TOHONO O'ODHAM REPORTS



VOLUME 1, Edition 3: 1985 to 1994

Third Publication, January 1, 2014

PREFACE TO THIRD EDITION

The January 1, 2014 third edition of the three volumes of the Tohono O'odham Reports includes appellate cases decided after the January 1, 2013 second edition publication, earlier appellate decisions not included in the prior editions, and also includes both recent and older trial court cases where the lower court cases resolved significant issues.

The third edition also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports.

January 1, 2014

Violet Lui-Frank
Chief Judge

PREFACE TO SECOND EDITION

The January 1, 2013 second edition of the Tohono O'odham Reports updates the cases in Volume 3 to include appellate cases decided after the November 1, 2011 first edition publication and their related trial court cases when the lower court cases resolved significant issues. Other trial court cases with precedential value in 2012 have also been included.

The second edition of all the volumes also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports to aid readers in finding them.

January 1, 2013

Teresa Donahue
Chief Judge

PREFACE

November 1, 2011 marks a milestone for the Tohono O'odham Judicial Branch with its first publication of cases from 1985 to the present. The cases are divided into three volumes and include both appellate and trial court decisions with precedential value.

Appellate cases lacking precedential value have been published as summaries. Additionally, in order to preserve confidentiality as required by the Tohono O'odham Children's Code, Section 62, all cases arising in whole or in part from a Children's Court matter have been redacted. As appropriate in a given case, initials or the individual's relationship to the child have been substituted for the name of an individual so that information identifying the child or parties is removed. The names of case workers and legal counsel have not been altered.

Further, obvious misspellings and punctuation errors have been corrected, such as misspellings of "O'odham" and double periods. No grammatical changes have been made.

November 1, 2011

Teresa Donahue
Chief Judge

TOHONO O'ODHAM REPORTS
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APPELLATE DECISIONS

PAPAGO COURT OF APPEALS

Matthew GERONIMO, Appellant,
v.
PAPAGO TRIBE, Appellee.

Case No. CTA-0003
(Ref. Case No. T10-572-83)

Decided September 9, 1985.

Nicholas Lewis, Counsel for Appellant.
Papago Tribal Prosecutor by Duane Two Two, Counsel for Appellee.

Before Chief Justice Ned Norris, II.

The matter having come before the above-entitled Court on this 25th day of July, 1985 with Appellant's Counsel Nicholas Lewis and Appellee's Counsel Duane Two Two, Tribal Prosecutor, being present and ready to proceed;

The Appellant states his cause for appeal as follows:

I.

That the defendant feels the Court made an error in applying an incorrect standard of proof and found the defendant guilty of Driving under the influence of alcohol, when there was in fact testimonial evidence and a driver present who testified that she was the actual driver of the vehicle. That testimonial evidence by Arlene Raymond who was driving and in actual physical control of the vehicle stated that the gears of the vehicle had locked, thereby asking the defendant to climb over the seat in order that he unlock the gears. And that she, (Arlene Raymond), was afraid due to the roadblock up ahead of her, however the vehicle was not moving.

II.

That insufficient evidence to support the verdict of the Judgment was used. Being that Prosecution failed to show beyond a reasonable doubt that the defendant drove or was in actual physical control of the vehicle.

III.

That the statute for Ordinance 51-A reads, "It is a unlawful and punishable in Paragraph H for any person who is under the influence of intoxicant liquor to drive or be in actual physical control of any vehicle within the boundaries of the Papago, San Xavier or Gila Bend Reservation. That this was incorrectly applied.

The Appellee answers in part:

Defendant was in actual physical control of motor vehicle. It is the contention of the Tribe that the Defendant was in actual physical control of the motor vehicle at the time of contact with Officer Harvey. Ordinance 51-A, of the Papago Law and Order Code set forth provisions governing of Driving Under the Influence of Intoxicating Liquor cases. Section A of the Ordinance states: "It is lawful and punishable as provided in Paragraph H for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within the boundaries of the Papago, San Xavier or Gila Bend Reservations."

The issue in this matter is one of actual physical control. Actual physical control of a motor vehicle is clearly set forth in State vs. Webb, 78 Ariz. 8, 274 P.2d 338 (1954) whereby a "defendant had by his own choice placed himself behind the wheel, and had either started the motor or permitted it to run, then the defendant had actual physical control of that vehicle, even though the manner in which such control was exercised resulted in the vehicle's remaining motionless at the time of the apprehension." In the action it is clear that the defendant was in actual physical control of the motor vehicle when Officer Harvey came in contact with him. That the engine was running, the Defendant was attempting to drive the motor vehicle by attempting shift the gears, and most importantly, he had placed himself behind that wheel by his own choice.

With the Court having heard the arguments and considered the Memorandums filed, the Court now enters it Opinion and ruling.

OPINION:

The Court in this case is required to examine the documents filed and consider the arguments presented, in order to determine whether the Appellate Court should over turn the conviction of the Appellant. The question before the Court is one of Actual Physical Control. The Appellant's contention is that he should not have been convicted of violating ordinance 51-A Driving under the influence of Intoxicating Liquors. The Appellant presented a Witness at trial who testified that she was the driver of the vehicle on the night in question. The Appellee thru his witness argues that upon approach to the vehicle the Officer saw the Appellant in the driver's seat attempting to engage the vehicle into gear. The Fact that another person had driven up to the point where the vehicle stopped is irrelevant, in that at the time the Officer made the arrest the Appellant was the person in the driver's seat. 7A American Jurisprudence 2d, Automobiles and Highway Traffic §300…In some cases, moreover, statutes making it unlawful for a person under the influence of intoxicants to drive or be in actual physical control of a motor vehicle have been

held to have been violated by defendants who, at the time they were apprehended in their automobiles parked on the highway, were asleep or in a drunken stupor…and State vs. Webb 78 Ariz.8,;

The Appellant argues, that because he presented a witness who testified that she was the driver, there was insufficient evidence to convict. There is no dispute, that the Appellant placed himself in the driver's seat, but that he was trying to unlock the gears of his vehicle. The Court upon examination of this case, is of the opinion that the Appellant was in Actual Physical Control of the vehicle and that the Lower Court was correct in its finding of guilt. The fact that the gears were locked and the vehicle could not move, is irrelevant. The Appellant by his own admission was attempting to unlock the gears, thereby intending to move or drive the vehicle.

It is the ruling of this Court that the Order of the Lower Court will stand and:

IT IS HEREBY ORDERED, ADJUDGED, DECREED:

1. That the defendant is hereby found **GUILTY** of Violating Ordinance 51-A.
2. That the sentence of the Lower is to be **ENFORCED IMMEDIATELY.**

PAPAGO COURT OF APPEALS

Katherine WILLIAMS, Appellant,
v.
PAPAGO TRIBE, Appellee.

Case No. CTA-0006
(Ref. Case No. 9-21-85)

Decided January 6, 1986.

Anthony Esalio, Counsel for Appellant.
Papago Tribal Prosecutor by Duane Two Two, Counsel for Appellee.

Before Chief Justice Ned Norris, Jr., for a Majority Court:

This matter having come before the above titled Court on the **"Petition for Appeal"** by Mr. Anthony M. Esalio, as Counsel, for Ms. Katherine Williams, the Appellant. This Court having further received the Appellee's Response by Mr. Duane Two Two, Tribal Prosecutor, for the Papago Tribe.

This Court having read the above reference Petition and Response and given the opportunity for Counsel of both interested parties to present Oral Arguments and is fully knowledgeable of the situation, hereby concludes and Orders the following:

CONCLUSION:

Ordinance of the Papago Council No. 5-83, Chapter 1, Section 6 (B)-1, specifies….Any party to any final Order or final Judgment….has….the right to Petition for Appeal……

In the Case at hand, it is unclear to this Appellate Court whether the Trial Court did in fact issue a final Order or Judgment, as required in order for an Appeal to be taken from the Trial Courts Decision. The Court of Appeals has made several inquiries to the Tribal Court Clerks of the Trial Court to produce the Case records of the Trial Court including the recorded tapes of the proceedings relating to the Appellant's Trial Court hearing(s). To date no record has been made available which is necessary in order for this Appellate body to give full consideration to both sides on Appeal. The Unavailability of the Trial Court records makes it impossible for the Appellate Court to render a fair decision relating to this Appeal.

THEREFORE IT IS HEREBY, ORDERED ADJUDGED AND DECREED:

1. That this Case be remanded back to the Trial Court for **Rehearing.**

TOHONO O'ODHAM COURT OF APPEALS

Corrine M. REDHORN, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0008
(Ref. Case No. CR1-89-86)

Decided Dec. 21, 2006, effective *nunc pro tunc* as of Aug. 28, 1986.

Before Chief Judge Betsy Norris.

Holding: Dismissed upon Appellant's Notice of Withdrawal on Appeal, effective *nunc pro tunc* as of Aug. 28, 1986.

TOHONO O'ODHAM COURT OF APPEALS

In the Matter of the Estate of: RICARDO VELASCO

Case No. CTA-0013
(Ref. Case No. 87-P-4206)

Decided Apr. 24, 1987.

Rodney B. Lewis for Appellant.

Before Judge Hilda Manuel.

Holding: Dismissed upon Appellant's request.

TOHONO O'ODHAM COURT OF APPEALS

Richard RAMIREZ, Respondent/Appellant,
v.
Lanova SEGUNDO, Petitioner/Appellee.

Case No. CTA-0018
(Ref. Case No. 87-CV-4338)

Decided August 1, 1989.

Before Judges Hershey, Titla, and Thomas.

JUDGE HERSHEY delivered the Opinion of the court.

Respondent/Appellant (hereafter "appellant" or "Ramirez") Richard Ramirez appealed the decision of the trial court against him and in favor of the Petitioner/Appellee (hereafter "appellee" or "Segundo") Lanova Segundo. This appeal reviews issues pertaining to the enforceability of agreements made by non-marital cohabitants.

FACTS

Appellant Ramirez and Appellee Segundo were never married. The parties lived together for approximately ten years with the exception of a one-year period of time during the interim. One child was born of the relationship.[1] Prior to her relationship with Ramirez, Segundo had been married twice before and had three other children. Segundo had been employed steadily

[1] The parties entered into an agreement prior to the trial whereby Ramirez obligated himself to pay $200.00 per month child support. No issue is raised on appeal concerning the propriety of the amount, although Appellant asks this Court to consider the child support in conjunction with the other "benefits" appellee received in the lower court's decree.

throughout their relationship. The parties shared household work such as washing dishes and laundry, the preparation of meals, and the common responsibilities associated with the children. Ramirez gave Segundo his paychecks to pay bills, get groceries, and buy clothes. The money was placed in her checking account. Jewelry, furniture, bikes and appliances were purchased collectively, and the parties contributed equally to the support of the family. Appellee and Appellant never discussed what portion of the property belonged to which party. Mr. Ramirez gave Mrs. Segundo a vehicle and all the personal property, he maintained a life insurance policy for the benefit of their daughter, and he agreed to pay the lion's share of the debts. The trial judge awarded Segundo the house trailer used by the parties and assigned to her for payment a debt in the amount of $73.00. The Court, in its judgment, declared:

> At no time during the course of the hearing does the Respondent deny or present contradicting testimony contrary to the Plaintiffs claim that during the relationship they lived together as husband and wife and further held themselves out to the general public as husband and wife. In furtherance of this the Respondent has failed to deny or contradict the Plaintiffs claim that he told Ms Segundo that he intended to share his life, his future, his earnings, and further that all property and debts acquired while living together as husband and wife would be shared jointly.
>
> The Respondent contends that during the time the relationship existed he was committed and did in fact contribute to the relationship as it has been testified to by the Petitioner, Lanova Segundo. That it was her decision to terminate the relationship and therefore once she decided to do such she also terminated the arrangement of each contributing to the well being of the relationship. He further contends that he was not totally aware of what all the financial obligations were, which was the reason she was given money, because she knew what she was doing, she knew what the obligations were, and again he committed totally to this. He further contends that, the Petitioner had a tendency to provide material items to the children to compensate for her absence from the home, or for not spending an adequate amount of time with the children.

The Court, therefore, found that the parties agreed to pool their resources for the benefit of the relationship, that they presented themselves to the public as husband and wife, and that their conduct, in both words and deeds, constituted an express and implied commitment, a contract, to share the assets, rights, responsibilities and obligations of the relationship.

Judge Norris expressed the view that while Chapter 3, Section 9 of the Domestic Relations Chapter in the Law and Order Code recognizes only ceremonial marriages, that Section was

inapplicable in light of the contracts described above. In support of its findings, the Court quoted from Cook v. Cook, 142Ariz. 573, 691 P.2d 664 (1984) and Carroll v. Lee, 148 Ariz. 10, 712 P.2d 923 (1986).

In addition to assigning debts and dividing property, the Court ordered Ramirez to pay to Segundo the sum of $300.00 per month for five years as and for "maintenance." The record lacks any reference to Ramirez promising future support to Segundo should the relationship come to an end. Segundo testified that she never considered what would happen concerning the assets once a breakup occurred.

STANDARD OF REVIEW

Findings of fact of a trial court should not be set aside on appeal unless clearly erroneous. Rule 52, Ariz.R.Civ.P.; State of Arizona v. Arizona Licensed Beverage Association, Inc., 128 Ariz. 515, 627 P.2d 666, 670 (1981). Findings must be set aside, however, where there is no evidence to support them. Tester v. Tester, 123 Ariz. 41, 597 P.2d 194 (1979). Legal conclusions of the trial court are not binding on the Appellate Court. Tencza v. Aetna Cas. & Sur. Co., 111 Ariz. 226, 527 P.2d 97 (1974).

SPOUSAL MAINTENANCE AND THE DIVISION OF PROPERTY

Chapter 3, Section 9 of the Domestic Relations Chapter of the Tohono O'odham Law & Order Code provides:

> After January 1, 1943, no marriage may be contracted by Agreement without marriage ceremony, and no marriage contracted within this jurisdiction shall be valid unless a license be issued as herein provided and marriage solemnized by a person authorized by law, or by someone purporting to act in such capacity and believed in good faith, by at least one of the parties.

The Tohono O'odham Nation, therefore, recognizes that ceremonial marriage is the public policy of the Tribe. A distinction is made between parties married by law and those that merely cohabitate. The law does not give unmarried parties living together the benefit of community property. Carroll v. Lee, 148 Ariz. 10, 712 P.2d 903 (1986). More explicitly, in Cook v. Cook, 142 Ariz. 573, 577, 691 P.2d 664 (1984), the Arizona Supreme Court stated that [a person] can

> not obtain from this Court the benefits which the law grants to those in the status of husband and wife. Those rights are conferred without the need of a contract and those who wish to obtain those benefits can do so only by becoming husband and wife.

Nevertheless, both Cook and Carroll recognize that unmarried parties may, by express or implied contract supported by independent consideration, agree to pool savings and other assets

and, upon a termination of the cohabitation, partition the property so acquired. Mutual promises made during the relationship can be adequate consideration to support an enforceable contract. The consideration need not be of a like or identical value.

In Cook, supra, at 557, the Arizona Supreme Court, quoting from Stevens v. Anderson, 75 Ariz. 331, 335, 256 P.2d 712, 714-15 (1953) stated the proper rule:

> There is much authority for allowing recovery where both parties know of the illegality of their activities, but where there exists an independent agreement that the property acquired during the period of their unlawful practices shall be owned in a certain manner. If the unlawful practices are merely incidental or separate from their contract concerning the ownership of property, the courts will give effect to the agreement and grant relief. (emphasis added)

Enforceability does not depend upon an agreement that is independent of the living arrangement. An implied contract may be inferred as a matter of reason and justice from the conduct and acts of the parties and from the circumstances surrounding their transaction. The party seeking partition has a high burden of producing evidence in order to establish the agreement. Carroll, supra.

There is ample uncontroverted evidence in the record to support the trial court's conclusion that, at the very least, an implied in fact contract existed between the parties to share in the assets purchased with the funds from the pool. From their course of conduct alone, the finder of fact was correct in determining that Ramirez and Segundo held themselves out as husband and wife and shared equally in the material benefits accruing to their relationship. There is no difference in legal effect between an express contract and an implied contract. Carroll, supra, at 13.

The record reflects that the appellant and appellee did not decide, beforehand, how to divide assets should a breakup occur. The trial transcript, at page 27, reflects:

> Lewis: When you say, it was understand between you two about who would have the property, or that you both had an interest in the property? What was your feeling about this?
>
> Segundo: I don't know because I, I we never talked about it, we never felt that it would have taken place.

This Court is of the opinion that it is a rare occurrence for parties, during the course of their lives together, to plan a division of property in advance of the end of their commitment. The trial court is vested with the equitable power to make such a fair apportionment. The record reveals that Ramirez gave to Segundo most all the personal property and agreed to assume the greater portion of debt. We are confident that Judge Norris considered this fact in fashioning his

judgment. The award of the house trailer need not be disturbed. The court's findings are not clearly erroneous.

With respect to spousal maintenance, Segundo asks this Court to uphold the trial court's award and cites for her authority Marvin v. Marvin, 18 Cal.3d 660,134 Cal.Rptr. 815, 557 P.2d 106 (1976). That case involved an alleged oral commitment between non-marital cohabitating parties where one person agreed to provide household services and the other agreed to support the first for life. Unlike Marvin, the record here reveals no express or implied agreement that Ramirez would support Segundo once their companionship ended.

Furthermore, Appellee has furnished this Court no authority for the proposition that, absent such an agreement, she is entitled to maintenance. Upon the record before us, this Court is not prepared to grant a benefit of marriage not consummated in accordance with tribal law.

In Taylor v. Taylor, 317 So.2d 422 (Miss. 1975), the court designated as "support," and not "alimony" the payment of $75 per month for thirty-six months by a man to a woman with whom he lived, unmarried to, for eighteen years. There was no foundation for the woman's right to alimony and it would have been improper for the monthly obligation to be characterized as such. Pickens v. Pickens, 490 So.2d 872 (Miss. 1986) (the payment in Taylor was a means of effecting a property division).

The maintenance award by the lower court cannot be deemed a part of the property division and it does not further the public policy of the Tribe.

THEREFORE, the judgment of the trial court is AFFIRMED with respect to the property division and REVERSED with regard to the grant of maintenance.

Thomas, J. and Titla, J. CONCUR.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM COUNCIL and in their Official Capacity as Members of the Legislative Council, Nicholas JOSE, Willard JUAN, Sr., Andrew PATRICIO, Fred STEVENS, Julia CARRILLO, Joseph JUAN, Eugene ENIS, Tony FELIX, Kenneth CHICO, Sr., Joann GARCIA, Percy LOPEZ, Fernando JOAQUIN, Johnson JOSE, Edward MANUEL, Max JOSE, John RENO, Virgil LEWIS, Cross ANTONE, Henry RAMON, Lloyd FRANCISCO, Rosita RUIZ, and Harriet TORO; TOHONO O'ODHAM ELECTION BOARD and in their Official Capacity as Members of the Election Board, Matilda S. JUAN, Nancy GARCIA, Mary Lou WILLIAMS, Paul L. ANTONE, and Jose N. LOPEZ, Defendants/Appellants,

v.

Larry GARCIA, Sylvester LISTO, Lucille ENCINAS, and the SELLS DISTRICT, Plaintiffs/Appellees.

Case No. CTA-0019
(Ref. Case No. 88-C-4390)

Decided September 14, 1989.

Before Judges Hershey, Titla, and Thomas.

JUDGE HERSHEY delivered the Opinion of the court.

FACTS

Appellants' Statement of Facts, which has not substantially been disputed by the Appellees, will be used in most part by the Court.

1. Introduction.

The Tohono O'odham Election Board ("Election Board") conducted a general election on May 23, 1987, for the offices of representatives to the Legislative Council. It certified and posted a Certificate of District Residents ("Certificate"), pursuant to subsection 1(B) of Article VII of the Uniform Election Ordinance ("Election Ordinance"). That section provides as follows:

> It shall be the duty of the Election Board to certify from the official Membership Roll of the Tohono O'odham Nation, or until such roll has been completed, from the Official List of Registered Voters and from such other sources known to the Election Board, the number of members of the nation residing in each district, and the number of votes each district is entitled to cast at the Tohono O'odham Council in accordance with section 2 of article V of the Constitution of the Tohono O'odham Nation. This certificate shall be posted, together with the Certificate of Election Results provided for in subsection 6(K) of the Tohono O'odham Council and of the district council of each district within three (3) days following the general election. Any district, or any member of the nation residing in a district, may appeal the number of votes given

> to each district by the Election Board to the Tohono O'odham Council provided they do so within (5) days after the certificate has been posted in the district. The Tohono O'odham council shall, of necessary, call a special meeting to decide such appeals, and the decision shall be final.

Because the official membership roll of the Nation had been completed before election day, the Election Board used that Roll to determine the number of members apportioned to each district. On May 28, 1987, the Sells District Council appealed the number of votes apportioned to the Sells District Council under the Certificate of the Legislative Council in accordance with subsection 1(B), claiming that more than the 2,556 members shown on the Certificate resided in the Sells District. It contended that the Election Board should have used a current count of the resident members or the IHS User Population Statistics compiled by the Office of Research and Development of the Indian Health Services ("IHS") as part of its Patient Care Information System. On June 1, 1987, the Legislative Council heard the appeal and, by Resolution No. 181-87, rejected the numbers contained in the Certificate. The Council decided to remain with numbers certified in the previous 1985 general elections and to refer the matter to the Rules Committee for further resolution. On January 13, 1988, the appellees filed their complaint in the court below.

The Nation currently maintains two membership rolls: (1) the official Membership Roll of the Tribe; and (2) the official list of Registered Voters. Both are referred to in Subsection 1 (B) of Article VII of the Election Ordinance.

2. Official Membership Roll.

The Membership Roll is prepared and maintained by the Enrollment Committee pursuant to the Enrollment Ordinance, which provides that any person who meets the membership requirements of the Nation may become enrolled as a tribal member by filing an application with the Enrollment Committee. See Enrollment Ordinance, Art. III, Section 1. The enrollment evaluation includes a line marked "Residence District" on which the applicant selects and writes his or her residence district. Section 2(13) of Article I of the Enrollment Ordinance defines a "resident" member as follows:

> "Resident" member as used in Section 1(b) of Article II of the Constitution, means any member who lives within the Nation with the intent to make the Nation his or her only permanent home, or any member who lives outside the Nation with the intent to return to the Nation and to make it his or her only permanent home. The intent to return to the Nation shall be presumed and can only be rebutted by a preponderance of the evidence to the contrary.

The Membership Roll, thereupon, lists each member of the Nation by an enrollment number which also bears one of twelve initials corresponding to the appropriate district. See Papago Enrollment Manual, Processing Applications, par. 3. When filing the applications, members usually select a district in or from which they, their families or forebears have or had a traditional connection by descent, land occupancy or custom. The choice of district will usually be (1) in one which they are registered or entitled to vote,[1] (2) in one which they had or are entitled to hold public office,[2] or (3) in which they own or entitled to receive a homesite land assignment.[3]

The Membership Roll does not develop accurate figures showing where members actually dwell. Lastly, the Roll may be updated every other year.

3. Official List of Registered Voters.

It is the responsibility of the Election Board to maintain the Official List of Registered Voters. Election Ordinance, Art. II, Sect. 2(c). The authority to register voters, however, exists not in the Election Board, but in District Councils, subject to the power of the Legislative Council to hear appeals from the determination of the District Councils. Election Ordinance, Art. III, Sec. 1, 2. All members of the Nation, whether resident or non-resident, who have reached the age of eighteen (18) years are eligible to vote and are eligible to register. Constitution, Art. X, Sec. 1;

[1] In order to vote, members of the Nation must register "with the district council of their respective districts." Election Ord., Art. III, Sec.1. In conformity with the mandate of the Constitution that "[a]ll members of the . . . Nation who have reached the age of eighteen (18) years prior to the election date shall have the right to vote," See Constitution, Art. X, Sec.1 the Uniform Election Ordinance sets no qualifications to vote other than membership in the Nation, and leaves it to the discretion of the district councils, or upon appeal, of the Legislative Council, see Unif. Election Ord., Art. III, Sec.2, to determine whether a voter is qualified for registration. The Various districts have adopted different criteria for voter qualifications. In the Sells District, for example, it may depend on the community in which the voter resides or intends to reside. A person residing or wishing to reside in the village of Sells may qualify to vote if he relinquishes his voter registration in any other district, while a person residing or wishing to reside in any of the other villages of the Sells District may not qualify, even though he has relinquished his voter registration elsewhere, simply because he or she does not have some historic tie or relationship to such other village.

[2] In order to hold office as representative on the Legislative Council a member "must be a member of the district in which he is seeking election," Election Ordinance, Art. IV, Sec.5(A). In order to determine whether a person qualifies as a candidate for office, i.e. whether he is a member of the district, district councils generally adopt the same standards as for voter qualifications. Thus, the right to run for office in the Sells Village may be available to a member of the Nation who relinquishes membership in another district, but not if such member seeks office in another village of the Sells District unless he or she can establish some historic tie or relationship to the village.

[3] Land assignments for homesite or residence purposes are made to members of the Nation "by the district councils under the customary procedures of their respective communities," Constitution, Art. XVI, Sec.4(a). In determining whether a person qualifies for a homesite assignment, the Sells District uses the same standards as it uses to determine whether such persons qualify to vote. Thus, the right to receive an assignment in the Sells village may be available to a member of the Nation who relinquishes membership in another district, but not if such member seeks an assignment in another village of the Sells District unless he or she can establish some historic tie or relationship to the village.

Unif. Election Ord., Art. III, Section 1.[4] The right to vote and the ability to qualify for residence in a particular district does not always depend upon physical presence or residence within the District. Such right is based upon a member's historical and customary connection to the District and its communities, and may also be acquired through relinquishment of community membership elsewhere and after acceptance into the new community.

4. IHS User Population Statistics.

Appellees assert that the member votes apportioned to the Sells District on the Legislative Council in accordance with Article V, Section 2 of the Constitution should be based either on a current physical count of the members living in each District or upon the population statistics contained in the IHS User Population Statistics ("IHS Statistics") compiled by the IHS as part of its Patient Care Information system. The IHS Statistics contain a count of nearly all tribal members in the location of their current abodes. The Service figures are more accurate than the official Decennial Federal Census.[5]

5. Comparison of Statistical Information.

The IHS Statistics establish the following population spread of the members of the Nation.

District	Members	% of Total Members	% of Resident Members
Baboquivari	858	5.37	8.34
Chukut Kuk	230	1.44	2.24
Gu Achi	1230	7.69	11.95
Gu Vo	583	3.66	5.66
Hickiwan	874	5.46	8.48
Pisinemo	649	4.06	6.30
Schuk Toak	489	3.06	4.75
Sells	3316	20.73	32.19
Sif Oidak	1051	6.57	10.20
San Xavier	1019	6.37	9.89
Other On-Reservation	2	0	0
Total Residents	10301	66.41%	100.00%
Total Non-Resident	5691	35.59%	
Total Members	15992	100.00%	

[4] In actuality, the ability to register to vote in a particular district may depend upon the customs of the District or of the communities within the District. See Note 3, supra.

[5] The 1980 Federal Census counted 8,204 people, including non-members, while the IHS Statistics counted 10,301 members residing in the Nation.

The Official Membership Roll and List of Registered Voters establish the following spread of members and voters of the Nation.

District	Membership Roll 1987 Election		1987 Registered Voter List	
	% of Members	% of Members	Voters	Voters
Baboquivari	2233	14.35	838	12.57
Chukut Kuk	1515	9.74	674	10.11
Gu Achi	1584	10.18	778	11.67
Gu Vo	1076	6.91	365	5.48
Hickiwan	1192	7.66	597	8.96
Pisinemo	1021	6.56	476	7.14
San Lucy	731	4.70	362	5.43
San Xavier	1259	8.09	453	6.80
Schuk Toak	1034	6.64	537	8.06
Sells	2556	16.42	879	13.19
Sif Oidak	1361	8.75	706	10.59
Total	15562	100.00%	6665	100.00%

Comparisons between the figures included in the IHS Statistics, the Membership Roll and the Registered Voter List elicit the following facts:

1. The 15,562 total membership of the Nation, reflected the 1987 Membership Roll, falls 430 short of the total of 15,992 membership established by the IHS statistics. The discrepancy is less than 2.7%.

2. IHS Statistics reveal that 10,301 members, or 64.41% of the total membership, reside within the Nation, and that 5,691 members, or 35.59% of the total membership, reside outside the reservation.[6]

3. The IHS Statistics manifest 20.73% of the total tribal membership and 32.19% of the resident tribal membership have their places of abode in the Sells District. The Membership Roll shows that only 16.42% of all members, resident and non-resident, are enrolled members of the Sells District. The IHS Statistics indicate that 3,316 members live in the Sells District, while the Membership Roll shows only 2,556, or 760 fewer.

6. Lower Court Decision.

On September 28, 1988, the trial court issued its Opinion and Order and Writ of Mandamus. It held that the failure by the Legislative Council to comply with Section 2 of Article V of the

[6] Appellants contend that if the votes of the Legislative Council are apportioned on the basis of members who actually reside in each district, 35.59% of the membership which does not reside within the Nation will not be represented on the Council. They posit that, by use of the Membership Roll, all 15,562 members including those living outside the reservation, are integrated into the count and 16.42% thereof are apportioned to the Sells District compared to 13.19% of the total members of the members who are actually registered to vote in the district.

Tohono O'odham Constitution, and to weigh the votes of the representatives on the Legislative Council by the number of Tohono Tribal members physically living in each District, constituted an underapportionment of such votes which violated the equal protection provisions of the tribal Constitution, Art. III, Sec. 1, and of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. Section 1302(8). The court ordered the Legislative Council to prepare and submit an acceptable and reasonable apportionment plan to the Judiciary within three months of the issuance of the writ.

ISSUES PRESENTED

Appellants seek a reversal of the tribal court judgment and assign three main points of error:

1. The trial court erred in failing to grant defendants' motion to dismiss for lack of subject matter jurisdiction because Section 7 of Article X of the Constitution grants exclusive jurisdiction to decide election matters to the legislative council.

2. The trial court erred in failing to grant defendants' motion to dismiss on the grounds that this cause presents a nonjusticiable "political question."

3. The trial court erred in applying a literal construction to the term "residing" appearing in Section 2 of Article V of the Constitution in the apportionment of votes on the Legislative Council, because the effect of such construction is to (1) apportion to the Sells District the votes of members who, though they live in the district, are registered to vote and vote in other district, and (2) deprive nearly 36% of the members who reside outside the Nation from participation in the economic resources and governmental processes of the Nation.

JURISDICTION

This Court has jurisdiction on appeal pursuant to Section 7, Article VIII of the Constitution of the Tohono O'odham Nation.

The Court is not bound by the conclusions of law reached by the trial court. Gary Outdoor Advertising Co. v. Sun Lodge, Inc., 133 Ariz. 240, 650 P.2d 1222. Furthermore, it must be inquired whether this Appellate Court as well as the lower court has subject matter jurisdiction to order the Legislative Council to produce an apportionment plan acceptable to the court. Wright & Miller, Appellate Review Sections 2588-2591. Findings of fact shall not be set aside unless clearly erroneous. Rule 52(a), Arizona Rules of Civil Procedure; Administrative Order IV, dated March 2, 1988, of the Chief Judge of the Judicial Court of the Tohono O'odham Nation.

SUBJECT MATTER JURISDICTION

The Court is called upon to harmonize seemingly discordant provisions in the Constitution of the Tohono O'odham Indian Nation.[7] Appellants argue that subject matter jurisdiction of all election matters rests with the Legislative Council and that there exists no right to judicially contest or correct a malapportionment of votes. In support of its position, they cited Section 7 of Article X of the Constitution:

> Section 7. The Tohono O'odham Council shall enact an election ordinance which shall prescribe rules for the apportionment of representatives to each district council when elections of such representatives are from communities within the district and not from the district at large, and for the setting and holding of primary elections for the offices of chairman and vice chairman of the Tohono O'odham Council and of the district council, and which shall prescribe the qualifications of candidates, the registration requirements for voting and such other rules and procedures necessary to the orderly conduct of elections, including but not limited to procedures for validation of the petitions and the settlement of any and all election disputes. The decision of the Tohono O'odham Council in all election matters, including the eligibility and qualifications of candidates, shall be final. (emphasis supplied by Appellants.)

They further claim that "where a constitutional[8] or statutory grant of jurisdiction and judicial power is conferred upon a legislative body to determine election matters, such power preempts the general jurisdiction given to the judicial branch over election matters."[9]

The cloth of statutorily derived power is cut from Section 1(B) of Article VII of the Uniform Election Ordinance, supra. That section reserves to the Council the final decision to determine the number of votes given to each district by the Election Board. Sells District did, in fact, appeal its apportionment of votes whereupon the Council determined that votes were not properly apportioned and adopted, instead, the apportionment certified at the preceding 1985 general election. Appellants contend that in recognizing their responsibilities under the

[7] The tribal voters adopted a new constitution for the Nation on January 19, 1986. The adopted constitution was ratified by the acting Deputy Assistant Secretary for Indian Affairs on March 6, 1986.

[8] Under Section 1(g) of Article VI of the Constitution, the Tohono O'odham Council has the power to enact laws and ordinances for conducting and regulating elections.

[9] Appellants' Opening Brief at page 19.

Ordinance, their actions comported with the equal protections provisions of both tribal Constitution[10] and the IRCA.[11]

The Tribal Constitution sets forth the powers of the courts. Article VIII, Section 2 states:

> The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation.

Article VIII, Section 10 reads:

> The Tohono O'odham Judiciary shall have the power to:
>
> (a) Interpret, construe and apply the laws of, or applicable to, the Tohono O'odham Nation.
>
> (b) Declare the laws of the Tohono O'odham Nation void if such laws are not in agreement with this constitution.
>
> (c) Issue injunctions, attachments, writs of mandamus, quo warranto, review, certiorari and prohibition, and writs of habeas corpus to any part of the Tohono O'odham Nation upon petition by, or on behalf of, any person held in actual custody.
>
> (d) Establish court procedures for the Tohono O'odham Judiciary.

The paramount question is whether, by virtue of its authority contained in Article X, Section 7, the Legislative Council may, by ordinance, limit the power of the judicial branch, when such judicial power includes the express mandate "to declare the laws of the Tohono O'odham Nation void if such laws are not in agreement with this Constitution." We hold that the power of the judiciary to scrutinize the laws and ordinances of the Tribe and to measure their compliance with the tribal Constitution has not been and is not divested by Article X, Section 7. This is not to say that an act or ordinance, otherwise constitutional, may not contain a finality clause deferring to a determination of the Legislature where express due process and equal protection safeguards are adequately established as part of such scheme. But any laws purporting to divest the judiciary of its power of constitutional inquiry is void.

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[10] Article III, Section 1 of the Nation's Constitution provides: "All political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights. It shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law."

[11] 25 U.S.C. Section 1302(8) specifies that "[n]o Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Article X, Section 7 does not necessarily mandate a different conclusion. Appellants could hardly contend that, the bright light of the new tribal Constitution, the Legislative Council could enact patently offensive law after law containing "finalty" provisions with impunity and without interference from the judiciary. That, most certainly, was not the intent of the framers of the Constitution.[12] The power to determine the constitutionality of its self-promulgated election law is not specifically granted the Council by virtue of Section 7, Article X. That power is unreservedly the province of the judiciary.

Our ruling is made not with aggressive defense of territory, but with the conviction that separation of powers means that separate branches of government are not self-policing. The judiciary is, beyond peradventure, the arbiter of constitutionality.

POLITICAL QUESTION

Appellees successfully persuaded the trial court to issue a writ of mandamus directing the Legislative Council to create a plan of apportionment based upon its definition of one-man, one-vote.[13] This would necessarily entail, by their reason, a physical census or the use of IHS statistics. The lower court opinion held that the use of the tribal Membership Roll to determine the population of resident members of a district caused a malapportionment in violation of Article III, Section 1[14] and Article V, Section 2[15] of the Tohono Nation's Constitution, and a violation of the Indian Civil Rights Act, 25 U.S.C. Section 1302(8).[16] Appellants urge this Court

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[12] Article XIX, Section 2, of the Uniform Election Ordinance specifies that nothing contained in the election ordinance "shall be construed to preclude a person from seeking redress of his grievance under the [ICRA], or other laws of the United States provided such person shall first exhaust the remedies available under this ordinance and other applicable laws of the Tohono O'odham Nation." The use of the word 'first' implies a subsequent or post-administrative path. With the exception of habeas corpus relief, ICRA claims are only cognizable in tribal courts. See Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978). Article XVIII, Section 11 of the Ordinance provides that:

> The Tohono O'odham Courts shall have jurisdiction over all violations of this ordinance not herein specifically reserved by the Tohono O'odham Council and may in addition to the penalties prescribed herein, grant such other relief as is necessary and proper for the enforcement of this ordinance, including but not limited to injunctive relief against acts in violation of this ordinance.

[13] Gray v. Sanders, 372 U.S. 368 (1963).

[14] See note 10, supra.

[15] "Each district shall be entitled to as many votes on the Tohono O'odham Council (divided by ten) as there are members of the Tohono O'odham Nation residing in the district. Such votes may be cast by either or both of the district representatives, or their alternates, who are present and voting. In the event the two representatives of a district, or their alternates, should divide their votes, each shall be entitled to vote one-half (1/2) of the votes of their particular district is entitled to cast. A majority of the votes cast shall govern the action of the Tohono O'odham Council."

[16] See note 11, supra.

to vacate the opinion below and order the action dismissed because the case presents a nonjusticiable "political question."

A. Justiciability

For many years courts assumed a restrained posture in reapportionment cases, fearful of becoming entangled in a "political thicket." Colgrave v. Green, 328 U.S. 549, 556 (1946). Yet, reversing years of judicial restraint, the Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), accepted jurisdiction for a claim asserted under the Equal Protection clause of the Fourteenth Amendment challenging the validity of an apportionment in a state legislature. Subsequently, in Gray v. Sanders, 372 U.S. 368, 381 (1963), Justice Douglas concluded that the "conception of political quality" can mean only one thing—one person vote." Accord, Westberry v. Sanders, 376 U.S. 1 (1964). In quick succession, also in reliance upon the Fourteenth Amendment's equal protection language, the Court held that state legislature and senatorial districts within a single state must be of equal population, Reynolds v. Sims, 377 U.S. 533 (1964), that United States congressional districts within a single state must be of equal population, Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and that election districts in local communities must also be of equal population, Avery v. Midland County, 390 U.S. 474 (1968).

It is undeniable, therefore, that the courts have been involved significantly in apportionment disputes since 1962. Appellants challenge, however, that Baker v. Carr, did not decide a question of the consistency of legislative action with the Federal Constitution by a political branch of government coequal with the Supreme Court. Baker and most of its progeny, we agree, rested upon comportment by state and local election districts with the equal protection standards of the fourteenth amendment. But in Wesberry v. Sanders, supra, at 7-8, the Court established that the constitutional test for the validity of congressional districting schemes was one of equality "as nearly as practicable" based upon Article I, Section 2 of the United States Constitution.[17] Furthermore, this Court, in construing the constitutionality of the Election Ordinance, does so by virtue of its powers under Article VIII, Section 10 of the Tohono Constitution and not by "expressing lack of the respect due coordinate branches of government." Baker, supra at 217. We conclude that this matter is justiciable.

B. Applicability

The next area of inquiry is whether the standards for fair and equitable apportionment enunciated by the courts under the equal protection clause of the fourteenth amendment to the

[17] "The House of Representatives shall be composed of Members chosen every second year by the People of the several States. . . ."

United States Constitution are equivalent with the Indian Civil Rights Act and the Tohono O'odham Constitution. Felix S. Cohen, in his authoritative Handbook of Federal Indian Law 663-664 n. 4 (1982) instructs that

> [t]he cultural norms embodied in the Bill of Rights are in many was akin to the original structures of Indian tribes. [It is time that relationships based on family-clan, membership societies, and other groups have a much greater role in the internal regulation of tribal societies than in the migratory communities of modern America generally], and these protections apparently have not yet been put to extensive use. However, the influence for compositions of the larger society have modified traditional views substantially, and formal civil rights guarantees gradually are being integrated into tribal institutions.

When, as here, the tribe's voting and election procedures parallel those found in Anglo-Saxon societies, federal constitutional standards will be utilized to determine whether a challenged tribal procedure violates the Indian Civil Rights Act. Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) citing White Eagle v. One-Feather, 478 F.2d 1311 (8th Cir. 1973); accord Daly v. United States, 483 F.2d 700 (8th Cir. 1973). In the present case, this Court will also use federal standards to guide its decision whether there has been compliance with Article III, Section 1 of the Tribe's Constitution.

C. Traditional Districting and the "Practical Mathematics of 'One-Man—Vote' "[18]

In 1975, an Amendment to the Constitution of the Papago Tribe was approved by the Area Director of the Bureau of Indian Affairs. That Amendment was produced to correct a severe malapportionment problem in voting districts.[19] The Tribe considered three alternative election approaches to meet the requirements of one-man one-vote as set forth by Daly v. United States, supra. The Tribe rejected a procedure whereby councilmen were elected in at-large voting. It also feared that by redrawing traditional district lines into equally populated districts, great disruption of communities would occur. Instead, a "weighted" voting plan was adopted under which each councilman was accorded voting strength which reflected the share of the population he or she represented. Such weighted system has carried forward since its adoption and its construction is the subject matter of this suit.

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[18] See Dodge & McCauley, "Reapportionment: A Survey of the Practicality of Voting Equality," 43 Univ.Pitt.L.Rev. 527, 536 (1982).

[19] See Memorandum dated November 8, 1973 from Field Solicitor to Superintendent of Papago Agency and letter dated February 27, 1974 from Field Solicitor to William E. Strickland (Tribal Attorney).

A review of the Summary of Statistical Information, supra, reveals (1) that the Membership Roll accurately reflects the membership of the Nation (IHS Statistics: 15,992 members; Membership roll: 15,662 members; difference: 430 members or 2.7% of total membership); (2) that the Membership Roll includes all members of the Nation (including 5,691 nonresident members, or 35.59% of the total membership), and (3) that the difference or deviation between the number of Sells District residents claimed in this action by plaintiffs/appellees (3,316 members, or 20.73% of the total membership as reflected in the IHS Statistics) and those reflected in the Membership Roll and actually apportioned to the Sells District (2,556 members, or 16.42% of total membership) is only 760 members, or 4.31% of the total membership.[20] A substantial focus, then, is whether a gross deviation in voting strength of 4.31%[21] of the total membership is constitutionally valid. This begs another question: Whether the gross deviation should be based upon members physically present on the reservation or the total membership, regardless of physical dwelling place.

A weighted system of voting respecting customary boundaries does not easily lend itself to comparison with reported decisions that have more often than not dealt with plans periodically redrawing district lines to achieve population equality. Nevertheless, a review of the different conclusion of courts examining congressional, state or local districting is instructive.[22]

1. In United States congressional districting, almost absolute numerical equality in population is the criteria for judging the constitutionality of an apportionment plan. See Wesberry v. Sanders, 376 U.S. 1 (1964); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (5.9% variance too great); Wells v. Rockefeller, 394 U.S. 542 (1969) (13.1% offensive); Ely v. Khlar, 403 U.S. 108 (1971) (1.8% unconstitutional); White v. Wesier, 412 U.S. 783 (1973) (4.13% unconstitutional). No maximum variance greater than 4% has been upheld in a post-1970 congressional case.[23]

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[20] Under appellees' construction, using IHS statistics, Sells District represents 32.2% of the members physically present on the reservation, 3316 out of 10301. The difference between 32.2% and 16.42% (reflected in membership rolls, 2256 out of 15562) is 15.78%.

[21] Or 15.78%, id.

[22] There exists a relatively precise mathematical model or standard, for the measurement of population equality. It is generally referred to as the "maximum variance" method and it is determined by the relationship between the population of the largest and smallest election district in the proposed plan of apportionment. As an example, whether the largest election district had 12,000 people and the smallest 10,000, the "maximum variance ratio" between the two would be 1.2 – 1 (or 20%). Note 18, supra.

[23] Id. At 539 (refer to Appendix A). The constitutional underpinning for fair congressional apportionment stems from Article I, Section 2 of the United States Constitution.

2. In state legislative districting, apportionment cases rest entirely upon the fourteenth amendment. In Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme Court emphasized that "population is, of necessity, the starting point for consideration and the controlling criteria for judgment in legislative apportionment controversies." Id. At 567 (emphasis added).

The Court articulated further:

> A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. . . . Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines may be little more than an open invitation to partisan gerrymandering. . . . [But] the overriding objective must be substantial equality of population among the various districts.
> . . . .
> . . . [D]ivergences from a strict population standards . . . based on legitimate considerations incident to the effectuation of a rational state policy . . . are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

This view was echoed and elaborated upon in White Eagle v. One Feather, 478 F. 2d 1311, 1315 (8th Cir. 1973):

> While we recognize the intimation in the record of difficulty in obtaining population figures for the tribe, nevertheless the controlling factor, the sine qua non, in apportionment determinations must be that of population, Reynolds v. Sims, 377 U.S. 533, 468 (1964), as nearly as such may be determined in the light of all available sources of information. It will, of course, not be assumed that the cases mandate mathematical exactness in apportionment and it may well be that in a situation such as presented in the areas occupied by this tribe, variations from a strict population standard may be justified by the "recognition of natural or historical boundary lines, Swann v. Adams, 385 U.S. 440 (1967), * * *, or other factors that are free from any taint of arbitrariness or discrimination." * * * Mahan v. Howell, 410 U.S. 315 (1973) * * *.

In Mahan v. Howell, 410 U.S. 315 (1973), the Supreme Court upheld a sizeable population disparity (16.4%) between state legislative districts. Mahan found that Virginia has sought to protect historically political subdivisions in order to preserve for the voters in those subdivisions a voice in the state legislature on local matters. Thus, states may deviate from mathematical exactness if a good faith effort has been made in constructing districts "as nearly of equal population as practicable." Reynolds, supra at 377 U.S. 577. At least, eight states, in 1982, had

such specific constitutional or statutory provisions that accounted for cultural, social or economic interests.[24]

Variances may well be de minimus and lacking constitutional significance. Population aside, there may be no invidious discrimination if a plan seeks to achieve political fairness. Gaffney v. Cummings, 412 U.S. 735 (1973). The Gaffney court states, id. at 752:

> Politics and political considerations are inseparable from districting and apportionment.
>
> . . . .
>
> The reality is that districting inevitably has and is intended to have substantial political consequences.
>
> It may be suggested that those who redistrict and reapportion should work with census, not political data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.
>
> It is much more plausible to assume that those who redistrict and reapportion work with both political and census data. Within the limits of the population equality standards of the Equal Protection Clause, they seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its office holders.

3. Hawaii and Nevada provide instances of special geographical and historical circumstances. Zero population deviation is not mandated. The political structure of Hawaii has remained the same since it was ruled by its kings because "unique geographic, geological and climatic conditions within each basic island unit have produced markedly different patterns of economic

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[24] Dodge, supra, note 18 at 545-546.

ALASKA CONST. art. VI, Section 6 (considers relatively integrated socio-economic areas); COLO. CONST. art. V, Section 47(3) ("communities of interest, including ethnic, cultural, economic, trade areas . . . and demographic factors, shall be preserved within a single district wherever possible" Id.) DEL. CODE ANN. Tit. 29 Section 806(4) (1969) (shall not "unduly favor any person or political party and if possible different socio-economic interests shall not be submerged); NEV. REV. STAT. Section 218.050 (1979) (consideration to rational representation of homogeneous groups, socio-economic interest); S.C. CODE Section 2-2-9 (1976) (considers history, tradition and commerce); VT.STAT.ANN. tit. 17 Section 1903(b) (2) (1968) ("recognition and maintenance of . . . social interaction, trade, politics and commin interests"). See also Grofman, "Criteria for Districting: A Social Science Perspective," 33 U.C.L.A. L.Rev. 77, 87 (1985).

development and occupational pursuits." Burns v. Gill, 316 F. Supp. 1285, 1290 (D. Hawaii 1970).[25]

In Hawaii, therefore, it is

> [a] practical impossibility to set up legislative districts on a state-wide plan on the basis of absolute numerical equality without conjoining areas on one island with areas on another, comprised of residents who had no fundamental community of interests and creating an expensive and difficult campaign problem for the candidates for those "interisland" districts and stultifying communication problems for those so elected. Id. at 1292.

Hawaii also uses a registered voter basis of determining its population variance among districts. This method was approved by the Supreme Court in Burns v. Richardson, 384 U.S. 73 (1966). In Burns, there was concern that large numbers of tourists and military personnel would inflate, or distort, the total population figures from that of the state citizenry. Therefore, in states like Hawaii, "a finding that registered voter distribution does not approximate total population distribution is insufficient to establish constitutional deficiency. It is enough if it appears that distribution of registered voters approximates distribution of state citizens or another permissible population base." Id. at 94-95. The Hawaii plans exceed 10% maximum variance.

In Nevada, similarly in excess of a 10% de minimus standard, "actually unique and difficult problems, demographically and geographically" call for "a pragmatic overlook of the effect of the entire apportionment scheme." Stewart v. O'Callaghan, 343 F.Supp. 1080, 1082 (D.Nev. 1972). The Court in Stewart, id. at 1085, discussed some of these factors:

> The evidence convinces us that county lines have great significance in Nevada. Distances are great and residents few. Major connecting highway facilities are at a minimum. Air transportation is practically nonexistent on a transstate basis, except as to the two principal communities. Two thirds of the rural counties have no local government except for that supplied by county commissioners. The only potential local political voice available to residents of a majority of the Nevada rural counties is through their county government. There then exists a county homogeny not found in smaller or more populated states. Substantial advantages to rural residents are gained in Nevada by maintaining the integrity of county lines within the

[25] The Burns court, 316 F.Supp. at 1291, stated: "Within each county therefore are insulated groups of citizens who, because of local industry and land use, and resulting economic status, combined with the nature of the terrain, have developed their own and, in some instances, severable communities of interest. The insular life has brought about an almost personalized identification of the residents of each county – with and as an integral part of that county. The residents take great interest in the problems of their own county because of that very insularity brought about by the surrounding and separating ocean.

> reapportionment plan. It is clear that consideration of such factors may properly be given in reapportioning a state legislature and may be reason to support some numerical deviation from population based representation.

4. Even though population equality may be reached through sheer mathematics or in conjunction with some rational policy, an apportionment plan may still be constitutionally deficient if it dilutes the voting strength of certain elements of the population. This is the "qualitative" aspect of the right to vote.[26] Equal districts, therefore, do not guarantee "substantive equality in the sharing of power." Casper, "Social Differences and the Franchise," 105 Daedalus 103, 112 (1976). It is simply wrong to assume that equal population can prevent gerrymandering.[27] Talismanic reliance upon such a standard does not always make sense.

The accuracy of census data is limited, and population equality within less than one percent is illusory. Gaffney v. Cummings, 412 U.S. 735, 745-46 (1972). Equal district populations at the beginning of a census period offer no guarantee that the same population equality will exist at the end of the census period. As expressed by Gaffney, id at 746:

> [I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction. . . .

Therefore, perfect population equality should not wholly immunize from attack an obvious gerrymander.

5. In basing the apportionment process upon the Membership Roll, the Tribe undoubtedly sought "to preserve, protect and build upon [the] unique and distinctive culture and traditions [of the O'odham]." This paramount goal is expressed in the Preamble of the Constitution. The constitutional requirements, customs and practices for residence, voting and the holding of elective officers, and for community and district membership, all revolve around a member's historical and cultural connection to a particular district.[28] The weighted voting plan,

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[26] See Dodge, supra, note 18 at 568 n. 160.

[27] Political gerrymandering cases are justiciable under the equal protection clause. Davis v. Bandemer, 106 S.Ct. 2797 (1986).

[28] See notes 1, 2 and 3, supra.

implemented through the enrollment process accomplished the goal of including all members in the population count.[29] Sells District, as the most populated of the Tribe's several districts, has undoubtedly filed this action to garner a greater share of funds that are appropriated to the districts upon the same basis as the votes are apportioned on the Legislative Council. Yet this Court cannot say that any diminishment of funding is the result of invidious process of discrimination. The percentage deviations from absolute population equality are part and parcel of a rational scheme of voter enfranchisement.

We hold, therefore, that the use of the Membership Roll to weight the votes of Legislative Councilmen, in accordance with the provisions of the tribal Election Ordnance, though creating a variance with absolute population equality, does not violate the equal protection clauses of the Indian Civil Rights Act and Section 1, Article III of the tribal Constitution.

RESIDING

This Court must also decide whether the Uniform Election ordinance, by requiring the use of the official Membership Roll to determine the number of members "residing" in each district instead of mandating an actual population count of persons physically dwelling within each district, violates the provisions of Article V, Section 2 of the tribal Constitution. That section states:

> Each district shall be entitled to as many votes on the Tohono O'odham Council (divided by ten) as there are members of the Tohono O'odham Nation residing in the district. Such votes may be cast by either or both of the district representatives, or their alternates, who are present and voting. In the event the two representatives of a district, or their alternates, should divide their votes, each shall be entitled to vote one-half (1/2) of the votes their particular district is entitled to cast. A majority of the votes cast shall govern the action of the Tohono O'odham Council (emphasis added).

Our constitutional analysis, therefore, rests upon the definition of the term "residing," Appellees maintain that a strict population count of persons physically dwelling in a district is the appropriate construction. Appellants argue that such a literal reading both would disenfranchise over a third of O'odham members and would have the effect of disadvantageously malweighting the vote of every member other than Sells District members. This Court also is

[29] As appellant further asserts, the tribal Constitution really is a compact between members of the Nation. All unalloted lands and waters are public resources. Sections 1 of Article XVI and Article XVII. Tribal members are given equal opportunity to participate in these resources. Section 3, Article III. All members over the age of eighteen years are given the right to vote no matter where they reside. Section 1, Article X.

mindful that it should interpret the meaning of "residing" in a fashion that harmonizes, as much as possible, Section 2 of Article V with other provisions of the O'odham Constitution.

The rule of one-man, one-vote is not to benefit an individual district or geographical area. It is to assume "that each councilman [will] be accorded voting strength which [will] reflect the share of the population he represents." Daly v. United States, 483 F.2d 700, 707 (8th Cir. 1973) (emphasis added). If a physical count were the sole criteria, then 5,691 non-resident members would not be weighted; though they would still be able to vote. Without their inclusion, Sells District would be apportioned a share of 3,316 out of 10,301 members, or roughly 34%. A person who gives a Sells address on the day of the count[30] could be included in a census notwithstanding such person (1) may be transiting[31] through the district, (2) may be unable to vote in Sells District, (3) may be living there without a landsite assignment or be present merely at the favor of a District resident member, or (4) may not be entitled to the services of the District.[32]

It is repugnant to this Court to allow a member to vote in a district but not apportion the weight of that vote to the same district. Appellees' scheme not only disenfranchises a member who dwells in Sells but votes in his or her traditional district, but it inflates the weight of the Sells District vote without the actual support of the member's vote in that district. Even more alarming is the potential conflict of interest a Legislative Councilmember faces if he or she lives in Sells but represents outlying districts. A member may also be forced to look to a councilman of the Sells District to represent him even though that Councilman may have opposing interests.

Article I, Section 2(13) of the tribal Enrollment Ordinance defines "Resident" member as

> any member who lives within the Nation with the intent to make the Nation his or her only permanent home, or any member who lives outside the Nation with the intent to return to the Nation and to make it his or her only permanent home. The intent to return to the Nation shall be presumed and can only be rebutted by a preponderance of the evidence to the contrary.

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[30] The chairman of the Sells District testified that between 800 and 1,000 tribal members live in the Sells District who are not qualified as district members.

[31] This Court has not been directed to any written requirement of duration in a district before a person is counted as "residing" there. No testimony revealed exodus patterns from each district. This Court suggests that the conservative or liberal nature of each district would determine whether a member would be allowed to return to a district that he or she left.

[32] Testimony revealed that non-resident members dwelling in Sells District would need to return to their "membership" residence to obtain tribal services.

The formulation of "resident" or residence" is not novel but certainly may have an evasive way about it. See Howlett v. Salish and Kootenai Tribes, 529 F.2d 233, 241 (9th Cir. 1976). Legal residence has been held to mean a "permanent fixed place of abode which one intends to be his residence and to return to it despite temporary residences elsewhere, or absences." United States v. Calhoun, 577 F.2d 969, 973 (5th Cir. 1978). Other courts have stated that a residence cannot be lost until another is gained. This insures that everyone has domicile at any given time. See Fenton v. Board of Directors of Groveland, 203 Cal.Rptr. 388, 156 Cal. App.3d 1115 (1984); Walters v. Weeds, 246 Cal.Rptr. 6, 45 Cal.2d 9 (1988). A person's residence then, can be a question of historical and traditional intention.

We believe that by giving the term "residing" a character of permanency, the Election Ordinance harmonizes significantly with other provisions of the O'odham Constitution. For example, if as was contended by appellees, the Sells District has such a liberal policy in receiving new district members wanting to change from their historic residences, then why simply cannot the Sells District Council expedite that process to allow a change in "membership residence" preference thereby including the new district member in the Sells District count. The Land Policy of the Tribe, Article XVI, Section 4(a) of the constitution, facilitates this process:

> Lands of the Tohono O'odham Nation may be assigned to members of the nation in accordance with the following provisions;
>
> (a) Assignments of homesites for beneficial use and occupancy shall be made by the district councils under the customary procedures of their respective communities, or in accordance with ordinances enacted by the Tohono O'odham Council and approved by the district councils. (emphasis added).

Furthermore, Article X, Section 7 of the Constitution provides the mechanism for any changes in registration requirements for voting or qualifications of candidates. See page 12, supra.

If there is an exodus from the smaller communities and districts to the Sells District, and a bridge is needed to span the gap between historical tribal customs and modern realities of relocation, then the foundations of such new structure need be built at a pace that will withstand the weathers of time. The transition to voting weight that Sells District seeks can be accomplished in harmony with the Tribe's new constitution. There is no need to abruptly sever or shock the past. The Election Ordinance's reliance upon the Membership Roll does not violate Article V, Section 2.

IT IS HEREBY ORDERED that the Opinion and Order of the trial court is VACATED with instructions dismissing Plaintiffs/Appellees' Complaint.

Thomas, J. and Titla, J. Concur.

TOHONO O'ODHAM COURT OF APPEALS

Angelo JOAQUIN, et al., Appellants,
v.
Robert GOODNIGHT, Appellee.

Case No. CTA-0022
(Ref. Case No. 89-C-4650)

Decided March 22, 1991.

Richard S. Fields, Tucson, Arizona, Attorney for Appellant
Rodney B. Lewis, Sacaton, Arizona, Attorney for Appellee.

Before Judges Pro Tempore Gary L. Thomas, Steven Titla, and Claudeen B. Arthur.

Judge Thomas.

This matter came before this court on the Petition for Special Action and Application for Interlocutory Stay of Proceedings concerning the February 28, 1990 Order of Hon. Robert Hershey entered in the Judicial Court granting Robert Goodnight's Petition for Writ of Mandamus requiring Max Atwell, Personnel Director of the Tohono O'odham Nation to hold a grievance hearing regarding the termination of Robert Goodnight as Chief of Police of the Tohono O'odham Nation.

The Judicial Court sua sponte suspended and stayed the issuance of the writ in the Order of February 28, 1991 thereby rendering the Application for Interlocutory Stay moot.

Having considered that this action involves the granting of the extraordinary writ of mandamus by the Judicial Court as to the exercise of the duties of the office of the Chairman and the Personnel Director of the Tohono O'odham Nation, review of Constitutional provisions of the Tohono O'odham Nation, and construction of enactments of the Legislative Council of the Tohono O'odham Nation, this court accepts jurisdiction of the Special Action.

A Petition for Special Action is an action under the State Law of Arizona for relief previously obtained against a body, officer or persons by writs of certiorari, mandamus or prohibition in the trial or appellate courts. A.R.S. Vol. 17B, Special Actions, Rule 1. This court has power to issue

injunctions, attachments, writs of mandamus, quo warranto, review, certiorari and prohibition pursuant to Article X, Section 10 (c) of the Constitution of the Tohono O'odham Nation. While the nomenclature is obviously different for these two separate jurisdictions, the concepts are similar and the authorities underlying the legal concepts concerning writs of certiorari, mandamus or prohibition are similar. It is for convenience that this court accepts the Petition for Special Action as an invocation of this court's authority under Article X, Section 10(c) of the Tohono O'odham Constitution.

The Petition for Special Action requested, inter alia, that this court direct the Judicial Court to grant Petitioner's Motion to Dismiss in toto and to prohibit the Judicial Court from taking any further action in Cause No. 89-C-4650. This court interprets the issues on appeal to be:

(1) Whether Petitioner Max Atwell should be required to establish a defense of qualified immunity from suit for his conduct in this matter, and

(2) Whether the granting of the issue of a writ of mandamus against Defendant Max Atwell to hold a grievance hearing for the termination of Robert Goodnight was proper.

A. Immunity From Suit

Robert Goodnight, Chief of Police, brought this action for damages against Max Atwell, Personnel Director of the Tohono O'ODHAM TRIBE, personally, due to Mr. Atwell's conduct in alleged denials and violations of Mr. Goodnight's Tribal Constitutional Rights. However, neither Mr. Goodnight nor Mr. Atwell appear to be Tohono O'odham tribal members.

Since neither Mr. Goodnight nor Mr. Atwell are Tohono O'odham Tribal members, the Judicial Court did not have inpersonam jurisdiction over the parties to adjudicate any claims the Mr. Goodnight believes he may have against Mr. Atwell. See Tribal Code,

This court and the Judicial Court have no jurisdiction to enter orders as to these non-tribal members, and the Judicial Court acted in excess of its jurisdiction when determining that Max Atwell, in his private right, was personally, exposed to charges, in the Judicial Court, of non-constitutional, tortious interference with contract.

Further, if the action for damages is brought against Max Atwell acting as an official of the Tohono O'odham Nation, there has been no waiver of sovereign immunity of the Tohono O'odham to be sued and be subject to pay monetary damages. Mr. Goodnight, not being a Tohono O'odham Tribal member, has no rights under the Tohono O'odham Constitution to allege violations of any substantive rights under the Tribal Constitution. Due to his non-tribal member status, Mr. Goodnight does not have standing to raise any Bivens v. Six Unknown

Named Agent of Fed. Bur. Nar., 403 U.S. 388 (1971) money damages claim in this or the Judicial Court Tribal forums.

While Mr. Goodnight's termination may not have been grounded on the best of intentions and he is left without a forum to seek redress, their circumstances are similar to terminated federal employees have found themselves with little or no relief even when constitutional claims have been raised. Cf. Lum v. Jensen, 876 F.2d 1385 (9th Cir. 1989) and Spagnola v. Mathis, 859 F2d. 223 (D.C. Cir. 1988).

Since it appears that if Mr. Atwell is being sued in his personal capacity, that this court has no jurisdiction over him nor the Plaintiff on such action. And further, since Mr. Goodnight is not a tribal member of the Tohono O'odham Nation, he has no constitutional claims which can be raised before this court. Thus, Defendant Atwell does not have to establish any qualified immunity as to any of Mr. Goodnight's claims.

The Judicial Court acted in excess of its jurisdiction in ruling that Defendant Max Atwell was required to establish any qualified immunity from the action instituted herein. Again, the Tohono O'odham Nation has not waived its sovereign immunity from suit and liability for damages to any parties and the Constitutional protections set forth in the Tohono O'odham Nation's Constitution are reserved to its tribal members only.

The Judicial Court's decision is reversed as to its denial of Defendant Max Atwell's Motion to Dismiss.

B. Mandamus Order

The Judicial District granted the Petition of Robert Goodnight for the Judicial District to "…schedule and hold a grievance hearing regarding Plaintiff's termination as Chief of Police pursuant to the Personnel and Policies Manual..". Order, February 28, 1990.

Robert Goodnight requested the issuance of the Writ of Mandamus in the Judicial Court upon the grounds that "…this court has held that Robert Goodnight is entitled to a grievance hearing as set forth in this court's order of January 12, 1990. (Respondent Goodnight's Petition for a Writ of Mandamus). The Judicial Court opined that "Plaintiff states a claim that this court has the authority to compel a grievance hearing in accordance with the Personnel and Policies Manual". Order January 12, 1990.

Petitioners assert that due to the authority of the Chairman under Article VII, Section 2(e) of the Nation's Constitution appointment of department heads rest with the Chairman subject to the approval of the Council and, therefore, the Chairman had the authority to remove the Chief of Police in his sole discretion. Respondent asserts that the Personnel and Policies Manual required

the Personnel Director to grant the Chief of Police a hearing and other procedural relief under the provisions of the Council passed manual before the Chairman could remove the Chief of Police. The Personnel Director declined Respondent's request for a Grievance Hearing upon the grounds that the Chief of Police was a Director and subject to removal under the Constitutional authority of Article VII, Section II(e) (sic) and that the Personnel Policies and Procedures provisions were not available to him.

The Manual provides that:

> All employees of the Papago Tribe are covered by and are subject to these Personnel Policies and Procedures. A Tribal employee is considered to be anyone in regular Tribal employment under Tribal Programs funded by special grants or outside sources. (but does not include persons working or training under subsidized employment provided under Federal or State Programs such as C.E.T.A. or T.W.E.P. with the following exceptions:
> (1) The Chairman and Vice-Chairman as elected officials;
> (2) Tribal Judges appointed or elected:
> (3) Tribal attorney and others on a consultant basis;
> (4) those employed by private businesses on reservation land, such as construction companies, trading posts. etc.
> (5) Treasurer and Tribal Council as appointed officers.

While, initially, broadly declaring that "all employees of the Papago Tribe are covered by and are subject to the Personnel Policies and Procedures", the Manual commences to narrow the scope of who a "Tribal employee" is, by first, defining an "employee" to be anyone "in regular Tribal employment under Tribal Programs funded by special grants or outside sources," ("regular Tribal employment is not defined), and, thereafter, further excludes "persons working or training under subsidized employment provided under Federal or State Programs".

The Chief of Police, being an official appointed by the Chairman with the approval of the Tohono Council, would not be considered to be "in regular Tribal employment". Next, as the Respondent himself emphasizes he was working pursuant to a Public Law 93-628 Contract between the Nation and the Bureau of Indian Affairs, which would be "…subsidized employment provided under a Federal…Program." Finally, paragraph (5) exempts the Treasurer and Tribal Council as appointed officers. The Treasurer and other officers and heads of all governmental departments are appointed pursuant to Article VII, Section 2(e) of the Nation's Constitution. Why the Treasurer, alone, would be specifically exempted from the Policies and Procedures provisions and not the other appointed department heads is perplexing but not unfathomable given the inartfully drafted nature of this particular section of the Manual. Their

omission is consistent with the language of the Manual and the intent to exclude certain appointed and elected positions from its coverage.

As a Department Head, the Chief of Police is granted particular authority and responsibility under Section 3-5 of the Manual. And, while, Department Heads are integral parts of the Grievance Process as decision makers. Section 11-2 Procedure, Step 2., there is no provision made for them under the Grievance Procedures when they are terminated. Given their appointed nature, their responsibility to the Chairman, and his ultimate executive authority recognized in the Manual, it is logical that any grievances against their immediate supervisor, the Chairman, would be resolved by the Chairman himself.

In sum, we construe the Personnel Policies and Procedures manual to have excluded Department Heads, including Respondent Robert Goodnight from coverage thereunder.

This conclusion may affect the Law Enforcement Contract between the Nation and the Bureau of Indian Affairs; however, that issue is not before us for decision. The Law Enforcement Contract was not relied upon by Respondent as providing an independent cause of action for mandamus; nor do we view the language of Part I, Section C, Clause 104.5 as imposing a duty upon Mr. Max Atwell, the Personnel Director, which could be enforced by a writ of mandamus.

The mandamus remedy is only available to compel a public officer to perform a duty if the plaintiff's claim is clear and certain, the duty of the officer is ministerial and plainly prescribed as to be free from doubt and there is no other adequate remedy. Fallini v. Hodel, 783 F.2d 1343 (9th Cir. 1986); Antieau, C.J., The Practice of Extraordinary Remedies, Section 2.04 (1987). The Tohono O'odham Personnel Policies and Procedures Manual did not clearly establish that Respondent was covered thereunder and, we hold, that he was not covered thereunder. It was, thus, error for the Judicial Court to order the issuance of a writ of mandamus directed to Petitioner.

IT IS ORDERED remanding this matter to the Judicial Court for further action not inconsistent with this opinion.

Judges Steven Titla and Claudeen Arthur, concur.

TOHONO O'ODHAM COURT OF APPEALS

Allen THROSSELL and Theresa THROSSELL, Plaintiffs-Appellants,
v.
Lucille THROSSELL, and the CHUKUT KUK DISTRICT COUNCIL and individually and in their official capacities as District Council Members, Laurence JOSE, Sr., Nellie MARTIN, Archie HENDRICKS, Vincent REINO, Corrine REDHORNE, Gleason NORRIS, Floyd BENNETT, Cecil WILLIAMS, Nick LOPEZ and JOHN DOE COUNCIL PERSONS 1-10, Defendants-Appellees.

Case No. CTA-0023
(Ref. Case No. 89-C-4693)

Decided February 6, 1992.

Before Judges Williams, Titla, and Tulley.

JUDGE WILLIAMS presented the opinion of the Court

I.

In 1988, plaintiff-appellants Allen and Theresa Throssell[1] applied to the defendant Chukut Kuk District Council ("Council") of the Tohono O'odham Nation for a homesite assignment to construct a HUD home. Plaintiff Throssell requested a specific piece of land measuring 200 by 200 feet for that purpose. Plaintiff Throssell's aunt defendant Lucille Throssell, objected to his request, claiming that under her deceased husband's will she had an ownership interest in a 140 acre parcel within the district which included the land selected by plaintiff Throssell.

While the land at issue was in dispute as to whether it was within the boundaries of the Village of New Fields or the Village of San Miguel within the Chukut Kuk District, the San Miguel Village Council, by resolution dated July 11, 1989, recognized and resolved that the 140 acre tract of land claimed by Lucille Throssell, "be set over, assigned and transferred" to her, her heirs, and descendants, '"perpetually and irrevocably," for their sole and exclusive use, occupancy and enjoyment.

The Chukut Kuk District Council refused to issue or make a decision on the homesite application of plaintiff Throssell. Having not received a homesite assignment from the District Council, plaintiff Throssell subsequently filed suit in the Judicial Court of the Tohono O'odham Nation for a declaration of his right to obtain a homesite assignment on the land he had selected. On September 9, 1989, Judge Hilda Manuel dismissed plaintiff's complaint on the grounds that it was premature. Pursuant to Article XVI, Section 4(A) of the Tohono O'odham Nation

[1] Hereinafter referred to in the singular as plaintiff Throssell.

Constitution, Judge Manuel directed the Chukut Kuk District Council to exercise its constitutional authority and assign a homesite to plaintiff Throssell and to resolve the matter within 30 days.

On October 14, 1989, the Chukut Kuk District Council passed a resolution "reaffirm[ing] the claim of Lucille Throssell," and further, "that the Chukut Kuk District established the ownership of Lucille Throssell of 140 acres as identified and deeded from Mr. Tom Throssell, now deceased." (emphasis added) Evidence in the record indicates that the Council heard testimony from all interested parties. The Council heard additional testimony indicating that the Village of San Miguel claimed that its boundaries included the disputed land, and that there was a consensus within the Village that the land belonged to defendant Lucille Throssell, even though she had not occupied or used the land for 20 years. The Council also heard testimony that the community of New Fields, which also claimed the disputed land within its boundaries, recognized plaintiff Allen Throssell's interest in the land over the interest of defendant Throssell.

The Council's decision purporting to establish the ownership of the disputed parcel did not constitute an assignment of the 140 acre parcel to defendant Lucille Throssell, as a homesite. Rather, the record is clear that the Council's resolution represented an attempt to formally recognize Lucille Throssell's rights, as interpreted by the Council at least, in an area willed to her by her husband traditionally occupied by her family.

On November 7, 1989, plaintiff Throssell appealed the Chukut Kuk District Council decision to the Judicial Court pursuant to the court's power to review district council decisions under Article VIII, Section 2 of the Constitution. Plaintiff specifically requested a declaratory judgment against the Council and Lucille Throssell as Defendants on the grounds that, (1) the homesite area requested by Plaintiff had not been in use by any person for at least twenty (20) years; (2) the Council acted in excess of its constitutional authority by assigning to Lucille Throssell exclusive use of 140 acres without a delegation of authority from the Tohono O'odham Legislative Council; and (3) the Council failed to obtain the approval of New Fields Village, the Village where the homesite was located, prior to granting Lucille Throssell exclusive use of the 140 acres in issue. Plaintiff Throssell also alleged a deprivation of due process and equal protection under the Federal Indian Civil Rights Act (cite), caused by the Council's denial of a homesite to Plaintiff because the Council lacked authority to recognize any interests asserted by Lucille Throssell in the disputed land.

The Defendants moved to dismiss plaintiff Throssell's claims, and after a hearing and testimony on February 21, 1990, Judge Robert Hershey of the Judicial Court granted

Defendants' motion to dismiss. In granting the motion, Judge Hershey found that the Council had the constitutional authority to award the 140 acres to Defendant Lucille Throssell, based upon the application of District customs and tradition. He further found that the District Council recognized the validity of the Village of San Miguels' endorsement of Defendant Lucille Throssell's right to the 140 acres, while recognizing that the boundary dispute between San Miguel and New Fields still needed to be resolved.

Judge Hershey further found that Plaintiff Throssell had not been discriminated against, nor denied a full and fair opportunity to be heard before the Council, that the size of the parcel recognized in favor of Defendant Lucille Throssell was not violative of due process, and that the Village of New Fields' endorsement of Plaintiff Throssells' claim to the land had been considered. Further, Judge Hershey found that Plaintiff Throssell had not been denied a homesite by the Council. The Council had simply ruled that Plaintiff Throssells' homesite could not be within the area of Defendant Lucille Throssell's parcel. Finally, the court ruled that Plaintiff Throssell had not been discriminated against, nor denied a full and fair opportunity to be heard before the Council.

From that decision, plaintiff Throssell has filed this appeal.

II.

Article XVI, Section 4 of the Tohono O'odham Nation Constitution states that district councils of the Nation have authority to assign homesites to members:

> Lands of the Tohono O'odham Nation may be assigned to members of the nation in accordance with the following provisions:
>
> (a) Assignments of homesites for beneficial use and occupancy shall be made by the district councils under the customary procedures of their respective communities or in accordance with ordinances enacted by the Tohono O'odham Council and approved by the district councils.
>
> (b) Every member of the Tohono O'odham Nation who is the head of a family that does now own any land under allotment, or who agrees to transfer such land, including interests in land in heirship status, to the Tohono O'odham Nation, shall be entitled to receive a homesite assignment if land is available. (TON Constitution, Article XVI)

It is clear from the record at trial that the Council's recognition of Defendant Throssell's interests in the 140 acre parcel was not an assignment of homesite rights as understood according to the language of Article XVI, Section 4 of the Nation's constitution. There does not appear within the record any evidence that Defendant Throssell sought rights in the parcel "for

beneficial use and occupancy" as required under the Constitution to qualify for an assignment of homesite rights.

The first issue to be resolved by this court, therefore, is whether the Nation's Constitution authorizes a district council to vest or recognize individual property interests, other than individual homesite assignments, in lands within a district. On this issue, the Constitution is clear. With the exception of homesite assignments, ultimate control and management of all unallotted lands within the Nation rests with the Tohono O'odham Nation and its Council:

> Article XVI, Section 1. The unallotted lands of the Tohono O'odham Nation and all lands hereafter acquired by the nation, or held for the use of the nation or its members, are a valuable public resource and shall be held as national lands forever. Control and management thereof are vested in the Tohono O'odham Council, which may enact laws governing the use, assignment, permit, lease or other disposition of lands, interests in land and resources of the nation consistent with Federal Law. (TON Constitution, Article XVI, emphasis added.)

This clear and unambiguous language demonstrates clearly the express will of the people of the Tohono O'odham Nation in enacting their Constitution to maintain all unallotted lands within the Nation as a valuable resource for public use, to be managed by the Nation's Legislative Council for the benefit and use of the Nation and its members.

We understand the public policy declared by the language of Article 16, Section 1 of the Constitution to be that the unallotted lands of the Nation may only be acquired under the authority of the express laws of the Nation; those laws being the constitution and any laws or regulations subsequently enacted by the Nation's Legislative Council.

Given this expressly stated policy, it is not surprising that the Constitution places significant restrictions in delegating to district councils limited authority in dealing with the unallotted lands of the Nation located within district boundaries. Except for the already cited provisions relating to homesite assignments in Article 16, Section 4, the Constitution strictly regulates district councils in establishing or recognizing any other types of individual property interests in unallotted lands within district.

Article 16, Section 5 of the Constitution sets out the relevant limitations on district council authority over unallotted lands:

> Section 5. Lands of the Tohono O'odham Nation which are not under use, permit, lease or other disposition authorized by the Tohono O'odham Council, and which are not under assignment made by a district council, may be used for communal pastures and

> gardens by the various districts, or for public purposes of any sort. Such lands may be leased by the district council consistent with federal law and one-half (1/2) of the proceeds of such leases shall accrue to the Tohono O'odham Council and one-half (1/2) to the district council; provided that such leases are subject to approval by the Secretary of the Interior and all leases to nonmembers, and leases to members in excess of a reasonable acreage, shall be subject to approval of the Tohono O'odham Council.

Applying the language of this section to the facts of this case, we hold that the Chukut Kuk District Council exceeded its constitutionally delegated powers over unallotted lands within its boundaries. The 140 acre parcel claimed by Defendant Throssell was "not under use, permit, lease or other disposition authorized by the Tohono O'odham Council." (TON Constitution, Article XVI, Section 5) Neither were the lands 'under assignment made by a district council." The Council's attempt to recognize Defendant Throssell's inchoate possessory rights to the property did not constitute a homesite "assignment," and this is the only type of "assignment" of individual rights in unallotted lands that district councils are authorized to make under the Constitution. Thus, given that this 140 acre unallotted parcel was neither under a land use disposition authorized by the Nation's Legislative Council, nor under assignment as a homesite by the Chukut Kuk District Council, the District Council's authority over the parcel was severely limited by the Constitution. The parcel could be used "for communal pastures and gardens" by the district, or for "public purposes of any sort" under the Constitution. See id. Additionally, the parcel could "be leased by the district council consistent with federal law and one-half (1/2) of the proceeds of such leases shall accrue to the Tohono O'odham Council and one-half (1/2) to the district council."

Under the Constitution, it is clear that the district has no authority whatsoever to recognize an individual's claimed inchoate unvested possessory interest in unallotted lands, unless it recognizes that interest by assigning homesite rights in those lands to that individual. The district is also free to lease those unallotted lands to that individual, or anybody else for that matter, consistent with federal law, provided that it share one-half of the proceeds of the lease with the Nation's Legislative Council as mandated by the Constitution.[2]

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[2] We withhold judgment as to whether a 140 acre homesite "assignment" "for beneficial use and occupancy" to an individual member of the Nation would be permissible under the Constitution, or, whether a lease of 140 acres to an individual member would be "in excess of reasonable acreage," thus requiring approval of the Tohono O'odham Council." Id. However, we feel that the concerns about large assignments of lands by districts and the problems such assignments can cause as stated by Judge Manuel in her September 1989 opinion in this case are well taken: "While scarcity of land may not be a problem in Chukut Kuk District, it behooves the District Council to assign land in a

Aside from the constitutionally delegated powers, the District lacks authority to recognize possessory interests in unallotted lands of the Nation except in a manner authorized by laws enacted by the Nation's Legislative Council. As the Nation's Council has not enacted laws permitting district councils to recognize individual member's inchoate and nonvested property interests acquired by will or any other means, the Chukut Kuk District Council's recognition of Defendant Throssell's asserted rights in the 140 acre parcel was ultra vires and invalid under the Constitution, and cannot be used as a reason to deny Plaintiff Throssell a homesite assignment within the boundaries of the same parcel. We find that the Constitution's requirements as to land acquisition and use within the Nation establish a clear and orderly scheme to preserve and utilize land resources for the use and benefit of all members of the Tohono O'odham Nation. While Article IX, Section 5 of the Tohono O'odham Nation Constitution gives the district councils the right to govern themselves concerning local matters,[3] the interests of the Tohono O'odham Nation and its members as a whole have been injured by the action of the Chukut Kuk District Council in overreaching its constitutional authority. Unallotted lands belonging to the Nation and protected and reserved for the benefit of all members of the Nation under the Constitution were unlawfully set aside for the benefit of a single individual without due process of law. Such actions, when undertaken by the district council, exceed the limits of the Constitution, and are therefore reviewable, by this court.[4]

III.

This leads us to the second issue presented by this appeal; that is whether the Chukut Kuk District Council's resolution attempting to affirm and establish defendant Throssell's inchoate ownership rights of the disputed land violated Plaintiff Throssell's right of due process protected under the Constitution. In an earlier proceeding in this case, Judge Manuel underscored the problems which may arise when an individual member devises an undetermined and unperfected interest in unallotted lands by will. As Judge Manual noted, this practice may permit individuals having no legal authority or basis to exclude others from land which might otherwise be

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uniform, consistent manner with definite acreage limits.: See Order and Opinion, Case No. 89-C-4623, Throssell v. Throssell, September 28, 1989.

[3] Section 5. Each district shall govern itself in matters of local concern, except that in any matter involving more than one district in which there is a dispute, the Tohono O'odham Council shall decide the matter.

[4] Article VIII of the Constitution states, in part:

> Section 2. The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation.

assignable to them as homesites. We note that the entitlement to a homesite assignment is guaranteed under Article 16, Section 4 (b), of the Constitution. This fundamental right belonging to all members of the Nation must be vigorously protected by the Nation's courts, as well as by the other branches and district councils of the Nation.

District councils cannot elevate one member's claimed interests in unallotted lands of the Nation to the status of permanent and exclusive ownership except through the provisions outlined in the Constitution, or by laws authorized by the Nation's Legislative Council. The dangers of permitting district councils to exercise such unconstrained powers are amply demonstrated by the record in this present appeal. Defendant Throssell never sought to perfect by legal process her claim of ownership in a 140 acre parcel of land which essentially had remained unused by her for at least 20 years, until Plaintiff Throssell sought an assignment for a homesite for beneficial use and occupancy of land within the parcel. Having expended considerable time and energy in acquiring HUD approvals, Plaintiff Throssell would certainly be able to assert claims of laches and estoppel against Defendant Throssell under the facts of this case, even absent the Constitutional restrictions that prevent the council from recognizing such inchoate rights in Defendant Throssell.

Defendants contend that the Chukut Kuk District Council action was merely a recognition of defendant Throssell's property interest, not an action establishing that right. However, the parties have stipulated that the recognition of defendant Throssell's property interest effectively denied plaintiff Throssell's request for a portion of that same land for assignment as a homesite. The Council's action made defendant Throssell's possession of the land absolute. It became impossible for Plaintiff Throssell, or any other member, to ask for and receive a homesite on that section of land.

Because this action in denying plaintiff Throssell's request exceeded the constitutional authority over unallotted lands of the Nation delegated to district councils under the Constitution, and also in recognition of the dangers of establishing permanent property rights in individuals through unregulated procedures, this court finds that the Chukut Kuk District Council's action violated plaintiff Throssell's constitutional right of due process.

IV.

In accord with the Tohono O'odham Nation Constitution, there are several actions which the Chukut Kuk District Council may now take in response to plaintiff Throssell's request for the designated homesite. Pursuant to Article XVI, Section 4 (a), the Council may grant plaintiff Throssell's request and assign the land to him as a homesite. Although the testimony in the court

below suggested that it is not the custom to make assignments of sites specifically requested by a member, it would not be unreasonable for a district council to respond favorably to a request for assignment of a specific homesite. Furthermore, nothing in the Constitution would forbid such a practice.

