

RESOLUTION OF THE
NAVAJO NATION COUNCIL

22nd NAVAJO NATION COUNCIL—FOURTH YEAR, 2014

AN ACTION

RELATING TO NAABIK'ÍYÁTI' AND NAVAJO NATION COUNCIL; OVERRIDING
THE NAVAJO NATION PRESIDENT'S VETO OF NAVAJO NATION COUNCIL
RESOLUTION CN-56-14

BE IT ENACTED:

Section One. Findings

- A. A vetoed resolution shall first be submitted to Naabik'íyáti' Committee before consideration by the [Navajo Nation] Council. 2 N.N.C. § 164 (A)(17) (2012) see also CO-45-12.
- B. The Navajo Nation Council passed legislation authorizing the formation of a low-profit limited liability company (L3C) in the Navajo Nation Limited Liability Company Act. CN-56-14.
- C. The Navajo Nation President vetoed CN-56-14 on December 1, 2014 because North Carolina abolished the structure from their general statutes and the Internal Revenue Code has not been amended to recognize the program-related investments in L3Cs. EXHIBIT A.
- D. However, the issues the Navajo Nation President raises are misleading:
 - 1. The North Carolina legislator who supported L3Cs retired and his political opponents set out to rescind his work.
 - 2. Further, Congress looks to pass a comprehensive tax bill in the next couple of years and there is hope the program-related investments in L3Cs will be included. Additionally, Private Letter Rulings are not required, nor does the Internal Revenue Service keep track of program-related investments.

- E. Proponents of the low-profit limited liability company have addressed issues surrounding the L3C and there are no major issues which would raise a concern regarding the amendments in CN-56-14. EXHIBIT B.
- F. The Navajo Nation President's veto is "subject to an override...by two-thirds ($\frac{2}{3}$) vote of the membership of the Navajo Nation Council." 2 N.N.C. § 164 (A)(17) (2012) see also CO-45-12.
- G. The Navajo Nation finds the override in the Nation's best interest.

Section Two. Override

The Navajo Nation Council hereby overrides the Navajo Nation President's veto of Resolution CN-56-14.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 18 in favor and 1 opposed, this 23rd day of December 2014.

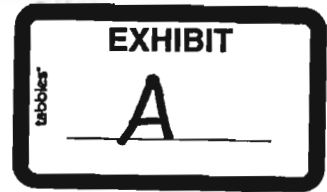


LoRenzo Bates, Pro Tem Speaker
Navajo Nation Council

12-29-14

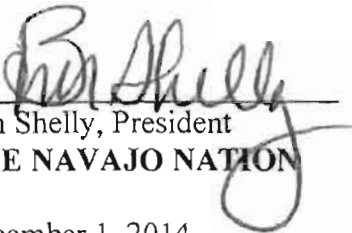
Date

Motion: Honorable Edmund Yazzie
Second: Honorable Duane Tsinigine



MEMORANDUM

TO: Honorable Lorenzo Bates, Speaker Pro Tem
The 22nd Navajo Nation Council

FROM: 
Ben Shelly, President
THE NAVAJO NATION

DATE: December 1, 2014

SUBJECT: **Legislation No. CN-56-14: RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE, BUDGET AND FINANCE COMMITTEE, LAW AND ORDER COMMITTEE, NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; AMENDING TITLE 5 N.N.C. §§ 3600, 3601 AND 3605 AND ADOPTING NEW 5 N.N.C. § 36020A IN THE NAVAJO NATION LIMITED LIABILITY COMPANY ACT TO AUTHORIZE THE FORMATION OF A LOW-PROFIT LIMITED LIABILITY COMPANY**

Pursuant to 2 N.N.C. §1005(c)(10), the above titled Legislation CN-56-14 is being submitted to the Navajo Nation Council, through the Office of the Speaker, within the ten (10) day requirement. 2 N.N.C. §1005(c)(10) establishes the Navajo Nation President's authority to veto legislation passed by the Navajo Nation Council. I hereby exercise my veto authority with this legislation.

