nation Council. Section 1604 shall only be amended or waived by a two-thirds (2/3) vote of the full membership of the Navajo Nation Council.

**History**

CO-53-06, October 31, 2006.

**§ 1608. Effective period**

The effective date of the Fund shall be May 1, 2006, and the Fund shall remain in place for a period of five years. At the end of that period, all monies remaining in the Fund that have not been budgeted or encumbered at that time shall be deposited into the General Fund of the Navajo Nation.

**History**

CO-53-06, October 31, 2006.

**Chapter 17. Business and Industrial Development Fund**

**§ 1701. Establishment**

A. The Navajo Nation Council established the Navajo Nation Business and Industrial Development Fund with an initial appropriation of thirty million dollars (\$30,000,000). Additional appropriations may be made from time to time by the Navajo Nation Council provided that additional sources of funds are available for appropriation. All money deposited into the Fund, plus accrued interest, shall be used only as provided herein.

B. Based upon the discussion of the Navajo Nation Council the initial capital contribution of twenty-five million dollars (\$25,000,000) was increased to thirty million dollars (\$30,000,000) with the understanding that the additional five million dollars (\$5,000,000) contribution would be utilized for small business development at the chapter level.

C. Therefore, twenty-five million dollars (\$25,000,000) will be utilized for financing larger tourism, commercial and industrial development projects, and five million dollars (\$5,000,000) will be utilized for financing small business development at the chapter level.

**History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Note.** Slightly reworded for purposes of statutory form.

**§ 1702. Purpose**

The purpose of this Fund is to establish a special Navajo Nation fund for providing financing for business and industrial development. The Fund will be utilized for Navajo Nation participation in large tourism, commercial and industrial development projects and small business development projects through various forms of financing including, but not necessarily limited to: direct Navajo Nation investment, direct loans, loan guarantees, or other forms of debt

security instruments. Further, to the maximum extent possible, the Fund will be utilized to leverage other sources of funding for project development and implementation.

### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

### **§ 1703. Definitions**

The following words used in this Fund Management Plan shall have the following meaning unless the context clearly indicates otherwise, and the singular whenever used herein shall include the plural:

A. "Government Services Committee" means the Government Services Committee, a duly authorized standing committee of the Navajo Nation Council (see 2 N.N.C. § 341 *et seq.*).

B. "B & F" means the Budget and Finance Committee of the Navajo Nation Council (see 2 N.N.C. § 371 *et seq.*).

C. "Division of Economic Development" means the Division of Economic Development, a duly authorized division of the Navajo Nation government (see 2 N.N.C.).

D. "Direct Loan" means the act of financing through the lending of principal to a party for a specific small business, tourism, commercial or industrial development purpose, whereby the principal plus interest will be repaid through an agreed upon schedule of payments or upon demand.

E. "Direct Navajo Nation Investment" means the commitment of monies for the purpose of obtaining a return which may be in the form of, among other things, dividends, rents, profits or creation of permanent jobs for Navajos; the term *investment* may include transactions such as direct or indirect purchase of stocks, bonds, real estate and personal property, etc.; and the procurement of services for economic development master planning, marketing and feasibility studies, engineering and architectural designing, surveying and platting where the same is necessary to the initiation or continuation of a Navajo Nation approved tourism, commercial and industrial development project.

F. "EDC" means the Economic Development Committee, a duly authorized standing committee of the Navajo Nation Council (see 2 N.N.C. § 721 *et seq.*).

G. "Fund" means the Business and Industrial Development Fund as authorized and established by Resolution CAU-45-87, August 13, 1987.

H. "Financing" means the act or process of providing and/or raising funds for business, tourism, commercial or industrial development within the Navajo Nation's territorial jurisdiction. Such financing may include, but are not necessarily limited to: direct tribal investment, direct loans, loan

guarantees or other forms of debt security.

I. "Loan Guaranty" means the designation of specified Fund assets as security for a loan or debt obligation from some source other than the Fund by a party or parties seeking to locate a commercial or industrial enterprise, or to locate, improve or expand a small business enterprise within the Navajo Nation's territorial jurisdiction.

J. "Navajo Nation" means the Navajo Nation government, including its Legislative, Judicial and Executive branches.

K. "Navajo Nation's Territorial Jurisdiction" means all Navajo lands as defined in 7 N.N.C. § 254.

L. "Navajo Tribe" means collectively the individuals who are registered Navajos and constitute the membership of the Navajo Tribe/Nation.

M. "N.N.C." means the Navajo Nation Council, the governing body of the Navajo Nation (see 2 N.N.C. § 101 *et seq.*).

N. "Debt Security" means an asset in the Fund which is pledged to secure a debt obligation of the Navajo Nation and/or which names the Navajo Nation as guarantor.

### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Note.** Slightly reworded for purposes of statutory form. The Advisory Committee is no longer a standing committee of the Navajo Nation Council. See CD-68-89, December 15, 1989 (Resolved Clause #10), and 2 N.N.C. § 341 *et seq.* for the authority of the Government Services Committee. CANDO is no longer an entity of the Navajo Nation. See 2 N.N.C. for the authority of the Division of Economic Development.