On the other hand, the District Council is free to deny plaintiff Throssell's request, so long as the denial is based on reasonable grounds, is not arbitrary and capricious, and protects and enforces plaintiff Throssell's due process and equal protection rights under the Constitution. The Council may not deny that request, however, on the sole grounds that the homesite is located within a parcel claimed by another member of the Nation who has not perfected his or her interest in the parcel in accordance with the laws of the Nation.

Further, we want to make it clear that the parcel remains available for assignment of homesites to any other members of the Nation under procedures spelled out in the Constitution. Nothing in our decision should be read as denying to defendant Throssell the right to apply for a homesite on any portion of the 140 acre parcel, or the entire parcel, provided that she complies with the requirements spelled out in the Constitution that she intends the homesite for her "beneficial use and occupancy." The District is also free to lease the parcel to anyone eligible to lease said lands under the Constitution and laws of the Nation, provided that such lease is consistent with the Constitution and laws of the Nation. This power to lease would also include the power to lease the parcel to Defendant Throssell, so long as the Constitution and laws of the Nation are followed.

The decision of the Judicial Court is vacated and remanded for decision by the Chukut Kuk District Council consistent with this opinion.

TITLA, Judge Pro Tem, and TULLEY, Judge Pro Tem, concur.

TRIAL COURT DECISIONS

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Donald HARVEY, Petitioner,
v.
TOHONO O'ODHAM COUNCIL, Respondent.

Case No. 87-TRO-4252

Decided January 26, 1987.[1]

Before Judge Tom Tso.

Nature of Case

Petitioner requests this Court to Issue a writ of mandamus, and a restraining order against the Tohono O'odham Council, essentially adjudicating the legality of their Resolution No. 566-86 and otherwise restraining them from removing Petitioner from office as a judge of the Papago Tribe.

Facts

1. Petitioner is an enrolled member of the Tohono O'odham Tribe of Indians.

2. Respondent (Tohono O'odham Council is the Legislative Branch of the Tohono O'odham Nation, having all legislative power vested in the Tohono O'odham Nation).

3. Petitioner was appointed judge of the Papago Tribal Court in November, 1985, with a two-year tenure pursuant to Papago Tribal Council Resolution No. 848-85.

4. The Papago Tribal Council Resolution No. 848-85 was adopted pursuant to Section 2A and 2B, Chapter 1, Law and Order Code of the Papago Tribe, as amended by Ordinance No. 05-83.

5. The Law and Order Code was enacted under the authority of the Constitution of the Papago Tribe adopted by the Tribe in 1936.

6. The Law and Order Code adopted 04-07-45, governed judicial appointments prior to the adoption of the new Constitution and provided for two regular permanent judges and two associate judges to sit when needed. The Appellate Court was composed of the two regular judges and the two associate judges.

7. On September 16, 1983, the Law and Order Code was amended to provide for trial courts (Papago Tribal Courts) and for a separate Court of Appeals. The trial courts were consisted of

[1] *Ed. Note:* The Opinion was issued as a separately captioned document from the Findings of Facts, Conclusions of Law, and Order, but has been combined for publication purposes.

two regular judges and two associate judges with the Chief Judge specifically appointed to that office. The Court of Appeals was to consist of a Chief Judge and two associate judges with the Chief Judge specifically appointed to that office.

8. The provisions of the 1945 Law and Order Code which provided that judges would serve two years unless their office was abolished was deleted from the 1983 amendment. The amendment just stated that judges could be removed for cause by the Papago Council.

9. On January 18, 1986, the electorate of the Papago Tribe voted to adopt a new constitution.

10. On March 6, 1986, the new constitution was approved by the Secretary of Interior and it became effective on that date.

11. Article VIII, Section 4, directed the Tohono O'odham Council to appoint six judges within sixty days after the effective date of the new constitution; two judges for a term of two years, two judges for a term of four years, and two judges for a term of six years. Thereafter one third of the judges are to be appointed every two years for periods of six years.

12. The appointment should have been made by May 5, 1986. No judicial appointments were made, however, until December 19, 1986. At that time only three judges were appointed for terms to begin February 1, 1987.

for additional appointment of part time judges and submit their report at the next legislative session of the Council.[2]

13. Donald Harvey applied for appointment as judge under the constitution and was appointed by tribal council. The appointment was vetoed by the chairman pursuant to the provisions of Article VII, Section 5.

14. On December 19, 1986, the Tohono O'odham Council passed a resolution informing that the FY87 budget for the Judicial Branch allows for the appointment of only three full time judges and three part time judges. Three judges were appointed and the Judicial Committee was directed to receive applications for three part time judges and report to the next council session.

15. Article VIII, Section 10 of the new Constitution provides:

The Tohono O'odham Judiciary shall have the powers to:

(a) Interpret, construe and apply the laws of, or applicable to, the Tohono O'odham Nation.

(b) Declare the laws of the Tohono O'odham Nation void if such laws are not in agreement with this constitution.

[2] *Ed. Note:* Sic. (The fragment appears in the original.)

(c) Issue injunctions, attachments, writs of mandamus, quo warranto, review, certiorari and prohibition, and writs of habeas corpus to any part of the Tohono O'odham Nation upon petition by, or on behalf of, any person held in actual custody.

(d) Establish court procedures for the Tohono O'odham Judiciary.

Opinion

Petitioner brought action in this Court for an order restraining the Tohono O'odham Nation from removing him from office as judge of the Papago Tribe.

Petitioner was appointed Judge of the Papago Tribal Court on November 12, 1985, for a two-year tenure pursuant to Papago Tribal Council Resolution No. 848-85. The electorate of the Papago Tribe voted to adopt a revised constitution, which was approved by the Secretary of the Interior on March 6, 1986, and became effective on the same date. Said new Constitution provides for the method of appointment of judges.

Petitioner contends that the Tohono O'odham Nation's effort to appoint three full time judges and three part time judges has the effect of removing him from office contrary to law and does not fulfill the Constitution provision for appointment of six judges. Plaintiff essentially contends that the Revised Constitution does not abolish his two year appointment of the office of a judge of the Papago Tribe.

There are essentially three issues in this case:

1. Whether the Tohono O'odham Council Resolution No. 566-86, appointing three full time judges is legal, valid and binding; and
2. Whether provisions of the new Constitution abolish the office of a judge of the Papago Tribe pursuant to the old Constitution; and
3. Whether Papago Council Resolution No. 848-85 is consistent with the new Constitution.

Prior to the adoption of the new constitution in March 1986, the judicial structure of the Papago Tribe was established in the Law and Order Code enacted pursuant to the Constitution of 1936. The Law and Order Code provided for Tribal Courts and a Court of Appeals. It also provided for a certain number of judges, the method of selection, and their term of office.

The new constitution establishes the Judicial Branch of the Tohono O'odham Nation. In addition to making the courts a separate branch of government, the new constitution provides a judicial structure that is different in many respects from that of the Law and Order Code. The important changes for purposes of this case are the number of judges, the term of office, and the

requirement that the judges be appointed within sixty days of the date of the new constitution becomes effective.

There is a new judicial system. The 1936 constitution was superseded by the 1986 constitution. The Preamble of the 1986 constitution states that it shall supersede the 1936 constitution and Article XXI of the new constitution specifically repeals and supersedes the constitution of 1936. The judicial offices established in the Law and Order Code were abolished.

Article XIX, Section 1 of the new constitution permits resolutions, ordinances or other legislation previously enacted by the Papago Tribe to remain in full force and effect only to the extent they are consistent with the new constitution. The new constitution has the effect of abolishing the judicial offices created under the Law and Order Code.

The issue as to Petitioner is the effective date of the abolition of his office. There appears to be at least six possible dates;

1. The effective date of the new constitution which was March 6, 1986.

2. The sixtieth day from the effective date of the new constitution (Article VIII §4 requires the appointment of six judges within sixty days from the effective date of the constitution). The sixtieth day was May 5, 1986.

3. The date the chairman vetoed the resolution of the Tribal Council appointing Donald Harvey a judge under the new constitution.

4. The date three judges were appointed, which three did not include Donald Harvey.

5. The date, yet to be determined, when a full complement of six judges is appointed.

6. The date that Harvey's appointment under Resolution No. 848-85 expires, such date being November 12, 1987.

Until the effective date of the abolition of the judgeship of Harvey the resolution of 1985 appointing him a judge for two years is not inconsistent with the new constitution.

Construction of a constitution requires that the intent and purpose of both the framers and of the people who adopt it be determined and given effect. Taos v. Arnold, 685 P.2d 111, 112, (1984).

As nearly as possible a construction must be construed within the limits of the document itself. If a provision is not clear on its face or is susceptible of more than one interpretation, it must be construed in light of the constitution's intent and purpose. A constitution is legislation directly from the people while a statute, ordinance, or resolution is legislation from the

representatives of the people. A constitution is the highest form of written law. Bower v. Big Horn Canal Assoc., 307 P2d 593, 597 (Wyo. 1957).

In order to determine the intent and purpose of the new constitution attention will be paid to the purposes stated in the Preamble. Construction of the constitution will be that most likely to carry out these purposes:

> The practical construction of a constitution is to be followed, in order that effect may be given the purpose of its provisions. Thus, it is said that constitutions must be construed from a common-sense standpoint, in a way which will make their operation practicable, and that where the general welfare is involved, constitutional questions should be approached from the pragmatic, rather than from a legislative point of view. 16 Am.Jur.2d, Constitutional Law, §99.

Construction of the new constitution for purposes of this case will be done by examining the provisions of the document itself and without reference to other documents.

Upon examination of the contents of the constitution and upon consideration of its purpose and intent, the conclusion must be that the effective date of the abolition of Judge Harvey's judgeship is the earlier of the time there is a full complement of six judges or November 12, 1987, when Judge Harvey's appointment expires.

Had the framers intended that the judges appointed under the Law and Order Code serve the full term for which they were appointed, such provision could have been made. Article XI, Section 3 provides that elected public officials shall continue in office for the remainder of their respective terms. It is clear that the framers knew how to provide for completion of tenure if they so desired. That they made no such provision for judges indicates an intention that all judicial positions be filled by appointment under the new constitution.

On the other hand, it is improbable that the framers intended that there be a period of time in which the Tohono O'odham Nation would be without judges. Such a situation would be contrary to the purpose in the Preamble of promoting "the rights, education and welfare of the present and future generations of our people". Therefore, the effective date of abolition of Judge Harvey's judgeship cannot have been the effective date of the constitution. The time between this date and the date by which all six judges were to be appointed created a potential of the Tohono O'odham Nation being authorized to function without courts. The courts have jurisdiction of criminal matters, injunctions, writs of habeas corpus, and other matters where time is of the essence. The only practical interpretation is that the framers and the people of the Tohono O'odham Nation intended that there be a continuous operation of the courts.

The above reasoning also eliminates the May 5, 1986, date by which appointments were to be made as the absolute effective date of the abolition of Judge Harvey's position. The dates on which Judge Harvey applied for a Judgeship, was appointed by the tribal council and the appointment then vetoed by the Chairman fail for the same reasons.

Neither the appointment of three full time judges on December 19, 1986, nor their taking of office on February 1, 1987, effect the abolition of Judge Harvey's position. The six judgeships provided in the constitution are entirely new positions. The three judges appointed on December 19, 1986, are not filling positions where the incumbent's term ended. They are not successors to an office. For this same reason, Judge Harvey's service from March 6, 1986, to the present cannot be labeled as a holding over or as a de facto judgeship. As stated earlier, the only dates on which Judge Harvey's position can be effectively abolished are the date on which the full complement of six judges is appointed and November 12, 1987, when Judge Harvey's term under Resolution No. 848-85 terminates.

The Constitution provision for the appointment of six judges is not self-executing but requires further action by the tribal council to carry it out, namely the actual appointment of the judges.

> It is also a well established rule that constitutional provisions contemplating and requiring legislation to enforce them are not self-executing and remain inoperative except as implemented by appropriate legislation which carries out the general spirit and purpose and supplies the deficiencies. 16 Am.Jur.2d, Constitutional Law, §140.

Until all six are appointed Judge Harvey's appointment is consistent with the constitution. In actuality, his appointment fulfills the express mandate of the constitution that there be six judges and carries out the intent of a continuous judicial system.

Should Judge Harvey's term expire prior to the appointment of six judges, there is no right to continue in office.

This opinion does not address the question of whether the appointment of three full time judges and three part time judges constitutes a full complement of six judges.

Conclusions of Law

1. The new constitution is the supreme law of the Tohono O'odham Nation
2. Appointment of a full complement of six judges would have the effect of abolishing the office of any sitting judge not appointed under the new constitution.
3. A full complement of six judges has not been appointed.

4. The resolution appointing Judge Harvey is not in conflict but rather carries out the mandate of the constitution.
5. The appointment of the three judges on December 19, 1986, is legal and mandated by the constitution.
6. The court has jurisdiction to determine the legality of Resolution No. 566-86 and to make orders regarding the removal of Donald Harvey from the tribal payroll.

Order

THEREFORE, IT IS HEREBY ORDERED AND DECLARED that the adoption of Tohono O'odham Council's Resolution No. 566-86 appointing three judges is legal, valid and binding.

IT IS FURTHER ORDERED that the officials and employees of the Tohono O'odham Nation responsible for preparing, issuing, and distributing payroll are hereby restrained from removing Judge Donald Harvey from the payroll until the earlier of the two events:

1. Appointment of six judges; or
2. Expiration of his tenure under Resolution No. 848-85.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

SAN XAVIER DISTRICT COUNCIL of the Tohono O'odham Nation: Austin NUNEZ in his representative capacity as chairman, Petitioners,
v.
Jose FRANCISCO, a member of the Tohono O'odham Tribe, Respondent.

Case No. 87-TRO-4362

Decided February 1, 1988.

Before Judge Hilda A. Manuel.

INTRODUCTION

In order to manage the growing interest in developing San Xavier District lands, the Tohono O'odham Council enacted several moratoriums putting on hold any commercial or residential development within that District. Each moratorium was in effect six months. This Court is now faced with the difficult task of interpreting the most recent moratorium numbered Resolution No. 407-86 to determine whether the moratorium is applicable to allotted land developed and belonging to Mr. Jose Francisco.

I

Mr. Jose Francisco, a tribal member entered into a business relationship with Mr. King, whereby Mr. King opened and operated two businesses located on Mr. Francisco's allotment. It is these two businesses that have become the center of dispute in the instant case. The San Xavier District Council and Austin Nunez, in his representative capacity as District Chairman filed a Petition for Temporary Injunctive relief seeking to enjoin the operation of the Westover Swap meet and King's Smoke Shop.

The Petitioners cited as grounds for the Petition violations of the Moratorium, the Transaction Privilege Tax Ordinance, the Archaeological Resources Protection Ordinance and two other ordinances regulating the conduct and activities of non-member visitors to the Tohono O'odham Reservation.

In response to the Petitioners' Petition, the Court issued a restraining order on October 14, 1987 temporarily enjoining the continued operation of both businesses on Mr. Francisco's land, pending the outcome of an Order to Show Cause hearing.

After two hearings, this Court extended the temporary restraining order for 90 days with directions to the parties to attempt a resolution with regard to the archaeological issues. The Petitioners subsequently filed another Petition asking the Court to permanently enjoin the Westover Swap meet and the Smoke Shop. The basis for this Petition was similar to the grounds cited in the first Petition. Another hearing was held and testimony given by both sides on the nature of the business relationship between Mr. Francisco and Mr. King, and on issues related to the archaeological resources located on Mr. Francisco's allotment. Without entering a final decision, the Court requested both attorneys of record to submit post-trial memoranda on several issues directly related to the Petitioners standing to enforce ordinances enacted by the Tohono O'odham Council.

II

The Petitioners contend that the San Xavier District is entitled to enjoin violations of tribal ordinances pursuant to Article IX, Section 5 of the Constitution of the Tohono O'odham Nation. This Article provides that each of the eleven Districts of the Tohono O'odham nation will have the right to govern themselves in matters of local concern when the matter is not disputed by, or affects any other District. The Petitioners argue that this right to govern in matters of local concern impliedly empowers the San Xavier District to enforce tribal ordinances which affect the District.

The Court does not agree with the Petitioners interpretation of Article IX, Section 5. In its most fundamental form, the Constitution of the Tohono O'odham Nation represents a written delegation of authority from the people to the tribal government consisting of three independent branches. This delegation explicitly and broadly empowers the three branches to act on behalf of the Nation in a variety of ways.

Article VI, Powers of the Tohono O'odham Council sets forth the powers of the Legislative Branch. Section 1 (c) of Article VI expressly empowers the Council to enact laws, ordinances or resolutions affecting the welfare of the O'odham. Section 1 (c) (6) further states that the Council will provide for . . . the administration of justice, and among other functions, to enact criminal and civil laws governing the conduct of persons within the Nation's jurisdiction. It is axiomatic that these functions are inherent police powers constitutionally vested in the Council because of the sovereign status of the Tohono O'odham Nation. Inherent police powers can neither be abdicated, bargained away and are inalienable. The administration of justice with respect to enforcement and prosecution of the Nation's laws or ordinances is placed with the Nation's Prosecution and Police departments. None of the eleven Districts have the authority or the mechanics to prosecute or enforce the Nation's laws or ordinances, and none do.

Past practice shows that the Nation's Prosecutor has always represented the Districts interest in enforcement or prosecution of the Nation's laws or ordinances when the need presents itself. While the Districts can, and often do, enact resolutions necessary to maintain the welfare of District residents, resolutions concerning budget, land, civil or criminal conduct or activities, proscribed or prohibited by the Constitution invariably must be approved by the Council.

There is no precise definition of what matters are deemed to be of local concern, but reference to past legislative actions by the Council reveals that prosecution or enforcement of the Nation's laws or ordinances has not been deemed to be within the Districts power to exercise.

It is the Courts' opinion that the power of the San Xavier District to enforce tribal Ordinances must arise out of some legislative enactment delegating such power to it. The Tohono O'odham Council has not delegated its authority to exercise this police power to any District. It remains with the Council and as such, the San Xavier District cannot seek to enforce the Ordinances cited in the Petition(s).

III

The issue of standing of the San Xavier District and Austin Nunez in his role as duly elected District Chairman is moot in light of the Courts' ruling that no delegation of police powers was made by the Tohono O'odham Council to the San Xavier District.

The question then, is whether the moratorium memorialized in Resolution 407-86 by the Tohono O'odham Council applies to the developed lands of the Respondent Jose Francisco. Resolutions number 105-83; 85-84 and 239-84 previously enacted by the Council have expired by their own terms and are useful in this case only to review the circumstances giving rise to their enactments.

The proximity of the San Xavier District to the City of Tucson has attracted the attention of developers interested in developing Indian lands. One such developer, Santa Cruz Properties, Inc. proposed to develop approximately 18,000 acres of allotted land at San Xavier into residential and commercial businesses. The proposed development sharply divided the District residents and precipitated strong protest and emotion by District residents opposed the development proposal. In response to the public excitement generated by proponents and the opponents, the San Xavier District Council in office at the time enacted a resolution calling for a moratorium pending the study and drafting of a comprehensive land use code. The Council approved the District resolution and passed the first moratorium Resolution numbered 105-83. This resolution placed a moratorium on all sales, leases or land development for a term of six months. One month before the expiration date of Resolution No. 105-83, the Council was presented with a draft land use code for consideration. The council tabled action on the draft code for further study and extended the moratorium for another six months period, Resolution No. 85-84. During the period this moratorium was in effect the Council did little to review the draft land use plan and as result the San Xavier District Council requested a third extension of the moratorium. The Council agreed and enacted Resolution No. 239-84 extending the moratorium another six months. The only action taken was to request from the BIA Superintendent any information regarding agreements affecting land use within the District. (San Xavier District Resolution 3-85-8)

The San Xavier District Council knew at this point that the Resolutions were intended to be limited in duration and to expire upon either the adoption of a comprehensive land use code or by its terms. This Court is certain that the San Xavier District Council was aware of business developments in existence such as the smoke shop. Yet, no effort was taken by the District to contact the businesses and inform them of the moratoriums.

The third Resolution numbered 239-84 expired on May 10, 1985 without any final action on the proposed land use. From this date until September 9, 1986 no moratorium was in effect. The San Xavier District Council did not request an extension of Resolution 239-84.

In response to the Santa Cruz Properties, Inc. proposal, the Council established a Standing Committee and charged them with the task of reviewing all matters pertaining to the proposed development. The Committee reported back to the Council and recommended, one, rejection of the proposed development by Santa Cruz Properties, Inc., and two, a moratorium on all commercial and large scale non-Indian residential development on all lands of the Nation. The Council accepted both recommendations and voted to reject the development (Resolution No. 409-86) and imposed the moratorium (Resolution 407-86).

It is this moratorium the Petitioners seek to enforce against the development on Mr. Francisco's allotment. Unlike the previous moratorium resolutions Resolution No. 407-86 did not specify time duration and did not refer to the adoption of a comprehensive land use plan to be adopted during the pendency of the moratorium.

There is no doubt that this moratorium was proper and that the Council has the right to pass zoning or land use ordinances pursuant to Article VI and Article SVI of the Constitution of the Tohono O'odham Nation. The Court realizes that the Council should have a reasonable time within which to survey its respective needs and to adopt, if they see the need, appropriate zoning or land use ordinances. A period of considerably more than 4 years has elapsed since the enactment of the first moratorium, during which no real effort was made by the Council or the San Xavier District to pass a land use plan.

Moreover, between the expiration of the third moratorium, Resolution No. 239-84 and the enactment of Resolution No. 407-86, the San Xavier District Council did little to notify land owners of the District's concerns over the apparent haphazard development of allotted lands. Likewise no notice was provided of the future zoning ordinance to enable land owners to provide their input and comments.

In any case, the Court reads the language of Resolution No. 407-87 to mean a moratorium on all commercial and large scale non-Indian residential developments which may be proposed in the future. No intent to apply the Moratorium retrospectively can be interred from the specific language of Resolution No. 407-86. The Resolution is not curative and cannot be construed to include, and to stop, the business developments already in existence. Thus, the moratorium, Resolution No. 406-86 does not apply, and cannot be applied, to the Westover Swap meet or the Smoke Shop.

V

The issues raised by the Petitioners with respect to the validity of the business agreement, which initially was oral and most recently written, and Mr. King's knowledge and willful

violation of the leasing and tribal taxing ordinance are not appropriate for this Court to rule on. The Bureau of Indian Affairs is directly responsible for ensuring that lease agreements are in compliance with 25 CFR, Part 162. Their failure to carry out this responsibility, which has been referred to by several courts as a "fiduciary duty" may be actionable. The fact that the District put the Bureau of Indian Affairs on notice of its interest in lease agreements (San Xavier District Resolution No. 3-85-8) should provide the District with reason to complain to higher Bureau of Indian Affairs officials of the local realty office's neglect or inability to enforce or carry out the requirements of the leasing statutes.

The question of Mr. King's willful violation of the Nation's tax ordinance is not, at this time, an issue for this Court to decide. Mr. King and tribal accountants have reached an agreement regarding payment of past and current taxes. Until that agreement is violated there is no reason for the Court's involvement.

VI

The deposit of significant archaeological resources on Mr. Francisco's allotments poses a difficult twist to the case. The archaeological Resources Protection Ordinance was not enacted until August 20, 1984. The Smoke Shop was already operating and the Ordinance could not be applied retroactively. The parties, i.e. Mr. Francisco and Mr. King had entered into a written lease agreement, was it not the Bureau of Indian Affairs' duty to review the agreement and to determine that all applicable laws were complied with? Perhaps the Federal Antiquities Act or environmental control laws might have been applicable.

The Archaeological Resource Protection ordinance contains self-enforcement provisions which provide what consequences will result when the Ordinance is violated. Although the Ordinance does not expressly confer jurisdiction on the Court to review actions carried out by the parties charged with enforcement duties, principles of due process and equal protection will support the Court's jurisdiction if there is a question of arbitrary or unreasonable conduct by tribal officials in denying a person the permit or license required by the Ordinance. The administrative provisions outlining the steps necessary to secure a permit or consent have not been exhausted by Mr. Francisco. The importance of protecting the archaeological resources deposited on Mr. Francisco's allotment cannot be over stated. It is imperative that he take whatever steps are necessary to protect, in accordance with the Ordinance, those resources.

In summary, it is the Court's decision that the San Xavier District cannot exercise a police power expressly reserved to the Tohono O'odham Council to enforce violations of tribal ordinances, and, the clear language of the moratorium, Resolution No. 407-86 applies only to

future developments of the type described in the resolution and cannot, in light of due process, be applied retroactively.

In accordance with this decision, the Petitioners Petition for Permanent Injunctive Relief is hereby denied, and, the Temporary Restraining Order issued on October 14, 1987 is hereby dissolved.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In the Matter of the Estate of Harry FRANCISCO, deceased.

Case No. 87-P-4290

Decided June 3, 1988.

Before Judge Hilda A. Manuel.

SUMMARY OF THE CASE

The Petitioner in this action brings this matter before the Court through the filing of a Petition to Probate the estate of her deceased husband. The Petitioner invokes the jurisdiction of the Court Pursuant to Chapter III, Section 16 of the Civil Code of the Tohono O'odham Nation. Although the Petition was originally filed in May of 1987 no hearing has been held until June 1, 1988. It appears that the Court did not entertain the merits of the Petition at the request of the Petitioner and other interested parties challenging the Petitioner's claim to the estate of the decedent, Harry Francisco. In addition to the Petitioner, there are three children named as heirs to the estate. The decedent's sole surviving sister and the children of a predeceased brother have become involved in the case after being summoned by the Court as "concerned parties". The relief sought by the Petitioner, Eloisa Francisco is distribution of the estate between her and the three children. The concerned parties have objected verbally to the Petitioner's claim for relief with respect to items #2 and #4 of the Petition. The concerned parties represented by Enos Francisco, Jr., a nephew of the decedent and Delores Savala, the surviving sister of the decedent base their challenge to distribution of the property identified as "the rock house" and "the ranch" on the contention that both pieces of property were ancestral property and should be maintained for use and enjoyment by members of the families on both maternal and paternal sides. The Court heard testimony from both sides concerning the acquisition of the property and the intended usage as recalled by the witnesses. There was no documentary evidence offered to

establish the truth of the ancestral property claim. It is not known whether such evidence even exists. In any case, the Court took the matter under advisement to answer several questions and enter findings of fact and conclusions of law with respect to the rights of the parties. This Order and Opinion states the Court's decision.

FINDINGS OF FACT

The Petitioner alleges jurisdiction is invoked by Chapter 3, Section 16 of the Civil Code of the Tohono O'odham Nation. Section 16, entitled Determination of Heirs, provides that any person claiming to be an heir of a decedent dying intestate can petition the Court for a determination of heirs. The instant Petition does not request such a determination. Instead, the Petition seeks probate of the estate of the decedent. The Petitioner alleges, by her pleading, certain persons as heirs entitled to share in the eventual distribution of the estate. The defect in the Petition is not fatal to the case and the Court will infer by the factual allegations contained in the Petition that the defect was merely an oversight by the Petitioner's advocate. The Court will, however, refer to the testimonial evidence presented to a fashion a finding of fact with regard to which persons are to be considered lawful heirs of the decedent. The Civil Code provides no definition of the term heir so the Court has looked to other sources to arrive at its determination.

Section 16 does provide that tribal custom can be a basis for determination of heirs. There is no argument by the Petitioner inviting the Court to look to tribal custom in determining lawful heirs in this case.

As such, the Court has reviewed the intestacy statutes of the State of Arizona and the Bureau of Indian Affairs' regulations governing probate to guide its finding in this matter. Typically, the definition of heirs under both of the above referenced laws, lists the surviving spouse and children of the decedent as succeeding to the estate of the decedent. The order of succession is further defined in the event the decedent left no surviving spouse or children. Generally, parents, siblings or grandparents of the decedent can claim before other relatives.

In the instant case, the issue is not whether the Petitioner and her children are lawful heirs of the decedent. The dispute centers on the two items of property listed as a rock house and ranch. Therefore, the Court will enter a finding of fact determining that Eloisa Francisco, Petitioner, and Harrison, Harriet and Lois Francisco, children of the decedent, are hereby determined to be lawful heirs of the estate in accordance with established case precedent and law. The Court further rules that Delores Savala and her family and the children of Enos Francisco, Sr., decedent's brother are likewise determined to be lawful heirs in a limited manner which the Court will explain further in a succeeding part of this opinion.

The Court further FINDS that general jurisdiction is vested with this Court pursuant to Chapter 01, Section 01 of the Civil Code of the Tohono O'odham Nation.

The parties challenging the Petitioner's request for distribution of the decedent's property give rise to their challenge, not by pleading, but through oral testimony. The Petitioner, neither by nor through her advocate representative objected to this challenge. As a matter of procedure, this challenge might have been better plead through the filing of a counterclaim or response to the Petition.

However, because the Petitioner has not objected the Court will bootstrap the challenge to the authority of Section 16, which requires the Court to give notice to all possible heirs upon receipt of a claim. This is how the counterclaimants were noticed and entered the case. Thus, the challenge issued by Delores Savala and Enos Francisco, Jr. is deemed to be an oral response and counterclaim.

Their claim is that the rock house and the ranch should be awarded to the "family". The testimony presented by Mrs. Savala and Mr. Francisco alleged that both pieces of property were acquired as ancestral property. The dates of actual habitation of the two land areas was not exact, but it is clear that the rock house was standing in 1944, the year the Petitioner married into the Francisco family. This fact was substantiated by testimonies given by Augustine Narcho, Delores Savala and the Petitioner herself. Thus, the Court FINDS that the rock house was built before the decedent married and started his family.

The counterclaimants further testified to the "communal" character of the rock house. Family members allegedly were welcome to use and enjoy the rock house during visits to Fresnal Canyon. On the other hand, the Petitioner was not able to dispute or corroborate this testimony because she did not arrive at Fresnal Canyon until 1944. Her testimony as well as the testimony of her children related events occurring after the marriage. The Petitioner's contention is that she and the children should be awarded the rock house to the exclusion of the counterclaimants and their respective families because of the admitted fact that upkeep and maintenance of the rock house was carried out by the decedent. The Petitioner also argues that the absence of the counterclaimants during the years following the marriage should be determinative of her right to claim the rock house.

On the other side, the testimony given by Mrs. Savala and Mr. Francisco gave reasons, which this Court finds reasonable, for the prolonged absences by them. More importantly, the Court is persuaded by the testimony offered relating the communal nature of O'odham families. The Court agrees that it is well recognized and accepted that extended family units traditionally lived

within clusters in close proximity to each other. Often living structures were built without limiting occupancy to only certain family members to the exclusion of others. Moreover, the Petitioner in closing remarks did not dispute the familial character of the rock house.

The assertion by the Petitioner of superior rights merely on the basis of absence and a lack of contribution by the counterclaimants towards the upkeep and maintenance of the rock house is not persuasive. The Court is not ready to fashion judicial precedent which in effect will undermine the traditional custom of communal living enjoyed by O'odham since their creation. The Court would be imposing a requirement which is contrary to the basic notion embodied in the Constitution of the Tohono O'odham Nation that all tribal members are entitled to equal and common enjoyment of the resources of the Nation. Accordingly, the Court FINDS that the rock house was constructed to be used and enjoyed by members of the family represented in this case.

The counterclaimants also challenge the Petitioner's claim to the ranch area. The Court in view of the testimonies given describing the method of acquisition of this area, and, in accordance with the reasoning given with respect to the rock house, FINDS that the ranch area, as identified in Court and in the Petition, is likewise of a familial nature and character. The Court concludes, as a result, that the ranch area cannot be restricted for use only by the Petitioner and her children.

In the interests of fairness, the Court further FINDS that the upkeep and maintenance of the rock house must be shared equally by the family members. It is also advisable that all family members arrive at a workable agreement clearly outlining responsibilities and expectations. For logistical and convenience purposes, the families may be required to coordinate, with adequate notices to all, of intended visits or stays at the rock or ranch house. The Court also, FINDS, in light of the statements given by the parties during the hearing, that access and use of the pasture area within the ranch boundaries, should be reasonable and considerate of the equal rights of all members of the families. The Court strongly encourages the parties to cooperate and respect each other's rights.

As a final point, the counterclaimants should, without urging by this Court, reimburse the Petitioner and her children for the costs they have incurred in rehabilitating the rock house and the ranch area, in an amount that reflects the equal share as a result of the Courts' findings in this case.

For these reasons, the Court concludes as a matter of law that the estate of the decedent, Harry Francisco consisting of the following personal property: block house located on the lot in Fresnal Canyon, with two storage buildings is awarded to the Petitioner and her children; that the rock

house and the ranch including several structures and a pasture area retain their character as ancestral property and are hereby awarded to all family members represented in this case for equal use and enjoyment.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

LaNova SEGUNDO, Petitioner,
v.
Richard RAMIREZ, Respondent.

Case No. 87-CV-4338
(decision aff'd in part and denied in part by *Ramirez v. Segundo*, 1 TOR3d 5 (Aug. 1, 1989))

Decided August 19, 1988.

Rodney B. Lewis, Attorney for Petitioner.
Respondent, *Pro Se*.

Before Judge Ned Norris, Jr.

INTRODUCTION

This matter has come to the attention of this Court on the Petition of the Petitioner, through her Attorney, Mr. Rodney B. Lewis. At the trial, the Petitioner, Ms. LaNova Segundo, is present, with Counsel, Mr. Lewis. The respondent is present without Counsel and is questioned by the Court on his intentions to secure Counsel and to file an answer to the Petition. The Court is satisfied that the respondent has intelligently waived his right to Counsel and is not intending to file an answer to the Petition, however is ready to proceed with the trial and will further make oral response to the Petition, during this hearing.

I.

The Petitioner alleges that for the past ten (10) years, on or about 1977 to 1987, with the exception of approximately one (1) year during 1985, both the Petitioner and the Respondent lived together as husband and wife and in doing so held themselves to the general public as husband and wife. The Petitioner further states that the Respondent has told the Petitioner that he intended to share his life, his future, his earnings, and further that all property and debts acquired while living together as husband and wife would be shared jointly.

II.

The Petitioner is requesting this Court for the following relief:

1. Maintenance to the Petitioner in the amount of $500.00, per month for not less than five (5) years, or

2. That the Court divide the entire joint tenancy holdings of the parties and impress a trust upon all of the property being held by the Respondent or on the Respondent's behalf that has been acquired through the joint efforts and endeavors of the Petitioner and Respondent, and

3. The Court order a fair division of debts and obligations contracted jointly and specifically that the Respondent be ordered to pay the debt owed to Norwest in the amount of fifty-eight dollars and twenty-five cents ($58.25) per month, and

4. The Court order that the house trailer acquired by LaNova Segundo be awarded to the Petitioner, and

5. That the Court order the 1979 Chevrolet automobile be awarded to the Petitioner, and

6. Whatever else the Court deems just and equitable.

OPINION

In review of the contents of the Petition and the testimony provided to the Court at the hearing, it is clear that the issues presented to the Court are issues of Palimony, Co-habitation, and issues related to a case of Divorce where both parties had not consummated a marriage.

Counsel for the Petitioner requests to the Court that this case be treated much like a divorce, because the relationship between the Petitioner and the Respondent was of a Husband and Wife relationship, where both parties participated in the rearing of their child, both pulled their resources together, that is, their pay checks and personal property was purchased through this relationship and that the Respondent provided support for the child. Counsel further states that this case is a case of both an expressed oral contract, where certain promises were made between the two parties, and, it is one of implied infact contract, where both had expectations. At no time during the course of the hearing does the Respondent deny or present contradicting testimony contrary to the Plaintiffs claim that during the relationship they lived together as husband wife and further held themselves out to the general public as husband and wife. In furtherance of this the Respondent has failed to deny or contradict the Plaintiffs claim that he told Ms. Segundo that he intended to share his life, his future, his earnings, and further that all property and debts acquired while living together as husband and wife would be shared jointly.

The Respondent contends that during the time the relationship existed he was committed and did in fact contribute to the relationship as it has been testified to by the Petitioner, LaNova Segundo. That it was her decision to terminate the relationship and therefore once she decided to

do such she also terminated the arrangement of each contributing to the well being of the relationship. He further contends that he was not totally aware of what all the financial obligations were, which was the reason why she was given money, because she knew what she was doing, she knew what the obligations were, and again he committed totally to this. He further contends that, the Petitioner had a tendency to provide material items to the children to compensate for her absence from the home, or for not spending an adequate amount of time with the children.

Although there exists in Chapter 3, Section 9, of the Domestic Relations Chapter in the Law and Order Code, a section of law which recognizes only ceremonial marriages, it should be pointed out here that the case at bench is a case of an expressed oral and implied infact contract, and therefore the applicability of Chapter 3, Section 9 does not apply.

In support of this decision, the Court makes citation to the following Arizona Case law: Cook v Cook, 142 Ariz. 573. and Carrol v. Lee, 148 Ariz. 10. In Cook v. Cook, the Arizona Supreme Court held the following:

> "…this evidence of Rose and Donald's express agreement, intention and subsequent course of conduct strongly support a finding that they did contract to pool their earnings and share equally in certain assets. The sine qua non of any contract is the exchange of promises. Restatement (second) of Contracts §1 at 2 (1957). Although it is most apparent that two parties have exchanged promises. Restatement (second) of Contracts §1 (1981). From this exchange flows the obligation of one party to the other. 1 Williston on Contracts, §1 at 2 (1957). Although it is most apparent that two parties have exchanged promises when their words express a spoken or written statement of promissory intention, mutual promises need not be express in order to create an enforceable contract. Restatement (second) of Contracts §4."Cook v. Cook, 142 Ariz at 576.

The Supreme Court further held that:

> "although isolated acts of joint participation such as cohabitation or the opening of a joint account may not suffice to create a contract, the fact finder may infer an exchange of promises, and the existence of the contract from the entire course of conduct between the parties. Here, there is ample evidence to support a finding that Rose and Donald agreed to pool their resources and share equally in certain accumulations, their course of conduct may be seen as consistently demonstrating the existence of such an agreement. Thus, the trial Court would not need to find an agreement by relying on the testimony of one party to the

> exclusion of the other, as some courts have done." Cook v. Cook, 142 Ariz. at 576

In the second case cited by the Court, Carroll v. Lee, supra, the Arizona Supreme Court held the following;

> We disagree with the above reasoning and now reach the unanswered question from Cook as to whether an Agreement between unmarried cohabitants with homemaking services severable from a meretricions relationship as consideration can stand. In Arizona we recognize implied contracts, Arizona Board of Regents v. York Refrigeration Co., 115 Ariz. 338, 341, 565 P2d 518 521, (1977), and there is no difference between an expressed contract and an implied contract. Swingle v. Myerson, 19 Ariz. App. 607, 609, 509 P2d 738, 740 (1973). An implied contract is one not created or evidenced by explicit agreement, but inferred by the law as a matter of reason and justice from the acts and conduct of the parties and circumstances surrounding their transaction, Alexander v. O'Neil, 77 Ariz. 91, 98, 267 P2d 730, 734 (1954)." Carroll v. Lee, 148 Ariz. at 13.

As in Lee and Cook, the case at bench does present similar findings by this Court. This Court recognizes that both La Nova and Richard, conducted themselves to the general public as husband and wife, through their conduct in the community. Further, that both agreed to pool their resources together, for the purposes of benefiting the relationship, and finally, that the relationship between the Petitioner and the Respondent did constitute both, an expressed contract and further an implied one.

It is therefore **ORDERED, ADJUDGED and DECREED** that:

1. The Petitioner is awarded maintenance, in the amount of $300.00 per month, for not less than five (5) years or until the Court has been presented with satisfactory evidence that the award should be modified.

2. The Respondent shall commence the maintenance payment no later than 30 days from the date of this opinion and order, and shall be deposited with the Courts.

3. The Respondent continue the maintenance payment each month thereafter, and payable no later than the last Friday of each month.

4. Through stipulation of both parties the Respondent is awarded the 1986 Chevrolet pick-up, and the Petitioner is awarded the 1979 Chevrolet Caprice. Each party is responsible for payments and/or maintenance costs incurred by each separate award.

5. The Respondent is further ordered to deposit with the Court, transfer of title of the 1979 Chevrolet, no later than five working days upon receipt of this opinion and order.

6. The Respondent is further ordered to pay the following debts contracted between the parties, a.) Norwest $58.25; b.) Telesound $43.00; Mervyn's (his account).

7. The Petitioner is ordered to pay the following debt contracted between the parties, a.) Telesound $73.00.

8. The Petitioner is awarded the house trailer.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In the Matter of the Estate of Ned Leo NORRIS, Sr. Deceased.

Case No. 87-P-4304

Decided December 6, 1988.

Before Judge Hilda A. Manuel.

The decedent died intestate on December 7, 1985, and was survived by his spouse and seven children and six other children from previous marriages and relationships. The estate consisted of assorted personal property, 6 head of cattle, a brand and real property allegedly assigned to him for homesite purposes by the Chukut Kuk District Council. The surviving spouse petitioned to settle the decedent's estate by filing a Petition to Settle on June 16, 1987. The hearing was set for July 29, 1987. One of the decedent's daughters from a prior marriage motioned to continue the hearing which was granted by the Court. This petitioner, Ms. Nadine Norris, also filed a Motion to Dismiss, requesting the Court to determine lawful heirs and to require the Petitioner, Mrs. Mary Ann Norris, to amend her petition to include any insurance policies the decedent owned at his death. Ms. Norris also alleged that reference to tribal custom and tradition in the disposition of the estate required prior notice of the applicability of custom and tradition to enable preparation of an adequate argument. In light of these contentions the Court continued the matter to a later date for a determination of legal heirs. The Court also left to the discretion of the parties the choice of referencing custom and tradition practices in settling the estate.

On February 24, 1988, the Court determined the lawful heirs of the decedent. In addition the Court ordered the spouse as Petitioner to file an amended petition listing insurance policies owned by the decedent at the time of his death. The matter was continued to March 24, 1988, at which time the Court stated tribal custom and the Arizona Probate laws would be applied. After several more continuances the matter was finally argued on October 28, 1988.

The original petition filed to settle the estate of the decedent invoked the jurisdiction of the Court by citing Chapter 2, Sections 1 and 2 of the Civil Code of the Tohono O'odham Nation (formerly the Papago Tribe). Section 1 provides the basis upon which the Court can exercise personal jurisdiction over members and non-members bringing actions in the tribal court.

Section 2 recites what law will be applied in such civil action. A literal reading of the language of Section 2 indicates that federal law is given preference followed by applicable Bureau of Indian Affairs' regulations and then any ordinance or custom of the Nation (Tribe) not prohibited by federal law. In addition, Section 2 allows the use of "counselors familiar with customs and usages" to provide evidence when a doubt arises concerning such practices.

The first Petitioner, Mrs. Mary Ann Norris contended through her advocate, that the estate should pass to her under tribal custom. This contention was related during one of the scheduled proceedings and merely consisted of oral argument by the advocate.

The Petition itself makes no reference to this point except that Section 2 is cited as the basis for jurisdiction. The decedent's daughter, Nadine Norris, herein referred to as Respondent-Petitioner, objected to the application of tribal custom because of the unusual nature of the case involving heirs from four different women.

This objection was set forth in a Motion to Dismiss and Memorandum of Law filed by the respondent-petitioner's attorney. The Court in response to this Motion and Memorandum left the choice of application of tribal custom to the discretion of the parties with the proviso that each side could present testimonial evidence from someone familiar with tribal custom.

The argument of the respondent-petitioner, Nadine Norris, in support of her position that tribal custom should not be applied has merit for a number of reasons. At first glance, the matter before the Court appears to be a simple case of determining who the lawful heirs of the decedent are and dividing his estate among those heirs. The case is complicated by the Petitioner's contention that she alone is entitled to the estate to the exclusion of children determined by the Court to be lawful heirs.

The case is further clouded by the language of Section 2 regarding the choice of law to be applied. However, in view of the Petitioner's argument that tribal custom should be the choice of law a discussion of this point will preface the Court's interpretation of Section 2.

As a matter of law, it is axiomatic that the Petitioner, as the proponent for application of tribal custom has the burden to offer proof to satisfy the evidentiary requirements implicit with this kind of fact. And, because there is no written treatise or definition of what "tribal custom" is in the Civil Code, the drafters of Section 2 provided a means to prove tribal custom and by enlisting

the expertise of "counselors familiar with tribal custom and usages". This clearly supports the position that as a factual matter the proponent must offer evidence of the existence of such tribal custom.

Thus, the Petitioner has the burden to go forward and establish the proof of tribal custom. The term "counselors" is not defined in Chapter 2 and apparently is left to the discretion of the Court to define its meaning. Since the "law of tribal custom" is not codified or easily defined the practice has been to call elders familiar with tribal custom to offer their expert opinions. These opinions may vary depending on the dialectic grouping the particular elder belongs to. Moreover, the application of tribal custom in probate matters has been too infrequent to provide a clear definition as precedent. To facilitate expedient probate, the Court has encouraged parties to arrive at a workable agreement distributing estates without court direction. If the parties chose to distribute estates in accordance with their respective knowledge of tribal custom the Court will ratify such agreements without delving into evidentiary analysis.

The proponent had the opportunity to call expert witnesses to testify to their knowledge of tribal custom and did in fact summon an elder from Poso Verde to one of the scheduled hearings. Due however to a continuance no testimony was given by Mr. Antone. No other witnesses were called in subsequent hearings although the petitioner/proponent did present the opinion of a witness called to testify to another fact in issue.

This witness, Mr. Ramon Chavez, was the District Chairman for the Chukut Kuk District Council during the period the decedent allegedly requested the land assignment. His testimony supported the Petitioner's position that the decedent had obtained the land assignment to build a home for his family. In addition, Mr. Chavez, was asked his opinion regarding how succession to an estate was determined under customary practices. Mr. Chavez testified that his understanding was that the surviving spouse inherited the entire estate. Mr. Chavez did qualify his opinion by stating that it was his own personal opinion. As such, the Court will consider his testimony in that light and cannot as a matter of law consider his personal opinion to be conclusive on the issue. No other evidence was offered by the proponent.

The application of tribal custom has not as a matter of practice been used by the O'odham since the 1930's. The adoption of the Law and Order Code and the Constitution in 1937 brought many changes to the traditional ways of the O'odham. Anthropological studies conducted during the period when tribal custom and usage was strongly practiced reveals that the O'odham kinship system was based on the patrilineal/patriarchal family. Daughters who married went to their husbands' homes and were cared for by the husbands' family. Upon death or divorce the woman

always returned to her fathers' home. No property was taken by the woman. Her father resumed the care he had prior to her marriage. Property was passed to the sons but not necessarily in order of seniority. Rather the father passed property, including land, to the son who seemed the most responsible. Daughters were not given property, but instead were cared for by the brothers who took over in the same manner as the father until the daughters married. There was some variation among the O'odham in accordance with their particular dialect grouping, but, as a general rule the woman did not inherit property.

The evolvement of the tribal court system as the dispenser of justice brought in the application of non-O'odham values and laws. These laws or ordinances were models of non-Indian systems and although the Law and Order Code gave deference to tribal custom, there has been no real application. Other factors which influenced the abandonment of tribal custom were the lifestyles of the O'odham themselves, awareness of individual rights and ordinary greed. Traditional notions of kinship and communal living were replaced by individualism and personal property ownership. Intra-family disputes have become more frequent especially in cases where there is more than one family claiming an interest in the disputed property. If tribal custom is applied in this case, the Petitioner/proponent of tribal custom would inherit nothing. The Court would be required to make a distribution to the male heirs found to be responsible. Not only is the Court not ready to carry out this function, the application of tribal custom would work a great injustice and give rise to potential equal protection problems. The application of tribal custom would be indefensible because of its lack of definition and consistent application, but moreover, because the Nation has not codified custom into a uniform law nor required its application.

The order of preference listed in Section 2 begins with federal law. There is no 'federal law' per se on intestate succession. Generally, Courts will refer to the law of the state where the property is located for definition. This is also true in cases where trust property is involved and Bureau of Indian Affairs' regulations are being applied.

In the instant case, there is no trust property, thus Bureau of Indian Affairs regulations are not applicable. There is likewise no tribal ordinance on succession to property so tribal ordinances are not applicable. Tribal custom is inappropriate for the reasons previously discussed by the Court. Arguably, the only choice applicable is federal law. Intestate succession under federal law is defined by state law. State law in this case is Arizona law. A quick review of intestate succession under Arizona law reveals that property is defined either as community or separate property.

Property is then passed to lawful heirs in accordance with rules governing patterns of heirship based on representation. The patterns of heirship are clearly intended to protect the interests of all lawful heirs and make provisions for them as necessary. This is not contrary to the customary practice of the O'odham under its kinship system.

Generally, community property is defined as any or all property acquired by the spouses during a marriage relationship. Each spouse is deemed to own a half interest in the community property unless otherwise proven. Separate property is property owned separately by a person before the marriage or acquired as separate property without community funds. These definitions have no application in this case because no such characterization has been made by any of the parties. The dispute centers on use and enjoyment of land obtained by the decedent for homesite construction. The petitioner, Mrs. Norris, intimates that the decedent intended the land assigned to be used and enjoyed by members of his current family. The testimonies of the decedent's immediate family consisted of hearsay statements allegedly made to them by the decedent. The Court is not convinced that the decedent intended to disregard his children from previous relationships without more credible evidence. The decedent's relationships with these children was apparently maintained in some fashion. He may not have intended to provide for them because they were all adults and had families of their own, but his continuing contact clearly dispels any notion that he intended to exclude them.

The land in dispute is not allotted land which can be owned by the decedent. The land is tribal land merely assigned to the decedent for homesite purposes. The land assignment is valid only for the purposes intended and can, theoretically, be assigned to someone else by the District Council. The customary practice among the Districts has been to allow land assignments to district members. The member may build and maintain a household which continues to be inhabited by family members beyond the death of the assignee. This practice has resulted in specific families occupying an area within the district for many generations. As such, these families develop beliefs that the assignment belongs to the family and only family members can use or enjoy the land. Too often, however, these same families limit use or access to only those family members deemed or defined by them as true family members. This has resulted in intra-family exclusions and disputes.

The Court was faced with this problem in the case of In the Matter of the Estate of Harry Francisco, 1 TOR3d 55 (Trial Ct., Jun. 3, 1988). The Court recognized the communal nature of O'odham families and found that living structures were often built without limiting occupancy to only certain family members. The Court held that the land in dispute was intended and obtained

for the use and enjoyment of all Francisco family members. The application of this holding to the instant case is appropriate. No evidence has been given to warrant this Court holding that the decedent intended to exclude his children from previous relationships to use or enjoyment of his assignment. The land cannot be characterized as community or separate because it is tribal land not subject to private ownership. While the land may remain in the control of the Norris family for generations, it does not become the sole property of the family. Therefore, it is the Court's finding that the lawful heirs of the decedent, Ned Norris, Sr., were not excluded from use or enjoyment of the land in dispute and, in accordance with this finding the Court Orders that all lawful heirs have a right to the use and enjoyment of the land located within the Chukut Kuk District, provided that access and use is made with notice to all the heirs and that upkeep or maintenance be shared among the users in equal proportion to their use.

The Court further holds that any lawful heir may renounce their interest or right to use the land by giving written notice of such decision to the Court and the remaining heirs.

Further, the Court Orders that the estate of Ned Leo Norris, Sr., consisting of personal property, not including the improvements or attachments located on the land assignment, are awarded to the petitioner, Mary Ann Norris, as her sole and separate property; and that the livestock consisting of six (6) head of cattle and the brand identified as _____ are also awarded to the petitioner, Mary Ann Norris as her sole and separate property.

SO ORDERED.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Enos FRANCISCO, Jr. Chairman Tohono O'odham Nation, Plaintiff,
v.
Harriet TORO, Chairperson Tohono O'odham Legislative Council and ALL MEMBERS OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL, Defendants.

Case No. 89-C-4537
(appeal dism'd, *Francisco v. Toro*, 3 TOR3d 17 (Sep. 4, 2008))

Decided January 12, 1989.[1]

Before Chief Judge Hilda A. Manuel.

[1] *Ed. Note:* The Order and Opinion were issued as separately captioned documents, but have been combined for publication purposes.

This is an action brought by Enos J. Francisco, Jr., Chairman of the Tohono O'odham Nation and Chief Administrator of the Executive Branch. The Chairman sought a preliminary injunction to prohibit the Tohono O'odham Legislative Council from implementing or enforcing Resolutions numbered 318-88, 320-88 and 322-88. The Plaintiff contends that the resolutions are in violation of the separation of powers doctrine embodied in the Constitution of the Tohono O'odham Nation, and, seeks a determination of their constitutionality in view of this doctrine.

It is apparent that a series of events gave rise to the instant court action although no factual information has been given by either side. It is also apparent that tension exists between the Chairman and the Legislative Council. The tension exhibited by the Chairman is best characterized as defensive in nature fortified by the threat of his veto power which implicitly has been used as a means to frustrate legislative purposes. It is also fair to say that both the Executive and Legislative officials have acted in an improvident and inflexible manner giving rise to the inevitable consequence now before this Court.

Deciding whether the actions of one branch of government exceeds the authority given it by the Constitution is a delicate exercise in constitutional interpretation, and is a responsibility of this Court. Binding on the Court, however, is the need to practice self-restraint without passing judgment or inquiring into the wisdom or efficacy of the actions or events giving rise to the case. The Motives of the parties are not for this Court to scrutinize provided that the purposes are not expressed or sought to be enforced through means that offend the Constitution. As such, this Court approached cautiously the questions presented, and attempted to fashion a constitutional interpretation which will aid in the orderly formation of a viable working government. The Court took into consideration the short history of practical experience under the doctrine of separation of powers and took care to arrive at a decision which will not frustrate the intent of the Constitution nor interfere with the expected experimenting likely to result as the new government takes shape. More importantly, the underlying notion behind the Court's decision is the desire that the tribal government will evolve into a new government without sacrificing the traditional and customary practice of governing unique to the O'odham. An integration of 'old' ways will result in a truly sovereign Nation. Moreover, it is important that internal clashes be kept within the Nation and resolved in a manner not inconsistent with the Constitution nor detrimental to the internal workings of the government.

The questions raised by the Chairman's action present issues of first impression for the Tohono O'odham Courts. Cases involving alleged violations of the separation of powers doctrine have never before been reviewed by this Court.

On January 18, 1986, the O'odham voters adopted a new Constitution which mandated the separation of powers as the framework for a new tribal government. This doctrine radicalized the existing government structure. Prior to the adoption of the new constitution, the Tohono O'odham Nation functioned as a tribal government under the authority of a constitution adopted in 1937 pursuant to the Indian Reorganization Act (IRA) of 1934. Neither the 1937 nor the 1986 constitutions are indigenous to the O'odham. The 1937 Constitution was modeled after the official IRA draft imposed on Indian tribes by the Bureau of Indian Affairs. The 1986 Constitution is a mixture of the old version and imitative of the U.S. Constitution and other non-Indian constitutions embodying the separation of powers doctrine. This form of governing is virtually non-existent among Indian tribes; less than five (5) Indian tribes throughout the United Sates have similar constitutions mandating a diffusion of power among three independent branches of government. Little by way of tribal case precedent was available for review in arriving at a decision. Thus, the case must be determined on the basis of past practices with deference to the notion of keeping intra-tribal disputes within the confines of the Nation.

The Court today will seemingly reverse an opinion rendered by the Chief Judge at the Chairman's request concerning the constitutionality of the same resolutions. The advisory opinion issued earlier may well impair the Court's position as the final organ for constitutional interpretation and perhaps even affect the confidence in its moral sanction. But in response it may be emphasized that the issues presented by the Chairman's action now for the first time raise real claims for a perceived wrong which is strongly entangled in a clash of political forces thereby threatening the orderly operation of the government. In such a setting, the Court is faced with the unenviable task of interpreting the Constitution and fashioning a judicial remedy even though it may foreshadow a deeper and more pervasive difficulty in consequence. Moreover, the advisory opinion of a judge suffers the infirmity of confusing the issue of a power validly exercised with the cause it is invoked to promote. The tendency is to emphasize momentary results on policies, and lose sight of enduring consequences on the Nation as a whole. Furthermore, the advisory opinion was issued with the objective of providing the Chairman with an analysis of the relevant issues in the hope that the opinion would enable him to substantiate his veto message. A well reasoned veto message had the assuasive potential for compromise between the feuding branches thereby relieving the Court from injecting itself into the dispute. Unfortunately, compromise or cooperation was beyond reach and the Court is now faced with the task of deciding whether the actions are in violation of the Constitution.

The doctrine of separation of powers has been defined simply as the division of power among three independent and separate branches of government. Theoretically, the doctrine was designed to avoid a dangerous concentration of power in one branch. Judicial history points out however, that this theoretical framework has never existed in pure form. A century and a half of trial and error has resulted in a refinement of the doctrine by the governments operating under the doctrine. It is fair to assume that the Tohono O'odham Nation will likewise refine the doctrine as history moves on.

Unlike the U.S. Constitution, the Tohono O'odham Constitution expressly requires the separation of powers between the Executive, Legislative and Judicial branches. A strict application of the doctrine would require that each branch of government keep their respective functions as distinct and separate as possible.

Several factors dictate a more practical approach however, and this Court has considered these factors significantly critical. The Tohono O'odham historically have had a systematic practice of governing themselves long before the requirements of a written constitution were imposed by the Indian Reorganization Act of 1934. While the 1937 Constitution was a mere reflection of the IRA model, it served as a framework to blend and integrate traditional practices of governing thereby giving meaning to the words of the Constitution. The 1986 Constitution provides a similar framework to continue the blending of old and new approaches to governing. As a practical matter, the art of governing under the new Constitution should not and cannot conform to a simplistic reliance on isolated clauses or articles of the Constitution by the respective branches. The history of the O'odham and the complex state of Indian affairs require the integration of the three branches into a workable government to accommodate not only the needs of the O'odham citizens but of non-members. Thus, it is imperative that the government recognize the theoretical distinction but keep in mind that the formation of a viable government must depend on the cooperation and interrelationship between all three branches of government.

In the absence of real useful and unambiguous authority applicable to this concrete problem the Court has relied on judicial precedent defining what types of action by one branch are deemed a usurpation of another branch's power. It has been suggested that in order to have usurpation one branch of the government must be subjected directly or indirectly to the coercive influence of the other. (See e.g. State ex rel. Anderson v. Fadely, 308 P. 2nd 537).

This seems to require a significant interference by one branch with the operations of another branch. Several factors must be examined to determine whether a significant interference has occurred. First, is an examination of the nature of power being exercised. Inquiry must be made

to determine whether the power is exclusively inherent in one of the branches, or a blend of the two. A corollary question to this is whether the action complained of is intended to act as a coercive influence or as a mere cooperative venture. The objective sought by the action is also important. In other words, is it the intent of the action to aid the other branch or is the intent to declare the superiority of the branch in an area exclusively reserved to the other branch? Finally, the Court must consider the practical effect of blending powers as shown by actual experience over a period of time. With these factors in mind, the Court now turns to a review of the actions complained of by the Plaintiff in this case. This requires a review of the specific facts and circumstances giving rise to the Legislative Council's actions and a determination whether these actions usurped the powers of the Executive as alleged by the Chairman.

The adoption of the Constitution occurred on January 18, 1986, and presented many unforeseen and perhaps unplanned logistical problems. Central to these problems was doubt as to the effective date of the Constitution. A review of the document itself reveals that the effective date was upon the signature of the Assistant Secretary of Indian Affairs. This occurred on March 6, 1986. Technically, the transition of the old government into the new government should have occurred soon after this date. The existing Executive administration did not have a plan prepared on March 6th to guide the transition and, as a result, the tribal government continued to operate under the framework of the 1937 Constitution and existing policies.

A critical prerequisite to an orderly and timely transition was the enactment of an Administrative Plan. This plan would clarify the powers, functions and roles of the various departments under the Executive branch as well as set policy. The Constitution delegated the responsibility of drafting the administrative plan to the Executive branch, specifically the Chairman. In the practical working of the tribal government it was logical to expect the Chairman to be in a better position to assume this responsibility. This grant of power to the Chairman was deliberately fashioned to encourage the leadership inherent in the office. It is the Chairman who represents the Nation and is the spokesman for the O'odham in national affairs. The office is respected as an office of leadership throughout the United States.

Moreover, the power to formulate policies inheres in the chairmanship and conditions the efficiency of the government. A risk inherent in the system of separation of powers is that the Chairman's policies or opinions may at times be frustrated by the Legislative Council. This should not be interpreted to mean that the Chairman cannot give his direct expression on any subject or issue. And, while the powers of the Chairman are not as detailed as are those of Legislative, unenumerated powers does not mean undefined powers.

Executive inaction, on the other hand, not only is foreign to the concept of leadership and initiative envisioned by the Constitution, but invites the disastrous consequence of a crippled or dysfunctional government. The real danger in Executive inaction is that it may provide the occasion for the exercise of power. Thus, it was imperative that the Chairman as Chief Administrator for the government undertake the constitutional duty to draft an administrative plan as a grave responsibility and prerequisite to a working government.

Unfortunately, several events delayed the preparation and adoption of an administrative plan. One was the election of a new chairman two months after the effective date of the new constitution. Another was the decision by the newly elected Chairman, the Plaintiff herein, to draft his own plan despite the existence of a draft prepared by the outgoing administration. No time frames were set within which this draft would be completed as seen by the time elapsed before a draft was presented for review by the Rules Committee, a legislative standing committee. The Chairman answered, in response to a question about the delay, that the administrative plan was not drafted sooner because the Constitution imposed no time requirements. This of course, is not true as the effective date was determined by this Court to be March 6, 1986.

As previously noted, a natural result of the delay was the continued operation and functioning of the tribal government under the old policies of the 1937 Constitution. Department heads and officers remained in their respective positions without formal appointment, a process required by the new constitution, and a subject to be included within the Administrative Plan. It is this business of appointment that is the theme of Resolution No. 322-88. A review of Article VII, Section 2 (e) leaves no question that the power to appoint department heads or officers is essentially executive in nature. The query then must be what the nature of power sought to be exercised by the Legislative Council was, and, what degree of control was intended by this legislative action? The language of the resolution ‘directs’ the Chairman to submit the names of those department heads or officers he had appointed for approval by the Legislative Council. While the language appears to be coercive there is no real influence possible since the Chairman retains the ultimate control to appoint those persons he chooses. The Legislative Council’s power to approve the appointments is subsidiary and incidental to check the power of the Chairman to coordinate the activities of the government.

What then was the objective of the Legislative Council in passing Resolution No. 322-88? A review of the language reveals nothing more than an intent to prod the Chairman to deal

expeditiously with the task of appointments. Subtly underlying this intent is the hope that this measure will further prod the Chairman to move with the drafting of the Administrative plan.

The final inquiry then, is to determine the practical effect of allowing the Legislative Council, to, in effect, bootstrap its own power onto the Executive power in an effort to invoke the Chairman to act?

The Legislative role is clearly defined by the Constitution and provides that the Administrative Plan be adopted by the Legislative Council before it can be implemented by the Executive. (Article VII, Section 2 (a) This condition is not ancillary to any legislative purpose but expressly required by the Constitution. This power to adopt does not threaten the Executive power to draft the administrative plan. Thus, the adoption and implementation of the administrative plan should, and can be, pursued as a cooperative effort between the Executive and the Legislative. There is no doubt that public policy would favor a blending of powers between the Executive and the Legislative branches in this respect. It would not be inconsistent with the O'odham tradition of consensus rule and would not offend the Constitution but give meaning to the words of the Constitution with the gloss of life unique to the O'odham tradition.

In summary, the Court finds that the Legislative Council's passage of Resolution No. 322-88 does not constitute a usurpation of the Executive power and is upheld as not being in violation of the constitutional doctrine of separation of powers. There remains for the Court's consideration the resolutions numbered 318-88 and 320-88.

Resolution No. 318-88 appoints Delma Garcia, Director of the Tribal Employment Rights Office as the official liaison for the 1990 Census. The Plaintiff contends that this appointment usurped the Executive power to appoint granted by Article VII, Section 2 (e) of the Constitution. Apparently, the Chairman had appointed Mrs. Garcia to the same post some months earlier. He did not however, submit the appointment to the Legislative Council as required by the Constitution. The Court will not engage in an exercise of delineating what powers belong to the Chairman and what powers must only be exercised by the Legislative. It ought to be a matter of common understanding that friction between the branches is inevitable and healthy in a government of distributed powers. But, with due regard for the distribution of powers, unprofitable clashes should be avoided if there is any potential for compromise. The instant dispute over the appointment of the tribal liaison is one such unprofitable clash. Whatever the reason behind the Legislative Council's action for making or duplicating the appointment, there is no evidence of a purpose to defy or act in any way inconsistent with the Executive power. There is not the slightest basis for inferring that the Legislative Council's objective was to

undermine the Chairman's appointment. It can be assumed, in the light most favorable to the Legislative Council to be a gesture of cooperation. Consequently, it is the finding of this Court that Resolution No. 318-88 is a valid exercise of the Legislative power to appoint under Article VI, Section 1 and should be deemed a confirmation of the Chairman's previous act of appointment. Therefore, it is found to be constitutional.

The last resolution to be considered is numbered 320-88 and directs the submission of a work plan in accordance with an evaluation conducted on the workings of the Skill Center. The Plaintiff again contends that the resolution is an attempt to usurp the Executive power to control the administration of the Skill Center, an executive branch department.

The power of the Legislative Council is to enact laws. In order to legislate properly and supervise the functions of the Executive and administrative agencies, it must be thoroughly informed. In short, it must have the power to investigate. The scope of its power can be as penetrating and far reaching as the power to make laws, and, is proper under the Constitution. Broad as it can be, the Legislative may only investigate into areas in which it may potentially legislate or appropriate funds. The question to be asked is whether the resolution was related to a valid legislative purpose? That the Legislative Council had wide power to legislate in areas of education and employment and to conduct investigations in aid of this power is without doubt. The Legislative Council has enacted an impressive array of legislative measures in the field of education and employment, including many recommendations which have stemmed from the office of the Executive itself.

The Legislative Council's inquiry into the operations of the Skill Center was a valid exercise of its power and evinced no intentions to control the Executive's administration. The interest of the Legislative Council in ensuring that the education of Skill Center trainees be superior in all respects is hardly debatable. Whatever motives spurred the inquiry, if there is a purpose being served, this Court will not intervene. Moreover, Executive indifference or quiescence will, as a practical matter, enable, if not invite, legislative actions.

This resolution was dictated by the imperatives of events and circumstances surrounding the Skill Center. Faced with the duty to provide for the general welfare and education of the members of the Nation, and the disastrous effect an inferior or substandard training program would have on the trainees, the Legislative Council acted to preserve the Skill Center. No basis for claims of usurpation of Executive power appears from the facts of this action. Thus, the Court concludes that Resolution 320-88 was a valid exercise of the Legislative Council's power to

legislate and investigate to support its action, and as such, is not in violation of the doctrine of separation of powers.

In conclusion, the Court cautions that the formation of the new government is not to be derived from an abstract analysis. The Constitution only provides the framework and the content must come from the true nature of governing with deeply embedded traditional ways of government as well as new, modern ideas incorporated into a workable system. There must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive and Judicial. There is no guarantee that friction will not occur, but by means of the friction, and reason, wisdom and self-restraint, the formation of a working government can be achieved.

Accordingly, this Court upholds the constitutionality of all legislative measures and draws consolation from the thought that the Executive and Legislative will work together to safeguard the intent of the Constitution and preserve the heritage of the O'odham.

ORDER

On the matter filed by the Plaintiff, Enos J. Francisco, Jr., seeking a determination of the constitutionality of Resolutions numbered 318-88, 320-88 and 322-88, it is the finding of the Court that said Resolutions are not in violation of the Constitution and in accordance with the Opinion of the Court, IT IS SO ORDERED the 12th day of January, 1989.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Enos FRANCISCO, Jr. as Chairman of the Tohono O'odham Nation, and Angelo J. JOAQUIN, Sr., as Vice Chairman of the Tohono O'odham Nation, Plaintiffs,
v.
LEGISLATIVE COUNCIL OF THE TOHONO O'ODHAM NATION, Defendant.

Case No. 89-M-4592
(appeal dism'd, *Francisco v. Legislative Council*, 2 TOR3d 14 (Oct. 5, 2004))

Decided March 7, 1989.[1]

Before Judge Hilda A. Manuel.

The basis upon which this Court declines to issue the injunctive relief is as follows in the foregoing opinion. The Constitution of the Tohono O'odham Nation, Article XIII, Section 1 provides a brief paragraph describing the process of removing an elected official, representative

[1] *Ed. Note:* The Order and Opinion were issued as separately captioned documents, but have been combined for publication purposes.

or judge. This section reserves the power to remove to the Legislative Council. The only requirement is that removal be voted for by a majority of the Legislative Council. Furthermore, this Constitutional section is clear that the decision to remove is final.

Complimentary to Article XIII, Section 1 is the Election Ordinance, 03-86, Article IX, which describes the process to be followed in removal cases. Both the Constitution and the Election Ordinance provisions on removal are structurally similar except that Article IX contains more detailed provisions. The text of these provisions reserves the power to remove to the Legislative Council. The only conclusion to be drawn is that the Legislative Council is exclusively vested with the power to remove. This Court agrees that such power should be vested with the Legislative Branch since removal is a uniquely legislative and political function. It is not judicial.

In the instant case, the Legislative Council has adopted rules and procedures to govern the conduct of the removal proceeding. This Court can clearly ensure that the Legislative Council follow its own rules and procedures on removal. It cannot, however tell the Legislative Council when to meet, what its agenda should be or what legislation to consider. The principle of separation of powers prohibits this Court from intervening in the legislative process. And, clearly, the Court cannot intervene and force the Legislative Council to amend or revise its rules to accommodate the needs of the Plaintiffs. The Plaintiffs complain about the lack of time needed to prepare an adequate defense. They further argue they will suffer immediate and irreparable injury if the Court does not grant the injunctive relief sought. The gist of the Plaintiffs claim is to ask the Court to extend to them the rights typically enjoyed by criminal defendants, e.g. the right to confront an accuser, to interview witness or to discover evidence.

Even if this Court agreed that the Plaintiffs are entitled to such constitutional rights, the Court clearly lacks constitutional authority to force the Legislative Council to adopt rules which safeguard constitutional rights. The removal proceeding is not a criminal proceeding. It is legislative brought for the sole purpose of deciding whether to remove the Chairman and the Vice-Chairman from elected office. The right the plaintiffs demand relate to criminal proceedings. They are not rights the constitution of the Tohono O'odham Nation give to tribal officials during removal proceedings. There is, after all, no right to hold office. Constitutional rights afforded criminal defendants are not coextensive with the privilege of holding a tribal office.

The Motion for a Temporary Restraining Order is denied.

ORDER

Plaintiffs Enos Francisco, Jr., as Chairman of the Tohono O'odham Nation and Angelo J. Joaquin, Sr., Vice-Chairman of the Tohono O'odham Nation jointly move this Court for injunctive relief against the Legislative Council of the Tohono O'odham Nation. Pursuant to Article VIII, Section 10, this Court generally has power to enjoin acts of tribal officers in certain circumstances. The Plaintiffs jointly ask this Court to enjoin the Legislative Council from proceeding as a Court of Removal scheduled to begin March 13, 1989, 10:00 A.M. The Court denies the Motion thereby declining to issue the requested temporary restraining order.
SO ORDERED.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

George IGNACIO, Plaintiff,
v.
TERO COMMISSION, Defendant.

Case No. 89-C-4595
(appeal dism'd, *Ignacio v. TERO Commission*, 3 TOR3d 18 (Sep. 4, 2008))

Decided August 9, 1989.

Before Judge Malcolm A. Escalante.

The Petitioner in this action brings this matter before the Court through the filing of a Civil Complaint alleging that one Virgil Lewis on or about the 20th day of February, 1989 at Sells, Arizona on the Tohono O'odham Nation, did by letter dated February 30, 1989 denied him a hearing on a grievance that he filed after his hearing, before the TERO Director in a case where he was terminated from a job that TERO Office placed him on. TERO Commission objects to the Civil Complaint through an Answer and Motion to Dismiss, that the Plaintiff has failed to set out a valid cause of action.

The Court FINDS that general jurisdiction is vested with this Court pursuant to Chapter 01, Section 01 of the Civil Code of the Tohono O'odham Nation.

This Court takes judicial notice, by the Legislative Council Ordinance Number 01-85 "Papago Employment Rights Ordinance", that certain powers (Section) are granted to the Director of TERO. "Part 6 ADMINISTRATIVE PROCEDURES, 6.3 Compliance and Hearing Procedures (a) ….If voluntary conciliation cannot be achieved and the Director has reasonable cause to believe a party has violated the Ordinance or Regulation, he shall issue a formal notice of

noncompliance to the party and shall proceed with the enforcement procedures as set out in Section 15 of the Ordinance." This section reserves the power to proceed to a hearing. The requirement is the Director to have reasonable cause to believe a party has violated the Ordinance or Regulations. In the instant case the Director conducted an investigation and concluded that probable cause did not exist and did not issue a formal notice of noncompliance to the party and proceed with the enforcement procedures set out in Section 15 of the Ordinance.

The defendants allege that the Plaintiff failed to set out a valid course of action.

This Court agrees that the Director is vested with the Power set out in part 6.3 (a) of the Papago Employment Rights Ordinance, and FINDS that the Director acted appropriately as outlined in her authority.

The defendants argue that the Plaintiff has no set claim set forth in the Petition and no request for relief, no specific legal rights that have been diminished by any action of the TERO Director. The Plaintiff has been served in the way that the TERO Commission was set up to serve. The Plaintiff was given time to file the proper pleading to state a claim and state the proper remedy he is seeking. The Court FINDS that as a matter of law this court has no other alternative but to dismiss the case before the court.

As a final point, the civil suit filed is not the proper way to bring this matter before this court, perhaps more appropriately a Motion for a Writ of Mandamus which would be requesting a court order that tells a public official or government department to do something. It may be sent to the Executive Branch, the Legislative Branch or a lower court.

For the foregoing reasons the Court ORDERS the Civil Complaint of George Ignacio is hereby DISMISSED.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

In the Matter of E. F. J., Minor Child.

Case No. 89-P-4637

Decided August 9, 1989. [1]

Larry Martinez, Counsel for Petitioner.

[1] *Ed. Note:* The Order and Opinion were issued as separately captioned documents, but have been combined for publication purposes.

Before Judge Malcolm A. Escalante.

SUMMARY OF CASE

The Petitioner in this action brings this matter before the Court through the filing of a PETITION TO ESTABLISH PATERNITY. Jurisdiction of this Court is pursuant to Chapter 3, Section 15 of the Tohono O'odham Law and Order Code. G. J., natural mother of the above mentioned child alleges that she lived in a common-law relationship with A. L., Jr. for approximately two years prior to his death on August 28, 1988. She alleges that during the latter part of the two years she conceived a child and A. L., Jr. claimed the unborn child. She alleges that A. Sr. and I. L., parents of A. L., Jr., desire that the paternity of E. J. be established to reflect that their son was the father.

FINDINGS OF FACT

Jurisdiction alleged as Chapter 3, Section 15 is defined: "DETERMINATION OF PATERNITY AND SUPPORT, The Tohono O'odham Court shall have jurisdiction of all suits brought to determine the paternity of a child and…". The Court finds that jurisdiction is proper in this Court.

In the instant case, the issue before the court is whether the petitioner's daughter, E. J., being an illegitimate child is the natural daughter of the deceased A. L., Jr.. The Court will refer to testimonial evidence presented and is guided and persuaded by a case decided by the Supreme Court involving presumption of legitimacy. The presumption of legitimacy is a rebuttable presumption, Anonymous v. Anonymous, 10 Ariz. App. 496, 460, 460 P.2d 32 (1969). The burden of proof overcoming the presumption of legitimacy is upon the person challenging it, Coffman v. Coffman, 121 Ariz. 522, 591 P.2d 1010 (app 1979), and this must be established by clear and convincing evidence in its findings of fact with regard to determining paternity. In a case like this the Court must look at the actions taken by the putative father, A. L., Jr.. G. J. testified that they had been living together for about two years prior to his death and he was aware she was pregnant. She testified that he expressed to her that he was looking forward to their baby being born. A. B. L., Sr., natural father to the putative father testified that his son had been in Sells for about two and one half (2½) years working on various ranches, and ever since that time he has known him to be with G. J., and they would come to visit the family home in Chui Chui together. Mr. L. testified that his son had talked to him about he and G. having a baby. I. L., natural mother to the putative father of the child, testified that he had come to the family house and talked to her about them having a baby, she said he was excited about having the child, and was aware that he had been living with G. for about two years up until his death. Both

Mr. & Mrs. A. B. L., Sr., testified that they desire to have their son legally recognized as the father of the child so that she may share in what he may have. In order for the court to establish paternity there has to be a showing of clear and convincing evidence of paternity. The Court has seen evidence and is satisfied that the burden has been met and FINDS A. L., Jr., to be the father of E. F. J.

For the above reasons the Court concludes and ORDERS that:

1. A. L., is the father of E. F. J.
2. The last name of E. F. J. be changed to L. to reflect the father's last name.

COURT ORDER

On the petition filed by Larry Martinez, counsel for petitioner, G. J., seeking establishment of paternity for E. F. J. naming A. L., Jr..

It is the finding of the Court that, A. L., Jr. is the father of E. F. J.; and that the last name of E. F. J. be changed to L. in accordance with the Opinion of the Court.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Emily FASTHORSE[1], Defendant.

Case No. CR10-1491-88
(appeal dism'd, *Fasthorse v. Tohono O'odham Nation*, 2 TOR3d 7 (Aug. 8, 2003))

Decided October 23, 1989.

Before Judge Hilda A. Manuel.

The Tohono O'odham Police department conducted a series of roadblocks between January 1988 and January, 1989. The defendants named and joined in this Motion to Suppress were all cited for liquor law violations at one of the roadblocks and all seek the exclusion of the evidence seized and dismissal of the charges. The Defendants claim that the roadblocks as conducted violate section 1302 (2) of the Indian Civil Rights Act, which prohibits unreasonable searches and seizures.

[1] *Ed. Note:* This decision included thirteen other defendants whose cases were decided by this decision. Fasthorse, however, was the only defendant who filed an appeal.

The facts common to these cases are derived from the answers provided by the police department in response to a list of questions provided by the Defendants. In response to these questions we learn that the purpose of the roadblocks was to detect drunk drivers. The authority cited by the Chief of Police to support the conduct of roadblocks is the law enforcement commissions held by members of the department. The police officers are all commissioned by the Tohono O'odham Nation, the State of Arizona and Bureau of Indian Affairs and charged to enforce all tribal, state and applicable federal laws. The police department procedures regarding roadblocks consist solely of patrol commanders or sergeants deciding when and where to set up roadblocks. There are no written directives or command orders from high level supervisory officials. Once a decision is made to set up a roadblock no advance notice is given to the public. Site location is prepared by using traffic cones, stop signs or flares depending on the volume of traffic and time of day. All vehicles are stopped and requested to produce their driver's license and vehicle registration documents. Officers present visually inspect the driver's demeanor and the interior and exterior of the vehicle. Drivers with visible indications of alcohol impairment or influence are cited by the officers. Drivers with no problems are then directed to pass through the roadblock. Oncoming vehicles who attempt to avoid a roadblock are pursued by officers and upon being stopped are questioned as to the reason for avoiding the roadblock. If an officer develops particularized suspicion after talking with a driver a more thorough search of the vehicle may be conducted including closed areas.

Police department statistics provided show that 263 drunk drivers were arrested during the same period when roadblocks were conducted. It is not clear, however, whether any of these arrests occurred at roadblock sites. There are no statistics to support a finding that roadblocks are more effective at controlling and deterring drunk drivers.

The question raised by this case is one of first impression for this Court, and as such, it is appropriate to look to authority in other jurisdictions. It should be noted, however, that no cases were found involving tribal jurisdictions. The analysis of cases concerning the legality of roadblocks leads the Court to conclude that there is no uniform agreement on the issue. The Supreme Court itself has not yet squarely addressed the validity of sobriety check points although it suggested in Delaware v. Prouse, 440 U.S. 648, 664 (1979) that "roadblock-type" stops to spot check vehicles for license and registration compliance might be acceptable and pass muster under the Fourth Amendment. It is clear, however, that despite the conflicts among jurisdictions, the subject of validity is judged by balancing the degree of intrusion on an individual's interests in privacy and personal security against the promotion of legitimate

governmental interests. In United States v Martinez-Fuerte, 428 U.S. 543 (1976) the Supreme Court addressed the issue of checkpoint operations by the Border Patrol and established additional criteria now widely used by those jurisdictions faced with a roadblock case, including the Arizona Supreme Court in State v Superior Court, 143 Ariz. 45, 691 P.2d 1073 (1984). It is with these factors the Court begins its analysis of the case at bar.

The first and governing consideration in all the cases reviewed concerned the gravity of public interest served by the roadblocks. In this case this factor weighs heavily in favor of the police department roadblocks for the following reasons.

There is no doubt that the Tohono O'odham Nation has a vital interest in promoting public safety on the roads by detecting and prosecuting drunk drivers. It is also true that drunk driving is epidemic everywhere in the United States including this reservation. The Court has no quarrel with these truths. The case, however, is not simply decided on these facts especially when the record before the Court suggests that the true purpose of the Tohono O'odham police roadblocks was not to detect drunk drivers but to apprehend drivers violating the liquor prohibition laws. It is therefore necessary to determine whether this subterfuge with respect to the true purpose of the roadblocks is fatal to the issue at hand. The Court finds it is not in view of the unique circumstances and factors applicable to the Tohono O'odham Nation.

The Tohono O'odham Nation as an Indian tribe possesses certain inherent powers as a sovereign government. One such power is to create and administer a criminal justice system and exercise police powers attendant to such system. Tohono O'odham Constitution, Art. VI, Sec. 1(c)(6). Operation of a police force has been an integral part of the Nation's criminal justice system and as a general proposition, there is no doubt that the Nation may employ police officers to aid in the enforcement of tribal laws and in the exercise of its tribal powers.

It is also intrinsic in the sovereignty of the Tohono O'odham Nation that it can enact laws and regulations to protect the public welfare, health, peace and morals of the members of the Nation. The Legislative Council, an arm of the Nation has done just that by enacting numerous ordinances to aid in the exercise of the Nation's powers. The Criminal Code, as amended on May 2, 1988 is one such ordinance. The Code enumerates criminal penalties for prohibited conduct. It also empowers the police department and the Judicial branch to enforce the provisions of the Code. Chapter 11 of the Code contains liquor law offenses and penalties and is the basis of the complaints filed against the defendants in this action.

Before 1953 the introduction of alcoholic beverages into Indian country was prohibited. See 18 U.S.C. 1154 (a). In 1953 Congress passed local option legislation allowing Indian tribes, with

the approval of the Secretary of Interior, to regulate the introduction of liquor into Indian reservations, so long as the State law was not violated. 18 U.S.C. 1161. In 1982 the Tohono O'odham Nation responded to this option and enacted Ordinance 05-82 entitled the Alcoholic Beverages Licensing and Control Ordinance.

This Ordinance allows possession and consumption of alcoholic beverages in Districts which have sanctioned their introduction pursuant to Section 4 of the ordinance. Three of the Nation's eleven Districts have sanctioned the introduction of alcoholic beverages i.e. consumption and possession, namely, San Xavier, Sif Oidak and San Lucy. In all other remaining districts possession, sale and consumption of liquor is prohibited. It is not indicated on the record but can be surmised that the roadblocks were all conducted within the boundaries of those districts considered "dry", where the possession, sale and use of alcohol is prohibited. It is axiomatic that the Nation's power to regulate under this Ordinance is only meaningful when combined with the power to enforce. The power of the Nation to prohibit the introduction of alcoholic beverages in Districts which have not legally sanctioned introduction would be meaningless were the police not empowered to investigate and enforce such prohibition. Clearly, the police must have this power.