I understand that this particular language authorizing creation of a Low-Profit Limited Liability Company ("L3C") has been adopted by several states and two tribes, it is also my understanding that the State of North Carolina has abolished the structure from its code books. There is uncertainty and confusion if this structure benefits all involved this type of business structure within the Navajo Nation. Additionally, it is my understanding, the Internal Revenue code has not been amended to reflect the changes in businesses such as L3C structure, and therefore the charitable investors may find themselves at odd with the IRS.

I strongly suggest the Navajo Nation Department of Justice and Navajo Tax Commission Office do a legal and tax analysis on this structure and what the benefit and concerns the Nation should have in adding the L3C. For the reasons stated above, I hereby veto CN-56-14.

cc: Executive file

RESOLUTION OF THE
NAVAJO NATION COUNCIL

22nd NAVAJO NATION COUNCIL~FOURTH YEAR, 2014

AN ACT

RELATING TO RESOURCES AND DEVELOPMENT COMMITTEE, BUDGET AND FINANCE COMMITTEE, LAW AND ORDER COMMITTEE, NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; AMENDING TITLE 5 N.N.C. §§ 3600, 3601 AND 3605 AND ADOPTING NEW 5 N.N.C. § 3620A IN THE NAVAJO NATION LIMITED LIABILITY COMPANY ACT TO AUTHORIZE THE FORMATION OF A LOW-PROFIT LIMITED LIABILITY COMPANY

BE IT ENACTED:

SECTION 1. FINDINGS

1. The Resources and Development Committee exercises oversight authority over economic and community development and commerce and trade. 2 N.N.C. § 500 (c).
2. The Resources and Development Committee reviews and makes recommendations to the Navajo Nation Council for final approval of resolutions requiring Navajo Nation Council approval to accomplish or impact the Committee purposes. 2 N.N.C. § 501 (B)(4)(f).
3. The Resources and Development Committee serves as the oversight committee of the Division of Economic Development. 2 N.N.C. § 501 (C)(1).
4. The Budget and Finance Committee has the oversight authority to recommend to the Navajo Nation Council the adoption of resolutions designed to strengthen the fiscal and financial position of the Navajo Nation and to promote the efficient use of the fiscal and financial resources of the Navajo Nation. 2 N.N.C. § 300 (C)(3).
5. The Law and Order Committee has the power to review and make recommendations to the Navajo Nation Council on proposed amendments to and enactments in the Navajo Nation Code. 2. N.N.C. § 601 (B)(14).

6. The Naabik'iyáti' Committee has the authority to determine whether a resolution shall proceed to the Council or be referred back to a standing committee. 2 N.N.C. § 700 (G).

7. A low-profit limited liability company is a new variation of the limited liability company (LLC).

8. A low-profit limited liability company combines the charitable purposes of a 501(c)(3) organization with the for-profit purposes of an LLC, in which its investors voluntarily accept a lower dividend on the net profits than would be considered appropriate for the financial risk of their investment.

9. A low-profit limited liability company is primarily focused on the achievement of a socially beneficial purpose, with recognition by its investors, and the community at large that it's profit making objectives are of secondary importance.

10. The Navajo Nation hereby finds that the authorization of the formation of a low-profit limited liability company in the Navajo Nation Limited Liability Company Act is in the best interests of the Navajo People.

SECTION 2. AMENDING 5 N.N.C. §§ 3600, 3601 AND 3605

The Navajo Nation Council hereby amends 5 N.N.C. §§ 3600, 3601, and 3605 as follows:

**NAVAJO NATION CODE ANNOTATED
TITLE 5. COMMERCE AND TRADE
CHAPTER 21. NAVAJO NATION LIMITED LIABILITY COMPANY
ARTICLE 1. GENERAL PROVISIONS**

§ 3600. Policy and purpose

The Navajo Nation Limited Liability Company Act is hereby enacted:

A. The purpose of this Act is to permit the formation of various limited liability entities, low-profit limited liability entities (L3C), ~~and~~ require registration of foreign limited liabilities; and to regulate such entities so as to promote economic growth and further exercise Navajo Nation sovereignty in the governance of its territory, and citizens.

