

**IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF CROWNPOINT, NEW MEXICO**

NAVAJO NATION

Plaintiff,

No. CP-CR-11-014/015/016

v.

ORDER

BEN SHELLY,

Defendant.

THIS MATTER came before the Court upon multiple pleadings filed by the parties subsequent to this Court's last Order issued on January 11, 2011. The Court, being informed in the premises, hereby FINDS:

The Court accepted transfer of the above-referenced cases from the Window Rock District Court on the morning of January 10, 2010. At approximately 2:00 p.m. that day, the Court received its first copy of parties' joint Stipulated Motion For Dismissal via fax. The filed motion did not cite any Navajo statutory or case law, or rules of criminal procedure. Based upon discussion between Counsel Gollis and Court staff, the matter was set for an expedited hearing which began approximately 4:30 p.m. on January 10, 2011. The Motion seeks dismissal of the three above-referenced cases with prejudice, but also included an agreement between the parties in order for Plaintiff to agree to dismissal with prejudice. While not cited in the motion, parties agreed that this motion was being brought pursuant to Nav. R. Cr. P. 32 under the Prosecutor's absolute discretion to dismiss criminal cases with prejudice. The substantive terms agreed to by Defendant in exchange for the dismissal of these cases with prejudice were that he would repay the sum of \$8,250.00 to the Navajo Nation and that he would work with the Special Prosecutor and other executive branch departments of the Navajo Nation to reform laws governing the future use of the Navajo Nation Discretionary Funds Program.

The Court's primary concern was the enforcement of an agreement once the cases are dismissed. Had this matter been brought as a plea agreement pursuant to Nav. R. Cr. P. 22 or as a deferred prosecution pursuant to Nav. R. Cr. P. 23, the Court would clearly retain jurisdiction over these cases until such time as all terms of the proposed stipulated agreement were satisfied. Yet, the stipulation was presented pursuant to Rule 32 which would dispose of these three criminal cases with prejudice. Plaintiff's Counsel suggested that should Defendant breach the agreement, the Navajo Nation could return to this Court and file a *civil* action for civil contempt

of court in order to enforce the agreement, regardless of the fact that the underlying criminal cases were now dismissed with prejudice. The parties, however, provided no Navajo legal authority or persuasive authority from other jurisdictions on this narrow issue. For this reason, the Court issued its January 11, 2011 order for a briefing on the narrow issue of enforcement of an agreement between the parties should these cases be dismissed with prejudice.¹

Soon thereafter, also on January 11, 2011, parties signed a “Notice of Withdrawal Of Stipulated Motion For Dismissal” (Withdrawal Notice) and the Special Prosecutor for Navajo Nation filed his own Motion For Dismissal Of Criminal Complaints” (Dismissal Motion). The Withdrawal Notice, only three lines long, basically informed the Court that the parties were officially withdrawing their stipulated motion for dismissal. In its place the Special Prosecutor filed his Dismissal Motion specifically referencing language from Nav. R. Cr. P. 32(a) “which provides that “[t]he court shall enter an order dismissing a case if the prosecutor files for dismissal of the complaint.” He also cited 2 N.N.C. § 1974(B) which “authorizes the Special Prosecutor to “[i]nvestigate, prosecute and dispose of all cases within his or her jurisdiction, acting independently and upon his or her own authority within the guidance of law and professional ethics in the performance of his or her duties.””²

On January 18, 2011, the day briefs were due pursuant to the January 11, 2011 Order, Special Prosecutor filed “Navajo Nation Special Prosecutor’s Response To The Court’s January 11 Order Requesting Briefing.” (Prosecutor’s Response).³ The Court’s briefing order ordered the parties to “submit a brief to the Court regarding Rule 32, specifically how this Court would enforce any stipulated agreement made between the parties should the cases be dismissed with prejudice. Parties should first cite any Navajo legal authorities and discuss Navajo traditional laws if applicable, and look to federal or state legal authorities as secondary sources.” The Prosecutor’s Response, rather than briefing the issue the Court found unanswered, suggests that because the parties withdrew their previous stipulated motion for dismissal, and because the Prosecutor has now filed a later motion seeking dismissal based upon his sole discretion under Rule 32(a), that the Court’s briefing order is now moot. Special Prosecutor also suggests that the parties have now agreed to enter into a private contractual settlement agreement that contains an

¹ Said order allowed the parties to either submit a joint brief or separate briefs.