Other legislative action which lends support to this notion and confirms the Nation's interest in continued enforcement are Resolutions numbered 15-87 and 278-87. Resolution 15-87 declared war on alcoholism and drug abuse and directed the establishment of a tribal coordinating committee to develop a tribal action plan in accordance with P.L. 99-570, Subtitle C, cited as the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. Resolution 278-87 approved and adopted a tribal action plan to begin the war on alcohol and drug abuse. The Legislative Council found that alcoholism was a prevalent health and societal problem. This problem gave rise to a whole range of other well documented problems such as bootlegging, auto accidents, suicides, homicides, domestic violence, unemployment etc… One of the goals of the tribal action plan is to review, revise and adopt and enforce laws relating to alcohol and drug abuse. Goal VI Tribal Action Plan. No action has been taken regarding this goal, but significance of the objective is clear: the Nation is vitally interested in the problem of alcohol and drug abuse, and has a legitimate interest to enforce all laws passed to aid in resolving the problem.

It is this legitimate interest that must be balanced against the defendant's rights to security and privacy. There is no doubt that both these may produce legitimate arguments either way. The Court, however, finds that the Tohono O'odham Nation's interest in prohibiting the introduction,

sale, possession and consumption of alcoholic beverages within the Nation unless a District has sanctioned it outweighs the motorists interests and rights to be free from unreasonable searches and seizures.

The second inquiry then is whether the roadblock procedure was significantly more effective to combat an egregious law enforcement problem of serious proportions than other available less intrusive means. The effectiveness of this enforcement technique is amply demonstrated by the record in the case.

It is clear that the Tohono O'odham Nation has a pervasively long policy of prohibiting the introduction of alcoholic beverages into the reservation. This policy was assumed after the federal government opted to allow Indian tribes to regulate the field. It is also clear that there is a long history of public and judicial acceptance of the Nation's policy of prohibition. This was illustrated by the voter disapproval of sanctioning liquor introduction reservation–wide in 1981. Thus, it is clear that the public interest has demanded that liquor prohibition be strictly enforced and continued.

Interdicting the flow of illegal alcohol has posed a formidable law enforcement problem. This problem has been exacerbated by the unlawful transporting of contraband alcohol by tribal members who "bootleg" to willing patrons. The foremost method of enforcing the liquor prohibition laws has been for police officers to act upon observed or reported violations. Too often however, violators have been tipped off of impending raids resulting in unsuccessful attempts in apprehending the violators. Other practical difficulties including the fear of reprisals against reporters have proven minimally effective by this traditional method.

On the other hand, the use of temporary roadblocks on roads known to be routes used by the public to transport illegal contraband liquor has proven to be the most effective method of enforcement of the prohibition laws. The police department typically will set up roadblocks in advance of or on the day a particular tribal festival is scheduled to take place. There is good reason for this strategic practice because the frequency of liquor transporting is known to increase during these times. It is common knowledge that festival-goers travel to nearby towns to buy alcoholic beverages to sell or drink at the festivities. This fact is likewise illustrated by the number of liquor law violators cited before or after a festival occurs. The use of roadblocks has netted many seizures of contraband liquor as well as resulted in the apprehension of violators. While there was no extensive statistical demonstration that the use of roadblocks resulted in drunk driving arrests, the Court has no doubt that the prospect of facing roadblock stops did deter potential drunk drivers. Confiscation of contraband liquor certainly reduced the

chances of drivers drinking and driving. There is no question then, that this method of enforcement has been effective.

Having determined that the roadblocks advanced a legitimate interest of the Nation and that this method proved to be more effective than more traditional methods, the inquiry now concerns the severity of the intrusion. The roadblocks must be shown to be minimally intrusive on an individual's rights. The Martinez-Fuerte decision established key factors to consider when reviewing the severity question. The Supreme Court described intrusion as objective and subjective, each with attendant criteria to apply. Subjective intrusion is examined by focusing on how the motorist reacts to the roadblock. Critical to this analysis is the determination of how much discretion is left to the officers conducting the roadblock. If the decision to set up a roadblock was made by supervisory level personnel with adequate guidance to the field officers to leave them little or no discretion in the method of operation and selection of vehicles, there is no concern for abusive or harassing stops of selected drivers. In this case, patrol commanders or sergeants were responsible for making overall decisions when and where to locate roadblocks. Vehicles were stopped in a preestablished systematic fashion at locations clearly marked by the use of orange traffic cones, stop signs or flares depending on the time of day. The Court is confident that probably a majority of the traffic coming on to the roadblock had no involvement with the unlawful transporting of contraband liquor to feel anxious or frightened at the prospect of being subjected to a stop. The Defendants themselves state that they thought the purpose of the roadblock was to warn of an accident thereby conceding they probably did not worry. This supports the Courts' conclusion that the subjective intrusion was appreciably less than the defendants would have this Court to believe.

The discretion of the officers conducting the roadblocks was not unconstrained but limited to asking a couple of questions to request a driver's license, registration or proof of insurance. The Court finds this intrusion consisting of the stop, the questioning and the visual inspection to be objective and minimal.

The Defendants contend that the officers acted illegally when they searched certain vehicles when there were no signs of alcohol impairment. It is admitted by the police department that officers do conduct searches of certain vehicles. The Court agrees that when there is no probable cause or other articulable basis amounting to reasonable suspicion to believe a person is violating the law, there is no legitimate basis upon which the officers could decide to conduct a search of the vehicle. But, in this situation the Court is convinced this was not the case. Officers at the scene of a roadblock take into account any number of factors in deciding whether to search a

certain vehicle. They may consider aspects of the vehicle itself, the behavior of the driver, or other information which the officers assess and rely on to justify further questioning. Admittedly if anything about the vehicle or the occupants lead the officers to suspect "criminal activity may be afoot" or arouse suspicions to the point of ripening into probable cause, then a search is conducted. There is no reason to think the officers in these cases acted arbitrarily in selecting vehicles to search. Moreover, the finding of this Court that the initial stops are legitimate warrants a finding that there is no requirement of particularized suspicion. The fact that the police department requires the officers to develop such suspicion is gratuitous in the least.

As a final point, it seems appropriate for this Court to recommend to the Tohono O'odham police department to establish written general guidelines for police officers conducting roadblocks. The guidelines should address the staffing and safety needs for the roadblocks. The magnitude of the roadblocks must be a decision made by supervisory level officials to dispel any argument that officers on the scene have an unconstrained amount of discretion. Logistical factors such as location, duration, use of warning sings, or flares should all be outlined in the general guidelines. The police department need not give advance notice of roadblocks although if the department chooses to it can publicly announce that roadblocks will be established in advance of, or on the day of scheduled tribal events. This announcement can be published in the local newspaper as regular notice or the department can post monthly notices reminding citizens of the policy.

In conclusion, it is this Court's opinion that unlike the circumstances found in other jurisdictions where deterrence of drunk drivers is the primary interest sought by the sobriety checkpoints, the Tohono O'odham Nation's legitimate and important governmental purpose of interdicting the introduction of contraband alcohol clearly outweighs the defendants' interests in privacy and personal security. The need for this enforcement technique is demonstrated as comparably alternative methods of apprehending violators is not available. The record in the case is proof of the effectiveness of this technique.

Therefore, it is the decision of the Court that the Tohono O'odham police did act within their authority and the roadblocks did not violate the guarantees of the Indian Civil Rights Act prohibiting unreasonable searches and seizures. The Defendant's motion to suppress is hereby denied.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Enos FRANCISCO, Jr. Chairman Tohono O'odham Nation, Petitioner,
v.
Edward MANUEL, Chairman, TOHONO O'ODHAM LEGISLATIVE COUNCIL, and all MEMBERS OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL, Respondents.

Case No. 89-WM-4664

Decided November 9, 1989.[1]

Stickland & Altaffer by Dabney R. Altaffer for Respondent.

Before Robert A. Williams, Jr., Judge Pro Tempore.

OPINION

I.

Respondents, Edward Manuel, Chairman, Tohono O'odham Legislative Council, and Members of the Council, seek dismissal of the Petition for a Writ of Mandamus filed by Enos J. Francisco, Jr., asking this Court to overturn the proceedings in the Tohono O'odham Legislative Council removing Petitioner from the office of Chairman of the Nation. The motion was argued before the Court by both parties on October 25, 1989.

The Respondents were represented at the hearing by their attorney. Although properly notified in accordance with this Court's rules and procedures, Petitioner's attorney failed to make an appearance at this hearing. The Court considered arguments from Respondents' attorney to proceed with the hearing on the motion to dismiss Petitioner's action despite the absence of counsel for the Petitioner. The Court then heard Petitioner, Mr. Francisco, who told the Court that he wished to proceed with the hearing despite the absence of his attorney. Given that in considering Respondent's motion for dismissal, the Court is required to review the evidence in the light most favorable to the Petitioner, in this case Mr. Francisco, given that Mr. Francisco's attorney had prepared a thorough brief in support of the petition for the writ of mandamus addressing the major issues before the Court in this motion for dismissal, and given that Mr. Francisco specifically requested that the hearing proceed, the Court determined to conduct the hearing with Mr. Francisco arguing on his own behalf. In point of fact, Mr. Francisco was a forceful and eloquent advocate for his cause, and his oral presentation was most helpful to the

[1] *Ed. Note:* The Opinion was issued as a separately captioned document from the Order of Dismissal of Petition for Writ of Mandamus, but has been combined for publication purposes.

Court in clarifying the complex and painful issues raised by this action. Mr. Francisco was not prejudiced by the failure of his counsel to appear at the hearing.[2]

II.

Article XIII, Section 1 of the Constitution of the Tohono O'odham Nation sets out the procedure for removal from office of an "elected officer . . . found guilty of a misdemeanor involving moral turpitude, gross neglect of duty, malfeasance in office, or misconduct reflecting on the dignity and integrity of the trial government . . ." Under the Constitution, an elected officer can only be removed from office by majority vote of the Tohono O'odham Council. Further procedures are spelled out in the Constitution as follows:

> Before any vote for removal is taken, the . . . officer . . . shall be given a written statement of the charges against him or her at least ten (10) days before the meeting of the council called to consider the removal action. The accused . . . officer . . . shall be given an opportunity to answer any and all charges at the designated council meeting . . .

According to Article XIII, Section 1, of the Constitution, the decision of the Tohono O'odham Council to remove an elected officer "shall be final."

This brief paragraph describing the process of removing an elected official under the Constitution of the Nation is supplemented by the Uniform Election Ordinance, 03-86, Article IX, which describes in detail the process to be followed in removal cases. Removal is to be commenced by the filing of an accusation with the chairman of the Judiciary Committee of the Tohono O'odham Council. The accusation must be made in writing, stating the offense charged against the accused, and signed under oath, by a registered voter of the Tohono O'odham Nation.

Upon the filing of the accusation, the Judiciary Committee of the Council is required by the Election Ordinance to hold a hearing to determine if there is reasonable cause to believe that the accused officer has committed a removable offense as charged in the accusation.

If a majority of members of the Judiciary Committee determines from the hearing that there is reasonable cause to believe that the accused officer has committed a removable offense, then the Council is formally notified. The accused officer is then given written notice of not less than ten days that he or she must appear before the Council and answer the accusation.

[2] The Court's conclusion that Mr. Francisco was not prejudiced by the failure of his counsel to appear at the hearing in no way implies that his attorney should be excused for failure, nor that disciplinary action against Mr. Francisco's attorney by the Tohono O'odham Courts would be inappropriate.

The Election Ordinance specifies in detail the procedure for the removal trial before the Council. Under Article IX, Section 2 of the Ordinance:

> G. . . . If the accused pleads not guilty, the council shall immediately try the accusation and the accused shall be given an opportunity to answer any and all charges, to confront the witnesses against him, and to present witnesses and evidence on his behalf . . .
> H. If the accused is found guilty by a majority vote of the representatives of the council representatives of the council present at the hearing, the council shall enter such judgment upon the minutes of the council. The judgment of conviction shall be final and shall provide that the accused be removed from office.

III.

Petitioner Enos Francisco, Jr. was found guilty of gross neglect of duty and removed from his elected office as Chairman of the Tohono O'odham Nation on March 31, 1989, by a majority vote of the Tohono O'odham Legislative Council, sitting as a Court of Removal. *See* Legislative Order No. 29A-89.

This order was the culminating event in a series of actions by the Council, beginning on January 5, 1989. On that date, an Accusation Upon Removal from Office was filed against the Petitioner as Chairman by Councilman Tony Felix, serving as chairman of the Tribal Council Judiciary Committee. The Accusation alleged eight separate counts of gross neglect of duty against the Petitioner in his capacity as Chairman of the Nation. Subsequently, the Judiciary Committee held consolidated hearings on the accusations and on January 15, 1989, by Resolution No. JC-09-98, determined that there was reasonable cause to believe that the accused had committed removable offenses. See Petitioner's Petition for Writ of Mandamus, at 2-3.

On February 17, 1989, the Legislative Council enacted Legislative Order No. 60-89, setting the time and date for the full Council Removal Hearing, and adopting Special Rules of Hearing and Procedure Upon Accusations for Removal. See Legislative Order No. 60-89.

On that same day, Petitioner Francisco was served with a Notice of Hearing on Accusation for Removal to be held on March 13, 1989, before the Legislative Council of the Nation sitting as the Special Court of Removal. The notice contained a written statement of the charges against Mr. Francisco. On March 13, the Council organized itself as a Court of Removal. The removal trial of the Chairman continued pursuant to the Special Rules, the Petitioner was present for the trial, witnesses were called and witnesses who testified against the Petitioner were cross-examined. See Petitioner's Petition for Writ of Mandamus, at 12.

The trial concluded at the end of the third week, a majority of the council finding petitioner guilty of gross neglect of duty as charged in six counts of the accusation against him. Petitioner was removed from the office of Chairman of the Nation by this Council action.[3]

IV.

In a previous case arising out of the Petitioner's efforts to enjoin the Council's action to remove him as Chairman of the Nation, this Court, in an opinion handed down by Chief Justice Hilda Manuel, one of the United States' most respected Indian jurists, stated as follows:

> In the instant case, the Legislative Council has adopted rules and procedures to govern the conduct of the removal proceedings. This Court can clearly ensure that the Legislative Council follow its own rules and procedures on removal. It cannot, however, tell the Legislative Council when to meet, what its agenda should be or what legislation to consider. The principle of separation of powers prohibits this Court from intervening in the legislative process. *Francisco v. Legislative Council of the Tohono O'odham Nation*, 1 TOR3d 76, 77 (Trial Ct., Mar. 7, 1989).

The "principle of separation of powers," firmly established in the Tohono O'odham Nation's Constitution, prohibited this Court from intervening in the ongoing Legislative removal process of the Chairman. This same principle also guides this Court's review of the Chairman's removal not that the process has ended and the Chairman has been formally removed from office by the Council's action.

The principle of separation of powers between the Executive, Legislative and Judicial branches of government is "expressly" required by the Tohono O'odham Constitution. *Francisco v. Toro*, 1 TOR3d 68, 71 (Trial Ct., Jan. 12, 1989)(Chief Judge H. Manuel). While this principle, incorporated into the Nation's new Constitution of 1986 is central to the system of government adopted by the Anglo-American legal system, the idea of avoiding a dangerous concentration of power in the government of a community is certainly not alien to the traditions and customs of Indian peoples in general, or of the Tohono O'odham people in particular.

Like all Indian people, the Tohono O'odham Nation historically possessed a systematic practice of governing themselves long before adopting their first written Constitution in 1937.

[3] On or about March 23, 1989, Gerald T. Miguel filed with the Election Board of the Tohono O'odham Nation an application to initiate a Referendum Petition, No. 01-03-89. The Referendum measure sought the approval or rejection of the voting members of the Tohono O'odham Nation of the Council's Special Rules adopted for purposes of Legislative removal hearings. As Mr. Miguel did not submit this Referendum Petition with the number of signatures required by the Election Ordinance to the Election Board until April 18, 1989, it could have no effect on the Council's final action in removing Mr. Francisco from office on March 31, 1989. This Court expresses no opinion as to the effect of this Referendum voted upon on July 29, 1989, on future Council Removal hearings.

See *Francisco v. Toro*, supra at 71. The tribal system of governance traditionally relies on the consensus of all members of the tribe and diffusion of power through local decision-making. Thus, power is never concentrated dangerously in the hands of individuals entrusted with carrying out the will of the people of the tribe.

Read against this backdrop of the customary practices of tribal self-governance, the present Constitution of the Tohono O'odham Nation can be read as simply renewing and continuing the traditional practice of the O'odham people to avoid concentrating political power in one person or branch of government. A written Constitution, though originally not a part of the Tohono O'odham Nation's traditions, nonetheless serves "as a framework to blend and integrate traditional practices of governing" with new approaches adopted from the Anglo-American legal tradition." *Francisco v. Toro,* supra at 71. The combining and reconciling of different beliefs and practices with their own traditions and customs is in fact central to the culture of the Tohono O'odham people. One need only visit the inside of the magnificent church building at San Xavier Mission to appreciate the dynamic ability of the Tohono O'odham people to adapt and integrate another culture's beliefs and practices into something uniquely their own and expressive of their needs and desires as a people.

While the attorney for the Respondents cited extensively to precedents and case law derived from the Anglo-American legal tradition in support of the Council's motion for dismissal, those texts, at most, are instructive of the lessons that can be learned from the Anglo-American experience with respect to the principle of separation of powers. Those lessons teach that removal of an elected officer of government is a legislative function and the Court's role in such a proceeding is an extremely limited one. See *Mecham v. Arizona House of Representatives*, 162 Ariz. 267, at 268 (Ariz., 1989).[4] But this Court is satisfied that by the recent enactment of their Constitution in 1986, the Tohono O'odham people themselves have reaffirmed a principle central to their customs and traditions, which counsels that political power should not be dangerously concentrated in any one person or part of the government of the people. As expressly declared in Article III, Section 1 of the Tohono O'odham Constitution:

> All political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights.

[4] *Ed. Note.* The original opinion erroneously titled the case "*Mecham v. Arizona Supreme Court*." The correct caption has substituted, as well as the current Arizona citation.

The principle of separation of powers, expressly required by the Nation's Constitution, is but a reaffirmation of the customs and traditions of the Tohono O'odham people, who have always governed themselves according to the principle that power should not be concentrated dangerously in the hands of individuals entrusted with carrying out the will of the people of the tribe.

V.

By the Tohono O'odham Constitution and its principle of separation of powers, therefore, the power of this Court over legislative removal proceedings is extremely limited. As this Court has previously held, "such power should be vested with the Legislative Branch since removal is a uniquely legislative and political function. It is not judicial." *Francisco v. Legislative Council*, 1 TOR3d 76, 77 (Trial Ct., Mar. 7, 1989). The Constitution specifies that "gross neglect of duty" is a removable offense. An elected officer can be removed from office by majority vote of the Council for the offense. Before any vote is taken, however, the Constitution requires that the accused officer be given a written statement of the charges against him or her at least 10 days before the Council hearing on removal. At the removal hearing before the full Council, the accused officer must be provided an opportunity to answer any and all charges against him.

These then are the requirements spelled out in the Constitution for removing an elected officer. As far as this Court is concerned, the constitutionality of Petitioner Francisco's removal by the Council must be tested against these requirements and these requirements only.[5] The scope of any rights belonging to the Petitioner in a removal hearing must be defined by these specific constitutional requirements.

There is no contested issue of fact in this case that the Legislature did not comply with the specified constitutional requirements for conducting a removal proceeding of an elected officer.

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[5] Article VIII, Section 2 of the Tohono O'odham Constitution sets forth the powers of the Nation's courts:

> The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation.

Article VIII, Section 10 of the Constitution reads:

> The Tohono O'odham Judiciary shall have the power to:
> Interpret, construe and apply the laws of, or applicable to, the Tohono O'odham Nation.
> Declare the laws of the Tohono O'odham Nation void if such laws are not in agreement with this constitution . . .

In a prior case interpreting the scope of the judicial power under the Constitution, this Court has stated that "separation of powers means that the separate branches of government are not self-policing. The judiciary is . . . the arbiter of constitutionality." *Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 18 (Ct.App., Sep. 14, 1989).

The Judiciary Committee of the Legislature, acting under the accompanying ordinance to the Removal Clause of the Constitution, found sufficient cause to accuse Mr. Francisco of gross neglect of duty. Mr. Francisco was notified of this accusation and of the Council's intent to conduct a Removal hearing not less than 10 days before the Council meeting. The hearing was conducted according to rules adopted pursuant to Art. XIII, sec. 3 of the Constitution, directing the Council to "enact such ordinances as are necessary to implement removal . . . consistent with this article." Mr. Francisco was given an opportunity at the removal hearing to answer the charges against him as required by the Constitution of the Nation. He was also given the opportunity to confront the witnesses against him as provided by the Council's rules. Under the Constitution and laws of the O'odham Nation, the Petitioner was entitled to all this, but no more. The Legislature met all the specified constitutional requirements for a removal proceeding against an elected officer of the tribe. This Court therefore has no jurisdiction to review the details of the actual Council proceedings, to scrutinize the hearing record for errors of fact or law, or to dictate the rules to be followed by the Council during the removal proceedings. Where the Constitution's text itself expressly states that the Legislature's decision to remove "shall be final," the principle of separation of powers required by the Constitution compels the conclusion that so long as the Legislature in fact complies with all constitutionally mandated procedures for removal the courts of the Nation will not interfere.

VI.

In conclusion, it is worth noting that the Petitioner himself, by submitting his case to the Courts of the Nation, has vindicated the faith of the Tohono O'odham people in a constitutional form of government, directed by the principle of separation of powers. That this painful chapter in the political history of the Nation has been concluded according to the Rule of Law chosen by the Tohono O'odham people testifies to their ability to rule themselves according to customs and traditions of their own choosing as a sovereign, self-governing Indian Nation. The Petitioner's Petition for Writ of Mandamus is dismissed.

ORDER OF DISMISSAL OF PETITION FOR WRIT OF MANDAMUS

On the motion filed by the Respondents, Edward Manuel, the Tohono O'odham Legislative Council and its members, seeking to dismiss the petition of Enos Francisco, Jr. for a writ of mandamus directing the Legislative Council to set aside and declare null and void the Hearing for Removal held in March, 1989, wherein the Legislative Council, sitting as a Court of Removal under Article XIII Section 1 of the Constitution, passed a Resolution of Judgment, Legislative Order No. 29A-89, finding the Petitioner guilty of gross neglect of duty and removing him from

the office of Chairman of the Nation, it is the finding of this Court that said Hearing and Resolution are not in violation of the Constitution. The Respondents' motion to dismiss is hereby granted in accordance with the Opinion of the Court. SO ORDERED.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Lucy HODAHKWEN, Plaintiff,
v.
Laura PAPENHAUSEN, LAURA AND LUCY'S PLACE, a Partnership, Defendant.

Case No. 89-C-4376

Decided January 8, 1991.

Before John L. Tully, Judge Pro Tempore.

THE COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ABOVE REFERENCED MATTER.

I. FINDINGS OF FACT

1. In August, 1984, Plaintiff and Defendant entered into a written partnership agreement (the "Agreement"). The Agreement specified that Plaintiff and Defendant would be equal partners in a retail store (the "Store") to be operated in Sells, Arizona.

2. Prior to the execution of the Agreement, the Defendant operated a similar type of store in Ajo, Arizona. The Defendant was elderly and was contemplating retirement.

3. Prior to the execution of the Agreement, the Plaintiff was employed by Southern Arizona Legal Aid in Tucson, Arizona.

4. The Plaintiff and Defendant had been life-long friends. In the course of conversation, the Plaintiff and Defendant discussed the possibility of opening a store in Sells, Arizona that would carry inventory similar to the inventory carried by the Defendant at the store in Ajo, Arizona. The arrangement contemplated by the parties was that the Defendant would provide the initial inventory for the Store and would be responsible, initially, for the day to day operation of the Store. The Defendant would train the Plaintiff to manage the Store such that the Defendant would eventually be in a position to step aside and permit the Plaintiff to be principally responsible for the day to day operation of the Store. The parties subsequently executed the Agreement.

5. After the execution of the Agreement, the Store was opened in Sells. The Defendant complied with her obligations under the Agreement by contributing the initial inventory to the Store. The Plaintiff, however, in violation of the Agreement, did not undertake efforts to take over the "day to day" operation of the Store. The Plaintiff continued to work for, and to draw her regular salary from, Southern Arizona Legal Aid on a full time basis.

6. As a consequence of the Plaintiff's failure to work at the Store on a full time basis, the Partnership was required to retain the services of Plaintiff's son, Willard, in order to operate the Store. The Plaintiff contends that Willard's presence satisfies Plaintiff's obligation to operate the Store on a "day to day" basis. The Court rejects such a conclusion for the following reasons: The evidence makes it clear that Plaintiff's son was not engaged in the process of learning to operate the Store on a day to day basis. Willard was present in the store and provided assistance with physical labor and sales. He did not, however, undertake to manage the books, records, and/or operation of the store. His presence in the Store was not a substitute of that of the Plaintiff.

7. In light of the necessity that the Defendant continue maintaining responsibility for the day to day operation of the Store, and in order to accommodate Willard's need for living accommodations while working at the Store, the Partnership purchased a trailer. The trailer was purchased in approximately November, 1984 for a downpayment of $500 and additional monthly payments. The monthly payments were funded by Partnership assets until February, 1986.

8. The parties gradually had a falling out over the operation of the Partnership. In February, 1986, the Defendant "locked out" the Plaintiff from the Store. In the course of doing so, the Defendant confiscated most of the books and records of the partnership. The Defendant kept the then existing inventory of the Store as well as any profits that the Store experienced after February, 1986.

9. Commencing in February, 1986, the Plaintiff and her son continued to occupy the trailer that had previously been purchased with partnership assets. The Plaintiff personally assumed the responsibility for making the monthly payments on the trailer and the trailer was paid off with the final payment being made in either December, 1989, or January, 1990.

10. From the time that the Store opened in 1984, until the lock out in February, 1986, any profits that the partnership experienced were split equally between Plaintiff and Defendant. The profits were diminished, however, by the amount paid to the Plaintiff's son as wages for his participation in the running of the Store.

II. CONCLUSIONS OF LAW

In light of the foregoing facts, the Court enters the following conclusions of law:

1. The Court finds that the Plaintiff failed to contribute the consideration contemplated by the parties at the inception of the Agreement. The Agreement contemplated that the Plaintiff would contribute time, energy, and the willingness to learn the details of the day to day operation of the Store such that the Defendant could eventually turn over the day to day operation of the Store to the Plaintiff. The Plaintiff's failure to carry out her end of the Agreement constitutes a breach of Partnership Agreement. The Plaintiff continued to work, on a full time basis, for Southern Arizona Legal Aid and to draw her full salary from Southern Arizona Legal Aid.

2. The Court finds that the Defendant faithfully executed her obligations under the Agreement.

3. The Court finds that the conduct of the Plaintiff constitutes a "constructive fraud" upon the Defendant within the meaning of Hanes v. Giambrone, 471 N.E.2d 801 (Ohio App. 1984). The Court recognizes that the term "fraud" carries the commonly understood connotation of a deliberate misrepresentation. The Court wishes to make it clear that the evidence does not justify the conclusion that the Plaintiff intended to defraud Defendant. Nonetheless, the Court finds that the Defendant contributed all of the consideration contemplated by the Agreement and the Plaintiff contributed little, if any, of the consideration required of her by the Agreement. Such conduct, whether intentional, negligent, or innocent, constitutes a "constructive fraud" on the part of the Plaintiff under the facts and circumstances of this case.

4. In light of the "constructive fraud" perpetrated by the Plaintiff on the Defendant, the Court finds that the Partnership Agreement was void ab initio. The Court further finds that the "lock out" on the part of the Defendant in February, 1986, was justified by the Plaintiff's failure to contribute the consideration required by the Partnership Agreement. In light of the fact that the Defendant contributed all, or virtually all, of the partnership assets, the Court finds that the Store, its assets and inventory, were the property of Defendant in February, 1986. Plaintiff is entitled to no portion of the partnership assets.

5. Defendant claims entitlement to reimbursement for certain expenditures on the part of the putative partnership. Specifically, Defendant claims entitlement to reimbursement for wages paid to Willard Manuel, as well as advances in payments made to the Plaintiff during the term of the putative partnership. Defendant also requests the Court declare that the Defendant be vested with title to the trailer. The Court rejects Defendant's claims for the following reasons:

a. In the course of litigation, the Plaintiff and Defendant were specifically ordered to participate in the preparation of an accounting of partnership assets. No accounting has been prepared and the Court finds, based upon the evidence presented at trial, that the failure to

prepare an accounting was principally caused by the Defendant. In this respect, Defendant failed and/or refused to make the books and records of the partnership available for inspection by an independent accountant so that an appraisal of the partnership assets could be made.

b. The Plaintiff contributed her time, labor, and energy to work the stores on Saturdays and holidays during the existence of the putative partnership and Plaintiff is entitled to some compensation for that activity. In the absence of an accounting, it is impossible for the Court to state with any degree of certainty whether the Plaintiff has been properly compensated for her time and labor in this regard. In light of the fact that the lack of an accounting is primarily the responsibility of the Defendant, the Court finds that the burden of producing evidence at trial rested with the Defendant and that the Defendant has failed to meet her burden of proving entitlement to reimbursement. Fernandez v. Garcia, 88 Ariz. 214, 354 P.2d 260 (1960).

III. JUDGMENT

In light of the foregoing Findings of Fact and Conclusions of Law, the Court orders, adjudges and decrees that the partnership is dissolved; that all inventory and assets of the putative partnership, with the exception of the trailer, are declared to be the property of the Defendant. The Court declares that title of the trailer shall be vested in the Plaintiff and that Defendant shall, upon request by Plaintiff, execute any documents necessary to establish valid title to the trailer in the Plaintiff.

The Court exercises its discretion, pursuant to A.R.S. §12-341.01, in favor of requiring each party to bear their own attorney's fees in this matter.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

HICKIWAN DISTRICT COUNCIL, Plaintiff,
v.
ARIZONA DISTRICT COUNCIL of the ASSEMBLIES OF GOD, a.k.a. THE ASSEMBLY OF GOD CHURCH and the Reverend Donald A. RICH, Defendants.

Case No. 88-TRO-4396

Decided March 20, 1992.[1]

Before Robert A. Williams, Jr., Judge Pro Tempore.

[1] *Ed. Note:* The Opinion is not dated by the Court, but does have a file stamp indicating it was entered March 20, 1992.

I.

The issues involved in this litigation involve primarily provisions of the Tohono O'odham Constitution, the Indian Civil Rights Act of 1968, (ICRA) and certain legislative actions of the Hickiwan District Council.

The portions of the Constitution of the Tohono O'odham Nation relevant to this case provide as follows:

Article III – Rights of Members

> Section 1. All political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights. It shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law.
>
> Section 2. All members of the Tohono O'odham Nation shall have the freedom of worship, speech, press and assembly.
> Section 4. The listing of the foregoing rights shall not be construed as denying or abridging other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968.

Article IX – District Council Organization

> Section 5. Each district shall govern itself in matters of local concern, except that in any matter involving more than one district in which there is a dispute, the Tohono O'odham Council shall decide the matter.[2]

The portions of the Indian Civil Rights Act of 1968, relevant to this case, provide as follows:

> No Indian tribe in exercising powers of self government shall

[2] The earlier, superseded version of the Nation's Constitution, the Constitution and By-Laws of the Papago Tribe of Arizona provided in pertinent part as follows:

> Article IV – District Organization
> Section 2. Each district shall govern itself in local matters in accordance with its old customs and such changes as may from time to time appear desirable and expedient, except that each district shall elect a District Council of not less than five members, one of whom shall act as headman or chairman.
> Section 3. Each district shall manage its own local affairs, but any matter involving more than one district shall be decided by the Papago Council.
> Article VI – Rights of Members
> Section 1. All members of the Papago Tribe shall have the freedom of worship, speech, press and assembly.

> (1)Make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress of grievances. . .
>
> (8)Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.
>
> ICRA, Publ.L. 90-284, 25 U.S.C. §1301, et seq., at §1302

II.

Plaintiff District Council of Hickiwan seeks in this action to enjoin the Defendants Hickiwan Assembly of God Church from using a church building which they have erected in the Village of South Hickiwan in the District of Hickiwan. The specific legal basis upon which this claim is asserted is the alleged failure of the Defendants to obtain prior approval of the building as required under the customs and traditions of the community, or under the Plan of Operation adopted by the District in 1985. The Defendants Hickiwan have counterclaimed against the District, alleging that this action is in violation of their rights of freedom of religion as guaranteed by the Constitution of the Tohono O'odham Nation and its predecessor, the Papago Tribe of Arizona, and ICRA.

III.

The Hickiwan Assembly of God Church is an association of members and spouses of members of the Tohono O'odham Nation. The association is composed primarily of residents of the District of Hickiwan, specifically the village of South Hickiwan. Prior to the construction of the church at South Hickiwan, there was no building within the District of Hickiwan which was suitable or available for the congregation to conduct religious services.

The language of the Tohono O'odham Constitution, Article III, Section 2, recognizes the fundamental right of freedom of worship belonging to all members of the Nation. Further, the ICRA prohibits an Indian tribe from interfering with the free exercise of religion in exercising its powers of self-government. This federal act applies to "tribes," but it has been held also to apply equally to the acts of political subdivisions of tribes, Means v. Wilson, (CA SD 1975) 522 F.2d 833, and like the Tohono O'odham Nation's constitution, governs the actions of the Hickiwan District Council.

The District Council's actions seeking to regulate the construction of the Defendant's church building within the district are in the nature of a land use zoning law. The Plan of Operation of

the District provides as follows with respect to programs or projects involving tribal lands or resources.

> 4.6 District Council Approval.
>
> All programs or projects of a community of the Hickiwan district which involve the grant, by lease, easement or otherwise, of an interest in tribal land or resources shall be subject to prior review and approval by the District Council.

While no published cases or opinions of the courts of the Tohono O'odham Nation have dealt with the issue, the United States Supreme Court has articulated the following standard for reviewing zoning and land use regulations which seek to regulate activities implicating fundamental rights protected under the First Amendment of the United States Constitution.

> When a zoning law infringes upon a protected liberty it must be narrowly drawn and must further a sufficiently substantial government interest . . . The court must not only assess the substantiality of the government interest asserted, but also determine whether those interests could be served by means that would be less intrusive on activity protected by the first amendment.

Schad v. Borough of Mount Ephraim, 452 U.S. 61 at 68, 70, 101 S. Ct. 2176 at 2182, 3, 68 L. Ed. 2d 671 (1981). While the First Amendment of the U.S. Constitution is not applicable to the Tohono O'odham Nation, the values protected by Art. III, Sec. 2 of the Nation's own Constitution are identical: the right of all individuals to express their opinions and beliefs freely in an open, democratic society. In such a society, government is limited in what it can do in terms of regulating speech, religion, and press.

The testimony of the District Council representatives at trial established that in addition to District Council approval for leases, prior approval of the village or local community is likewise required. Neither the ordinance nor the procedural requirements of local approval contain any standards whatsoever for the granting or denial of approval, nor do they provide in any fashion for any protection whatsoever for members' rights to congregate for religious observances.[3]

In similar circumstances, courts have shown no reluctance to strike down land use regulations which required neighborhood approval for church construction as violative of constitutionally protected rights of freedom of religion.[4]

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[3] *Ed. Note:* Although a footnote is indicated in the text, the footnote does not appear in the decision.

[4] *Ed. Note:* Although a footnote is indicated in the text, the footnote does not appear in the decision.

The power to regulate land use is an incident to the police power to provide for public health, safety and welfare. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The evidence at trial quite clearly established that the construction of the church on its present site would have no negative impact on the public health, safety or welfare. There were some concerns raised in the April 7, 1984 hearing concerning the size of the proposed land lease at the old "yellow front" site and the possible adverse impact on community members who wanted to build homes there. However, these concerns were never raised as to the present site. There was absolutely no evidence presented to the court of negative community impact due to traffic or uses connected with the Church. The witnesses who testified at trial specifically denied any such impact. Generally, churches are presumed to be beneficial to the community's welfare and cannot be prohibited in the absence of evidence of significant negative impact, see Cornell University v. Bognardi, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986). The evidence likewise established that there is at least one Catholic church in virtually every village in the District of Hickiwan, including one that is directly across the road from the Joses' land and only a few hundred feet from the Assembly of God church. A denial of permission to one denomination to build a church in an area where other churches are permitted is an impermissible interference with freedom of religion, see, e.g., Lubavitch Chabad House of Illinois, Inc. v. City of Evanston, 112 Ill. App.3d 223, 445 N.E.2d 343 (1982), cert. denied, 464 U.S. 922, 78, 78 L.Ed.2d 681, 104 S.Ct. 485. The denial of permission to the Assembly of God, in the absence of any evidence of adverse community impact, in an area in which other churches have been permitted, is arbitrary and capricious, and prohibited by Tohono O'odham Nation's constitution and the Indian Civil Rights Act.

IV.

The evidence established that a lease was proposed in 1982 by the District Assembly of God Church. By the Constitution of the Papago Tribe of Arizona, this lease was required to be approved by the District Council and the Department of Interior. By the custom of the District, the lease was first required to be approved by the village. The evidence establishes that the lease was in fact approved by the village and repeatedly approved by the District Council. The lease was in fact executed by the vice chairman of the District on April 10, 1984. The only reason given by the District Council for repudiating the lease was the allegation that it was not properly signed by the Chairman. However, the evidence established that the person then serving as district chairman, Felix Mike, was not an elected member of the District Council. By both the Constitution of the Papago Tribe of Arizona, Article IV, Section 2, and the General Election

Ordinance, only an elected District councilman could serve as Chairman. Felix Mike was not, therefore, as a matter of law, the chairman of the District, and in the absence of a chairman, the vice chairman, Archie Pilone, who was an elected member of the District Council, was duly empowered to execute the lease as acting chairman. The repudiation of the lease by the District Council was therefore a breach of the lease agreement.

The evidence established that the Assembly of God Church is located about 100 yards from a group of houses built and occupied by the Jose family, and between those houses and a pasture which was fenced by the Jose family nearly 40 years ago. The area, consisting of approximately 20 acres, is regarded by the Joses as their traditional land or family compound. This area is comparable in size to the other areas or compounds occupied by other families in the village. No witness disputed this testimony and two of Plaintiff's witnesses from the village of South Hickiwan, Irene Maxfield and Mary Enos, confirmed that the church is on land regarded by the community as the Jose land. The practice of recognizing family ownership of large tracts of land is traditional throughout the Tohono O'odham Nation as recognized by the recent tribal court decision of Estate of Norris, 1 TOR3d 63 (Trial Ct., Dec. 6, 1988), and Estate of Francisco, 1 TOR3d 55 (Trial Ct., Jun. 3, 1988), involving intra-family inheritance disputes.

Despite the denials of the District Council members, and their tolerance of the Assembly of God when it was a small sect meeting in people's houses, the objective facts show a discriminatory result, if not intent. Catholic churches have been built in each of the District's villages without incident. No non-Catholic churches exist in the District. There is a Catholic church directly across the road from the Assembly of God Church which holds services semi-monthly. Significantly there was a Catholic church presently under construction in North Hickiwan, within a mile of the Assembly of God Church at the time of trial. There is no record that the District Council was asked or did approve of this construction, yet no effort has been made to enforce the Plan of Operation as to it. Most telling, however, are the minutes of the August 22, 1985 meeting. This meeting occurred when construction of the ramada at the Assembly of God Church was observed. The minutes clearly reflect that the Council was not concerned about construction by the Joses on their land of a building. They were specifically concerned about a church. Such discrimination by a government committed by its own constitution and federal law to preserving freedom of religion cannot be sustained in the nation's courts.

For all of the reasons stated the injunction is therefore denied by the court.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

J. D. G, Plaintiff,
v.
S. G., Respondent.

Case No. 90-D-4900
(appeal dism'd and cross-appeal granted, *S. G. v. J. G.*, 3 TOR3d 4 (Jun. 3, 2005))

Decided April 22, 1992.

Charles T. Flett, Attorney for Petitioner.
Laverne Rios, Counsel for Respondent.

Before Judge Mary Juan.

The above captioned matter came to be heard before the Tohono O'odham Court on a MOTION FOR AN ORDER TO SHOW CAUSE AND FOR EXPEDITED HEARING, submitted by Laverne Rios, Counsel for Respondent, S. G. Present were Respondent, S. G. with Counsel Laverne Rios, Petitioner, J. D. G. with Attorney, Charles T. Flett; Concerned Parties, Doreen Garcia; Respondents' Minor Children, L. G. and V. G.

Amended Motion for Continuance submitted by Charles T. Flett, Attorney for Petitioner.

Laverne Rios, Counsel for Respondent, objects to motion for continuance, Petitioner did not file response to the Motion for an Order to Show Cause and Expedited Hearing timely and moves that Petitioner make payment to Child Support and Spousal Maintenance.

Charles T. Flett, Attorney for Petitioner, moves the Court on the issue of the amount owed to Child Support, that it be determined on any arrearages owed on the date of Petitioners' Termination of Parental Rights dated October 3, 1992; Case No. 91-TPR-2078.

The Court finds that in regards to Child Support ordered on April 10, 1991. This order remains in full force and effect. The Court notes that an order of child support is always subject to modification upon showing of changed circumstances. In this case no showing was made, the record reflects no court ordered modification to Child Support and Spousal Maintenance. The Court finds that the Petitioner is obligated to Child Support and Spousal Maintenance till such time that the Court relieves him of this responsibility. The Court also finds that the Petitioner is in arrears of two thousand seven hundred forty dollars and no cents ($2,740.00).

The Court having heard statements from parties present is fully knowledgeable of the situation.

It is hereby **ORDERED** that:

1. The issue on Spousal Maintenance set for Review on May 27, 1992 at 9:00 A.M.
2. The Court continues this matter to allow Petitioner and Respondent to submit Points and Authorities on the jurisdictional issues of Termination of Parental Rights and how that applies to Child Support.
3. Petitioner will pay Child Support and Spousal Maintenance in the amount of Four hundred forty dollars and no cents ($440.00) due on April 24, 1992, and continue thereafter.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Wynona CAMPILLO, Defendant.

Case No. CR12-2181-91; CR02-202-92

Decided June 23, 1992.

Kenneth Briggs, Counsel for Defendant.
Tohono O'odham Prosecutor's Office for Plaintiff.

Before Judge Ambrose J. Encinas.

Defendant, by and through Counsel Kenneth Briggs, files a Motion to Dismiss in the above entitled action. Defendant in her Motion to Dismiss challenges the constitutionality of being charged for two separate offenses arising out of the same incident both regarding the same elements, which she denominates as a "doubling up of offenses." Defendant also contends that the office of the Nation's prosecutor is without authority to file contempt charges and in so doing violates the constitutionality mandated Separation of Powers.

The defendant Wynona Campillo was charged with both Disobedience to a Court Order and Criminal Contempt of Court on two separate occasions, under Chapter 2, Section 2.1A and Chapter 2, Section 2.2A of the Tohono O'odham Nation's Criminal Code, the charges arise pursuant to a Plea Agreement in Case #CR07-1136-90/CR04-1518-90/CR07-1242-90 which in relevant part states: ". . . #3. Defendant enters into a restraining order enjoining her from having any contact or communications of any kind with minor child . . . until said minor attains the age

of majority or until further order of the Court." The first incident allegedly occurred on December 21, 1991 when defendant was charged with violating a court order issued in Case #CR07-1136-90 prohibiting contact with a certain minor child, thereby giving rise to the Disobedience to a Court Order Charge. In addition to the disobedience charge, the defendant was also charged with Criminal Contempt of Court alleging intent to disobey the Court mandate in Case # CR07-1136-90/CR04-1581-90/CR07-1242-90. The second incident allegedly occurred on February 10, 1992 when defendant was charged with Disobeying a Court Order issued in Case No. CR07-1136-90/CR04-1518-90/CR07-1242-90, when defendant allegedly was found with a certain minor child, thereby violating the No contact Order in those cases. In addition, the defendant was also charged with Criminal Contempt of Court in the same incident alleging that she, with intent, disobeyed the court order in the above referenced cases. The Defendant was also charged with Contributing to the Delinquency of a Minor in both incidents, which is not part of the Motion to Dismiss. Jury trials for both incidents are scheduled for July 02, and July 09, 1992.

Defendant has filed a Motion to Dismiss counts 2 of both complaints entitled Criminal Contempt of Court arising out of incidents on December 21, 1991 and February 10, 1992.

Defendant's motion is made on the grounds that on each complaint she is being charged with two offenses which contain identical elements and which arise out of the same criminal act. Therefore, it is defendant's argument that said prosecution is therefore unconstitutional as it constitutes what counsel terms a "doubling up."

Further the defendant is requesting dismissal of said charges on the grounds that the charges for contempt violate the doctrine of separation of powers.

The Nation opposes defendant's motions on grounds as follows:

1. When an alleged criminal act meets the elements of two separate criminal ordinances prohibiting the same conduct the prosecutor has the discretion of charging the defendant with violating either or both of the ordinances citing U.S. v Batchelder 442 U.S. 114, 99 S.Ct. 2198 (1979).
2. The contempt power does not rest solely with the Judiciary and it is within constitutional bounds for both legislative and judicial branches to exercise contempt authority citing In Re Chapman 166 U.S. 661, 17 S.Ct. 677 (1897).

Defendant does not state what is unconstitutional about being charged under both sections, the Court can only surmise that this is a question of double jeopardy. The doctrine of double jeopardy holds that an individual cannot be tried twice for the same offence. In the case at bar, the defendant was charged under two sections of the criminal code each requiring specific

elements. The question is: are the two sections of the criminal code one and the same. It is a fact that in cases, where the elements under two statutes are identical, prosecution for one crime, bars prosecution for the other. U.S. v Batchelder supra. cited by the Nation is not dispositive of whether a prosecutor can charge the defendant under both ordinances for the same criminal act which is prohibited in both ordinances. Batchelder states only that "when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendant." Batchelder at 442 U.S. 123, 124, 99 S.Ct. 224. In fact, Batchelder involves a situation where a prosecutor exercises his discretion when choosing to charge a defendant under one of two statutes with identical elements, and not where a prosecutor chooses to charge the defendant under both ordinances containing identical elements.

In view of the above, the requirement that needs to be met is whether each section requires elements to be proven in which the other does not. In the instant case, a review of the two sections of the criminal code in questions leaves no doubt that the elements are not the same. Disobedience to a Court Order consists of not following a mandate of the Court. Whereas the Criminal Contempt of Court section requires intent which the above does not.

Defendant also raises the issue of whether the filing of a complaint for contempt by the office of the Nation's prosecutor violates the constitutionally mandated separation of powers. The power of contempt is not exclusive with the Judicial Branch of government. Contempt powers can and are exercised both the judicial and the legislative branches. The Nation cites as authority In Re: Chapman, 166 U.S. 661, 41 L.Ed. 1154, 17 S.Ct. 677 (1897) as case law and the Court has reviewed and is in agreement with the citation. Various tribunals, judicial, and quasi-judicial as well as legislative have exercised the contempt power and therefore, it follows that as stated above, is not exclusive to the realm of the Judicial Branch of government. Defendant also contends that the inclusion in the criminal code of the offense of contempt was a mistake. The Tohono O'odham Nation Legislative Council's inclusion of both sections, Disobedience to a Court Order and Criminal Contempt of Court in the criminal code and to deem them criminal, was deliberate and not a mistake.

The additional issue raised in the response pleadings by the Prosecution goes to the requirements of Rule 35. Rule 25 requires that "all motions . . . . shall be accompanied by a Brief Memorandum stating the specific factual grounds therefore and indicating the precise Legal points, Statutes, and Authorities relied upon" ARS, Rules of Criminial Procedure 35.1, by the moving party to support their position. If this court were to strictly apply the spirit of the rule, then all motions shall be filed with regard to memorandums of points and authorities.

It is the opinion of the Court that the complaints filed against the defendant for both Disobedience to a Court Order and Criminal Contempt of Court does not pose double jeopardy as the test that needs to applied is whether the elements required to prove one charge is not present in the other, in this case the element of intent is required in the charge for Criminal Contempt of Court which is not a required element in the charge of Disobedience to Court Order. Further, filing of criminal contempt charges by the prosecution is not unconstitutional as the power of contempt does not rest solely with the Judicial Branch of government. Further, The inclusion of both sections constituting Contempt in the Criminal Code was the specific intent of the Tohono O'odham Nation Legislative Council.

It is also the opinion of the Court that all motions filed under Rule 35 SHALL be accompanied by memorandum of legal points and authorities as stated above, by the moving party to support their position, although not necessarily filed as a separate brief.

Therefore, based on the above, defendant's Motion to Dismiss on the stated grounds is hereby denied.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Bernadette GARCIA, Petitioner,
v.
Sidney GARCIA, Respondent.

Case No. 94-E-4638
(appeal dism'd *Garcia v. Garcia*, 3 TOR3d 10 (Aug. 17, 2006))

Decided January 24, 1994.

Charles T. Flett, Counsel for Petitioner.
Rodney Lewis, Counsel for Respondent.

Before Judge Mary A. Juan.

On September 1, 1993 a hearing was held on Motion to Reduce Child Support and Child Support Arrearages. Parties present were, Sidney Garcia, herein the Petitioner; Counsel Charles Flett. Also present was Bernadette Garcia, herein the Respondent. Counsel Rod Lewis present telephonically. Janet Valenzuela-Garcia appearing as witness for Petitioner. The Petitioner,

Sidney Garcia, filed his post-dissolution Motion for Order to Show Cause requesting reduction of his present $200.00 monthly child support order for two minor children born to himself and Bernadette Garcia. The Petitioner is requesting a reduction in the current child support on the following grounds:

A. Petitioner is married has four children by his new wife.

B. Respondent also has an additional child.

C. Petitioner is supporting his new wife's child, and that child's minor child.

D. Petitioner has been ordered to pay arrearages of child support of $10,800.00 by Order dated September 21, 1989.

The Court finds that grounds A and B, consistent with applicable law and Tohono O'odham policy, are valid reasons for requesting a change in child support. However, the fact that the Respondent is supporting his present wife's child and his present wife's grandchild is not relevant to these proceedings as the Petitioner has no legal obligation to support these children. Petitioner's obligation to support his own children is considered to be a priority. Regarding the claim that Petitioner's child support amount should be reduced because Petitioner has been ordered to pay arrearages of child support of $10,800.00, the Court finds that it would be inequitable both to the custodial parent and the child to give a reduction on the current child support because Petitioner failed to pay his child support obligation in prior years. By entering such an order, the Court would sanction and give reward to those who have failed or refused to support their children. Further, reducing amounts available for the children's present reasonable needs via reduction of the current support is adverse to the best interests of the children.

Regarding the request for reduction of the child support based upon the fact of the five new children of the parties, the Court finds that Petitioner's income is $914.16 every two weeks. $914.16 X 2.16 given a total monthly income of $1,974.00. Respondent's income is 891.84 X 2.16 for a total monthly income of $1,926.00. The Court finds that both of the parties are entitled to an adjustment to their gross incomes reflecting the parties' obligation to support their natural children who are not at issue in these proceedings. In accordance with the Tohono O'odham Child Support Guidelines, the Court allows a $600.00 adjustment to Petitioner's income, leaving $1374.00 as Petitioner's adjusted gross income. The Court further allows an adjustment to the Respondent's income in the amount of $246.00, leaving 1,680.00 as Respondent's adjusted gross income. The combined adjusted gross income is thus $3054.00, leaving a basic child support obligation of $610.00. Petitioner's appropriate portion of the basic child support obligation is not sufficiently low to reduce Respondent's child support obligation.

The Court, therefore, finds that even with consideration given to the parties' additional children, circumstances are not such that Petitioner's current child support obligation should be reduced. Petitioner's request to reduce his current child support obligation is therefore denied.

Petitioner has also requested that the Court reduce the child support arrearages he presently owes on the grounds that $3,000.00 of the $10,800.00 was barred by the Statute of Limitations on Judgments at the time the September 21, 1989 order for arrearages was entered, and, that during the years following 1982, Petitioner was unemployed and unable to earn sufficient funds to be obligated to pay more than $116.00 per month for child support. The Court will use Arizona law for guidance on this issue, and deems A.R.S. §12-2453 (D) (E), applicable to this matter. Section (E) specifically states that one may file an action for support within three years after the emancipation of the youngest of all the children who is the subject of the court order. In such a proceeding there is no bar to the establishment of a money judgment for all of the unpaid child support arrearages for the entire minority of the children. The Court finds that it is the policy of this Nation that the children of the Tohono O'odham Nation be sufficiently supported during their minority. To allow payers to escape their responsibilities on the basis of the cited Statute of Limitations is in derogation of this policy.

Petitioner next argues that he was unemployed and unable to earn sufficient funds to pay the support order by the Court. He further states that even though he tried to hire legal representation to assist him and represent him in court, that this failed and presumably the order should be reduced or changed in a retroactive fashion. Again, the Court will deem Arizona Revised Statutes §25-327(A) as instructive in this matter. Pursuant to said statute, a decree for child support may be modified only as to installments occurring subsequent to notice to the opposing party of the Motion for Modification, and only upon the showing of changed circumstances which are substantial and continuing. A modification order may not otherwise be made retroactive. Under some rare circumstances, the custodial parent may have been deemed to waive child support arrearages, but neither party is claiming this. Petitioner's argument that Respondent committed a fraud upon the court when alleging that Petitioner willfully failed to comply with the court's order to pay child support is without merit. Fraud requires an intentional perversion of the truth. Since, in fact, Respondent did not receive the court ordered child support her allegation of willful failure to comply does not rise to the level of fraud. Therefore, Petitioner's Motion to reduce the arrearages is denied.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Conrad GILMORE, Defendant.

Case No. CR04-660/661-93
(appeal dism'd *Gilmore v. Tohono O'odham Nation*, 2 TOR3d 13 (Aug. 18, 2004))

Decided March 28, 1994.

Before Judge Mary A. Juan.

The Defendant, CONRAD GILMORE, has been charged with criminal slander under Section 10.7A, Slander of the Tohono O'odham Nation's Criminal Code. The Defendant has filed his Motion to dismiss the charges filed against him on the grounds that the Nation's criminal slander statute is unconstitutional. Defendant argues that, based on Garrison vs. Louisiana, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), the Tohono O'odham Nation's Section 10.7A Slander of the Code is unconstitutional in that the Nation's statute does not require that the Defendant knowingly utter a false statement, and on the additional ground that the Nation's statute does not mandate that the false statement be made in reckless disregard of the truth.

In its response to the Motion, the Nation agrees that Garrison v. Louisiana, id., should control the decision of this Court in determining whether Chapter 10, Section 10.7A of the Tohono O'odham Criminal Code is constitutionally sound, but argues that Section 10.7A, when read concurrently with Section 1.16 Definitions 47, passes the constitutional test,

Defendant replies that the Court cannot use the statutory definition of the words contained within Section 10.7A to bolster the statute for purposes of determination whether Section 10.7A is constitutional, and that the statute itself must reflect the specific wording as set forth in Garrison v. Louisiana, id., to pass constitutional muster. Defendant also contends the Complaint itself is also fatally vague and defective. Defendant's final argument is that criminal sanctions for slander are inappropriate and that civil remedies should be pursued.

The Court finds that, in order to seek the full meaning of the Nation's Criminal Code Section 10.7A, as well as its effect on the citizens of the Nation, it is necessary to consult all statutory definitions of the words contained within the codified provision, and further finds that the words of Section 10.7A, must be given their legislatively intended and statutorily defined meaning for

purposes of determing whether said provision is constitutional. The Court further finds that it is not necessary that the words be stated exactly the same as in Garrison v. Louisiana, id., so long as the essence or material part and meaning of the required standard is expressed within the statute.

Garrison v. Louisiana, id., at page 78 as cited in the Defendant's brief, states in applicable part, as follows:

> The statute is also unconstitutional as interpreted to cover false statements against public officials. The New York Times standard forbids the punishment of false statements unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. (emphasis added)

Thus, Garrison v. Louisiana, id., required only that either that Nation prove that the Defendant made the false statement while knowing the statement false; or that the Defendant made the false statement with reckless disregard of whether the statement was true or false.

To determine whether Section 10.7A falls short of the constitutional guard, one must carefully consider the meaning of the words and context contained therein. Chapter 10, Section 10.7A of the Nation's Criminal Code states as follows:

> A person commits the offense of slander if he or she maliciously speaks or utters a false and defamatory statement with intent to injure or prejudice the reputation, character, office, business, trade or livelihood of another.

The basic premise of criminal law requires that the crime contain both an act and the requisite mental state. In this case, the act is the utterance of the false statement. The word "maliciously" provides the mental culpability necessary for proper enforcement of the statute. To determine whether the word "maliciously" provides sufficient mental culpability under Garrison V. Louisiana, id., one must turn to Chapter 1 of the Nation's Criminal Code, Section 1.16 (47), the definition for malicious, which states as follows:

> means as intent or wish to do a wrongful act, to injure, annoy or to act in reckless disregard of another's rights. (emphasis added)

For our purposes in this analysis, it is unfortunate that Section 1.16 (47) above does not contain punctuation which would better assist us in determing the legislative intent of Section 1.16 (47) when conjoined with Section 10.7A. However, when reading the statutory definition of "malicious" in conjunction with Section 10.7A, the Court finds that the Code required that: (a) Defendant make a false statement, and that he intentionally make the statement he knew to be

false; or (b) Defendant make a false statement and additionally make said false statement in reckless disregard of another's rights; and (c) Defendant's false statement was made with the intent to injure or prejudice the reputation, character, office, business, trade or livelihood of another.

Regarding (a) above, the intent or wish to do a wrongful act (in this case to utter the false statement), clearly encompasses and implies that Defendant knew he made this false statement. Thus, said portion of Section 10.7A clearly passes the constitutional test.

In the present case the right mentioned in (b) above is the right to be free from prejudice or harm due to false statements made by another. To act in reckless disregard of these rights is thus to make a statement with reckless disregard to the truth or falsity thereof.

Therefore, the Court holds that, pursuant to Section 10.7A when properly read with the statutory definition of Section 1.16 (47) in criminal prosecution for slander the Nation must prove that either the Defendant intentionally made the false statement; or that the defendant made the false statement in reckless disregard of whether the statements were true or false; and the false statement was made with the intent to injure or prejudice the reputation, character, office, business, trade, or livelihood of another.

Further, Defendant's argument that criminal sanctions for slander are inappropriate and that civil remedies should be pursued is one based on public policy. The Tohono O'odham Council, however, by the through its lawmaking power, is the body mandated by the Tohono O'odham Constitution to declare public policy and to legislate laws which are in the public good. This is not within the purview or the jurisdiction of the Courts.

Therefore, the Court declines to declare Chapter 10, Section 10.7A unconstitutional.

The Court further finds that the Nation's failure to identify in the complaint the persons to whom the Defendant spoke the alleged defamatory statement does not render the complaint unconstitutionally vague and defective.

The Defendant's argument that the present situation is analogous to the situation where the Nation would allege in the complaint that Defendant committed the crime of assault, but would fail to name the victim is not applicable here since the victim was named in the instant complaint. The Defendant is free during the pendency of the proceedings to conduct proper discovery and interviews to identify the person (s) to whom the statement was purportedly made.

The Court therefore denies Defendant's Motion to Dismiss based on constitutional grounds.

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TOHONO O'ODHAM REPORTS



VOLUME 2, Edition 3: 1995 to 2004

Third Publication, January 1, 2014

PREFACE TO THIRD EDITION

The January 1, 2014 third edition of the three volumes of the Tohono O'odham Reports includes appellate cases decided after the January 1, 2013 second edition publication, earlier appellate decisions not included in the prior editions, and also includes both recent and older trial court cases where the lower court cases resolved significant issues.

The third edition also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports.

January 1, 2014

Violet Lui-Frank
Chief Judge

PREFACE TO SECOND EDITION

The January 1, 2013 second edition of the Tohono O'odham Reports updates the cases in Volume 3 to include appellate cases decided after the November 1, 2011 first edition publication and their related trial court cases when the lower court cases resolved significant issues. Other trial court cases with precedential value in 2012 have also been included.

The second edition of all the volumes also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports to aid readers in finding them.

January 1, 2013

Teresa Donahue
Chief Judge

PREFACE

November 1, 2011 marks a milestone for the Tohono O'odham Judicial Branch with its first publication of cases from 1985 to the present. The cases are divided into three volumes and include both appellate and trial court decisions with precedential value.

Appellate cases lacking precedential value have been published as summaries. Additionally, in order to preserve confidentiality as required by the Tohono O'odham Children's Code, Section 62, all cases arising in whole or in part from a Children's Court matter have been redacted. As appropriate in a given case, initials or the individual's relationship to the child have been substituted for the name of an individual so that information identifying the child or parties is removed. The names of case workers and legal counsel have not been altered.

Further, obvious misspellings and punctuation errors have been corrected, such as misspellings of "O'odham" and double periods. No grammatical changes have been made.

November 1, 2011

Teresa Donahue
Chief Judge

TOHONO O'ODHAM REPORTS

VOLUME 2, Edition 3: 1995 to 2004

Third Publication, January 1, 2014

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APPELLATE DECISIONS

TOHONO O'ODHAM COURT OF APPEALS

CHUKUT KUK DISTRICT, Defendant/Appellant,
v.
Cecil WILLIAMS, Plaintiff/Appellee.

Case No. CTA-0036
(Ref. Case No. 92-PWM-5445)

Decided August 27, 1996.

Carol A. Summons, Tucson, Arizona, Attorney for Defendant/Appellant.
Rodney B. Lewis, Sacaton, Arizona, Attorney for Plaintiff/Appellee.

Before Judges Evelyn B. Juan, Rose Johnson, and Lucilda J. Norris.

This is an Appeal from a Default Judgment, entered by the Trial Court against the Appellant, Chukut Kuk District.

Appellee Williams filed his Petition for Writ of Mandamus in the Judicial Court below. It was served on the Chukut Kuk District on November 12, 1992. A Response was due on or before December 2, 1992, but was not timely received by the Court.

On December 08, 1992, Appellee filed his Petition for Default. Therefore, on December 14, 1992, Appellant filed its response to the Petition for Writ of Mandamus and Opposition to Default Judgment.

Nevertheless, on April 28, 1993, the Court entered a Default Judgment against the District. This Appeal followed.

The Appellant argues that the Default Judgment should not have been entered against the District, on the grounds that the Nation's Judicial Court, in its Judicial Administrative Order III, adopted the Arizona Rules of Civil Procedure. The Appellant argues that based on Rule 55 (a)(2) of these rules, a default could not be effective unless the District had not pleaded or otherwise defended upon the expiration of ten (10) days from the filing of the Application for Default. Appellant points out that the District had until December 18, 1992 to file the responsive pleadings, but the District filed its response on December 14, 1992. The date of actual filing being well within the period allowed by the Rules.

The Appellee does not dispute the fact that responsive pleadings were filed by the District within the (10) day grace period, but argues that the Court's decision to enter Default is correct, on the grounds that the Judicial Administration Order III does not create substantive rights under the laws of the Tohono O'odham Nation. Appellee Williams further argues that particularly

since the Trial Court provided Appellant with opportunity at a hearing to provide good reason why the filing deadline was not met, and Appellant failed to appear, and the Court had full authority to enter the Default Judgment.

We reject Appellee's argument and find that once Judicial Administrative Order III was entered, litigants in the Nation's courts have a right to rely on its continued effectiveness until such time as it is specifically withdrawn or amended.

We concur with Appellant and hold that based on A.R.C.P. Rule 55, entry of default should have been precluded by the filing of responsive pleadings within the ten (10) day grace period, and remand this matter back to the Judicial Court for a trial on the merits.

Judgment entered on April 28, 1993 is vacated.

TOHONO O'ODHAM COURT OF APPEALS

JULIA CORTY, Director of the Tohono O'odham Advocate Program; Petitioner,
and
TOHONO O'ODHAM NATION,
Real Party in Interest,
v.
JUDICIAL COURT OF THE TOHONO O'ODHAM NATION;
the Honorable Rosalie M. LOPEZ, a Judge thereof, Respondent.

Case no. CTA-0058
(Ref. Case No. CR05-937-942-97, CR05-935/936-97, CR05-723-93, CR04-609-97, CR05-805-93, CR05-933/934-97, Tohono O'odham Nation, Plaintiff v. Mark Michael Cruz, Anthony Francisco, Emily Joaquin, Individual Defendants)

Decided July 7, 1997.

Tohono O'odham Office of the Attorney General by Assistant Attorneys General Mark E. Curry and Jonathan L. Jantzen, for Petitioner.

Before Chief Justice Rose Johnson and Justices Mary Juan and Betsy Norris.

OPINION OF THE APPEALS COURT

AUTHOR: Johnson, Rose Chief Justice

On May 29, 1997, this Court received a special petition action, a request for immediate stay of proceedings, and a request for expedited hearing. These matters were filed in this Court of Appeals in response to the lower court's actions by Honorable Rosalie M. Lopez, Judge of the Tohono O'odham Judiciary, concerning alleged contempt matters which gave occasion to Judge Rosalie M. Lopez to issue an order to show cause on May 21, 1997, and a cease and desist order

filed on May 23, 1997, against Julia Corty, Director of the Tohono O'odham Nation Advocate Program.

This is a special action matter originally brought on behalf of and therefore submitting jurisdiction, of Julia Corty, to the Court of Appeals of the Tohono O'odham Nation by the Tohono O'odham Nation Attorney General's Office, Assistant Attorneys General Mark Curry and Jonathan Jantzen. We have jurisdiction pursuant to the Tohono O'odham Nation Constitution, Article VIII, specifically Sections 7 and 8, granting expressed appellate powers of the Tohono O'odham Nation to be vested in the Court of Appeals of the Tohono O'odham Nation. By mandate, we have jurisdiction to hear all appeals from the Tohono O'odham Courts. Decisions of the Court of Appeals on all matters within its appellate jurisdiction are final and no other jurisdiction is competent to hear these sovereign matters.

The Court finds that representation of the Nation's Attorney General's Office of Julia Corty, as Director of the Advocate Program, involves a direct and clear conflict of interest. The very caption of the pleadings clearly reveals the conflict. No man can serve two masters. The Legislative Council ensured this when it enacted Resolution No. 326-89 on September 22, 1989 adopting the Statute Creating the Office of the Attorney General and Resolution No. 91-500, Resolution of the Tohono O'odham Legislative Council amending the Statute Creating the Office of the Attorney General, adopted November 6, 1991. The Office of the Attorney General shall have overall ***responsibility for providing legal advice and representation to all officials, agencies, departments,*** divisions, and branches of the Nation's government…(Emphasis added). This means that Judge Lopez and the entire Judiciary is affected by such representation by the Office of the Attorney General, not only Julia Corty. The Amendment further magnifies the extent of the Attorney General's conflict:

> *The Attorney General shall also work with the Court Solicitor for the Judicial Branch, in conjunction with the Staff Attorney to the Chairman, if appropriate, on legal matters involving action by or the involvement of the Judicial Branch, to promote cooperation and resolution of any potential conflicts or disagreements between the Judicial Branch and the Legislative Council or the Chairman's Office; provided, however, that such efforts shall be limited to subjects which the Attorney General is ethically permitted to discuss under the ethical standards referred to in Section 3(L) or otherwise applicable and shall not extend to pending cases in the Judicial Branch or other matters to the extent such discussions would be foreclosed by pertinent ethical responsibilities.*
> *(Res. 91-500)*

The Court further finds that the Attorney General has exceeded his authority under Section 3 (A) of the Statute Creating the Office of the Attorney General of the Tohono O'odham Nation. Section 3.[1] Authority, Responsibilities and Duties.

The Attorney General shall have the following authority, responsibilities and duties:

A. To provide legal advice and representation as needed to the Nation, its agencies nd offices, the Legislative Council and its committees, and such other entities ***as the Legislative Council shall authorize the Attorney General to advise and represent…*** (Emphasis added). (Res. 326-89).

No such authorization has been afforded the Office of the Attorney General by the Legislative Council, and thus, the Office of the Attorney General has acted outside the scope of their legal and ethical authority in giving legal advice and representation to Julia Corty and/or the Advocate Office.

When adverse representations are undertaken concurrently…the appropriateness of disqualification must be measured against the duty of undivided loyalty which an attorney owes to each of his clients. Alexander v. Superior Court Ex. Rel., County of Maricopa, 685 P.2d 1309, 141 Ariz. 157 (S.Ct. 1984). The Nation's Attorney General is governed by the rules governing conflict of interests. An impermissible conflict exists by reason of incompatibility in position in relation to the opposing parties, and the respective parties have antagonistic positions of legal questions when either party would be harmed by that representation. Canon School District No. 50 v. W.E.S. Construction Co., 868 P.2d 1014, 177 Ariz. 431 (Ct.App. 1993).

Disqualification is the appropriate resolution here in light of the violation of Rule 42 of the Arizona Rules of Professional Conduct and in light of Section 3 (L), of the Statute Creating the Office of the Attorney General: [T]o perform all the duties and responsibilities of the Office in accordance with the highest standards of legal ethics. The Court disfavors the Nation's Attorney General from representing any party in this action due to the conflict of interest.

The matters of the Petition for Special Action are now **MOOT** based on the orders of Judge Rosalie M. Lopez dismissing the show cause on June 6, 1997 and no stay of proceedings is necessary. Therefore, the Court herein **DENIES** review of the Petition for Special Action, with prejudice. No right of appeal is provided for contempt actions in the Nation by Constitution or legislative action, the same as in Arizona courts.

[1] *Ed. Note:* Sic. (Section number appears in original decision.)

TOHONO O'ODHAM COURT OF APPEALS

Lorenzo Z. MIRANDA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.[1]

Case No. CTA-0005
(Ref. Case No. CR08-1523-1524-94)

Decided January 6, 2003, effective *nunc pro tunc* August 14, 1997.

Before Judge Violet Lui-Frank.

Holding: Special Action dismissed upon Petitioner's motion, *nunc pro tunc*.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
M. J. R., Appellee.

Case No. CTA-0065
(Ref. Case No. 97-DC-034/TH-035)

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
L. M. P., Appellee

Case No. CTA-0066
Children's Court No: 97-UPL-031/PI-032

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

[1] *Ed. Note:* Caption corrected to reflect the correct parties.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
L. T., Appellee.

Case No. CTA-0068
(Ref. Case No. 97-DC-034/TH-035)

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

CITY OF CARS, INC., Appellant,
v.
Paul F. NORIEGO and Melanie E. PORTER, Appellees.

Case No. CTA-0028
(Ref. Case No: 91-NP-5058)

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Robert CRUZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee

Case No. CTA-0054
(Ref. Case No: TR05-288-96)

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Harry LEWIS, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0078
(Ref. Case No. CR-05-2545-2549; CR12-2551-2555-97; CR06-4079-4080-98)

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Emily FASTHORSE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0044
(Ref. Case No: CR10-1491-88)

Decided Aug. 8, 2003.

Tohono O'odham Advocate Program by Kenneth Briggs and Jim White for Appellant.
Tohono O'odham Prosecutor's Office by George Traviolia for Appellee.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Nicholas KUTH-LE, Sr., Appellant,
v.
Thelma KUTH-LE, Appellee.

Case No. CTA-0010
(Ref. Case No. 3973-85)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Darla JOHNSON, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0011
(Ref. Case No. CR2-281-86)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Marie LEWIS, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0026
(Ref. Case No. CR10-2070/2071-90)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Steven VELASCO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Appellate Case No. CTA-0030
Criminal Court No: TR10-1037/1039-91; CR10-1641-91

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Calvin RAMON, Appellant,
v.
CITY OF CARS, INC., Appellee.

Case No. CTA-0031
(Ref. Case No. 91-OSC-5088)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Edward LOPEZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0046
(Ref. Case No. CR10-1855-89)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

L. H., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0048
(Ref. Case No. 94-UPM-786)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Harold LUCAS, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0049
(Ref. Case No. CR09-155-95)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
Lisa HARRIS, Appellee.

No. CTA-0050
(Ref. Case No. CR12-3188/3189-95)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Clyde JOHNSON, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0064
(Ref. Case No. CR09-155-95)

Decided Aug. 11, 2003

Faithe C. Seota for Appellant

Tohono O'odham Prosecutor's Office by P. Michael Ehlerman for Appellee

Judge Betsy Norris

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

In Re the Custody and Support of Raenna HARVEY.

Case No. CTA-0067
(Ref. Case No: 89-CS-4704)

Decided Aug. 11, 2003

Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

John B. NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0069
(Ref. Case No. CR11-2595/2597-97)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Brandon HAVIER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0070
(Ref. Case No. CR07-3809/3810-97)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
Glen ESCALANTE, Appellee.[1]

Case No. CTA-0071
(Ref. Case No. CR03-640-642-98)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Vernon MENDEZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0076
(Ref. Case No. CR-08-3632-3634-99)

Decided Oct. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed due to Appellant's abandonment of the appeal.

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[1] *Ed. Note:* Caption corrected to reflect the correct parties.

TOHONO O'ODHAM COURT OF APPEALS

Conrad GILMORE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0045
(Ref. Case No. CR04-660/661-93)

Decided Aug. 18, 2004.

Before Judge Teresa Donahue.

WHEREAS, the defendant filed a Notice to Appeal on October 21, 1994, and the above-entitled proceeding was referred to the Chief Judge for assignment on appeal in the year 1999; and

WHEREAS, the criminal appeal does not survive the death of the appellant because the appellant is now deceased;

IT IS HEREBY ORDERED that this appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Laticia AYALA, Appellant,
v.
Vincent AYALA, Appellee.

Case No. CTA-0035
(Ref. Case No. 4002-85)

Decided Aug. 23, 2004.

Before Judge Rose Johnson Antone.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Enos FRANCISCO Jr. as Chairman of the Tohono O'odham Nation, and Angelo J. JOAQUIN, Sr., as Vice-Chairman of the Tohono O'odham Nation, Appellants.
v.
LEGISLATIVE COUNCIL OF THE TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0021
(Ref. Case No. 89-M-4592)

Decided Oct. 5, 2004.

Before Judge Violet Lui-Frank.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Julia CORTY, Director of the Tohono O'odham Advocate Program, Petitioner, and TOHONO O'ODHAM NATION, Real Party in Interest,
v.
JUDICIAL COURT OF THE TOHONO O'ODHAM NATION, the Honorable Rosalie M. LOPEZ, a judge thereof, Respondent.

Case No. CTA-0058
(Ref. Case No. CR05-937-942-97; CR05-935/936-97; CR05-723-93; CR04-609-97; CR05-805-93; CR05-933/934-97)

Decided Oct. 5, 2004.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Samuel JONES aka Melvin JONES, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0060
(Ref. Case No. CR06-1225/1226-97)

Decided Oct. 6, 2004.

Tohono O'odham Advocate Program by Fred Brahms for Appellant.
Tohono O'odham Prosecutor's Office by Dmitri Downing for Appellee.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ronald PABLO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0037
(Ref. Case No. TR03-220-93; CR07-1054/1059-93)

Decided Oct. 19, 2004.

Tohono O'odham Advocate Program for Appellant

Before Judge Rose Johnson Antone.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Leonardine J. ROMERO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0062
(Ref. Case No. CR07-1671-1673-97)

Decided Oct. 20, 2004.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Gregory TASHQUINTH, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0061
(Ref. Case No. CR07-3721-3724-96; CR08-3725-3728-96;
CR01-340-370-97; CR02-371-374-97; CR12-3660-96;
CR12-3744-96)

Decided Oct. 29, 2004.

Before Judges Violet Lui-Frank, Roy Mendoza, and Linda Carlos.

The Tohono O'odham Court of Appeals, sitting en banc, reviewed the Trial Court record and remands this case to the Trial Court to complete the sentencing order. For the reasons stated herein, we find that this case does not come within the jurisdiction of the Court of Appeals because the amount of restitution was not finalized. In other words the judgment is not final and ripe for appeal.

The Proceedings in the Trial Court

The trial began on August 7, 1997 with 43 charges. On August 14, 1997 the jury returned verdicts of guilty on 42 charges, and not guilty on CR07-3723-96, Criminal Fraud. The defendant was sentenced on September 8, 1997. The court imposed the recommended sentence, with certain changes noted in the Order of Commitment: 4,320 days, no probation, eligibility for parole after three-fourths of the sentence was served, and restitution, without specifying an amount. After several attempts a restitution hearing was held on January 5, 1998 at which time the court took the matter of the amount of restitution under advisement, but an Order was not issued, or is not in the file.

The appellant filed the Notice of Appeal on January 22, 1998, appealing "the judgment of guilt imposed in this jury trial of August 7, 1997." On that same date the appellant also designated the record on appeal as "the following hearings and matters as the record on appeal: jury trial, August 7, 1997, together with all motions and trial record entries filed therewith."

Discussion

The Tohono O'odham Court Rules of Appellate Procedure, Rule 3(c)(2) provides, in pertinent part, that:

> The appellate court may review any: …Criminal matter after a judgment of guilt and sentencing, …

We find that the trial court did not complete its final order regarding restitution, and, therefore, the case was not ready for appeal.

IT IS ORDERED THAT the case is remanded to the trial court for conclusion of the sentencing order. The appellant will still have the right to file an appeal within thirty days of the entry of judgment by the trial court.

TRIAL COURT DECISIONS

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

TOHONO O'ODHAM NATION, Petitioner,
v.
L. H., Respondent Child.

Case No. 94-UPM-786
(appeal dism'd *Tohono O'odham Nation v. L. H.*, 2 TOR3d 9 (Aug. 11, 2003))

Decided February 16, 1995.

Before Judge Malcolm Escalante.

The Court, having heard oral arguments on the issue of the testing of marijuana for identification purposes, RULES THAT:

1. The results of the Duquenois-Levine Test, the test currently in use by the police officers of the Tohono O'odham Nation, are admissible in court with the testimony of the officer who conducted the test that he is qualified by training to perform such test.
2. Once evidence of a positive test result is presented to the Court, the burden of proof shifts to the Defendant to produce evidence that the substance is not in fact marijuana.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Melvin JOSE, Defendant.

Case No. TR04-413/414-95; CR04-671/672-95

Decided August 14, 1995.

Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Plaintiff.
Tohono O'odham Advocate Program by Chris Shank, Counsel for Defendant.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary for a hearing on Defendant's MOTION TO DISMISS FOR WANT OF PROBABLE CAUSE. Parties present: George Traviolia, Nation's Chief Prosecutor; Chris Shank, Defense Counsel, Advocate Program; Officer E. Loza, Nation's witness. Defendant, Melvin Jose is not present, was not served. Defense Counsel waives Defendant's presence.

Testimony given by Officer Loza was that he observed Defendant's vehicle approaching with the headlights indicating that Defendant was weaving in his traffic lane on Highway 86, a public highway. Officer Loza then followed the vehicle, initiated a traffic stop, and subsequently charged Defendant with DUI and other charges. Although the vehicle was weaving in its lane, given the time of night, the Officer had an obligation to make contact with the driver to see if there was any impairment to the driver which could affect public safety. Thus, the Court finds that the Officer had probable cause to initiate a traffic stop on the Defendant.

THEREFORE, the Court denies Defendant's Motion to Dismiss for Want of Probable Cause.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
John PABLO and Anthony YAZZIE, Defendants.

Case No. (1) TR08-492-494-94; CR08-1525-1527-94
(2) TR01-005/006-95; CR01-053-057-95

Decided November 29, 1995.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary on Defendants' Motion for Clarification of the Court's Order dated October 10, 1995.

The cases at bar are cases of first impression. This Court has heretofore allowed, with no objection from either side, the admission of the Duquenois-Levine (NIK) test results as conclusive evidence of the presence of certain substances resulting in the conviction of defendants.

In its Order dated June 01, 1995, this Court allowed the Defendant to provide proof to the Court that the NIK test has not gained general acceptance in the scientific community as reliably sufficient to positively identify certain drug substances.

Subsequent to a hearing the Court did find the NIK test was unreliable when used alone to identify certain drug substances.

The Court declined to hold that the NIK test results are not admissible as evidence in Court, as was requested by the Defendant.

The Court instead determined that the results of the NIK test may be admitted as evidence as being administered by the Officer, but that said test could not be presented to the trier of fact to be conclusive in identifying the drugs as alleged.

By its order, the Court placed the burden on the Prosecution to show whether the NIK test combined with any other circumstantial evidence obtained by the Officer would be sufficient to prove the identity of the substance beyond a reasonable doubt.

The Officer, of course, will not be allowed to testify as to the conclusiveness of the testing technique or that the test results prove the substance to be the drugs as alleged.

The Prosecution must now move forward to show what evidence, if any, it has to present in addition to the NIK test. If the Nation does not feel they can meet their burden, it is the Nation's choice to act in accordance with that belief.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Dorothy ENOS, Plaintiff,
v.
TOHONO O'ODHAM HOUSING AUTHORITY, Defendant.

Case No. 97-TRO-6004
(appeal dism'd *Tohono O'odham Housing Authority v. Enos*, 3 TOR3d 19 (Sep. 4, 2008))

Decided January 10, 1996.

Before Judge Lucilda J. Norris.

I. Facts

A. In Chronological Order

1. Dorothy and Justin were married at the time they applied for the lot and homesite property on which the HUD home was eventually built.
2. Dorothy and Justine were married at the time they applied for the HUD home and in March of 1981 when they signed the Mutual Help and Occupancy Agreement (hereinafter "MHOA").
3. During the time that Dorothy and Justin occupied the home, there were numerous delinquencies in payment of the amounts due and owing the HUD under the agreement.

4. Tohono O'odham Housing Authority (hereinafter "TOHA") has at least one meeting with Dorothy to discuss the fact that the Enos' were behind in their payments.
5. During one meeting Dorothy Enos met with Wayne Chico, Director of TOHA, who testified that at the meeting he informed Dorothy that if she relinquished the home, this action would break the MHOA and Dorothy would relinquish all rights to the property. This discussion did not take place in the Tohono O'odham language.
6. TOHA sent several relinquishment forms to Dorothy.
7. On March 31, 1989, Dorothy finally signed one of the relinquishment forms at home and took to TOHA. The relinquishment form stated that Dorothy "forfeited all the interest, rights, duties, and obligations in the Mutual Help Home…"
8. Soon thereafter Dorothy moved into one of the adobe structures that already existed on the homesite property prior to building of the HUD home. Dorothy testified that she believed that by her relinquishment she forfeited only the HUD house and not the adobe structures and land on which these structures were located.
9. Other people were and are currently living in another adobe structure which was existing on the homesite property. The Enos' rent this structure for residence by others.
10. In March of 1994, Bertram Norris executed a MHOA with TOHA and moved into the HUD home Dorothy formerly occupied.
11. On November 10, 1995, Dorothy was notified by a hand delivered notice that TOHA intended to demolish the two adobe structures on November 15, 1995.

The issue before the court is whether and what Dorothy relinquished by signing the relinquishment form and whether Dorothy relinquished by signing the relinquishment form and whether Dorothy can remain in the adobe structure.

II. DISCUSSION

A. Description of Agreement

On March 6, 1981, Dorothy and Justin Enos executed the MHOA. The agreement is a 40 page document containing 12 articles and one attachment. Apparently, it was developed and drafted by the United States Department of Housing and Urban Development. It is complex and written in language usually used in legal contracts and documents, making it difficult for any person other than an attorney to fully understand the material.

B. A Strict Reading of the MHOA Support TOHA.

Article I, Part 1.2, includes a definition of the "home" which is:

> "The dwelling unit covered by this MHO agreement includes the homesite, as identified in Exhibit A of this Agreement or any other dwelling unit and homesite in the Project (as indicated by the context).

Further, Article II, part 2.1 states:

> (a) Certain land as identified in Exhibit A of this agreement has been leased or conveyed to the will be, as a contribution for the home, this land is valued at $1,500.00, which amount shall be pooled with the values attributed to other contributed homesite in the Project."

If Dorothy could read and understand the above two portions of the agreement, she would have been aware that a relinquishment of the "home"meant she relinquished all rights to the entire homesite, including the 2 adobe structures.