§ 3601. Definitions

In this Chapter, unless the context otherwise requires:

A. "Articles of organization" means initial, amended, and restated articles of organization and articles of merger. In the case of a foreign limited liability company, the term includes all records serving a similar function required to be filed in the Department or other official having custody of company records in the State, Indian Nation or country under whose law it is organized.

B. "At-will company" means a limited liability company other than a term company.

C. "Business" includes every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.

D. "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency.

E. "Department" means the Business Regulatory Department within the Division of Economic Development or its designate successor.

F. "Distribution" means a transfer of money, property, or other benefit from a limited liability company to a member in the member's capacity as a member or to a transferee of the member's distributional interest.

G. "Distributional Interest" means all of a member's interest in distributions by the limited liability company.

H. "Entity" means a person other than an individual.

I. "Foreign limited liability company" means an unincorporated entity organized under laws other than the laws of the Navajo Nation which afford limited liability to its owners comparable to the liability under Section 3642 and is not required to obtain a certificate of authority to transact business under any law of the Navajo Nation other than this Act.

J. "Limited liability company" means a limited liability company organized and existing under this Act.

K. "Low-profit limited liability company" means a for-profit limited liability company that is organized and exists pursuant to this Act and that does not have as a significant purpose the production of income or the appreciation of property.

~~K~~ L. "Manager" means a person, whether or not a member of a manager-managed company, who is vested with authority under Section 3640.

~~L~~ M. "Manager-managed company" means a limited liability company which is so designated in its articles of organization.

~~M~~ N. "Member-managed company" means a limited liability company other than a manager-managed company.

~~N~~ O. "Navajo Nation" means:

1. When referring to the body politic, the Navajo Nation government, including its Council and applicable standing committees and boards;

2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All land within the exterior boundaries of the Navajo Indian Reservation, including the Navajo Partitioned Land, or of the Eastern Navajo portion of the Navajo Nation, including Alamo, Canoncito, and Ramah, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

b. All lands held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indian as such; and

c. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

Θ. P. "Operating agreement" means any written under Section 3603 concerning the relations among the members, managers, and limited liability company. The term includes amendments to the agreement.

Ρ. Q. "Person" includes any individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, government subdivision, government agency, or instrumentality, or any other legal or commercial entity.

Ϟ. R. "Principal office" means the office, whether or not in the Navajo Nation, where the principal executive office of a domestic or foreign limited liability company is located.

Ϛ. S. "Record" means information that is inscribed on a tangible medium or that it stored in an electronic or other medium and is retrievable in perceived form.

Ϝ. T. "Sign" means to identify a record by means of a signature, mark, or other symbol, with intent to authenticate it.

Ϟ. U. "State" means a state of the United States, a federally-recognized Indian Tribe, the District of Columbia, the Commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States.

Ϡ. V. "Term company" means a limited liability company in which its members have agreed to remain members until the expiration of a term specified in the articles of incorporation.

ϡ. W. "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, and gift.

§ 3605. Name

The name of a limited liability company as set forth in its articles of organization shall:

A. Contain the words "limited liability company" or limited company" or the abbreviations "L.L.C.," "LLC," "L.C.," or "LC", or if organized as a low-profit limited liability company shall contain the term "L3C", in upper or lower case letters. Limited may be abbreviated as "Ltd.", and "company" may be abbreviated as "Co."