² Defendant filed a response to this motion dated January 12, 2011, only stating that he did not object to the dismissal with prejudice.

³ Defendant filed a separate Response To The Court’s January 11, 2011 Order Requesting Briefing, essentially deferring to the contents of the Prosecutor’s Response.

explicit enforcement provision and mutual waiver of sovereign immunity suggesting that this agreement is absolutely enforceable in a Navajo District Court. The proposed agreement contains a provision that states “parties agree to the jurisdiction of the Navajo Nation District Court, Judicial District of Window Rock, for the sole purpose of enforcing the terms of this Agreement by any appropriate remedy ... [and that both parties] waive any immunity from suit either of them may possess for the limited purpose of obtaining specific performance of the terms of th[e] Agreement.”

The Court first takes issue with how the parties treated the Court’s January 11, 2011 briefing order. Rather than motion to be relieved from submitting legal briefs on the issues the Court took a keen interest in *before* the day the briefs were due, they file on the due date an alternate response suggesting that the Court’s order is now moot. In addition, the Court had not yet ruled on the original stipulated dismissal motion when the parties filed their Withdrawal Notice, thus presuming that once the issue was put before the Court, they could pull it off the table after opening the door to the Court’s concerns. While these occurrences do not have a bearing on the Court’s ultimate decision, the Court finds that such practice is not befitting of the respect that the decorum of the Court deserves.

That being said, had the Special Prosecutor initially filed a Rule 32(a) motion with this Court without ever raising the issue of a stipulated motion and settlement agreement, the Court would clearly have been bound by such a motion and not had the discretion to question it. However, the Special Prosecutor himself opened the door to the inquiry into enforcement of the originally-proposed settlement agreement. The Court still has concerns about the enforcement of the currently-proposed agreement. While the parties in the proposed—but not-yet-signed—agreement both submit to the jurisdiction of the Window Rock District Court for enforcement of their agreement, this Court is still not convinced that the agreement could still be enforced once these cases are dismissed with prejudice, regardless of the present agreement of the parties.

Diné Traditional Law teaches that “All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the People and the government; the People's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahaz'áanii.” 1 N.N.C. § 203. The judges of the Navajo Courts, and by proxy, specially appointed prosecutors like the one representing the Navajo Nation in these cases have the same duties and responsibilities to the

Navajo People. The instant cases deal with allegations that the *Peoples'* money has been misappropriated. The Court makes special note that all criminal defendants who comes before a Navajo Court are presumed innocent until proven guilty, but it was the Special Prosecutor who initiated these actions and who now seeks dismissal pursuant to his discretion under Rule 32(a). Regardless of Rule 32(a)'s broad discretion it gives a Navajo Prosecutor to dismiss a case, it was the Special Prosecutor who opened the door to the Court's inquiries and concerns in the first instance. For this reason the Court finds itself between a rock and a hard place in considering the disposition of these cases with prejudice. Because this Court and this judge also has a duty to act in the best interest of the Navajo People and to instill in them trust and confidence in their judicial system, the Court issues this order.

Based on the foregoing, **IT IS THEREFORE ORDERED** that the Special Prosecutor submit a declaration to the Court that with his motion to dismiss these cases with prejudice, he is acting in the best interested of the Navajo People considering the trust and confidence of the Navajo People through his actions, and that he understands that as far as the Crownpoint Court is concerned, enforceability of any outside agreement between himself and the Defendant by a Navajo District Court after dismissal of these cases with prejudice is not necessarily guaranteed. Upon submission of such a declaration that this course of action is in the best interest of the Navajo People, only then will the Court will see fit to grant his motions to Withdraw and his Dismissal Motion.

SO ORDERED this 20th day of January, 2011.



Irene Toledo
DISTRICT COURT JUDGE