C. Dorothy's Level of Sophistication and Language Skills Prevented her from Understanding the Terms of the Contract.

It is true that Dorothy signed the Contract; however, it is apparent the she knows little of the terms contained within it. Dorothy is an elderly Tohono O'odham. It is also clear that English is not Dorothy's first language and that Dorothy speaks most fluently in her native language. There was no testimony regarding the content of any actual discussions between the staff at TOHA during which Dorothy could have been educated and informed regarding the MHOA at the time of execution. The complicated process of turning the homesite over to TOHA for later reconveyance back to Dorothy after successful completion of the terms of the Agreement and the unusual definition of "home" would not be clear to many others, much less to Dorothy.

D. TOHA has a higher Duty and Responsibility to Correctly and Timely Inform Dorothy of her Rights and Responsibilities in a way Dorothy can Understand.

Due to the following:

1. The Agreement is written in English.
2. Dorothy speaks English, but has limited understanding of it.
3. All notices to Dorothy are written in English
4. The MHOA is complicated and full of legal terms.

5. Dorothy is not familiar with this type of complicated contract. Without assistance she could not know how the terms in the contract apply to all future actions relating to the Mutual Help Home.

Dorothy must rely on TOHA to inform her of her rights and responsibilities under the Agreement. Therefore, it is the duty of TOHA to fully inform Dorothy in her own language of the nature and content of the agreement.

Fully informing Dorothy is especially important prior to acceptance of Dorothy's relinquishment because, without a full explanation to Dorothy, Dorothy's relinquishment is less than voluntary. The duty of full and proper notice by TOHA to Dorothy was not met.

The fact that TOHA allowed Dorothy to live in the adobe structure for five and one-half years, failing to enforce Dorothy's relinquishment for this period, compounded the problem by reinforcing Dorothy's interpretation of the relinquishment.

E. The Actions and Non Actions of TOHA have Created a Situation Where There are Several Victims.

We now have a situation where presumably the new tenant has signed a MHOA to purchase the home and obtain a homesite lease on the parcel, including the land on which the 2 adobe structures have been built. This new homebuyer has had an assignment granted by the Sells District and has complied with all of the terms and conditions of his agreement but he and his two sons have never been provided with what was promised…the home and land parcel.

Dorothy believing she has a right to return to her former home, is now threatened with loss and demolition of her home.

Further, Dorothy is living in one adobe structure, and another family is living in another adobe structure and Mr. Norris is living in the HUD home-all located on the parcel that, according to Sells District Policy, is only appropriate for one family.

HUD not only allowed Dorothy to stay after her relinquishment, but complicated the situation even further by leasing the home and land to Mr. Norris and left Mr. Norris and Dorothy there to "fight it out" themselves. It is no wonder there is trouble between Dorothy and Mr. Norris. It is no wonder Mr. Norris doesn't want to negotiate for division of what he thought was his parcel.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Prior to execution of all future MHO Agreements, Tohono O'odham Housing Authority staff meet with the new home buyer to explain and review each and every

paragraph in the homebuyer's native language…even if this takes several meetings between Tohono O'odham Housing Authority staff and the home buyer.

2. Prior to acceptance by Tohono O'odham Housing Authority of any relinquishment, a thorough explanation of the consequences of the relinquishment should be made. These explanations should be made in the person's Native language. Tohono O'odham Housing Authority should note in the file the name of the staff member who provided the explanation, the date, what paragraphs of the Agreement or other document were discussed, and whether the homebuyer appeared to understand.
3. Tohono O'odham Housing Authority shall provide to the Court at the end of Thirty (30) days **a proposal as to how they will accommodate the victim Ms. Dorothy Enos at no cost provided by Tohono O'odham Housing Authority.**
    A. Proposal plan to be submitted to the Court by **FEBRUARY 28, 1996 @ 11:00 A. M.** for further order.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

TOHONO O'ODHAM NATION, Petitioner,
v.
L. T., Respondent Child.

Case No. 97-DC-034; 97-TH-035
(appeal dism'd *Tohono O'odham Nation v. L. T.*, 2 TOR3d 6 (Aug. 6, 2003))

Decided February 14, 1997.

Before Judge Rosalie M. Lopez.

The above-named minor child, the age of 15 years having been advised of her constitutional rights and present with her parent at the Juvenile Arraignment on the offenses of DISORDERLY CONDUCT – 3.6A5; THEATENING – 7.3A1 as to the Petition/Citation filed 01-29-97:

THE COURT FINDS: Dismissing due to it has passed the 10 days from date of filing, with prejudice, in accordance with Tohono O'odham Children's Code, Chapter I, Section 09(B)(2).

IT IS FURTHER ORDERED: Dismissing 97-DC-034 & 97-TH-035 (with prejudice).

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Carmen DELORES, Defendant.

Case No. CR-07-2569-96; CR09-2783-96

Decided September 15, 1997.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Robert Bushkin for Plaintiff.
Faithe Seota, Counsel for Defendant.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary on Defendant's Motions to Dismiss and for Appointment of Defense Counsel. The Nation has filed a written response. The Court has ruled to deny Defendant's motion for appointment of counsel pursuant to the Indian Civil Rights Act (hereinafter ICRA), 25 U.S.C., Chapter 15, Section 1302, and set the matter for oral arguments regarding the motion to dismiss.

Parties present: Tohono O'odham Nation's Assistant Prosecutor (hereinafter Nation), Robert Bushkin; Defendant, Carmen Delores; with Defense Counsel, appearing pro bono, Faithe Seota.

FACTS

On July 28, 1996 and September 14, 1996, the Defendant's minor son was arrested while being away from home between the hours of 9:00 P.M. and 6:00 A.M. Subsequently, Defendant was charged with violations of the Juvenile Curfew Ordinance.

Defendant was issued citations on the Arizona Traffic Ticket and Complaint form alleging Curfew Violation; however the citations do not indicate the juvenile in question or which penalty would be applicable if the Defendant were found in violation as alleged. The Ordinance provides a different penalty for each violation.

Trial date was set for November 19, 1996 for case number CR07-2569-96 and December 3, 1996 for case number CR09-2783-96.

At the December 3, 1996 trial Defendant filed the motion now at bar. Although the matter was not filed in accordance with Rule 16, Arizona Rules of Criminal Procedure, the Court set the matter for oral arguments due to the constitutionality question being raised by the Defendant. The Nation filed a response and moved the Court for leave to file an amendment to their original

response. The Court has granted the Nation's motion; however, an amended response has not been filed with the Court as of the date of signing of this Order.

ISSUES BEFORE THE COURT

Defendant's motion moves the Court to declare the Juvenile Curfew Ordinance 96-001 (hereinafter Ordinance) as unconstitutional pursuant to the Nation's Constitution and the ICRA.

Defendant argues the Ordinance denies the right to equal protection guaranteed to the Defendant and all similarly situated single mothers on the reservation by the Nation's Constitution and ICRA. Defendant additionally complains the Ordinance authorizes prosecution of a juvenile's mother while simultaneously authorizing non-prosecution of that juvenile's father.

Defendant further argues the Ordinance violates a juvenile's freedom of speech, and assembly, and that the Ordinance lists no exceptions to these freedoms.

Finally, Defendant argues that certain terms with the Ordinance are "impermissably vague." Specifically, "usual place of abode of the juvenile" and "most direct route."

The Nation contends Defendant's reading of the Ordinance is too limited and the Ordinance does provide parameters around the freedom of religion, speech, and assembly while the juvenile is accompanied by parent/guardian or other adult person. The Nation also contends the Nation has a right to regulate a juvenile's behavior by requiring the supervision of his/her custodial parent, legal guardian, or other adult between the hours of 9:00 P.M. and 6:00 A.M.

The Nation does not share in the vagueness assertion made by Defendant and argues that the meaning of these terms could be established at trial based upon testimony presented by the parties and other witnesses. The Nation opposes the Defendant's motion in all respects.

COURT'S FINDINGS AND ORDER

On October 14, 1955, the Tohono O'odham Legislative Council (hereinafter Legislature), formerly known as the Papago Council, passed Resolution No. 848 making it unlawful for any child under 18 years of age to be absent from home, or the ground immediately surrounding his home, (between the hours of nine o'clock at night and five o'clock in the morning) unless in the company of a parent or guardian or other responsible adult.

On March 28, 1996, the Legislature enacted Ordinance 96-001, Juvenile Curfew Ordinance. This Ordinance provides that a person commits the offense of curfew violation if while he or she is the custodial parent, legal guardian or other adult person having the care, custody, or supervision of a juvenile under the age of eighteen (18) years, the juvenile is on or remains on or loiters in, about or upon any place private or public within the Tohono O'odham Nation away

from the dwelling house or usual place of abode of the juvenile, between the hours of 9:00 o'clock P.M. and 6:00 o'clock A.M. the following day.

The Court finds Ordinance 96-001 prescribes a process to be followed by the police officers who find a juvenile in violation of the curfew. Black's Law Dictionary, revised 6th edition, explains the differences between a resolution and an ordinance as follows:

Resolution. A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution.

The term is usually employed to denote the adoption of a motion, the subject-matter of which would not properly constitute a statute; such as a mere expression of opinion; an alteration of the rules.

Ordinance. An ordinance is a rule established by authority; a permanent rule of action; a law or statute.

The chief distinction between a "resolution" and a "law" is that the former is used whenever the legislative body passing it wishes merely to express an opinion to some given matter or thing and is only to have a temporary effect on such particular thing, while a "law" is intended to permanently direct and control matters applying to persons or things in general. An ordinance is a law.

Clearly, in this matter Ordinance 96-001 supersedes Resolution No. 848 and this Court shall so hold that it does. Where two statutory provisions conflict, the more recent one controls. Pima County v. Heinfeld, 134 Ariz. 133, 654 P.2d 281.

An ordinance is unconstitutionally vague if it contains language so imprecise that it fails to give persons of ordinary intelligence fair notice of what it forbids and fails to provide explicit standards for those who enforce the ordinance. State v. Tocco, 156 Ariz. 166, 118, 750 P.2d 784, 876 (1988); State v. Cook, 13 Ariz. 406, 678 P.2d 987 (1984).

In construing an ordinance, words are given their usual and commonly understood meaning unless the legislative body intended otherwise. Carrow Co. v. Lusby, 167 Ariz. 18, 20, 804 P.2d 747, 749 (1990). Even if the ordinance's language was unclear, courts strive to give it a sensible construction and, if possible, uphold the ordinance. State v. Wagstaff, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990).

"Away from the dwelling house or usual place of abode" reasonably presumes the home with whom the minor usually resides. If the dwelling house or usual place of abode of the minor is that where the mother resides, then she is the person legally responsible for the minor who is the

subject of the curfew violation. Likewise, if the dwelling house or usual place of abode of the minor is that where the father resides, then he is the person legally responsible for the minor who is the subject of the curfew violation. The fact that this may affect single mothers more so than fathers is not proved merely by Defendant's naked allegations. But even assuming arguendo that it does, the Ordinance does not recite that it only affects single mothers and the wording of the Ordinance in Section A does not imply that the intent is to affect single mothers adversely. In fact, the Ordinance is written in gender-neutral form and clearly, by its language, does not target single mothers.

In the enactment of the Ordinance the Nation has not removed parental responsibility. The Ordinance defines that a parent, legal guardian or other responsible adult person of a minor must be aware of the minor's activities between the hours of 9:00 P.M. and 6:00 A.M. or face the following consequences:

> I. A custodial parent, legal guardian, or other adult person having the care, custody or supervision of the juvenile found guilty of a curfew violation shall be sentenced to the following:
>
> 1. For a first time offense, a $50.00 fine and counseling for the custodial parent, legal guardian, or other adult person having care, custody or supervision of the juvenile and the juvenile involved as directed by the Court in its discretion.
>
> 2. For a second offense, a $200.00 fine and counseling for the custodial parent, legal guardian, or other adult person having care, custody or supervision of the juvenile and the juvenile involved as directed by the Court in its discretion;
>
> 3. For a third offense, a $500.00 fine or imprisonment in jail for a period not to exceed ninety (90) days or both;
>
> 4. For a fourth or subsequent offense, a $500 fine or imprisonment in jail for a period not to exceed one hundred eighty (180) days or both;
>
> 5. The above fines are mandatory and may not be suspended nor converted to community service; and
>
> 6. The custodial parent, legal guardian, or other adult person having the care, custody, or supervision of the juvenile shall be ordered to make restitution for any and all damage done to public or private property by the juvenile during the time he or she was in violation of this ordinance.

Section B. of the Ordinance provides allowance for defenses:

> B. The provisions of this ordinance shall not apply under the following circumstances:
>
> 1. When the juvenile is accompanied by his or her custodial parent, legal guardian or other adult person having the care, custody, or supervision of the juvenile; or
>
> 2. Where the juvenile is on an emergency errand where the health or safety of an individual is endangered; or
>
> 3. Where the juvenile is in transit from a public or private school event or function which began prior to 9:00 o'clock P.M. of the same day and he or she is using the most direct route from the event or function to his or her dwelling house or usual place of abode; or
>
> 4. Where the juvenile is lawfully employed and is enroute to or from the employment or is engaged in lawful activities related to the employment.

According to the legislative action, the purpose of the Ordinance is to curb escalation of juvenile illegal activity that is occurring primarily in the Sells village. "The traditional right of the State" to impose time, place and manner restrictions on minors' rights, while citing juvenile crime statistics in support of the curfew has been upheld. Chambers, 4 Ill.Dec. at 310-12, 360 N.E.2d at 57-59.

The Arizona Traffic Ticket and Complaint form on which Defendant was charged with the offense does not indicate whether this is the Defendant's initial offense or a subsequent offense; therefore, Defendant has not been given notice as to which penalty would be applied.

THEREFORE, IT IS ORDERED BY THE COURT:

1. The Juvenile Curfew Ordinance does not imply any adversity toward single mothers nor does it exclude fathers from being prosecuted for violation of the Ordinance; thusly, the Ordinance is not in violation of the Tohono O'odham Nation's Constitution or the Indian Civil Rights Act.

2. Defendant's motion to dismiss is GRANTED on the basis that Defendant has not been given sufficient notice for the applicable penalty which the Defendant may be subject to.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
John B. NARCHO, Defendant.

Case No. CR11-2595/2597-97
(appeal dism'd, *Narcho v. Tohono O'odham Nation*, 2 TOR3d 11 (Aug. 11, 2003))

Decided April 16, 1998.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Patricia Pogo Overmeyer, Attorney for Defendant.

Before Judge Lucilda J. Norris.

PROCEDURE

This matter having come to be heard on March 6, 1998 in the Adult Criminal Court Division on a Motion To Dismiss filed by Patricia Pogo Overmeyer, Attorney for Defendant, John B. Narcho, with a Response filed by Michael Ehlerman, Assistant Prosecutor for the Tohono O'odham Nation. Further, the Court is in receipt from the parties a Stipulation Of Facts For Limited Purpose Of Motion To Dismiss Hearing. The parties summoned and present were: Michael Ehlerman, Assistant Prosecutor for the Tohono O'odham Nation, Patricia Overmeyer, Counsel for the Defendant, John B. Narcho and the Defendant. The Nation's witnesses properly noticed were: Austin Nunez, San Xavier District Chairman, Dave Pablo, San Xavier District Office, Marsha Davis San Xavier District Office. The Nation moved the Court that the testimony of Marsha Davis would not be needed and requested that she be excused. The Court granted request and allowed Ms. Davis to leave the courtroom. The parties addressed the stipulated motion and stated its purpose to the Court to provide the Court with a factual background for oral arguments on the Defendant's Motion To Dismiss. Further the parties stipulated to the admission into evidence of a letter dated November 7, 1997 from San Xavier District Chairman, Austin Nunez to the Defendant.

SUMMARY OF FACTS

On November 7, 1997, Defendant, John B. Narcho went to the San Xavier District of the Tohono O'odham Nation to collect signatures for a petition to recall the Nation's Chairman, Edward Manuel.

The Defendant had previously informed San Xavier District Chairman Austin Nunez that he would be gathering signatures by the mission church and plaza area. Mr. Narcho was aware that District Chairman Nunez had determined that Mr. Narcho needed to "come before our people at our District/Community meeting to obtain approval" before collecting signatures in the San Xavier Plaza area.

On November 7, 1997 at approximately 12:40 p.m., the Defendant set up a truck with a large sign approximately 20-25 yards to the east of the plaza wall and approximately ten feet to the west of Little Nogales road. At that time, District Chairman Nunez approached the Defendant and repeated that under District customs the Defendant needed to obtain community approval before collecting signatures. The Defendant declined to leave the area and the Tohono O'odham Nation Police were called. The Defendant was ultimately arrested by Tohono O'odham Police Officer, Kevin Ruder for Criminal Trespass.

DISCUSSION

Defendant argues that this Court must follow the First Amendment Jurisprudence of the United States Supreme Court because the Indian Civil Rights Act guarantees freedom of speech to members of Indian Nations by tracking the precise language of the First Amendment to the U.S. Constitution and thereby imposes First Amendment jurisprudence on the Courts of the Nation. He also asserts that the Tohono O'odham Constitution by its Article III, Section 4 adopts the U.S. Supreme Court's First Amendment jurisprudence. Defendant's arguments are therefore based upon United States Supreme Court analysis of the United States Constitution.

Defendant argues that the area where the Defendant was attempting to gather signatures is a traditional public forum. He argues that such traditional public forums, the right of the government to limit expressive activity such as those attempted by Mr. Narcho is sharply circumscribed and that the government may not place unreasonable restrictions on the Defendant's ability to exercise his free speech rights. Defendant further argues that the requirement that Defendant obtain permission from the District/Community prior to soliciting signatures is unreasonable. Defendant cites U.S. Supreme Court case law in support of his position that the District's requirement that Defendant attend a District/Community meeting to obtain permission to solicit signatures is a prior restraint which is impermissible. Defendant asserts that it is constitutionally impermissible because it presents a danger that government officials may unduly suppress expression protected by the First Amendment and that the District

procedure lacks safeguards designed to prevent the dangers of political suppression of projected speech.

Although this may be an accurate analysis of the law in the United States, it is difficult to use the same analysis when addressing this case because the U.S. Constitution is not the same as the Tohono O'odham Constitution. It is felt by this Court that provisions of the Tohono O'odham Constitution are in conflict with the analysis of prior restraints presented by Defendant and that use of the prior restraint analysis would violate certain portions of the Tohono O'odham Constitution. Therefore, although U.S. Federal case law is helpful in analysis of this matter, it is inappropriate to wholly apply the U.S. Supreme Court interpretations of the First Amendment to the U.S. Constitution.

The Tohono O'odham Constitution itself directly guarantees the freedom of speech to its members. Section 2 of Article III entitled Rights of Members states in applicable part, **"All members of the Tohono O'odham Nation shall have the freedom of worship, speech, press and assembly".** Because the foregoing rights were specifically and directly provided for by the drafters of the Tohono O'odham Constitution, it is necessary that these rights be interpreted in harmony with other applicable sections of the Constitution so that the document is a consistent workable whole. One such applicable section is Section 3 of Article XVI/Land Policy which states:

> Inasmuch as the lands of the Tohono O'odham Nation are held in common, district boundaries shall not prevent any member of the Nation from going into any district to Live or beneficially use the lands in accordance with the Customary procedure of the district. (Emphasis added).

One can only surmise that the basic rights of the Tohono O'odham people to free speech and assembly as described in Article III, Section 2 of the Constitution and the rights of the Nation's members to use district lands in accordance with the customary procedures of the district (wherein the land is located) are separate and distinct rights belonging to the people of the Nation. These rights must be read in harmony and therefore necessarily in a manner unique and different from the those of the United States Constitution.

In the case, we may not determine that use of district customary procedures in managing land use are unconstitutional when the Preamble of the Tohono O'odham Constitution states that one purpose of the Constitution is to preserve, protect and build upon our unique and distinctive

culture and traditions; and Article XVI, Section 3 of the Tohono O'odham Constitution provides that use of the land are to occur in accordance with customary procedure. (emphasis added).

Although in other jurisdictions it may be necessary to have written guidelines for obtaining permits or other grants of right to use federal land, we are a unique people. Historically here on the Nation the customary procedures are not written in books or treaties, as the framers of the Tohono O'odham Constitution were certainly aware. In fact, the customary procedures vary from district to district and usually involve the whole community. The ability of the Districts/Communities to govern their own lands is deeply rooted both in the Constitution and in the fabric of Tohono O'odham society.

In accordance with the customary procedure of the San Xavier District the Defendant was informed he should approach the District/Community for approval of his intended activity. According to the testimony of District Chairman Nunez, these meetings are held to hear presentations from outside persons and organizations; to provide a forum for the Nation's Legislative Council members and San Xavier District Council members to report to the community; and to provide a forum by which members of the community may bring matters for discussion before the community. Approaching the District/Community, therefore, is not equivalent to approaching a governmental body or official. It is equivalent to approaching the residents of the community and is keeping with the cultural courtesy and respect that Tohono O'odham people show for their fellow members. We therefore cannot ignore the validity of these customary procedures until is shown that such procedures directly infringe on other rights provided for by the Tohono O'odham Constitution. In this particular instance, the Defendant was provided with the information about how to obtain community approval for his activities. The Defendant knew what he had to do, but declined to do it.

The Court therefore holds:

1) It is in keeping with the Constitution that district customary procedures be used to manage the beneficial use of district land.
2) The customary procedure of going to the District/Community to request permission to use certain lands is a prior restraint that is not unreasonable as it is rooted in the custom and tradition of the Tohono O'odham people and recognized by the Constitution.
3) Defendant's rights to free speech were sufficiently safeguarded in this matter, in the fact that District/Community membership, when applying its customary procedures,

is less likely than governmental bodies or public officials to impermissibly prevent the free speech of its fellow Tohono O'odham members.

4) It is up to each District to develop safeguards to ensure that the District/Community's application of customary procedures is not an effort to suppress expression merely because public officials oppose the speaker's view.
5) Defendant's Motion to Dismiss is hereby **DENIED.**

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Wayne EVANS, Petitioner,
v.
TOHONO O'ODHAM NATION and Edward D. MANUEL, Respondent.

Case No. 96-C-6751
(appeal dism'd, *Evans v. Tohono O'odham Nation*, 3 TOR3d 20 (Sep. 4, 2008))

Decided July 17, 1998.

Before Judge Malcolm Escalante.

This matter came on to be heard on the 27th day of May, 1998 pursuant to Defendants' Motion to Dismiss. The Court having heard the arguments of counsel and having reviewed the Complaint, Defendants' Motion to Dismiss, Plaintiff's Opposition to Defendants' Motion to Dismiss, and Defendants' Reply to Opposition to Defendant's Motion to Dismiss and for good cause shown, the Court makes the following Findings of Fact and Conclusions of Law.

FINDING OF FACT

1. This Court has jurisdiction over the subject matter and parties pursuant to the Constitution of the Tohono O'odham Nation and Title III of the Law and Order Code, Civil Actions, Chapter 2, Section 1.
2. The Tohono O'odham Farming Authority, hereinafter TOFA, was established by the Tohono O'odham Legislative Council pursuant to a Plan of Operation for the purposes of utilizing, developing, and generating profits from the agricultural resources of the Tohono O'odham Nation for the benefit of the Nation.
3. From August 22, 1995 to early November 1996, Plaintiff served as the General Manager of TOFA.

4. The terms and conditions of Plaintiff's employment as well as the conditions for Plaintiff's termination are set forth in the Management Contract

5. Pursuant to the Management Contract, Plaintiff's employment was subject to termination for misfeasance, malfeasance, and non-feasance at any time without prior notice.

6. On September 9, 1996 in Resolution 96-387, the Tohono O'odham Legislative Council suspended TOFA's Plan of Operation for a period of 180 days and authorized the Defendant Edward Manuel, Chairman of the Tohono O'odham Nation, hereinafter Chairman Manuel, to secure and take control of the assets of TOFA and take any and all necessary steps to insure that the day to day farming operations continued without interruption.

7. On September 9, 1995 Chairman Manuel suspended Plaintiff without pay as the General Manager of TOFA.

8. On November 5, 1996, in Resolution 96-511, the Tohono O'odham Legislative Council directed Chairman Manuel to terminate Plaintiff as General Manager of TOFA.

9. On or about November 5, 1996, Chairman Manuel terminated Plaintiff as General Manager of TOFA.

CONCLUSIONS OF LAW

10. By its enactment of the Indian Civil Rights Act, hereinafter ICRA, Congress did not grant jurisdiction to Federal Courts over Indian nations or their officials with respect to claims of Indian Civil Rights Act violations nor did Congress waive the immunity of such Indian nations or officials from ICRA suits in federal Court.

11. By its enactment of the ICRA, Congress did not waive the immunity of Indian nations or official from ICRA suits in tribal court.

12. In accordance with well settled law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

13. The people of the Tohono O'odham Nation did not waive the tribe's sovereign immunity by adopting the Tohono O'odham Constitution.

14. Congress has not abrogated the sovereign immunity of the Tohono O'odham Nation or its officials, nor has Defendant Tohono O'odham Nation waived said sovereign immunity. The Tohono O'odham Nation, therefore, is immune from suit.

15. In suspending and terminating Plaintiff as General Manager of TOFA, Chairman Manuel acted in his official capacity and pursuant to authority delegated to him by the Legislative Council.

16. Plaintiff fails to state a claim against Defendant Edward Manuel, the Chairman of the Tohono O'odham Nation for acting in excess of his authority.

IT IS THEREFORE ORDERED:

The Plaintiff's complaint against the Defendants Tohono O'odham Nation and Chairman Manuel is hereby dismissed with prejudice.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Glen ESCALANTE, Defendant.

Case No. CR03-640-342-98
(appeal dism'd, *Tohono O'odham Nation v. Escalante*, 2 TOR3d 12 (Aug. 11, 2003))

Decided July 31, 1998.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Tohono O'odham Advocate Program by Jim White and Laurie Bowman, Counsel for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary Court (hereinafter Court) for oral argument hearing on Defendant's MOTION FOR DISCOVERY SANCTIONS, filed by and through his Defense Counsel. The Tohono O'odham Nation by and through the Prosecutor's Office has filed a response.

Parties present: Tohono O'odham Nation Assistant Prosecutor (hereinafter Nation), Michael Ehlerman; Defense Co-Counsels, Jim White and Laurie Bowman; Defendant, Glen Escalante.

ISSUES

Defendant, by and through his Counsel, moves the Court to sanction the Nation for failure to provide the written statement/incident report authored by Officer J. Garcia, #242, whom the Nation will call as a witness in the case-in-chief. Disclosure of such statement is required within the time frame set out by Rule 15.1 (1), Ariz.R.Crim.P.

Defendant argues that on April 7, 1998, he received the Nation's Rule 15.1 (a) disclosure at his pretrial conference, disclosing Officer J. Garcia as a witness in its case-in-chief and failed to disclose Officer Garcia's incident report.

Defendant further argues the Nation should be sanctioned by precluding Officer J. Garcia as a witness, as provided for by Rule 15.7 (4), Ariz.R.Crim.P.

The Nation in their response argues that the Defendant's motion should be denied as (1) the Nation cannot be sanctioned for failing to disclose a witness statement that does not exist, (2) The Nation has no duty to generate written reports, witness statements or to otherwise assist the defendant in the presentation of his case, and (3) the doctrine of separation of powers prevents the Judicial Branch from mandating report writing policies for an Executive Branch Department.

FINDINGS AND ORDER

The court has adopted the Arizona Rules of Criminal Procedure, as applicable, to be the rules of court in adult criminal matters, pursuant to Administrative Order III and the Constitution of the Tohono O'odham Nation, Article VIII, Section 10 (d).

Rule 15.1(a) states in relevant part, no later than the pretrial conference or 20 days after arraignment, whichever is earlier, or at such time as the court may direct, the prosecutor shall make available to the defendant for examination and reproduction the following material and information except as provided by Rule 39(b) within the prosecutor's possession or control:

> (1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;

The court has not otherwise directed for discovery to be provided to the defendant.

The investigating officer, Officer J. Garcia, in accordance to his authority as a police officer of the Tohono O'odham Department, arrested and filed complaints against the defendant that defendant did on or about March 8, 1998 committed the following violations of the Tohono O'odham Criminal Code: Assault/Domestic Violence, CR03-640-98; Threatening/Domestic Violence, CR03-641-98; Disorderly Conduct/Domestic Violence, CR03-642-98.

Defendant was arraigned on March 23, 1998, entered not guilty pleas to all charges and requested a trial by the jury. A pretrial conference was ordered for April 7, 1998.

Defendant filed his MOTION FOR DISCOVERY SANCTIONS on May 7, 1998 requesting the court to preclude Officer J. Garcia from testifying for the reason that the Prosecution has not disclosed Officer Garcia's report as required under Rule 15.

Rule 15 specifically defines the process to be followed in obtaining discoverable material in a criminal action and also describes the Nation's obligation to make disclosures, in this case the Officer's report, within a particular timeframe.

The Nation raises the issue the court does not have authority to mandate report writing policies for an Executive Branch Department, Police Department. The court recognizes the separation of powers doctrine and does not view its role to mandate any policies for departments of the Executive Branch.

The police department, a law enforcement agency and in this case has initiated an investigation in the alleged criminal actions of the defendant, is an arm of the Nation. In this relationship the Nation has control of the agency and is required to produce the police officer's report within the timeframe of Rule 17.

The court promulgated the discovery rules to provide both the Nation and defendants with adequate means to discoverable materials to aid in the preparation of each side's case to avoid any delays or surprises at trial.

Defendant has not waived any of the applicable timeframes. (The Nation reported during oral arguments that the defendant did receive the police officer report on the day of the hearing.) Whether the Nation has now provided the police officer report is not relevant. The Court finds the Nation's has failed to provide the discoverable material within the timeframe of Rule 17.

NOW THEREFORE IT IS ORDERED BY THE COURT Defendant's MOTION FOR DISCOVERY SANCTIONS is **GRANTED**, Officer J. Garcia is precluded from testifying in this case matter.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

UNITED LININGS, INC, a corporation, Plaintiff,
v.
VI-IKAM DOAG INDUSTRIES, INC., a tribally chartered corporation of the Tohono O'odham Nation

Case No. 98-C-7354

Decided December 20, 1998.

Before Robert A. Williams, Jr., Judge Pro Tempore.

This case arises out of a contract dispute and collection of an alleged debt between plaintiff, United Linings, Inc. (United Linings), a non-Indian corporation licensed to do business in the state of Arizona, and defendant, Vi-Ikam Doag Industries (VDI), a tribally chartered corporation of the Tohono O'odham Nation (the Nation). United Linings claims that VDI owes it $28,571.72 for materials VDI purchased as part of a project for a containment basin in the San Lucy District of the Nation. United Linings also asks for any interest which has accrued on the debt, alleged as due and owing since May 1, 1996. Attorney's fees are also requested as part of the claim.

According to United Linings, this case is about whether VDI "honors the agreements it makes." [Plaintiff's Response to Motion to Dismiss, p. 2]. VDI, however, views the case differently. It asks this court to dismiss United Linings' claim, arguing that as a wholly-owned tribal corporation, it enjoys the benefit of what it asserts is the Nation's sovereign immunity from suit in the Nation's own courts. According to its theory of the case, since VDI has neither consented to this lawsuit, nor agreed to waive its immunity by express, written provision, United Linings' contract claim cannot be heard by this court. As VDI's counsel acknowledged to the court during oral argument on its motion, whether in fact VDI owes the claimed debt on the materials provided under contract by United Linings is of no consequence, for *no* court, it argues, may hear the claim under the theory of tribal sovereign immunity which VDI asserts in this case.

VDI's motion to dismiss came before this court for oral argument on October 21, 1998. The court, having considered the arguments and evidence presented before it, hereby denies VDI's motion to dismiss. Accepting for argument's sake that VDI indeed does possess sovereign immunity as a tribally chartered corporation of the Nation, the arguments and evidence, at least so far as presented to the court, are sufficient to establish a waiver of VDI's immunity with respect to the transactions at issue in this case.

I.

This action arises out of a contract dispute and collection of an alleged debt between plaintiff, United Linings, and defendant, VDI. United Linings alleges that it contracted with VDI to deliver a lining for a containment basin project in the San Lucy District of the Nation. By 1996, United Linings alleges that it had completed delivery of materials worth $132,359 for the project, and that thereafter, VDI made payments of $50,000 and $53,787.28, leaving an unpaid balance for the materials of $28,571.72.

United Linings further alleges that when VDI refused to pay for the balance of materials as it had agreed, it asked for their return. VDI has neither returned nor paid for these materials, at least according to United Linings.

On January 7, 1998, United Linings filed a complaint against VDI in the Superior Court for the State of Arizona, County of Pima. In addition, United Linings filed an Application for Provisional Remedies. In an ex parte proceeding at which VDI was not present, the Arizona Superior Court ordered the issuance of a writ of garnishment permitting United Linings to remove funds from VDI's bank account at Bank One, Arizona, based on United Linings' statements that VDI did not have sufficient funds to pay its creditors, was disposing of its assets, had refused to secure its debt to United Linings, and intended to defraud its creditors.

As permitted under Arizona law, VDI immediately requested an expedited hearing to protest the garnishment and to ask for the refund of its property in state court. A hearing was held on January 30, 1998, after which the Arizona Superior Court judge concluded that United Linings had not met its burden and VDI's funds were returned.

VDI then filed a Motion to Dismiss and Motion to Change Venue with the Arizona Superior Court on February 13, 1998. The Motion to Change Venue was later withdrawn by VDI. The Motion to Dismiss was based upon the asserted lack of an Arizona court's jurisdiction over matters that arise on the reservation, the sovereign immunity of VDI as a tribally chartered corporation, and failure to state a claim.

The Superior Court granted VDI's Motion to Dismiss for lack of subject matter jurisdiction, finding as following:

> . . . there are insufficient contacts with this state outside the boundaries of the Tohono O'odham Nation to permit the exercise of subject matter jurisdiction over the defendant, a tribally chartered corporation wholly owned by the Nation and created for the benefit of its members. *R.J. Williams Co. v. Ft. Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983). Tribal Courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1982).
>
> The assertion of jurisdiction in this case would violate tribal Indian law and the policy of preempting State court jurisdiction over Indian Tribes and their subordinate economic organizations in the absence of waiver or consent. *Tohono O'odham Nation v. Schwartz*, 837 F. supp 1024 (D. Ariz. 1993).

Minute Entry, April 6, 1998. The Superior Court did not address the issues of sovereign immunity or failure to state a claim raised by VDI in its motion to dismiss.

Having failed to collect on its alleged debt in state court, United Linings filed this action in tribal court on May 7, 1998. VDI responded to this action by filing its motion to dismiss and a request for oral argument, which was held on October 21, 1988.

II.

That part of VDI's motion to dismiss upon United Linings failure to state a claim upon which relief may be granted is easily disposed of by this court. It is well-established that a motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *See Triad Assocs. V. Chicago Housing Authority*, 892 F.2d 583, 586 (7th Cir. 1989). A motion to dismiss can only be granted if it appears beyond doubt that the plaintiff could prove no set of facts entitling him or her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Taking all well-pleaded facts in the plaintiffs' complaint as true for the purposes of ruling on defendant's motion to dismiss, *see Ed Miniat, Inc. v. Globe Life Insurance Group., Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987), this court finds that United Linings has met its burden on the sufficiency of its complaint. United Linings alleges that VDI purchased material and/or services, agreeing to pay the sum of $28,571.72, that demand was made upon VDI, and that said obligation remains due and owing. In its supplemental memorandum, requested by the court at the October 26 hearing, and timely filed and responded to by VDI's Controverting Statement of Facts and Supplemental Memorandum, United Linings attached as an exhibit a purported copy of its agreement with VDI, signed by VDI's then-General Manager, contemplating United Linings' supplying and installing wastewater lagoon linings at a site within the San Lucy District of the Nation. VDI does raise several issues with respect to the authority of its then-General Manager to sign such an agreement and whether the agreement contains a waiver of sovereign immunity. These issues do not have to be decided on at this time for purposes of VDI's motion to dismiss for failure to state a claim. The agreement as alleged, along with the statements asserted by United Linings in its complaint, provide this court with adequate evidence regarding the sufficiency of the underlying contract claim. That part of VDI's motion to dismiss for failure to state a claim is therefore denied.

III.

That part of VDI's complaint seeking dismissal on the grounds that it is immune from suit presents a more difficult burden for United Linings to meet. Generally, courts treat sovereign immunity defenses as grounds for dismissal and consider it when testing for the existence of subject matter jurisdiction. *See, e.g., Wetlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 673 (9th cir. 1993); *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th circ. 1988), *cert. denied*, 489 U.S. 1052 (1989). On a motion to dismiss for lack of subject matter jurisdiction, generally plaintiff bears the burden of establishing subject matter jurisdiction because it is plaintiff who is seeking to invoke the court's jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994); *Sopcak v. Northern Mountain Helicopter Service*, 52 F.3d 817, 818 (9th Cir. 1995). The burden of demonstrating that VDI either does not enjoy the Nation's sovereign immunity from suit, or that VDI does enjoy sovereign immunity but it has been waived, thus rests with United Linings. See *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746 (Fed. Cir. 1988) (1975). An inability to make such a showing creates a fundamental jurisdictional defect which warrants dismissal. See 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3654, at 186-99 (1985); C. Wright, The Law of Federal Courts 115 (4th ed. 1983). See also *Hahn v. United States*, 757 F.2d 581, 586 (3d Cir. 1985).

It is well-established under principles of federal Indian law that Indian tribes enjoy sovereign immunity from suit in *federal* and *state* courts, unless Congress or the tribe consents to waive tribal immunity in such suit. This immunity was first recognized in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), where the Supreme Court held that "Indian Nations are exempt from suit without congressional authorization," 309 U.S. at 512. Commentators and some courts had expressed a degree of doubt as to whether tribes themselves could waive their sovereign immunity, but this issue has been considered as having been resolved by the United States Supreme Court in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). There, the Court found a tribe immune from a *state* court action seeking to enjoin off-reservation fishing claimed to be in violation of state law. The Court, in its discussion on the tribe's sovereign immunity from suit in state court under federal law, assumed a power on the part of a tribe to waive its own immunity: "Absent an effective waiver or consent [by the tribe], it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

Thus, this court accepts the proposition that the Nation would enjoy sovereign immunity from suit in state and federal court, absent a waiver or consent by Congress or the tribe. The court also accepts VDI's assertion that under the rules and principles set out by federal and Arizona courts (which are not binding on this court), VDI would likely be held to possess tribal sovereign immunity as a commercial enterprise that functions as a subordinate economic unit of the tribe. As such a tribal entity, VDI would be immune from suit in federal and Arizona courts, absent an effective waiver or consent by Congress, the Nation, or VDI. See *In re Greene*, 980 F.2d 590 (9th Cir. 1992) (holding that tribal sovereign immunity extended to a commercial enterprise wholly owned by the Yakima Indian Nation); *White Mountain Apache Indian Tribe v Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971) (Fort Apache Timber Co. is a subordinate business organization which enjoys sovereign immunity); *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104, 1110 (1989) (affirming the immunity of subordinate business organizations but concluding the Picopa Construction Co. is *not* a subordinate economic unit enjoying the immunity of the Salt River Pima-Maricopa Indian Community). These cases, however, do not establish definitively whether the Nation or VDI enjoy sovereign immunity in the Nation's *own* courts.

VDI, in urging this court to hold that the Nation and its subordinate economic enterprises enjoy sovereign immunity in the Nation's courts, mischaracterizes the Supreme Court's holding in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). According to VDI, *Puyallup* holds that "absent an effective waiver or consent, a tribe may not be sued in *tribal*, state, or federal court." [Defendant's Motion to Dismiss, at 5 (emphasis added by this court)]. *Puyallup* did not mention *tribal* courts anywhere in its text, and for good reason. It would be an invasion of tribal sovereignty contrary to more than a century of Supreme Court Indian law jurisprudence for the Court to declare limits on a tribal court's jurisdiction respecting the issue of tribal sovereign immunity, absent congressional legislation. Since the days of *Ex parte Crow Dog*, 109 U.S. 556 (1883) and *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court consistently has refrained from instructing tribal legal systems and courts on how to interpret their own constitutions, customs and traditions, or how to treat defenses under tribal law, absent express congressional legislation. *Puyallup* simply does not speak to the issue of the degree and extent of tribal sovereign immunity in tribal court.

Further, unlike a number of other tribes, the Tohono O'odham Nation in its Constitution and laws does not specifically affirm or declare the existence of its sovereign immunity in any court. For example, Article XXIV of the Constitution of the Pascua Yaqui Tribe of Arizona States:

> The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, *unless the tribal council enacts an ordinance expressly consenting to suit*. (Emphasis added).

The Hopi Tribal Council, by resolution, has asserted that "sovereign immunity is proper and should continue to be available in suits for damages against tribal governments as such is necessary to preserve limited public funds for public purposes." Hopi Res. H-62-90 (Apr. 2, 1990). Some tribes have specifically restricted their own tribal courts from hearing claims against the tribe, absent specific waiver by tribal legislation. For example, Chapter 33, *Civil Matters*, section 33-02-01 of the Sisseton-Wapeton Sioux Tribe, states that its tribal court

> Shall have no jurisdiction over any suit brought against the Tribe without the consent of the Tribe, unless by specific legislation the Tribe has restricted its sovereign immunity under certain circumstances. Nothing in this Code shall be construed as consent by the Tribe to be sued.

Defendant VDI has cited to no provision of the Tribal Constitution or Tribal Code which declares that the Nation has declared through its laws that it enjoys sovereign immunity from suit in its own courts. The authority contained in Article VI of the Nation's Constitution, vesting the Council with the powers of preventing encumbrance upon the fiscal assets, land and other public property of the Nation, appears to be sufficient support for a power of legislation declaring the Nation's sovereign immunity from suit. These powers, however, are granted by the Constitution to the Council, and, must be, by the terms of Article VI, "exercise[d]." By this language, it is clear that the framers of the Tohono O'odham Constitution intended that the Council possess these powers, but it is also clear that the powers are not self-executing. They must be acted upon, by appropriate legislation. Thus, the Nation's Constitution vests the Council with ample authority to enact legislation similar to that passed by the Hopi Council and the Sisseton-Wapeton Sioux Tribe preventing the Nation's courts from entertaining suits against the tribe.

Thus, in the absence of an express constitutional or legislative declaration that the Nation enjoys, unconditionally, sovereign immunity in its own courts, this court proceeds cautiously on the assertion of the defense in the present action. In fact, because of this court's finding on the issue of waiver, discussed below, it declines to rule specifically on the existence or scope of tribal sovereign immunity in the Nation's courts under the Constitution and laws of the Nation. The court will assume, without expressly so holding, that for the purposes of argument only, VDI

possesses sovereign immunity from suit in the Nation's courts. However, because this court holds that whatever degree of immunity VDI enjoys has been effectively waived by the Nation in VDI's charter, it is unnecessary for this court to speculate any further on the existence or extent of the Nation's or VDI's sovereign immunity in tribal court.

IV.

VDI urges this court to adopt the "general principle" that a waiver of tribal sovereign immunity must be "unambiguous and 'unequivocally expressed,'" *quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). VDI argues that this principle is "simple" and it requires this court to find that VDI's immunity to suit has not been expressly waived by a written provision. Therefore, United Linings' complaint must be dismissed. [Defendant's Motion to Dismiss, at 8]. In a tribal court, however, application of the "general principle" of the United State' Supreme Court's decision in *Santa Clara* that a waiver of sovereign immunity must be "unambiguous and 'unequivocally expressed'" by a written provision is not as "simple" as VDI makes out.

The reasons supporting the *Santa Clara* express written waiver principle's application by a non-Indian court, whether it be the United States Supreme Court or the Superior Court of Arizona sitting in Pima County, simply do not apply to a tribal court. As Judge Posner, reflecting on the reach of *Santa Clara* to contractual debt obligation cases, stated in *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 23 Indian Law Reporter 2125 (7th Cir. 1996):

> Doubt about the efficacy of the tribe's waiver arises only because of statements in a number of judicial opinions that waivers or other overrides of tribal sovereign immunity must be explicit to be effective. These statements are found in two distinct classes of case. In one, illustrated by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the issue is whether Congress has curtailed tribal rights; in these cases the requirement of a clear statement serves to protect tribal prerogatives. In the other class of case, illustrated by contract cases such as the present one, the issue is whether the tribe itself has waived one of its rights. Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity, the harder it is for it to make advantageous business transactions.

Id. at 2126.

To accept VDI's argument that a tribal court can find a waiver of tribal sovereign immunity only where it is "unambiguous and 'unequivocally expressed'" by written provision would be to accept the proposition that the Nation's courts, established as an independent branch of the Nation's government by Article IV of the Nation's Constitution, cannot be trusted to "protect tribal prerogative." This court rejects that proposition.

It is instructive to examine closely the United State Supreme Court's *Santa Clara* opinion which VDI primarily relies on, for the Court there similarly rejected the notion that tribal courts cannot be trusted to "protect tribal prerogatives." *Santa Clara* dealt with Congress' intent in passing the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303. The question before the Court there was whether *Congress* intended to waive the tribe's sovereign immunity from suit to authorize *federal courts* to review violations of the Acts' provisions except as they might arise on habeas corpus, the only remedial provision *expressly* supplied by Congress in this landmark legislation. See 25 U.S.C. § 1303 (the privilege of writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." *Id.*)

Thus, in *Santa Clara,* the Supreme Court was confronted with the contention that Congress *impliedly* waived tribal sovereign immunity under the ICRA to authorize civil suits for equitable relief against the tribe and its officers in federal courts. The plaintiff in that case argued against the tribe that Congress impliedly waived tribal immunity, in addition to its express waiver of immunity for habeas corpus actions brought in federal court under the ICRA. It was in response to this argument that the Court, in one of its most important decisions protecting tribal sovereignty, announced its "unequivocally expressed" rule for *Congressional* waivers of tribal sovereign immunity.

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are banned by its sovereign immunity from suit.

Id. at 59.

Thus, VDI's reliance on *Santa Clara* for the general principle that in tribal court, waivers of tribal sovereign immunity must be "unequivocally expressed" is misplaced. *Santa Clara*, as the Supreme Court itself recognized, dealt with the weighty issue of Congress' "plenary authority to

limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." *Id*. 56. In such cases involving the unilateral congressional extinguishment of tribal powers of sovereignty "pre-existing the Constitution," *id*., the Supreme Court has traditionally, and rightly, looked for clear expressions of Congressional intent to extinguish. "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Id*. at 60. The Court in *Santa Clara*, out of respect for the principle of tribal sovereignty in federal Indian law, ruled that the plaintiff's remedies for violations of the ICRA, exclusive of a writ of habeas corpus, were limited to the tribal forum. Under the Constitution of the Nation, as with most other Indian tribes, that forum would be the tribal court. Under *Santa Clara*, tribal courts therefore are presumed by the United States Supreme Court to be perfectly capable institutions for protecting tribal prerogatives under the ICRA. *See also National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

Neither *Santa Clara*, nor any other case cited by VDI, therefore, answers the question of what interpretive principle a tribal court should apply in determining whether or not the tribe has waived its sovereign immunity from suit in tribal court on a contractual debt alleged as owed by a tribal corporation. The waiver of sovereign immunity by the tribe is clearly an act of self-determination in the unilateral exercise of tribal sovereignty. Unlike the congressional exercise of plenary power, as exemplified by the ICRA, the tribe alone decides upon whether it shall waive its immunity. In the absence of a constitutional or legislative directive from the Nation's elected Council, the Nation's courts, as a constitutionally created independent branch of the Nation's government, *see* Constitution of the Tohono O'odham Nation, Art. IV, must decide upon the general principle for deciding whether there has been a waiver of sovereign immunity in a particular case.

V.

Santa Clara, therefore, does not support the rule which VDI urges should be applied by a *tribal* court to determine whether the tribe or VDI waived VDI's sovereign immunity to suit in this case. In federal and state court, the reasons for requiring express waivers relate directly to the institutional respect for tribal sovereignty that is deeply embedded in the principles of federal Indian law. Such reasons do not apply in a tribe's own courts, which are entrusted with a constitutional obligation to protect and exercise the sovereignty of the tribe. In fact, the institutional respect accorded tribal sovereignty by federal and state courts, and by Congress as

well, counsels that tribal courts approach the issue of deciding the rule for finding a waiver of tribal sovereign immunity with great care and sensitivity, fully cognizant of its unique responsibilities under the principles of federal Indian law, as well as under the Nation's constitution and laws. For a tribal court must be ever mindful of the institutional reality that under the principles of federal Indian law, Congress possesses plenary power to diminish or extinguish this important attribute of tribal sovereignty.

The source of tribal immunity from suit in federal and state courts is a subject of considerable current debate and controversy. No congressional statute exists conferring such an immunity on tribes, nor does the doctrine appear in the Constitution of the United States. In the Supreme Court's most recent pronouncement on the doctrine, *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1998), Justice Kennedy, writing for the six person majority, stated "though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident." *Id*. at 1703.

While the majority in *Kiowa* reluctantly upheld tribal sovereign immunity from civil suits in contract, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation, the Court indicated that the doctrine was ripe for congressional scrutiny as to its soundness and need for reform as public policy.

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment. (Citations omitted).

Id. at 1705.

It is worth noting that two Justices joined Justice Stevens' vigorous dissent in *Kiowa*, which argued strongly for limiting the reach of the doctrine judicially to on-reservation conduct only. Further, at the very time that oral argument was presented to the Court in *Kiowa*, Congress had scheduled hearings on tribal immunity, see Transcript of Oral Argument, *Kiowa Tribe*, 118 S.Ct. 1700 (1998) (No. 96-1037), available in 1998 WF 15116, at *15, *27-*28. (Jan. 12, 1998), and several members of Congress, most particularly Senator Slade Gorton of Washington, a long-time ranking majority member of the Senate committee with oversight responsibility for Indian affairs, had recommended legislation to significantly curb tribal immunity in the period of time between when the Court heard oral argument and issued its opinion in *Kiowa*. *See, e.g.*, Jim Camden, "Gordon Rips Taxes, GOP Senator Says We Should Just Start Over With Tax Code," *Spokesman-Review* (Spokane, Wash.) April 17, 1998, at B3.

Criticism of tribal sovereign immunity is not limited to all of the current members of the Supreme Court and prominent members of Congress with oversight responsibility for Indian legislation. A large number of state and federal courts have questioned the wisdom of applying the doctrine, particularly in situations where tribes or their instrumentalities are engaged in commercial activity or have been sued for activities occurring off the reservation. *See* Note, "In Defense of Tribal Sovereign Immunity," 95 Harv.L.Rev. 1058 (1982)(collecting state and federal court cases criticizing the doctrine). The legal literature criticizing the doctrine has similarly burgeoned in recent years. *See, e.g.*, Fogleman, Note, "Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses," 79 Va.L.Rev. 1345, 1364-65 (1993).

The lack of a federal constitutional or legislative foundation for the doctrine of tribal sovereign immunity, the United States Supreme Court's open invitation to Congress to reform this court-created doctrine, and sustained criticism by non-Indian courts and commentators would normally counsel a tribal court to proceed cautiously when confronted by a motion to dismiss a contract claim against a tribal corporation solely on the basis of tribal sovereign immunity not having been expressly waived. Caution is advisable, not necessarily out of any fear of criticism or providing more ammunition to those who would attack or seek to abrogate or extinguish this important attribute of tribal sovereignty, but rather because of the unique responsibility entrusted upon the tribal courts of the Nation in applying this doctrine. Under the present state of federal Indian law, tribes have sovereign immunity in federal and state courts, at least for the time being. This means that the courts of the Tohono O'odham Nation have the sole

responsibility for deciding the scope of the Nation's sovereign immunity in tribal courts, and it is a responsibility that this court takes most seriously.

VI.

A proper respect for protecting tribal prerogatives requires that the Nation's courts adopt a simple principle that waivers of sovereign immunity should never be implied, but, following the soundly reasoned opinion of the Appellate Court of the Hopi Tribe in *Martin v. Hopi Tribe*, 25 Indian Law Reporter 6185 (1996), no "magic words" should be required either for a tribal court to find a waiver of tribal sovereign immunity:

> Although a waiver must be "unequivocally expressed," courts have not required valid waivers to explicitly state, "sovereign immunity is hereby waived," or any other "magic" words for there to be a valid waiver. See *Hopi Tribe*, 46 F.3d at 921; *see also Franchise Tax Bd. Of Cal. V. U.S. Postal Service*, 467 U.S. 512, 521, (1984)….
>
> Therefore, although an effective waiver of sovereign immunity will be strictly construed and not enlarged beyond what the language of the statute requires (*see Ardestani v. I.N.S.*, 502 U.S. 129, 112 S.Ct. 515 (1991)), there is no "ritualistic formula" for such an expression (quoting *Franchise Tax Bd. of Calf.*, 467 U.S. at 521).Also, although we must look at the plain statement made, the Tribal Council's intent to waive immunity must be reviewed to put the scope of the statement in context

Id. At 6188. Following *Martin*, this court adopts the principle that a waiver of tribal sovereign immunity in a suit on a contractual debt alleged as owned by a tribally chartered corporation must be established by looking to the plain statements and the intent of the words asserted as constituting the waiver.

Applying this principle to the present case convinces this court that the Nation has waived whatever degree of sovereign immunity VDI might enjoy from suit in tribal court for the type of contract claim being brought by United Linings. The plain statement of waiver is contained in VDI's corporate charter, *see* Ordinance of the Papago Tribal Council (Charter of the Vi-ikam Doag Industries, Inc.) Ord. No. 1-84 (enacted Feb. 8, 1984). The charter sets out a broad array of powers on behalf of VDI by which the Council intended the corporation "to encourage and promote the development of business and employment opportunities and income in the San Lucy District and cooperate with individuals, families, groups, the District Council, Legislative Council, other governmental agencies, and private and public corporations to achieve VDI's

objectives." Charter, Art. I. In order for VDI to better carry out these important purposes, the Council, by Article II(2) of the charter, declared as follows:

> The Papago Tribe hereby gives its irrevocable consent to allowing the Vi-ikam Doag Industries to sue and be sued in its corporate name upon any contract, claim or obligation arising out of its activities under this Charter, and hereby authorizes the Vi-ikam Doag Industries to agree by express provisions in a contract to waive any immunity from suit it might otherwise have; provided however, that the foregoing consent and authorization shall not be deemed a consent or an authorization by or on behalf of the Vi-ikam Doag Industries of the Papago Tribe to the levy of an judgment, lien, attachment, execution or other judicial process upon the property, assets or receipts pledged or assigned, and further provided that neither the Papago Tribe nor the San Lucy District shall be liable for the debts or obligations of Vi-ikam Doag Industries.

VDI argues that by this language, the Papago Tribal Council (the predecessor to the Tohono O'odham Legislative Council), authorized VDI "'to sue and be sued in its corporate name' and to exercise this authority 'by express provisions on a contract'" [Defendant's Motion to Dismiss, p. 9 (underline supplied by VDI)] The purpose and effect of this provision authorizing the corporation to sue and be sued and agree to express provisions in a contract to waive immunity, VDI argues, is thus to permit VDI to waive its immunity, but until it so acts, it is immune from suit.

The language of the charter, however, does not support VDI's interpretation. The "sue and be sued" clause as set forth in the tribal ordinance quoted above has been recognized as constituting an express waiver of sovereign immunity by a number of non-Indian courts. *See, e.g., Weeks Const. Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *American Indian Agricultural Credit, American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux*, 780 F.2d 1374 (8th Cir. 1985) (quoting with approval the "sue or be sued" clause at issue in *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23 (D. Minn. 1974) (Heaney, J., sitting by designation), *aff'd* 517 F.2d 508 (8th Cir. 1975); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918(1966) (tribal corporation validly waived sovereign immunity through use of "sue and be sued" clause, though waiver qualified to bar attachment of property). This court is similarly persuaded that the "sue or be sued" language in VDI's charter represents a plain statement that the Council intended to and in fact did waive VDI's sovereign immunity on

any "contract, claim or obligation" arising out of its activities under the charter. Under the charter, VDI is still possessed of any immunity "it might otherwise" still have with respect to all suits not involving a contract, claim or obligation arising out of its activities under the Charter. According to this language, therefore, it has the power, should its business judgment so dictate, to waive this remaining form of immunity by contract.

This construction is a more reasonable and clear interpretation of VDI's powers under its Charter than that urged by VDI. It is also more consistent with the broad intent spelled out in the Charter by which the Council sought to give VDI whatever authority it might need to successfully carry out its activities, short of consenting to the levy of any judgment, lien, attachment, execution or other judicial process upon the property the assets or receipts pledge or assigned by the Nation and the District."[T]he harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogan*. 23 Indian Law Reporter at 2126.

VII.

In conclusion, this court finds that the Tribal Council of the Nation intended to waive whatever degree of immunity VDI might enjoy under tribal law in tribal court on "any contract, claim, or obligation arising out of its activities" under its charter by allowing VDI "to sue and be sued in its corporate name." The Council's protection from "levy of any judgment, lien, attachment, execution or other judicial process upon the property, assets or receipts pledged or assigned" by the Nation to VDI signals a clear intent to insulate the Nation's property from any debts that might be incurred by VDI, thus further buttressing the interpretation that this subordinate economic entity would stand on its own in carrying out its activities. For these reasons, VDI's motion to dismiss is denied.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Raycita PANCHO, Defendant.

Case No. CR10-3252-3260-98

Decided January 13, 1999.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor C. Peter Delgado for Plaintiff.

Faithe Seota-Norris, Counsel for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary for a Settlement Conference. Parties present: Assistant Prosecutor for the Tohono O'odham nation (Nation), C. Peter Delgado; Defendant Raycita Pancho; Defense Counsel, Faithe Seota-Norris.

The Nation presents the stipulated facts as presented by the Police Officer's Report. The Nation having conferred with the victim, Darren Lopez, moves to dismiss the matters relating to the victim, CR10-3252-98, CR10-3253-98, CR10-3254-98, CR10-3255-98.

The Nation further moves the Court to issue a ruling whether an unborn child is considered a person based on O'odham tradition. Defense Counsel does not object to having the Court issue its ruling, based on Defense Counsel's personal knowledge that the unborn child is deemed a person.

The Nation finally moves the Court if the Court rules an unborn is considered a person they move to dismiss CR10-3257-98 and CR-3260-98.

THEREFORE, IT IS HEREBY ORDERED BY THE COURT:

1. Finds cause to and dismisses CR10-3252/3253/3254/3255/3257/3260-98.
2. Finds based on the oratory history of the O'odham, women who are pregnant are cautioned against being around certain situations (ie the butchering of an animal, family members are not permitted to hunt during the pregnancy) in order to prevent any harm to the child or suffering to the child once the child is born. The Court rules that an unborn child is a person.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Delbert LOPEZ, Defendant.

Case No. CR11-3309-98

Decided May 12, 1999.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Tohono O'odham Advocate Program by Kenneth Sheffield, Attorney for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary for hearing of oral arguments regarding the amount of jail time to be imposed on Defendant when found in violation of parole.

Parties present: Tohono O'odham Nation (Nation) Assistant Prosecutor Michael Ehlerman; Defendant, Delbert Lopez; Defense Attorney, Kenneth Sheffield, Tohono O'odham Advocate Program.

FACTS

Defendant was granted parole on August 24, 1998 after having served 196 days of the original 360 days detention imposed. Defendant was informed in writing, by the assigned Probation/Officer, of the possible penalty should he be found in violation of his parole. The detention sentence could be 540 days.

Based on the Defendant's arrest on November 1, 1998, by Officer Richard Cantu, the Probation/Parole Officer filed a Petition to Revoke Parole. On February 20, 1999 Defendant was arrested pursuant to three bench warrants for failure to appear for arraignment. He was found by the Court to be in contempt and the Court imposed 10 days detention on each warrant.

At the Parole hearing on March 29, 1999, Defendant admitted to violating his parole. Based on the sentence recommendation and arguments from both Counsels, the Court issued instructions for Counsel to file written briefs on the issue of the appropriate sentence to be imposed.

ISSUE

When a parolee is found in violation of a petition to revoke parole must they serve only "the rest of the sentence" or "the sentence imposed which resulted in parole, plus one half of that sentence."

FINDINGS AND ORDER

Defense Counsel asserts, and the Nation stipulates, a petition to revoke, which is filed by the Probation/Parole Officer, is civil or quasi-criminal in nature. This burden of proof is lower than would be in a criminal case. The parolee does not have the right to many guaranteed protections under the constitution as in criminal procedures. The applicable rules would be those used in administrative or civil hearings.

On the other hand when a parolee is charged with the crime of parole violation, Chapter 2, Section 2.16 Tohono O'odham Nation Criminal Code, the Defendant argues the crime of parole violation entitles the Defendant to all protection otherwise afforded in criminal matters. This

includes a burden of proof beyond a reasonable doubt and the right to a trial by jury on the merits.

The Court concurs that Chapter 2. Section 2.16 applies only to criminal offenses and not to revocations alleged on a Petition to Revoke filed by the Probation/Parole Officer. These matters would proceed as in a civil or administrative hearing where hearsay evidence has limited admissibility.

Definition #52 located in Section 1.16 of the Criminal Code defines parole as "a release from prison before a sentence is up, that depends on the person "keeping clean" and doing what he or she is supposed to do while out. If the person fails to meet the "conditions of parole," the rest of the sentence must be served." The court finds Definition #52 as the applicable sentence to be imposed for a parole violation pursuant to a Petition to Revoke Parole filed by the Probation/Parole Officer.

The Nation also argues that the Indian Civil Rights Act (ICRA) imposes a mandate upon the Court limiting detention up to 360 days on any one sentence although multiple charges could exceed the total of 360 days.

Chapter 2, Section 2.16 of the Criminal Code states when a person is found guilty of parole violation 9they0 shall be sentenced to the following: 1. Imprisonment in jail for a period equal to the sentence imposed which resulted in parole, plus one half of that sentence; and 2. If parole violation is based on a new offense the Court shall impose additional jail time to be served consecutively with the parole violation sentence. (Emphasis added). The Court finds the penalty that may be applied when a person is found in violation of this section may be in excess of that allowed under the ICRA since additional time may be imposed. A sentence exceeding the ICRA mandated limit of 360 days is unconstitutional. The Court is constitutionally banned from exceeding 360 days for any one sentence it imposes.

THEREFORE THE COURT ORDERS the penalty for Petitions to Revoke Parole would be as stated in Definition #52, … the rest of the sentence must be served. Defendant in this case shall serve the balance of the 164 days consecutive to any other sentence imposed by the Court during the time of his incarceration from February 20, 1999. Defendant is not given credit for time served while on parole.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Cecil WILLIAMS, Plaintiff,
v.
CHUKUT KUK DISTRICT, Defendant.

Case No. 92-PWM-5445

Decided June 9, 1999.

Before John L. Tully, Judge Pro Tempore.

The Court enters the following findings of fact, conclusions of law, and order.

The facts are largely undisputed. In October, 1990, the Chukut Kuk District council approved a district budget for fiscal year 1991. The budget established a salary for the position of district chairman in the amount of $14,000 per year. The district resolution and the budget were subsequently approved by the Tohono O'odham Legislative Council on October 22, 1990, and were rendered retroactively effective to October 1, 1990.

Plaintiff Cecil Williams was subsequently elected chairperson of the Chukut Kuk District and took office on May 9, 1991. Plaintiff was paid, pursuant to the district budget, from that time through and including August 15, 1991.

Plaintiff failed to attend council meetings and failed to report to council offices. On September 17, 1991, the Chukut Kuk District Council approved Resolution No. 18-91 (the "1991 Resolution"). The 1991 Resolution stated, in material part:

> That the Chukut Kuk Council does stop paying the chairman and hereby pay the vice-chair woman the chairman's salary.

The parties have stipulated that the 1992 fiscal year district budget approved a salary for the position of chairperson of the district in the amount of $14,700. The parties have further stipulated that the 1993 district budget, which was subsequently approved by the Tohono O'odham Legislative Council, established a pay rate of zero for the position of chairperson and approved a salary of $14,700 for the vice-chairperson of the district.

On December 13, 1993, the Tohono O'odham Legislative Council approved a resolution removing Plaintiff Cecil Williams from the position of chairman of the Chukut Kuk District. The parties are apparently in agreement that Mr. Williams remained district chairman until removed from office in December 1993. The parties are also in agreement that the resolution enacted by

the legislative council in December 1993 was valid and did, in fact, effectively remove Mr. Williams from office.

Mr. Williams claims that he is entitled to be paid as district chairman in accordance with the budgets approved by the district for the time period August 15, 1991 through December 13, 1993, when he was removed from the position of chairman. The district concedes that Mr. Williams is entitled to salary for the period August 15, 1991 through September 17, 1991, but argues that the 1991 Resolution effectively eliminated any further entitlement Mr. Williams might have to salary as district chairman. The district also contends that it is entitled to an offset for unauthorized withdrawals of district funds allegedly made by Mr. Williams. The parties have stipulated that the offset issue is to be severed for trial at a later date for reasons of judicial economy and to allow the parties to complete disclosure/discovery on that issue.

The Court finds that Mr. Williams is entitled to be paid salary as chairman for the period August 15, 1991 through September 17, 1991, and that he is entitled to no other pay as district chairman.

This case raises issues of statutory and constitutional interpretation. The first issue is whether the 1991 Resolution effectively eliminated pay for the position of chairman of the district. The second issue is whether the district is constitutionally entitled to reduce the salary of a sitting chairman.

The first issue is essentially one of statutory interpretation. In interpreting statutes, the court is obligated to determine and give effect to the legislative intent behind the statute. Calvert v. Farmers Ins. Co. Of Arizona, 144 Ariz. 291, 697 P.2d 684 (1985). To do so, the court must look at the words, context, subject matter, and effects and consequences of the statute. State ex. rel. Flournoy v. Mangum, 113 Ariz. 151, 548 P.2d1148 (1976). Measured against this standard, this Court has little difficulty in determining the district's intent in enacting the 1991 Resolution. The budget for fiscal year 1991 establishing the chairman's salary at $14,000 per year was based upon the assumption that the chairman would work what was, in essence, a half time job. The 1991 Resolution recites, and Mr. Williams concedes, that he had not fulfilled his duties as chairman and had not performed the anticipated services for the district since July, 1991. Although the language of the 1991 Resolution may be somewhat inartful, the Court has no difficulty in concluding that the district's intent in passing the 1991 Resolution was to modify the 1991 fiscal year budget, and the chairman's salary, by reducing that salary to zero.

The district council's intent in enacting the 1993 fiscal year budget is also clear: by enacting a budget with no salary allocated for the chairman, the district council clearly exercised its desire to pay no wages to Mr. Williams for that fiscal year.

The 1992 fiscal year is somewhat more problematic. The parties have not provided the Court with a copy of the 1992 fiscal year budget, with a copy of the district resolution, or the legislative council resolution approving the budget for the 1992 fiscal year. The parties have stipulated, however, that the budget, as approved by the district and the legislative council, includes a line item for the chairman's salary in the amount of $14,700. An argument could be made that the district council, in approving a budget for the 1992 fiscal year with this line item, intended to reinstate Mr. Williams' salary for the 1992 fiscal year. The Court, however, finds to the contrary.

Legislative intent is to be determined from the language of the documents in issue, along with the historical context in which the district has acted. In construing legislative intent, this Court must take into account not simply the 1992 fiscal year budget but must consider the budgets for 1991 and 1993, the 1991 Resolution, and other historical data.

The budget for the 1991 fiscal year was approved and adopted in October, 1990, and effective October 1, 1990. The budget for the 1992 fiscal year was adopted in the fall of 1991. At that time, as reflected in the 1991 Resolution, the vice-chairwoman was performing the duties and functions of the position of chairman and, according to the 1991 Resolution, it was the intent of the district council to pay her an amount equal to the chairman's salary. The Court finds it probable that the legislative intent in adopting the 1992 fiscal year budget was to continue paying the chairman's salary to the vice-chairwoman.

The issues Mr. Williams raises in this litigation appear to have first surfaced after the adoption of the budget for the 1992 fiscal year. The earliest notice of the issue in the record is a letter dated January 28, 1992, from the Tohono O'odham Attorney General's Office to the district treasurer concerning the issue. Mr. Williams filed this action in October, 1992. When the district council met to adopt the budget for the 1993 fiscal year (presumably in October, 1992), it was aware of the issues in this litigation. The budget subsequently adopted therefore addresses the issue by clearly reflecting the district's intent to continue paying the vice-chairwoman a salary for the 1993 fiscal year and not pay the chairman. Since the district council evidenced its intent in the 1991 Resolution to withdraw all salary from Mr. Williams, and since the council evidenced the same intent in adopting the 1993 budget, it is logical to infer that the 1992 budget simply contained a scrivener's error inconsistent with the intent of the council. In short, the

Court concludes in interpreting legislative intent that the adoption of the budget for the 1992 fiscal year was not intended by the council to supersede the 1991 Resolution and that the 1991 Resolution continued in effect throughout fiscal year 1992.

The second issue presented is whether the district council had the legal authority to reduce the income of a sitting district chairman. The Court concludes that the 1991 resolution is a valid exercise of the district council's governmental authority.

Legislative enactments, such as the 1991 Resolution, are presumed to be constitutional and effective. See, e.g., State v. Ramos, 133 Ariz. 4, 648 P.2d 1189 (1982); State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987). The burden of proof is upon the party asserting that a particular exercise of governmental authority is unconstitutional.

The 1986 Constitution provides for the creation of district councils (Article IX, Sec. 3) and provides for the position of chairman and vice-chairman of each district. (Id.) The Constitution also addresses the issues of compensation, and the reduction of compensation, for certain public officials. Article VII, Sec. 4, provides that the chairman and vice-chairman of the Nation are to receive compensation for their services and that such compensation "shall not be diminished during their continuance in office." Similarly, Article VIII, Sec. 9, provides that judges of the Tohono O'odham courts shall receive compensation "which shall not be diminished during their continuance in office." However, there are no similar provisions for the positions of district chairman and vice-chairman. While the Constitution recognizes the positions of district chairman and vice-chairman, there is no requirement that such positions be compensated, or that any salary for these positions not be reduced during a particular individual's tenure in office.

Compensation and the reduction in compensation for certain public officials was a subject considered and addressed by the framers of the Constitution. By excluding district chairmen and vice-chairmen from the designation of those who are required to be compensated and from the designation of those whose compensation cannot be reduced while in office, the framers expressed their intent that the districts would be unfettered in their authority to address these issues as a matter of local governmental control.

Mr. Williams asserts that the district council is precluded from exercising such authority by Article IX, Sec. 7 of the Constitution. Section 7 provides, in pertinent part, that: "No district council shall expend district funds except to budgets authorized under resolutions of the district council and approved by the Tohono O'odham council." Section 7 evidences a desire on the part of the framers of the Constitution to vest fiscal authority in the local districts subject to the

legislative council's constraint on undue expenditures. Section 7 is not a mandate that all funds identified in a particular district budget must, in fact, be spent. Rather, Section 7 indicates an opposite intent: that districts may not expend funds unless first approved by the legislative council.

Based upon the foregoing, the Court finds that Petitioner is entitled to a salary as district chairman for the period August 15, 1991 through September 17, 1991, computed on the basis of an annualized salary of $14,000 per year, subject to any offset that the District may claim and prove at the remainder of the bifurcated matter.

The Court further orders that a telephonic status conference is scheduled for Monday, June 21, 1999, at 4:00 p.m., for the purpose of scheduling the remainder of this matter for hearing. Defense Counsel is directed to initiate the conference call.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Roy PARRAZ, Plaintiff,
v.
DESERT DIAMOND CASINO, the TOHONO O'ODHAM NATION TRIBE, Defendant.

Case No. 96-C-6462

Decided June 30, 1999.

Before Robert Hershey, Judge Pro Tempore.

The above-entitled proceeding came before this Court on May 5, 1999 upon defendants' Motion to Dismiss and Plaintiff's Motion to Amend Complaint. Upon hearing arguments of counsel,

IT IS HEREBY ORDERED granting defendants' Motion to Dismiss and denying Plaintiff's Motion to Amend.

The Tribe has not waived its sovereign immunity from suit and, as such, this Court lacks subject matter jurisdiction to hear the complaint. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 118 S.Ct. 1700 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940). This Court rejects the reasoning of Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 877 F.Supp. 1262 (D. Wisc. 1995). The Court is

mindful of Judge Williams' carefully crafted opinion in United Linings v. VI-IKAM Doag Industries, Inc., 2 TOR3d 39 (Dec. 20, 1998). The facts presented by Mr. Parraz, however, do not rise to the level required by United Linings to overcome The Nation's sovereign immunity.

The Court declines to treat or convert the matter to a Motion for Summary Judgment.

The Court disallows Plaintiff's Motion to Amend. Plaintiff was terminated on March 9, 1995. The Tohono O'odham Gaming Authority did not come into existence until March 31, 1995 by Plaintiff's own admission in court. Furthermore, Plaintiff has not alleged in his complaint that the Gaming Authority has waived its immunity from suit.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Codylee Michael JUAN and Charmaine JUAN, a married couple, Plaintiff,
v.
Carlos Francisco JUAN and Jane Doe JUAN, a married couple; the ESTATE OF CARLOS FRANCISCO JUAN; Jane Doe JUAN and/or John DOE, as personal representatives of the estate of Carlos Francisco JUAN; TOHONO O'ODHAM NATION, a governmental entity; SELLS DISTRICT, a district of the Tohono O'odham Nation, John DOES 1-10; and Jane DOES 1-10, Defendants.

Case No. 96-T-6510
(appeal dism'd *Juan v. Juan*, 3 TOR3d 1 (Jan. 4, 2005))

Decided January 27, 2000.

Before Judith M. Dworkin, Judge Pro Tempore.

This case arises out of a traffic accident in which the vehicle of Plaintiff Codylee Juan, a Tohono O'odham police officer collided into the vehicle of Defendant Carlos Francisco Juan. At the time of the collision, Defendant was employed by the Sells District. In addition to Defendant Carlos Juan and fictitious wife Jane Doe Juan, Plaintiff brought suit against personal representatives of the Estate of Carlos Francisco Juan, the Tohono O'odham Nation and the Sells District.

Defendants filed a Motion to Dismiss on the ground that all claims asserted in the Complaint were barred by the doctrine of sovereign immunity. Plaintiffs filed a Memorandum of Points and

Authorities in Opposition to Defendants' Motion to Dismiss. Defendants filed a Reply in Support of Their Motion to Dismiss. The Court having heard oral argument on the matter and considered the arguments presented to it, grants Defendants motion and dismisses the Complaint in its entirety.

Courts treat sovereign immunity defenses as a matter of subject matter jurisdiction. *See, e.g. Wetlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993). On a motion to dismiss for lack of subject matter jurisdiction, generally, plaintiff bears the burden of establishing subject matter jurisdiction because it is plaintiff who is seeking to invoke the Court's jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994).

Plaintiffs affirmatively allege in their Complaint that the Nation and the District are governmental entities, that Defendant Carlos Francisco Juan was acting within the course and scope of his employment at the time of the accident and that the basis of the claim against the Nation and the District is that of *respondeat superior* as the employer of Carlos Francisco Juan. In their response and opposition to the motion to dismiss, Plaintiffs do not dispute that sovereign immunity bars claims against any but Defendant Sells District. As to this Defendant, Plaintiffs contend that the Sells District of the Tohono O'odham Nation is not immune from suit. Plaintiffs argue that unlike the Tribe which enjoys sovereign immunity, the District is a separate entity much like a City and does not enjoy the immunity of the Tribe. Plaintiffs argue, in the, alternative that if the Sells District enjoys immunity it has waived that immunity by acquiring and/or purchasing liability insurance.

The Districts of the Tohono O'odham Nation are unlike municipal corporations within the State of Arizona. Municipal corporations, such as cities and town, are voluntary organizations organized by the initiative and by the approval of the inhabitants and are independent of general governmental activities of the state. *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 206 P.2d 1041 (Ariz. 1949); ARIZ. CONST. art. XIII.

The Districts of the Tohono O'odham Nation are organizations of fairly limited power and authority which may act only under the supervision of the Tohono O'odham Council. CONST. art. IX. A district may only govern itself in matters of "local concern;" minutes of all district council meetings must be submitted to the secretary of the Council; and a district council may expend district funds only pursuant to a budget approved by the Council. CONST. art. IX §§5, 6 and 7. Finally, the Tohono O'odham Council may even change the number and boundaries of districts. CONST. art. IX § 2. This is all evidence that the districts are merely subordinate

governmental units of the tribal government and as such enjoy the same rights and privileges as the Tohono O'odham Nation, including immunity from suit.

In Defendants' reply in support of their motion to dismiss. Defendants' attach an affidavit of Bob Burrows, Insurance Manager of the Tohono O'odham Nation. Mr. Burrows was familiar with the policies in effect and the specific claims made as a result of the traffic accident in this case. Mr. Burrows attested that (1) the Sells District does not carry its own policy of liability insurance, (2) liability coverage was provided through the Nation, (3) both vehicles were repaired pursuant to claims made under the Nation's automobile insurance policy, and (4) Plaintiffs' complaint was submitted to the Nation's insurance carriers. Thus, Plaintiffs claim that the Sells District has waived any immunity that it may have fails.

In conclusion, this court finds that the Defendants are immune from suit and that, as to the Sells District, the immunity of suit has not been waived.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

TOHONO O'ODHAM LEGISLATIVE COUNCIL, Dennis RAMON, Chairman, and Mary Ann ANTONE, Sif Oidak District Council Representative, Petitioners,
v.
Edward D. MANUEL, Tohono O'odham Nation Chairman, Respondent.

Case No. 00-TRO-8283

Decided October 18, 2000.

P. Michael Ehlerman, Counsel for Petitioners.
Mary Cowan, Counsel for Respondent.

Before Judge Rose Johnson Antone.

This matter came to be heard before the Court, commencing on the 11th day of October 2000. Parties present: Petitioners, Dennis Ramon and Mary Ann Antone; Counsel for Petitioners, P. Michael Ehlerman; Respondent, Edward Manuel, Counsel for Respondent, Mary Cowan.

The Court makes the following Findings of Fact and Conclusions of Law:

The Court had before it evidence and testimony regarding the preliminary injunction requested by the Petitioners. Several criteria must be met before a preliminary injunction shall be issued by this Court.

An injunction shall not be granted to prevent the lawful exercise of duties by a public officer. Further, the party requesting the preliminary injunction must prove that:

1. There is a strong likelihood that he will succeed on the merits at trial.
2. There is strong possibility that irreparable injury will result to him should an injunction not issue.

Article II, Section 2(h) of the Constitution empowers the Chairman of the Tohono O'odham Nation to call the Legislative Council into special session. Respondent called the Legislative Council into Special Session and scheduled the session to occur on October 9, 2000. Respondent provided appropriate notice of the special session by delivering a written letter to the Chairman of the Legislative Council on October 6, 2000, three days before the scheduled special session.

Although the Legislative Rules of the Tohono O'odham Legislative Council clearly bind the Legislative Council, the Court does not hold that the Respondent is bound by the Legislative Rules of the Tohono O'odham Legislative Council which require a four day notice period. In accordance with Section 2 of the Legislative Rules of the Tohono O'odham Legislative Council, the Office of the Legislature is responsible for providing notice to the members of the Council.

Article V, Section 2 in applicable part states , "A majority of the votes cast shall govern the action of the Tohono O'odham Council." In accordance with this section of the Constitution, the calendar for the legislative sessions was adopted by a majority of the members of Council in a formal resolution. Petitioner Chairman of the Legislative Council, by an October. 6, 2000 memo to Legislative Council members, attempted to cancel the October legislative session and close the Legislative Branch. The Court finds, however, that the calendar had not been amended by a formal action of the Council and the October sessions were not canceled in accordance with the Constitution. Therefore, the Petitioner Chairman of the Legislative Branch had no authority to cancel the session. Such attempted cancellation and closure cannot act to invalidate Respondent's notice of the special session.

The testimony presented at the hearing showed that several members of the Council got actual notice of the special session and chose not to participate. It was not the fault of Respondent that some members may not have received notice because they left the legislative branch office as a result of the Petitioner Legislative Chairman's memo closing the Legislative Branch and "canceling" the October session.

Testimony at the hearing failed to show that Respondent presided over the special session on October 9, 2000 or that Respondent acted in any way so as to usurp the authority of the

Legislative Branch. The affidavit filed and testimony presented showed that the special session was presided over by Councilman Albert Manuel, Jr. and that the acting legislative secretary, Julianna Saraficio, took role at the session and determined that a quorum was present.

The Court therefore holds that Respondent called a special session of the Legislative Council in conformance with the Constitution of the Tohono O'odham Nation and that Respondent gave appropriate and sufficient notice of the session to the Legislative Branch. The Court further finds that Respondent did not usurp powers given to the Legislative Branch. The Court finds that the Petitioners have failed to meet the criteria for issuance of the preliminary injunction.

The Court has held a full hearing on all matters brought to the court by the Pleadings. Both Petitioners and Respondent have had ample opportunity to present any and all evidence in support of their positions. For these reasons and Rule 65(a) (2) of the Rules of Civil Procedure, the Court makes its final findings and orders.

Article V, Section 4 of the Tohono O'odham Constitution states that the Chairman of the Legislative Council shall exercise any authority delegated to him by the Council. Further, this Court has entered into evidence Respondent's Exhibit 4 which is a Legislative Council Resolution entitled Approving Delegation of Authority to Chairman and Vice Chairman of Legislative Council. Nowhere in this document is the Chairman of the Legislative Council delegated to file suit on behalf of the Council. The Court, however, specifically notes Section 5 which states that the Chairman has full authority to, "with the consent of the Tohono O'odham Council, act as representative of the Council." This section merely reiterates the language in the Constitution that when actions are to be taken by the Chairman of the Council on behalf of the Council, the Council must delegate that authority to its Chairman. There has been no showing that the Legislative Council lawfully authorized the Chairman of the Council or the remaining Petitioner Antone to act in its behalf in filing the present suit. Therefore, the Court finds that both Petitioners lack standing to bring this suit.

The Court makes no findings regarding the validity of the actions taken at the October 9, 2000 special session by the Legislative Council, as these matters were not the subject of the present action.

THEREFORE THE COURT HEREBY ORDERS that the Petitioners' motion for injunctive relief is DENIED. This matter is dismissed.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Ernest MORISTO on behalf of the Moristo heirs, Plaintiff,
v.
BABOQUIVARI DISTRICT COUNCIL et al., Ronald VENTURA, Chairperson, Defendants.

Case No. 00-TRO-8334

Decided March 14, 2001.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Judiciary Adult Civil Division for a status hearing on Plaintiff's MOTION FOR TEMPORARY RESTRAINING ORDER.

Court having heard the arguments and having received the documentation of the public hearing ordered by the Court finds:

1. A resolution has not been reached by the parties.
2. Article IX, Tohono O'odham Nation Constitution, Section 5, states "Each district shall govern itself in matters of local concern, except that in any matter involving more than one district in which there is a dispute, the Tohono O'odham Council shall decide the matter." (emphasis added)
3. That parties have not presented the matter of I'itoi's cave and its impact as it relates to the cultural significance on the O'odham and its adjacent location to the area in question.
4. The Tohono O'odham Legislative Council does have authority to decide this issue based on the recognized cultural significance and location of I'itoi's cave to the area in question; therefore this issue is prematurely before the Court.

IT IS HEREBY ORDERED that the Motion for Temporary Restraining Order is denied and the matter is dismissed.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

BIG FIELD COMMUNITY, Plaintiff,
v.
Thomas JOHNSON, Defendant.

Case No. 01-TRO-8734

Decided January 22, 2002.

Nicholas Lewis, Counsel for Plaintiff.
Verlon Jose, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The hearing in this matter was on January 15, 2002. The parties appeared with their legal counsel, Nicholas Lewis for the plaintiff, and Verlon Jose for the defendant.