SECTION 3. ADOPTING A NEW 5 N.N.C. § 3602A TO AUTHORIZE THE FORMATION OF A LOW-PROFIT LIMITED LIABILITY COMPANY

The Navajo Nation Council hereby adopts new 5 N.N.C. § 3620A:

NAVAJO NATION CODE ANNOTATED
 TITLE 5. COMMERCE AND TRADE
 CHAPTER 21. NAVAJO NATION LIMITED LIABILITY COMPANY
 ARTICLE 2. ORGANIZATION

§ 3620A. Low-profit limited liability company

A. A limited liability company that intends to qualify as a low-profit limited liability company pursuant to this section shall indicate the intention in its articles of organization and further state that:

1. No significant purpose of the company is the production of income or appreciation of property; however significant income or capital appreciation is not conclusive evidence of a significant purpose in the absence of other factors.

2. No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170 (c) (2) (D) of the Internal Revenue Code of 1986, 26 U.S.C. § 170 (c) (2) (D), or its successor.

B. A low-profit limited liability company shall at all times significantly further the accomplishment of one or more charitable or educational purposes within the meaning of Section 170 (c) (2) (B) of the Internal Revenue Code of 1986, 26 U.S.C. § 170 (c) (2) (B) or its successor, and would not have been formed but for the relationship to the accomplishment of such charitable or educational purposes.

C. A company that no longer satisfies the requirements of this section continues to exist as a limited liability company and shall promptly amend its articles of organization so that its name and purpose no longer identify it as a low-profit limited liability company.

D. This section does not prevent a limited liability company that is not organized as a low-profit limited liability company from electing a charitable or educational purpose in whole or in part for doing business.

SECTION 4. EFFECTIVE DATE

The amendments of the Navajo Nation Code enacted herein shall be effective pursuant to 2 N.N.C. § 221(B).

SECTION 5. CODIFICATION

The provisions of this Act which amend or adopt new sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall incorporate such amended provisions in the next codification of the Navajo Nation Code.

SECTION 6. SAVINGS CLAUSE

Should any provision of this Act be determined invalid by the Navajo Nation Supreme Court, or the District Courts of the Navajo Nation without appeal to the Navajo Supreme Court, those provisions of the Act not determined invalid shall remain the law of the Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 14 in favor and 0 opposed, this 14th day November 2014.



LoRenzo Bates, Pro Tem Speaker
Navajo Nation Council

11-21-14
Date

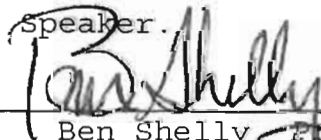
Motion: Honorable Alton Joe Shepherd
Second: Honorable Jonathan Hale

ACTION BY THE NAVAJO NATION PRESIDENT:

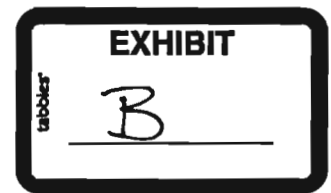
1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C) (10), on this _____ day of _____ 2014.

Ben Shelly, President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (11), this _____ day of DEC 01 2014 2014, for the reason(s) expressed in the attached letter to the speaker.



Ben Shelly, President
Navajo Nation



July 13, 2011

Via Email

Willard L. Boyd III, Esq.
Chair, ABA Business Section Nonprofit Organizations Committee
Nyemaster Goode
700 Walnut, Suite 1600
Des Moines, IA 50309
wlb@nyemaster.com

Scott E. Ludwig, Esq.
Chair, ABA Business Section LLCs, Partnerships and Unincorporated Entities Committee
Bradley Arant Boult Cummings LLP
200 Clinton Ave. W., Suite 900
Huntsville, AL 35801-4900
sludwig@babbc.com

Saba Ashraf, Esq.
Chair, ABA Business Section Tax Committee
McKenna Long & Aldridge LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, GA 30308-3265
sashraf@mckennalong.com

With a copy to:

Daniel S. Kleinberger, Esq.
William Mitchell College of Law
875 Summit Ave., Room 355
Saint Paul, MN 55105
daniel.kleinberger@wmitchell.edu

Ladies and Gentlemen:

We, the undersigned, are writing in our individual capacities to respond to the letter and attachment that you have circulated in opposition to the low-profit, limited liability company or "L3C". We understand that you intend, on behalf of Nonprofit Organizations Committee and the Limited Liability Companies, Partnerships and Unincorporated Entities Committee of the Business Law Section of the American Bar Association, to lobby state legislators in opposition to any new L3C authorizing legislation.