### **§ 1704. Program Administration**

A. Legislative Oversight. The Economic Development Committee of the Navajo Nation Council shall review and approve all proposed economic development plans which require the use of Business and Industrial Development Funds and/or assets; and shall be the central point of contact for all economic development activities. Further, the EDC shall have the authority to establish process and procedures for review and approval of Fund project financing.

B. Program Management. The Division of Economic Development has the following delegated duties and responsibilities in matters involving the development of business and industrial development projects and the administration of the Fund:

1. To participate in administering the Fund, and any other funds designated for business and economic development;

2. To plan, implement and manage Navajo development projects including, but not necessarily limited to: (a) expanding, diversifying and privatizing existing Navajo Nation enterprises; (b) planning, developing and constructing facilities and services to capture a major share of the tourism market in the southwestern United States; and (c) improving industrial parks and related infrastructure to increase their attractiveness to industry;

3. To market and solicit proposals from major outside businesses and industries to locate facilities and operations on Navajo Nation industrial sites and assist them in bringing projects to the point of implementation; and

4. To develop policies, proposed regulations and procedures pertaining to specific projects, plans or funds for review and approval by the Economic Development Committee of the Navajo Nation Council.

#### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

ACAU-196-87, August 26, 1987.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1705. Fund Management**

A. Fund Manager. The Chief Financial Officer (CFO) of the Division of Economic Development shall maintain the following duties and authorities in matters involving the administration and management of the Fund:

1. Coordinate with the Division of Finance and others as appropriate to manage the Fund and other funds earmarked for development purposes;

2. Develop and recommend appropriate arrangements for project financing; and

3. Administer the Commercial Lending Program of the Navajo Nation through loan officers stationed at the Regional Business Development Offices. In addition to administering current funds for commercial credit, the CFO will develop other financing assistance programs, including loan packaging, loan guarantees, "leveraging" and other methods. The CFO may recommend to the Economic Development Committee of the Navajo Nation Council standards, guidelines and procedures for the approval of loans to improve commercial lending practices.

B. Fund Accounting. The records and books of account for the fund shall be kept separate from the Navajo Nation General Fund as a separate fund with its own "Balance Sheet and Revenue and Expenditure Statement." Day to day accounting shall be performed by the Division of Finance in accordance with generally accepted accounting practices.

C. Investment Goals and Objectives.

1. The Navajo Nation Council approved the creation of the Fund to be administered and managed in accordance with the established Navajo Nation Investment policies and procedures as provided for by the Budget and Finance Committee of the Navajo Nation Council.

2. The Fund shall be invested in accordance with established Investment Objectives and Policies until such time the Budget and Finance Committee, upon the advice and recommendations of the Fund manager and the Navajo Nation Investment Committee, adopts Investment Objectives and Policies specific to the Business and Industrial Development Fund.

D. Project Financing Practices.

1. The Fund may be used to fund different types of financing. These may include: (a) direct Navajo Nation investment; (b) loans; (c) loan guarantees; and (d) various other forms of debt security. The Fund will be apportioned for administrative and financing purposes as follows:

a. Small Business Development Funds. No more than five million dollars (\$5,000,000) of the initial capital contribution shall be designated "Small Business Development Funds" and may be used to provide direct loans/or loan guarantees to projects. Such projects must promote the development of Navajo owned small businesses at the chapter level within the Navajo Nation or within close proximity to the Navajo Nation.

b. Tourism, Commercial and Industrial Development Funds. The remaining twenty-five million dollars (\$25,000,000) of the initial capital contribution to the Fund shall be designated "Tourism, Commercial and Industrial Development Funds" and may be used to provide for direct Navajo Nation financing of industrial, commercial or tourism development projects located anywhere within the Navajo Nation's territorial jurisdiction. Any interest earnings, rents, dividends, profits due to the Navajo Nation as a result of project financing from this portion of the Fund shall be deposited into this portion of the Fund.

2. Upon approval of this Fund Management Plan, the Division of Economic Development, in consultation with the appropriate Navajo Nation officials and Legislative authorities, will develop the policies, rules and regulations for implementation of the Fund financing programs.

### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

See also CAU-45-87, August 13, 1987.

See also ACAU-195-87, August 26, 1987.

See also BFJA-22-87, January 12, 1987.

**Note.** Slightly reworded for purposes of statutory form.

#### **§ 1706. Eligibility requirements**

A. Compliance with the Navajo Business and Procurement Act. Compliance with the provisions of the Navajo Business and Procurement Act, 12 N.N.C. § 1501 *et seq.*, is a condition precedent to any transactions or granting of any business opportunity, contract, procurement activity; or processing any easement, permit, lease transaction; or considering any loan application by or from the Navajo Nation to any individual, business, corporation, partnership or entity other than the Navajo Nation. Therefore, "eligibility and compliance under the Act" as defined in 12 N.N.C. § 1504 must be satisfied and met prior to further consideration and processing of any application or request for project financing through the Fund.