Based upon the testimony and other evidence presented, the Court finds that the plaintiff's principal concerns were the impact of eventual erosion upon the two crosses which are memorials for two deceased members of the Big Field Community, from future water backup in the roadside ditch which the defendant's road currently obstructs, and the fact that the defendant was not a registered member of the Sells District, and, therefore, not able to hold land or use land. The plaintiff abandoned the issue of the Right of Way. The testimony heard by the Court showed that there is a dispute over the land in question being within the Big Field Community or within the Sells Community. That is not an issue which the Court can decide, and the find of a dispute over the land in question is applicable in this case only to show the Court that Big Field Community has standing to raise questions in this case. The Court finds that the plaintiff presented sufficient evidence to show that damage is likely to the area where the crosses are when the rains come and the water flows build up along the paved road up to the area of the defendant's roadway.

The Court also finds that the defendant established that the current situation has not resulted in damage to the crosses, since there has not been rain for a while, but he indicated that he is mindful of the impact, and is reviewing ways to mitigate the effects of the road by a proper culvert with the help of the Bureau of Indian Affairs. Further, the defendant conceded that he was not a registered member of the Sells District, but was in the process of registering with the District.

For the reasons stated herein, a restraining order shall be issued.

IT IS ORDERED, ADJUDGED AND DECREED THAT the defendant is restrained and enjoined from further work on the roadway until further order of this court, after his membership status in the District of Sells is confirmed and approved, and after the defendant resolves the matter of the roadside ditch for the water runoff near the two crosses, either through a culvert or relocation of the roadway. This order shall remain effective until the court issues an order dissolving the restraining order and injunction.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Kelly R. JOHNSON, Defendant.

Case No. CR07-2240-02

Decided April 8, 2003.

Before Judge Violet Lui-Frank.

This case is based upon a Petition to Revoke Probation filed on July 29, 2002. The defendant presents a novel question for the court: Does a term of probation begin at the time of sentencing, when a defendant is in jail under another sentencing order in another case, and the judge did not specifically allow the sentence to be concurrent to any other term of imprisonment?

The defendant was convicted of assault under a plea agreement in CR05-1974-01 on September 10, 2011. On that date the court approved the plea agreement, accepted the plea, found the defendant guilty of assault, and sentenced him. The sentence was made that day: 120 days, suspended for ten months of supervised probation, evaluation by the Alcohol and Substance Abuse program and compliance with recommendations, completion of the Personal Growth Class through Behavioral Health, and an order prohibiting contact with the victim.

At the time that sentence in CR05-1974-01 was pronounced, the defendant was serving 150 days in CR06-2307-01, on a revoked probation originally granted in CR02-766-00. His release date was October 17, 2001.

Defendant moved to dismiss the Petition to Revoke Probation filed by the Probation Officer on July 29, 2002, alleging violations of the probation conditions ordered in CR05-1974-01. The defendant executed the Conditions and Regulations of Probation on October 17, 2001, the same day he was released from jail in CR06-2307-01. The defendant's motion to dismiss is based upon

his argument that the probation period of ten (10) months in CR05-1974-01 expired on July 10, 2001. Defendant argued that the probation period began at the time that sentence was imposed, September 10, 2001. Defendant argued that the sentence was effective upon imposition, and due process notice to the defendant was that probation began on September 10, 2001. The Nation argued that the defendant was serving time in another case, and that there was no provision in the sentence in CR05-1974-01 for concurrent time while the defendant completed his sentence in CR06-2307-01.

The parties agreed on February 28, 2003 that the court could rule on the motion to dismiss after reviewing the taped arguments from September 9, 2002 and September 17, 2002. Having done so, the court makes the following findings: there is no case precisely on point under Arizona case law; neither party offers case law from any other jurisdiction; the Court uses the Arizona Rules of Criminal Procedure to the extent that the rules work under existing Tohono O'odham law.

If the sentencing order in this case had imposed the 120 days, without probation, when would the sentence have begun, under the law and the applicable rule? Rule 26.13 is clear that a sentence is consecutive, unless the judge expressly orders otherwise. The 120 days would have begun no earlier than October 17, 2001, when the defendant completed his sentence in the other case. The jail time was suspended as of the day it would have begun, October 17, 2001. Therefore, the probation period could not have begun earlier than that same date.

Finally, the defendant signed the Conditions and Regulations on October 17, 2001. At that time the defendant was on notice that the probation period began on that day and ended on August 17, 2002. He did not file any objection, nor appeal any part of the sentence, and neither did he object to the notice that his probation began on October 17, 2001 and ended August 17, 2002.

The Court concludes that the answer to the question presented is that a sentence of imprisonment begins on the day that it can be implemented. Thus, if a defendant is serving time on one sentence, and a new sentence has been imposed, which is consecutive, the new sentence begins after the other sentence is completed. If probation is allowed and the new sentence is suspended, the probation for the suspended sentence begins only when that sentence of imprisonment would have started.

IT IS ORDERED, for the reasons stated above, that the defendant's motion to dismiss on grounds that the probation period expired as of July 10, 2002 is denied.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

C. V. K. a.k.a. C. O., Plaintiff,
v.
N. K., Sr., Defendant.

Case No. 96-D-6497
(aff'd by *C. V. K. a.k.a. C. O. v. N. K., Sr.*, 3 TOR3d 1 (Apr. 2, 2005))

Decided May 19, 2003.

Before Judge Violet Lui-Frank.

This matter was brought into the Children's Court in connection with a CINC proceeding, 01-CINC-3339, and pursuant to the Children's Court's exclusive jurisdiction over custody matters, when CINC proceedings are pending. The CINC case has been closed with resolution of the issues involving the mother of the children. This proceeding is based upon the respondent/father's petition to modify custody under the Order of the court dissolving the marriage of the parties on October 20, 1997, wherein the children remained in the petitioner/mother's custody, awarding reasonable visitation to the father, and requiring him to pay child support.

The Court heard testimony from both parties on March 25, 2003 on the modification of child custody.

The parties agreed that A.R.S. 25-403 can serve as guidance for the court in considering the request to modify custody. The Arizona statute is appropriate guidance, and congruent with this court's concern for the best interests of the children.

The Court finds that, notwithstanding the issue of the father's conviction regarding the mother's oldest child from another relationship, the mother called upon him to help with the children when she was ill; when Child Welfare Services ["CWS"] removed the children from their mother's custody, they took the children to the father; the mother successfully completed her disposition plan under the CINC case, and CWS recommended that custody be restored to the mother; the recommendation was appropriate in that context, and was the basis for the closing of the CINC case; the children remained in the father's physical custody pending resolution of the petition to modify custody.

The Court finds the following as compelling reasons to modify the custody decree: on two separate occasions, when the mother believed her circumstances were very bad, and she was

desperate for money, she agreed to a very risky enterprise, transporting illegal entrants into the United States for money; such action could have jeopardized her liberty and life, as well as the life and welfare of the baby she had with her, another son not a party herein, and the welfare of her other children; the basis for the CINC proceeding involved physical abuse of one of the children by the mother; the father has provided a stable home for the children since September 2001; and Child Welfare Services recommended at trial that they remain with their father. This last recommendation is very compelling, given the agency's knowledge of past incidents with the mother.

The mother has custody of other children, who share their mother with the K children; the relationship with the siblings can be maintained through visitation.

The Court is convinced that the children love, appreciate and need both parents.

The Court's findings support the conclusion that the best interests of the three children are served by custody being given to the father, with regular visitation to the mother.

IT IS ORDERED THAT custody of R. K., G. K. and S. K. is modified and awarded to the father, N. K., Sr., with reasonable visitation to the mother, consistent with the Court's Order of December 26, 2002 for alternating weekends. The parties are urged to resolve the summer visitation schedule and holiday schedule visitation, and file a proposed schedule with the Court as soon as possible, to avoid future difficulties.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Reynaldo Velasco LEON, Jesus Ramon Ballesteros SOTO, Reuben Sosa VALENZUELA, Norma HERMOSILLO, Ramon Marcial VELASCO, Jose Servando LEON LEON, Jose A. LEON LEON, Plaintiffs,

v.

Rita MARTINEZ, Chair, and MEMBERS of the TOHONO O'ODHAM LEGISLATIVE COUNCIL; Matilda JUAN, Chair, and MEMBERS of the ELECTION BOARD; Nancy GARCIA, Director, Enrollment Services, Defendants.

Case No. 03-C/TRO-9346

Decided May 19, 2003.

Ruben Valenzuela, Counsel for Plaintiffs.
Tohono O'odham Attorney General's Office by Assistant Attorneys General Veronica Geronimo and Mark Curry for Defendants.

Before Judge Rose Johnson Antone.

The above captioned matter coming before the Tohono O'odham Judiciary Adult Division for oral argument hearing on Plaintiffs' **EMERGENCY PETITION FOR TEMPORARY RESTRAINING** and **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** and Defendants' **OPPOSITION TO THE APPLICATION FOR PRELIMINARY INJUCTIVE RELIEF**.

Parties present: Plaintiffs, Reynaldo Velasco Leon, Jesus Ramon Ballesteros Soto, Ruben Valenzuela, Ramon Marcial Velasco, Jose Servando Leon Leon, Jose A. Leon Leon; Counsel for Plaintiffs, Ruben Valenzuela with Legal Assistant, Jose Rodriquez; Defendants, Rita Martinez, Matilda Juan, and Nancy Garcia; Counsel for Defendants, Assistant Attorneys General, Veronica Geronimo and Mark Curry.

The Court makes the following FINDINGS of FACT and CONCLUSIONS OF LAW:

The Court finds that it has jurisdiction to hear this matter pursuant to Article VIII, Section 2 and Section 10 of the Tohono O'odham Nation Constitution and Title III, Chapter 1, Section 1-101 of the Tohono O'odham Nation Civil Code.

The Court agrees the constitutional right to vote of otherwise eligible members of the Nation is fundamental to the Nation's democracy and is a principle of equality for all enrolled members of the Nation. Plaintiff's Complaint at Paragraph 26.

In finding the right to vote is a fundamental right, the Court also finds the right to vote has its limitations in accordance with case law and legislative action. In *Tohono O'odham Council v. Garcia,* 1 TOR3d 10 (Ct.App., Sep. 14, 1989) the privilege to exercise the right to vote is summarized in a process. The process for an enrolled member of the Nation to exercise their right to vote is relatively simple, a person must be a member of the Nation and 18 years of age. Moreover, the Tohono O'odham Legislative Council (hereafter Council) has adopted the Election Ordinance which establishes the criteria for voter eligibility and also states to be eligible to vote, a member must register not less than 60 days prior to the general, primary or special election by providing the name of the voter, his date of birth, home address, and the district in which he or she will be permitted to vote. Election Ordinance, Ord 03-86.

Pursuant to the Election Ordinance for a person whose name has not been added to the voter registration list of a district they may appeal to the Council. Plaintiffs did appeal to the Council; however, following a full hearing the Council adopted Legislative Order 03-207, tabling final decision on voter eligibility petitions until Legislative Council determines the petitioners are

entitled to appeal under Election Ordinance, it adopts hearing procedures and sets voter eligibility appeal hearings. By this action, the Council has not denied the Plaintiffs' appeal, but has set forth an avenue for the Plaintiffs to address their grievance.

More specifically, the Council determined it does not have the power to grant the right to vote unless the registration requirements of Article III Section 1 of the Election Ordinance are first met; and the Council by its resolution stated it currently lacks adequate information to determine whether the Petitioners have satisfied the eligibility or registration requirements of the Election Ordinance. (Emphasis added). In addition, it is unclear from the argument, the resolutions, or the petition if application by the Plaintiffs to register to vote was made within the 60 day requirement.

Therefore, while the Plaintiffs do have an avenue for registration available to them, it appears the petition to the Council may be untimely, it was heard only 18 days before the 2003 general election leaving insufficient time for the Plaintiffs to qualify for registration for this election.

Plaintiffs assert they are not attempting to stop the elections but want the Plaintiffs to have the right to vote. In that regard until the action of the Council is final this action is premature. Contrary to their argument the Plaintiffs and other members are not disenfranchised of their free speech right and their right to vote. By filing this petition they are asserting those rights.

Plaintiffs allege they have approached District Councils and have been dismissed because they are not able to provide proof sufficient contacts with that District to be eligible to vote in that particular District. Plaintiffs state that each District has their own criteria in making this determination and do not have consistent criteria that any of the Plaintiffs are able to satisfy. Much as the United States is divided into individual states each state legislates its own voter registration requirement, each district of this Nation asserts that same right.

Plaintiffs argue that the Council has made a decision and this will cause the Plaintiffs and others not to be able to vote in the upcoming election. By this action the Council has taken power away from the Court as described above. Additionally, that this Court must see the importance of this issue and not allow the Council to take away the individual's fundamental right (to vote), a right granted by the Constitution. But by creating this process the Council has taken into consideration the Plaintiffs' application to register.

Defendants counter that Plaintiffs are indeed attempting to stop the election. Plaintiffs request relief to postpone the election and establish the Plaintiffs' fundamental right to vote. In the *Garcia* matter, the Court outlined the voter application requirement that a member must provide

evidence of their historical ties to a particular district in which that member wishes to be registered to vote.

Defendants argue the harm to the remaining voters is greater than the benefit to the Plaintiffs. Further, the Plaintiffs have not been denied their right to register to vote and should not be treated differently than other voters who have been required to meet the same standards. Here the Court agrees

Thus the Court concludes that the Council has, pursuant to the vote registration requirement, Ord.03-86, Article III, requested additional information be provided by the Plaintiffs and therefore; the Plaintiffs have not exhausted their administrative remedies and this matter is prematurely before the Court.

IT IS THE ORDER of the Court that Plaintiffs have not met their burden of proof as required by Rule 65, Arizona Rules of Civil Procedure and denies the Plaintiffs' Emergency Restraining Order and the Plaintiffs' Complaint for Declaratory Injunctive Relief is dismissed.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In the Matter of Joe L. MIGUEL, Decedent.

04-PI-9723

Decided April 2, 2004.

Tohono O'odham Advocate Program by Fred Lomayesva, Counsel for Petitioners.
Renay Peters, Counsel for Respondent.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Judiciary Adult Civil Division for hearing regarding a **Petition for Injunctive Relief**.

Present: Petitioners, Layne Miguel, Amelia Miguel; Counsel for Petitioners, Fred Lomayesva, Tohono O'odham Advocate Program; Respondents, Donna Jackson, Jeremy Miguel, Jason Miguel; Counsel for Respondent, Renay Peters.

The Court having heard the testimony of the parties **FINDS**:

1) This Court has jurisdiction over the parties, the Petitioners are members of the Tohono O'odham Nation, the Decedent was an enrolled member of the Tohono O'odham Nation, the

Respondents submit to the jurisdiction of this Court for purposes of this hearing. All parties have been given the opportunity to be heard.

2) That the relationship between the Decedent and the Respondent Jackson was not a legal marriage pursuant to Chapter 3, Section 4 of the Tohono O'odham Civil Code

3) The Decedent being an enrolled member of the Tohono O'odham Nation is found to domiciled within the Tohono O'odham Nation as defined in Chapter 1 Section 1-101 (c) (4) of the Tohono O'odham Civil Code.

4) That there is no dispute regarding the Decedent's wishes. The custom of the Tohono O'odham Nation is to follow and honor the wishes of the Decedent.

THEREFORE IT IS ORDERED that the Court declares that statements made by a member of the Tohono O'odham Nation regarding their wishes of where they want to buried to be O'odham common law.

IT IS FURTHER ORDERED that the Petition for Injunctive Relief is granted.

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PREFACE TO THIRD EDITION

The January 1, 2014 third edition of the three volumes of the Tohono O'odham Reports includes appellate cases decided after the January 1, 2013 second edition publication, earlier appellate decisions not included in the prior editions, and also includes both recent and older trial court cases where the lower court cases resolved significant issues.

The third edition also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports.

January 1, 2014

Violet Lui-Frank
Chief Judge

PREFACE TO SECOND EDITION

The January 1, 2013 second edition of the Tohono O'odham Reports updates the cases in Volume 3 to include appellate cases decided after the November 1, 2011 first edition publication and their related trial court cases when the lower court cases resolved significant issues. Other trial court cases with precedential value in 2012 have also been included.

The second edition of all the volumes also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports to aid readers in finding them.

January 1, 2013

Teresa Donahue
Chief Judge

PREFACE TO FIRST EDITION

November 1, 2011 marks a milestone for the Tohono O'odham Judicial Branch with its first publication of cases from 1985 to the present. The cases are divided into three volumes and include both appellate and trial court decisions with precedential value.

Appellate cases lacking precedential value have been published as summaries. Additionally, in order to preserve confidentiality as required by the Tohono O'odham Children's Code, Section 62, all cases arising in whole or in part from a Children's Court matter have been redacted. As appropriate in a given case, initials or the individual's relationship to the child have been substituted for the name of an individual so that information identifying the child or parties is removed. The names of case workers and legal counsel have not been altered.

Further, obvious misspellings and punctuation errors have been corrected, such as misspellings of "O'odham" and double periods. No grammatical changes have been made.

November 1, 2011

Teresa Donahue
Chief Judge

TOHONO O'ODHAM REPORTS
VOLUME 3, Edition 3: 2005 to 2013

Third Publication, January 1, 2014

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APPELLATE DECISIONS

TOHONO O'ODHAM COURT OF APPEALS

Codylee Michael JUAN and Charmaine JUAN, a married couple, Appellants,
v.
The ESTATE OF CARLOS FRANCISCO JUAN; et al, Appellees.

Case No. CTA-0077
(Ref. Case No: 96-T-6510)

Decided January 4, 2005.

Before Judge Robert Hershey.

Holding: Dismissed with prejudice upon stipulation by the parties.

TOHONO O'ODHAM COURT OF APPEALS

C. V. K. a.k.a. C. O., Appellant,
v.
N. K., Sr., Appellee.

Case No. CTA-0081
(Ref. Case No: 96-D-6497)

Decided April 7, 2005.

Before Judges Roy A. Mendoza, Linda Carlos, and Teresa Donahue.

This is an Appeal arising from a judgment of the Tohono O'odham Tribal Court Children's Civil Division modifying an award of custody from the Appellant/mother C. V. K., a.k.a. C. O. to the Appellee/father N. K., Sr., and granting him legal custody of children R. K., G. K., and S. K. with reasonable visitation rights lodged in the Appellant/mother. The Tohono O'odham Court of Appeals, sitting en banc, has reviewed the Trial Court Record and Orders the Appeal Dismissed.

The original Order dissolving the marriage of the parties on October 20, 1997 allowed the children to remain with the Appellant/mother awarding reasonable visitation to the father/Appellee and required him to pay child support. On May 14, 2002 the Petition for modification of child custody was filed alleged a change of circumstances charging that Appellant/mother with neglecting her responsibilities as a mother.

On March 25, 2003 a hearing before the trial Court was held on the modification of child custody with both Parties represented by Attorneys. The Trial Court found from the testimony

compelling reasons to modify the custody decree supported by Child Welfare Services recommendation that they remain with their Appellee/father based upon past experiences they had with the Appellant/mother and so ordered the modification with regular visitation granted to the Appellant/mother.

On May 20, 2003 the Order Modifying Legal Custody in favor of Appellee/father issued by the Trial Court was filed. On June 19th 2003 Attorney David K. Kovalik who had been Attorney of record for Appellant/mother throughout the proceeding filed a timely "Notice of Appeal pursuant to the Arizona Rules of Civil Procedure" in the Trial Court before he disengaged himself from the case by declaring "Counsel will not represent the Petitioner on Appeal." A Notice of Completion of Record on Appeal was filed on February 8, 2005 and a Certification of Accuracy of the record on Appeal was filed February 12, 2005.

A Review of the record of proceedings by this Tribunal requires a Dismissal of this Appeal. The Notice of Appeal filed by Appellant does not meet the requirements of Rule 12 of the Tohono O'odham Court Rules of Appellate Procedures, effective April 28, 2003. Rule 12(d) states:

> "the notice of appeal shall, at a minimum, include:
> (1) the names, addresses, and telephone numbers of the parties taking the appeal and their counsel……
> (2) A concise statement of the adverse ruling, alleged errors or reasons for reversal made by the lower court.
> (3) The nature of the relief being sought.

Appellant's Notice of Appeal fails to address (2) and (3) above which is the essence of any appeal. Furthermore, Appellant relies on the Arizona Rules of Civil Procedure without any detail as to which Rules are applicable, if any. Since this Court has its own Court approved Appellate Rules which govern, we note that even Rule 8 of the Arizona Rules of Civil Appellate Procedure can require more. Rule 8 (a) states:

> "Failure of an Appellant to take any step other than the timely filing of a notice of appeal, does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which MAY INCLUDE DISMISSAL OF THE APPEAL."

It is the Order of this Court that the Appeal is Dismissed and the prior ruling of the Tribal Trial Court is AFFIRMED.

TOHONO O'ODHAM COURT OF APPEALS

Shirley MANUEL, Appellant,
v.
TOHONO O'ODHAM NATION.

Case No. CTA-0080
(Ref. Case No: CR03-2559-02; *et. al.)*

Decided April 8, 2005.

John Neis, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor by George Traviolia for Appellee.

Before Judges Violet Lui-Frank, Rose Johnson Antone, and Rachel Frazier Strachan.

The parties submitted the Joint Memorandum in Support of Settlement on January 11, 2005.

The parties argue that the Court of Appeals has the authority to approve the proposed settlement under Rule 28(a) and Rule 31(a) of the Tohono O'odham Rules of Appellate Procedure. The Court disagrees with the parties that the proposed settlement is allowed under the Rules of Appellate Procedure. This is a matter of first impression, and the Court will not accept the settlement.

The Court agrees that there are significant problems with the record, particularly the deplorable quality of the audio recording. The problem is such that the defendant is, indeed, denied due process in that she is unable to review and identify the appealable issues, if any, that may have arisen during the course of the trial, including adequacy of legal representation. The record does show that trial defense counsel missed the deadline for the pretrial motion to suppress the defendant's confession, and the Court agrees that this is a serious cause for concern.

On the issue of whether the defendant knew that her legal counsel was not a state licensed attorney, the Court is not convinced that the defendant had no knowledge that Faithe Seota was not a state licensed attorney. Ms. Seota has been in the Tohono O'odham Nation a long time as a practicing advocate. The real issue is that the defendant now believes that she should not have retained Ms. Seota to represent her, given the trial result.

Based upon the foregoing, we find that the defendant's due process rights are denied based upon the inadequate record of the proceedings below, impeding her ability to review and identify legitimate issues for appeal. There is good cause to vacate the judgment below and remand for a new trial.

IT IS THEREFORE ORDERED THAT the decision below is vacated and the case is remanded to the trial court for further proceedings consistent with this Order.

TOHONO O'ODHAM COURT OF APPEALS

S. G., Appellant/Cross-appellee,
v.
J. G., Appellee/Cross-appellant.

Case No. CTA-0033 & CTA-0034
(Ref. Case No: 91-TPR-2078 & 90-D-4900)

Decided June 3, 2005.

Before Judge Violet Lui-Frank.

THE COURT having reviewed the Stipulation between J. G., and S. G., by and through their respective counsel, and good cause appearing;

IT IS HEREBY ORDERED:

1. That Appellant/Cross-Appellee, S. G.'s appeal regarding her opposition to J. G.'s termination of parental rights be vacated and that the termination of parental rights, entered in this Court's decision in 91-TPR-2078, remain in full force and effect.

2. That Appellee/Cross-Appellant, J. G.'s appeal regarding his request to terminate child support effective with the father's termination of parental rights is granted and that no child support is due and owing after October 3, 1991, the termination date, and any child support already received by the mother after that date shall be deemed her property and shall not be repaid to father.

TOHONO O'ODHAM COURT OF APPEALS

Delbert HENDRICKS, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0063
(Ref. Case No: CR08-1963-97)

Decided June 14, 2005.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

John B. NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided July 20, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The Court finds itself in the awkward position of having Rules of Appellate Procedures that are clear, but confronting the fact that the appeal has been pending since 1998, through no fault of the appellant or the appellee, specifically the Tohono O'odham Office of the Prosecutor; the delay has been due to turnover in the appellate panels, and lack of coordination to process the appeals; fairness requires that this Court allow the defendant time to file the brief, especially because he now has legal counsel to assist him. This case shall not be taken as precedent for allowing an appellant more time to file an opening brief merely because the appellant does not have counsel.

IT IS ORDERED THAT appellant John Narcho shall file his brief on appeal within 30 days of receipt of this Order by his counsel, David M. Juarez. All parties shall comply strictly with the Tohono O'odham Rules of Appellate Procedure. Failure to file the appellant's brief in a timely manner shall result in a dismissal of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Idaleen REYES for Ge'e Oidag Community, Appellant,
v.
Julius ANGIANO and FOUR WINDS TOWING, Appellee.

Case No. CTA-0083
(Ref. Case No. 04-TRO-9838)

Decided August 9, 2005.

Before Judges Linda Parley, Roy A. Mendoza, and Rose Johnson Antone.

This is an appeal arising from a judgment of the Civil Division of the Tohono O'odham Judiciary, Dismissing Appellant's Request for a Temporary Restraining Order and Injunctive Relief against Julius Angiano and Four Winds Towing.

First, the Court finds that the Notice of Appeal was timely filed.

Second, after a full review of the record on appeal, the Court, sitting en banc, affirms the trial court's dismissal of the Petition for a Preliminary Injunction. The Court also finds that the policy decisions required to address and resolve the issues presented, concerning boundary lines, land assignments and environmental issues, are not within the authority of the trial court to decide but lie with the affected Districts and its communities, and the Legislative and Executive branches of the Tohono O'odham Nation (Nation) to determine.

Issues regarding land assignments have been presented to the Nation's court and the court has ruled that the issue of land assignments is a matter not to be decided by the court. *Big Fields Community vs. Thomas Johnson*, 2 TOR3d 68 (Trial Ct., Jan. 22, 2002). See also Article IX, Section 5 of the Nation's Constitution.

The Nation's Legislative Council by Article VI, Section 1 (i)(2) is empowered "to manage, protect, preserve and regulate the use of the …. land …. and natural resources (including surface and ground waters) of the Tohono O'odham Nation".

Therefore, in the Court's read of the Nation's Constitution, this court and the Nation's trial court lack jurisdiction to decide the issues raised in this appeal.

We affirm the trial court's order.

TOHONO O'ODHAM COURT OF APPEALS

John B. NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided September 20, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The appellant filed a motion on August 25, 2005 for sixty days more to file the opening brief in this appeal. The appellee objected to the motion.

The opening brief was due thirty days from the date that the appellant was served on December 17, 2004 the Order advising that the appeal was accepted and directing the parties to proceed pursuant to the Tohono O'odham Rules of Appellate Procedure, and specifically referring to Rule 26 for the filing of briefs. The appellant had notice as of December 17, 2005 that the opening brief was due thirty days after the receipt of the Order. He did not file anything. The Court issued a followup Order on April 1, 2005 directing the appellant to show cause why the appeal should not be dismissed by April 22, 2005. The appellant timely filed the Statement of Reasons / Motion for Extension of Time. The appellee objected to the reasons as justification and moved to dismiss the appeal.

The Court finds that the reasons for a further extension of time do not support granting another significant period for filing of the opening brief. The time for decision on these matters has in effect given appellant time to prepare for the appeal.

IT IS ORDERED THAT a sixty day extension of time to file the brief on appeal is denied; appellant John Narcho shall file his brief on appeal within three (3) days of receipt of this Order by his counsel, David M. Juarez. Failure to file the appellant's brief as ordered herein shall result in a dismissal of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

John B. NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided November 1, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The appellant's legal counsel received this Court's Order of September 21, 2005, denying the extension of time to file the opening brief and requiring the filing of the brief within three days of receipt of the September 21, 2005 Order at the legal counsel's office. The Post Office verified that the certified letter containing the September 21, 2005 Order was delivered to the appellant's counsel's office on October 1, 2005, as confirmed by the Appeals Clerk by telephone. Allowing for mail delivery the appellant's brief was due by or before October 10, 2005. The appellant did not file his opening brief. Pursuant to Rule 26(f), the Court finds good cause to grant the appellee's Motion to Dismiss Appeal, filed April 29, 2005.

IT IS ORDERED THAT the appeal filed herein is dismissed for failure to timely file the opening brief. The judgment below is still effective. The case is remanded to the Trial Court for any matter pending herein.

TOHONO O'ODHAM COURT OF APPEALS

Christopher PRESTON, Appellant,
v.
Andrea PRESTON, Appellee.

Case No. CTA-0085
(Ref. Case No. 05-D-10112)

Decided March 16, 2006.

Tohono O'odham Advocate Program by Sarah Michele Martin for Appellant.

Faithe C. Seota, Counsel for Appellee.

Before Judges Teresa Donahue, Linda Parley, and Roy Mendoza.

The Court of Appeals, *en banc*, having reviewed the Record on Appeal in this matter finds a simultaneous filing by Petitioner/Appellant of a timely Motion for Reconsideration and Notice of Appeal which the Court recognizes pursuant to Rule 8 of the Tohono O'odham Nation Court, Rules of Appellate Procedure and therefore remands the case back to the Trial Court for further consideration and ruling.

TOHONO O'ODHAM COURT OF APPEALS

Ina Jean DENNY, Appellant,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Appellees.

Case No. CTA-0087
(Ref. Case No. 04-PT-9678)

Decided May 8, 2006.

Before Judges Robert Williams, Linda Parley, and Roy A. Mendoza.

The Court of Appeals, sitting en banc, finds it has jurisdiction over this matter and accepts this Appeal pursuant to Rule 13(a) of the Tohono O'odham Court Rules of Appellate Procedure.

Counsel for the Appellee filed a Motion for Dismissal of Appeal on March 25, 2006. The Court finds that the assignment of Judges to the Appellate Panel on March 16, 2006 did not constitute acceptance of the Appeal and thus the Motion for Dismissal of the Appeal is denied.

The Appeal having been accepted by the Tohono O'odham Nation Court of Appeals, the Appellant has 30 days to file a written brief or statement of law in support of the appeal pursuant to Rule 26(a) of the Tohono O'odham Court Rules of Appellate Procedure.

TOHONO O'ODHAM COURT OF APPEALS

Sidney GARCIA, Appellant,
v.
Bernadette GARCIA, Appellee.

Case No. CTA-0040
(Ref. Case No: 1992-4638-E)

Decided August 17, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ina Jean DENNY, Appellant,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Appellees.

Case No. CTA-0087
(Ref. Case No. 04-PT-9678)

Decided September 12, 2006.

Before Judges Robert Williams, Linda Parley, and Roy A. Mendoza.

The Court of Appeals, sitting en banc, finds it has jurisdiction over this matter and accepts this Appeal pursuant to Rule 13 (a) of the Tohono O'odham Court Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellant filed her Complaint based on an accident that occurred, on or about March 16, 2002. Trial was scheduled for January 19, 2006. A pretrial conference was held on January 18. On January 19, 2006, Appellant filed a Demand for the Recusal of the trial Judge Violet Lui-Frank. The Motion was heard by the Honorable Rose Johnson Antone and denied. Appellant failed to appear at the time of trial, and Appellees subsequently moved the court for an Order of Dismissal for failure to prosecute. The court granted Appellees' Motion and the matter was dismissed. Appellant filed her appeal.

ANALYSIS

The Appellate Court finds only two discernible issues that Appellant raises on Appeal. First, failure of the trial court to wholesaledly allow the admission of both Tribal and State Police reports as her case in total. Federal Rule of Evidence 801, prohibits the introduction of hearsay as evidence. Hearsay is defined as follows:

> "Hearsay is a statement, other that one made by the declarant while testifying at the Trial or Hearing, offered in evidence to prove the truth of the matter asserted."

The Trial Court did not err in keeping both Police reports out of evidence.

Next, the Appellant contends that the trial court's dismissal of her case was an abuse of discretion. The facts in the record show otherwise. The trial court went to great lengths to accommodate the Appellant on several occasions including the introduction of another trial court judge to hear her request for removal of the sitting judge. The Court finds that Appellant herself failed to comply with Court Rules of Procedure and Evidence in the prosecution of her claim and at the last moment refused to participate at all. The trial court did as any other Court would do and dismissed the case. The trial court did not abuse its discretion.

Based upon the above, the appellate court dismisses the appeal and affirms the trial court dismissal of appellants' case.

TOHONO O'ODHAM COURT OF APPEALS

Clement ANTONIO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0059
(Ref. Case No: CR04-655-97)

Decided December 21, 2006.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

PISINEMO COMMUNITY / Patricia CRUZ, Appellants,
v.
Gloria ANTONE, Appellee.

Case No. CTA-0072
(Ref. Case No: 98-TRO-7220)

Decided December 22, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ivan JOHNSON and Harry JOHNSON, Appellants,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0038 & CTA-0039
(Ref. Case No: CR03-571-93; CR03-405-93; CR03-572/742-93)

Decided December 29, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed due to Appellants' abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Fernando OCHOA (Rachel ROSS, Real Party in Interest), Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0079
(Ref. Case No: CR12-3607-3611-02)

Decided February 28, 2007.

Before Judges Rachel Strachan, Roy A. Mendoza, and Robert Hershey.

Holding: Remanded for a hearing *de novo* due to an inadequate record.

TOHONO O'ODHAM COURT OF APPEALS

Gregory NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0089
(Ref. Case No: CR04-810-812-05)

Decided September 11, 2007.

Donna Yellowhair, Counsel for Appellant.
Tohono O'odham Prosecutor's Office for Appellee.

Before Interim Chief Judge Linda Parley and Judges Violet Lui-Frank and Rachel F. Strachan.

The Appellant, through legal counsel, Donna Yellowhair, appealed the Appellant's conviction following his acceptance of a plea agreement on September 28, 2005for Misuse of a Weapon and Threatening. The Appellant was sentenced on both charges. On, October 31, 2005, the Appellant filed a Notice of Appeal with the Tribal Court of Appeals.

Rule 12(a) and (c) of the Tohono O'odham Court Rules of Appellate Procedures state,

> "An appeal shall be taken by filing a notice of appeal with the lower court within thirty (30) days of entry of judgment by the same court…". Rule 12(a)
>
> "Failure to file a timely notice of appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice is filed after the date set by law…". Rule 12(c).

Appellant entered into a plea agreement with the Nation on September 28, 2005 for Misuse of a Weapon and Threatening. On that same date, the Court entered judgment, sentenced the Appellant and entered an order against him. As stated above, the appellate rules require an appellant to file a Notice of Appeal within thirty (30) days of entry of judgment. Therefore, the Appellant had until October 28, 2005 to file a Notice of Appeal which is thirty days from September 28, 2005, the date the Appellant was sentenced. However, the Appellant's Notice of Appeal was not filed until October 31, 2005, thereby making it untimely. Although the Appellant's Notice of Appeal was dated October 28, 2005 it was not filed with the Tohono O'odham Justice Center until October 31, 2005 as evidenced by the Court stamp.

Based upon the foregoing, the Court finds that the Appellant's Notice of Appeal to the Tohono O'odham Nation Court of Appeals was untimely and there being good cause to dismiss the appeal.

IT IS ORDERED THAT the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Nicholas KUTH-LE, Sr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0075
(Ref. Case No: CR05-3193-3195-97; CR05-1291-97)

Decided January 18, 2008.

Before Judge Linda Parley.

Holding: Dismissed due to Appellant's withdrawal of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM ELECTION BOARD, Defendant/Appellant,
v.
SAN LUCY DISTRICT, a political Subdivision of the Tohono O'odham Nation,
Plaintiff/Appellee.

Case No. CTA-0090
(Ref. Case No: 2007-10985-C)

Decided May 30, 2008.

Before Interim Chief Judge Linda Parley and Judges Violet Lui-Frank and Rachel F. Strachan.

This Appeal arises from a Judgment and Order of the Tohono O'odham Nation Tribal Court Civil Division issued on October 1, 2007, denying Defendant/Appellant's motion to dismiss for lack of subject matter, failure to join an indispensable party and finding Tohono O'odham Legislative Order 07-199 unconstitutional as it applies to the actions of the San Lucy District in conducting its May 26, 2007 General Election of District council seats and the remedial District Council election held thereafter on June 30, 2007.

The court has received the Defendant/Appellant, Tohono O'odham Election Board's *Notice of Appeal and Request for Record* ("Notice of Appeal") filed on October 29, 2007, the Plaintiff/Appellee, San Lucy District's, *Objection to Notice of Appeal of Non-Final Interlocutory*

Order Filed Well After 15 Day Time Limit filed on November 14, 2007, and the Appellant's *Reply to Appellee's Objection to the Notice of Appeal* filed on November 29, 2007.

The Court of Appeals finds it has subject matter jurisdiction to review this matter. The Court of Appeals has jurisdiction to hear all appeals from the Tohono O'odham Courts. Constitution of the Tohono O'odham, Art. VIII, § 7. The scope of the judicial power to adjudicate is set forth in Art. VIII, Sections 2 and 10 of the Tohono O'odham Constitution.

The first issue that this Court must consider is Plaintiff/Appellee San Lucy District's *Objection to the Notice of Appeal* in which it argues that the Defendant/Appellant's *Notice of Appeal* is not in compliance with the Tohono O'odham Rules of Appellate Procedure [henceforth, the "Appellate Rules"], Rules 14 and 15. Plaintiff/Appellee San Lucy District seeks to have this Court treat Defendant/Appellant's Notice of Appeal as an Appeal of an Interlocutory Order and dismiss for lack of timely filing.

A party may appeal the lower court's decision by filing an appeal. The procedure for filing an appeal depends on whether the trial court order is a final decision. If the trial court order is a final order, then the appellant must file a notice of appeal within thirty days. Appellate Rule 12(a). If the order is not final, then the appellant must follow the procedures governing interlocutory appeals. Appellate Rule 14.

Appellate Rule 6(h), "Definitions," states, "Final judgment' or decision" means a judgment or decision which affects a substantial right leaving nothing open to dispute and which ends the action between the parties in the trial court." In its review of the trial record of the case, the Appellate Court, among other things, notes the following: 1) the lack of a written response to the Verified Complaint by Defendant/Appellant 2) the lack of an evidentiary hearing useful to further established an accurate and factual record of the case and 3) the lack of a final order as requested by the plaintiff/Appellee in its initial complaint regarding a preliminary and permanent injunction, mandamus or declaratory judgment. The October 1, 2007 order addressed the legal issues raised by the Defendant's Motion to Dismiss, but did not dispose of all legal claims at issue in the pending litigation. The Court of Appeals, therefore, finds that the trial court order of October 1, 2007 was not a final order that resolved all remaining legal issues raised by Plaintiff/Appellee's *Verified Complaint* filed on June 26, 2007.

Since a final order has not been issued, the Appellant's filing of its *Notice of Appeal* was premature. The Court of Appeals must next examine if the Plaintiff/Appellee's notice of appeal will stand as an interlocutory appeal.

For an interlocutory appeal, the Appellant must first seek the permission of the trial court within fifteen (15) days of entry of the lower court's order which is the basis of the appeal to file the appeal:

> A request for permission to appeal an action or an order of the lower court which is not a final judgment shall be made by filing a request with the respective lower court within 15 days of the judge signing the Record Entry giving rise to the appeal.

Appellate Rule 14 (a).

In the instant matter, the case record does not provide any evidence that Appellant sought permission from the trial court to file an interlocutory appeal. Furthermore, the Appellant's filing of its Notice of Appeal was untimely since the statute merely provides 15 days for the appellant to request permission to file for an interlocutory appeal. The Appellant's Notice of Appeal was filed on October 29, 2007, which was 27 days after the entry of the trial court order. Thus, the Defendant/Appellant's filing of its Notice of Appeal exceeded the statutorily prescribed time limit of 15 days.

According to Appellate Rule 12 (c), "failure to file a timely notice of appeal is jurisdictional and the appellate court *shall* dismiss the appeal if the notice is filed after the date set by law." (Emphasis Added). Because the Defendant/Appellant's Notice of Appeal is untimely, it must be dismissed.

Therefore, based upon the foregoing, the Court of Appeals, en banc, finds (1) the trial court did not resolve all issues in its October 1, 2007 order and (2) dismisses the Appellant's Notice of Appeal and Request for Record as it is not properly before the Court of Appeals as an interlocutory appeal; and (3) remands the case back to the trial court for final adjudication of all remaining matters consistent with this Order.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
J. G., Appellee.

Case No. CTA-0093
(Ref. Case No: 97-TH-036; 97-DC-037)

Decided August 28, 2008.

Tohono O'odham Prosecutor's Office by George Traviolia for Appellant.
Tohono O'odham Advocate Program by Dwight Francisco for Appellee.

Before Judges Rose Johnson Antone, Teresa Donahue, and Roy A. Mendoza.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Enos FRANCISCO, Jr.,[1] Appellant,
v.
Harriet TORO, Chairperson Legislative Council and All Members of the LEGISLATIVE COUNCIL, Appellees.

Case No. CTA-0020
(Ref. Case No: 89-C-4537)

Decided September 4, 2008.

Before Judges Rose Johnson Antone, Violet Lui-Frank, and Rachel Frazier Strachan.

Holding: Dismissed upon Appellant's motion filed March 15, 1990.

[1] *Ed. Note:* Caption changed to reflect the correct parties.

TOHONO O'ODHAM COURT OF APPEALS

George IGNACIO, Appellant,
v.
TERO COMMISSION, Appellee.

Case No. CTA-0024
(Ref. Case No: 89-C-4595)

Decided September 4, 2008.

Before Judges Rose Johnson Antone, Roy Mendoza, and Rachel Frazier Strachan.

The Tohono O'odham Court of Appeals has jurisdiction over this matter.

On August 28, 1989, the Appellant timely filed Notice of Appeal. The trial court record was not certified.

The Appellee filed a Motion to Dismiss on January 31, 1991. On June 28, 1991, the Appellee filed a second Motion to Dismiss. In each Motion to Dismiss, the Appellee cited Arizona Rules of Civil Appellate Procedures Rule 12 (c).[1] The Appellee contends in each Motion to Dismiss that the Appellant failed to comply with the rule by transmitting the trial court record to the appellate court.

The Court finds the Appellant did not comply with Rule 12 (c). Thus, the trial court record is not complete.

Therefore, IT IS ORDERED the matter is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Alvin Virgil LEWIS, Appellant,
v.
TOHONO O'ODHAM ELECTION BOARD, Appellee.

Case No. CTA-0029
(Ref. Case No: 91-CSRP-5209)

Decided September 4, 2008

Before Judges Robert Hershey, Rachel Frazier Strachan, and Roy Mendoza.

Holding: Dismissed due to Appellant's abandonment of the appeal.

[1] Rule 12 (c) is currently known as Rule 12 (d).

TOHONO O'ODHAM COURT OF APPEALS

Lawrence GARCIA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0032
(Ref. Case No: TR05-530-91)

Decided September 4, 2008.

Before Judges Robert A. Hershey, Teresa Donahue, and Roy A. Mendoza.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Danny GALVEZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0043
(Ref. Case No: TR07-504/505-93)

Decided September 4, 2008

Before Judges Teresa Donahue, Roy A. Mendoza, and Rachel Frazier Strachan.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM HOUSING AUTHORITY, Appellant,
v.
Dorothy ENOS, Appellee

Case No. CTA-0051
(Ref. Case No: 94-TRO-6004)

Decided September 4, 2008.

Before Judges Teresa Donahue, Robert Hershey, and Rachel Strachan.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Eleanor CASTILLO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0056
(Ref. Case No: CR12-2834-2836-94)

Decided September 4, 2008.

Before Judges Teresa Donahue, Robert A. Hershey, and Rachel Strachan.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Wayne EVANS, Appellant,
v.
TOHONO O'ODHAM NATION and Edward D. MANUEL, Appellee.

Case No. CTA-0073
(Ref. Case No: 96-C-6751)

Decided September 4, 2008.

Before Judges Roy A. Mendoza, Rose Johnson Antone, and Teresa Donahue.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM ADVOCATE PROGRAM, a department of the Executive Branch of the Tohono O'odham Nation's Government; Sarah Michelle MARTIN and Frederick K. LOMAYESVA in their official capacity as Chief and Deputy Chief Advocates, and the TOHONO O'ODHAM ADVOCATES employed with the Advocate Program, Real Parties in interest, Plaintiffs/Appellants,

v.

The Honorable Betsy NORRIS, in her official capacity as Chief Judge of the Tohono O'odham Judicial Court, a division of the Judicial Branch of Government of the Tohono O'odham Nation; the Honorable Violet LUI-FRANK, in her official capacity as Deputy Chief Judge; and Traci HOBSON, in her official capacity as Judicial Court Solicitor, Defendants/Appellees.

Case No. CTA-0082
(Ref. Case No: 05-PVC-10069)

Decided September 4, 2008.

Before Judges Roy A. Mendoza, Rachel F. Strachan, and Robert A. Hershey.

The trial court in this case entered its Final Order on April 25, 2005. On May 19, 2005 the Plaintiffs/Appellants filed their Notice of Appeal pursuant to Rule 12, Tohono O'odham Rules of Appellate Procedure. On May 27, 2005 the trial Judge signed the certification of trial record for appeal which was filed June 1, 2005. The Defendants/Appellees did not file a responsive brief. Subsequently, there continued to be filings by both parties at the trial court level.

On March 27, 2008, a trial/lower Court Judge Ordered the Dismissal of the Appeal on Stipulation For Withdrawal Of The Appeal And Order for Resolution Of The Case By Mutual Agreement filed January 31, 2007. The Tohono O'odham Nation Advocate Program gave assurance that a Notice of Errata Correcting the omission of the appellate case number would be filed. However, a Notice of Errata was not filed. On June 19, 2008, the same trial/lower Court Judge vacated the prior Order of Dismissal recognizing that jurisdiction lay with the Appellate Court to determine all matters once the Notice of Appeal was filed, a fact that was not considered by counsel for the Parties.. On June 19, 2008, a three member Appellate Court was assigned to the case.

The Appellate Court recognizes its sole jurisdiction and authority to review the matter. Rule 3, Tohono O'odham Court Rule of Appellate Procedure. Further, the Court Finds as a matter of fact and law that the Parties by prior written stipulated agreement found on January 31, 2007, had by clear intent abandoned the appeal.

It is therefore the Order of the Court, seated *en banc*, that pursuant to Rule 31(a), Tohono O'odham Rule of Appellate Procedure the Appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM DEPARTMENT OF HEALTH AND HUMAN SERVICES, Appellant,
v.
H. J. A., Appellee.

Case No. CTA-0095
(Ref. Case No. 05-UPM-179; 2006-053-UDPLC; 2007-3588-CINC)

Decided September 4, 2008.

Before Judges Teresa Donahue, Judge Rachel Frazier Strachan, and Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ronald MANUEL, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0096
(Ref. Case No: CR-05-711/712/717/718-94)

Decided September 4, 2008

Before Judges Teresa Donahue, Roy Mendoza, and Violet Lui-Frank.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Elvira GOMEZ, Appellant,
v.
Richard SAUNDERS, Appellee.

Case No. CTA-0047
(Ref. Case No: 94-CS-5849)

Decided October 9, 2008.

Before Judges Robert Hershey, Rachel Strachan, and Roy A. Mendoza.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

In the Matter of the Estate of Eloisa L. Thomas[1]

Case No. CTA-0097
(Ref. Case No: 96-P-6503)

Decided October 9, 2008

Louis Barassi, Counsel for Appellant.
Tohono O'odham Advocate Program by Cheryl Lopez for Appellees.

Before Judges Robert A. Hershey, Rachel Strachan, and Roy A. Mendoza.

Parties present were Cheryl Lopez from the Tohono O'odham Nation's Advocate Office for Elaine Delahanty and Ronald Thomas, Pro Se. Wilbert Thomas and counsel were not present.

DONE IN OPEN COURT this 9th day of October, 2008, Cheryl Lopez for Elaine Delahanty and Ronald Thomas both motion to dismiss the appeal. The Court of Appeals grants their respective motions and dismisses the above captioned matter pursuant to Rule 31 of the Tohono O'odham Rules of Appellate Procedures.

TOHONO O'ODHAM COURT OF APPEALS

Nancy HUNTER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0098
(Ref. Case No: 2007-03-0650-0652CR)

Decided November 12, 2008

Larry Boswell, Counsel for Appellant
Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellee

Before Judges Robert A. Hershey, Rose Johnson Antone, and Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

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[1] *Ed. Note:* Caption corrected.

TOHONO O'ODHAM COURT OF APPEALS

Alfred HAVIER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0092
(Ref. Case No: 2006-01-0876-0878CR)

Decided December 10, 2008.

Before Judges Rose Johnson Antone, Rachel Frazier Strachan, and Violet Lui-Frank.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Lynn PORTER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0099
(Ref. Case No: 12-796-82)

Decided December 10, 2008.

Nicholas Lewis, Counsel for Appellant.
Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellee.

Before Judges Roy Mendoza, Violet Lui-Frank, and Rose Johnson Antone.

Holding: Dismissed due to Appellant's abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM HOUSING AUTHORITY, Appellant,
v.
Spencer J. ARNETT and Deborah J. ARNETT, husband and wife doing business as Spencer Arnett Plumbing

Case No. CTA-0084
(Ref. Case No: 97-C-6962)

Decided December 29, 2008.

Before Judges Roy A. Mendoza, Violet Lui-Frank, and Robert A. Hershey.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

William ANTONIO, Sr., Appellant/Defendant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0057
(Ref. Case No: TR01-865-95; CR10-1808-95)

Decided January 27, 2009.

Before Judges Violet Lui-Frank, Teresa Donahue, and Rachel Frazier Strachan.

This Court issued an order on October 23, 2008 accepting the Appellant, WILLIAM ANTONIO, Sr., appeal and setting a schedule for the parties' briefs to be submitted to the court.

The Court's brief schedule required the Appellant to file his opening brief by November 24, 2008. To date, the Appellant has not filed an opening brief.

THEREFORE based upon the foregoing,

IT IS ORDERED that the Appellant's appeal is dismissed for his failure to file an opening brief.

TOHONO O'ODHAM COURT OF APPEALS

V. R. P., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0052
(Ref. Case No. 96-DC-116; 96-AT-117; 96-CS-118; 96-UA-119; 96-AB-120)

Decided February 9, 2009.

Before Judges Roy Mendoza, Violet Lui-Frank, and Rachel Strachan

Holding: Dismissed upon the parties' stipulated motion.

TOHONO O'ODHAM COURT OF APPEALS

Joseph WICHAPA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0057
(Ref. Case No: 2008-1298-1305CR; 2008-1381-1385CR)

Decided February 10, 2009.

Before Judges Rachel Frazier Strachan, Robert Hershey, and Rose Johnson Antone.

This Court is in receipt of the Appellee's Motion to Dismiss Pursuant to Rule 12 (c) requesting that Appellant's appeal be dismissed.

The Appellee contends that Appellant's appeal is untimely.

The Court finds that the Appellant was sentenced by the trial court on September 29, 2008. Appellant filed a Request to Speak with the Court form on December 8, 2008 requesting to appeal these matters.

The Court finds that the Rules of Appellate Procedures, Rule 12 (a), requires that an appeal be filed within 30 days of the entry of judgment by the lower court. Rule 12 (b) states that failure to file a timely notice of appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice is filed after the date set by law.

IT IS ORDERED that the Defendant's request to appeal these matters is untimely; therefore the Appellee's Motion to Dismiss Pursuant to Rule 12 (c) is granted.

TOHONO O'ODHAM COURT OF APPEALS

Carolyn ALVAREZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0101
(Ref. Case No: CR-04-571-89)

Decided March 11, 2009.

Before Judges Violet Lui-Frank, Rose Johnson Antone, and Teresa Donahue.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ernest MORISTO, Appellant/Defendant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0091
(Ref. Case No: TR01-865-95; CR10-1808-95)

Decided June 10, 2009.

Before Judges Violet Lui-Frank, Robert Hershey, and Rachel Frazier Strachan.

The Court has received and considered the Appellant's, ERNEST MORISTO, *Joint Rule 36 Motion to Dismiss* ("Motion to Dismiss") filed on May 19, 2009. According to the Motion to Dismiss the parties are seeking dismissal of the Appellant's appeal.

The Appellant's Motion to Dismiss states that the Appellant and Appellee have reached a stipulated agreement which would vacate the Appellant's conviction of the Criminal Trespass charge and which would permit the Appellant to be resentenced on the Resisting Arrest charged.

Based upon the foregoing and good cause appearing,

IT IS ORDERED that the Appellant's appeal is dismissed. Thus, no further action is required by the parties.

TOHONO O'ODHAM COURT OF APPEALS

Alexander BLAINE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0094
(Ref. Case No: CR05-2054-2056-98)

Decided September 14, 2009.

Before Judges Violet Lui-Frank, Roy A. Mendoza, and Robert A. Hershey.

The Court of Appeals, en banc, having heard oral arguments and reviewed the written briefs submitted by the parties, pursuant to Rule 31 (a) of the Tohono O'odham Rules of Appellate Procedure, ORDERS that the appeal is denied.

Further, the matter is remanded back to the Trial Court for proceedings consistent with this decision.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM COMMUNITY COLLEGE, Appellant,
v.
TOHONO O'ODHAM TRIBAL EMPLOYMENT RIGHTS OFFICE, TOHONO O'ODHAM TRIBAL EMPLOYMENT RIGHTS OFFICE MISSION, and Marlos NORRIS-ENOS, as Director/Administrator of the Tohono O'odham Tribal Employment Rights Office, Appellee.

Case No. CTA-0103

Decided September 30, 2009.

Before Judges Violet Lui-Frank, Rachel Frazier Strachan, and Robert A. Hershey.

This matter comes before the Court of Appeals as a Notice of Appeal and Request for Record filed by the appellant on June 22, 2009. The appeal is from the Decision and Order, No. 01-09, of the Tohono O'odham Employment Rights Commission, dated 5-18-09.

Ordinance No. 01-85 is the duly enacted law providing for administrative proceedings before the Tohono O'odham Employment Rights Commission. Under this Ordinance, appeals from any final order of the Commission may be taken to the "Tribal Court". Ord. No. 01-85, section 15 (G).

The Constitution of the Tohono O'odham Nation, Article VIII, section 7, provides as follows: *The appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham Courts. Decisions of the court of appeals on all matters within its appellate jurisdiction shall be final*.

We find that the Court of Appeals lacks jurisdiction over direct appeals from the decisions of the Tohono O'odham Employment Rights Commission. The Constitution of the Tohono O'odham Nation allows the Court of Appeals"…to hear all appeals from the Tohono O'odham Courts." The appeal in this case must be taken to the Trial Court. The Rules of Appellate Procedure, Chapter II, Judicial Review of Administrative Decisions, addresses the process for appeals such as the one taken now.

IT IS ORDERED dismissing the appeal in the Court of Appeals. The Clerk shall process the appeal in the Trial court under the Rules of Appellate Procedure, Chapter II, Judicial Review of Administrative Decisions.

TOHONO O'ODHAM COURT OF APPEALS

REED'S RENTAL, Plaintiff-Appellant,
v.
Celia NORRIS, Defendant-Appellee.

Case No. CTA-0017
(Ref. Case No: 87-NP-4221)

Decided October 14, 2009.

Westlyn C. Riggs, Attorney for Appellant.
Papago Legal Services by Kenneth Briggs, Counsel for Appellee.

Before Judge Teresa Donahue.

Holding: Dismissed due to earlier remand to the trial court.

TOHONO O'ODHAM COURT OF APPEALS

Steven JOSE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0104
(Ref. Case No: 2009-5284-5285CR)

Decided April 22, 2010.

Before Judges Robert Hershey, Violet Lui-Frank, and Rachel Frazier Strachan.

The Court has received and reviewed the Appellant/Defendant's, STEVEN JOSE, Motion for Expansion Of Time To File Appeal Brief And Request For Trial Record And Transcript ("Motion for Expansion of Time") filed on February 4, 2010. In the Motion for Expansion of Time, the Appellant/Defendant requests this court to afford him additional time to obtain a copy of the trial court record, including transcripts, prior to the Appellant filing his opening brief.

In response to the Appellant's motion, the Appellee/Plaintiff, the Tohono O'odham Nation, filed a Motion to Dismiss Appeal on February 17, 2010. The Appellee/Plaintiff asserts that the Appellant/Defendant's Notice of Appeal was required to be filed by December 2, 2009 since judgment was entered against the Appellant/Defendant on November 2, 2009. The Appellee/Plaintiff claims that since the Appellant/Defendant did not timely file a notice of appeal, the Appellant/Defendant's request is untimely.

The court agrees with the Appellee/Plaintiff that the time to file a notice of appeal is set by law in the Tohono O'odham Court Rules of Appellate Procedure ("Rules of Appellate Procedure"). The Rules of Appellate Procedure require an appellant to file a notice of appeal within 30 days of entry of the judgment. Otherwise, the Appellant/Defendant's appeal must be dismissed. In the instant matter, the Appellant/Defendant was sentenced on November 2, 2009. Thus, his notice of appeal was required to be filed no later than December 2, 2009.

Also, it should be noted that court has considered the Appellant/Defendant's Request to Speak to the Court submitted on November 9, 2009 in which the Appellant/Defendant states that he wished to appeal the guilty verdict entered against him for lack of communication with his legal counsel, David Oliver. The court finds that the Appellant/Defendant's attempt to appeal the matter in his Request to Speak to the Court was insufficient. Pursuant to the Rules of Appellate Procedure, a notice of appeal requires, at a minimum, "a concise statement of the adverse ruling… or errors…" and "the nature of the relief being sought". Rule 12 (d). The Rules of Appellate Procedure require both conditions be met. However, the Appellant/Defendant's Request to speak to the Court does not provide a concise statement of the adverse ruling or alleged errors by the trial court, nor the relief being sought by the Appellant/Defendant. As a result, on November 12, 2009 the trial court issued a Trial Record Entry that explained to the Appellant/Defendant that he must file his appeal by December 2, 2009. Furthermore, the Trial Record entry states that the Appellant/Defendant was given a copy of the Rules of Appellate Procedure.

On December 2, 2009, the Appellant/Defendant filed a Motion to Extend Time for Filing of Appeal in which the Appellant/Defendant requested the court to afford him additional time to "evaluate the grounds and merits of Defendant's Appeal", inter alia. (See page 2, lines 8-9 of Appellant/Defendant's Motion to Extend Time for Filing of Appeal (Motion to Extend Time filed on December 2, 2009). Specifically, in the Motion to Extend Time, the Appellant/Defendant requested an additional thirty (30) days to file a notice of appeal. In addition, the Appellant/Defendant stated, "Should this motion not be granted, please treat this as a filing of appeal." Previously, on November 12, 2009 the trial court judge reminded the Appellant/Defendant that the deadline to file his appeal was December 2, 2009. However, on December 2, 2009 the judge granted the Appellant/Defendant's Motion to Extend Time which extended the deadline to file an appeal to January 4, 2010.

This court finds that the trial court lacked the authority to issue an order regarding the filing of a notice of appeal when such a ruling is inconsistent with the Rules of Appellate Procedure. And as a result, the Appellant/Defendant should not have relied upon the trial court's ruling. Moreover, legal counsel for the Appellant/Defendant in the instant matter represented the Appellant/Defendant before the trial court and thus, should have been fully abreast of any "adverse ruling" or "alleged errors" which occurred before the trial court. Thus, this court finds that the Appellant/Defendant's Notice of Appeal was defective and therefore, his appeal must be dismissed.

The Court also finds that legal counsel has failed to adequately represent the Appellant/Defendant in this matter by familiarizing himself with the Rules of Appellate Procedure.

Based upon the foregoing,

IT IS ORDERED that the Appellant's appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Verlon JOSE, Petitioner,
v.
Harriet TORO, Muriel SEGUNDO, Lucinda DELORES, Lavinda ESPUMA, Marion TORO, Cornelius ANTONE, Lisa ANTONE, Ira CHAVEZ, Sr., Caroldene GARCIA, Cornelia NORIEGA, Devorah GARCIA, Sidney GARCIA, Marie NORRIS, Elaine DELAHANTY, Patricia VICENTI, Georgeann JOHNSON, Kenneth WILLIAMS, Tanya SALVICIO, Roland TORO, Riginald TORO, Hutchie TORO, Caroline TORO, Celia TORO, Kenneth JOSE, Jr., Jule JOSE, Francine JOSE, Arline F. JOSE, Kendall JOSE, all in their official capacities as Council Members of the Chukut Kuk District and Marlakay HENRY, incumbent District Chairwoman of the Chukut Kuk District, Respondents.

Case No. CTA-0108

Decided July 27, 2011.

Before Judges Larry K. Yazzie, Maria Borbon, and Robert A. Hershey.

This matter is before the Nation's Appellate Court for a hearing on a Petition for a Writ of Mandamus. Petitioner is Verlon Jose. According to the Election Board of the Tohono O'odham

Nation and resolution of the Tohono O'odham Legislative Council Mr. Jose is the newly elected Chairman of Chukut Kuk District.[1]

The Appellate Court's jurisdiction is derived by Tohono O'odham Code, Title 12, ELECTIONS, Chapter 1 – UNIFORM ELECTION ORDINANCE, Article XIII, PENAL PROVISIONS, §11 Jurisdiction.[2] Section 11 specifically authorizes this Court to grant "such other relief as is necessary and proper for the enforcement of this ordinance". This Court's jurisdiction is also supported by the Constitution of the Tohono O'odham Nation and the Nation's Court's Rules of Appellate Procedure, Rule 23.[3] The Appellate Court is part of the Judiciary and this is consistent with the provisions of the Constitution that grants the Judiciary the power to interpret, construe and apply the laws of; or applicable to the Tohono O'odham Nation.[4]

Pursuant to Rule 13(a) of the Tohono O'odham Court Rules of Appellate Procedures, the Court accepts the Petition for Writ of Mandamus. Pursuant to Rule 23(c) of the Tohono O'odham Court Rules of Appellate Procedures, the court held an order to Show Cause hearing. The Appellate Court allowed the Tohono O'odham Nation to appear as Amicus Curiae in support of the Petition for Writ of Mandamus. The parties were well represented by their respective counsel.

Verlon Jose seeks to have this Court issue a Writ of Mandamus and to Order respondents who are members of Chukut Kuk District's legislative body certify him the winner of the election held on May 28, 2011 and seat him as that District's Chairman as required by the Election Ordinance of the Tohono O'odham Nation.[5] The respondents' refusal to comply is based on a number of irregularities that occurred during the election, procedures requiring an election

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[1] See Attachment A: Tohono O'odham Nation Certification of Election Results CHAIRMAN AND VICE CHAIRMAN OF THE CHUKUT KUK DISTRICT, signed by members of the Tohono O'odham Nation Election Board, dated 28th Day of May 2011, and SEE Attachment B: Legislative Order No. 11-291 of the Tohono O'odham Nation Legislative Council (judgment in Contest of 2011 General Election for Chukut Kuk District Chairperson and Vice Chairperson).

[2] The Tohono O'odham Courts shall have jurisdiction over all violations of this ordinance no herein specifically reserved by the Tohono O'odham Council and may, in addition to the penalties prescribed herein, grant such other relief as is necessary and proper for the enforcement of this ordinance; including but not limited to injunctive relief against acts in violation of this ordinance.

[3] Constitution of the Tohono O'odham Nation, Article VIII § 10(a), (c) and Rule 23: Writs of mandamus and prohibition; contents of petition; procedure; time limits; denial without action.

[4] See: Constitution of the Tohono O'odham Nation, § 10(a).

[5] See: Title 12 Tohono O'odham Code, Chapter 1, Article VII § 6 N.

contest before the Legislative Council of Tohono O'odham Nation (hereinafter the Nation) in order to stay the mandatory regulatory obligations of the Respondents to certify and seat the Plaintiff, Mr. Verlon Jose.[6] The respondents filed five (5) contest statements[7] and appeared before the Nation's Legislative Council for a consolidated election contest hearings held on June 14-16, 2011.[8] The parties' interest were represented by attorneys, and "were given the opportunity to appear, to make opening statements; to call, question, and cross-examine witnesses; to present evidence; to make objections; to present and argue motions; and to make closing statements" before a vote was taken by the Legislative Council.[9] The Nation's Constitution and the Uniform Election Ordinance provide that judgments of the Legislative Council are deemed final as a matter of law.[10]

The Respondents filed three actions with the Nation's Tribal Court seeking to overturn the election of plaintiff, Verlon Jose, based on constitutional grounds. This Court submits that those actions may continue. Mr. Jose is not a party to that action. The action before this Court solely addresses Mr. Verlon Jose. There is no reason for this Court to believe that the trial court actions will be resolved in the immediate future.

The Respondents' arguments regarding sovereign immunity are misplaced. A petition for Mandamus is not a claim for damages. It is in fact a request for equitable relief. The Tohono O'odham Courts have allowed suits for many years against government officials for prospective relief when the court deemed such officials to be acting outside the bounds of their constitutional authority.[11] The Respondents, by refusing to certify Mr. Jose the winner of the election are acting outside the scope of their authority. In fact, they are mandated by the Nation's Uniform Election

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[6] See: Uniform Election Ordinance, Title 12 Tohono O'odham Code, Chapter 1, Article VII, § 6N, Article VIII § 5, Ordinance No. 03-86.

[7] See: LEGISLATIVE ORDER OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL (Judgment in Contest of 2011 General Election for Chukut Kuk District Council Representatives and Alternatives for the Miguel Community, LEGISLATIVE ORDER NO. 11-216, 16th Day of June, 2011.

[8] SEE: LEGISLATIVE ORDERS OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL, LEGISLATIVE ORDER NO.s 11-213 through 11-221.

[9] See: *Id.*, at n. 6.

[10] See: Nation's Constitution, Article X, § 7 and Article VIII, § 7, Uniform Election Code.

[11] For example See: Tohono O'odham Advocate Program v. Norris, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005*) appeal dism'd*, 3 TOR3d 21 (Ct.App., Sep. 4, 2008).

Ordinance to issue a Certificate of Election, certifying Mr. Jose the winner as Chair of the Chukut Kuk District. This is not a discretionary duty on the part of Respondents.

In that regard the Respondents reliance on Sears v. Hull is unfounded.[12] This Court takes note that on the issue of Mandamus as a remedy, the Arizona Supreme Court acknowledges an "extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty".[13] The problem this Court needs to resolve is not a question of the Plaintiff's or Respondent's interpretation of the law.

IT IS THEREFORE ORDERED that a Writ of Mandamus issues as follows:

1. Respondents captioned above all in their official capacities as Council Members of the Chukut Kuk District, including incumbent Chairwoman Marlakay Henry are to issue Petitioner, Verlon Jose, a Certificate of Election and to seat him as Chairman of the Chukut Kuk District, and
2. Compliance with this Writ of Mandamus shall be no later than 5:00 p.m. on Thursday, July 28, 2011.

TOHONO O'ODHAM COURT OF APPEALS

Angela ORTIZ and Frances RUIZ, Petitioners,
v.
Charlene MONTANA, *et. al.*, Respondents.

CONSOLIDATED WITH

TOHONO O'ODHAM NATION, Plaintiff,
v.
GU-VO DISTRICT GOVERNING COUNCIL, *et. al.*, Respondents.

Case Nos. CTA-0109
CTA-0110

Decided August 24, 2011.

Before Judges Robert A. Hershey, Larry K. Yazzie, and Violet Lui-Frank.

[12] Sears v. Hull, 192 Ariz 65 (Ariz S. Ct. 1998), 961 P2d 1013 (1998).

[13] *Id*, at p. 1016.

These cases come before the Tohono O'odham Court of Appeals upon Verified Petitions for Extraordinary Relief in the Nature of a Writ of Mandamus, and Stipulated Motion for Consolidation and Order. On August 11, 2011 the Court heard arguments on behalf of all interest parties.

I.

JURISDICTION AND SERVICE OF PROCESS

This Court has jurisdiction to hear the matters before it. *Tohono O'odham Council v. Garcia*, 1 TOR3d 10 (Ct.App., Sep. 14, 1989); Constitution of the Tohono O'odham Nation, Article VIII, Sections 2 and 10. Respondents have consented to the jurisdiction of the court by appearing generally and, in fact, litigating against the Petition for Mandamus, TO Code Title 4, Ch. 1 101(b)(a). Service of process rules are designed to give notice of an impending action and an opportunity to be heard. Petitioners sought to serve members of the Gu-Vo District Governing Council in their *official* capacities. Pursuant to Rule 23 of the Rules of Appellate Procedure, Tohono O'odham Nation, that service must be made within 72 hours after the initial filing of the Petition. Service was refused by Ervina Francisco (at the time the resoluted Vice-Chair of Gu-Vo District) at the District office. Could respondents simply defeat the Petition by refusing to accept process in their *official* capacities for three days even though they have *actual* knowledge of the filed case and thereafter have chosen to participate in the litigation The Nation's suit, and by agreement to consolidate, is against the Gu-Vo District Governing Council and its officials. The District cannot complain of lack of service of process if it, in fact and deed, refuses to accept the suit in these circumstances.

II.

THE ELECTION

Respondents' counsel stated in court that he represents all persons of the Gu-Vo District. But how can that be? At the very least he does not represent Angela Ortiz, Frances Ruiz, and those that voted for them. The District prepared and administered the election. Now the *District* complains that the election it *itself* conducted was unconstitutional and wrong. Here is where the problem facing respondents begins.

Article VII of the Election Code prescribes the duties of the Election Board. By law voters are to indicate their choice of candidates by placing an "X" in the appropriate position. What happens if a person does not favor a particular candidate? Articles III and VII provide the answer, and the Court here works a little backwards. Article VII dictates that sample ballots are

to be widely distributed in order to acquaint voters of the candidates. Respondents present no evidence that this was not done. If the ballot did not reflect itself and choices accurately a challenge could have been made to it *prior* to the election. No one did so. To have more than one choice of candidates, Article III provides the mechanism to certify candidates. Did anyone besides petitioners file timely to declare their candidacy? No. In fact, the incumbent chairperson of the District Council, who desired to oppose petitioners sought an injunction in the lower court to place her name on the ballot. To her misfortune, she did not comply with the election rules and her case for injunctive relief was dismissed.

The Board is charged with rejecting votes if it cannot determine the choice of the voter. Respondents claim that by signing, but not marking, the ballot, over one hundred persons voted *against* petitioners. But *not voting* for someone does not necessarily mean they are voting against them. If more than one set of candidates is running for election, then what is the Board to make of a signed, unmarked for preference, ballot? Did the voter intend to vote against all, some, or express no preference? Why should the Board, and this Court, be charged with determining a voter's silence – and intent thereby – where, by law, there are a series of expressly delineated steps that could have been taken to mitigate the likelihood that this matter would ever have to be brought before a court. No evidence was presented at the hearing that it is the custom of the Tohono O'odham people to vote against a candidate by not marking an "X" by that person's name. Indeed, it seems more likely that it is the custom and practice of the voters of the Nation to choose a candidate by placing an "X" by a person's name, as that practice has been carried out routinely now for several decades. The Court adopts the reasoning in Bennett v. Yoshima, 140 F.3d 1218 (9th Cir. 1998), and will not infer intent to the blank votes argued about in this litigation.

Any voter of the District who is unhappy with the outcome of the election and who submitted a blank ballot could have contested the election to the Board and thereafter the Legislative Council. No one did so. Yet, the District complains that irreparable harm will come to it if the Court grants the requested Writ. But will not even greater harm come its way if the Court does not grant the Writ? The Nation has substantial control over and responsibility for the Gu-Vo District's finances. The Court adopts the Nation's position of its fiduciary obligations in insuring that funds are expended only by authorized officials of the District.

The Gu-Vo District Council may proceed, if it should still desire, with its lower court suit challenging the Legislative Council's constitutional authority to enact certain provisions of the

Uniform Election Ordinance, and to uphold respondents' interpretation thereto. It can make its argument to the trial court that *Juan v. Juan*, 2 TOR3d 62 (Trial Ct., Jan. 27, 2000) *appeal dism'd*, 3 TOR3d 1 (Jan. 4, 2005), should not control the outcome. It could also consider the processes of Recall and Initiative, as provided by law. This Court makes no determination on the propriety or likelihood of success of the three actions posited just above.

Good cause appearing, the Writ is granted. *Jose v. Toro*, 3 TOR3d 31 (Ct.App., Jul. 27, 2011), is controlling. The defendants are ORDERED to fulfill their duty under the Uniform Election Ordinance and to issue Certificates of Election and to seat Angela Ortiz as Chairwoman of the Gu-Vo District and Frances Ruiz as Vice-Chairwoman of the Gu-Vo District on or before August 31st, 2011.

TOHONO O'ODHAM COURT OF APPEALS

Clifford TANNER, Appellant,
v.
TOHONO O'ODHAM GAMING, Appellee.

Case No. CTA-0112

Decided September 16, 2011.

Before Judge Teresa Donahue.

Holding: Case forwarded to the Civil Division of the trial court due to the case being misfiled with the Court of Appeals.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0111
(Ref. Case No: 2009-5284-5285CR)

Decided September 27, 2011.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Strachan.

The Appellee has filed a Motion to Dismiss Appeal on the grounds that the Appellant failed to file his notice of appeal within thirty (30) days of the entry of judgment in his case as required by Rule 12(a), Tohono O'odham Rules of Appellate Procedure.

According to the record, the sentencing order was filed on June 9, 2011. The record does not reveal when the sentencing order was mailed or delivered to the Appellant. The Appellant contends that he did receive the sentencing order until July 2, 2011. Assuming the Appellant is correct and that he was not served with the order until July 2, 2011, Rule 12(a) required that he file his notice of appeal no later than August 2, 2011. The Appellant's Notice of Appeal was not filed until August 22, 2011 – twenty days after the expiration of the Rule 12(a) deadline.

The Tohono O'odham Rules of Appellate Procedure state that unless a notice of appeal is filed in a timely manner, the appellate lacks jurisdiction and the appeal must be dismissed. Rule 12(c), Tohono O'odham Rules of Appellate Procedure. This Court has held that the trial may not extend the period for filing a notice of appeal and has strictly adhered to the mandatory language of Rule 12. *See Jose v. Tohono O'odham Nation*, 3 TOR3d 29 (Ct.App., Apr. 22, 2010); *Narcho v. Tohono O'odham Nation*, 3 TOR3d 13 (Ct.App., Sep. 11, 2007). This Court will not disturb that precedent.

The workings of Rule 12 may seem to be unduly rigid, especially in a case such as this where the Appellant's Notice of Appeal raises issues of grave concern to the interests of justice. However, a defendant, the Nation and the victims of a criminal offense are all entitled to finality. Rule 12 serves the vital interest of promoting the finality of cases. The impact of Rule 12 in criminal matters is moderated by the fact that a convicted defendant has the right to pursue a writ of habeas corpus in this Court pursuant to Rule 24, Tohono O'odham Rules of Appellate Procedure.

Based upon the foregoing, the Court finds that the Appellant's Notice of Appeal to the Court of Appeals of Tohono O'odham Nation was untimely and good cause exists to dismiss the appeal.

IT IS THEREFORE ORDERED that the Appellee's Motion to Dismiss Appeal is granted and the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Willard R. MANUEL, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0105
(Ref. Case No: 2009-0624-0644CR)

Decided November 9, 2011.

Before Judges Maria Borbon, Larry K. Yazzie, and Robert Hersey.

Defendant/Appellant appeals his conviction and judgment following a jury trial that resulted in guilty verdicts on all three charges alleged in the Criminal Complaint. On July 1, 2010, a jury found Mr. Manuel (hereinafter Appellant) guilty of Embezzlement (2009-0624CR), Abuse of Office (2009-0643CR) and Criminal Contempt of Court (2009-0644CR). Defendant who appears pro se files an appeal and later an Amended Notice of Appeal.

Appellant's Arguments on Appeal

1. "Denial of Right to Counsel at all stages of the proceedings.
2. Violations of Due Process and Equal Protection
3. Trial Court's refusal to submit Jury Instructions submitted by Appellant
4. "Trial Court undermined the pending Attorney-client relationship in open court with disparaging statements about Defendant's choice of counsel. . ."
5. Prosecutorial misconduct
6. Trial court purging from records, defendant's Notice of Appeal
7. Trial court laughing with prosecutor"

Amended Notice of Appeal

This Court received an Amended Notice of Appeal that was filed on July 15, 2011.

Appellant's Amended Appeal more clearly defines the nature of defendant's arguments.

> "Appellant alleges the trial court violated both constitutions of the United States and the Tohono O'odham Nation because counsel of his choice was not present to represent him at all phases of the proceedings".
>
> "The Trial Court violated his constitutional rights to due process and equal protection and rights under the Indian Civil Rights Act (25 USC § 1301) by engaging in bias, prejudice and unfairness pre-trial, trial and post-trial and by denying his right to counsel".
>
> "Appellant's constitutional and federal rights were violated when the trial court eliminated all of Defendant's jury instructions and

> by refusing to grant a Motion for a Mistrial, resulting in prejudicial error".
>
> "The Trial Court undermined the "pending Attorney-client relationship in open court with disparaging statements about Defendant's choice of counsel resulting in severe prejudice and instilling a chilling effect of Defendant's trust in the Judicial System resulting in reversible error".
>
> "The trial court ratified the Tohono O'odham Nation's repeated misconduct of violating Defendant's Constitutional and Federal rights above said and his misrepresentations of fact, selective presentation of the law and misrepresentations of law both verbally and in-writing to Defendant, jury and the trial court resulting in bias, prejudice and prosecutorial misconduct resulting in reversible error".

Appellant is an enrolled member of the Tohono O'odham Nation. The record reflects he served both as Acting Director of the Ki:Ki Association, the Nation's housing authority and Vice-Chairman of the Board of Directors for the same organization. On November 9, 2005, along with officials of the Ki:Ki registered to attend a trade show in Honolulu, Hawaii to take place on May 20-27, 2006.[1] On May 10, 2006, a check was issued in the amount of $1,879.65 (one thousand eight hundred seventy-nine dollars and sixty-five cents) to Appellant to attend the trade show. On May 12, 2006, the check was deposited by Appellant into his Bank of America checking account. Appellant did not attend the trade show because he was ordered not to attend by the Chairwoman of the Legislative Branch's Housing Committee, the legislative oversight committee for the Ki:Ki Association.

On July 19, 2006, the Ki:Ki Association Interim Director sent Appellant a certified letter requesting that he repay the amounts he received for per diem, hotel expenses and travel fare totaling $2,311.95 (two thousand three hundred eleven dollars and ninety-five cents).[2]

After failing to respond, Appellant was subjected to a civil complaint for the full costs associated with the travel including airfare. As plaintiff in the civil action, Ki:Ki Association sought $2,906.95 plus 12% interest for a total of $3,272.28 (three thousand two hundred seventy-two dollars and twenty-eight cents). On March 22, 2007, Appellant signed a settlement

[1] The stipulated facts identify Appellant as a member of the Board of Directors of the Ki:Ki Association. The jury instructions identify Appellant as Acting Director.

[2] See: Nation's Exhibit C: Letter from Ki:Ki Association Interim Director, dated, July 19, 2006 and Nation's Exhibit #12: TIMELINE @ entry number 4.

agreement agreeing to pay $529.59 (five hundred twenty-nine dollars and fifty-nine cents) per month until paid in full. Appellant testified during trial that he signed the settlement agreement under protest. The record reflects that Appellant made two payments pursuant to the settlement agreement. Appellant testified during trial that he used the monies he received to fix his truck. A witness also testified he observed Appellant gambling at a casino.

The criminal complaint was filed on March 5, 2009.

Several meetings ensued within the Ki:Ki Association and its Board of Directors. Appellant was diligent in requesting access to these recordings for use in his defense, to no avail. At all times, Appellant believed issues pertaining to the Ki:Ki Association at the time he served its Board of Directors could aid his defense. By letter dated May 5, 2010, an assistant prosecutor for the Nation requested from an attorney representing the Ki:Ki Association, a number of items, including telephone records canceling plane and hotel reservations, three resolutions concerning the trip to Hawaii and records of board minutes of the Friday before the trip was scheduled to occur.

A written response from counsel for the Ki:Ki Association indicated that recordings of certain meetings were available as well as a transcript of at least one meeting.[3] Apparently, even with the use of "counsel" as discussed below, he was not able to obtain any of the information. This court cannot determine to what extent it would have been helpful, if at all. Instead, Appellant stipulated to facts to be used at trial.

Denial of Right to Counsel of Choice

The premise of Appellant's argument is the denial of his right to counsel of his choice. Unfortunately, while Native Americans are citizens of the United States, the United States Constitution does not apply to Indian tribes.[4] Instead, Native Americans are subject to the Indian Civil Rights Act.[5] The Sixth Amendment right to counsel was not provided for in the Indian Civil Rights Act.[6] A defendant facing criminal charges in tribal court is only entitled to counsel

[3] See: Letter dated May 21, 2010 addressed to the prosecutor from counsel for Ki:Ki Association.

[4] *State of Montana v. Spotted Eagle*, 71 P.3d 1239, p. 1243 (citations omitted)(Mont.S.Ct. 2003).

[5] 25 U.S.C. § 1302.

[6] *State of Montana v. Spotted Eagle*, at p. 1243-1244.

at his or her own expense.[7] The Constitution of the Tohono O'odham Nation adopted the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77).[8] Accordingly, the Rules of the Court of the Tohono O'odham Nation provide:

> Any party to a matter before the Court shall have the right to assistance of counsel at his or her own expense, provided that such counsel, whether a licensed attorney or lay advocate, must be authorized to practice in accordance with any applicable law or court rule.[9]

The Nation's Court of Appeals is not authorized to appoint counsel for Appellant.[10]

On October 30, 2009, Appellant's counsel of choice, (as attorney for defendant Willard Manuel) filed a "Motion for Reconsideration of Release Conditions to Own Recognizance" with the Trial Court. Appellant signed off on the front page of the motion as "In Pro Per." The last page was signed by Appellant's counsel of choice as "Attorney for Willard Manuel."[11] It is not clear to this Court whether this filing permitted by the Trial Court was inadvertent.

Numerous continuances were granted throughout the proceedings. Continuances of the scheduled pre-trial hearings and of the scheduled trials were granted. At least one hearing was continued because the prosecutor failed to appear. There were requests by Appellant for additional discovery, in addition to his requests to continue regarding his choice of counsel.

On January 25, 2010, Appellant's proposed counsel filed an affidavit with the Court declaring:

1. That he was in the process of seeking admission to practice before the Tohono O'odham Tribal Court to represent Appellant in his criminal matter, and
2. He anticipated his admission would be approved within the next 45-60 days and would file a proper Notice of Appearance to represent Appellant, and
3. That based upon his "review of information," he believed "Mr. Manual's criminal defense is greatly meritorious and has a strong chance of prevailing on the merits and be acquitted."[12]

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[7] *Id.*, citing 25 U.S.C. § 1302(6), p. 1244, *United States v. Ant*, 882 F.2d 1389, p. 1392, 1398 (9th Cir. 1989) [According to ICRA, "[n]o Indian tribe . . . .shall deny to any person in a criminal proceeding the right . . . .at his own expense to have assistance of counsel," citing 25 U.S.C. § 1302(6)].

[8] See: *Article III – RIGHTS OF MEMBERS*, Section 4, Constitution of the Tohono O'odham Nation.

[9] Title 6-Courts, Chapter 1 – COURTS AND PROCEDUERS, Section 1108, Right to Counsel.

[10] See: Tohono O'odham Court Rules of Appellate Procedure, Rule 12(h).

[11] See: Notice and Motion for Modification of Release Conditions to Own Recognizance. October 30, 2008.

[12] See: Affidavit, filed with the Court on January 25, 2011, along with Appellant's Notice and Motion to Reset Pre-Trial Hearing. ("Counsel has the application completed, the Letter of Good Standing is waiting for the two original Letters of

Waiver of Right to Counsel

The facts of this case are problematic for both the Trial Court, this Court, and Appellant for a number of reasons. First and foremost, Appellant is not entitled to legal representation as provided for non-Native peoples under American general jurisprudence. The Court's finding that Appellant has waived his right to counsel[13] is without legal justification, even if he is not entitled to appointed counsel as we understand Federal Indian Law and the Indian Civil Rights Act. The record below is void of any discussion between the Trial Court and Appellant that he knowingly and voluntarily waived his rights to either his counsel of choice at his own expense or waived his right to substitute counsel under the circumstances.