We believe that your Committees' opposition to L3C is misguided and that your discussion of the tax-law rules as they relate to L3C is not entirely accurate. We are quite surprised that the ABA Business Law Section would take such a strong position against the

Willard L. Boyd III, Esq.
Scott E. Ludwig, Esq.
Saba Ashraf, Esq.
Daniel S. Kleinberger, Esq.
July 13, 2011
Page 2

adoption of a new legal form based primarily on tax-law considerations. Neither the Exempt Organizations Committee nor the Tax Section as a whole is opposing L3C; nor, to our knowledge, are any of the major organizations that represent private-foundation interests, including: the Council on Foundations, the Association of Small Foundations, or the PRI Makers Network.

In our view, L3C represents a progressive attempt to utilize the LLC legal form to (1) make program-related investments easier for private foundations (although not automatic) and (2) provide an investment vehicle for mixed-motive investors who want to promote a charitable purpose while still having the potential to make a return on their investment.

Specifically, we offer the following preliminary comments to your letter and attachment, in hopes that you will reconsider your opinion:

1. Your letter indicates that “The L3C is no better than any other business form for receiving program related investment[s]” In our view, an L3C is a better vehicle for accepting program-related investments than a standard LLC. The state-law L3C restrictions will make it easier for private foundation investors to conduct the due diligence necessary in order to complete a program-related investment and comply with expenditure responsibility. A charitable purpose would necessarily be articulated in the L3C’s operating agreement, helping to ensure that the L3C’s purposes and operations are aligned with PRI requirements. Persons who form L3Cs are likely to be better informed about the requirements applicable to private foundations for PRIs and for expenditure responsibility and so draft their operating agreements accordingly. The L3C designation automatically sets the entity apart from ordinary LLCs that may or may not be structured in a way compatible with PRI requirements.

We agree, and understand that, L3C is not necessary for an LLC to serve as the vehicle for a program-related investment, and we have represented many foundations that have made PRIs into LLCs, but we believe that in many cases L3C will make it easier for foundation investors to make the findings that they need to make for a proper PRI and for compliance with expenditure responsibility.

2. Your letter indicates that “tranching investing purposefully uses foundation funds to subsidize (and thereby attract) private, profit-seeking investors” so

Willard L. Boyd III, Esq.
Scott E. Ludwig, Esq.
Saba Ashraf, Esq.
Daniel S. Kleinberger, Esq.
July 13, 2011
Page 3

that such a PRI “almost inevitably results in private benefit.” Tranched financing does not lead to per-se private benefit, as you suggest. Private benefit depends on all of the facts and circumstances in a given situation. In fact, a PRI (other than one made to a charity) always involves some level of private benefit, but rather than a disqualifying private benefit, it is deemed incidental to the accomplishment of charitable purposes. One example in the Treasury regulations involves a foundation making a below-market-rate loan to a “business enterprise which is financially secure and the stock of which is listed and traded on a national exchange,” in order to encourage the enterprise to establish a factory in a depressed urban area.¹ In this example, there is clearly private benefit, since the corporation receives a below-market-rate loan from charity – but the private benefit is incidental. In any PRI investment in a for-profit entity there is private benefit, but the private-benefit doctrine involves a weighing of public good against private benefit.

In any case, there is *nothing* in the L3C statutes that requires or even addresses tranched financing anymore than there is in the LLC statutes. L3C is now a creature of the states and American Indian nations that have adopted it, not of some promoters. Just because some promoters of L3C have talked about tranches does not mean that tranched financing is an inherent part of L3C. It is simply not in the L3C legislation.