#### B. General Application Requirements.

1. Once the provisions of Subsection (A) above are satisfied, the party requesting and seeking funding must satisfy the following general application requirements:

a. Nature of Business. The party must be engaged in or actively pursuing the creation of an enterprise for the sale (either wholesale or retail), manufacturing, warehousing or distribution of a product or service;

b. Employment. The party must be adding or creating new permanent Navajo Nation based employment opportunities, or retaining Navajo jobs that would otherwise be lost;

c. Ownership/Equity Interest or Representative Capacity. The party must demonstrate; (a) Sole Proprietorship—one hundred percent (100%) proof of ownership; or (b) Partnership or Joint Venture—the party must hold at least a fifty-one percent (51%) equity position in the business or company; or (c) Corporation—the party must demonstrate that participation in the contract has been authorized by corporate resolution and that the party is authorized to represent the corporation;

d. Minimum Capital Investment Requirement. The party must, at a minimum, provide capital investment of twenty percent (20%) of the cost of the project from sources independent of the Fund or any other Navajo, state or federal sources. The party must provide proof that said twenty percent (20%) minimum capital investment is available and can be drawn from a verified source or sources. This provision is not applicable to the Navajo Small Business Development Fund;

e. Benefit. The proposed project, if implemented, must directly benefit the members and residents of the Navajo Nation; and

f. Submission of a Standard Business Plan. The party must demonstrate a genuine desire for the success of the proposed project as evidenced by submission of a standard business plan elements and sub-elements:

(1) Business Summary. General business description (name, location and plant description, product, market and competition, management expertise), business goals, summary of financial needs and application of funds, projected earnings and potential returns to investors;

(2) Description of Products and/or Services. Describe: products; proprietary position: patents, copyrights, and legal and technical considerations; and compare products/services to competitors' products/services;

(3) Detailed Market Analysis. A detailed analysis describing the total market, industry trends, the target markets, and competition;

(4) Detailed Marketing Plan. Describe: overall strategy, pricing policy and methods of selling, distributing and servicing products;

(5) Management and Organization. Describe and/or submit: form of business organization, board of directors composition, officers within organization chart and responsibilities, resumes of key personnel, staffing plan and number of employees, facilities planned, other capital improvements, and operating plan and schedule of upcoming work for next one to two years; and

(6) Financial Data. Submit: financial statements (five years to present); and five-year financial projections (first year by quarters; remaining years annually) for: profit and loss statements, balance sheets, cash flow charts and capital expenditure estimates. Explain: projections, key business ratios, use and effect of new funds, and potential return to investors.

2. Upon approval of this Fund Management Plan, the Division of Economic Development in consultation with the appropriate Navajo Nation officials and Legislative authorities, will further develop specific policies, rules and regulations for implementation of the above general application requirements.

### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Note.** Slightly reworded for purposes of statutory form.

### **Cross References**

Navajo Business and Procurement Act, 12 N.N.C. § 1501 *et seq.*

#### **§ 1707. Compliance with the Navajo Sovereign Immunity Act**

Under the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, the Navajo Nation and certain elected officials of the Navajo Nation are immune from suit and/or may not be subpoenaed or otherwise compelled to appear or testify in the courts of the Navajo Nation, or any proceeding which is under the jurisdiction of the courts of the Navajo Nation concerning any matter involving such official's actions pursuant to his or her official duties; except as provided for in § 554 of the citation above; and in the event that such a suit must be brought against the Navajo Nation and/or its duly authorized representatives, in actions involving project financing through the Fund, then the procedure defined within § 555 of the same citation above must be followed.

### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Revision Note.** Slightly reworded for purpose of statutory form.

### **Cross References**

Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*

#### **§ 1708. Compliance with the Navajo Nation Ethics in Government Law**

The Navajo Nation Ethics in Government Law, 2 N.N.C. § 3741 *et seq.*, requires accountability to the people of the Navajo Nation by their elected, appointed and assigned public officials and employees in exercising the authority vested or to be vested with them as a matter of public trust, through the following provisions:

A. Establishing and requiring adherence to standards of conduct to avoid such conflicts of interest as the use of public offices, employment or property for private gain, the granting and exchange of favored treatment to persons, businesses or organizations; and the conduct of activities by such officials and employees which permits opportunities for private gain or advantage to influence government decisions.

B. Providing for a more informed electorate by requiring the disclosure of significant economic and business interests and affiliations of public officials which involve any potential for conflict with the primary interests of the people and government of the Navajo Nation; and

C. Requiring public officials and employees to abstain from, using any

function of their office or duties, in a manner which could place, or appear to place, their personal economic or special interests before the interests of the general public.

D. All provisions of the Act must be fulfilled throughout the process of review and approval of any application or request for project financing through the Fund.

#### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Revision Note.** Slightly reworded for purpose of statutory form.

#### **Cross References**

Navajo Nation Ethics in Government Law, 2 N.N.C. § 3741 *et seq.*

#### **§ 1709. Audit requirements**

The Fund shall be audited annually by independent outside auditors. Within 60 days of the end of each fiscal year, a certified audit report shall be distributed to the members of the Navajo Nation Council. The report shall be written in easily understandable language. The report shall include standard financial statements, and any other financial statements required by federal or Navajo Nation laws.

#### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

#### **§ 1710. Amendments**

Any section(s) may be amended by a majority vote of a quorum of the Navajo Nation Council based upon recommendation from the Government Services Committee of the Navajo Nation Council and the Economic Development Committee of the Navajo Nation Council.

#### **History**

CJY-33-88, July 28, 1988.

CF-3-88, February 3, 1988.

CAU-45-87, August 13, 1987.