Appellant's Choice of Counsel

While it is through no fault of the parties or of the trial court that Appellant's choice of counsel did not complete his application timely, appellant expressly relied on his choice of counsel to do so as evidenced by his requests to continue the trial. This is clearly not a matter of requesting continuances for purpose of delay, as the Appellant at all times was led to believe his choice of counsel would eventually appear to represent him. After realizing that his counsel of choice would not appear, Appellant sought representation from the Tohono O'odham Nation's Advocate Program on or near the day his trial was scheduled to begin. Appellant told the jury in closing that due to a conflict of interest they could not represent him.

A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction.[14] A Sixth Amendment violation is not subject to harmless-error analysis,[15] "in sum, the right at stake here is the right to counsel of choice, not the right to a fair trial."[16] The right of counsel of choice is not derived from the Sixth Amendment's purpose of ensuring a fair trial.[17] Instead it has been regarded as the "root meaning of the constitutional

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Recommendation then the admission package will be complete and will be filed with the Committee. It is necessary to continue the matter for at least sixty (60) days to allow counsel to get current in the case after admission").

[13] See: Trial Record Entry, dated June 11, 2010.

[14] *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), pp. 144-152.

[15] *Id.*, at p. 414. (This Court construes the rights affected in the case before it as one included in the Indian Civil Rights Act, rather than one under the Sixth Amendment).

[16] *Id.*, at p. 146. (Cases submitted by the government involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice).

[17] *Id.*, at p. 147.

guarantee."[18] While the Sixth Amendment is not included in the Indian Civil Rights Act, the right to counsel of choice at one's own expense clearly is.

This Court recognizes the authority of the Tohono O'odham Nation's Trial Court, consistent with *Gonzalez-Lopez*, supra, to establish criteria for admitting lawyers and or advocates who practice before them and requires that a defendant's counsel of choice be a member of the bar where the trial will occur.[19] Consistent with *Gonzalez-Lopez* this Court agrees with the trial court's power to enforce rules and to balance the right of Appellant to his counsel of choice as against scheduling decisions.[20]

Appellant's choice of counsel submitted his application for admission to practice before the Nation's Court on June 7, 2010. Appellant requested a final continuance while his counsel of choice's application was reviewed. The record before this Court does not include the status of the application for admission to practice before the Nation's Courts. There is however, an Order of Recusal, filed on November 8, 2010, signed on October 7, 2010[21] by a judge assigned to the Appellate panel in this case; whose recusal is based on the fact that she is evaluating Appellant's choice of counsel's application for admission to practice before the Nation's Courts.

While Appellant's choice of counsel never formally entered a Notice of Appearance to represent him, it is clear that he acted as an informal standby counsel of sorts. The trial court acknowledged so. Generally the role of stand-by counsel is provided where a defendant chooses to represent himself. This Court's experience has been that a stand-by counsel is available in the event a defendant is not able to proceed or if anything develops during the course of a trial requiring advice or information. The stand-by counsel is generally appointed by the court and available throughout the duration of the trial.

During the discussion regarding jury instructions, the Court initially expressed comfort with proposed Jury Instruction # 19 which states:

> Evidence of Any Kind
> The Nation must prove guilt beyond a reasonable doubt based upon the evidence. The defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant acting with the advice of an

[18] *Id.*, at pp. 147-148.

[19] *Id.*, at pp. 151-152.

[20] See: *Id.* at p. 152.

[21] *Ed. Note.* Date error appears in the original.

> attorney. The defendant's decision not to produce any evidence is not evidence of guilt.

The trial court declared on the record that Appellant "has represented on many occasions that he sought legal help from Mr. Randy Lang for preparation of motions and with this matter." The trial court submitted the instruction leaving out "acting with the advice of an attorney," in order to prevent confusing the jury who never witnessed an attorney representing Appellant.

The problem for this court arises because the informal representation was sanctioned by the trial court without the appropriate acknowledgment afforded a non-Native defendant and his or her standby counsel under similar circumstances. The trial court was thereby restricted from properly recognizing and appointing stand-by counsel all in the same proceedings.

More disturbing is the lack of clarity regarding side bar discussions. Numerous conversations were held outside the hearing of the jury but in their presence. Some did not appear to have been recorded. After hearing the entire recording, including the unintelligible side bar discussions, this Court is not able to determine whether or not Appellant's efforts to raise his arguments at side bar were undermined and denied due process within the meaning of the Indian Civil Rights Act.

During the end of the proceedings, prior to the reading of the instructions to the jury, the court explained the following to Appellant:

> But I will tell you that when you use an affirmative defense; the burden is on you to provide evidence and you have to reach your burden and your burden is preponderance of the evidence in establishing that affirmative defense, so, unless you can tell the court; right now, how you've satisfied that burden; of these affirmative defenses; you did not raise any of this prior to today's jury instructions; you have not shown the court that you have satisfied that burden of these affirmative defenses;
> You raise them; you present evidence to that effect; then you submit the jury instructions; the jury instructions should not be the first time the court is informed of what your affirmative defense was.

The Trial Court accurately advised Appellant regarding the role of counsel of record during a trial. Appellant, purportedly through "his counsel" raised plausible issues and arguments throughout the proceedings. However, Appellant in the end was left without an attorney and relegated to self-representation by default. In this case, however, the occasion of "jury instructions" was not the first time that Appellant had raised affirmative defenses. On September

21, 2009, Appellant in his first pleading filed with the Trial Court, a Notice of Defenses as "Date of Alleged Offense: May 12, 2006."[22]

The question regarding Appellant's Choice of Counsel does not end the inquiry in this Court's opinion.[23] This Court addresses the ways the role of counsel would have aided his defense.[24]

For example, this court is aware that a civil proceeding was filed against Appellant in order to collect monies paid to him by the Ki:Ki Association. Appellant notified the trial court of his intent to use as evidence in the criminal proceedings, records relating to the civil action. The record however is void regarding what if anything in the civil action would have aided Appellant in defending the criminal matter. While the Nation's prosecutor moved to amend one of the criminal charges (Count 3) prior to trial, he told the jury in closing argument "There's the Court Order telling him to pay it." This Court's review of the record failed to identify the Order from the civil action that the Nation's prosecutor addressed during closing arguments. While the Nation's prosecutor documented one payment throughout the proceedings, the record reflects that Appellant made two payments of $529.59, approximately one-third of the monies involved in the criminal case.[25] The role of Appellant's counsel of choice could have more fully developed a defense of the lack of criminal intent.

This Court believes that the role of Counsel of Choice would have aided the defendant greatly during trial on the preparation of jury instructions. This Court's recollection in reviewing the recording indicated that time was of the essence for the Trial Court and both parties were scrambling to submit jury instructions suitable for the Trial Court to instruct. There is some question as to the interpretation of the Nation's Criminal Code for the purposes of the jury instructions. This is important to this Court, as we recognize that ambiguities in criminal statutes be construed in favor of the defendant particularly where more than one interpretation may apply.[26]

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[22] List of Appellant's defenses include for example, Lack of Intent, Statute of Limitations, etc.

[23] See: *United States v. Kloehn*, No. 07-50274 (9th Cir. August 30, 2010).

[24] *Id.*

[25] See: Tohono O'odham Judiciary Receipt No. A 20119, dated 4/10/07, for Restitution and Tohono O'odham Judiciary Receipt No. A 20131, dated 5/4/07, for Restitution.

[26] See: *Frank Douglas Hughes v. Hon. Cindy Jorgenson, Judge of the Superior Court of the State of Arizona*, Supreme Court of Arizona, en banc, 2002 AZ 123).

It is clear to this court from listening to the recording of the trial below that Appellant muddled through the proceedings to the best of his ability. He was at all times respectful of the proceedings, court and the Nation's prosecutor.

The right to any attorney is significant and the court acquiesced by continuing with the trial with Appellant's counsel's input in whatever capacity, to his detriment. One last continuance while Appellant's Counsel of Choice application was reviewed under all circumstances is the best approach considering the significant rights that were at stake.

This Court's decision is fact specific and is not intended to open the door for similar situations whereby a defendant's choice of counsel is not admitted to practice before the Nation's Courts or where a request to continue a trial is denied. The Appellate Court by its ruling does not intend to suggest that a defendant is entitled to representation by an individual not admitted to practice before the Tohono O'odham Nation's Courts nor may a defendant insist on representation by an advocate he cannot afford.[27]

IT IS ORDERED, reversing the conviction in the Trial Court below and remanding for a new trial.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0111
(Ref. Case No: 2009-5284-5285CR)

Decided November 29, 2011.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Johnson.

Inmate Glenn Frank has filed several Requests to Speak to the Court. The Court addresses the Requests in the chronological order, beginning with the oldest request.

Request to Speak to the Court filed 9/2/11

On August 30, 2011, the Nation filed a Motion to Dismiss Appeal. On September 2, 2011, the Appellant Glen Frank ("Frank") filed a Request to Speak With the Court ("Request"). In this

[27] See: *Wheat v. United States*, 488 U.S. 153 at 159 (1988).

Request, Mr. Frank responds to the Nation's Motion to Dismiss. This Court has already entered an order granting the Nation's motion and ordering the dismissal of Mr. Frank's appeal. *Frank v. Tohono O'odham Nation*, 3 TOR3d 37 (Ct.App., Sep. 27, 2011). Although Mr. Frank's response was filed in a timely manner, the Court notes with concern that his response was not transmitted to this Court until October 31, 2011. Nonetheless, the Court has considered Mr. Frank's response and finds that there are no grounds for reconsidering the order granting dismissal of the appeal.

Request to Speak to the Court filed on September filed 9/9/11[1]

In this Request, which was also labeled as "Petition for Writ of Habeas Corpus," Mr. Frank alleges that the conditions of his incarceration and denial of access to legal research materials violate his right to due process of law. A copy of the Request/Petition was sent to the Nation on September 9, 2011. The Nation has not filed a response to the Request/Petition. The Request/Petition was transmitted to this Court on October 31, 2011.

Petitions for writs of habeas corpus are governed by Rule 24, Tohono O'odham Rules of Appellate Procedure. Mr. Frank's petition substantially complies with the requirements of Rule 24. Rule 24 provides that if this Court does not act on a petition within thirty days after it is filed, it shall be considered denied. However, in light of the fact that this Court did not receive the Request/Petition until October 31, 2011, the Court will assert jurisdiction over this matter and order that the Nation file a response to the Request/Petition no later than thirty (30) days from the filing of this order.

Request to Speak to Court filed 9/21/11

In this Request, Mr. Frank requests that the Court provide him with a copy of the log indicating when his sentencing order was served on the Corrections Department as well as a copy of the minute entry from May 5, 2011. The Request was transmitted to this Court on October 31, 2011. A copy of the Request was not sent to the Nation; however, since the request is administrative nature rather legal,[2] the Court finds it unnecessary to provide notice to the Nation or for the Nation to respond to the Request. This Court will not deny Mr. Frank reasonable access to documents related to his case. It is ordered that copies of the requested documents be attached to this order and served on Mr. Frank.

Requests to Speak to the Court filed 10/13/11 and 10/14/11

[1] *Ed. Note. Sic.*

[2] *Ed. Note. Sic.*

In the three requests which were filed between October 13, 2011 and October 14, 2011, Mr. Frank essentially alleges that he has been denied access to legal research materials and other supplies necessary to pursue legal action in this Court. The Requests were transmitted to this Court on October 31, 2011. Copies of the requests were forwarded to the Nation on October 13, 2011 and October 14, 2011. The Nation has not filed a response.

The issues in these requests are similar to the issues raised in the Request/Petition filed on September 9, 2011, but allege that the on-going denial of access to legal materials is preventing Mr. Frank from pursuing relief in this Court. In light of the allegation, the Court will treat these Requests as motions made pursuant to Rule 25, Tohono O'odham Rules of Appellate Procedure. The Nation is ordered to file a response to Mr. Frank's motion no later than fifteen (15) days from the filing of this order.

IT IS THEREFORE ORDERED that the Order of Dismissal in CTA-0111 is affirmed.

IT IS FURTHER ORDERED that the Nation file a response to the Appellant's Request/Petition for Habeas Corpus no later than thirty (30) days from the filing of this order.

IT IS FURTHER ORDERED that copies of the service log reflecting service of Appellant's sentencing order on the Corrections Department and the court minute entry from May 5, 2011 be attached to this order and served on the Appellant.

IT IS FURTHER ORDERED that the Nation file a response to the Requests to Speak to the Court filed on October 13, 2011 and October 14, 2011, no later than fifteen (15) days from the filing of this order.

TOHONO O'ODHAM COURT OF APPEALS

Wayne MANUEL, Appellant,
v.
Frank HECHT, Jail Supervisor, Tohono O'odham Corrections Facility, Appellee.

Case No. CTA-0113
(Ref. Case No: 2010-1315-1323C)

Decided March 23, 2012.

Tohono O'odham Advocate Program by David Oliver for Appellant.
Tohono O'odham Office of the Attorney General by Vanessa Saavedra for Appellee.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Johnson.

THE COURT having reviewed the Petition for Habeas Corpus,

THE COURT FINDS that the Petitioner has not moved the trial court to dismiss the charges against the Petitioner on the grounds that the Nation's failure to provide for a competency exam violates the Petitioner's right to the effective assistance of counsel and due process of law,

IT IS THEREFORE ORDERED that the Court declines to accept jurisdiction in this matter.

IT IS FUTHER ORDERED remanding the matter to the trial court for action consistent with this order.

TOHONO O'ODHAM COURT OF APPEALS

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. CTA-0107
(Ref. Case No. 2008-0283AV)

Decided July 19, 2012.

Before Judges Michael Telep, Jr., Larry Yazzie, and Veronica Darnell.

Holding: Dismissed upon the parties' stipulated motion.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
Wilford GARCIA, Appellee.

Case No. CTA-0106
(Ref. Case No: 2010-2370CR)

Decided April 3, 2013.

Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellant.
Tohono O'odham Advocate Program by David Oliver for Appellee.

Before Judges Walter Marcus, Rachel Johnson, and Violet Lui-Frank.

SUMMARY

The hearing on Defendant's [henceforth Appellee's] Motion to Strike the Plaintiff's [henceforth Appellant's] Notice of Appeal was held on January 29, 2013. David Oliver, Tohono

O'odham Advocate Program, for Appellee, and George Traviolia, Chief Prosecutor, Tohono O'odham Nation, for Appellant, appeared. The matter was taken under advisement. The parties agreed that the Court could decide the appeal on its merits, as well as the Motion to Strike. The Appellant's Notice of Appeal concerns the acquittal of defendant on one count of Abuse of a Person.

The trial court directed a verdict of acquittal on the charge of Abuse of a Person, 2010-2370CR. Any subsequent trial of the Appellee on the same charge after judgment of acquittal would be in violation of his right not to be twice put in jeopardy for the same offense. 25 U.S.C. §1302(a)(3). For the reasons set forth in this opinion, the Appeal is denied and the judgment of acquittal of Abuse of a Person is affirmed. The Court does not have to rule on the Motion to Strike as it is made moot by the Court's ruling on the Appeal.

FACTS

Appellee Wilford Garcia was charged with the following violations of the Tohono O'odham Code: 1312(A)(I)- Driving Under the Influence, 8.4A3- Abuse of a Person and 12.4- Unlawful Possession of Liquor. He pled not guilty to the charges and a bench trial was held on February 9, 2010 before the Honorable Maria Borbon. After testimony was presented in the Appellant's case, but before Appellant formally rested, the Appellee made a Rule 20 motion for a directed verdict of acquittal on the charge of abuse of a person and the trial court granted the motion. The Appellant ("Nation") objected that he was not given an opportunity to respond to the motion and the Judge reconsidered her decision and allowed argument by the Nation. The Appellee "suspended" his motion until the prosecution case closed. Later, the Appellee said "Accordingly, if counsel has rested his case I will move for a directed judgment of acquittal." The trial court granted the motion as to the charge of Abuse of a Person only and directed a verdict of acquittal on that charge. The Nation rested its case. Further evidence was taken as to the remaining charges and the Appellee was eventually found guilty of Driving Under the Influence and not guilty of Unlawful Possession of Liquor. At the end of the trial the Nation moved that the Judge reconsider her ruling on the Rule 20 motion for a directed verdict of acquittal on the charges of Abuse of a Person and she denied his motion. The Nation filed its Notice of Appeal on April 20, 2011, and the Appellee filed his Motion to Strike the Notice of Appeal on July 26, 2011.

DISCUSSION

The issue in this case is whether the Appellee's rights under the Indian Civil Rights Act and the Tohono O'odham Constitution not to be twice put in jeopardy for the same offense are implicated in this matter, and, if so, when jeopardy attached.

The Fifth Amendment of the United States Constitution states in part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

The Indian Civil Rights Act of 1968 ("ICRA"), as amended by the Tribal Law and Order Act of 2010, was passed by Congress in order to provide protections similar to those of the provisions of the Bill of Rights to persons subject to tribal government actions. The principal guarantees of the ICRA are found in 25 U.S.C.A. § 1302, and the portion relevant to this case states, "No Indian tribe exercising powers of self-government shall …(3) subject any person for the same offense to be twice put in jeopardy." The Tohono O'odham Constitution explicitly adopts the protections of the ICRA in Article III, Section 4: "The listing of the foregoing rights shall not be construed as denying or abridging other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77)."

The similarity between the double jeopardy prohibition of the Fifth Amendment and the ICRA makes examination of federal cases interpreting the Fifth Amendment useful in construing double jeopardy in the ICRA. Generally, double jeopardy prohibits subsequent prosecution of a defendant after acquittal of that defendant. The core issue of this case is whether jeopardy attached to the Defendant, and if so, at what point? Federal cases have held that jeopardy in a bench trial attaches "when the judge begins to receive evidence." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), See also, *Serfass v. United States*, 420 U.S. 377, 388 (1975) (jeopardy attaches when the first witness is sworn in during a bench trial). Acquittal by a directed verdict, as in this case, strengthens the argument that jeopardy has attached. Acquittal by directed verdict … cannot be appealed by the prosecution since it would subject a person for the same offense to be twice put in jeopardy. *Fong Foo v. United States*, 369 U.S. 141 (1962).

It is the opinion of this Court for the reason stated below that jeopardy attached to the Appellee when the Appellant's witness was sworn in and testified. Granting the appeal would subject the Appellee to double jeopardy.

ORDER

The Appeal is denied.

TOHONO O'ODHAM COURT OF APPEALS

Gary CIPRIANO, Jr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0115
(Ref. Case No: 2009-5998-6003CR; 2009-6391-6400CR; 2010-2042-2047CR; 2011-0189CR; 2011-0301-0305CR)

Decided May 3, 2013.

Tohono O'odham Office of the Attorney General by Virjynia Torrez for Appellee.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

On March 28, 2012, the Petitioner filed a Petition for Writ of Habeas Corpus seeking to vacate, set aside, or correct an illegal sentence or order of confinement. On March 28, 2013, the Court of Appeals held a hearing on Petitioner's Petition for Writ of Habeas Corpus. Gary Cipriano, Jr., Petitioner, and Virjynia Torrez, Assistant Attorney General, Office of the Attorney General, Tohono O'odham Nation, for Respondent, appeared. The matter was taken under advisement. Petitioner, Gary Cipriano, Jr., was charged with numerous criminal violations of the Tohono O'odham Code including robbery, armed robbery, threatening, and disorderly conduct, misuse of deadly weapon and or dangerous instrument, and conspiracy. He was represented by Demitri Downing, a lay advocate who filed an appearance on May 2, 2011. On October 9, 2011, the Petitioner signed a consolidated plea agreement. On October 31, 2011, the consolidated plea agreement was incorporated into the Court's Order. Petitioner's counsel indicated that Petitioner understood and agreed to the plea agreement. If the Petitioner had filed an appeal, it had to be filed within 30 days of entry of judgment. (Rule 12(a)). The Petitioner did not appeal the Court's action, but filed Petition for Writ of Habeas Corpus on March 28, 2012.

There is an error in the case numbers in the Petition. One set of the case numbers was 2009-6391-6400CR. It is cited in the Petition and the heading of the pleadings as 2009-6391-6460CR. It includes all of the Petitioner's cases, but also includes 40 additional cases which are not his cases. The Petitioner has sufficiently indicated his cases for purposes of the action

Given a review of the entire file and the totality of the circumstances, the Court finds that the Petitioner has suffered harm, and a Petition for Writ of Habeas Corpus should be granted.

ORDER

The Petition for Writ of Habeas Corpus is granted, the plea agreement is vacated, the convictions are set aside, the case is remanded to the Trial Court, and the Petitioner shall continue to be held until his conditions of release are decided by a Trial Court Judge.

TOHONO O'ODHAM COURT OF APPEALS

Lester LOPEZ, Jr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0120
(Ref. Case No: 2012-3005CR)

Decided August 30, 2013.

Before Judges Larry Yazzie, Walter Marcus, and Veronica Darnell.

This Appellant failed to file his notice of appeal within thirty (30) days of the entry of judgment in his case as required by Rule 12(a), Tohono O'odham Rules of Appellate Procedure.

According to the record, the Appellant was found guilty of violating his probation on April 8, 2013. On April 8, 2013, the Defendant was sentenced. Rule 12(a) therefore required that he file his notice of appeal no later than May 8, 2013. The Appellant did not file his Request to Speak with the Court, in which he requested to appeal his Probation Violation case, until May 21, 2013 – 13 days after the expiration of the Rule 12(a) deadline.

The Tohono O'odham Rules of Appellate Procedure state that unless a notice of appeal is filed in a timely manner, the appellate court lacks jurisdiction and the appeal must be dismissed. Rule 12(c), Tohono O'odham Rules of Appellate Procedure.

Based upon the foregoing, the Court finds that the Appellant's Request to Speak with the Court, which served as his Notice of Appeal to the Court of Appeals of the Tohono O'odham Nation, was untimely and good cause exists to dismiss the appeal.

IT IS THEREFORE ORDERED that the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0114
(Ref. Case No: 2009-6318-6328CR)

Decided November 8, 2013.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

THE COURT OF APPEALS FINDS THE FOLLOWING FACTS:

1. On August 8, 2011, in a Trial Record Entry for case number 2009-6318-6328CR, Judge Borbon with Prosecutor Traviola, Romina Martin of Corrections, the Defendant, and Laura Berglen of the Attorney General's Office were in Court, the Court Ordered, "The parties have agreed to a resolution of access to library legal materials on-line. The Nations corrections staff believes that w/in 60 days; there will be computer access for Mr. Frank. The Attorney General's office will provide Rules of Appellate Procedure to Mr. Frank. The Corrections Office will allow Mr. Frank to listen to remainder of CDs oral recording of trial." (Exact wording of the judge with no corrections)
2. On March 11, 2013, the Court Ordered the Appellant to file his brief by April 15, 2013 and the Appellee to file its brief 30 days thereafter and the Court would schedule oral arguments after it received Appellee's brief.
3. The Appellant filed his brief on April 11, 2013.
4. The Appellee requested and was granted extension of time to file its brief.
5. On August 12, 2013, the Appellee filed a Motion to Dismiss and Remand to Trial Court, but did not file a brief. The Appellee's Motion to Dismiss was not filed within 15 days of it receiving the Notice of Appeal as required by the Tohono O'odham Rules of Court, Section 10, Rules of Appellate Procedure, Rule 12i.
6. The Court was incorrect when it Ordered the case heard as appeal.
7. The Tohono O'odham Constitution provides that "[T]he appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham Courts. Decisions of the court of appeals on all matters within its appellate jurisdiction shall be final." Tohono O'odham

Constitution Article VIII, § 7. The Tohono O'odham Rules of Appellate Procedure place sole authority in the Appellate Court to hear appeals, and a strict interpretation of the Constitution would dictate that since a habeas corpus action is not an appeal, but is instead a special writ, that the Appellate Court lacks jurisdiction to hear the matter and that the habeas corpus matter must be remanded back to the trial court to be heard.

8. The Court does not require oral argument and it is not scheduling oral argument.

THE COURT OF APPEALS ORDERS AS FOLLOWS:

1. Appellee's Motion to Dismiss is denied.
2. The case shall be heard as a Petition for a Writ of Habeas Corpus.
3. The case is remanded to the Trial Court to either enforce the Court's August 8, 2011 Order regarding legal materials or to hear the Appellant's Petition for a Writ of Habeas Corpus.

TOHONO O'ODHAM COURT OF APPEALS

Joseph WICHAPA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0121
(Ref. Case No: 2008-1100CR; 2008-1298-1305CR; 2008-1381-1385CR)

Decided November 14, 2013.

Before Judges Barbara A. Atwood, Robert A. Hershey, and Violet Lui-Frank.

Appellant Joseph Wichapa filed a Petition for Writ of Habeas Corpus in this Court on May 3, 2013. On July 26, 2013, Chief Judge Violet Lui-Frank designated herself and Judges Pro Tem Robert Hershey and Barbara Atwood to serve on the appellate panel. After convening to consider the matter, the Court has decided that the Petition for Writ of Habeas Corpus must be remanded for determination by the trial court in the first instance.

Because the authority of the judiciary is defined by the Tohono O'odham Constitution, we interpret the Rules of Appellate Procedure, Tohono O'odham Rules of Court, in a manner that is consistent with constitutional restrictions. Article VIII, Section 7, of the Tohono O'odham Constitution provides that "the appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham

Courts." In the constitutional framework, the Court of Appeals is to exercise appellate jurisdiction rather than original jurisdiction.

Rule 24 of the Rules of Appellate Procedure prescribes procedures for adjudicating a petition for a writ of habeas corpus. Although the Rule allows for resolution by the Court of Appeals in the first instance, a question arises as to the Rule's conflict with the Tohono O'odham Constitution, in light of the constitutional provision on this Court's jurisdiction, we remand to the trial court to process Appellant's Petition for Writ of Habeas Corpus in the first instance. If a decision is rendered that is adverse to the Appellant, he can return to this Court and invoke its appellate jurisdiction.

Furthermore, in light of this Court's deliberations on the matter and our decision to remand, we find that the period prescribed in Rule 24(f) is tolled. The thirty-day period will begin to run on the date that Appellant's Petition for Writ of Habeas Corpus is refiled in the trial court.

TOHONO O'ODHAM COURT OF APPEALS

Swan MORISTO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.[1]

Case No. CTA-0118
(Ref. Case No: 2012-0425-0436CR)

Decided December 3, 2013.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

Holding: Appeal dismissed and trial court judgment vacated upon stipulation by the parties.

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[1] *Ed. Note:* Caption corrected.

TRIAL COURT DECISIONS

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

TOHONO O'ODHAM NATION, a federally recognized Indian tribe, Plaintiff,
v.
Rodney LEDBETTER, a single man, ADVANTAGE 99 TD TRUST, a Delaware business trust; ESI 97, an unknown entity; Brian SANFORD, a single man; COYOTE MOUNTAINS CACTUS COMPANY, an Arizona limited partnership; Henry A. WHITAKER, a single man; Jimmy D. LINKER and Linda LINKER, husband and wife; Anita H. BACA, a widow; Bryan CARSON, a single man; Kate WHITE, a single woman; Susan N. SILVAS, a widow; Gary Chalk CLEMONS and Dawn Ellen CLEMONS, husband and wife; Randy L. HOURSCHT and Hertha HOURSCHT, husband and wife; Thomas D. PERROW, Jr., a single man; Leila Kathleen BRADLEY, a single woman; David A. HURD, a single man; Jason J. SINCLAIR, a single man; Danny BRYAN, a single man; Donald Gene CRUSE and Janice J. CRUSE, husband and wife; Susan Kay CLAFFEY, a single woman; Alfred C. GALLEGOS and Josie M. GALLEGOS, husband and wife; Robert SALINAS and Carmen E. SALINAS, husband and wife; and Thomas BOSSERT, a married man as to his separate property, Defendants.

Case No. 03-VC-9343

Decided March 23, 2005.[1]

Before Rose Johnson Antone.

This matter having come before the Court on Plaintiff's Motion for Partial Summary Judgment pursuant to Rule 56, Ariz.R.Civ.P. as to Defendants Advantage 99 TD Trust, ESI 97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas, and the Court having considered the Motion and having heard oral argument on same, finds as follows:

1. That there is no genuine issue of any material fact as to liability and the Plaintiff is entitled to a judgment as a matter of law;

2. That the first mile of Coleman Road south of Arizona State Highway 86 is on Rangeland, as defined by the Nation's Trespass Ordinance;

3. That the undisputed facts establish that Defendants have trespassed upon the Nation's Rangelands in violation of the Nation's Trespass Ordinance;

4. That Defendants, as Southwest Properties' successors in interest, have no right to use that portion of Coleman Road that lies on the Plaintiff's land, between Arizona State Highway 86 and the development commonly known as the Hayhook Ranch;

[1] *Ed. Note.* Date of decision corrected by the Second Edition of the Tohono O'odham Reports.

5. That Plaintiff has properly served notice of said trespass upon each of the Defendants and has properly brought this Trespass Action against the Defendants;

6. That Plaintiff has established that there exists an actual and justiciable controversy between the parties; and

7. That Plaintiff has established that the issuance of a permanent injunction against Defendants to prevent their future use of Coleman Road is warranted.

Based upon the foregoing findings, and good cause appearing therefore;

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment as to Defendants **Advantage 99 TD Trust, ESI 97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas** is GRANTED.

IT IS FURTHER ORDERED that Defendants **Advantage 99 TD Trust, ESI97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas** are hereby permanently enjoined from any present or future unauthorized use of that portion of Coleman Road located on the Nation's land.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

TOHONO O'ODHAM ADVOCATE PROGRAM, a department of the Executive Branch of the Tohono O'odham Nation's Government; Sarah Michelle MARTIN and Frederick K. LOMAYESVA in their official capacity as Chief and Deputy Chief Advocates, and the TOHONO O'ODHAM ADVOCATES employed with the Advocate Program, Real Parties in interest, Plaintiffs,

v.

The Honorable Betsy NORRIS, in her official capacity as Chief Judge of the Tohono O'odham Judicial Court, a division of the Judicial Branch of Government of the Tohono O'odham Nation; the Honorable Violet LUI-FRANK, in her official capacity as Deputy Chief Judge; and Traci HOBSON, in her official capacity as Judicial Court Solicitor, Defendants.

Case No: 05-PVC-10069
(appeal dism'd *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 21 (Sep. 4, 2008))

Decided April 25, 2005.

Plaintiffs, *Pro Se*.
Robert Palmquist, Attorney for Defendants.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Adult Civil Court for a hearing on April 19, 2005 regarding the Plaintiffs' Petition, Application for Preliminary Injunction, Response to Defendants' Motion to Dismiss and the Defendants' Response, Motion to Dismiss, Motion to Exclude.

Parties present: Plaintiffs, Sarah Michele Martin, Fred Lomayesva, Dwight Francisco, and Cheryl Lopez; Defendant, Honorable Betsy Norris, Honorable Violet Lui-Frank, and Traci Hobson; Defendants' attorney, Robert Palmquist.

The court having taken into consideration the issues raised pursuant to the pleadings, arguments, and comments, **FINDS** and **ORDERS** the following:

The Plaintiff's submit a DVD prepared by their staff that provides statements from tribal members; however, the Defendants move to exclude the DVD for the reason that the statements made are in O'odham and the Plaintiffs provide no written transcript regarding these statement; thus leaving the Defendant at a disadvantage; two of the Defendant do not speak or understand the O'odham language. Further that the court too is not clear about what the statements are being referred to; therefore, the Defendants' motion to exclude the DVD is granted.

The court recognizes the vital roles culture and tradition play in the application of O'odham Law. However, the facts of this case, which revolve around the simple interpretation of a constitutional provision, do not require the court to expend valuable time and resources on a matter where a consensus already exists between the parties.

Sovereign immunity does not apply. The Plaintiffs seek a declaratory action; sovereign immunity is not a bar to declaratory or injunctive relief. *Native Village of Noatak v. Blatchford, 38 F 3d 1505.*

The court has inherent authority to regulate the practice of law and establish rules to such effect pursuant to the Tohono O'odham Nation (Nation) Constitution, *Article VIII, Section 10(d), Establish court procedures for the Tohono O'odham Judiciary."*

Definition of Judiciary[1]: 'n. That branch of government invested with judicial power; the system of courts in a country; the body of judges; the bench. That branch of government which is intended to interpret, construe and apply the law; *Board of Com'rs of Wyandotte County v. General Securities Corporation, 138 P 2nd 479, 478.*

[1] Black's Law Dictionary

Definition of Judicial Power[2]: The authority exercised by that department of government which is charged with declaration of what law is and its construction. The authority vested in courts and judges, as distinguished from the executive and legislative power. Courts have general powers to decide an pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision; **and also such specific powers as contempt powers, power to control admission and disbarment of attorneys, power to adopt rules of court etc….** (*emphasis added*)

Article VIII, Section 1(e) of the Nation's Constitution does establish the authority to "authorize, regulate, and charter public or private corporation or associations, whether organized for profit or for non-profit or charitable purposes." It is the duty of the court to ensure that its decisions are consistent with the Nation's Constitution. The only way to construe Article VIII Section 10(d) and Article VII, Section 1(e) as consistent as follows:

a) The judiciary has the authority (inherent and mandated by the Constitution) to establish court procedures. The very definition of judicial power includes the authority to regulate who may practice before the court. Therefore, the court may establish procedures regulating who may practice within the Nation.
b) A regulatory mechanism would be very helpful to the court as it moves forward in accomplishing (a). However, the words of the Constitution are express and the court does not have the authority to establish a bar association, if the words are to be read literally and not for their intent.

The Constitution is silent regarding attorney's costs; however, the Law & Order Code does permit the court to award costs. Therefore, the Plaintiffs shall pay one half of the Defendant's attorney's fees and costs.

Based on the foregoing the Defendant's Motion to Dismiss is denied in part and granted in part.

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[2] *Id.*

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Idaleen REYES for Ge'e Oidag Community, Plaintiff,
v.
Julius ANGIANO and FOUR WINDS TOWING, Defendant.

Case No. 04-TRO-9838
(aff'd by *Reyes v. Angiano*, 3 TOR3d 6 (Aug. 9, 2005))

Decided May 11, 2005.

Before Judge Violet Lui-Frank.

This matter was referred to a Settlement Judge by Order dated January 12, 2005. The Settlement Judge issued her Order on January 26, 2005.

The settlement process was used in this case to allow the parties to present the issues and the relevant facts in a more informal setting than a trial. The settlement judge made some very important findings which this court has considered carefully and adopted as the basis for this Order. The undisputed facts of the case are that the respondent has had a business on the land in question for a while, and he is building an auto storage yard. The dispute centers around the petitioner's objection to the business, especially the auto storage yard, the respondent's right to have a business on the land in question, petitioner's allegations of harm to the environment, and respondent's argument that his lease agreement with the persons who hold the land assignment allow him to conduct his business and build the auto storage yard, and there are no laws that prohibit such business.

The court finds that the settlement process in the Tohono O'odham Court has been useful in identifying the threshold issues which can only be resolved by the Ge'e Oidag Community and the Sells Community and the Sells District; the issue of the Ge'e Oidag Community boundary is unresolved, but related to the issues of this case; there is the open issue of whether or not individual families are allowed to lease land assignments; there are serious questions as to what policies the Nation and the Economic Development Office have put in place for protection of the environment in the operation of a business like respondent's; and there is a need for policies which have not yet been implemented through codes to regulate businesses that might create some type of hazard to the environment; the issues raised in this action involve the powers of the District, the community, and the Legislative Council and Executive Branch. The court is

mindful that its jurisdiction is limited, and issues of land do require the participation of community, district and the Nation.

The settlement judge recommended that the court refer the parties to the Ge'e Oidag Community and the Sells Community/District to begin to address these concerns. The court finds that this recommendation is well-founded; essentially, the issues are serious ones, but the policy decisions are not within the authority of the court; the issues raised here must be taken first to the Communities and the District, and may require that the parties also approach the Legislative Council and its committees, and the Executive Branch and its programs.

THEREFORE, IT IS ORDERED dismissing the request for the Temporary Restraining Order without prejudice. The parties are referred to the appropriate administrative processes of the Communities involved, the Sells District and the Tohono O'odham Nation.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Ina Jean DENNY, Plaintiff,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Defendants.

Case No. 04-PI-9678
(appeal dism'd *Denny v. Lopez and Martinez*, 3 TOR3d 10 (Sep. 12, 2006))

Decided January 19, 2006.

Plaintiff, *Pro Se.*
Todd Rigby, Counsel for Defendants.

Before Judge Rose Johnson Antone.

This case is set for trial today and Plaintiff has filed a Demand of Recusal of Judge Violet Lui-Frank, the assigned judge in this case, at 0840 hours, January 19, 2006.

The court **FINDS** and **ORDERS** that the Plaintiff is absent from the courtroom; however, counsel for the Defendants, Todd Rigby, is present; the court is informed by the court officer that the Plaintiff is in the lobby and refuses to enter the courtroom; upon proceeding with the motion hearing, the Plaintiff enters the courtroom and addresses the court without permission of the court; the Plaintiff then proceed to exit the courtroom again; the court proceeds with the motion hearing recognizing that the Plaintiff has waived her right to be heard on the motion by exiting the courtroom; the court, by the court's Administrative Order III, applies the Arizona Civil Rules

of Procedures; based on Rule 42(f) the parties have had notice of the hearing set for today well beyond the 60 day limit per the Rule, that this motion is filed untimely pursuant to Rule 42(f); the Plaintiff has known that Judge Lui-Frank is the assigned judge and the Plaintiff has not raised issue with Judge Lui-Frank being the judge until the filing of this motion; that the Plaintiff does not provide specific reasons why the motion is filed this late; therefore, the Plaintiff's motion is denied for being filed untimely.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Ina Jean DENNY, Plaintiff,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Defendants.

Case No. 04-PI-9678
(appeal dism'd *Denny v. Lopez and Martinez*, 3 TOR3d 10 (Sep. 12, 2006))

Decided January 25, 2006.

Plaintiff, *Pro Se.*
Todd Rigby, Counsel for Defendants.

Before Judge Violet Lui-Frank.

The first day of trial was January 19, 2006. A panel of jurors reported for jury service. The defendants' counsel appeared at the call of the case. The plaintiff was not present in the courtroom. Court Officer Alvin Salazar informed the Court that the plaintiff was present in the lobby when he called the case, but refused to enter the courtroom.

Before the case was called the plaintiff had filed a Demand for Recusal of Judge Violet Lui-Frank on January 19, 2006, at 8:40 a.m. The plaintiff's motion was heard by the Honorable Rose Johnson Antone, and denied.

The Court finds that the plaintiff has the responsibility and burden to go forward in presenting her case. The plaintiff represents herself. Defense counsel argues that the plaintiff's refusal to comply with procedures would support sanctions, including dismissal. The Court concludes that the plaintiff's refusal to appear and present her case constitutes an abandonment of her lawsuit. Further the time for filing an action in this case expired on March 15, 2004, therefore, a new filing in this case is barred.

IT IS ORDERED THAT the complaint is dismissed with prejudice.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

CHILDREN'S COURT

TOHONO O'ODHAM NATION, Plaintiff,
v.
H. J. A., Respondent Child.

Case No. 05-UPM-179; 2006-053-UDPLC; 2007-3588-CINC
(appeal dism'd *Tohono O'odham Department Health and Human Services v. H. J. A.*, 3 TOR3d 22 (September 4, 2008))

Decided April 16, 2007 (as amended Apr. 17, 2007).

Tohono O'odham Prosecutor's Office by George Traviolia for Plaintiff.
Tohono O'odham Advocate Program by Fidelis Manuel for Respondent Child.
Office of the Attorney General by Rosalynde Alexander and Jennifer Espino for Tohono O'odham Department of Health and Human Services.

Before Judge Rose Johnson Antone.

The above-named minor child, having been advised of her constitutional rights and present with without his parent or guardian at the hearing regarding Detention on the offense of 12.3A – UNDERAGE POSSESSION OF LIQUOR BY CONSUMPTION:

THE COURT FINDS: Nation states they have concerns when a juvenile is detained in JDC[1] because no adult available to have him released to, the court should consider temporary custody be given to CPS,[2] legal and physical custody; OAG[3] states that their client, CPS, is not a party to this case and the court cannot order and Executive Branch department to do as requested; Respondent's counsel requests Respondent's release, he's been in detention for 26 days or more; court order dated 022701 does not indicate that the guardians were present at that hearing or that they were willing to become the Respondent's guardian; OAG states that the court should have reviewed the electronic recordings regarding the guardianship appointment, CPS believes that the court did order the appointment and the guardian(s) have not come in to have the guardianship terminated; Nation reiterates its position that Respondent should be released; OAG requests to have their objection noted; the court makes its findings pursuant to Chapter 1, Section 6 of the Tohono O'odham Children's Code, Respondent has been detained for 26 or more days,

[1] *Ed. Note:* Abbreviation for Juvenile Detention Center.

[2] *Ed. Note:* Abbreviation for Child Protective Services.

[3] *Ed. Note:* Abbreviation for Office of the Attorney General.

reasonable efforts have been made to contact the Respondent's guardian to release the Respondent from JDC, no parent/guardian has come to release the Respondent; therefore, good cause to place Respondent in shelter care pending a review hearing and to give CPS temporary legal and physical custody of Respondent.

Child Protective Services is awarded temporary care, custody, and control of the Respondent pending a CINC[4] hearing; the Nation did inform the court that they will be filing the CINC upon Ms. Nixon's return to their office.[5]

IT IS ORDERED: Respondent is placed in shelter care, pursuant to Chapter 1, Section 6, Tohono O'odham Children's Code, with CPS given temporary legal and physical custody of the Respondent pending a review hearing on 050807, 930 AM. Parties have their notice to appear.

Child Protective Services is awarded care, custody, and control of the Respondent pending the CINC and/or review hearing on 050807, 930 AM.[6]

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Justin Michael ANTONE, Defendant.

Case No. 2007-03-0701-0704CR

Decided September 25, 2007

Before Judge Roy A. Mendoza.

COURT DATE: SEPTEMBER 25, 2007

CALENDAR EVENT: Other: ORDER DENYING MOTION TO LIMIT SENTENCING TO 360 DAYS.

ADDITIONAL ORDERS: Defendant Motions to limit this Court's ability to assess consecutive sentences for separate charges to which the Defendant has entered guilty pleas, asking the Court to apply the finding in Spears v. Red Lake Band of Chippewa Indians, 363 Federal Supp. 2nd dated March 30, 2006 issued by a U.S. District Court in Minnesota. That Court interpreted the

[4] *Ed. Note:* Abbreviation for Child in Need of Care.

[5] *Ed. Note:* The Court on April 17, 2011 issued an amended order including the language in this paragraph to the April 16, 2007 Record Entry.

[6] *Id.*

"intent" of Congress to limit separate crimes arising out of a single criminal episode to be treated as a single offense for sentencing purposes under the Indian Civil Rights Act. Factually however, its application is limited to that single U.S. District Court boundaries and the decision even recognizes a contrary view in Ramos v. Pyramid Tribal Court, 621 Fed Supp 967, District of Nevada, 1985.

In this case, the Court holds, as the Spears Case in rejecting the holding in the Ramos case, that Spears is not binding on this Court and the Court declines to follow it for the reasons that each charge in this case is separate and distinct, the Spears decision is narrow in its scope and not controlling in this jurisdiction, and the Tohono O'odham Nation Tribal Court is the judicial arm of a Sovereign and Independent Nation which has historically applied consecutive sentencing in cases resulting in jail terms of over 1 year in probation & other criminal cases.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

SAN LUCY DISTRICT, a political Subdivision of the Tohono O'odham Nation, Plaintiff.
v.
TOHONO O'ODHAM ELECTION BOARD, Defendant,

Case No. 2007-10985-C
(appeal dism'd *Tohono O'odham Election Board v. San Lucy District*, 3 TOR3d 14 (May 30, 2008))

Decided October 1, 2007.

Before Judge Rose Johnson Antone.

The Court issues this Order after having heard the oral arguments on August 28, 2007 and having considered Defendant's Motion to Dismiss, Plaintiff's Response to Defendant's Motion to Dismiss, and Defendant's Reply to Plaintiff's Response.

A. <u>BRIEF HISTORY.</u>

The Plaintiff San Lucy District (the Plaintiff) brings this action against the Defendant Tohono O'odham Election Board (the Defendant) requesting the Court to issue, initially, a preliminary injunction enjoining the Defendant to include all three District Council representative seats, at issue from the May 26, 2007 General Election, on the ballot for the Remedial Election of District Council representatives on June 30, 2007; however, the date had passed before this matter was assigned by the Court.

The Plaintiff asserts that Remedial Election is unconstitutional for the reason that the election is not in accordance with the San Lucy District Council action and the Tohono O'odham Nation's Election Ordinance.

On January 25, 2007, the San Lucy District Council approved Resolution No. 01-08-07 eliminating the Ajo voting constituency created in 1985. Subsequent to the San Lucy District Council's action Virginia Garcia filed an appeal to the Tohono O'odham Legislative Council (TOLC) appealing the San Lucy District Council's Resolution No. 01-08-07.

The TOLC by Legislative Order 07-199 "finds the San Lucy District's January 25, 2007 adjustment to its schedule of representatives was invalid; the adjustment is therefore void." Legislative Order 07-199, page 2 of 2, lines 8-10. By this same action the TOLC granted Ms. Garcia's appeal.

B. JURISDICTION.

The Plaintiff is a political subdivision of the Tohono O'odham Nation (Nation) and the Plaintiff is governed by the San Lucy District Council pursuant to the Nation's Constitution. T.O.N. Const. Art IX, §§ 1 through 7.

The Defendant was established in accordance with the Nation's Constitution. T.O.N. Const. Art. VI, § 1 (g) and Art. X, §7.

The Tohono O'odham Nation's Constitution, adopted on January 18, 1986 and ratified on March 6, 1986, directed the TOLC to enact an election ordinance. The Election Ordinance. ORD 03-86, was enacted on November 18, 1986 and sets forth the requirements for District Council members, specifically, "Must be a member and qualified voter of the Tohono O'odham Nation." Election Ordinance, Art. VI, §3 (A) (1).

The Election Ordinance, Article II, Section 1 (A) states:

> There is created an Election Board which shall be composed of five (5) bilingual members of the Tohono O'odham Nation.

Pursuant to Article VI, Section 3 (A) (1), Article II, Section 1 (A), and Article XIII, Section 11 of the Election Ordinance, and Article VIII, Section 2 and 10 of the Tohono O'odham Nation's Constitution this Court has personal and subject matter jurisdiction to hear this case.

C. SOVEREIGNTY IMMUNITY

The Defendant's assertion that it has sovereign immunity and cannot be sued is without merit. The Defendant is empowered by the Election Ordinance with conducting the Nation's elections. The Election Ordinance provides that this Court has jurisdiction "including but not limited to

injunctive relief against acts in violation of this ordinance." Article XIII, § 11, Election Ordinance. Therefore, the Plaintiff and the Defendant are properly before this Court.

An express wavier by the TOLC is not required for the Plaintiff to bring forth this action. The Tohono O'odham Nation's Constitution, Article VIII, Section 10 empowers the Court to decide the matter at issue here.

D. LEGISLATIVE ORDER 07-199.

The TOLC by Legislative Order 07-199 "finds the San Lucy District's January 25, 2007 adjustment to its schedule of representatives was invalid; the adjustment is therefore void." Legislative Order 07-199, page 2 of 2, lines 8-10. Legislative Order 07-199, therefore, kept in place a voting constituency outside the boundaries of the Nation.

The Election Ordinance provides in pertinent part:

> Number of Representatives: Each district council shall consist of at least five (5) representatives, or their alternatives, who shall be elected either from the district at large, or from communities consisting of villages or groups of villages within the district and recognized or established as separate voting constituencies.

Article VI, § 3 (B), Election Ordinance.

The Tohono O'odham Nation's Constitution, Article I, § 2, provides that "the sovereign powers, authority and jurisdiction of the Tohono O'odham Nation and its government shall extend to all persons and activities carried on within the boundaries of the Tohono O'odham Nation consistent with federal law." Therefore, voting constituencies shall be established within the boundaries of the Nation.

The Court finds that the action taken by the TOLC, Legislative Order 07-199, permits a voting constituency outside the boundaries of the Nation and is in violation of the Tohono O'odham Nation's Constitution, Article I, Section 2, and the Election Ordinance, Article VI, Section 3 (B).

IT IS ORDERED that:

1) Defendant Tohono O'odham Election Board's Motion to dismiss is denied.
2) The Tohono O'odham Legislative Council, Legislative Order 07-199, is in violation of the Tohono O'odham Nation's Constitution, Article I, Section 2, and the Election Ordinance, Article VI, Section 3 (B). Any elections conducted by the Defendant Tohono O'odham Election Board shall be held within the boundaries of the Tohono O'odham Nation.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

In re the Matter of: J. J. M., A Minor Child.

Case No. 2007-11170-PCA

Decided December 18, 2007.

Tohono O'odham Advocate Program by Director Dwight Francisco, Counsel for Petitioner.

Before Judge Roy A. Mendoza.

This matter is before the Court for an evidentiary hearing set by the Court to clarify whether a Certification to Adopt is necessary when the Petitioner is the child's Godparent. Present is the Petitioner M. J. L., minor child J. J. M., and counsel Dwight Francisco, Nation's Advocate Program Director appearing for the Petitioner. A Certification to Adopt is ***not*** necessary under Chapter II, sect. 32(I)(2) of the Tohono O'odham Nation Children's Code in the instance where a person seeking to adopt is an "extended family member" as set forth therein as defined by tribal custom. Also impacted if a Godparent is found to be a "extended family member" is the necessity for a 90 day waiting period which can be waived if a "relative" adopts.

Petitioner calls Kathleen Carmen, Tohono O'odham Child Welfare Specialist for the Tohono O'odham Department of Health and Human Services who is sworn, seated and offers testimony. Kathleen Carmen has qualified as an expert witness in the Superior Courts of Arizona on Tohono O'odham custom and tradition regarding family issues and issues related to the Federal Indian Child Welfare Act. The Court finds for the record that Kathleen Carmen qualifies in this Nation's Courts as an expert witness. Carmen testifies that in the Tohono O'odham tradition a "Godparent" found to have been designated as such in any religious ceremony of baptism assumes the place of a natural parent for the care and custody of the baptized child in the event the natural parent cannot and is considered a vital family member.

Based upon the above and for good cause appearing, it is the Finding and Order of this Court that:

1) Tohono O'odham custom and tradition includes official Godparents in the definition of "extended family";
2) When a Petitioner is an official Godparent, he or she is a "extended family member" as defined under Chapter II, Section 31 E, Tohono O'odham Children's Code;

3) As an "extended family member" no pre-certification of a Godparent is needed prior to the filing of a Petition to adopt under Chapter II, Section 32 I (2), Tohono O'odham Children's Code,

4) All other statutory requirements under Chapter II, Adoptions, O'odham Children's Code, apply.

The Petition for Certification to Adopt is dismissed as unnecessary.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

In the Matter of F. A. M. and C. L. M., Minor Children.

Case No. 2006-10417-CCV

Decided May 27, 2008.

Tohono O'odham Advocate Program by Sarah Michele Martin, Counsel for Petitioner.

Before Judge Roy A. Mendoza.

The Court is convened this day for the purpose of hearing a motion for a *ex parte* emergency order to rescind the K. S. M. relinquishment of minor child C. L. M.'s membership in the Tohono O'odham Nation. Petitioner S. M. appears as the court appointed temporary guardian of C. L. M. with her counsel Sarah Michelle Martin, of the Tohono O'odham Advocate Program. Also giving the Court an Oral Notice of Appearance is Samuel Daughety, Assistant Attorney General of the Tohono O'odham Nation and observing the proceedings without objection is Michael Ehlerman, Tohono O'odham Legislative Counsel.

Petitioner, the Temporary Legal Guardian/Grandmother of C. L. M. since 1998 states that she and the Tohono O'odham Nation's Courts have been involved in a long standing legal dispute with the natural mother K. S. M. a member of the Crow Nation over custody of the child now located in the State of Pennsylvania with non-Indian individuals named R. and C. H. who took the child from Arizona with her mother's permission. The natural father of the child is M. L. M., Petitioner's son and a member of this Nation. A lower Pennsylvania court ruling has recognized the jurisdiction of the Tohono O'odham Nation's Court over the child pursuant to the Indian Child Welfare Act, and is on appeal through the Pennsylvania Appellate Courts. The mother applied for and was granted the relinquishment of the child C. L. M.'s membership in the Tohono O'odham Nation without the disclosure of any of the above information to the Nation's

Enrollment Office and without notice to the Petitioner; and has enrolled the child in the Crow Tribe of Montana. This Nation's statutory Relinquishment of Membership process was followed, which resulted in the child's membership being relinquished. Petitioner now seeks to have this Court declare the action of the nation's enrollment committee and the Nation's Council in accepting the relinquishment void *ab initio* as it was fraudulently obtained.

Legal analysis

This Court acknowledges and respects the authority of the Tohono O'odham Council under Article VI, Powers of the Tohono O'odham Council under Article VI, Powers of the Tohono O'odham Council, Section 1(h) of the Nation's Constitution to enact laws and ordinances regarding loss of membership in the Nation. The Legislative Council adopted an Enrollment Ordinance, that sets forth the process for relinquishment of membership, Title 14, Chapter 1, Article IX, Section 1 which provides:

> ARTICLE IX – RELINQUISHMENT AND LOSS OF MEMBERSHIP
>
> A Member of the Nation may relinquish his membership in the Nation by submitting a written statement clearly expressing an intent to relinquish his membership to the Council, a copy of which must be signed by the person wishing to relinquish his membership or, if a minor or incompetent, by the parent(s), guardian or other person legally authorized to act on his behalf. Relinquishment does not require approval of the Council but is effective upon receipt of the statement by the Council and cannot be subsequently denied. Upon recognition by the Council that the individual has renounced his membership, his name shall be deleted from the membership roll. Tohono O'odham Code, Title 14, Chapter 1, Article IX, Section 1. (emphasis added)

This pertinent section does not provide for any judicial review of any relinquishment decisions. The decisions lay exclusively with the Legislative body and are final. To rule otherwise, no matter how meritorious the facts may be, infringes upon the sole powers of the Legislative Branch of the Tohono O'odham Nation as plainly expressed by the Constitution of the Tohono O'odham Nation and the Enrollment Ordinance.

Therefore, based upon the above, the Court DENIES the motion for an Ex Parte Order to set aside the relinquishment of the membership of minor child, C. M., for lack of jurisdiction.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

In the Matter of R. V., Minor Child.

Case No. 2006-10417-CCV

Decided July 10, 2008

Tohono O'odham Attorney General's Office by Vanessa Franco, Counsel for Health and Human Services.

Before Judge Linda Parley.

This matter comes before the Court for a Shelter Care Hearing, continued from July 8, 2008. Present: Tohono O'odham Attorney General's Office, Vanessa Franco, Counsel for Health and Human Services; Tina Scott, Child Welfare Investigator; Myra Lawson, Child Welfare Division Supervisor. M. V., Grandmother to the minor child. Not Present: A. V., Natural Mother of the minor child.

THE COURT FINDS that this hearing was set to determine if the Court had jurisdiction over the mother and child.

THE COURT FINDS that the motion by counsel to proceed (in absentia) of the natural mother is granted and the hearing proceeds.

THE COURT FINDS that the Nation presents opening statements that the infant is eligible for enrollment by the mother being eligible for enrollment with the Tohono O'odham Nation ("Nation"). The grandmother is a member of the Nation. The Nation states the natural mother is mostly domiciled on the Nation.

THE COURT FINDS that testimony is heard from Grandmother. Grandmother is the natural mother to the Mother. Grandmother is an enrolled member of the Tohono O'odham Nation. Grandmother states that the Mother is eligible for enrollment and the infant is eligible for enrollment. Mother stays here and there. Grandmother also testifies that she found the Mother in Casa Grande yesterday, the house smelled like marijuana. She tried to tell her daughter to come home, but her daughter got angry and told her to leave. The most consistent place the Mother stays is with her aunt in Chui Chi, the last time she stayed for four months. The Mother recently asked her aunt if she could come stay again, but the aunt told her she did not want any drugs or alcohol around. The Mother got angry and left.

THE COURT FINDS that the Nation believes it has jurisdiction over this matter and has established that the grandmother of the minor child is an enrolled member of the Nation, the most current residence of the mother of the minor child is on the Nation and there is sufficient evidence to accept jurisdiction.

THE COURT FINDS that the Constitution of the Tohono O'odham Nation, Article II – Membership, Section 1(b), states, The membership of the Tohono O'odham Nation shall consist of the following: "All children born to resident members."

THE COURT FINDS that the Civil Code, Title III – Civil Actions, Chapter 1: Civil Jurisdiction, 1-101.b.1.; states that civil jurisdiction of the Tohono O'odham Courts shall extend to the following persons: "any person who is domiciled within the territorial jurisdiction of the Tohono O'odham Nation. The Code also defines domicile as the person's true, fixed and permanent home and the place to which a person intends to return even though actually residing somewhere else and shall mean a person's actual place of residence."

THE COURT FINDS that the natural mother is not an enrolled member of the Nation.

THE COURT FINDS that there is no subject matter jurisdiction over the minor child as the minor child would not be eligible for enrollment based on the Constitutional requirements for membership.

THE COURT FINDS that there is no personal jurisdiction over the natural mother as the testimony presented did not establish when the natural mother stayed on the Nation for four months. Since the birth of her child, she has not returned to the Nation. There is no evidence that the natural mother intends to return to the Nation to make it her permanent residence.

THE COURT ORDERS that the case is dismissed for lack of subject matter and personal jurisdiction.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Veronica MORENO, Petitioner,
v.
Michelle MORENO, Defendant,

Case No. 2009-0025AV

Decided February 17, 2009.

Tohono O'odham Advocate Program by Dwight Francisco and David Oliver for Petitioner.
Legal Services by Rebel Harjo for Respondent.

Before Judge Roy A. Mendoza.

This matter comes before the Court for hearing with Petitioner Veronica Moreno appearing with Dwight Francisco and David Oliver, Advocate Program and Respondent Michelle Moreno appears with Rebel Harjo, Legal Services. Petitioner is the natural mother of decedent in the matter, Michael Eddie Moreno Sr. The Respondent is the widow of the decedent. The Court finds it has both subject matter and personal jurisdiction to proceed as the Petitioner and decedent are members of the Nation, pursuant to Article I, Section 3, of the Constitution of the Tohono O'odham Nation and Title 4 (Title IV), Section 1-101(a) and (b) of the Tohono O'odham Code (1st ed. 2006). The Respondent submits to the jurisdiction of this Court for the purposes of this hearing as she is of Yakama and Nez Perce tribal descent. The decedent being an enrolled member of the Nation is found to be domiciled within the Tohono O'odham Nation as defined in Chapter I, Section 1-101 (c) (4).

The following witnesses were sworn, testified, and cross examined. For Petitioner, Deborah Moreno, Karen Sabori, Michael Moreno Jr., Joseph Joaquin, Mary Miguel, Camillus Lopez, and Veronica Moreno. For Respondent: Lucy Zaueta, Mary Jane Juan Moore, Marie Ortiz, DJ Ortiz, and Michelle Moreno.

The Court finds the relationship between decedent Michael Eddie Moreno Sr. and Respondent Michelle Moreno was one of husband and wife. Also, that both lived together in Lapwai, Idaho for approximately 10 years and have 3 children. He then returned to this Nation on November 16, 2008 to work on the border fencing project where he stayed with family members, got his Tohono O'odham identification card reissued, received some mail here, and brought his family for the Christmas holidays during which time he mentioned to his wife of his desire to move here while visiting the San Xavier Mission. Petitioner witness Karen Sabori testified that shortly after

his return in November 2008 he on at least 4 occasions, mentioned to her his wish to be buried next to his grandmother. Further, his son, Michael E. Moreno, Jr., also commented on his father's desire to be buried here.

Several witnesses testified about their understanding of custom and tradition which must be followed as common law by this court by the fact that no law exists in the Tohono O'odham Constitution or Code giving express authority as to who of several family members has the final say on how and where a loved one is to be buried. Tohono O'odham Civil Code provision 1-102, makes it clear that when no law exists custom and tradition must be followed, further supported by a prior written decision of this Court in case No. 04-PI-9723, *IN THE MATTER OF JOE L. MIGUEL, Decedent*, 2 TOR3d 75 (Trial Ct., Apr. 2, 2004).

The Court finds that normally as a matter of course once a Tohono O'odham family member passes on a family meeting is usually held where funeral arrangements are agreed to usually by a consensus. However, there was no written statement produced by the deceased as to how and where he wanted to be buried. All parties were present at the meeting and the only statement made by Petitioner mother was that she could understand why Respondent wanted to take him to Idaho to be buried because of his small children. There was no debate or other divisive oratory expressed which is a significant trait of the Tohono O'odham people, culture, and tradition to avoid conflict. The Court received testimony that if no consensus is reached custom and tradition requires the decedent wishes are to be followed and that the elder is the ultimate arbiter. Some agreement for a funeral service on the Nation was made and while a service was held the Petitioner and other family members changed their mind about his removal and burial outside of the Nation which led to the filing of this lawsuit due to a perception that the Nation and Petitioner had been disrespected by Respondent. Thus, the wishes of the decedent and elder (mother) is found by this Court to be of paramount importance in resolving this issue limited to the facts as they exist in this case under Tohono O'odham common law. The Custom and Tradition of the Tohono O'odham Nation is to be followed and honored.

Therefore, based upon the above and for good cause shown, it is ORDERED, ADJUDGED, AND DECREED that the Temporary Restraining Order issued in this case is made PERMANENT and Respondent Michelle Moreno or any other person or persons are Permanently Restrained and Enjoined from possessing and or removing the remains of decedent Michael Eddie Moreno Sr. anywhere outside the boundaries of this Nation.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Cecilia D'ALESSIO, an individual and as mother and guardian of Alejandro GRIVALVA-D'ALESSIO and Miguel GRIVALVA, Jr., Plaintiff,
v.
DESERT DIAMOND CASINO and TOHONO O'ODHAM GAMING AUTHORITY, Defendants,

Case No. 05-C-10043

Decided August 27, 2009.

Law Office of Durazzo & Eckel, P.C. by Neil Eckel and Eric Hawkins, Tucson, for Plaintiff.
Jones, Skelton & Hochuli, P.L.C. by James Curran and Gary Burger, Phoenix, for Defendants.

Before Judge Roy A. Mendoza.

A civil bench trial in the above matter was conducted before the Tohono O'odham Nation Tribal Courts, Sells, Arizona on July 8, 2009 with Tribal Court Judge Roy A. Mendoza presiding.

The Court renders its Verdict as follows:

STATEMENT OF FACTS

The Court as the trier of facts finds the following derived from video recordings, depositions, statements, police reports, exhibits and testimony received at trial. On January 28, 2004, Miguel Grijalva and Plaintiff Cecilia D'Alessio were at the Desert Diamond Casino ("Casino"), located on Old Nogales Highway in Tucson, Arizona, and located within the exterior boundaries of the Tohono O'odham nation. Grijalva and Plaintiff, an unmarried couple who had lived together for six years and had children in common, visited the Casino three to four times a week to drink and gamble. On January 28, 2004 they arrived at the Casino at approximately 2:30 p.m. At 4.30 p.m., they both left the Casino to cash a check. Unsuccessful, they returned to the Casino around 5:00 p.m., where Plaintiff cashed a personal check. Grijalva and Plaintiff departed the Casino at 10:07 p.m. During their stay at the Casino they played slots, Blackjack, and drank Heineken beer. Grijalva purchased for himself and others at most 12 beers during his seven hours at the Casino. All beer purchases were made by Miguel Grijalva and were purchased at a Casino bar and none from any server during their entire stay. The beers were purchased two at a time. Shortly before 10:00 p.m. and their departure from the Casino at 10:07 p.m., Plaintiff made a derogatory statement to a female server whom she believed was flirting with Grijalva. Plaintiff was also angered because Grijalva left a large tip. The video recording of their departure at 10:07 p.m.

clearly shows both pausing briefly for a discussion at the exit to the Casino, then walking in the parking lot separated from each other by several feet to the Plaintiff's vehicle where Grijalva entered the driver's side and sat behind the wheel. Plaintiff then walked to the front of the vehicle for a few seconds, returned to the driver's side next to where Grijalva was seated with the door opened, appeared to say something to him and then she slammed his door shut. Plaintiff then walked around to the front passenger side door, opened it and sat. Plaintiff is next seen tossing out what appears to be an empty bottle through her passenger side window just seconds before Grijalva backed out and proceeded to drive off.

Within a few minutes thereafter, Grijalva, driving Plaintiff's vehicle north on Old Nogales Highway at a high rate of speed, ran the red traffic signal at the Valencia Road intersection smashing into a tractor trailer, causing his death and injuring Plaintiff.

Plaintiff told the police at the scene that "they were arguing after leaving the Casino. Miguel got made when the light (traffic signal) turned red. Miguel drove through the red signal light." Plaintiff further stated they both were drinking at the Casino and they "only had a few drinks." Grijalva's Ameritox Toxicological Laboratory Report results at autopsy showed his blood alcohol, Ethyl as 0.21% and Vitreous Alcohol, Ethyl as 0.23%. Testimony indicated Grijalva was a "practiced drinker" who had learned to mask any outward signs of intoxication.

APPLICABLE LAW

Plaintiff's cause of action is predicated solely on a violation of Arizona Revised Statutes, Section 4-311, Liability for serving intoxicated person. Sections (A) and (D) read as follows:

> Section A. A licensee is liable for property damage and personal injuries or is liable to a person who may bring an action or wrongful death pursuant to section 12-612, or both, if the Court or jury finds all of the following:
>
> 1. The licensee sold spirituous liquor to a purchaser who was obviously intoxicated.
> 2. The purchaser consumed the spirituous liquor sold by the licensee.
> 3. The consumption of spirituous liquor was a proximate cause of the injury, death, or property damage.
>
> Section D. For purposes of this section, "obviously intoxicated" means inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or

> significant physical dysfunction that would have been obvious to a reasonable person.

It should be noted that under the Tohono O'odham Nation's Alcohol Beverage Licensing and Control Regulations, section 3.1.17, "it is unlawful for a licensee or other person to serve, sell, or furnish liquor to a disorderly or obviously intoxicated person" and under Section 1.2.12 thereof, the definition of "obviously intoxicate" mirrors the term as defined under A.R.S. 4-311(D).

LIABILITY

The sole question of Casino liability lies on whether Plaintiff met her burden of proof that the Casino sold spirituous liquor to an "obviously intoxicated" Miguel Grijalva and thus this impairment was the proximate cause of his death and injury to Plaintiff Cecilia D'Alessio shortly after Grijalva was allowed by Plaintiff to drive Plaintiff's motor vehicle from the Casino parking lot to the scene of the crash. Without establishing the first, the second is moot.

In rendering its decision, the Court finds the following facts compelling: 1. Both Grijalva and Plaintiff were "regulars" at the Desert Diamond Casino, and were therefore known to the bartending staff. 2. Grijalva purchased beer two at a time and never bought any beer from a cocktail/drink floor server. 3. Grijalva purchased beer that was consumed by himself, the Plaintiff, and others during the 7-8 hours he and Plaintiff were at the Casino. 4. Only Grijalva made the beer purchases at the Casino. 5. Grijalva and Plaintiff left the Casino for approximately 30 minutes in the mid-afternoon. 6. As evidenced on the video tapes condensed from several hours of recordings and reinforced by both expert witnesses called by each party, there were some "cues" that Grijalva appeared to be animated, happy, unhappy, and unsteady at times in his movements – some apparently depending how Plaintiff or he were doing gambling. 7. Plaintiff, who had lived with Grijalva for six years, did not express any concern about his ability to operate her motor vehicle and let him drive upon leaving the Casino. 8. the last video of both leaving the Casino shows them engaged in a verbal discussion, then Grijalva walking to Plaintiff's motor vehicle without stumbling, staggering, or leaning on any motor vehicle he passed. He then entered the Driver's side and eventually with Plaintiff as his front seat passenger, backed out safely, avoided a pedestrian on the way to the exit gate, stopped, turned right and drove forward to the Old Nogales Highway without swerving or striking any objects on the way out.

Based upon these facts, the Court does not find Grijalva significantly impaired, uncoordinated, or physically dysfunctional that would show and be interpreted by a reasonable

person in that setting that he was "obviously intoxicated" and continuously served by Casino staff to the point of "obvious intoxication".

The Court in the above-entitled and numbered action finds in favor of the Defendants and it is Ordered, Adjudged, and Decreed on the verdict aforesaid that the Plaintiff recover nothing from Defendants.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided March 11, 2010.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

By amended Petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction, the Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch through the office of the Chairman of the Tohono O'odham Nation from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law," or "Code"). An Order Granting Emergency Preliminary Injunction was filed January 6th, 2009, and modified January 28, 2009. The Legislative Council seeks to intervene in the litigation.

There are no named individual litigants. Rather, this dispute is between co-equal branches of the Tohono O'odham Nation, though captioned as *In Re: The Petition of the Judicial Branch*. The ability of one branch of the government to sue one another is a matter of first impression. And, here the Judiciary itself is, unenviably, the litigant and arbiter of the outcome by virtue of its Constitutional Authority under Article VIII, Section 10.

This Court begins its analysis of the appropriateness of Intervention by echoing the words of former Chief Justice Hilda Manuel. "The motives of the parties are not for this Court to scrutinize provided that the purposes are not expressed or sought to be enforced through means

that offend the Constitution." *Francisco v. Toro*, 1 TOR3d 68, at 69 (Trial Ct., Jan. 12, 1989) *appeal dism'd* 3 TOR3d 17 (Ct.App., Sep. 4, 2008).

Choice of Law

Administrative Order 03-09 rescinds Administrative Orders III and 01-04. Nevertheless, the parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent Arizona law. This Court agrees.

Jurisdiction

The Jurisdiction of the Court to hear the Amended Petition will be discussed below.

Intervention

I

The procedure and criteria for intervention under the Arizona Rules of Civil Procedure are found in Ariz.R.Civ.Pro. Rule 24 (a)-(d). Under those provisions, any party whose interests may be affected by pending litigation can apply to intervene either as a plaintiff or as a defendant.[1] Ariz.R.Civ.Pro. Rule 24 (a)-(b). Depending upon the circumstances, intervention may be a matter of right or merely permissive. *Id.* The party pleading to intervene has the burden of showing the propriety of and/or entitlement to intervention. *Morris v. Southwest Sav. & Loan Ass'n*, 449 P.2d 301 (Ariz. Ct. App. 1969). However, the intervener takes the case as he or she finds it. In other words, the scope of the case cannot be broadened by the intervention. *Ariz. Real Estate Dept. v. Ariz. Land Title and Trust Co.*, 449 P.2d 71 (Ariz. Ct. App. 1968).

Intervention is a matter of right when a statute confers an unconditional right to intervene or when disposition of the action may impair or impede the applicant's ability to protect his or her interest in the subject matter of the action – that is, "unless the applicant's interest is adequately represented by existing parties." Ariz.R.Civ.Pro. Rule 24(a).

Intervention is permissive when a statute confers a conditional right to intervene or when a common question of law or fact exists. Ariz.R.Civ.Pro 24 (b). In exercising its discretion in permissive intervention situations, the court considers whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.*

In the case at hand, no statutory right to intervene exists, either permissively or as a matter of

[1] An application to intervene must be timely whether made as a matter of right or as a permissive intervention, and a motion to intervene filed after judgment is considered timely only in extraordinary and unusual circumstances. *See Weaver v. Synthes Ltd.*, 784 P.2d 268 (Ariz. Ct. App. 1989). Here, because the case is in its preliminary stages, it is unlikely that the proceedings will be unduly delayed by the intervention.

right. Thus, the ability of the Tohono O'odham Legislative Council ("Council") to intervene hinges on 1) whether the injunction prayed for by the Judicial Branch of the Tohono O'odham Nation ("Judicial Branch") will obstruct the Council's ability to protect its interests; 2) whether the Council's interest is adequately represented by an existent party; and 3) whether the Council's action has a question of fact or law in common with the Judicial Branch's request for an injunction.

First, it is arguable whether the injunction prayed for by the Judicial Branch—a finding of unconstitutionality as to §§ 1102(B)(1), 1103(D), 1106(B), 1106(C) and 1107(C) of 6 Tohono O'odham Code Chapter 1 ("Courts and Procedures Law")[2]— will obstruct the Council's ability to protect its interests. In short, the Council argues that, because they have been granted broad power to enact laws providing for the "administration of justice" – more specifically, the power to set judicial compensation, appoint judges,[3] and approve budgets for the expenditure of the Nation's funds, including Judicial Branch budgets – their interests are in preserving those laws. Thus, the Council argues that it has an interest warranting intervention in any suit contending the constitutionality of those laws.

However, under the rule announced in *Greene v. U.S.*, 996 F.2d 973 (9th Cir. 1993), to meet the threshold permitting intervention, although no specific legal or equitable interest must be established, "the movant must demonstrate a 'significantly protectable interest'" in the matter. *Id.* at 976. Under this test, the "interest" threshold will not be met if "a holding 'will not affect a statute or regulation governing the applicant's actions, nor will it directly alter . . . other legally protectable rights of the proposed interveners.'" *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989); *see also Hill v. Alfalfa Seed and Lumber Co.*, 297 P. 868, 869 (Ariz. 1931) (holding that "interest" entitling a party to intervene must be in matter in litigation and of such direct character that intervener will either gain or lose by direct legal operation of judgment). Thus, the Council's assertion that a decision denying or affirming the constitutionality of the contested sections of the Courts and Procedures Law will affect its ability to enact laws begs the question: Will the Council lose or gain a protectable right by the direct operation of the judgment? The answer to this question rests with the Court, as it is the ultimate question

[2] By Order of this Court, dated January 28, 2009, good cause existed to modify the Emergency Preliminary Injunction to enjoin only the implementation of the following provisions of Title 6, Chapter 1 of the Tohono O'odham Code that remain in dispute: The final sentence of Subsection 1102(B)(1); Subsection 1103(D); Subsection 1106(B); the first sentence of Subsection 1106(C); and Subsection 1107(C).

[3] In their brief, the Council also argues that they have the power to remove judges under Constitution, Art. XIII, Sec. 1, 3.

presented in the constitutional challenge. If this Court decides that the Council has the constitutional power to enact those provisions of the Courts and Procedures Law, then the Council loses nothing and gains nothing. On the other hand, if this Court decides that the Council does not have such power, the Council still loses nothing, because it did not have the power to pass the Courts and Procedures Law in the first place. The Judicial Branch asked, originally, only for an injunction declaring certain provisions of the Courts and Procedures Law unconstitutional; however, by subsequent pleading it has sought to restrain the passage of future laws affecting the subsections of the Code which might then alter the subject matter of this controversy.

The Council also argues that the disposition of the case will, as a practical matter, impair the ability to protect its interest. It argues that an unfavorable ruling on any of these constitutional issues will significantly restrict the Council's ability make any laws regulating the Judicial Branch in the future. Were the Council not to intervene, it argues, the *stare decisis* effect would be a serious impediment to any future litigation. As the State Bar Committee Note to Ariz.R.Civ.Pro. 24(a)(2) 1966 Amendment makes clear, whether "a party is in fact so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interests is a question to be determined by the court, it is not sufficient that such an impairment or impediment is pleaded." In *McGough v. Insurance Co.*, 691 P.2d 738 (Ariz. Ct. App. 1984), the Arizona Court of Appeals held that where collateral estoppel prevents a party from protecting its interests in the future, the potentially estopped party has the requisite interest necessary for intervention under Ariz.R.Civ.Pro. Rule 24. *Id.* at 743. Likewise, in *John F. Long Homes, Inc. v. Holohan*, 396 P.2d 394 (Ariz. Ct. App. 1964), the same court held that intervention as a matter of right is absolute where an applicant may be bound by a judgment involving his or her interests. *See also Green*, 996 F.2d at 977 ("Intervention may be required when considerations of stare decisis indicate that an applicant's interest will be practically impaired."); U.S. v. Oregon, 839 F.2d 635, 638 (9th Cir. 1998) ("a *stare decisis* effect is an important consideration in determining the extent to which an applicant's interest may be impaired."). However, the Court need not reach this argument if it determines that the Council's interest is not "significantly protectable" in the first place. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

Although the Council's argument in favor of intervention is questionable, a significant amount of precedent exists suggesting that intervention as of right is to be "construed broadly in favor of applications for intervention." *Green*, 996 F.2d at 973; *see also Cascade Natural Gas Corp. v El*

Paso Natural Gas Co., 386 U.S. 129 (1967); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 536 F.3d 980 (9th Cir. 2008); *California ex rel. Lockyer v. U.S.*, 450 F.3d 436 (9th Cir. 2006); *U.S. v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001). In *Harris v. State*, 11 P.3d 403 (Ariz. Ct. App. 2000) the Arizona Court of Appeals held that an analysis for intervention should include, at least, the nature and extent of the intervener's interest, the intervener's standing to raise legal issues, the legal position the intervener seeks to assert, whether intervention would unduly prolong litigation, and whether the intervener would significantly contribute to the proceedings.

Second, it is unlikely that an existent party adequately represents the Council's interest. In *Harris*, 11 P.3d 403, the Arizona Court of Appeals held that organizations are not allowed to intervene in constitutional matters as a matter of right where the state had provided all the information regarding the drafting of the law, the purpose behind it, the public policy reasons for it, and the history of similar provisions in the nation. However, in *Saunders v. Superior Court*, 109 Ariz.424, 510 P.2d 740 (Ariz. 1973), the same Court held that city firemen and incorporated policemen and firemen associations were allowed to intervene in a constitutional question case as a matter of right, where the intervening party under such statute would have no chance in future proceedings to have the constitutionality of the statute upheld. In *Saunders*, although the Attorney General was made party to the action, because the Attorney General represented only named state officials in the proceedings, the petitioners were allowed to intervene as a matter of right, to protect their own constitutional interests. *Id.* at 742. In a case such as the one at hand, where the Attorney General is unable to weigh in upon the law in question at all, it is not inconceivable to consider the proposition that the Council be allowed to intervene as a matter of right.[4] Unless the Council enters the case, no parties involved in the suit will defend the constitutionality of the Courts and Procedures Law.[5] Such situation would upset longstanding

[4] The Attorney General has declared a conflict of interest that prevents that Office from representing any branch of the Tohono O'odham Nation against another. This Court adopts the ethical considerations expressed by the Attorney General's pleading and relieves it from appearing pursuant to the subpoena previously issued. *See* Statement of the Office of Attorney General, Jan. 20, 2009.

[5] The Judicial Branch argues in its brief that the Chairman of the Tohono O'odham Nation, as a party to this suit, has the obligation to defend the law against constitutional challenges, and, thus, the interest of the Executive Branch is adverse to the Judicial Branch. Therefore, they argue, any interest in upholding the constitutionality of the Courts and Procedures Law will be fully represented by the Executive Branch. However, the Chairman has made clear the Executive Branch's position that it is not adverse to the Judicial Branch and, in fact, supports the Judicial Branch's position. For that reason, the Executive Branch has endorsed the Council's motion to intervene. *See* Respondent Executive Branch's Response Brief, Jan. 21, 2009 at p.4.

precedent establishing that, at the least, one party must be adverse to the petitioning party, "proceeding with diligence [,] and [appraising] the court of the issues and law on the subject." *Mitchell v. City of Nogales*, 320 P.2d 955, 958 (Ariz. 1958); *see also Flast v. Cohen*, 392 U.S. 83 (1968) ("the 'gist of the question of standing' is whether the party seeking relief has 'alleged . . . concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'").

Third, the Council's action likely has a question of fact or law in common with the Judicial Branch's request for an injunction. This question at hand is analogous to the issue presented in *City of Tucson v. Pima County*, 19 P.3d 650 (Ariz. Ct. App. 2001). In that case, the Arizona Court of Appeals allowed the Town of Oro Valley to intervene in the constitutional challenge of a statute allowing certain communities within Pima County to incorporate as towns, without the City of Tucson's consent. The Court ultimately held that, because both the Town of Oro Valley and the City of Tucson were arguing apropos the constitutionality of the same statute, the lower court did not abuse its discretion in allowing Oro Valley to participate. *Id.* at 656. Like *City of Tucson*, because the intervening Council asserts questions of fact and law in common with the Judicial Branch, the Council argues credibly that it should be allowed to intervene.

Whether to grant a motion to intervene as a permissive matter is a decision that rests within the discretion of this Court. *Purvis v. Hartford Acc. and Indem. Co.,* 877 P.2d 827, 830 (Ariz. Ct. App. 1994). However, as the Arizona Court of Appeals made clear in *Bechtel v. Rose*, 722 P.2d 236 (Ariz. Ct. App. 1986), permissive intervention is remedial and should be liberally construed with a view toward assisting parties in obtaining justice and protecting their rights.[6] Even where, under usual circumstances, the intervener would not be a proper party at the beginning of the suit, Arizona's liberal standard allows the party to intervene where justice so demands, at the discretion of the Court. *Arizona Dept. of Economic Sec. v. Superior Court of State, Juvenile Div.*, 839 P.2d 446, 448 (Ariz. Ct. App. 1992).

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[6] In fact, *Bechtel* goes so far as to overturn a lower court's denial of intervention because it did not make an "individualized determination of the petitioner's motion to intervene," based upon obtaining justice and protecting rights. 722 P.2d at 242.

II

Traditionally, the Tohono O'odham (Papago)[7] had no central government, were not organized under a central chief, and were, at best, "loose confederations among village units."[8] As illustrated in their creation stories, civil divisions were firmly integrated as an essential part of the Papago identity.[9] However, these "village units" did share a common language, like economic systems, and, most importantly, similar religious, social, and political customs.[10] Ultimately, although there was certain marriage preferences involving other units, most Papagos "possessed a latent 'in group' feeling," referred to themselves in common as "O'otam," and were organized in "a moiety organization that was pan-Papago in scope."[11] A mutually dependent trade relationship – the Desert People supplying labor in exchange for food from the river dwellers – helped to cement this relationship.[12]

By the close of the nineteenth century, what was left of traditional civil divisions began to collapse.[13] Due to a number of factors – Spanish encroachment, the introduction of European disease, and Apache attacks – the Papago were forced into an ever-shrinking range, and the

[7] "Though outsiders erroneously referred to them as 'Papago,' these desert dwellers call themselves the O'odham, which means "the People." Peter MacMillan Booth, Creation of a Nation: The Development of the Tohono O'odham Political Culture, 1900-1937, 1 (March 2, 2000) (unpublished Ph.D. dissertation, Perdue University). For the purpose of this memo, the terms will be used interchangeably. This Court agrees with the Respondent that some of the written documents referred to herein are authored by Non O'odham and are translations from O'odham to English. In translations, words can lose their original meanings. "As the late Frances Manuel of San Pedro Community explained, *English kills the meaning you have to speak Papago to really understand. Papago is a different dialogue…if you really want to [say something] it has to come from your feeling, it has to come from your heart.* Frances Manuel and Deborah Neff, *Desert Indian Woman, stories and dreams*, (2001) Appendix A at 201," as *cited* in Respondent's Supplemental Pleading, p.4, filed September 28, 2009. Petitioner and Intervenor/Movant have chosen not to present evidence of customary and traditional dispute resolution and how such cultural knowledge could advise the Court in determining whether or not to grant intervention. Respondent Executive Branch has provided a brief summary which the Court takes judicial notice of. Respondent's Supplemental Pleading p.4, line 23-p. 10, line 3.

[8] Bernard L. Fontana, *The Papago Tribe of Arizona*, *in* PAPAGO INDIANS III, 151, 166 (David A. Horr ed., 1974).

[9] *See generally* Henriette Rothschild Kroeber, *Traditions of the Papago Indians*, 25 J. AM. FOLKLORE 95 (1912); Jonathan Elliott Skinner, Ecopoetics: Outsider Poetries of the Twentieth Century (May 13, 2005) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with Venito Garcia Library, Tohono O'odham Community College).