3. Your letter also points to a purported “technical error” in the L3C legislation, suggesting that there is some contradiction between the requirement that “no significant purpose of the company is the production of income or the appreciation of property” on the one hand and the label “low-profit” and the involvement of for-profit investors on the other. But there is no such contradiction.

L3C requires that the primary purpose of the organization must be charitable, but permits the production of income to be a secondary purpose. As with a tax-exempt charity that must have a charitable purpose by law, yet also must, from an economic standpoint, have sufficient revenue to conduct operations, institutional decisions must be made with the L3C’s overarching charitable purpose in mind, but profit may certainly be the result. The fact that an investment produces significant income or appreciation is not, in the absence of other factors, conclusive evidence of a significant purpose involving the

¹ Treas. Reg. § 53.4944-3(b), Ex. 5.

Willard L. Boyd III, Esq.
Scott E. Ludwig, Esq.
Saba Ashraf, Esq.
Daniel S. Kleinberger, Esq.
July 13, 2011
Page 4

production of income or the appreciation of property.² In fact, an example in the Treasury regulations, in analyzing an investment by foundation “Y,” states that the investment “is a program-related investment even though Y may earn income from the investment in an amount comparable to or higher than earnings from conventional portfolio investments.”³

When assessing whether a “significant purpose” of a foundation’s proposed investment is the production of income for purposes of the PRI rules, the IRS finds it “relevant whether investors solely engaged in the investment for profit would be likely to make the investment on the same terms as the private foundation.”⁴ Such an investment is less likely to be a PRI to the extent that for-profit investors would enter it on the same terms as a foundation. The clear corollary is that for-profit investors may enter such investments on terms more favorable to them than those under which a foundation is willing to invest. Thus, L3C can bring together foundations’ PRIs and investments on more favorable terms by for-profit investors to accomplish the L3C’s primary charitable purpose through a business that, because of its inherent risk and low likelihood of profit, simply would not be attractive solely to for-profit investors.

4. There is increased interest in the U.S. and the United Kingdom, as well as in other countries, regarding new types of business entities and financing structures, be it an L3C, a benefit corporation, a flexible purpose corporation, a community interest corporation (UK), a social enterprise LLP (UK) or a social impact bond (UK and MA). States have always been responsible for adopting new legal forms. In the interests of transparency and general access to information, it is perfectly appropriate for states to adopt new legal forms that signify a certain brand or purpose to the public. Certainly, such alternative structures are not “necessary” in the sense that businesses that pursue socially useful goals will cease to exist if the structures are not adopted, but there are benefits from having a standard structure and a means of more easily identifying the options. The example of Delaware proves that a separate nonprofit corporation law is not necessary to enable charities to flourish, but most other states find it useful. Why not the same dichotomy for the LLC structure?

² *Id.* § 53.4944-3(b), Ex. 1.

³ *Id.*

⁴ *Id.* § 53.4944-3(a)(2)(iii).

Willard L. Boyd III, Esq.
Scott E. Ludwig, Esq.
Saba Ashraf, Esq.
Daniel S. Kleinberger, Esq.
July 13, 2011
Page 5

In our view, the L3C designation identifies the entities to the public and to regulators, providing an element of transparency of purpose that is lacking in LLCs and corporations, whether non-profit or for-profit. It is a form that should be embraced rather than condemned.

Very truly yours,

Marcus S. Owens
Caplin & Drysdale

William M. Klimon
Caplin & Drysdale

Richard Schmalbeck
Simpson Thacher & Bartlett Professor
Duke University School of Law

Diara M. Holmes
Caplin & Drysdale

Sharon Weinberg Nokes
Caplin & Drysdale

Robert A. Wexler
Adler & Colvin

Betsy Buchalter Adler
Adler & Colvin

Rosemary E. Fei
Adler & Colvin