**Note.** Slightly reworded for purposes of statutory form. The Advisory Committee is no longer a standing committee of the Navajo Nation Council. See CD-68-89, December 15, 1989 (Resolved Clause #10), and 2 N.N.C. § 341 *et seq.* for the authority of the Government Services Committee. See 2 N.N.C. § 721 *et seq.* for the authority of the Economic Development Committee.

## **Chapter 18. Oil and Gas Development Special Revenue Fund**

### **§ 1801. Establishment**

There is established the "Oil and Gas Development Special Revenue Fund" (hereinafter "Fund"). During the first fiscal year, the Office of the Controller shall deposit into such Fund a sum not less than three million dollars (\$3,000,000) from any additional sources of income that becomes available to the Navajo Nation. During the four fiscal years thereafter, the Office of the Controller shall deposit into such Fund a sum not less than three million dollars (\$3,000,000) per fiscal year from general revenue sources. Additional money may be added to the Fund at any time. Any money deposited into the Fund, plus accrued interest, shall be used only as provided herein.

#### **History**

CO-97-99, October 20, 1999.

### **§ 1802. Purpose**

The purpose of this Fund is to establish a special fund to provide financing for development projects and related costs of the Navajo Nation Oil and Gas Company, Inc. (hereinafter "Company") in furtherance of the Navajo Nation Energy Policy announced in January 1992 and pursuant to its corporate charter.

#### **History**

CO-97-99, October 20, 1999.

### **§ 1803. Program administration**

A. Legislative Oversight. The Resources Committee of the Navajo Nation Council shall review and approve all requests from the Company which will require the use of money from the Fund for development projects.

B. Program Management. As authorized in its federal charter, the Company shall use the funds:

1. To own and operate, directly or through subsidiary corporations, joint ventures, associations, partnerships or otherwise, any oil and/or gas production, operating, refining, drilling or marketing businesses; and any motor or fossil fuel distributing, trucking, jobber, wholesale, or retailing and related business.

2. To form subsidiary corporations and to enter into and form partnerships, joint ventures, associations and other business

arrangements.

3. To conduct activities in all phases of the oil and gas industry either within or outside of Navajo Indian Country.

4. To engage in any lawful business with the powers permitted to a corporation organized pursuant to 25 U.S.C. § 477.

#### **History**

CO-97-99, October 20, 1999.

#### **§ 1804. Fund management**

##### **A. Fund Accounting.**

1. The records and books of account for the Fund shall be kept separate from the Navajo Nation General Fund as a separate fund with its own balance sheet and revenue and expenditure statement. Day to day accounting for the Fund shall be performed by the Navajo Division of Finance in accordance with generally accepted accounting principles.

2. The Company shall account for the funds spent out of the Fund. Such accounting shall be included as part of the annual report of the Company submitted to its shareholder's representatives.

**B. Investment Goals and Objectives.** All monies deposited into the Fund shall be invested as soon as practicable in accordance with:

1. The degree of care exercised by reasonable and prudent managers of investments intended to produce maximum growth of the investments with a high degree of safety; and

2. The Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

**C. Financing Practices.** The Fund shall be used to finance development projects and related costs for the Company related to the oil and gas industry in furtherance of the Navajo Nation Energy Policy announced in January 1992, including, but not limited to, enhancement of crude oil marketing, purchase of existing oil or gas production, exploration and development of new oil wells, development of a vertically integrated oil company, development or acquisition of a pipeline, development or acquisition of a refinery, and participation in energy generation projects.

#### **History**

CO-97-99, October 20, 1999.

**Revision Note.** Slightly reworded for purpose of statutory form.

#### **§ 1805. Effective period**

The effective date of the Fund shall be the beginning of Fiscal Year 2000, and the Fund shall be maintained for five fiscal years thereafter. At the end of the fifth full fiscal year, any funds remaining in the Fund that have not been budgeted by the Company, in consultation with the Resources Committee of the Navajo Nation Council, for projects contemplated under § 1804(C) shall be returned to the Navajo Nation, and this Chapter shall expire, unless extended by resolution of the Navajo Nation Council.

#### **History**

CO-97-99, October 20, 1999.

#### **§ 1806. Audit requirements**

The Fund shall be audited annually by independent auditors as part of the overall audit of the Navajo Nation government.

#### **History**

CO-97-99, October 20, 1999.

### **Chapter 19. Insurance Services Fund**

#### **§ 1901. Insurance Services Fund**

A. There is created in the treasury of the government of the Navajo Nation a series of funds to be known as the Insurance Services Fund.

B. All monies received by the Insurance Services Department for insurance purposes shall be deposited into this Insurance Services Fund.

C. In addition to those monies contributed or appropriated pursuant to Subsection (B) of this Section, any premium refunds, reimbursements, lien recoveries and interest accrued on monies deposited into this Fund shall remain in this Fund.

D. Monies deposited to this Fund shall be expended according to fund management plans approved by the Insurance Commission and the Budget and Finance Committee. These fund management plans will be actuarially based with amounts in excess of reserve requirements being refunded to the participants of the various insurance programs.

E. Notwithstanding the foregoing, the Insurance Commission may, in its discretion, direct some balance to be maintained in these funds in anticipation of claims and other expenses related to the provision of Insurance Services.

#### **History**

CJA-17-99, January 28, 1999.