[10] Fontana, *supra* note 7, at 166.

[11] *Id. See also* Booth, *supra* note 6, at 2 ("The O'odham saw themselves as separate peoples within a collective *Himdag*, or 'way of life.'").

[12] Booth, *supra* note 6, at 3.

[13] *Id.* at 4.

desert-river cooperative relationships began to collude.[14] The organization was permanently altered in 1916, when President Woodrow Wilson established the Papago reservation.[15] Although guaranteeing protection for the remaining O'odham land, the establishment of the reservation trapped these non-united peoples within a common area.[16] "Through both external and internal forces, the O'odham began (voluntarily and involuntarily) the process of forming a common identity."[17] By the 1930's, a common political unity was formed, which culminated in 1937 when the Tohono O'odham accepted the Indian Reorganization Act (IRA) in 1937, and adopted a single constitution.[18]

Internally and practically, however, until recently power remained vested at the local/village level.[19] In all actuality,

> the O'odham political culture did not fundamentally change, even after the people formed a single tribal entity. On the contrary, defense of the autonomy of the village remained paramount, regardless of the time or the village-complex involved. Many of the Desert People felt the need to create a united front to deal with the changing world. However, others feared that a central tribal government would upset village authority. As a compromise, after two decades of heated debate and political conflict, the O'odham took the ironic path of protecting village independence by constructing a single tribe. The majority of O'odham viewed the formation of semi-independent councils, linked by a weak central council, as the best way to protect the cultural and political integrity of their villages.[20]

A large component of the Papago ethos is "primarily concerned with corporate social cohesion . . . ."[21] This often meant that a comprehensive perspective was sought; in order respect

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[14] *Id.*

[15] *Id.* at 2.

[16] *Id.* at 4.

[17] *Id.*

[18] *Id.* at 2, 5.

[19] Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 202 (Eric D. Lemont ed., 2006).

[20] Booth, *supra* note 6, at 6.

[21] Skinner, *supra* note 8, at 224-25. This philosophy is illustrated by the O'odham's continuing practice of the "cactus ritual," long after desert subsistence patterns were no longer the preferred method of survival (at least since after the U.S. government forced the O'odham to change their method of survival by drilling wells in their traditional lands). *Id.* at 225.

and take into account the viewpoints of all tribal members equally.[22] According to traditional Papago spiritual beliefs:

> The O'odham's supreme being, *Íitoi*, gave the *Himdag* to the people who orally passed on this philosophy of existence from generation to generation. *Himdag* means more than just a religion, but instead it "encompasses the whole way of life." This O'odham doctrine stresses the need to interact harmoniously. It recognizes the reality that power cannot be centralized and no matter what one does, other entities can affect ones existence.[23]

As a widely esteemed Papago political figure active in creating the *Constitution and By-Laws of the Papago Tribe of Arizona* in 1937, Peter Blaine, stated: "A white man hears one thing and okays it right away. Indians, they don't. They wait and wait. They consider everything. In a way, they really put their minds to it. It's just a good way."[24]

The responsibility to retain this cohesion also "carries an obligation to settle disputes amicably."[25] Traditionally, recourse to legal authority was taken only when the dispute was between a Papago and persons or entities outside of the tribe.[26] Matters that required local collaboration were usually handled without hostility: the situation was brought to a leader, and his decision was followed.[27] Leaders were respected because of their positions, and their decisions were accepted when people felt that those decisions were "based on a thorough knowledge of the recognized way of doing things and . . . made after discussion and expression of 'what all people think.'"[28] As Blaine has noted, "Leadership and respect for leadership is where education starts. If that breaks down, the life of the Papago breaks down."[29]

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[22] *See* PETER BLAINE, SR., PAPAGOS AND POLITICS 42 (Michael S. Adams ed., 1981).

[23] Booth, *supra* note 6, at 21.

[24] BLAINE, *supra* note 21, at 87. *See also* James R. Simpson, *Uses of Cultural Anthropology in Economic Analysis: A Papago Indian Case*, 29 HUMAN ORGANIZATION 162, 163 ("noting that, in explaining economic farming decisions, "[t]he answer seems to lie in Papago traditionalism in which group rather than individual decisionmaking . . . .").

[25] ALICE JOSEPH, ROSAMOND B. SPICER, & JANE CHESKY, THE DESERT PEOPLE: A STUDY OF THE PAPAGO INDIANS 55 (1949).

[26] *Id*. Even in 1949, though, the traditional dispute settlements were breaking down, and Papagos were resorting to legal recourse among themselves. *Id.*

[27] *Id.* at 65.

[28] *Id.*

[29] BLAINE, *supra* note 21, at 131.

In all, "few individuals are willing to assume the role of 'policeman' when all of the pressures are toward a sensitivity in personal contacts and a kind of introversion that precludes setting oneself up as a dominant leader rather than a social conformer."[30] This does not mean, though, that traditionally there were no decisionmakers. Customary Papago authority was vested in the *kobanal* (chief) and his two assistants.[31] The chief was usually elected by the village unanimously, and retained office until people became dissatisfied, or he wished to retire.[32] Thus, although the empowerment of individuals was expected, it was only legitimate at the village level, the chief having gained his authority by and at the will of a particular village.[33] In his non-judicial capacity the chief served as head of the village council (where village problems were discussed, such as land assigned for farm use and dealings with other governments.)[34] In the council, all villagers had an equal vote, and a proposition was acted on unless there was unanimity throughout the village population.[35] In his judicial capacity, the chief acted as an arbitrator of disputes.[36] However, he was not the last resort – if one wished, he could take his case to the tribal court, or the district councilman:

> In one case . . . the defendant was not satisfied with the tribal court's decision and so brought the matter to the village chief, and then through the district councilman back to the tribal court. There were apparently no negative sanctions . . . against this procedure; a man [was] free to take his legal problems wherever he wishe[d]."[37]

This situation changed fundamentally with the passage of the IRA in 1934. After the IRA, many tribes adopted constitutions that demanded an elected Council and chairman, and an

[30] Simpson, *supra* note 23, at 163.

[31] JOSEPH, *supra* note 24, at 63.

[32] *Id.* "Everyone has a say if it takes all night. In the old days, unanimity of opinion had to precede a decision, for the concept of majority rule was not known to the Papago." *Id.*

[33] *See* Kalt, *supra* note 18, at 202.

[34] JOSEPH, *supra* note 24, at 63.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 65.

appointed judiciary - much like the U.S. Constitution.[38] However, as Blaine put it, "The [Papago] people didn't know nothing about organizing a government. . . . What the chief said was law. The people had accepted this way of village government for who knows how long."[39] Thus, although the Papago Constitution was similar to the U.S. Constitution in many instances, the by-laws informing the Papago Constitution were based principally upon Papago custom and tradition.[40] This was largely due to Papago common law principle of inclusiveness mentioned above. For example, when the Papago began drafting their Constitution, the drafters

> told the old people, "If you want the old traditions, we'll put them in." The San Xavier people wanted certain things and other parts of the reservation wanted something else. Each part of the reservation had their own ways. The [C]onstitution would not change the existing customs of our people. All traditions and ways were to be continued just as if there was no [C]onstitution.[41]

This principle was also carried out in initial Council proceedings.[42] When the Constitution was first implemented, councilmembers sought the approval of all members of the tribe, "never start[ing] a program without the people agreeing."[43] Even though they started the first reservation-wide government, the leaders "still wanted all villagers to know and understand what the Council was doing."[44] As an increasing amount of individuals sought work outside of the reservation, this principle of customary Papago law did not waiver – the tribe sought, and

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[38] *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 301 (1998). Even tribes that chose not to adopt such constitutions acquired similar institutions by other means. *See id.* at n.49 (noting that "the Navajos never adopted such a constitution, yet their government is much the same as that of neighboring tribes like the Papagos . . . who did.").

[39] BLAINE, *supra* note 21, at 81.

[40] *Id.* at 67. In January, 1937, at the inception of the Papago Constitution, the *Arizona Daily Star* ran an article comparing the Papago district council meetings more to New England town meetings than the United States legislature. *See Tribal Council Now Completed*, ARIZONA DAILY STAR, Jan. 21, 1937.

[41] BLAINE, *supra* note 21, at 82.

[42] The Council "was set up to handle two phases of activity: [To] regulate behavior, handle legal matters, and [to] develop government for the Indians . . . ." *Program and Proceedings of the Arizona Commission of Indian Affairs: "The Off-Reservation Papagos"* 58 (Dec. 7, 1957) [hereinafter Commission Proceedings] (statement of William H. Kelly, Member of the Commission).

[43] BLAINE, *supra* note 21, at 126. *See also* HENRY F. DOBYNS, REPORT ON INVESTIGATIONS ON THE PAPAGO RESERVATION 3 (1949) ("When the Council takes action, this generally means the people as a whole are decided, and the Council action represents the will of the people. . . . [T]his is true generally of Papago leaders.").

[44] BLAINE, *supra* note 21, at 126.

eventually enacted, a provision to include those persons in the Council decision-making process.[45]

As Henry Dobyns recognized as far back as 1949, Papago governmental entities are "successful for the people only when . . . entirely solid: planned and executed by them."[46] Tohono O'odham common law recognizes the need for social cohesion established through including all peoples, now represented by the political branches, in the decision-making process.[47] Although the Papago's *Himdag* has gone through some drastic alterations, molded to fit the changing world, it is thoroughly embedded in the Tohono O'odham political structure as an interpretative backdrop to the text within the Constitution.[48]

There is little discussion in the later opinions of the Tohono O'odham Judiciary that reference the effect of the 1986 Constitution on customary inclusion in dispute resolution. *Francisco v. Toro*, 1 TOR3d 68 (Trial Ct., Jan. 12, 1989), written just three years after the adoption of the "newest" Constitution expresses the following:

> The Constitution only provides the framework and the content must come from the true nature of governing with deeply embedded traditional ways of government as well as new, modern ideas incorporated into a workable system. There must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive and Judicial. There is no guarantee that friction will not occur, but by means of the friction, and reason, wisdom and self-restraint, the formation of a working government can be achieved…and draws consolation from the thought that the Executive and the Legislative will work together to safeguard the intent of the Constitution and preserve the heritage of the O'odham.

The Preamble of the 1986 constitution states, among other aspirations, that it is established "to preserve, protect and build upon our unique and distinctive cultures and traditions…and to show our gratitude to Í'itoi our Maker." It is obvious from these expressions that the establishment of three branches of government did not erase a fundamental governing principle of inclusion.

This Court is placed in the unique situation of setting concrete precedent regarding the

[45] *See generally* Commission Proceedings, *supra* note 41.

[46] DOBYNS, *supra* note 42, at 3.

[47] *See* Booth, *supra* note 6, at 437.

[48] *Id.* at 439.

distinction of powers[49] within the constitutional construction of the Tohono O'odham Nation. Recognizing as much, this Court should be undiscriminating in obtaining input from the Tohono O'odham community – whether this input is represented by the Judicial Branch, the Council, the Executive Branch, Tohono O'odham common law, or community elders. Justice demands so.

Two more points counsel toward granting intervention. Article VII, Section 2(C) grants to the Chairman, as Chief Executive Officer, the power "to *oversee* the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham Council." "Oversee" means to survey, watch, inspect, examine, supervise, run, control, manage, handle, conduct, look after, be responsible for, administer, preside over, keep an eye on, superintend, etc.[50] Article VI, Section 1(C)(6) provides that the Legislative Council has the power to administer justice. Subsection (l) gives the Council the express ancillary authority "to enact laws, ordinances and resolutions necessary or incidental to the exercise of its legislative powers." Pursuant to this authority, on April 15, 1986[51], the Legislative Council passed Resolution No. 223-86, which delegated the Authority of the Council to the Chairman and Vice Chairman *of the Council* to "Follow up on the implementation of legislation." "Follow-up" is defined as to further an end or increase effectiveness, to review developments, or an activity that continues something that has already begun, etc.[52]

Article IV – Form of Government – creates "three independent branches." As expressed in Articles V, VI, VII and VIII, each branch has distinct delineated powers and duties. While it is obvious that the Constitution intends to provide a system of checks and balances of authority, the term *separation of powers* is never articulated. Given the historical background of the creation of the Nation, the Court will not read into the Constitution that the governing processes must necessarily be *adversarial*. If, and this Court repeats, "if," an enactment of the Legislative Council proves to be unconstitutional, that determination will be made in the interest of harmonizing the strength and sovereignty of the Nation as a whole.

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[49] The Court has chosen to avoid the nomenclature, "separation of powers." Such characterization necessarily demands an exploration into an entire body of Non O'odham constitutional law.

[50] See www.merriam-webster.com/netdict/oversee;www.thefreedictionary.com/oversees.

[51] The 1986 Constitution passed on January 18, 1986 and was approved by the Secretary of the Interior on March 6, 1986.

[52] www.thefreedictionary.com/follow-up.

Paying heed to this backdrop, the Court holds that the Legislative Council's Motion to Intervene is granted, but only to the limited extent permitted by the discussion below.

Jurisdiction

The Court must determine its subject-matter jurisdiction, and it is for this purpose, at this stage in the proceedings that the Court permissively allows intervention.

This Opinion becomes part of a body of Tohono O'odham common law. Counsel for the parties have cited a series of cases that have but tangents to the central issue before this Court; which is, under what circumstances, if any, can one branch of the Tohono O'odham Nation sue another? This question provokes a number of interior enquiries.[53]

1. Who has the authority to waive the Sovereign Immunity of a Tribe/Nation in a three branch government?[54] Counsel have spent a good deal of time writing about legislative immunity, but does the Legislative Council have the power to waive solely its own subordinate immunity? What is the nature of subordinate immunity? Can it be waived by simple pleading? And to what extent? Can a party waive immunity and not be bound by the judgment? Must the Executive and Judicial branches also waive immunities? This Court regards Judge Williams' analysis of sovereign immunity in *United Linings, Inc. v. VI-IKAM DOAG Industries* 2 TOR3d 39 (Trial Ct., Dec. 20, 1998) measurably persuasive, yet it is unnecessary and immaterial at this time to determine the correctness of that case's holding.

2. Is sovereign immunity even implicated? Does it further O'odham sovereignty to incorporate the doctrine of *Ex Parte Young* into its common law jurisprudence. *See, e.g. Blatchford v. Native Village of Noatak,* 896 F.2d 1157(9th Cir.(1990) *remanded on other grounds* 501U.S.775 (1981)*; Jackson as Chairperson of the 1939 Committee v. Kahgegab, Chief of the Saginaw Chippewa Indian Tribe of Michigan,* 33ILR6105 (Saginaw Chippewa Indian Tribe Appellate Court 2003); *Le Compte v. Jewett,* 12 ILR 6025 (Cheyenne River Sioux Ct. App. 1985).

3. Does this case involve a non-justiciable political question?

4. Does there exist a case or controversy?

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[53] A mechanism to "certify" questions of constitutional interpretation to the court is not codified under Tohono O'odham law.

[54] This Court is unaware of any Solicitor's or Attorney General's opinion for the Nation that cements the authority to just one branch of the government. It has searched over extensively the National Indian Law Libraries to limited avail. *See e.g. A. D. Ellis v. Muscogee (Creek) Nation National Council*, No. SC-05-03/05-05(S. Ct. Muscogee [Creek] Nation 2006).

5. Are Petitioner's Arguments ripe for review? One only has to look at the claimed offending passages of the Code to query who could bring the case before the Court for a determination as to their constitutionality, or when the matter provoked sufficiently an antagonist interest. Must a judge be in jeopardy of not receiving his or her salary before a contention of unconstitutionality is raised? *See, e.g., In the matter of the Constitutionality of NCE 98-102*, 4MVS L REP 177( ).

The Court is prepared to rule on these issues quickly in order to determine if subject matter jurisdiction is established. At that time, it will decide whether further intervention is necessary or moot.

Lastly, there is pending a Motion by Petitioner to expand the scope of the original Order granting an emergency injunction. A decision thereupon will be rendered in open court.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Max A. CHAVEZ, Defendant,

Case No. 2008-3328-3567 CR

Decided March 12, 2010.

Before Judge Rachel Frazier Strachan.

On February 3, 2010, Defendant filed a Motion to Reconsider Motion to Dismiss for Lack of Jurisdiction Due to Expiration of Statute of Limitations ("Motion to Reconsider). The Defendant requests this court to reconsider its denial of the Defendant's Motion to Dismiss for Lack of Jurisdiction Due to Expiration of Statute of Limitations ("Motion to Dismiss") filed with this court on September 30, 2009. Furthermore, the Defendant asserts in his Motion to Reconsider that this court failed to make any findings of acts or application of law in support of the court's denial of the Defendant's Motion to Dismiss.

After careful review of the Defendant's Motion to Reconsider, Motion to Dismiss and the Nation's responses to each, this court denies the Defendant's Motion to Reconsider and Motion to Dismiss on the basis that the court lacks jurisdiction due to the expiration of the statute of limitations. The court's decision is based upon the following Findings of Facts and Statements of Law.

Findings of Facts

This court finds that the Defendant was the Court Administrator beginning in November 1984. The Tohono O'odham Judiciary conducted an administrative investigation into alleged misconduct of the Defendant, Max A. Chavez, in June 2007. The investigation was performed by Court Solicitor, M. June Harris. Ms. Harris was given the responsibility of determining whether the Defendant's alleged conduct was a violation of the Judicial Branch's General Personnel and Procedures Manual. Ms. Harris shared the findings of her investigation with Chief Judge Linda Parley who was the supervisor for Ms. Harris and the Defendant. On May 10, 2007, prior to commencement of the investigation, the Defendant and his assistant, Sandra Sixkiller, were suspended without pay.

On June 6, 2007, Ms. Harris issued Preliminary Findings of her investigation. Ms. Harris enumerated her findings in a document titled, "Preliminary Findings", dated June 6, 2007. The following day, June 7, 2007, staff of the Tohono O'odham Judiciary interviewed the Defendant and others pursuant to the court's investigation regarding alleged salary overpayments by the Defendant. The Defendant and Ms. Sixkiller were terminated from employment with the Tohono O'odham Judiciary on June 15, 2007.

Subsequently, on November 7, 2007, Chief Judge Linda Parley requested the Tohono O'odham Police Department to conduct a criminal investigation into the Defendant's alleged misconduct. The Tohono O'odham Judiciary provided information and documents to the Tohono O'odham Police Department relevant to its investigation of the alleged misconduct.

In December 2007, the Defendant was hired as the Property and Supply Manager for the Tohono O'odham Nation Executive Branch. During his tenure as the Property and Supply Manager, the Defendant was issued and accepted the funds for a paycheck which included 302 hours of annual leave and 3,498 hours of sick leave. The annual leave and sick leave were purportedly earned while the Defendant was the Court Administrator and transferred with him as he started his new employment as the Property and Supply Manager.

On June 30, 2008, Lucille Campillo, Judicial Accountant, was interviewed by the Tohono O'odham Police Department. Ms. Campillo informed the Tohono O'odham Police Department that in her role as Judicial Accountant she was responsible for making modifications to budget and payroll records referred to the Court Administrator for correction. Ms. Campillo states that the Defendant directed her to make changes to budget and payroll, as requested, but not to make

changes to his salary. Ms. Campillo informed law enforcement that she complied with this directive by the Defendant.

A few months later on November 20, 2008, Ms. Campillo signed a written statement summarizing her interview by the Tohono O'odham Police Department on June 30, 2008.

On November 7, 2008, Criminal Investigator Charles Dimond of the Tohono O'odham Police Department executed an Affidavit of Probable Cause. On the same day, Chief Prosecutor, George Traviolia filed a Criminal Complaint alleging 240 criminal counts against the Defendants, including Criminal Fraud, Abuse of Office, Theft and Criminal Conspiracy.

A Probable Cause Hearing ("Hearing") was held on May 18, 2009 and May 22, 2009, at the Defendant's request. At the Hearing, many documents including Ms. Harris' document titled "Preliminary Findings" were entered into evidence. The Nation's prosecutor marked Ms. Harris' Preliminary Findings and other documents it sought to have admitted into evidence for purposes of the Hearing.

Following the Hearing, this court found that the Tohono O'odham Nation had provided sufficient evidence for a finding of probable cause that criminal offenses had been committed and a likelihood that the Defendant had committed them.

Statements and Application of Law

The law is well-settled that the statutes of limitations in criminal cases are jurisdictional. The statute of limitation is the power of the sovereign to act against the accused. (*See* Price v. Maxwell, 140 Ariz. 232, 234, 681 P.2d 384, 386 (1984). However, the statute of limitations in a criminal matter does not begin to run until the State having jurisdiction over the matter, discovers or should have discovered that the offense occurred. According to Section 1.5 (A) of the Tohono O'odham Code, a person shall not be prosecuted, fined or punished unless a complaint is filed within one year after discovery that an offense has been committed. This section further states that if the offense is based upon a series of acts, the statute of limitations begins "at the time the last discovered act is alleged to have been committed". The burden is on the State to establish that the statute of limitation has not run for purposes of prosecution. Thus, in this instance the Tohono O'odham Nation must satisfy this burden to establish that the period has not run to prosecute the Defendant for the charges alleged.

The Defendant argues that the charges against the Defendant should be dismissed because the Tohono O'odham Nation had *actual knowledge* of the Defendant's alleged misconduct prior to June 6, 2007. The Defendant claims that Ms. Harris' investigation of the Defendant and a

document she prepared titled "Preliminary Findings". The Defendant asserts that the document prepared by Ms. Harris is an indicator that Ms. Harris' findings supported a finding of probable cause by law enforcement for their issuance of a criminal complaint. The court finds the Defendant's assertion flawed.

The Defendant's conclusion would require this court to make a finding that Ms. Harris' investigation was a criminal investigation rather than an administrative investigation. The court finds that Ms. Harris' investigation was merely administrative and was the result of a request by Chief Judge Linda Parley. Furthermore, this court finds that Ms. Harris' investigation into alleged misconduct by the Court Administrator consistent with Ms. Harris' duties and responsibilities as the Court Solicitor for the Tohono O'odham Judiciary.

In regards to the Defendant's argument regarding the markings "Probable Cause Hearing" and "Nation's Exhibit #3" located in the upper right hand corner of Ms. Harris' document titled "Preliminary Findings", the court finds that the phrases were not added by Ms. Harris. The court finds the two phrases were later added to the document by the Prosecutor's Office in preparation of the Probable Cause Hearing, pursuant to this court's request that all exhibits be marked prior to the hearing.

Furthermore, the Defendant asserts that at the time of Ms. Harris' investigation and the interviews conducted by judiciary staff, the statute of limitations commenced because court personnel were aware that a crime had been committed. The Defendant cites People v. Moore which states that the statute of limitations begins when either the "victim" or "law enforcement" learn of facts which if investigation would make the person aware that a crime has occurred. 176 Cal. App. 4th 687, 97 Cal.Rptr. 3d 844 (Cal.App.2 Dist. 2009). This court finds that neither Ms. Harris nor the court staff are law enforcement officials. As a result, the investigation they were conducting was an internal administrative investigation into the alleged misconduct of a manager, the Court Administrator. None of the facts presented to this court suggests that the investigation conducted by Ms. Harris and court personnel was criminal in nature.

Moreover, it was not until June 30, 2008 when the Tohono O'odham Police Department interviewed Ms. Campillo did law enforcement discover that the Defendant may have committed a crime. At this point, law enforcement established that probable cause existed to file criminal charges and the statute of limitations began to toll. Therefore, the criminal complaint filed by the Tohono O'odham Nation against the Defendant on November 7, 2008 was well within the one year period.

Lastly, the court finds that the Defendant's argument baseless that all of the counts against the Defendant should be dismissed because they are either inadequate on their face or inadequate as a matter of law. The court finds that the statute of limitations for counts 1-238 commenced on June 30, 2008 which is the date of the Tohono O'odham Police Department's interview with Ms. Campillo that law enforcement discovered there was probable cause to file criminal charges against the Defendant. As stated, it was during this interview that law enforcement learned that the Defendant instructed Ms. Campillo to not make changes to his payroll/salary. Since Ms. Campillo's interview was June 30, 2008 and the criminal charges were filed against the Defendant on November 7, 2008, this timeframe was within the one year statute of limitations for criminal prosecution.

Furthermore, Counts 239 and 240 provide a period over which the Defendant is alleged to have committed the respective charges. The Defendant asserts that no possible "overt act" could have occurred after the Defendant and Ms. Sixkiller were terminated on May 15, 2007. The Defendant's reasoning is flawed. This court agrees that when the Defendant accepted the paycheck which afforded him unearned annual leave and sick leave this was the final stage of the conspiracy between the Defendant and Ms. Sixkiller.

Furthermore, in regards to Count 239, the alleged Criminal Fraud occurred during a specific period of time which is stated in the criminal complaint. The Criminal Fraud count provides specificity that the charge relates to the Defendant's acceptance of annual leave hours which were not earned. Moreover, Count 240 relates to the Conspiracy count. Once again, this count provides a timeframe in which the Defendant in collaboration with Ms. Sixkiller to allegedly submit documents to the Judiciary and the Legislative Council and accepted an unauthorized higher rate of pay.

The court disagrees that the last opportunity for the Defendant and Ms. Sixkiller to conspire to commit Criminal Fraud, Theft or Abuse of Office was on June 15, 2007. Both the Defendant and Ms. Sixkiller set into effect a series of events through their actions and which the results of were not known until months later.

Thus, this court finds that the criminal charges filed by the Tohono O'odham Nation against the Defendant were timely. Thus, the Motion to Reconsider filed against the Defendant and the criminal charges are not dismissed.

IT IS ORDERED that as a result of the court's denial of the motions, a Status Hearing shall is scheduled on April 7, 2010 at 10:00 a.m. in this matter.

IT IS ALSO ORDERED that the jury trial scheduled for April 12 through April 20, 2010 is also affirmed.

IT IS FURTHER ORDERED that the Defendant's current release conditions shall remain in effect.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Jesse VAVAGES, Defendant,

Case No. 2009-5938-5944 CR

Decided October 20, 2010.

Before Judge Larry Yazzie.

This matter is before the Court on Defendant's Motion for Mistrial and For New Trial. The motion is fully briefed pursuant to the Court's briefing schedule. The basis for the motion is Defendant's argument that (1) the testimony of the arresting officers is inadmissible hearsay and, accordingly (2) deprived the defendant of his sixth amendment right to confront witnesses against him.

On July 21, 2010 trial was held without a jury. As a preliminary matter the Court inquired as to the number of witnesses to be called by the Nation and Defendant. The Prosecutor informed the Court two officers were present to testify. Defense counsel stated they did not intend to call any witnesses. The prosecutor observed that the defense did not provide disclosure or a witness list and further advised that the alleged victim/witness specifically informed him that she would not appear for trial.

I. FACTS:

On October 4, 2009 Officer Radcliff was contacted by dispatch regarding a possible injury by use of a pipe at the Anthony Blackwater residence. The time was 0438. The officer was in the Sells area and traveled 55 miles per hour or slightly faster. The 15-20 miles to arrive at the Blackwater residence was approximately 30 minutes. Officers Radcliff and Rosales found the victim, Annette Manuel waiting outside the house. Ms. Manuel made the call to dispatch. She was crying, very upset, excited, frightened, and scared that the suspect would come back. The suspect had run off into the desert. The victim sustained injury to her hand from what she

described as a "machete" and that Jesse Vavages while swinging the machete cut her. The injury appeared fresh and bloodied. The incident occurred recently within 30 minutes of the police arriving. The victim however refused medical treatment. The suspect, victim and others had been drinking alcoholic beverages. A fight started between Jesse Vavages and Anthony Blackwater. Victim Manuel attempted to stop the fight and was cut by the machete. No weapon or machete was found.

The officers continued with their efforts to locate and apprehend the suspect. Approximately two (2) hours later they were called back to the scene and were contacted by Renae Anselmo. Ms. Anselmo was scared and described the incident wherein Jesse was swinging the machete that resulted in the injury to Annette Manuel. She thereupon informed the officers that the suspect was in the house.

The suspect Jesse Vavages was located in the back bedroom. He was intoxicated and very belligerent and aggressive towards the officers. One officer drew her weapon in a defensive posture and the suspect yelled for her to shoot him. The officers then wrestled with the suspect to get the handcuffs on and escorted him out. The suspect was cussing and yelled out ,"(you) have no weapon, or victims and I will be out in 8 hours."

At trial, the officers testified as to the statements made by the victim, Annette Manuel and witness, Renae Anselmo during the investigation of the incident. Defense counsel objected to the testimony of both officers as inadmissible hearsay evidence. The Prosecution however persuaded the Court that the testimony regarding the Manuel statement fits within the hearsay exception of an "excited utterance". No specific finding was made as to the testimony regarding the Anselmo statement.

Defense counsel, as he indicated at the outset of the trial, did not call any witnesses and rested his case. The Prosecutor presented his closing argument. Defense Counsel, instead of a closing argument, made an oral motion to reopen his case because he was informed that the victim/witness was in the courtroom and they should be allowed to call her as a witness.

The Court denied the motion to reopen the case based upon Defense counsel's failure to subpoena any witnesses, representation to the Court that the Defendant was not calling any witnesses to testify, and prior statement that the Defendant rested his case. Defense counsel thereupon submitted a motion for mistrial and a new trial based upon a violation of Defendant's right of confrontation guaranteed by the Indian Civil Rights Act and the 6th Amendment of the Constitution of the United States. The motion for a mistrial was denied based on the Court's

ruling on the hearsay exception of "excited utterance" wherein the availability of a witness is immaterial.

The Defendant was found guilty of all counts except count 4 of the Complaint, Disorderly Conduct/Domestic Violence. The Prosecution failed to establish cohabitation as an element of the domestic violence charge. Defense counsel concedes the charges of disorderly conduct, unlawful possession of liquor and disturbing the peace (counts 1,2,3 and 7) as having been proven beyond a reasonable doubt. A pre-sentence report was ordered and a sentencing date was scheduled.

On August 02, 2010, a status hearing was held pursuant to the defendant's request to speak to the Court. The parties were directed to brief the issue of defendant's right of confrontation and if such right overcomes the exception to the hearsay rule as argued by defense counsel.

II. THE EXCITED UTTERANCE OF ANNETTE MANUEL IS NOT EXCLUDED BY THE HEARSAY RULE EVEN THOUGH SHE IS AVAILABLE AS A WITNESS

A. Excitement.

"When a hearsay statement is offered under this exception, the trial court must make a preliminary factual determination that the declarant was so excited or distraught at the moment of utterance that he did not reflect (or have an opportunity to reflect) on what he was saying." United States v. McLennan, 563 F 2nd 943,948 (9th Circuit 1977), cert. denied 435 U.S. 969, 98 S.Ct. 1607(1978). Additionally, "the contents of the statement itself, along with circumstances including the declarant's appearance, behavior and condition, may be relied upon to establish the occurrence of an excited event, United States v. Moore, 791 F 2d 566, 570-71 (7th Cir. 1986) and the declarant's personal perception of it," McLaughlin v. Vinzant, 522 F2d 488, 451 (1st Cir. 1975), cert denied, 423 U.S. 1037, 96 S.Ct. 573 (1975).

The hearsay statement of Annette Manuel was made under such circumstances and based upon her personal perception that establish the occurrence of an excited event. Ms. Manuel was very recently assaulted with a machete and obviously distraught, frightened, and excited under such circumstances named the defendant as her assailant. She called the police for assistance and was waiting in fear that the defendant might return when they arrived. The cut on her hand from the machete was still bloodied. Defendant had just run off into the desert with the machete. The victim's perception of the event was as a potentially life threatening situation and without question establish the occurrence of an excitement engendering event.

B. Lapse of Time.

The hearsay statement was made while the declarant was under the stress caused by the excited event as required by Rule 803(2) of the Arizona Rules of Evidence, as adopted by Administrative Order 03-09. If the event is sufficiently startling as in this instance, the period of stress may persist for some time. "Several factors must be considered, including: (1) The lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; (5) the subject matter of the statements." Morgan v. Foretich, 846 F.2nd 941,947 (4th Cir. 1988) ; accord, United States v Marrowbone , 211 F.3rd 352 (8th Cir. 2000). Finally, " The rationale of the excited utterance exception is that 'the stress of nervous excitement or physical shock stills the reflective faculties, thus removing an impediment to truthfulness." United States v. DeMarce, 564 F3rd 989, 997 (8th Cir. 2009).

In this instance, the victim was under the stress of nervous excitement up to an including the time she was questioned by the officers: a thirty (30) minute period of time. The victim, an adult female, had reasonable basis to be stressed, excited, and afraid. The suspect was still in the immediate area in an intoxicated condition and armed with a machete. The victim was neither calm nor in a safe environment. She was facing an ongoing emergency and the interrogation provided the necessary information to enable police assistance to meet the emergency situation.

In the case of witness Renae Anselmo, however the lapse of time was too great to qualify her statements as an excited utterance. Two hours had passed since the initial event and her declarations. Her statements to the police are inadmissible hearsay.

III. THE HEARSAY STATEMENTS OF ANNETTE MANUEL ARE NONTESTIMONIAL AND THE CONFRONTATION CLAUSE DOES NOT APPLY

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (U.S. Wash. 2006), held: The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant has had a prior opportunity for cross-examination." Crawford v Washington, 541 U.S. 36, 53-54. These cases require the Court to determine which police "interrogations "produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there

is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In applying Crawford's testimonial – nontestimonial distinction in the context of an "excited utterance " case, the Davis decisions provide some guidance:

> The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events as they were actually happening, rather than 'describing past events,' Lilly v. Virginia, 527 U.S. 116,137 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an on going emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon….And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator would make out) safe." Id. at 547 U. S. 827.

Based on the above, the interrogation of victim Manuel at the scene is held nontestimonial. The statements were made for the primary purpose of obtaining police assistance to meet the ongoing emergency.

IT IS THEREFORE ORDERED THAT:

1. Defendant's Motion for a Mistrial and a New Trial is Denied.
2. The sentencing of the Defendant shall be scheduled.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided October 22, 2010.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

The Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch, through the office of the Chairman of the Tohono O'odham Nation, from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law") by amended petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction. The Emergency Preliminary Injunction was granted through an Order, filed January 6, 2009, and modified January 28, 2009. The Legislative Council of the Tohono O'odham Nation filed a motion to intervene in the litigation on January 21, 2009.

This dispute is between co-equal, independent branches of the Tohono O'odham Nation. The ability of one branch of the Tohono O'odham government to sue another is a matter of first impression. Although the Judicial Branch acts as petitioner here, it is also under a constitutional duty to adjudicate the litigation under Article VIII, Section 10 of the Tohono O'odham Constitution.

This Court begins by determining whether the Legislative Council may properly intervene. In doing so, it will rule on Petitioner's Motion for Summary Judgment, Consolidated Motion for Judgment on the Pleadings, and Request to File Interloculatory Appeal. This Court will then determine whether it has jurisdiction to address the ultimate issue, the constitutionality of the contested portions of the Courts and Procedures Law. Parties are referred to the Court's Order, dated March 11, 2010, as the law of the case.

Choice of Law

The parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent Arizona law. The Court agrees, noting that the use of foreign law will be considered if it aligns with Tohono O'odham custom, which fosters a spirit of inclusiveness—a spirit this Court emphasized in its March 11, 2010 Order.

Jurisdiction

As discussed below, the Court has jurisdiction to hear Petitioner's Amended Petition.

Discussion

I. Intervention

The Court grants the Legislative Council permissive intervention, but has not been adequately briefed to rule on whether the Legislative Council possesses a statutory right to intervene. The question of the constitutionality of 1 T.O.C. Chap. 2, Sovereign Immunity; Legislative Immunity (hereinafter the "Sovereign Immunity Law"), purporting to give the Legislative Council a right to intervene in cases that challenge the validity of the Nation's laws, will be reserved for a more appropriate time in which the issue is a central element to the cause of action. Sovereign immunity is not implicated here by the Judicial Branch's petition for injunction or by the Legislative Council's petition to intervene, and waiver of sovereign immunity is therefore not necessary in establishing the Court's subject matter jurisdiction.

A. The Court grants the Legislative Council general permissive intervention.

A party may intervene in pending litigation either as a matter of right or permissively. Ariz.R.Civ.Pro. Rule 24. However, the intervening party bears the burden of showing its entitlement to intervention. *Morris v. Southwest Sav. & Loan Ass'n*, 449 P.2d 301, 304 (Ariz. Ct. App. 1969).

Intervention is a matter of right when mandated by statute or when the intervening party claims an interest in the subject of the action and disposing of the action may impair or impede the party's ability to protect its interests—unless the party's interests are adequately represented by existing parties. Ariz.R.Civ.Pro. Rule 24(a). Permissive intervention is proper when a statute confers a conditional right to intervene or when the intervening party's claim or defense shares a common question of law or fact with the main action. Ariz.R.Civ.Pro. Rule 24(b).

> *i. The Court will not rule on whether the Legislative Council has a statutory right to intervene due to the question such ruling raises about the constitutionality of the Sovereign Immunity Law.*

This Court originally granted the Legislative Council limited permissive intervention in its March 11, 2010 Order. *In Re: Petition of the Judicial Branch*, 3 TOR3d 81 (Trial Ct., Mar. 11, 2010), *appeal dism'd*, 3 TOR3d 49 (Ct.App., Jul. 19, 2011). However, the Legislative Council now argues that, due to the recently enacted Sovereign Immunity Law, it possesses a statutory right to intervene in the present case.

The Sovereign Immunity Law purports to give the Legislative Council a right to intervene in "an action to determine the validity of a Nation's law or a Legislative Council decision or action when authorized by a majority vote of the Council." 1 T.O.C. § 2102(D)(2). As proscribed by the Sovereign Immunity Law, the Legislative Council cast a majority vote to exercise its statutory right to intervene in the present case. Legislative Order No. 09-019, *available at* http://www.tolc-nsn.org/docs/actions09/09019.pdf.

However, the Judicial Branch asserts that the Sovereign Immunity Law is unconstitutional, encroaching on the Executive Branch's constitutional authority to enforce the Nation's laws. Petitioner's Reply to Respondent Legislative Council's Response to Petitioner's Brief on Additional Questions, 2 (June 4, 2010). The Sovereign Immunity Law sets forth the Legislative Council's ability to defend the Nation's laws within the judiciary while Article VII, Section 2(C) of the Tohono O'odham Constitution grants the Executive Branch's Chairman the power to oversee the implementation of the Nation's laws. In raising this concern, the Judicial Branch asks the Court to address this case's ultimate question—to what extend does each governmental branch within the Tohono O'odham government possess independent powers that it alone may exercise.

Tohono O'odham common law and custom encourage cooperation and a sharing of power between the government's three independent branches. Although the current Tohono O'odham Constitution contains Article IV, which states that the government will be composed of three independent branches, it should be interpreted in conjunction with Tohono O'odham tradition, including the "fundamental governing principal of inclusion." *In Re: Petition of the Judicial Branch*, at 92. In *Francisco v. Toro*, 1 TOR3d 68 (Trial Ct., Jan. 12, 1989), *appeal dism'd*, 3 TOR3d 17 (Ct.App., Sep. 4, 2008), the Court began its "separation of powers" analysis with the notion that "a viable government must depend on the cooperation and interrelationship between all three branches of government." *Id.*, at 71. The Court set forth a three-prong test for determining whether one branch has usurped another's power. *Id.*, at 71-72. A court should consider 1) the nature of the power being exercised, 2) the objective sought by the allegedly

offensive action, and 3) the practical effect of blending powers. *Id.* This test asks whether the power allegedly usurped should be shared between branches, and if so, whether the action was taken in the spirit of cooperation. It also inquires into what the practical effects of sharing will be.

It seems that authority to ensure the Tohono O'odham Nation's laws are implemented may be exercised by both the Legislative and Executive Branches. The Tohono O'odham Constitution states that the Executive Branch possesses the constitutional power to "oversee the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham Council." TOHONO O'ODHAM CONST. art. VII § (2)(C). However, the Legislative Council also possesses constitutional power "to enact laws, ordinances and resolutions necessary or incidental to the exercise of its legislative powers," *Id.* at art. VI § (1)(L), and to "create laws, ordinances, or resolutions to provide for the maintenance of law and order and the administration of justice." *Id.* at art. VI § (1)(C)(6). Pursuant to this constitutional authority, the Legislative Council passed a resolution giving authority to the Chairman and Vice Chairman of the Council to "follow up on the implementation of legislation." Resolution No. 223-86 (April 15, 1986).

One may infer that the Legislative Council's objective in enacting the Sovereign Immunity Law, giving itself a right to intervene in cases that determine the validity of the Nation's laws and decisions made by the Legislative Council, was to further the Tohono O'odham principal of inclusiveness and to provide continued support in defending the Nation's laws. The Sovereign Immunity Law's practical effect would be that, in cases dealing with any enactment by the legislative council, both the Executive and Legislative Branches would be eligible to act as litigants. Here, the Executive Branch vetoed adoption of the Courts and Procedures Law, while the Attorney General has declared a conflict of interest. Respondent's Response Brief, 2 (Jan. 21, 2009); Statement of the Office of Attorney General, 1 (Jan. 20, 2009). In this situation, the Sovereign Immunity Law would provide for an interested party, the Legislative Branch, to be heard respecting the validity of the law in question.

However, the Court has not been adequately briefed about whether the Sovereign Immunity Law is constitutional or whether it usurps the Executive Branch's powers. Additionally, this important question should not be answered on the sidelines of a tangentially related cause of action. We reserve this question for another day, when it is central to the issue presented to the Court and when the parties have had a more thorough opportunity to provide their arguments on the matter.

Additionally, ruling on the constitutionality of the Sovereign Immunity Law in this context would create precedent that leads in the wrong direction. The Judicial Branch, in alleging that the Sovereign Immunity Law is unconstitutional, is doing so on behalf of the Executive Branch, whose power it alleges was usurped. To allow the Judicial Branch to challenge the Sovereign Immunity Law—or any other law for that matter—on behalf of the Executive Branch would create a downward spiraling cyclone in which the Legislative Branch enacts a law and the Judicial Branch challenges its validity without itself experiencing the requisite harm necessary to establish standing. This does not comport with the Tohono O'odham custom of harmony between governmental branches, recognized in the March 11, 2010 Order. Although the issue has been briefed in a professional manner, this Court will not allow this litigation to become a tempest of its own. Instead, this Court chooses to uphold the Tohono O'odham principal of *s-ba:bigĭ*. This Court will slowly and methodically address each issue relevant to the ultimate question—the constitutionality of the Courts and Procedures Law—without allowing this litigation to become a whirlwind spinning out of control.

As stated below, the Court finds adequate support to extend its previous grant of limited permissive intervention to a general grant of permissive intervention, removing the necessity to rule on the constitutionality of the Sovereign Immunity Law at this point.

ii. The Court grants the Legislative Council permissive intervention.

The Court's March 11, 2010 Order recognized that the Legislative Council had sufficient interest in the present litigation to warrant a limited permissive intervention to address specific jurisdictional questions pertaining to this case. 3 TOR3d, at 86. A court may grant permissive intervention where 1) the petitioner shows an independent ground for jurisdiction, 2) the motion is timely, and 3) the petitioner's claim or defense has a question of law or fact in common with the main action. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989).

Additionally, where the "intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention." *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990). An Arizona Court of Appeals reasoned that permissive intervention should be liberally construed so as to assist parties in protecting their rights. *Bechtel v. Rose*, 722 P.2d 236, 240 (Ariz. Ct. App. 1986). Ultimately, whether to grant a permissive motion to intervene is a decision that rests within the discretion of the court. *Purvis v. Hartford Acc. And Indem. Co.*, 877 P.2d 827, 830 (Ariz. Ct. App. 1994).

The Legislative Council's interest in arguing for the constitutionality of the Courts and Procedures Law remains applicable for the remainder of this litigation, and the Court grants the Legislative Council general permissive intervention. In this special circumstance, the Legislative Council is the only party that will argue for the validity of the law, giving more weight to the necessity of the Legislative Council to protect its interests. Respondent-Applicant's Supplemental Brief on Legislative Immunity and Traditional Dispute Resolution, 5 (Sept. 28, 2009). Granting permissive intervention in this case does not establish the Legislative Council's ability to intervene in future cases challenging the validity of the Nation's laws.

Additionally, inclusion of the Legislative Council in the present litigation comports with the Tohono O'odham custom of inclusiveness. *In Re: Petition of the Judicial Branch*, at 3 TOR3d, at 92-93; Respondent's Supplemental Pleading (Sept. 28, 2009); Petitioner's Brief (Sept. 28, 2009). The Legislative Council's motion to intervene is timely and comports with this court's jurisdiction, as discussed below.

B. Sovereign Immunity

> *i. The Tohono O'odham Nation does possess Sovereign Immunity within its own tribal judicial system and the Legislative Council possesses authority to waive such sovereign immunity on behalf of the Nation.*

Tribes exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Therefore, a tribe possesses sovereign immunity from suit in federal and state courts unless Congress or the tribe waives this immunity. *Kiowa Tribe v. Manufacturing Technologies Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 164 (1977).

However, a tribe's sovereign immunity in federal and state court does not automatically translate to sovereign immunity within its own tribal judicial system. *United Linings, Inc. v. Vi-Ikam Industries*, 2 TOR3d 39, 43-44 (Trial Ct., Dec. 20, 1998). Although the question of whether the tribe possesses sovereign immunity within its own judicial system has been raised, *Id.* at 44-45, many Tohono O'odham cases have proceeded as if it does. *Evans v. Tohono O'odham Nation*, 2 TOR3d 35 (Trial Ct., Jul. 17, 1998), *appeal dism'd*, 3 TOR3d 20 (Ct.App., Sep. 4, 2008) (dismissing for lack of waiver of sovereign immunity); *Juan v. Juan*, 2 TOR3d 62 (Trial Ct., Jan. 27, 2000), *appeal dism'd*, 3 TOR3d 1 (Ct.App., Jan. 4, 2005) (dismissing for lack of waiver of sovereign immunity); *San Lucy District v. Tohono O'odham Election Board*, 3 TOR3d 68 (Trial Ct., Oct. 1, 2007), *appeal dism'd*, 3 TOR3d 14 (Ct.App., May 30, 2008)

(determining the tribe waived sovereign immunity for a particular issue through a statute); *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005), *appeal dism'd*, 3 TOR3d 21 (Ct.App., Sep. 4, 2008) (reasoning that sovereign immunity did not apply to a claim against a government agent seeking injunctive relief from unconstitutional conduct). Additionally, Tohono O'odham sovereign immunity from suit within the tribe's own judicial system can be inferred by the Tohono O'odham Constitution's preamble, which recognizes the "sovereign powers, authority, and jurisdiction of the Tohono O'odham Nation and of its government." TOHONO O'ODHAM CONST. pmbl. This sovereign protection can also be gathered from Article I of the Tohono O'odham Constitution, which states that the sovereign powers, authority and jurisdiction of the Tohono O'odham Nation extend to all Tohono O'odham lands and all people and activities carried out within that land. *Id.* at art. I. Sovereign immunity is reaffirmed in the Civil Actions Chapter of the Tohono O'odham Code which states that "[n]othing in this chapter shall be construed as a waiver of sovereign immunity of the Tohono O'odham Nation." 4 T.O.C. § 1-106.

Who then, has authority to waive the Tohono O'odham Nation's sovereign immunity? To examine how other multi-branch governments address this question, we will look to United States procedures for waiver of sovereign immunity.

Both the United States' federal and state systems recognize a legislature's authority to waive a government's sovereign immunity from suit. In the United States federal system it is the Congress. *McGuire v. U.S.*, 550 F.3d 903, 913 (9th Cir. 2008). In many states it is only the legislative body. *See e.g. Murray v. Missouri Highway and Transp. Com'n*, 37 S.W.3d 228, 235 (Mo. 2001); *Vincent v. Prince George's County*, 157 F.Supp.2d 588, 594 (D. M.D. 2001); *Alewine v. State*, 803 P.2d 1372, 1375 (Wyo. 1991); State of Ohio v. Madeline Marie Nursing Homes No. 1 and No. 2, 694 F.2d 449, 460 (6th Cir. 1982). This is also true in Arizona, as dictated by Article IV of the Arizona Constitution. A.R.S. Const. art. 4, § 18; *City of Phoenix v. Fields*, 201 P.3d 529, 571 (Ariz. 2009).

The Tohono O'odham trial court in *United Linings, Inc. v. Vi-Ikam Industries* called on the Legislative Council to enact a sovereign immunity statute, stating "the Nation's Constitution vests the Council with ample authority to enact legislation . . . preventing the Nation's courts from entertaining suits against the tribe." 2 TOR3d, at 45.[1] In enacting the Sovereign Immunity Law on April 6, 2010, the Legislative Council acted on the Court's encouragement. The statute

[1] This Court subscribes to parts of the Court's reasoning in *United Linings, Inc. v. Vi-Ikam Industries* without discussing the merits of the case or concurring with that Court's conclusion that sovereign immunity was waived.

reaffirms the tribe's sovereign immunity and dictates that such immunity can be waived only by a resolution or other official act of the Legislative Council. 1 T.O.C. § 2101(C). Such waiver must be expressly granted in a separate writing. *Id.*

Although this Court will not rule on the constitutionality of the Sovereign Immunity Law today, the statute does serve as persuasive evidence that the Legislative Council intended to uphold Tohono O'odham common law adopting a broadened version of the U.S. *Ex Parte Young* doctrine, which will be discussed in more depth in Part (I)(B)(iii). The Sovereign Immunity Law reaffirms that "sovereign immunity does not preclude . . . lawsuits brought against the Nation . . . for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation." 1 T.O.C. § 2101(A). The Sovereign Immunity Law should be read in conjunction with the Tohono O'odham Code, which defines persons able to waive sovereign immunity through conduct as "any other group of individuals acting in concert; a government, any of its political subdivisions . . . ." 4 T.O.C. §1-101 c.3. The Sovereign Immunity Law's attempt to waive sovereign immunity for the Nation should be read to include political subdivisions, including governmental branches. The Sovereign Immunity Law, read in conjunction with the Tohono O'odham Code, indicates that the Legislative Council supports Tohono O'odham common law allowing suit against governmental entities, including governmental branches, for injunctive or declaratory relief.

Some courts have also held that a government's simple act of voluntarily intervening in a case effectively waives its sovereign immunity. *See, e.g., Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 289 n. 10 (1959) (stating that when a state voluntarily intervenes in a case, it waives its sovereign immunity); *State of California v. Taylor*, 535 U.S. 553 (1957) (a state's intervention in an action brought against the National Railroad Adjustment Board served as a voluntary submittal of the state to the federal court's jurisdiction); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916); *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914); *McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) (stating that initiation of a lawsuit by the tribe established consent to the court's adjudication over the merits for that particular controversy); *Wyandotte Nation v. City of Kansas*, 200 F.Supp.2d 1279, 1284 (D. Kan. 2002) (holding that the tribe waived sovereign immunity by bringing suit). This line of cases is not to be confused with the line that holds a tribe does not waive its sovereign immunity for counterclaims that could not otherwise be brought against the tribe simply because they are pleaded in a case filed by a tribe. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509

(1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (9140). In the second case, the court is protecting tribes' sovereign immunity in situations where they have voluntarily submitted to suit and an opposing party attempts to bring other claims under the court's jurisdiction.

The Tohono O'odham Code bolsters the assertion that voluntary intervention acts as a waiver of sovereign immunity. The Code provides that civil jurisdiction of the Court shall extend to "[a]ny person who consents to the jurisdiction of the Tohono O'odham Court whether expressly, by filing an action, by appearing as a defendant, or in any other manner . . . ." 4 T.O.C. §1-101 b. 9. As discussed above, the Code defines persons to include "any other group of individuals acting in concert; a government, any of its political subdivisions . . . ." *Id.* at c.3. Voluntary intervention may qualify as either "appearing as a defendant" or as consenting to the Court's jurisdiction "in any other manner." Additionally, a governmental branch is encompassed within those entities that may consent to civil jurisdiction through conduct.

Here, the Legislative Council is voluntarily submitting itself to the court's jurisdiction regarding the very issue at the heart of this case, the constitutionality of the Courts and Procedures Law. Whether the Legislative Council's act of inserting itself into the litigation serves as a waiver of sovereign immunity or not, it does serve as evidence of the Legislative Council's intent to disallow sovereign immunity from barring this kind of suit.

By a separate analysis, this case does not implicate sovereign immunity, because Tohono O'odham common law has adopted a broader reading of the U.S. *Ex Parte Young* doctrine. Therefore, waiver of sovereign immunity is not necessary. However, the Legislative Council, a body of government recognized as holding the power to waive the Nation's sovereign immunity, has passed a statute upholding this common law doctrine and has attempted to intervene in a case implicating this doctrine. These acts serve as persuasive evidence of the Legislative Council's intent to reaffirm this common law doctrine, allowing suits for injunctive or declaratory relief against the Nation's governmental entities acting outside the scope of their constitutional authority.

ii. The party bearing the burden of establishing the Court's subject matter jurisdiction over the Legislative Council's waiver rests on whether the Legislative Council is an indispensible party.

The party seeking to invoke the court's jurisdiction bears the burden of establishing subject matter jurisdiction over all parties. *United Linings, Inc. v. Vi-Ikam Industries*, 2 TOR3d, at 43; *Juan v. Juan*, 2 TOR3d, at 63; *Parraz v. Desert Diamond Casino*, 2 TOR3d 61, 61-62 (Trial Ct.,

Jun. 30, 1999) (dismissing because plaintiff did not prove the defendant tribe's waiver of sovereign immunity). Establishing waiver of sovereign immunity is an essential element of establishing subject matter jurisdiction over a party possessing such immunity. *Smith v. U.S.*, 507 U.S. 197, 197 (1993); *Juan v. Juan*, 2 TOR3d, at 63.

This case is different than most joinder cases that come before courts. Often, a governmental entity attempts to prove that its presence in litigation is necessary and that it is an indispensable party according to Rule 19 of the Federal Rules of Civil Procedure[2], but that joinder is not feasible due to lack of subject matter jurisdiction caused by the governmental entity's sovereign immunity. *See, e.g., Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2nd Cir. 2010); *United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.2d 1161 (9th Cir. 1993); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F.Supp. 791 (D. D.C. 1990).

Rule 19(a) states that a necessary party must be included in litigation. Ariz.R.Civ.Pro. Rule 19(a). Rule 19(b) lists factors to consider when determining whether a necessary party, whose joinder is not feasible, is also an indispensable party, meaning that litigation cannot continue without the party's presence in the case. When considering whether a necessary party is also indispensable to the action, a court should consider 1) whether a judgment rendered in the party's absence might prejudice the party or an existing party, 2) whether prejudice could be lessened by relief or measures alternative to dismissal, 3) whether a judgment rendered without the party would be inadequate, and 4) whether the plaintiff would have an adequate remedy if the action were dismissed. Ariz.R.Civ.Pro. Rule Rule 19(b). When a party is deemed to be both necessary and indispensable, but joinder cannot be accomplished because the intervening party's sovereign immunity would remove the court's subject matter jurisdiction, the case must be dismissed.

In the present case, the Legislative Council has not asserted that it is a necessary and indispensable party nor that sovereign immunity precludes its being joined in the case, but has instead asserted its right to intervene under Rule 24. However, Committee notes from the 1966 Amendment to Arizona Rules of Civil Procedure Rule 24 indicate that Rule 24 should be read in conjunction with Rule 19[3] and case law has recognized the possibility that a party possessing a

[2] *Macpherson v. Taglione*, 762 P.2d 596, 598 (Ariz. App. 1988) ("[s]ince the Arizona Rules of Civil Procedure were adopted from the Federal Rules of Civil Procedure, Arizona courts should give great weight to the interpretation given to similar federal rules.").

[3] It is unclear whether these Committee Notes imply that a statutory right to intervene under Rule 24 should be read in conjunction with Rule 19. The Committee Notes simply state that a petitioner is entitled to intervene under Rule 24 when his situation is comparable to a person under Rule 19(a)(2)(i), which establishes when a party is necessary to the litigation.

statutory right to intervene under Rule 24 may also be an indispensable party under Rule 19. *Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519 (1947). Therefore, it seems that, the Council's statutory right to intervene under Rule 24 could qualify the Council as a Rule 19 necessary, and possibly indispensable, party. If the Court recognized the Legislative Council's right to intervene pursuant to the Sovereign Immunity Law, and that the Legislative Council was an indispensable party, the Judicial Branch would bear the burden of establishing the Court's subject matter jurisdiction over the Legislative Branch in order to avoid dismissal.

However, we have chosen to reserve the question of the constitutionality of the Sovereign Immunity Law for another day and instead grant the Legislative Council a general permissive intervention. Therefore, this Court does not address whether the Legislative Council is a necessary and indispensable party under the Sovereign Immunity Law.

When a party is intervening permissively, the intervening party must show an independent ground for jurisdiction. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). This is because joinder of the party is not necessary, and the court may use its discretion not to join the party if joinder would upset subject matter jurisdiction. Therefore, in this instance, the Legislative Council bears the burden of showing that sovereign immunity does not bar the court from exercising subject matter jurisdiction over it. In granting permissive intervention, the Court bases part of its reasoning on the fact that the Attorney General and Executive Branch have no real interest in defending the law. Respondent-Applicant's Supplemental Brief on Legislative Immunity and Traditional Dispute Resolution, 5 (Sept. 28, 2009). This unique fact pattern does not set precedent making the Legislative Council a necessary or indispensable party in later actions challenging the validity of any of the Nations' laws as enacted by the Legislative Council.

iii. This case does not implicate sovereign immunity.

In *Ex Parte Young*, the Court permitted an injunctive action in federal court against the Minnesota attorney general to prohibit him from enforcing an allegedly unconstitutional statute. 209 U.S. 123 (1908). The Court reasoned that the 11th Amendment, the amendment in the U.S. Constitution prohibiting suits against state governments, did not apply in injunctive actions against a government actor acting outside the scope of his constitutional authority. *Id.* at 159-60 ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or

representative character and is subjected in his person to the consequences of his individual conduct.") In order to sue a government official under the *Ex Parte Young* doctrine, "such officer must have some connection with the enforcement of the act." *Id.* at 157.

A broader version of the U.S. *Ex Parte Young* doctrine's exception to the sovereign immunity bar was directly incorporated into Tohono O'odham common law in *Tohono O'odham Advocate Program v. Norris*, where the plaintiff was not barred by sovereign immunity from suing members of the judicial branch because the matter involved declaratory or injunctive relief. *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d, at 61. The Court cited directly to *Native Village of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir. 1994), a Ninth Circuit opinion, for its assertion that "sovereign immunity is not a bar to declaratory or injunctive relief." *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d, at 61. *Native Village of Noatak v. Blatchford* held that U.S. sovereign immunity did not bar claims for prospective relief, either injunctive or declaratory, against state officials acting in their official capacity. 38 F.3d 1505, 1511-12, 1513 (9th Cir. 1994). In asserting that a state's sovereign immunity does not bar suits for injunctive relief against state officers in their official capacity, the Court in *Native Village of Noatak v. Blatchford* cited directly to *Ex Parte Young*. *Id.* at 1511. Thereby, in citing to *Native Village of Noatak v. Blatchford*, which relied on *Ex Parte Young*, the Court in *Tohono O'odham Advocate Program v. Norris* incorporated a modified version of the U.S. *Ex Parte Young* doctrine into its jurisprudence.

Tohono O'odham courts, before explicitly adopting this evolved *Ex Parte Young* doctrine in *Tohono O'odham Advocate Program v. Norris*, have allowed suits for many years against government officials for prospective relief when the court deemed such officials to be acting outside the bounds of their constitutional authority. In *Francisco v. Toro*, an injunctive action, the Court examined whether the Legislative Council was acting outside the scope of its legislative authority in enacting specific regulations. 1 TOR3d 68. Similarly, in *Francisco v. Legislative Council*, another injunction case, the Court examined whether the Legislative Council was acting within the scope of its constitutional authority in removal proceedings against the Chairman and Vice Chairman of the Nation. *Francisco v. Legislative Council*, 1 TOR3d 76 (Trial Ct., Mar. 7, 1989) *appeal dism'd*, 2 TOR3d 14 (Ct.App., Oct. 5, 2004). Again, in *Tohono O'odham Legislative Council v. Manuel*, the Court examined whether the Chairman acted outside the scope of his constitutional authority in calling the Legislative Council to a

special session. *Tohono O'odham Legislative Council v. Manuel*, 2 TOR3d 64 (Trial Ct., Oct. 18, 2000).

Each of these cases employs the basic elements of the *Ex Parte Young* doctrine, allowing suits for injunctive or declaratory relief against government officials deemed to be acting outside the scope of their constitutional authority. In employing the U.S. *Ex Parte Young* sovereign immunity exception, Tohono O'odham common law has slightly altered the doctrine, allowing plaintiffs to bring suit against groups of government officials to be sued in their official capacity, rather than limiting plaintiffs to suing just one government figure. This can be seen in *Francisco v. Toro*, and even more clearly in *Francisco v. Legislative Counsel*. In *Francisco v. Toro*, the plaintiff named the Chairperson of the Legislative Council, as well as the Council itself, as a defendant. 1 TOR3d 68. However, in analyzing the case, the Court examined whether the Legislative Council, as a group of government officials, was acting outside the scope of its constitutional authority. *Id.* In *Francisco v. Legislative Council*, the plaintiff simply named the Legislative Council itself as the sole defendant and the Court analyzed whether it, as a governmental entity, was acting outside the bounds of its constitutional authority. 1 TOR3d 76. *Cf. Imperial Granite v. Pala Band of Mission Indians*, 940 F. 2d 1269 (9th Cir. 1991).

Tohono O'odham common law has adopted a modified version of the U.S. *Ex Parte Young* doctrine which does not limit suit to individual governmental officials. Instead, plaintiffs are free to bring suit against groups of governmental officials, including entire branches of government, for injunctive or declaratory relief if they are acting outside the scope of their constitutional authority and within their official capacities. This Court adopts a bright line rule, explicitly recognizing this doctrine as valid within the Tohono O'odham judicial system. Perhaps, it should be called, henceforth, the *Ex Parte Norris* doctrine.[4]

Here, the Judicial Branch asks for injunctive relief against a statute enacted by the Legislative Council. The Judicial Branch brought suit against "the Tohono O'odham Nation Executive Branch through the office of the Chairman of the Tohono O'odham Nation," a government official charged with the authority to implement and defend the law. Amended Petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction, 1 (Jan. 26, 2009). Additionally, the chairman has recognized that, although he vetoed the law, his veto was overridden by the Legislative Council, and therefore "the Chairman is required by the

[4] *Ex Parte* connotes in actuality only one party seeking relief from the Court and, to be true to its sense, should not necessarily be employed when multiple litigants are embedded in the litigation. A more literally correct nomenclature would express the litigation as *In Re.* Nevertheless, the Court uses the phrase here to mean the "concept" of injunctive or declaratory relief envisioned in cases such as the one now before us.

Constitution to oversee and implement this law." Respondent's Response Brief, 4 (Jan. 21, 2009). According to the Judicial Branch, the Courts and Procedures Law is unconstitutional, and enforcement of such law by the Chairman falls outside the scope of his constitutional authority. Additionally, the Legislative Council, as discussed in Part (I)(A)(i), also possesses authority to ensure the Nation's laws are implemented. Although the entire Legislative Council asks to intervene as a defendant, rather than a single government official, Tohono O'odham common law has altered the U.S. *Ex Parte Young* doctrine, allowing injunctive or declaratory suits against groups of governmental officials acting in their official capacities. Accordingly, this case does not implicate the Nation's sovereign immunity and the Court has subject matter jurisdiction over all parties.

C. Judicial Branch's Motions

Petitioner's Motion for Summary Judgment, Consolidated Motion for Judgment on the Pleadings and Request to File Interloculatory Appeal are inappropriate vehicles for challenging the Court's grant of permissive intervention to the Legislative Council. For this reason, each motion is denied. Additionally, the Court has granted the Legislative Council general permissive intervention, recognizing that the Court has subject matter jurisdiction over the Legislative Council. Therefore, the arguments the Judicial Branch raised in its motions are no longer applicable.

Rule 56 governs petitioner's motion for summary judgment. Ariz.R.Civ.Pro. Rule 56. A motion for summary judgment is proper when a party seeks "to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment." Ariz.R.Civ.Pro. Rule 56(a). The Judicial Branch seeks summary judgment on the Legislative Council's motion to intervene, rather than on its own original petition for declaratory relief. A motion to intervene does not qualify as a claim and, therefore, summary judgment on such motion is inappropriate and the Judicial Branch's summary judgment motion must be dismissed.

Rule 12 governs petitioner's motion for judgment on the pleadings. Ariz.R.Civ.Pro. Rule 12. Judgment on the pleadings is limited to matters within the pleadings. Pleadings are defined as a complaint or an answer, a reply to a counterclaim, an answer to a cross-claim that contains a cross-claim, a third-party complaint if a person was summoned under Rule 14, or a third-party answer if a third-party complaint is served. Ariz.R.Civ.Pro. Rule 7(c). A motion, such as a motion to intervene, is not a pleading. *Mallamo v. Hartman*, 222 P.2d 797, 798 (Ariz. 1950). Additionally, the purpose of a motion on the pleadings is to test the sufficiency of the complaint.

Giles v. Hill Lewis Marce, 988 P.2d 143, 144 (Ariz. Ct. App. 1999). Again, this vehicle is inappropriate because a motion to intervene does not qualify as a pleading. The Judicial Branch's motion for judgment on the pleadings must be dismissed.

Petitioner's request for interlocutory appeal is governed by Rule 14 of the Tohono O'odham Rules of Appellate Procedure. Rule 14 provides an avenue for parties to "appeal an action or an order of the lower court which is not a final judgment." T.O. Rules of Appellate Procedure Rule 14. A request for interlocutory appeal is only appropriate for final orders. 25 Fed. Proc., L. Ed. § 59:444 (2010). Neither the Court's decision to deny reconsideration of intervention, or the grant of intervention itself, are appropriate subjects for interlocutory appeal. *See Elliot v. White Mountain Apache Tribe*, WMATCA: C-03-97 (2006) (dismissing an interlocutory appeal because denial of a motion to dismiss does not constitute a final decision or order); 15 A.L.R. 2d 336 § 2(c) (2010) ("Most courts hold that an order granting the right of intervention is not appealable, since obviously any of the original parties to the proceedings may appeal from an adverse decision granting the intervener relief on the merits, and in such a situation procedural economy requires that only the latter appeal be permitted."). Instead, the proper procedure would be to appeal the final judgment of the case. 25 Fed. Proc., L. Ed. § 59:444 (2010).

However it should be noted that the Tohono O'odham interlocutory rule is broader than other jurisdictions' rules. Rule 14 allows for a party to appeal not just final decisions and orders, but "actions." T.O. Rules of Appellate Procedure Rule 14. The Merriam-Webster dictionary defines "action" as "the initiating of a proceeding in a court of justice by which one demands or enforces one's right" as well as "the proceeding itself." Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/action (last visited Oct. 14, 2010). The plain meaning of Rule 14 indicates that the "action" eligible for interlocutory appeal is the original claim brought by the plaintiff, not an intermediate motion to reconsider a grant of intervention.

Additionally, Rule 14 does not impose a duty to approve the request for permission to appeal upon the Court. Instead, it simply requires the lower court to "issue its order granting or denying the request." T.O. Rules of Appellate Procedure Rule 14(d). The Court has ruled that it has subject matter jurisdiction over the Legislative Council and has granted permissive intervention. Therefore, in its discretion and due to the inappropriate use of interlocutory appeal, it denies the Judicial Branch's request.

Each of the Judicial Branch's motions and its request for interlocutory appeal are denied. The Judicial Branch's motions and request are procedurally inappropriate and arguments it made

pertaining to lack of subject matter jurisdiction over the Legislative Council are no longer applicable.

II. Jurisdiction

A. This case does not involve a non-justicible political question.

Political questions, or issues reserved for the political branch, are non-justicible in the U.S. judicial system. *Coleman v. Miller*, 307 U.S. 433, 450 (1939). "The nonjusticiability of a political question is primarily a function of the separation of powers," because it is based on the rationale that issues reserved for the political arena should not be decided by the judiciary. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Therefore, the validity of the political question doctrine in the Tohono O'odham judiciary hinges partially on the outcome of this case. However, for the time being, we will proceed as if the Tohono O'odham Constitution establishes a distinction of powers sufficient to trigger the political question doctrine in Article IV, which calls for "three independent branches" of government. TOHONO O'ODHAM CONST. art. IV.

A case presents a non-justicible political question when 1) the issue has been demonstrated textually to be commitment to a coordinate political department, 2) there lacks a judicially discoverable and manageable standard for resolving the issue, or 3) judicial resolution of the issue may result in embarrassment due to multiple departments answering the same question. *Goldwater v. Carter*, 444 U.S. 996, 998-1000 (1979). Whether the issue has been committed to a political branch is of primary importance to the analysis. *Powell v. McCormack*, 396 U.S. 486, 519-20 (1969). A true conflict must exist and the "mere possibility of political overtones inconveniencing petitioner's claim does not amount to inextricable textual commitments." *Los Angeles County Bar Ass'n v. EU*, 979 F.2d 697, 702 (9th Cir. 1992).

The issue in the present case is whether the Courts and Procedures Law is unconstitutional, in that it encroaches on power the Constitution reserves for the Judicial Branch. The Tohono O'odham Constitution clearly vests the Judicial Branch with authority to review the Nation's laws when they are alleged to be unconstitutional. TOHONO O'ODHAM CONST. art. VIII § 10(b). The Courts and Procedures Law is alleged to be unconstitutional due to its encroachment on powers reserved to the Judicial Branch. The judicial standard for distinction of powers issues has been clearly delineated in *Francisco v. Toro*. 1 TOR3d, at 71-72. Last, the authority to render laws unconstitutional is reserved specifically to the Judicial Branch, so there is no harm of embarrassing other branches of government by a contradicting decision. TOHONO O'ODHAM

CONST. art. VIII § 10(b). The issue of whether the previously enacted Courts and Procedures Law is unconstitutional due to its usurping judicial authority is not a political question.

B. The present case does present a case or controversy.

Article III of the U.S. Constitution restricts federal courts to the resolution of cases and controversies. *Davis v. Federal Election Com'n*, 128 S.Ct. 2759, 2768 (2008). A plaintiff that claims his interest in the proper application of the Constitution and laws has been harmed, and who is seeking relief that does not directly benefit him more than it would benefit the general public, does not state a case or controversy under Article III of the U.S. Constitution. *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (U.S. 2007).

i. The Judicial Branch does have standing to bring suit.

Derived from the case or controversy requirement is the requirement that a person have standing to bring suit. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 27 (1976); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Whitmore v. Arkansas*, 495 U.S. 149 (1990). A party has standing if it is the proper person or entity to bring an action for adjudication. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A party meets the U.S. Constitution's standing requirement by showing that it personally suffered an actual or threatened injury as a result of illegal conduct. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The U.S. judicial system has constructed a three-part test to determine whether a plaintiff has standing. First, a party must show that it suffered an injury in a personal way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Second, there must exist a causal connection between the injury felt by the party and the illegal conduct complained of. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Last, it must be likely, rather than speculative, that a favorable decision will address the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The Tohono O'odham Constitution does not possess a case or controversy clause. Instead, Article VIII of the Constitution grants the Judicial Branch broad jurisdiction to hear cases. TOHONO O'ODHAM CONST. art. VIII § (2) (power extends to cases and matters arising under the Tohono O'odham Constitution, laws, ordinances and Tohono O'odham customs). Additionally,

Tohono O'odham custom values inclusiveness and the broad ability for individuals to bring grievances. *In Re: Petition of the Judicial Branch*, 3 TOR3d 81; Respondent's Supplemental Pleading (September 28, 2009); Petitioner's Brief, 14 (Sept. 28, 2009).

Accordingly, Tohono O'odham courts have dealt with standing requirements in distinction of powers cases differently, because standing is not specifically prescribed by the Constitution. A plaintiff has satisfied the Tohono O'odham three-part test for standing in a distinction of powers case when he is 1) a duly authorized head of a governmental branch, *Francisco v. Toro*, 1 TOR3d 68 (allowing the case to go forward with the Chairman alleging that actions taken by the Legislative Council encroached on constitutionally protected Executive Branch interests), 2) that has been authorized to assert an invasion of a constitutionally protected branch interest, *Tohono O'odham Legislative Council v. Manuel*, 2 TOR3d 64 (stating that the Legislative Council could claim encroachment on its constitutional authority by the Executive Branch if it properly delegated authority to the Legislative Chairman to act as its representative), 3) if the court has authority to fashion a remedy to redress the injury, *Francisco v. Legislative Council*, 1 TOR3d 76 (stating that a party's asserted interest in an intra-governmental suit must be protected by the Tohono O'odham Constitution and that the Court have the authority to grant the relief requested).

In the present case, the Chief Judge of the Judicial Branch, a duly authorized head of a governmental branch, initiated litigation. She asserts that the Legislative Branch has usurped the Judicial Branch's constitutional powers to set court procedures, has violated the constitutional clause stating that judicial pay may not be lowered and has violated the independent branch clause. Judicial pay, an asserted branch interest protected by the Tohono O'odham Constitution, has been considered of extreme importance for preserving the independence of the judiciary. *Evans v. Gore*, 253 U.S. 245, 248-49 (1920) (stating that the rule against the diminishment of judicial pay is meant to free the judiciary from coercion from other branches). If the Court finds that the Legislative Council has violated the Tohono O'odham Constitution by usurping the Judicial Branch's powers or by violating the rule against diminishment of judicial pay, the Court may declare portions of the statute unconstitutional and void, providing a remedy for the Judicial Branch. The Judicial Branch has, therefore, met the more inclusive standing threshold for Tohono O'odham courts.

ii. Petitioner's arguments are ripe for review.

Ripeness is again a function of the case or controversy requirement found in Article III of the U.S. Constitution, but "while standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). Plaintiffs must experience an injury or immediate threat of harm in order for their arguments to be ripe. *In the Matter of the Constitutionality of NCA* 98-02, No. SC-99-02 (Aug. 19, 1999). This harm must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 496 U.S. 149, 155 (1990)). Declaratory judgments also require "concrete legal issues, presented in actual cases." *United Public Worker v. Mitchell*, 330 U.S. 75, 89 (1947).

Although the Judicial Branch succeeded in obtaining an emergency injunction, preventing portions of the Courts and Procedures Law from taking effect until the Court determines whether they are constitutional, the Judicial Branch has adequately plead that it is facing imminent harm sufficient to satisfy its ripeness requirement. The Judicial Branch waited until the Courts and Procedures Law had been duly enacted through the legislative process to file its claim. Additionally, had the Judicial Branch failed to file its claim, just days later it would have been required to submit certifications showing that no cases had been pending more than 60 days pursuant to the Courts and Procedures Law. This provision would place conditions on the Judicial Branch's compensation, which the Judicial Branch alleges are in violation of the Tohono O'odham Constitution. TOHONO O'ODHAM CONST. art. VIII § (9). Additionally, just days after filing the claim, the Judicial Branch would have been in violation of publication and meeting requirements set out in the Courts and Procedures Law. These proscriptions are, again, alleged to be in violation of the Judicial Branch's constitutional right to create courtroom proceedings. TOHONO O'ODHAM CONST. art. VIII § (10)(d). The Judicial Branch's arguments are ripe.

Conclusion

The Court has adequately answered the five questions it posed in its March 11, 2010 Order.

1) In the Tohono O'odham Nation, the Legislative Council has authority to waive sovereign immunity for the Nation and did so for cases challenging the validity of the Nation's laws in its Sovereign Immunity Law. However, this Court defers a ruling on whether that law is or is not constitutional.

2) Sovereign immunity is not implicated in this case. Rather the matter involves a suit against a government official, the Chairman of the Nation, with the Legislative Council intervening, to

enjoin him from enforcing an allegedly unconstitutional law, an action that would be outside the scope of his constitutional authority. Such cases do not implicate sovereign immunity.

3) This case does not involve a non-justicible question. The Judicial Branch possesses sole constitutional authority to decide the constitutionality of the Nation's laws.

4) There does exist a case or controversy. The Judicial Branch, in a case brought by the Chief Judge, alleges that its constitutional authority is being usurped and that its constitutional right to undiminished pay is being violated, and a declaration that the Courts and Procedures Law is void would provide relief to the Judicial Branch.

5) Petitioner's arguments are ripe for review. The Courts and Procedures Law was duly enacted through the legislative process and, if not for the emergency injunction, would currently be affecting the Judicial Branch's alleged independent constitutional rights. According to the Judicial Branch's pleadings, harm alleged by the Judicial Branch is imminent.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT

TOHONO O'ODHAM NATION, Petitioner,
v.
D. A. T., Jr., Respondent Child.

Case No. 2009-0302-0309COP; 2009-031209314COP

Decided November 15, 2010

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Petitioner.
Tohono O'odham Advocate Program by William Callaway, Attorney for Respondent Child.

Before Judge Violet Lui-Frank.

This matter came for hearing on October 6, 2010 on the Respondent's Motion for Revocation of Detention Order. Eric L. Hager, Assistant Chief Prosecutor, appeared for the Nation. William Callaway, attorney for Respondent Child, from the Tohono O'odham Advocate Program, appeared.

The issue is whether the Tohono O'odham Nation is prohibited by the Indian Civil Rights Act [the ICRA], specifically, 25 U.S.C. sec. 1203(7), from imposing more than one year for all the offenses for which the Respondent is being held pending adjudication. Respondent seeks immediate release pending adjudication because he has been in custody since August 15, 2009, and the total time in custody at the time of the hearing was 417 days. He argues that, if he is

adjudicated a child offender for the offenses charged, he cannot be required to serve more than one year for all the offenses; that he has been held for more than one year; and, therefore, he should be released immediately.

25 U.S.C. sec. 1302(7) provides:

> No Indian tribe in exercising powers of self-government shall (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [sic] a fine of $5,000, or both;

Respondent cites a United States District Court decision, Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005), for the proposition that 25 U.S.C. sec.(7) means that the one year limitation on sentences imposed by tribes applies to all offenses charged in an incident, that is, the most that a defendant or child offender could serve is one year, no matter how many separate offenses were proven in a single criminal event. In the Arizona federal courts, one District Court decision, Miranda v. Nielsen, et al., No. CV-09-8065-PCT-PGR (ECV), is in accord with Spears, but another District Court Judge rejected the reasoning of Spears, holding there was no ambiguity in the phrase "any one offense" of 25 U.S.C. sec. 1302 (7), Bustamante v. Valenzuela, et al., CV-09-8192-PCT-ROS. In New Mexico, a United States Magistrate Judge agreed with the decision in Miranda v. Nielsen.

The Nation's argument is in line with the Bustamante decision, and presents the case law supporting the holding that "one offense" is not ambiguous and means what it says.

This Court now finds that there is no ambiguity in the phrase "any one offense", and there is no need to engage in contortions of construction that create a result contrary to Congress' express language in sec. 1302(7) of the Indian Civil Rights Act. If the Nation is able to prove the charges, the Respondent Child can be subject to dispositions that may amount to several years.

The Court is concerned about the amount of time pending the scheduling of the adjudication, but the record is clear that the investigation and the involvement of federal authorities have delayed access to the evidence for the prosecution and the Respondent Child. In addition, release under conditions was considered again on July 28, 2010, but the Respondent was not able to provide sufficient assurances that the Respondent would comply with release conditions.

IT IS ORDERED denying the Motion for Revocation of Detention Order.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Michael Thomas LEWIS, Defendant,

Case No. 2010-2896-2899CR

Decided December 14, 2010.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.

Before Judge Rachel Frazier Strachan.

On December 16, 2010, a hearing on the Nation's Motion for Change of Judge for Cause filed on November 22, 2010. Legal counsel for the Nation, Eric Hager and the Defendant were present. The court heard argument regarding the motion from both parties. The court took the matter under advisement.

The court has considered the parties' arguments, the Tohono O'odham Administrative Order 01-09, Sections II(A) and (B)[1] as well as Canon 4 of the Tohono O'odham Judicial Canons of Conduct. Based upon the foregoing, the court grants the Nation's Motion for Change of Judge for Cause and orders the matter reassigned. The basis of the court's decision is based upon the following:

First, Judge Telep is the subject of an investigation by the Tohono O'odham Police Department. Although Judge Telep claims the police department's investigation is not "adverse", Judge Telep's impartiality must be questioned. According to Canon 4(C), Judge Telep should have disqualified himself from the case.

Secondly, Judge Telep offered to have a "conference" with the Defendant in the courthouse lobby to discuss the Defendant's conditions of release. Judge Telep said the following,

And you can drop that [request to speak with the court] off and actually, we don't even need to set that in for a hearing. You can just make a request to speak to me and bring it into the court, bring it out in the lobby and they'll let me know and I'll come out and have a conference with you, and take a look at it and then if we need to we'll have a hearing regarding any modifications of the conditions of your release. (Emphasis added.)

[1] *Ed. Note.* Administrative Order 01-09 was amended and incorporated into the Tohono O'odham Rules of Court.

Judge Telep clearly stated that the matter did not need to be set for a hearing but that he would have a "conference" with the Defendant to discuss the Defendant's conditions of release. Such communication between the judge and the Defendant is an ex parte communication and prohibited.

In addition, Judge Telep made comments during an October 15, 2010 hearing relating to the Defendant's conditions of release. Statements made by Judge Telep indicate that he has a personal bias against the alleged victim in the instant case. Judge Telep stated during the hearing, But, you, you Mr. Lewis you have to, you have to, you have, if, but, you know that the ball's in your court. You have to take the initiative to make sure that you don't have any contact with her 'cause she's gonna get you in trouble. That's just my perception. If what you're telling me is true, and I have no reason to doubt it, my perception is that is the type of person she is". (Emphasis added.)

During the same hearing, Judge Telep also said,

And I had you, Mr. Lewis, get a hold of your friends, get a hold of her, which they did. And she had the opportunity to be here today and give testimony regarding the conditions of your release. So everybody's had ample notice that this hearing is going on today." Moreover, Judge Telep, Jr. declared during the same hearing "…everybody's had ample notice that this hearing is going today. And when the victim blows off the court, my sympathy for the victim isn't as strong as it used to be". (Emphasis added.)

Judge Telep's biasness is displayed when he commented that the alleged victim had "blown off" the hearing although Judge Telep did not give the alleged victim proper notice of the hearing. Instead, Judge Telep relied upon the Defendant and his friends to notify the alleged victim of the hearing. Furthermore, Judge Telep made reference to the "type of person" the alleged victim is and would get the Defendant "in trouble".

In accordance with Administrative Order 01-09II(B), this court finds Judge Telep's actions in this matter and statements provide sufficient facts to establish that he has an actual bias and personal interest against the Nation's witnesses which prevent him from being impartial. The court further finds that the instant matter is assigned to Judge Telep and the Nation's motion was timely filed.

Based upon the foregoing, and good cause appearing,

IT IS ORDERED that the Nation's motion is granted. Thus, Judge Telep is disqualified for cause from presiding over the instant matter.

IT IS ALSO ORDERED that at Chief Judge Rose Johnson Antone's discretion, another judge be assigned to this case.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided May 18, 2011.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

The Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch, through the office of the Chairman of the Tohono O'odham Nation, from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law") by amended petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction. The Emergency Preliminary Injunction was granted through an Order, filed January 6, 2009, and modified January 28, 2009. The Legislative Council of the Tohono O'odham Nation filed a motion to intervene in the litigation on January 21, 2009 and in its March 11, 2010 Order, the Court granted limited intervention. In the October 26, 2010 Order, the Court determined that it has jurisdiction to address the ultimate issue, the constitutionality of the contested portions of the Courts and Procedures Law. The parties have since filed briefs on the merits. The legal conclusions and accompanying rationales of all prior orders in this proceeding are thereby incorporated into this Order.

At this time, the Court will address the underlying substantive matters of the case, namely the constitutionality of Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C) of Resolution 08-704, hereafter the "Courts and Procedures Law."