### **Chapter 20. Capital Outlay Match Funding Special Revenue Fund**

#### **§ 2001. Establishment**

There is hereby established the "Capital Outlay Match Funding Special Revenue Fund" (hereinafter "Fund"). During the annual appropriation the Navajo Nation Council shall appropriate two million dollars (\$2,000,000) to the Fund from any sources of income that becomes available to the Navajo Nation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided herein. These funds shall not lapse on an annual basis, pursuant to 12 N.N.C. § 820(N).

#### **History**

CD-85-00, December 14, 2000.

#### **§ 2010. Purpose**

The purpose of this Fund is to establish a special fund to provide match funding and cost reimbursement for the States of Arizona, Utah and New Mexico partially funded capital outlay projects. Often times said states will require the Navajo Nation to match fund and/or cost reimburse the capital outlay projects that benefit the Navajo people residing on the Navajo Nation in the respective States, and there is no ready source of funds within the budget of the Navajo Nation to make the match and/or cost reimbursement. This Fund is created to address this deficiency.

#### **History**

CD-85-00, December 14, 2000.

#### **§ 2020. Program administration**

A. Legislative oversight. The Transportation and Community Development Committee of the Navajo Nation Council shall review and approve all requests from the Navajo local chapters and Navajo government branches, divisions, departments and programs that require the use of money from the Fund for match funding and/or cost reimburse capital outlay projects that are partially funded by the States of Arizona, Utah or New Mexico.

B. Program management. The Capital Improvement Office of the Division of Community Development shall have the authority and responsibility to use the Fund to match fund and/or cost reimburse capital outlay projects that are partially funded by the States of Arizona, New Mexico and Utah with concurrence by the Transportation and Community Development Committee of the Navajo Nation Council in conformance with § 2030(C), Matching Practices. Such requests for funding road and airport projects shall follow the established process including the capital improvement project policies and procedures.

#### **History**

CD-85-00, December 14, 2000.

#### **§ 2030. Fund management**

A. Fund accounting

1. The records and books of account for the Fund shall be kept separate from the Navajo Nation General Fund with its own balance sheet and revenue and expenditure statement. The day-to-day accounting for the Fund shall be performed by the Navajo Nation Division of Finance in accordance with generally accepted accounting principles.

2. The Capital Improvement Office shall account for the money spent out of the Fund. Such accounting shall be included as part of the quarterly program reports submitted to the Transportation and Community Development Committee of the Navajo Nation Council and the Navajo Nation Council.

B. Investment goals and objectives. All monies deposited into the Fund shall be invested as soon as practicable in accordance with:

1. The degree of care exercised by reasonable and prudent managers of investments intended to produce maximum growth of the investments with a high degree of safety; and

2. The Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

C. Matching and cost reimbursement practices. The Fund shall be used to match fund and/or cost reimburse capital improvement projects, as defined at 12 N.N.C. § 810(F) of the Navajo Nation Appropriations Act, that are partially funded by the States of Arizona, Utah and New Mexico for the construction of, including but not limited to, preschool buildings, chapter houses and multi-purpose buildings on the Navajo Nation. The monies can be used to fund any stage of the projects such as planning, designing, required clearances, construction, etc. The Transportation and Community Development Committee of the Navajo Nation Council shall approve the use of the monies in the Fund. This provision shall not be deemed to waive or amend any requirement of law concerning the recovery of indirect costs, including 2 N.N.C. § 824(B)(9).

#### **History**

CD-85-00, December 14, 2000.

#### **§ 2040. Effective date**

The effective date of the Fund shall be the beginning of Fiscal Year 2001 and shall remain in effect until the Navajo Nation Council terminates the Fund by resolution.

#### **History**

CD-85-00, December 14, 2000.

#### **§ 2050. Audit requirements**

The Fund shall be audited annually by independent auditors as part of the overall audit of the Navajo Nation government.

### **History**

CD-85-00, December 14, 2000.

### **§ 2070. Amendments**

This Fund Plan of Operation shall be amended by the Navajo Nation Council from time to time upon the recommendation of the Transportation and Community Development Committee of the Navajo Nation Council.

### **History**

CD-85-00, December 14, 2000.

## **Chapter 21. Navajo Nation Water Rights Claim Fund**

### **§ 2101. Establishment**

There is hereby established the "Navajo Nation Water Rights Claim Fund" (hereinafter the "Fund"). During the annual operating budget appropriations the Navajo Nation Council shall appropriate no less than two million dollars (\$2,000,000) to the Fund from any and all projected revenue. Additional money may be added to the Fund at any time. Any money deposited into the Fund, plus accrued interest, shall be used only as provided in this Chapter. These funds shall not lapse on an annual basis pursuant to 12 N.N.C. § 820(N), but shall be a continuing account.

### **History**

CMY-47-02, May 17, 2002.

### **§ 2102. Purpose**

The purpose of this Fund is to provide assured annual funding for the protection of the Nation's water rights in the States of Arizona, Utah and New Mexico. On April 9 and 12, 2002, the Navajo Nation Council received reports from the Navajo Nation water rights experts, Navajo Department of Justice, Navajo Nation President, and Navajo people all indicating that the Navajo Nation must diligently pursue and protect the Navajo Nation's water rights in the Little Colorado River, Colorado River Main Stem, San Juan River in Utah and San Juan River in New Mexico. As used in this Chapter, water rights shall mean the development, filing and adjudication or settlement of claims in any jurisdiction and the establishment and operation of whatever program or offices are deemed necessary to further the purposes stated herein.

### **History**

CMY-47-02, May 17, 2002.

### **§ 2103. Expenditure of the Fund; authorization; Fund expenditure plan**

A. The Fund shall be expended pursuant to a Fund Expenditure Plan.

B. The Navajo Nation Water Rights Claim Commission shall establish the policies and priorities for the expenditure of the Fund and the Commission is hereby delegated the authority to approve the budget and expenditure of the Fund. Said policies and priorities shall be developed and in place by August 1, 2002.

C. The Navajo Nation Water Rights Commission, the Attorney General, the Controller, the Budget and Finance Committee, and the Resources Committee are hereby authorized to promulgate a Fund Expenditure Plan specifying the procedures for requesting the use of money from the Fund.

#### **History**

CMY-47-02, May 17, 2002.

#### **§ 2104. Fund accounting**

A. The records and books of account for the Fund shall be kept separate from the Navajo Nation General Fund with its own balance sheet and revenue and expenditure statement. The day-to-day accounting for the Fund shall be performed by the Division of Finance in accordance with generally accepted accounting principles.

B. The Office of the Attorney General shall account for the money spent out of the Fund. Such accounting shall be included as a part of the quarterly program reports submitted to the Resources Committee of the Navajo Nation Council and the Navajo Nation Council.

#### **History**

CMY-47-02, May 17, 2002.

#### **§ 2105. Investment of the Fund**

All monies deposited into the Fund shall be invested as soon as practicable in accordance with:

A. The degree of care exercised by reasonable and prudent managers of investments intended to produce maximum growth of the investments with a high degree of safety; and

B. The Investment Objectives and Investment Policies of the Navajo Nation as formally adopted by the Budget and Finance Committee of the Navajo Nation Council.

#### **History**

CMY-47-02, May 17, 2002.

#### **§ 2106. Audit requirements**

The Fund shall be audited annually by independent auditors as part of the overall audit of the Navajo Nation government.

### **History**

CMY-47-02, May 17, 2002.

### **§ 2107. Amendments**

This Chapter may be amended only by ninety percent (90%) vote of all members of the Navajo Nation Council and upon the recommendation of the Resources Committee of the Navajo Nation Council.

### **History**

CMY-47-02, May 17, 2002.

### **§ 2108. Effective date**

The effective date of the Fund shall be the beginning of Fiscal Year 2003 and shall remain in effect until the Navajo Nation Council terminates the Fund by resolution.

### **History**

CMY-47-02, May 17, 2002.

Chapter 22. Navajo Nation Gaming Distribution Plan

### **§ 2201. Establishment**

A. There is hereby established the "Navajo Nation Gaming Distribution Plan" (hereinafter "Plan"). The Class II and III net gaming revenues received by the Navajo Nation government from the Navajo Nation Gaming Enterprise shall be received and distributed in accordance with this Plan.

B. The Controller of the Navajo Nation, the Navajo Gaming Regulatory Office, and the Navajo Nation Gaming Enterprise shall work together and communicate to properly insure compliance with this Plan.

### **History**

CJY-30-08, July 25, 2008.

### **§ 2202. Purpose**

A. The purpose of this Plan is to provide a revenue allocation plan for the use of the Class II and III net gaming revenues received from the Navajo Nation Gaming Enterprise from its gaming activities, and to provide procedures to use and to account for the net gaming revenues in accordance with federal law.

B. According to the Indian Gaming Regulatory Act, Indian tribes must expend net gaming revenues for the following purposes:

1. To fund tribal government operations and/or programs;

2. To provide for the general welfare of the tribe and its members;
3. To promote tribal economic development;
4. To donate to charitable organizations; and/or
5. To help fund operations of local government agencies.

#### **History**

CJY-30-08, July 25, 2008.

#### **§ 2203. Definitions**

A. "Gaming Revenues Fund Management Plan" means a fund management plan approved by the Budget and Finance Committee that distributes gaming revenues within the Navajo Nation.

B. "Gross gaming revenues" means, for purposes of this plan, the annual total amount of money wagered on Class II and III games, admission fees (including table or card fees), less any amounts paid out as prizes or paid for prizes awarded, and less an allowance for amortization of capital expenditures for structures. 25 C.F.R. § 514.1.

C. "Indian Gaming Regulatory Act" or "IGRA" means the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*, as amended.

D. "Management Contract" means any contract, subcontract, or collateral agreement between and Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation. 25 C.F.R. § 502.15.

E. "Net gaming revenues" or "net revenues" means the gross revenues of an Indian gaming operation less, amounts paid out as, or paid for, prizes; and total gaming-related operating expenses, including debt services and gaming facilities, but excluding management fees. See 25 C.F.R. § 502.17.

F. "Per capita payment" means the distribution of money, loans or other things of value to all or any members of the Navajo Nation, or to an identified group of the Navajo Nation, which is paid from the gaming revenues of any Navajo gaming activity. This definition does not apply to payments or services performed by Navajo Nation government programs, established for social welfare, medical assistance, education, housing, and veterans.

#### **History**

CJY-30-08, July 25, 2008.

**Note.** Slightly reworded at Subsection B, by adding the word "for" as the fifth word, for purposes of clarity; and at Subsection F, by adding the word "the" between "group of" and "Navajo Nation,".

#### **§ 2204. Authorized Use of Gaming Revenues**

A. The Navajo Nation Gaming Enterprise may use gaming revenues that it generates from its gaming activities for the following:

1. To pay applicable fees to the National Indian Gaming Commission, in accordance with the Indian Gaming Regulatory Act;

2. To pay revenue sharing and tribal contributions to the applicable state pursuant to the Navajo Nation-state gaming compacts;

3. To pay capital, improvement, operational and administrative costs of the Enterprise, gaming facilities and other gaming-related facilities; and the Enterprise may use gaming revenues to pay down existing debt service and to facilitate financing for the construction, expansion, improvement, repairs, and maintenance of gaming facilities and other gaming-related facilities;

4. To pay or reimburse all necessary costs to ensure that gaming is conducted in a manner that adequately protects the environment and the public health and safety.

B. The Navajo Nation Gaming Enterprise shall pay all remaining net gaming revenues to the Navajo Nation for deposit into a special revenue fund for gaming revenues.

#### **History**

CJY-30-08, July 25, 2008.

**Note.** Slightly reworded at Subsection B, by adding the word "the" before "Navajo Nation", for purposes of clarity.

#### **§ 2205. Distribution**

A. The net gaming revenues received by the Navajo Nation government from gaming activities must be distributed in the following order, unless otherwise approved by the Navajo Nation Council as follows:

1. To fund the operations of the Navajo Gaming Regulatory Office through the annual budget process; then

2. To be deposited into a special revenue fund and distributed in accordance with the Gaming Revenues Fund Management Plan, which is approved by the Budget and Finance Committee and recommended by the Navajo Gaming Regulatory Office.

B. The request and budgeting of gaming revenue funds from the Gaming Revenues Fund Management Plan shall be budgeted in accordance with the Navajo Nation budget process.

#### **History**

CJY-30-08, July 25, 2008.

#### **§ 2206. Per Capita Payments**

Gaming revenues shall not be distributed as per capita payments to any member or group of the Navajo Nation.

**History**

CJY-30-08, July 25, 2008.

**§ 2207. Accounting**

A. The Office of the Controller shall maintain this special revenue fund in accordance with applicable state gaming compacts in separate accounts, with their own balance sheets with revenue and expenditure statements.

B. If any Navajo Nation chapter receives gaming revenues, the Navajo Nation chapter shall prepare quarterly reports detailing their expenditures from this special revenue fund, and submit such reports to the Controller and the Budget and Finance Committee of the Navajo Nation Council.

**History**

CJY-30-08, July 25, 2008.

**§ 2208. Investment**

All deposits into the special revenue fund shall be invested as soon as practicable, and in accordance with the Navajo Nation Investment Objectives and Investment Policies.

**History**

CJY-30-08, July 25, 2008.

**§ 2209. Audit**

The Office of the Controller shall include this Plan as part of its overall audit of the Navajo Nation funds. Pursuant to 25 U.S.C. § 2710(b)(2)(C), the audit of this Plan may be provided by the Navajo Nation to the National Indian Gaming Commission.

**History**

CJY-30-08, July 25, 2008.

**§ 2210. Amendments**

This Act may be amended only by two-thirds (2/3) vote of the full membership of the Navajo Nation Council, and only upon the recommendation of the Budget and Finance Committee of the Navajo Nation Council.

**History**

CJY-30-08, July 25, 2008.

## **Chapter 23. Diné Higher Education Grant Fund**

### **§ 2301. Establishment**

There is established the "Diné Higher Education Grant Fund" (hereinafter "Fund"). The Fund shall be held in trust for the governmental units set forth herein. Thereafter, the Office of the Controller shall deposit into such fund the sum of seven million two hundred thousand dollars (\$7,200,000) per fiscal year from annual recurring revenue sources. Any money deposited into the Fund plus accrued interest, shall be used only as provided herein. And furthermore, the Diné College, Crownpoint Institute of Technology and Navajo Nation Scholarship and Financial Assistance Program shall not request supplemental appropriations during the life of this Act.

#### **History**

CJY-39-04, July 23, 2004.

**Note.** Previous error is corrected by replacing the word Grand with Grant.

### **§ 2302. Purpose**

The purpose of this Fund is to establish a special fund to provide funds as developed and subject to approval by the Education Committee and recommended to the Navajo Nation Council.

#### **History**

CJY-39-04, July 23, 2004.

### **§ 2303. Fund Administration**

A. Legislative Oversight. The Navajo Nation Council Education Committee shall review and approve all requests from the governmental units, which will require the use of money from the Fund for development and operating projects.

B. Program Management. As authorized by their enabling legislation or plan of operations, the governmental units shall use the funds:

1. Diné College.

a. To operate and maintain programs, facilities, and maintenance.

b. To enter into and form partnerships, joint ventures, associations, and other initiatives and arrangements.

c. To conduct activities in all areas of higher education.

2. Crownpoint Institute of Technology.

a. To operate and maintain programs, facilities, and maintenance.

b. To enter into and form partnerships, joint ventures, associations, and other initiatives and arrangements.

c. To conduct activities in all areas of higher education.

3. Office of Navajo Nation Scholarship & Financial Assistance. To provide financial assistance to eligible applicants at the undergraduate, graduate, and dissertation levels.

C. Fund Distribution. The Fund shall be distributed yearly in the following amounts:

Diné College.....	\$4,200,000
Crownpoint Institute of Technology.....	\$1,500,000
Scholarship & Financial Assistance.....	\$1,500,000

D. Fund Management/Accounting. The records and books of account for the governmental units shall be kept separate from the Navajo General Fund as a separate Fund with its own Balance Sheet and Revenue and Expenditure Statement. Day to day accounting for the Fund shall be performed by the governmental units in accordance with generally accepted accounting principles. The Governmental units shall account for the funds spent out of the Fund. Such accounting shall be included as part of the Annual Audit of the Navajo Nation submitted to the Navajo Nation Council.

#### **History**

CJY-39-04, July 23, 2004.

**Note.** Slightly reworded and reformatted for purposes of statutory form.

#### **§ 2304. Effective Period**

The effective date of the Fund shall be the beginning of Fiscal Year 2006, and shall be maintained for 20 fiscal years thereafter.

#### **History**

CJY-39-04, July 23, 2004.

**Note.** Previous error is corrected by replacing the heading Purpose with Effective Period.

### **Chapter 24. Historical Trust Fund Asset Mismanagement Litigation Trust Fund**

#### **§ 2401. Establishment**

There is established the "Historical Trust Fund Asset Mismanagement Litigation Trust Fund, (the Fund)".

A. The Navajo Nation Council hereby appropriates the amount of \$298,928.94 from attorneys fees and costs reimbursed to the Navajo Nation from other litigation, as the initial appropriation to the fund.

B. Beginning with the Navajo Nation Fiscal Year 2008 and ending when the Navajo Nation's Historical Trust Asset Mismanagement Litigation against the United States is fully and finally resolved, the Navajo Nation Council shall appropriate no less than \$1,500,000.00 each year during the annual operating budget appropriation into the Historical Trust Asset Mismanagement Litigation Fund Account.

C. Funds deposited or appropriated into the Historical Trust Asset Mismanagement Litigation Fund account are to be expended for fees, costs, and expenses incurred by the Navajo Nation's Historical Trust Asset Mismanagement litigation against the United States, and shall not lapse on an annual basis, but shall be a continuing appropriation available until expended or such time as the Navajo Nation's Historical Trust Asset Mismanagement litigation against the United States is fully and finally resolved.

D. The Navajo Nation Council may make appropriations to the Fund from any other sources of revenue that become available to the Navajo Nation. Any money deposited into the Fund, plus accrued interest, shall be used only as provided herein. The funds shall not lapse on an annual basis, pursuant to 12 N.N.C. § 820(N).

E. The Navajo Nation Controller shall deposit the full amount of any monetary award or settlement to the Navajo Nation resulting from the final resolution of the Navajo Nation's historical trust asset mismanagement litigation against the United States in the Unreserved, Undesignated Fund Balance of the Navajo Nation.

#### **History**

CN-57-06, November 1, 2006.

#### **§ 2402. Purpose**

The Fund shall be held in trust for the purpose of financing litigation against the United States for its failure to adequately manage and protect the Navajo Nation's tribal trust assets.

#### **History**

CN-57-06, November 1, 2006.

#### **§ 2403. Fund Management Plan**

A. The Fund shall be expended in accord with a fund management plan adopted by the Budget and Finance Committee.

B. In consultation with the Office of the Controller, the Office of the

Attorney General shall develop proposed priorities and policies for the expenditure of the Fund in the form of a fund management plan, subject to recommendation by the Government Services Committee and final approval by the Budget and Finance Committee of the Navajo Nation Council.

**History**

CN-57-06, November 1, 2006.

**§ 2404. Fund Accounting**

A. The day-to-day accounting for the Fund shall be performed by the Office of the Controller in accord with generally accepted accounting principles.

B. The Office of the Attorney General shall account for the money spent out of the Fund. Such accounting information shall be included in quarterly reports submitted to the Government Services Committee and the Navajo Nation Council.

**History**

CN-57-06, November 1, 2006.

**§ 2405. Investment of the Fund**

All monies deposited into the Fund shall be invested as soon as practicable in accord with:

A. The degree of care exercised by reasonable and prudent managers of investments intended to produce maximum growth of the investments with a high degree of security; and

B. The Investment Objectives and Investment Policies of the Navajo Nation as duly adopted by the Budget and Finance Committee of the Navajo Nation Council.

**History**

CN-57-06, November 1, 2006.

**§ 2406. Audit requirements**

The Fund shall be audited annually by independent external auditors as part of the overall audit of the Navajo Nation government.

**History**

CN-57-06, November 1, 2006.

**§ 2407. Amendments**

This Chapter may be amended or repealed at any time by the Navajo Nation Council upon the recommendations of the Government Services Committee and the Budget and Finance Committee of the Navajo Nation Council.

**History**

CN-57-06, November 1, 2006.

**§ 2408. Effective date**

The effective date for the Fund shall be the beginning of Fiscal Year 2007 on October 1, 2006.

**History**

CN-57-06, November 1, 2006.