Choice of Law

The parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent

Arizona law. The Court agrees, noting that the use of foreign law will be considered if it aligns with Tohono O'odham custom, which fosters a spirit of inclusiveness—a spirit this Court emphasized in its March 11, 2010 and October 26, 2010 Orders.

Jurisdiction

The Court has jurisdiction to hear Petitioner's Amended Petition under Article VIII of the Tohono O'odham Constitution and the October 26, 2010 Order.

Discussion

I. Constitutionality of Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C) of the Courts and Procedure Law

This controversy revolves around the constitutionality of several provisions enacted as part of the Courts and Procedures Law: Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C).

The contested portion of Section 1102(B)(1) addresses the judicial calendar and provides that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once every calendar quarter until the final, written judgment is entered."

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount

> equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

Section 1106(B) addresses the application of court rules and provides that:

> [i]n order to ensure that all persons appearing before the Court are guaranteed equal protection and due process of the law, the application of the rules of court shall not be discretionary but shall be applied by all judges to the matters before the Court. Court rules promulgated by another jurisdiction or entity and adopted by the chief judge that directly conflict with a Tohono O'odham Nation law or Judicial Court rule or order shall be inapplicable.

Section 1106(C) concerns the publication of court rules. Its contested language states that "[a]ll court rules shall be compiled in a single volume, shall be made available to the public in electronic and paper formats, and be distributed to all persons who practice before the Judicial Court."

Similarly, Section 1107(C) sets out procedures for publishing court decisions and provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

Petitioner argues that these provisions violate both the express language of the Tohono O'odham Constitution and the related doctrine of separation of powers. Because this is a matter of constitutional interpretation, we must first review the canons of interpretation that guide this Court's analysis. As the Tohono O'odham courts have previously articulated, a constitution must be construed within the limits of the document to the extent possible. *Harvey v. Tohono O'odham Council*, 1 TOR3d 43, 46 (Trial Ct., Jan. 26, 1987). However, where a provision is not clear on its face or is susceptible of more than one interpretation, then it must be construed in light of the intent and purposes of both the framers and the people who adopted it. *Id.* Relatedly, legislative enactments are presumed to be constitutional and the burden of proof rests upon the

party asserting that a particular exercise of governmental authority is unconstitutional. *Williams v. Chukut Kuk District*, 2 TOR3d 57, 60 (Trial Ct., Jun. 9, 1999).

An additional canon, expressly utilized by other jurisdictions and implicitly embraced by Tohono O'odham courts, is that of *expressio unius est exclusio alterius*. This canon holds that "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (9th ed. 2009). Past Tohono O'odham decisions implicitly employ this canon to a degree. For example, *Williams v. Chukut Kuk District* dealt with a legislative resolution to reduce a district chairman's compensation to zero dollars in response to the chairman's failure to perform his governmental duties. *Williams*, at 57-58. That court found that because there exist constitutional provisions prohibiting the diminishment of compensation for *specified* government officials, by implication *non-specified* officials are not within the scope of that prohibition and could have their compensation diminished. *Id.*, at 60. Similarly, in *Francisco v. Legislative Council*, the court held that because the Constitution expressly provides only the Legislative Council, and no other branch, with the power of removal, this power is exclusively legislative. *Francisco v. Legislative Council*, 1 TOR3d 76, 76-77 (Trial Ct., Jul. 17, 1989) *appeal dism'd* 2 TOR3d 14 (Ct.App., Oct. 5, 2004). While this Court adopts the canon of *expressio unius est exclusio alterius* as an instructive tool of interpretation, it recognizes that the canon is of limited import and does not amount to irrefutable evidence of constitutional meaning. This is particularly true where many governmental powers go unexpressed in constitutional documents but rather are inherent to those powers expressed therein.

a. The Separation of Powers Doctrine

A critical aspect of the constitutional analysis in this case is the *related* doctrine of separation of powers. The Tohono O'odham Constitution announces that the "government of the Tohono O'odham Nation shall be composed of three independent branches:" the Council, Executive, and Judiciary. T.O. Constitution Art. IV. While the phrase "separation of powers" is not itself articulated in the Constitution, the doctrine is implied by this system of three separate and independent government branches.[1] In contrast to its predecessor—the 1937 Papago Constitution that established a single governing body—the 1986 Constitution of the Tohono O'odham Nation consciously decentralized governmental power. This decentralization of power reflects traditional Tohono O'odham governance: a system that relied on consensus of all tribal

[1] In its March 11th, 2010 Order, this Court specified its ideation of the term, "distinction of powers," given the Tohono O'odham preferences for inclusivity among its three "independent branches." Yes, of course, the powers are "separate," in ordinary nomenclature. But, the Court still wants to avoid incorporating wholesale, from other jurisdictions, foreign doctrinal analyses of the term "separation of powers."

members and diffusion of power through local decision-making. *See Francisco v. Toro*, 1 TOR3d 68, 74 (Trial Ct., Jan. 12, 1989) *appeal dism'd* 3 TOR3d 17 (Ct.App., Sep. 4, 2008).

The concept of separate, or distinct, governmental powers is not unique to the Tohono O'odham but exists in a multitude of other jurisdictions, including the U.S. federal government. In jurisdictions that adhere to the separation of powers doctrine, time and experience have demonstrated that this theoretical framework does not, and perhaps cannot, exist in a pure form. *See, e.g.*, *Francisco v. Toro*, 1 TOR3d, at 71 ("Judicial history points out…that this theoretical framework has never existed in pure form"); *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (recognizing that the powers are not "hermetically sealed" from one another). Particularly where, as in here, a newly formed constitutional government arises from deeply embedded traditional forms of governance, "[t]here must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive, and Judicial." *Toro,* at 76. While such a system necessarily creates a degree of friction between the three branches, "by means of the frictions, and reason, wisdom and self-restraint, the formation of a working government can be achieved." *Id.* Consequently, "it is imperative that the government recognize the theoretical distinction [of separate powers] but keep in mind that the formation of a viable government must depend on the cooperation and interrelationship between all three branches of government." *Id.*, at 71. Intergovernmental cooperation and interrelation strongly resonate with Tohono O'odham culture and tradition, which stress the importance of harmonious interactions and fosters a spirit of inclusiveness. *See*, *In Re: Petition of the Judicial Branch*, 3 TOR3d 81, 89 (Trial Ct., Mar. 11, 2010, appeal dism'd *In Re: Petition of the Judicial Branch*, 3 TOR3d 50 (Ct.App., Jul. 19, 2012) (discussing the *Himdag* philosophy of living—passed down to the O'odham from Íitoi—which recognizes the reality that power cannot be centralized and no matter what one does, other entities can effect one's existence). An important aspect of this O'odham ethos is the patient deliberation of all factors. *See id.* at 89 (quoting Papago activist Peter Blaine). Therefore, as we proceed with our discussion of constitutional distinction of powers, we must do so against the backdrop of these Tohono O'odham values.

The coalescence of a traditional distinction of powers doctrine with Tohono O'odham custom and tradition is exemplified by *Francisco v. Toro*. The first Tohono O'odham decision to squarely address a potential separation of powers violation, *Toro* looked at whether a council resolution directing the executive to make appointments violated the executive's constitutional power to create administrative plans. *Toro,* 1 TOR3d, at 69, 73–75. In concluding that the

Council had not, in fact, encroached upon the Executive's power, the court set up a three-prong encroachment analysis. First, the court examined the nature of the power being exercised, asking whether it is a power exclusively inherent in one branch or a blend of two branches. *Id.* at 71-72. Second, the court looked at whether the exercise was intended to act as a coercive influence or as a mere cooperative venture. *Id.* at 72. Under this step, the objective of the acting branch is important; was the action intended to aid another branch or was the acting branch declaring superiority in an area exclusively reserved to another branch? *Id.* Third, the court evaluated the practical effect of blending powers as shown by actual experience over time. *Id.* This framework, while not offering an easy bright-line rule, carefully incorporates considerations of constitutional fidelity, adherence to customary governance, and the evolution of the Tohono O'odham's nascent government. *Id.* at 69. This Court will primarily utilize the *Toro* test for the remainder of the opinion.

In order to determine whether the contested provisions amount to a violation of the separation of powers, the Court must first articulate what exactly is the power at issue. The parties have framed the underlying exercise of power in two distinct ways. According to the Petitioner, the contested provisions demonstrate an effort by the Legislature to establish judicial procedure. *See* Petitioner's Brief at 21–22. Conversely, Respondent Legislative Council views these provisions as an exercise of the Council's power to protect individual rights. *See* Respondent's Response at 3. While the Court assumes that the latter interpretation is correct, it will examine each of these powers in their own right.

b. The Right to Create Judicial Procedure Lies Exclusively in the Judicial Branch.

A central point of contention in this case is whether the power to enact judicial procedure is shared between the Judiciary and the Legislative Council, or whether the Judiciary holds this power to the exclusion of all other branches. Under Article VIII of the Constitution, the judicial branch has the power to "[e]stablish court procedures for the Tohono O'odham Judiciary." T.O. Constitution Art. VIII § 10(d). However, Article VI, which sets forth the Council's assorted powers, states that the Council has the power to "provide for the maintenance of law and order and the administration of justice." T.O. Constitution Art. VI § 1(c)(6). Petitioner argues that because the power to establish court procedure is explicitly enumerated in Art. VIII § 10(d), by implication no other branch holds this power. Petitioner's Reply at 3–4. Furthermore, Petitioner maintains that the legislative power to provide for the "administration of justice" refers only to the Council's authority to enact substantive civil and criminal law, as well as to regulate the

Nation's police force. *Id.* at 3. While Respondent does not argue that "administration of justice" implies unfettered power to enact judicial procedure, it interprets this language as authorizing legislation that directly affects judicial affairs. Respondent's Response at 4.

To determine the constitutional import of Articles VI § 1(c)(6) and VIII § 10(d), the Court must employ the canons of construction set forth above. On its face, the phrase "administration of justice" is ambiguous and could be construed broadly to include the power to enact court procedure. However, set against the specific delegation of power to create court procedure in Article VIII, it appears clear that "administration of justice" was intended by the framers to denote powers other than court rulemaking. This interpretation is bolstered by the canon of *expressio unius est exclusio alterius*—the fact that framers explicitly addressed the power to create court procedures in Article VIII implies that they considered the issue and decided to award the Judiciary this power to the exclusion of the Legislature and Executive.

An examination of both the framers' intent and underlying constitutional principles further supports this interpretation, although inconclusively. As discussed above, the Tohono O'odham traditionally maintained a decentralized form of governance and decisionmaking. By enacting the 1986 Constitution, the O'odham hoped to reinforce this decentralization of power through the establishment of a tripartite government complete with separate and independent zones of authority. Inherent in that division of power is the notion that each branch is best equipped to determine its own procedures and rules of operating. *See, e.g.*, *Francisco v. Legislative Council*, at 77 (finding that the Judiciary cannot tell the Legislative Council "when to meet, what its agenda should be or what legislation to consider"). Nevertheless, the premium placed on inclusiveness and intergovernmental cooperation, as well as the *Toro* conception of blended powers, lends credence to the notion that "administration of justice" enables the Legislature to create court procedures alongside the Judicial branch. However, a careful look at O'odham case law strengthens the argument that the Judiciary alone has authority to enact judicial procedure.

In *Tohono O'odham Advocate Program v. Norris*, the court held that the Judiciary could not create a bar association where the Constitution explicitly grants only the Legislative Council the authority to establish organizations. *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 58 (Trial Ct., Apr. 25, 2005) *appeal dism'd* 3 TOR3d 21 (Ct.App., Sep. 4, 2008)). The court recognized the Judiciary's inherent authority to regulate the practice of law and establish rules to such effect under the Tohono O'odham Constitution, yet it clarified that such authority may only be exercised in accordance with the express language of the Constitution. *Id.* at 60. In other

words, not only must a branch act in furtherance of constitutionally appropriate objectives, it must utilize constitutionally appropriate means. And where only one branch is delegated a means—e.g. the power to set up organizations—by implication no other branch may employ such means. *See also, Francisco v. Legislative Council*, 1 TOR3d, at 77 (finding that because removal power is expressly delegated to the Legislative Council, no other branch may exercise that power).

Because the power to create judicial procedure has been discussed at length in other jurisdictions, it is illustrative to examine foreign law. In the United States federal system, Congress has "undoubted power" to regulate the practice and procedure of federal courts. *Sibbach v. Wilson*, 312 U.S. 1, 9 (1941). Congress has delegated this power to the federal courts under the Rules Enabling Act. *See* U.S.C. §§ 2071–77; *id.* § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress… ."); *Sibbach*, 312 U.S. at 9 (explaining that Congress may delegate its power to regulate court procedure). However, Congress remains involved in the regulation of judicial procedure and may intervene to disapprove or modify rules promulgated under the Rules Enabling Act. *See Jackson v. Stinnett*, 102 F.3d 132, 143 (5th Cir. 1996) (explaining that despite the delegation of rulemaking authority via the Rules Enabling Act, "Congress maintains an integral, albeit passive, role in implementing any rules drafted by the court" and "all such rules are subject to review by Congress); House Report Accompanying Judicial Improvements & Access to Justice Act, H.R. Rep. 100-889, 1988 U.S.C.C.A.N. 5982, 5987 (describing the increased level of congressional intervention in judicial rulemaking as demonstrated by the 1973 substitution of judicially created Federal Rules of Evidence with a congressional drafted version). Essential to the federal system of a shared power to enact judicial procedure is the underlying constitutional language. In contrast to the T.O. Constitution, the U.S. Constitution does not expressly set up *independent* governmental branches. Furthermore, it fails to address judicial procedure entirely, including which branch has the power to create it. Therefore, the U.S. framework is of limited persuasiveness for the Tohono O'odham.

The State of Arizona operates under a constitution more similar to that of the O'odham and therefore is more useful in its approach to judicial procedure. The Arizona Constitution explicitly requires separation of powers in Article III:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Although the power to enact judicial procedure is not itself addressed, Article VI states that the judicial power of the state shall be vested in its supreme court and inferior courts. A.Z. Constitution Art. VI § 1. The Arizona Supreme Court has examined whether the power to make court rules and procedure is judicial or legislative in nature, and found that "courts have the inherent power to prescribe rules of practice and rules to regulate their own proceedings in order to facilitate the administration of justice, without any express permission from the legislative branch." *See Burney v. Lee*, 59 Ariz. 360 (1942). However, the *Burney* Court tacitly recognized the concurrent power of the legislature to create judicial procedure by leaving untouched the statute at issue: A.R.S. § 12-109. *See Burney* at 364–65. Section 12-109 is a delegation by the Arizona legislature to the courts of the authority to promulgate court rules and procedure. Therefore, while the judiciary may have "inherent" power to create judicial procedure, in Arizona the legislature may also legislate in this arena. *See, e.g., Anderson v. State*, 54 Ariz. 387, 389 (1939) (holding that a procedural *statute* supersedes any conflicting rules of court except to the extent that it "unreasonably limits the court in the performance of its constitutional duty"); *Burney* at 364 (highlighting that among states, the legislature may generally exercise rulemaking power and courts will bow to this authority unless such legislatively created rules "unreasonably limit or hamper" the courts in the performance of their duties).

Colorado law is perhaps an even better example due to certain constitutional similarities between the State of Colorado and the Tohono O'odham. The Colorado Constitution expressly provides that "[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases." Colo. Constitution Art. VI § 21. The Colorado Supreme Court interpreted this provision as providing the judiciary with "plenary authority" (i.e. full or complete power) to create procedural rules. *City of Broomfield v. Farmers Reservoir & Irrig. Dist.*, 239 P.3d 2370, 1278–79 (Colo. 2010). Other Colorado case law elucidates that the judiciary has the power to promulgate rules of practice and procedure, while the legislature has the power to enact substantive rules and statutes. *People v. Diaz*, 985 P.2d 83, 87 (Colo. App. Div. V. 1999). However, *Diaz* recognized that the line between substance and procedure is often inscrutable

and, accordingly, conceded the legislative policymaking and judicial rulemaking may overlap to some extent. *Id.* Ultimately, Colorado has reached a compromise concerning judicial procedure: "where a statute is a statement of legislative policy but also affects the practice and procedure of the courts, it will not be deemed an unconstitutional intrusion into matters exclusively judicial unless it conflicts with a court rule adopted by the supreme court." *Id.*

This sojourn into foreign law demonstrates that all jurisdictions grapple with the issue of who may create judicial procedure and, relatedly, when substantive law impermissibly amounts to judicial procedure. Each jurisdiction has answered these questions uniquely, a uniqueness intimately tied to the specific language of each jurisdiction's constitution. Therefore, our analysis is brought full circle to the express language of the Tohono O'odham Constitution. In light of the explicit grant of power to the Judiciary, as well as O'odham case law and constitutional history, the Court finds that the Judiciary has the primary authority to establish court rules and procedures. However, this right is not absolute and the Legislative Council may enact substantive laws with procedural effects so long as these laws are in furtherance of a constitutionally delegated power and do not impermissibly encroach upon the Judiciary. Furthermore, the Court adopts the proposition that such laws with procedural effects are assumed constitutional unless they conflict with a court rule adopted by the Judiciary.

c. All Three Governmental Branches Share the Power to Protect Individual Rights.

The prior holding segues naturally into the next phase of our analysis. Rather than framing the issue as the power to create judicial procedure, Respondent argues that the contested provisions are valid exercises of its power to enact substantive laws protecting individual rights. Respondent's Response at 3. Article III of the Constitution provides that the Tohono O'odham Nation was established to "protect and maintain [the people's] individual rights." T.O. Constitution Art. III § 1. Furthermore, the government "shall not deny to any member of the Tohono O'odham Nation the equal protection of the laws or deprive any member of liberty of property without due process of law." *Id.* The Court agrees that Article III both obligates and empowers the Legislative Council to protect the individual rights of its members. Furthermore, the Court finds that the unambiguous language of this provision, which addresses the Tohono O'odham government as a whole, provides all three branches with a shared power to protect these rights. However, the provision does not grant each branch unlimited power to effectuate this protection using any means available. Rather, the protection of individual rights must be accomplished within each branch's constitutionally appropriate zone of power.

As determined above, the Legislative Council may enact substantive laws with procedural effects so long as these laws are in furtherance of a constitutionally delegated power and do not impermissibly encroach upon the Judiciary. Accordingly, the Legislative Council may legislate to protect individual rights and such legislation may have procedural effects *unless* it amounts to an encroachment of the Judiciary's power to set court procedure. Encroachment, in turn, is to be determined by an application of the *Toro* test to each legislative act. Because the Court characterizes the contested provisions of the Courts and Procedures Law as exercises of the shared power to protect individual rights, it will apply *Toro* to each and determine whether encroachment has occurred and, consequently, whether the Council has overstepped its constitutional authority.

i. Section 1102(B)(1) Is an Unconstitutional Exercise of Legislative Power.

Section 1102(B)(1) requires that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once ever calendar quarter until the final, written judgment is entered." Under step one of *Toro*, we must examine the nature of the power being exercised. Respondent emphasizes that this provision promotes due process and the right to appeal by ensuring that appeals are reviewed in a timely matter. Respondent's Response at 22. However, the focus on these individual rights is overshadowed by the explicit objective of setting the appellate court calendar, an objective that is inherently judicial in nature. Furthermore, such an exercise of control over the court calendar is antithetical to the Tohono O'odham notion of distinct powers. *C.f. Francisco v. Legislative Council*, 1 TOR3d, at 77 (finding that the separation of powers principle clearly prohibits the Judiciary from telling the Legislative Council when to meet).

As per the second step of *Toro*, the Respondent argues that Section 1102(B)(1) is not coercive but rather complements existing court rules to ensure the timely review of appeals. Respondent's Response at 22. While the Court has no reason to question the Council's stated objective, it must recognize that the establishment of the appellate calendar represents a legislative intrusion into an area traditionally reserved to the Judiciary and, as such, ties the Judiciary's hands in managing its time and resources.

Lastly, the Court must look at the practical effect of such a provision as shown by actual experience. Respondent highlights Section 20 of the Children's Code as another example of legislatively set court timeframes. *Id.* at 21. However, the Court finds this example distinguishable, where Section 20 does not actually require the appellate court to convene for a

hearing on the merits but rather establishes a back-up plan pending the appeal. Admittedly, this does in a sense create judicial procedure; however, that effect is ancillary to the main thrust of the provision, which is to provide a safety net for children whose welfare is at stake.

Therefore, under the principles articulated in *Toro*, Section 1102(B)(1) is an unconstitutional encroachment of judicial power.

ii. Section 1106(B) Is a Constitutional Exercise of Legislative Power.

Section 1106(B) provides that:

> [i]n order to ensure that all persons appearing before the Court are guaranteed equal protection and due process of the law, the application of the rules of court shall not be discretionary but shall be applied by all judges to the matters before the Court. Court rules promulgated by another jurisdiction or entity and adopted by the chief judge that directly conflict with a Tohono O'odham Nation law or Judicial Court rule or order shall be inapplicable.

Although Petitioner appears to take issue with only the first sentence, the Court will examine the constitutionality of the entire provision and therefore apply *Toro* to each sentence separately.

1. Uniform Application of Court Rules

Under step one, the power being exercised is the promotion of individual rights; specifically, the guarantee of equal protection and due process. As already established, this is a shared power between the three branches. The particular application of this power here does interfere, to a certain extent, with matters traditionally within the scope of judicial authority, namely judicial discretion to apply court rules. However this intrusion is not as egregious as prescribing rules of court or constraining judicial discretion to determine which rules are triggered by a given case. Furthermore, Tohono O'odham law does not provide for absolute judicial discretion; there are constitutionally imposed outer limits to this discretion, such as requirements of equal protection and due process.

Next, the Court finds that this provision does not amount to coercion. The objective is clear: to ensure fairness, uniformity, and notice to all parties before the court as to the body of rules by which they will be bound. While the Petitioner may perceive any legislative actions that affect judicial discretion as inherently coercive, this Court believes the provision is more appropriately characterized as a cooperative effort to ensure equal protection and due process.

Lastly, the primary effect of this exercise of power is that parties before the court will have both notice of the court rules and assurance that everyone else before the court is subject to the same set of rules. This satisfaction of equal protection and due process does not interfere with

the vast discretion of Tohono O'odham judges to control their proceedings and arrive at decisions, nor does it hinder the Chief Judge's ability to promulgate court rules.

Therefore, the first sentence of Section 1106(B) is a constitutional exercise of legislative power.

2. Choice of Law

Again, the power at issue is the protection of individual rights through the guarantee of equal protection and due process—a shared power amongst the three branches. This particular application of that power involves a conflict of laws provision. It is widely recognized that conflict-of-law, or choice-of-law, rules may be enacted by legislatures or formulated through jurisprudence. *See, e.g.*, Restatement 2d Conflicts of Laws § 6(1) (1971) (announcing the fundamental choice-of-law principle that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law" but if none exists, a court will follow the Restatement choice-of-law framework). Although not easily characterized as substantive or procedural, it is clear that choice-of-law rules are treated as substantive law for the purpose of federal diversity suits. *See Klaxon Co. v. Stentor Elec. Manuf. Co.*, 313 U.S. 487 (1941) (holding that federal courts must abide by state choice-of-law rules in diversity suits). Therefore, for the purposes of *Toro*'s first step, this provision involves a shared power among the Judiciary and Legislative Council.

The Court finds that its analysis for steps two and three as applied to the first sentence of Section 1106(B) is equally applicable to the second sentence. The choice-of-law provision is not inherently coercive where it does not interfere with the power to create court rules, nor does it eliminate judicial discretion in determining which rules are implicated be the facts of a case. Rather, it promotes equal protection and due process by assuring parties of the primacy of Tohono O'odham court rules and substantive law. In practice, this type of law fairly balances judicial discretion against the legislative power to enact substantive laws and protect individual rights.

Therefore, the second sentence of Section 1106(B) is a constitutional exercise of legislative power.

iii. *Sections 1106(C) and 1107(C) Are Unconstitutional Exercises of Legislative Power.*

Due to their underlying similarities, Sections 1106(C) and 1107(C) will be analyzed concurrently. The contested portion of Section 1106(C) states that "[a]ll court rules shall be

compiled in a single volume, shall be made available to the public in electronic and paper formats, and be distributed to all persons who practice before the Judicial Court." Similarly, Section 1107(C) provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

As per *Toro* step one, the basic power exercised in these provisions is the protection of individual rights, specifically the due process right to notice of the applicable procedure and substantive law. However, in enacting Sections 1106(C) and 1107(C), the Legislative Council prescribes in great detail the procedure for accomplishing this right and in doing so, treads upon a generally protected realm of judicial authority.

Respondent makes a persuasive argument under *Toro* step two that these provisions are in furtherance of a cooperative effort between the Judicial Branch and the Legislative Council to make court rules and decisions accessible to the public. *See* Respondent's Response at 12–13, 19–20. In support of its argument, Respondent cites to examples of past or ongoing interbranch cooperation. *Id.* (discussing a joint effort to publish court rules in printed and electronic form, as well as the Council's attempt to compile scattered court decisions and provide them to the Judiciary). While these collaborations are praiseworthy attempts to increase public access to Tohono O'odham law, it must be noted that they are voluntary in nature. In other words, neither branch has been legally required by the other branch to perform these actions. By transforming this effort into an extensive framework of mandatory procedure, the Legislative Council exercises a degree of inappropriate coercion.

In Respondent's consideration of step three, it reiterates the numerous examples of intergovernmental cooperation detailed under step two. However, Respondent's argument ignores the fact that in the past the Judiciary has voluntarily worked with the Legislative Council, rather than being required to do so by legislatively set procedural rules. In practice, the ability of the Legislature to enact detailed judicial procedure that will incur monetary costs and require human resources ignores the intimate knowledge the Judiciary has of its own needs and capabilities. Not only could this result in frustration within the Judicial branch, but it has the potential to create inefficiencies and misuse of judicial resources that negatively impact the public's ability to utilize the Nation's justice system.

Therefore, Sections 1106(C) and 1107(C) are unconstitutional encroachments upon judicial power.

iv. *Section 1103(D) Is an Unconstitutional Exercise of Legislative Power.*

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

Section 1103(d) requires a unique analysis. Rather than perceiving this section as primarily a matter of encroachment, similar to the other contested provisions, Petitioner argues that Section 1103(d) directly violates the express language of the Constitution's Compensation Clause. The Compensation Clause requires that "[t]he judges of the Tohono O'odham Courts shall receive for their services a compensation to be established by the Tohono O'odham Council, *which shall not be diminished during their continuance in office*." T.O. Constitution Art. VIII § 9 (emphasis added). Respondent defends Section 1003(d) as a valid legislative measure to protect the

individual rights of the Nation's members to timely judicial decisions and further contends that it does not fall within the meaning of "diminishment" as prohibited by the Compensation Clause. Respondent's Response at 25–28. Because this is primarily a matter of strict constitutional interpretation, the Court will evaluate Section 1103(d) according to the language of the Constitution, taking into consideration relevant case law from foreign jurisdictions.

Article VIII § 9 expressly prohibits any measure that diminishes judicial compensation during a judge's term of office. While the Tohono O'odham courts have had few occasions to examine the scope of this prohibition, there is an extensive body of federal and state case law analyzing analogous compensation clauses. These jurisdictions have highlighted the intention behind compensation clauses, primarily the protection of judicial independence from overbearing legislatures and executives. *See, e.g.*, *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). In order to fulfill that purpose, courts have construed broadly the terms "compensation" and "diminishment." *See* Petitioner's Brief at 14–15 (citing *O'Donogue v. U.S.*, 53 S. Ct. 740 (1933); *Hatter v. U.S.*, 64 F.3d 647 (C.A. Fed. 1995), *aff'd by U.S. v. Hatter*, 117 S. Ct. 39 (1996); *Evans v. Gore*, 40 S. Ct. 550 (1920). As articulated by the Supreme Court in *Evans*, "all [forms of diminishment] which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle." 40 S. Ct. at 553. This Court acknowledges that the holding of *Evans*—finding the imposition of a nondiscriminatory income tax on federal judges after their appointment date violative of the compensation clause—was later overruled. Nonetheless, the Court still finds persuasive the underlying rationale that the compensation clause was enacted to protect judicial independence and therefore must be interpreted broadly. The Court recognizes, however, that the protection against diminishment is not absolute. As Respondent illustrates, judicial salaries are not shielded from nondiscriminatory taxes or taxes enacted following judicial appointment. *See* Respondent's Response at 24. Nonetheless, our case is distinguishable where it does not involve a general nondiscriminatory tax, but rather legislative actions directed specifically at the Tohono O'odham Judiciary for the purpose of *molding* judicial behavior.

The Court finds persuasive the reasons provided by other jurisdictions for construing compensation clauses broadly; namely, the protection of judicial independence. Section 1103(D), while not reducing the amount of compensation, explicitly withholds judicial compensation if certain conditions are not met. It is clear to this Court that the Tohono O'odham

prohibition against diminishment encompasses actions that indefinitely withhold judicial compensation. It is further evident that a legislative action wielding the Judiciary's paycheck as the proverbial "stick" to incentivize certain behavior is exactly the type of legislative interference that the Compensation Clause was designed to protect against. Therefore, Section 1103(D) violates Article VIII § 9 of the Constitution and, accordingly, is invalid.

Assuming for argument's sake that Section 1103(D) does not violate the clear language of the Tohono O'odham Compensation Clause, it still fails as a matter of encroachment under the *Toro* analysis. Under step one, the nature of this power is ostensibly the protection of individual rights, specifically the right to a timely ruling. *See* Respondent's Reply at 28. In actuality, this section is heavily laden with procedural requirements, such as the imposition of strict timelines on judicial decisionmaking and mandatory certification processes. As noted *above,* judicial procedure is generally reserved to the Judiciary. Next, every component of Section 1103(D) exhibits a degree of coercion on the Judiciary. Not only does it withhold judicial pay if certification requirements are not met, it penalizes court employees involved in the issuance of paychecks to noncompliant judges. It also places the Legislative Council in a supervisory position over judicial practice and procedure by forcing the Chief Justice to regularly submit time-consuming certification requirements to the Council. Lastly, this Court can only speculate as to the practical effect of such a provision since it does not mirror any prior certification framework between the Judiciary and Legislative Council. It is clear, however, that it would amount to an unprecedented and unwelcome intrusion by the Legislative Council into the inner workings of the Judiciary—an intrusion likely to interfere with management of judicial resources and case administration.

Accordingly, Section 1103(D) is an unconstitutionally encroachment upon the Judiciary's power.

d. Severability

Title One (General Provisions) of the Tohono O'odham Code provides that:

> The Nation's laws are severable. If any word, clause, phrase, sentence, subsection, section, or other provision … of a Nation's law or its application to any person or circumstances is held invalid by a court of competent jurisdiction, the invalidity shall not affect any other provisions or applications of the law that can be given effect without the invalid provision or application.

1 T.O.C. § 1101.

This severability clause empowers the Court to eliminate unconstitutional provisions from otherwise constitutional statutory schemes. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (embracing the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected"). Accordingly, the Court will evaluate each invalidated provision to determine whether severability may be applied.

i. Section 1102(B)(1) Is Severable.

Section 1102(B)(1) requires that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once ever calendar quarter until the final, written judgment is entered." The Court's primary issue with this provision is its attempt to dictate the appellate calendar. *See above* Part I(c)(i). However, by striking the latter clause, the Court eliminates the undue intrusion into the details of the judicial calendar while preserving the underlying objective of promoting the right to a timely appeal. Section 1102(B)(1) should read: "Each designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules."

ii. Sections 1106(C) and 1007(C) Are Not Severable.

Section 1106(C) provides, in relevant part, that "[a]ll court rules shall be compiled in a single volume, shall be made available to the public in electronic and paper forms, and be distributed to all persons who practice before the Judicial Court." Similarly, Section 1107(C) provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

As the Court explains *above* Part I(c)(iii) , these provisions impermissibly encroach upon the judicial authority to set court procedures due to their exacting level of detail. However, there is no graceful manner in which this Court could parse the language of Sections 1106(C) and 1107(C) so that they satisfy the distinction of powers doctrine while remaining faithful to the legislative objective. Therefore, the Court declines to apply severability. Nonetheless, the Court appreciates the Legislative Council's concern with providing public access to court rules and precedential decisions. In attempting to legislate on this issue, the Council should consider articulating its legislation so that it both focuses on the protection of the substantive right and

refrains from over-specifying judicial procedures for achieving such right. For example, a provision stating that "all individuals before the Tohono O'odham Court shall have access to court rules and decisions" would satisfy *Toro* strictures while furthering the same objective. In implementing such a provision, the Legislative Council and Judiciary should work collaboratively to identify rules, locate decisions, share resources, and construct a system of public access. By collaborating, the parties will be able to attain a comprehensive perspective, one that respects and takes into account all viewpoints and comports with traditional O'odham ethos. *See In Re: Petition of the Judicial Branch*, 3 TOR3d, at 88-89.

iii. Section 1103(D) Is Not Severable.

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

The Court found, *above* Part I(c)(iv), that the portions of this section authorizing the withholding of judicial compensation directly violate the prohibition against diminishment in Article VIII § 9. Furthermore, it found that the assorted certification requirements and penalties violate separation of powers as defined by *Toro*. Therefore, no parts of Section 1103(D) are severable.

Conclusion

By enacting the relevant portions of the Courts and Procedures Law, the Legislative Council undoubtedly wished to strengthen the protection for individual rights by fine-tuning court administration and procedure. This goal, while noble, cannot sway the Court from its responsibility to invalidate laws that violate the letter and spirit of the Tohono O'odham Constitution. In striking down Sections 1102(B)(2), 1103(D), 1106(C), and 1107(C) in whole or in part, this Court is confident that the Legislative Council will find other constitutionally appropriate means of obtaining the same objectives. Such means should involve the wisdom and experience of the Judiciary, for it is only when the branches function in harmony with one another that the rights of the Tohono O'odham can be confidently guaranteed.

Petitioner's request for declaratory judgment is granted in part and denied in part.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Altha HANSEN and James SCOTT, Plaintiffs,
v.
Tohono O'odham Gaming Enterprise, Defendant.

Case No. 2008-0220AV

Decided March 2, 2012.

Richard L. Keefe, Counsel for Plaintiff.
Jones, Skelton & Hochuli, P.L.C. by James P. Curran for Defendant.

Before Judge Michael T. Telep, Jr.

This matter is before the court on the Defendant's Motion for Summary Judgment. A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt 2; Orme Sch. V. Reeves, 166 Ariz. 301, 309, 802 P.2nd 1000, 1008 (1990). A trial court should only grant

a motion for summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. Orme Sch., 166 Ariz. at 309, 802 P.2d at 1008. In Arizona, a summary judgment motion sets in play shifting burdens. Initially, a party moving for summary judgment has the burden of showing there are no genuine issues of material fact and it is entitled to summary judgment as a matter of law. Only if the moving party satisfies this burden will the party opposing the motion be required to come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial.

We begin with the portion of Arizona Rule of Civil Procedure 56 that sets out what a court must do when presented with a motion for summary judgment. Rule 56(c) directs a court to enter summary judgment in favor of the moving party "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Accordingly, to obtain a judgment under Rule 56(c), the moving party must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor. Orme School v. Reeves, 166 Ariz. 301, 310, 802 P.2d 1000, 1009(1990); Allyn, 167 Ariz. at 195, 805 P.2d at 1016(moving party bears burden of demonstrating both absence of any factual conflict and right to judgment). The moving party's responsibility to produce evidence is often referred to as the moving party's initial burden of production; the moving party's responsibility to persuade the court that there is no genuine issue of material fact for a reasonable jury to find is often referred to as the moving party's burden of persuasion or burden of proof. In a motion for summary judgment the moving party has the burden of persuasion while at trial one has the burden of proof. See Aguilar v. Atlantic Richfield Co., 24 P.3d 493, 506 n.4 (Cal. 2001). The moving party's burden of persuasion on the motion remains with that party; it does not shift to the non-moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 300, 106 S.Ct. 2548, 2556, 91 L.Ed.2d 365(1986)(Brennan, J., dissenting). Regardless of the party that must prevail on the burden of proof at the time of trial, the burden of persuasion to show no genuine issue of material fact remains with the moving party. Lujan v. MacMurtie, 94 Ariz. 273, 277, 383 P.2d 187, 189(1963); State v. Crawford, 7 Ariz. App. 511, 557, 441 P.2d 586, 592(1968).

The burden of persuasion on the summary judgment motion is heavy. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. Allyn, 167 Ariz. at 197, 805 P.2d at 1016. Further, a court must view the evidence in a light most favorable to the non-moving party and draw all justifiable inferences in its favor. Sanchez v. City of Tucson, 191 Ariz. 128, 130; 953 P.2d 168, 170(1998); Orme School, 166 Ariz. at 309-10, 802 P.2d at 1008-09. The court need not "decide whether the moving party has satisfied its ultimate burden of persuasion" on the summary judgment motion unless it first finds "the moving party has discharged its initial burden of production." Celotex, 447 U.S. at 330-31, 106 S. Ct. at 2556 (Brennan, J., dissenting); Schwab, 207 Ariz. at 60, 83 P.3d at 60 ("if a moving party's summary judgment motion fails to show an entitlement to judgment, the non-moving party need not respond to controvert the motion"); Hydroculture Inc. v. Cooper & Lybrand, 174 Ariz. 277, 283, 848 P.2d 856 862 (App 1992).

PLAINTIFF OPPONENT:

When faced by a motion for summary judgment, a plaintiff has the duty to show that a genuine fact issue is present. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202, 4 Fed. R. Serv.3 d 1041 (1986); Whalen v. City of Atlanta, 539 F. Supp. 1202 (N. D. Ga. 1982); Taylor v. Alson, 79 N. M. 643, 447 P.2 523, 29 A.L.R.3d 653 (Ct. App. 1968). The mere allegations of the complaint do not constitute proof sufficient to defeat a motion by defendant for summary judgment. Champion v. Artuz, 76 F.3d 483, 34 Fed. R. Serv. 3d 1124 (2d Cir. 1996); Epprecht v. Delaware Valley Machinery, Inc., 407 F. Supp. 315 (E.D. Pa. 1976). The requirement that a party opposing a motion for summary judgment set forth specific facts showing a genuine issue for trial applies to a plaintiff. Markwell v. General Tire & Rubber Co., 367 F.2d 748 (7th Cir. 1966). Summary judgment for a defendant is appropriate if the plaintiff fails to make a showing sufficient to establish the existence of an element essential to the case, and on which he or she will bear the burden of proof at trial. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999).

A plaintiff is not required to establish his or her opposition to a motion for summary judgment by a preponderance of proof; it is sufficient that the affidavits, there were no affidavits provided in this matter supporting plaintiff's position, show that there is a genuine triable issue, and that the plaintiff will have some proof to support his or her allegations at the date of the trial. Copeland v. Lodge Enterprises, Inc., 2000 OK 36, 4 P.3d 695 (Okla.2000). However, a mere existence of a

scintilla of evidence in support of the plaintiff's position is not sufficient; there must be evidence on which a jury could reasonably find for the plaintiff.

CONCLUSION:

This court finds that the defendant casino has met its burden of production and consequently there need be no testimony to satisfy the defendant's burden of persuasion. The plaintiff failed to provide evidence of a genuine issue of material fact upon which it could possibly prevail at the time of trial. Construction of the casino was irrelevant to the violent conduct of the un-identified female that forcibly pushed another patron into the plaintiffs causing the plaintiffs to fall to the ground in such a manner that caused their injuries. The casino has a duty to assure the establishment is safe from hazards both obvious and hidden to prevent injury to its invitees. It also must ban those patrons that have a history of or the casino has knowledge of that patron's propensity for violence or unacceptable intoxication that the casino knows would lead to violence with this particular patron. The casino was unaware of either. Neither construction nor intoxication of one of the patrons involved in the incident lead to the plaintiff's injuries. The violent nature of the un-identified female and ultimately her conduct was the proximate cause of the plaintiffs injuries. Plaintiff never names those patrons as defendants but concentrates only on the casino where there was no causation or knowledge. Upon discovery of the incident casino security responded immediately and provided the attention that was necessary under the circumstances. The information regarding the true defendant was provided by Ms. Penick and Mr. Scott. Their depositions provided, in part, the factual basis for this opinion.

The impulsive spontaneous actions of a third party were clearly the cause of plaintiff's injuries. The casino defendant had no knowledge of the un-identified patron's intentional conduct. In addition, the level of intoxication of Mr. Acosta is of little significance. It was the violent conduct of the unidentified women patron that caused Mr. Acosta to fall into the plaintiffs resulting in their injuries.

IT IS THEREFORE ORDERED: the motion for summary judgment in favor of the defendant is granted.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Dionne BAHYESVA, Plaintiff,
v.
Keith MIGUEL, Defendant.[1]

Case No. 96-CS-6731

Decided March 7, 2012.

Tohono O'odham Advocate Program by Raenna DeJesus for Plaintiff
Rose Johnson Antone, Counsel for Defendant

Before Judge Nicholas Fontana.

IN CHAMBERS

On February 8, 2012, Petitioner Dionne Bahyesva and Respondent Keith Miguel appeared before the Court for a scheduled hearing regarding arrearages or the overpayment of child support. Petitioner appeared with Legal Counsel Raenna DeJesus of the Tohono O'odham Advocate Program and Respondent appeared with Legal Counsel Rose Johnson Antone.

Ms. Bahyesva contends that she is entitled to the payment of child support arrearages in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00). Mr. Miguel asserts that Ms. Bahyesva abandoned her obligations as the primary physical custodian of the minor children and is not entitled to any child support arrearages.

The Court heard testimony from two of the minor children, Marisa Miguel and Kristen Miguel. The Court also reviewed the child support ledger. Neither party disputed the accuracy of the ledger at the hearing. In addition to the evidence presented at the hearing on February 8, 2012, the Court also received evidence and heard testimony from Kristen Miguel at a hearing on January 4, 2012.

FACTS

Ms. Bahyesva and Mr. Miguel were divorced in 1997. Ms. Bahyesva was awarded physical custody of the minor children and Mr. Miguel was ordered to pay child support. The child support ledger reflects that Mr. Miguel's child support payments are in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00).

[1] *Ed. Note.* Case caption corrected to reflect the actual parties.

Marisa Miguel testified that in January, 2005, all of the minor children left Ms. Bahyesva's residence and moved into the residence of their maternal aunt. Marisa testified that Ms. Bahyesva would sporadically provide financial assistance or other support in the form of clothing and school supplies. She also testified that Mr. Miguel would also purchase clothing for the children. Marisa testified that in terms of supervision and parenting, the minor children were essentially abandoned by Ms. Bahyesva.

Kristen Miguel also testified that she and all of the other minor children left Ms. Bahyesva's residence in 2005 and moved in with their maternal aunt. Kristen lived with relatives while attending Hopi High School in 2007 and 2008. Kristen testified that she lived with Mr. Miguel during the 2008-2009 school year, and that from 2009 until she graduated from Hopi High School, she lived with relatives and friends. According to Kristen's testimony, Ms. Bahyesva paid for Kristen's cell phone during her junior and senior years of high school and paid for bus tickets from Sells to the Hopi Reservation. Kristen also testified that Mr. Miguel would also pay for bus tickets and was primarily responsible for providing her with school supplies.

DISCUSSION

The Tohono O'odham Nation recognizes that the parents' obligation to support their minor children is not extinguished by a decree of divorce. The law of the Nation specifically authorizes the Court to order one of the parties in a divorce to pay child support for the "present comfort and future well-being" of the minor children. 9 T.O.C. § 13. When neither the code or Tohono O'odham custom address a specific issue regarding child support, the Court has the discretion to look to Arizona law for guidance. 4 T.O.C. § 1-102; *Garcia v. Garcia*, 1 TOR3d 108, 110 (Trial Ct., Jan. 24, 1994) *app. dism'd* 3 TOR3d 10 (Ct.App., Aug. 17, 2006); *C.V.K. a.k.a. C.O. v. N.K., Sr.*, 2 TOR3d 71 (Trial Ct., May 19, 2003) *aff'd* 3 TOR3d 1 (Ct.App., Apr. 2, 2005).

Support payments are for the support and maintenance of the minor child. *Cole v. Cole*, 101 Ariz. 382, 420 P.2d 167 (1966). The purpose of child support is not to raise the standard of living of the custodial parent. *Edgar v. Johnson*, 152 Ariz. 236, 237, 731 P.2d 131, 133 (App. 1986).

Mr. Miguel asserts that he is not liable for any child support arrearages because the minor children were not in Ms. Bahyesva's physical custody after January, 2005. Mr. Miguel's position fails to recognize that under the terms of the order granting divorce and the law, he is obligated to provide support for his children until they reach the age of majority. The fact that

the minor children were no longer in Ms. Bahyesva's physical custody does not relieve him of this obligation, especially in light of the fact that Mr. Miguel was entitled to seek a modification of child support. A.R.S. § 25-503(E). The issue is whether Ms. Bahyesva is entitled to payment of the arrearages.

Divorce and child support proceedings have long been recognized as equitable actions. *Cole*, 101 Ariz. at 384, 420 P.2d at 169. As one court observed, "the equities of natural justice in a given situation may turn a court of conscience away from the cold realm of legalism." *Crook v. Crook*, 80 Ariz. 275, 278, 296 P.2d 951, 952 (1965). Even in equity, the Court is obligated to consider the best interests of the child. *Garcia v. Garcia*, 1 TOR3d, at 109.

Is it equitable and in the best interests of the children to order that Ms. Bahyesva receive payment for child support arrearages incurred after January, 2005? The Court finds that the answer is no: to do so would be of no benefit to the children and would unjustly enrich Ms. Bahyesva. Unjust enrichment occurs when a party retains money or benefits that in justice and equity belong to another. *City of Sierra Vista v. Cochise Enterprises, Inc.*, 144 Ariz. 375, 382 (App. 1984). Arizona has recognized that the defense of unjust enrichment may apply to child support cases. *Savage v. Thompson*, 22 Ariz.App. 59, 63 (1974).

The evidence is not clear as to the exact date in January, 2005, when the children left Ms. Bahyesva's custody, so the Court finds that Ms. Bahyesva is entitled to child support through the end of January, 2005. According to the child support ledger, as of January, 2005, Mr. Miguel's child support obligations were not only current, but in fact in overpayment status in the amount of five-hundred and forty-nine dollars ($549.00). Ms. Bahyesva is entitled to keep the overpayment. *S.G. v. J.G.*, 3 TOR3d 4.

After January, 2005, the children were no longer in Ms. Bahyesva's custody. Mr. Miguel did not seek a modification of his child support obligations after the children left Ms. Bahyesva's custody. Mr. Miguel was still legally obligated to pay child support for the children. The child support ledger indicates that as of September, 2011, Mr. Miguel's child support obligation was in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00). Although Ms. Bahyesva is not entitled to any of the arrearages, it may be that the person or persons who had custody of the children after January, 2005 are entitled to seek payment from Mr. Miguel. *Murren v. Murren*, 191 Ariz. 335 (App. 1998). It may also be that the children themselves may seek payment of the arrearages. *Moody v. Moody*, 565 N.E.2d 388, 391 (Ind.App., 1991); *Thacker v. Thacker*, 710 N.E.2d 942 (Ind.App.,

1999). Since neither the children nor a guardian other than Ms. Bahyesva are seeking payment of the arrearages, that issue is not before the Court.

IT IS THEREFORE ORDERED that Dionne Bahyesva is not entitled to any additional child support payments from Keith Miguel after January 31, 2005.

IT IS FURTHER ORDERED that Dionne Bahyesva may retain any overpayment of child support.

IT IS FURTHER ORDERED that Keith Miguel's child support obligations are in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00), which may be subject to claim by the children or the person/persons with custody of the children after January 31, 2005.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Herbert GARCIA, Defendant,

Case No. 2012-0569-0582CR

Decided March 22, 2012.

Before Judge Veronica Darnell.

At the pre-trial hearing of Herbert Garcia on Friday, March 16, 2012, the Court erred when it granted the Nation's motion to set a jury trial. The defendant requested a bench trial and the Nation argued that the government has just as much of a right to a jury trial as the defendant. The defendant's right to a jury trial rests in federal law. The Indian Civil Rights Act provides that no Indian Tribe shall deny to any person the right to a trial by jury (25 U.S.C. 1302 (10). The Indian Civil Rights Act does not provide that the government has a right to a jury trial. The Court vacates the jury trial that was set for May 3, 2012 at 9:00 am and sets a bench trial for May 9, 2012 at 10:30 am.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Kirklin L. FRANCISCO, Defendant,

Case No. 2012-0037-0041CR

Decided April 19, 2012.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.
Belinda BreMiller, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The Defendant is charged with Threatening/Domestic Violence, Sec. 7.3(A)(1) / 8.9(A); Criminal Damage to Private/Personal Property/Domestic Violence, Sec. 5.2(A)(1) / 8.9(A); Disturbing the Peace/Domestic Violence, Sec. 3.6(A)(1) / 8.9(A), of the T.O.N. Criminal Code. He is a member of the Tohono O'odham Nation.

The threshold issue for this case was raised by the Defendant in the Motion for Appointment of Expert for Competency Evaluation, which included the names of three mental health professionals who are on the list of mental health experts used by the Pima County Superior Court. The Motion was heard on March 30, 2012. Nation did not object to the competency evaluation. The Court found there were reasonable grounds to Order the competency evaluation.

The Defendant claims he is unable to pay for the competency evaluation and any other expenses associated with these proceedings. He is under the guardianship of his parents, although he is over the age of 18 years. He is low functioning intellectually, and does not work. He is represented by attorney Belinda BreMiller, licensed in Arizona. Ms. BreMiller's fee is paid for by the Tohono O'odham Nation ["the Nation"] under a contract with the Nation to provide legal representation services to the Nation's members in the Tohono O'odham Court when a member cannot be represented by the attorneys or advocates of the Tohono O'odham Advocate Program [the "Advocate Program"] because of conflicts from their representation of other members. The Advocate Program is part of the Executive Branch of the Nation's government, providing free legal services to the Nation's members without regard to indigency, and to the extent of the Advocate Program's budget. (Not every tribal member in a criminal proceeding is represented by an Advocate Program attorney or advocate or by conflict counsel.) The Court is informed that the contract for

the "conflict counsel" does not include any funds or expenses such as a competency evaluation or the costs of the report or court appearance fees for testimony by the evaluating expert(s).

Competency proceedings in this Court are not governed by Rule 11 of the Arizona Rules of Criminal Procedure, or by A.R.S. Section 13-4503, because the Tohono O'odham Court is not authorized by ordinance to use the Nation's funds for competency evaluations in the same way that the Arizona Superior Court is authorized to do so. Competency of a defendant to stand for trial is an issue of due process. The Nation's Criminal Code does not specifically address competency of a defendant to stand for trial, to enter a plea, or to assist the defendant's attorney. Section 1.7 of the Tohono O'odham Criminal Code, Chapter 1, provides for a defense of mental disease or defect to a criminal charge.

The Constitution of the Tohono O'odham Nation, Article III, Section 1 provides:

> All political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights. It shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law.

Article III, Section 3 continues: "All members of the Tohono O'odham Nation shall be given equal opportunity to participate in the economic resources and activities of the Tohono O'odham Nation." Article III, Section 4 also provides: "The listing of the foregoing rights shall not be construed as denying or abridging other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77)."

Title II of the Indian Civil Rights Act ["the ICRA"], 25 U.S.C. 1302, as amended by the Tribal Law and Order Act in 2010, (124 Stat. 2258), Section 6 states, in part, that an Indian tribe shall not deny to any person in a criminal proceeding the right to hire his or her own counsel, subject to specific situations that are not relevant here. Section 8 of the ICRA also provides that an Indian tribe exercising its powers of self-government shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law." The United States Supreme Court has held that a defendant was deprived of his constitutional right to a fair trial when the trial court failed to hold a hearing on his competency to stand trial where there was evidence of insanity. *Pate v. Robinson*, 383 U.S. 375 (1966). The defendant, Robinson, was tried and convicted in spite of consistent claims of incompetence to be tried, and evidence that he had a history of disturbed behavior from childhood into adulthood, with episodes of violence and hallucinations. The Supreme Court held that "the evidence introduced on Robinson's behalf

entitled him to a hearing on this issue [competence to stand trial]. The Court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial." *Id.*, at 385.

There is no dispute in the instant case on whether Defendant should have a competency evaluation. The only question is how to pay for it. Defendants represented directly by the Advocate Program apparently are able to schedule competency evaluations approved by the Court, and the Tohono O'odham Nation has provided funds or arranged for funds through the Advocate Program to pay for the evaluations, reports, and any contemplated court appearance by the mental health expert(s).

Although the Nation is not required by law to provide any defendant with free legal counsel, it has chosen to do so for members of the Nation through the Advocate Program and the "conflict counsel" under contract with the Nation. Based upon the clear language of Article III of the Tohono O'odham Constitution, (1) identifying the purpose of the government is to protect and maintain the individual rights of its members, and (2) providing for the right of a member to equal protection of the laws and for due process in any action to deprive a member of liberty or property, and the similar mandate of the federal law in Section 8 of the ICRA, *supra*, the Court finds that the Defendant in this case is in the same position as a tribal member who is actually represented by legal counsel from the Advocate Program, and is in need of a competency evaluation before he or she can be tried. As a matter of due process and equal opportunity to use the economic resources of the Nation, the Defendant is entitled to have the Nation provide the necessary funding for his competency evaluation and the accompanying costs of the report and any court or other appearance by the mental health expert(s).

The competency evaluation of a defendant is fundamental to the due process of law required under Article III, Section 1 of the Constitution of the Tohono O'odham Nation and Section 8 of the ICRA, 25 U.S.C. 1302 when the defendant is subject to criminal charges that may result in incarceration and / or fines, and the defendant provides sufficient proof that competence is an issue.

IT IS ORDERED THAT:

1. Declaratory judgment is entered for the Defendant that he is constitutionally entitled to apply for and receive funding from the Nation for the competency evaluation(s), reports, court appearances of the evaluating expert(s) and related fees as part of the representation provided for him by conflict counsel. Except for good cause shown, the Defendant shall be able to be evaluated by at least one, but no more than two, of the expert evaluators named in the Defendant's Motion and Memorandum within thirty days of the date of this Order, but not more than sixty days from the date of this Order. Defense counsel shall make all

arrangements in accordance with directions for how to ensure and process payments from the appropriate Nation funding source.

2. Should the defendant be denied funding for the competency evaluation(s) and related costs and fees, the charges shall be dismissed.
3. Because this is a matter of first impression in this Court and involves the provision of services to members of the Nation, the Clerk shall distribute copies of this Order to the immediate parties, the Nation's Prosecutor, the Defendant and defense counsel, as well as to the Special Counsel to the Chairman, the Legislative Counsel, the Nation's Attorney General, and to the Advocate Program.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Michael MATTIAS, Defendant,

Case No. 2011-2406-2417CR

Decided May 31, 2012.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.
Larry Boswell, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The Court required counsels to appear regarding the re-opening of the Nation's case. On May 23, 2012 the Nation presented its case and rested; the Defense presented its case and rested; after closing arguments the Court took the matter under advisement. The Defense stipulated to the Nation's motion to re-open the Nation's case.

"[t]he trial court has a large discretion in respect to order of proof and permitting a party to reopen its case after it has rested." *Lucas v. United States*, 343 F.2d 1, 3 (8th Cir., 1965), cert. denied, 382 U.S. 862; *Massey v. United States*, 358 F.2d 782 (10th Cir., 1966), cert. denied, 385 U.S. 878, cited in *Rhyne v. United States*, 407 F.2d 657 (7th Cir., 1969). See, also, *U.S. v. Woodring*, 444 F.2d 749 (9th Cir., 1971). The Court is satisfied that permitting the re-opening of the Nation's case is not to initiate new proceedings, and the Court has not yet rendered a verdict. Trial shall resume June 14, 2012 at 9 a.m.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff,
v.
Bernadette K. LOPEZ, Defendant,

Case No. 2010-0625-2627CR

Decided August 6, 2012.

Tohono O'odham Prosecutor's Office by Cindy Burnett for Plaintiff.
Belinda BreMiller, Counsel for Defendant.

Before Judge Violet Lui-Frank.

Defendant's lawyer explains that she has not been able to obtain a firm answer from anyone within the government of the Tohono O'odham Nation regarding payment for a qualified competency evaluator for the defendant. The Advocate Program referred Ms. BreMiller to Dr. Nye of HIS, who referred her to someone else, and there has not been a response. The defendant's motion for a competency hearing under Rule 11 of the Arizona Rules of Criminal Procedure was granted on July 2, 2010. Since that time the defendant has sought to arrange an appropriate evaluation. The defendant has not had access to the same resources that a direct client of the Tohono O'odham Advocate Program has for a competency evaluation. The Constitution of the Tohono O'odham Nation states in Article III, Section 1 that the government of the Tohono O'odham Nation "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law." The Constitution also states in Section 3, Article III, that all members are to be given equal opportunity to participate in the economic resources and activities of the Tohono O'odham Nation. Section 4, Article III of said Constitution refers to "other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Sta. 77). The Indian Civil Rights Act ("the ICRA"], Title II, 25 U.S.C. 1302, as amended by the Tribal Law and Order Act in 2010, (124 Stat. 2258), provides, in Section 8, that an Indian tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law." It is settled law that "A criminal defendant may not be tried unless he is competent." Godinez v. Moran, 509 U.S. 389 (1993), citing Pate v. Robinson, 383 U.S. 375, 378 (1966).

The defendant is not able to pay for an evaluation by a psychologist or psychiatrist experienced in conducting competency evaluations, based upon financial information provided to the Court. Defendant's lawyer represents the defendant under a contract with the Tohono O'odham Nation for representation of individual members when the Tohono O'odham Advocate Program is unable to do so because of a conflict, e.g., the Program represents the adverse party. The lawyer's contract does not provide for costs of engaging experts or other witnesses, in general. The competency evaluation of a defendant is fundamental to the due process of law required under Article III, Section 1 of the Constitution of the Tohono O'odham Nation and Section 8 of the ICRA when the defendant is subject to criminal charges that may result in incarceration and/or fines, and defendant provides sufficient proof that competence is an issue. The Court agreed that competence is an issue on July 2, 2010, and the defendant has not had appropriate assistance from the Tohono O'odham nation to obtain appropriate evaluation(s) for competency. Based upon the time that has passed, the defendant's motion to dismiss for lack of resources to determine competency is hereby granted. Without an appropriate evaluation for competency, the defendant cannot be tried. The charges of Abuse of Office 2010-0625CR, Embezzlement 2010-0626CR, and Criminal Fraud 2010-0627CR are dismissed without prejudice.

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2021 Supplement

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IN THE JUDICIARY COURT OF THE TOHONO O'ODHAM NATION
COUNTY OF PIMA, IN THE STATE OF ARIZONA

COURT OF APPEALS

Alfreda A. Havier Appellant vs. Tohono O'Odham Nation, Respondent	Case No. CTA-0016-CR10-1402-86 C O U R T O R D E R

A Petition appealing the decision of the Trial Court denying the Appellant's motion to withdraw a guilty plea having been timely filed, and, the Court of Appeals sitting en banc having reviewed the Appellant's Petition finds that the Petition for Appeal does have merit, and, the Court of Appeals hereby grants relief to the Appellant in the following manner:

It is ordered that the Appellant's case is remanded to the Trial Court with instructions that the Appellant's conviction is reversed and the Appellant to be allowed to withdraw her guilty plea, and the trial court to proceed as if the Appellant had pled not guilty to the charges.

So ordered on 29th day of May, 1987.

Hilda Manuel
JUDGE HILDA MANUEL

Ned Norris Jr.
JUDGE NED NORRIS JR.

Evelyn Juan
JUDGE EVELYN JUAN

FILED
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JUDICIAL COURT
OF THE
TOHONO O'ODHAM
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In the Judicial Court of the Tohono O'odham Nation
County of Pima, State of Arizona
Adult Civil Division

TOHONO O'ODHAM GAMING ENTERPRISE, an enterprise of the Tohono O'odham Nation,
Plaintiff,

vs.

TOHONO O'ODHAM EMPLOYMENT RIGHTS COMMISSION,
Defendant.

CASE NO. CTA-0086-01-2005

COURT ORDER

This matter comes before the court on the Plaintiff's Complaint and Opening Brief filed on February 3, 2006; the Defendant filed their Response Brief on February 23, 2006. There are no other pleadings filed to date for the court's consideration.

The court, having reviewed the pleadings filed, **FINDS** and **ORDERS** that the Plaintiff Tohono O'odham Gaming Enterprise (the Gaming Enterprise) is subject to this court's jurisdiction pursuant to Tohono O'odham Legislative Council (TOLC) Resolution No. 39-311, as subsequently modified in Resolution Nos. 03-231 and 04-513; the Defendant Tohono O'odham Employment Rights Commission (the Commission) likewise was created by TOLC Ordinance No. 01-85 and is subject to this court's jurisdiction; this complaint rises out of a decision made by the Commission, per their letter dated December 15, 2005, against the Gaming Enterprise and the Gaming Enterprise filed this complaint as their subsequent appeal per Section 1.5(g), TERO Ordinance 01-85; the Commission in their Response state that they have since amended Section 1.4(a) of the Tribal Employment Rights Regulations that 'indisputably applies to

the Gaming Enterprise', Defendant's Response Brief, page 3, lines 26-27; that the TERO Ordinance authorizes the Commission to '(A) Adopt, amend or rescind rules, regulations or guidelines;' Section 9, Ord No. 01-85; therefore, this matter is remanded to the Commission for the Commission's decision in accordance with the amended Section 1.4(a), TERO Regulations.

SO ORDER THIS 13TH DAY OF MARCH 2006.

JUDGE Rose Johnson Antone

JUSTICE CENTER

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IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
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IN THE COURT OF APPEALS OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, STATE OF ARIZONA

Tohono O'odham Gaming Enterprise and
Tohono O'odham Gaming Office,
Defendant-Appellants,

vs.

Clifford Tanner,
Plaintiff-Appellee,

Case No.: CTA-0117
(Ref:2011-0195AV)

ORDER

Upon joint motion of Defendants-Appellants Tohono O'odham Gaming office and Tohono O'odham Gaming Enterprise, and good cause appearing,

IT IS HEREBY ORDERED, that this case is DISMISSED in its entirety as to all parties, with prejudice, and that each party shall be responsible for and bear that party's own attorney's fees, cost and expenses.

Dated this 5th day of December, 2013.

Violet Lui-Frank
Judge Violet Lui-Frank

Judge Pro Tem Rachel Johnson

Barbara Atwood
Judge Pro Tem Barbara Atwood

TOHONO O'ODHAM NATION
JUSTICE CENTER

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TOHONO O'ODHAM COURT OF APPEALS

ELVIRA AGUILLA	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. CTA-0119
	)	
TOHONO O'ODHAM NATION,	)	ORDER REMANDING TO TRIAL COURT
	)	
Appellee.	)	
_____	)	

Before Judges Barbara Atwood, Veronica Darnell, and Rachel Johnson.

Appellant filed a Notice of Appeal on May 20, 2013, from the Trial Court Findings and Order, entered April 30, 2013. In that Order, the trial court found that reasonable suspicion justified Appellant's stop and that all evidence derived from the stop would be allowed at trial. No further proceedings occurred in the trial court, and Appellant has not yet been convicted of any offense.

Because Appellant is appealing from an interlocutory order of the trial court, this Court directed the parties to address the requirements of Rule 3(c) and Rule 14 of the Tohono O'odham Rules of Appellate Procedure ("Rule 3" and "Rule 14"). Appellant filed a brief in a timely manner but did not address the questions raised by the Court. The Nation did not file a responsive brief.

Oral argument was held on January 29, 2014, at which both Appellant and the Nation, by Court permission, addressed the requirements of Rule 3 and Rule 14 on interlocutory appeals. Appellant , through counsel, acknowledged that she had not complied with the requirements of Rule 14 but argued that the spirit of the Rule had been satisfied.

Rule 3(c)(2) authorizes appellate review in criminal matters "after a judgment of guilt and sentencing, or a ruling by the trial court giving rise to good faith claims that an error of law or procedure occurred, which would have affected the outcome of the case." Rule 3(c)(3), in turn, authorizes appellate review of "trial court action, which is not final by filing an interlocutory request for permission to appeal as permitted under Rule 14 of these rules." The interplay of these two provisions is unclear. In particular, the omission of any reference to Rule 14 in Rule 3(c)(2) might be read to permit interlocutory appeals in criminal cases without regard to the ordinary requirements for interlocutory review. Nevertheless, Rule 14 itself is written in broad terms applicable to civil and criminal matters alike.

In light of the overall structure of the Tohono O'odham Rules of Appellate Procedure, the Court interprets Rule 14 to apply whenever an appeal is taken from a non-final judgment. Under Rule 14, a litigant seeking to appeal from an interlocutory order must file a request with the trial court within 15 days of the order giving rise to the appeal, and the trial court is required to issue its order granting or denying the request within 20 days after the request is filed. Rule 14, in other words, requires that the trial court authorize the interlocutory appeal. Rule 15 further limits availability of interlocutory review with the following language:

> Such appeal shall be granted only if the lower court has committed an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented which would determine the outcome of the appeal.

Rule 15(a), Tohono O'odham Rules of Appellate Procedure. Together, Rules 14 and 15 make clear that interlocutory review is not automatically available and requires the consent of both the trial court and appellate court.

Appellant in the instant case did not comply with Rule 14 of the Tohono O'odham Rules of Appellate Procedure. In particular, her notice of appeal was filed 30 days after the trial court order, and she did not request the trial judge to grant permission for the interlocutory appeal. This Court is therefore without jurisdiction to consider the appeal. The case is remanded for further proceedings in the trial court.

It is so ordered.

Signing for the Court: Barbara A. Atwood

Barbara A. Atwood, Presiding Appellate Judge

Date: Feb 13, 2014

TOHONO O'ODHAM NATION
JUSTICE CENTER

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
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DATE/TIME
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In the Judicial Court of the Tohono O'odham Nation
County of Pima, State of Arizona
Court of Appeals

TOHONO O'ODHAM NATION, Appellant,	)	
vs.	)	Case No.: CTA-0122
	)	Ref: TR2013-0747
ELISA L. ESCARSEGA, Appellee.	)	
	)	Order Dismissing Appeal

Before Judges Barbara Atwood, Michael Brown, and Rachel Johnson.

In this case, the Tohono O'odham Nation filed a Notice of Appeal on October 17, 2013, from a trial court order dismissing criminal charges against Appellee. Having examined the file, this Court concludes that the appeal must be dismissed. The trial court order of September 23, 2013,[1] dismissing the criminal charges against Appellee was a dismissal "without prejudice for lack of evidence of probable cause at the time of arraignment."

As noted by Judge Marcus during the arraignment, the Nation was free to gather evidence sufficient to show the existence of probable cause and refile the criminal charges against Appellee. The trial court order therefore was not a final order subject to appeal within the meaning of Rule 3 of the Tohono O'odham Rules of Appellate Procedure. Under Rule 3(c)(2), the Court of Appeals may review any:

> criminal matter after a judgment of guilt and sentencing, or a ruling by the trial court giving rise to good faith claims that an error of law or procedure occurred, which would have affected the outcome of the case.

Because the prosecutor for the Nation could have returned to the trial court with evidence establishing probable cause, there is no basis for the appeal.

Dated this 14th day of March, 2014.

For the Court:

Barbara A. Atwood

Barbara A. Atwood, Presiding Judge

[1] The Notice of Appeal erroneously refers to the trial court order as having been entered on October 23, 2013, and on September 23, 2012. The actual date of the trial court order was September 23, 2013.

TOHONO O'ODHAM NATION
JUSTICE CENTER

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TOHONO O'ODHAM
NATION
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DATE/TIME
L. Rios
COURT CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, IN THE STATE OF ARIZONA

COURT OF APPEALS

TOHONO O'ODHAM NATION, Plaintiff, Vs. HIA-CED DISTRICT COUNCIL; MARLENE VASQUEZ, SHERRY SERVENTI, DELFINA CAMERON, BRENDA SAVILLE, AND VIRGINIA GARCIA, ALL IN THEIR OFFICIAL CAPACITIES AS DISTRICT REPRESENTATIVES OF HIA-CED DISTRICT; FERNANDO MARTINEZ, VICE-CHAIRMAN OF THE HIA-CED DISTRICT, IN HIS OFFICIAL CAPACITY; AND CHRISTINA C. BELL ANDREWS, CHAIRWOMAN OF THE HIA-CED DISTRICT, IN HER OFFICIAL CAPACITIY, Defendants,	Case No. CTA-0125 Designation of Chief Appellate Judge and Order Not Accepting Petition

The Amended Complaint and Petition for Writ of Mandamus was filed on March 13, 2014. Judge Mashone L. Antone has been chosen Chief Appellate Judge pursuant to Rule 2c of the Tohono O'odham Rules of Appellate Procedure.

The Court of Appeals finds it does not have jurisdiction over this matter and does not accept the Petition pursuant to Tohono O'odham Rules of Court, Section 5 Rules of Extraordinary Writs *"(j) Effect. All writs of mandamus or other extraordinary writs pending in the Tohono O'odham Court of Appeals pursuant to Rule 23 of the Tohono O'odham Rules of Appellate Procedure at the time of the adoption of this Rule shall be remanded by the Appellate Court for further proceedings pursuant to this Rule."*

Therefore, the Court of Appeals remands the case to the Civil Court of the Tohono O'odham Nation pursuant to Rule 2(j) of the Tohono O'odham Rules of Court, Section 5 Rules of Extraordinary Writs.

Dated this 28th day of March, 2014.

For the Court,

Mashone L. Antone

Mashone L. Antone
Chief Appellate Judge

TOHONO O'ODHAM NATION
JUSTICE CENTER

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In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

MARY FRANCES GARCIA, Appellant, vs. TOHONO O'ODHAM NATION, Appellee.	Case No.: CTA-0123 Ref. 2007-02-0332-0336CR, 2007-02-0338-0340CR; 2011-0116CR ORDER DISMISSING APPEAL

Before Judges Barbara Atwood, Veronica Darnell, and Rachel Johnson.

Appellant Mary Frances Garcia had the right to file an appeal brief within 30 days of receiving notice of this Court's order of February 19, 2014. The Court directed that Appellant's brief must contain a "concise statement of her arguments as to why the Trial Record Entry of November 7, 2013, was in error." Because Appellant received a copy of the order on February 20, 2014, and has not filed a an appeal brief consistent with this Court's order, her appeal is dismissed.

Appellant may continue to seek habeas corpus relief before the Tohono O'odham Civil Court on the ground that her conviction or detention is in violation of the Indian Civil Rights Act, 25 U.S.C. § 1303, or the Tohono O'odham Constitution. In order to pursue habeas corpus relief, Appellant must comply with Rule 1, Rules of Procedure for Extraordinary Writs, Tohono O'odham Rules of Court.

Dated this 28th day of March 2014.

For the Court Barbara Atwood
Barbara Atwood, Presiding Judge

TOHONO O'ODHAM
NATION
JUSTICE CENTER

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IN THE
SUPREME COURT
OF THE
TOHONO O'ODHAM
NATION
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DATE/TIME
L. Rios
COURT CLERK

IN THE COURT OF APPEALS

OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, IN THE STATE OF ARIZONA

VALERIE GARCIA,

Appellant,

vs.

TOHONO O'ODHAM NATION

Appellee.

_____/

NO. CTA-0126

ORDER DISMISSING APPEAL

IT IS HEREBY ORDERED DISMISSING APPELLANT'S APPEAL as untimely filed. Tohono O'odham Rules of Appellate Procedure, Rules 12 (a) (c), & Rule 13. Sentencing concluded on March 10th, 2014, as evidenced by Trial Court Minute Entry and appellant's signature accepting the terms and conditions of the Probation Department. There is an additional note by the trial court judge stating the Defendant can appeal the denial of her Motion to Withdraw the Plea, which is dated March 11, 2014.

Appellant, therefore, had to file her appeal on or before April 9th or 10th, 2014, depending on which of these two dates indicated finality. However, the appeal was filed on April 14th, 2014. Failure to timely file is jurisdictional.

DATED this 14th day of May, 2014

Robert Alan Hershey
Judge Pro Tempore
Chief Judge of the Court of Appeals

TOHONO O'ODHAM NATION
JUSTICE CENTER

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APPELLATE COURT
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L. Rios
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In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Court of Appeals

GLEN FRANK, Appellant, vs. TOHONO O'ODHAM NATION, Appellee.	)	Case No.: CTA-0116 (Reference 2010-1483-1489CR) COURT ORDER

POSTURE AND SUMMARY OF PROCEEDINGS, AND FACTS

A. POSTURE AND SUMMARY OF PROCEEDINGS

On April 23, 2012, Petitioner/Appellant Glen Frank ("Appellant") filed a Petition for Writ of Habeas Corpus pursuant to Rule 24 of the Tohono O'odham Rules of Appellate Procedure, Tohono O'odham Rules of Court. The Appellant's grounds for the Writ were withdrawal of counsel, failure to be given a continuance to allow him to prepare his defense, failure to be provided legal materials, and failure to be advised of appellate time requirements. An evidentiary hearing was held June 13, 2013, and the parties filed briefs on July 12, 2013.

Upon review of the matter, this Court held in its Order of November 7, 2013, and reaffirmed on January 9, 2014 over the objection of the Appellee, that the matter was more properly an appeal as: (1) the Petition for a Writ of Habeas Corpus was filed on April 23, 2012, nineteen days after Appellant's sentencing on April 4, 2012, well within the thirty-day time period for filing his appeal; (2) Rule 10(a) of the Tohono O'odham Rules of Appellate Procedure provides that "[A]n appeal shall not be dismissed for informality of form or title so long as it complies with Rule 12(d) of these rules;" (3) although Appellant labeled his filing as "Petition for Habeas Corpus," and this Court initially treated the Petition as a habeas corpus matter, the Petition is in substantial compliance with the requirements of Rule 12(d) of the Appellate Rules as an appeal in that it lists the Appellant's name and address, states grounds for reversal, and the nature of the relief being sought; and (4) by analogy, although Appellant did not title the action as an appeal, it has been the long-standing practice of the Tohono O'odham Courts to treat documents submitted by *pro se* parties as appellate filings on a case by case basis, such as "Request to Speak to the Court" documents, so long as the filing is both timely and in substantial compliance with Rule 12(d) of the Appellate Rules given the lack of legal experience of *pro se* parties.

The Court further held in the January 9, 2014 Order that of the four issues raised by Appellant in his original filing, the only the issue remaining was whether the Appellant was harmed by the withdrawal of legal counsel and, by implication, whether the Appellant, if he was indigent, should have been provided effective assistance of counsel at the expense of the Tohono O'odham

Nation ("Nation"). The Court determined that the Appellant had been advised of the appellate time requirements at the time of trial; that the issue of legal materials had been addressed in *Frank vs. Tohono O'odham Nation*, Case No. CTA-0114, 3 TOR 3d 55 (Ct.App., 2013); and that a review of the record showed that Appellant had been given numerous continuances and the denial of an additional continuance was not an error. The Court finally ordered that the parties were, by February 10, 2014, to notify the Court if the party was requesting a hearing on the appeal and/or wanted to file a brief on the appeal.

On January 23, 2014, the Appellant submitted a Request to Speak with the Court requesting: (1) a hearing; (2) to file a brief; and (3) for the Court to "please tell me what to write about in my brief." On February 4, 2014, the Appellee filed a Notice of Waiver of Right to Hearing and Intent to File Brief. On February 10, 2014, the Court Ordered that there would not be a hearing and briefs should be filed by April 7, 2014. The Appellant did not file a brief. The Appellee filed its brief on April 7, 2014.

B. FACTS

Prior to trial Appellant, Glen Frank, was represented by an advocate, but his advocate was allowed to withdraw as Appellant's legal counsel on January 18, 2012. Although in custody on the hearing date, Appellant was not physically brought to the hearing, nor was he able to appear telephonically when the Motion to Withdraw was granted. Appellant had previously testified, and a review of the trial court record confirms, that he was never advised that if he was indigent he could be provided effective assistance of counsel at the expense of the Nation. On numerous occasions prior to trial, Appellant requested continuances to obtain counsel, or to prepare for trial. The trial court denied his last request and, after a bench trial on January 27, 2012, Appellant was found guilty of the charges. On April 4, 2012, he was sentenced to four and one half years in jail.

ISSUE:

Was the Appellant harmed by the withdrawal of counsel, and, by implication, should the Trial Court have advised the Appellant that if he was indigent he could be provided effective assistance of counsel at the expense of the Nation?

DISCUSSION:

On January 9, 2014, this Court determined that the sole issue remaining was whether the Appellant suffered harm by the withdrawal of is legal counsel and, further, whether the Appellant suffered harm by the failure of the Trial Court to advise him that if he was indigent, Appellant could be provided effective assistance of counsel at the expense of the Nation.

Even if this issue was not raised by implication, the Court may raise the issue *sua sponte* or *nostra sponte*, meaning that the court may act upon its own motion. The nature of the appellate process is that the entire record of the Appellant's matter is reviewed. This review may result in the Court discovering an issue which is relevant to the appeal. *Trest v. Cain*, 522 U.S. 87, at 90 (1997). The review of the record in this case in fact revealed an issue which is dispositive of the case. This

is not the first time this Court has issued an Order *sua sponte*. *See*, *Joaquin v. Goodnight*, 1 TOR 3d 29 (Ct.App., 1991). The Nation argues that "courts are generally limited to addressing the claims and arguments advanced by the parties" and cites *Sanchez-Llamas v. Oregon*, 548 U. S. 331, 356-357." The case states, however, "[t]his reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Id.*, at 356. The words "generally" and "chiefly" clearly indicate that the Court may appropriately raise an issue *sua sponte*. Defendants must be guaranteed a fair trial and a manifest injustice must be avoided to prevent a miscarriage of justice. The Nation's Constitution in Article III – Rights of Members, Section 1 guarantees these rights, and states: "[The Nation's government] shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of its law." Tribal governments are not subject to the Bill of Rights or the 14th Amendment to the United States Constitution. *Talton v. Mayes*, 163 U.S. 376 (1896); *United States v. Wheeler*, 435 U.S. 313 (1978). By enacting the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301 *et seq.*, and as amended by the Tribal Law and Order Act of 2010 (TLOA), Congress, however, granted protections similar to those under the Bill of Rights and the 14th Amendment to persons subjected to tribal government actions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir., 1977). The ICRA in § 1302(c) provides in part:

> In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than one year on a defendant, the Indian tribe shall—
>
> 1. Provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
> 2. At the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

The Tohono O'odham Nation Constitution in Article III, Section 4, explicitly adopted the protections of the Indian Civil Rights Act, which was amended by the Tribal Law and Order Act.

The Appellant was arraigned on June 14, 2010. The Tribal Law and Order Act was not signed by President Obama until July 29, 2010. Appellant's trial, however, was held on January 27, 2012. The ICRA as amended by the TLOA has been held applicable in cases tried after it became a law, even if a defendant was charged before law took effect. *Johnson v. Tracy*, 2012 WL 4478801 (D.Ariz., 2012).

Appellee indicated at the evidentiary hearing that the Nation must "opt in" in order for §1302 to apply to the Nation. When Appellee's counsel was questioned as to where in the Tribal Law and Order Act required the Nation to "opt in" in order to apply to the Nation, counsel indicated that "opting in" was not in the Tribal Law and Order Act but it was the intent of the Act. The Court has

not found any statutory language or case law which requires the Nation to "opt in" to the Tribal Law and Order Act.

It should be noted that a judge could also determine that since a Defendant was not provided effective assistance of counsel at the expense of the Nation, the judge could not sentence the Defendant to more than one year in jail on all the charges. This was not done in this case.

The Tribal Law and Order Act applies to a "criminal proceeding in which an Indian tribe, in exercising the powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant." 25 U.S.C. § 1302(c). Questions have been raised as to whether "total term of imprisonment of more than one year" for a defendant applies to a criminal proceeding or incident with the total term of all the charges which is referred to as "stacking," or applies to one criminal charge. If the total sentences for all the crimes charged for the criminal proceeding or incident exceed one year, then the requirement for effective assistance of counsel at the expense of the Nation applies. It is our opinion that it applies to criminal proceeding or incident. *Johnson v. Tracy*, at 5. Appellant's "total" prison term of two years, resulting from a single "criminal proceeding," clearly falls within this provision.

On October 1, 2013, the Tohono O'odham Legislative Council adopted Resolution 13-390, amending Title 6 of Tohono O'odham Code, specifically Court Rules and Procedures Section 1108. The law provides in Section 1108(B) for appointment of a state-licensed attorney at the Nation's expense in criminal cases where incarceration in excess of one year is imposed, and in Section 1103(D) for the judge to be a state-licensed attorney, and to also have sufficient training to preside over criminal proceedings. The law was prospective and provides that an attorney is only appointed in new cases or any pending criminal proceeding in which a trial is scheduled within 30 days of the effective date of the resolution, October 3, 2013. On October 25, 2013, Administrative Order 2013-04, amending Rule 3 of the Tohono O'odham Rules of Criminal Procedure, was issued by the Court to implement appointment of an attorney for indigent defendants. Although this action by the Legislative Council is not determinative of this case, it does demonstrate that the Council sought to comply with the Tribal Law and Order Act.

The Appellant faced over one year in detention. Appellant was not advised that he was entitled to the effective assistance of an attorney at the Nation's expense if he was indigent. No inquiry was made into whether Appellant was indigent. This right effective assistance of counsel is fundamental. *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Appellant's advocate requested that he be allowed to withdraw because the Appellant could not pay him. This raises the issue of whether the Appellant was indigent. The Appellee/Appellee argues that the "appellant never objected to the withdrawal of counsel either at the time of withdrawal or trial." This assumes that the Appellee had the legal expertise to know he could object. Furthermore, the Appellee was not in Court and could not be reached by telephone the day the Motion to Withdraw was granted.

As a result of the Appellant not being advised if he was indigent that he could be provided effective assistance of counsel at the expense of the tribal government, and the lack of any finding of whether he qualified for legal representation at the Nation's expense, the Appellant was not adequately represented when he was convicted, and suffered significant harm.

THE COURT OF APPEALS ORDERS AS FOLLOWS:

For the reasons set forth in this Opinion, the appeal is granted and the Judgment of the Trial Court convicting Defendant is reversed and the conviction set aside. The case is remanded to the Trial Court. The Trial Court shall enforce Title 6, Section 1108 of the Tohono O'odham Code, and Rule 3 of the Tohono O'odham Rules of Criminal Procedure. The Prosecutor shall notify the victim of all hearings. Appellant shall continue to be held until his conditions of release are determined by the Trial Court judge.

Dated this 11th day of August, 2014.

Walter Marcus, Judge

Rachel Johnson, Judge Pro Tem

Veronica Darnel ,Judge Pro Tem,

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OF THE
TOHONO O'ODHAM
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In the Judicial Court of the Tohono O'odham Nation
Court of Appeals

JONATHAN EMERSON **Appellant,** **vs.** **TOHONO O'ODHAM NATION** **Appellee.**	**Case No.: CTA-0124** **(Reference 2013-2813-2814CR)** **OPINION AND ORDER**

Before Judges Barbara Atwood, Michael Brown, and Walter Marcus.

Judges Barbara Atwood and Walter Marcus delivering the opinion of the Court.

Judge Michael Brown, concurring in part and dissenting in part.

On February 24, 2014, Jonathan Emerson, Defendant/Appellant (hereinafter referred to as Appellant), filed a Notice of Appeal in cases 2013-2813 CR and 2013-2814 CR. On March 13, 2014, the Court of Appeals found it had jurisdiction over the matter and accepted the appeal. This Court ordered Appellant, within thirty (30) days after being served with the notice that the Court of Appeals had accepted the appeal, to file a written brief or statement of law in support of the appeal. This Court also ordered the Tohono O'odham Nation, Appellee, (hereinafter referred to as either Appellee or Nation) to file an answering brief within thirty (30) days of service of Appellant's brief. Neither Appellant nor Appellee filed a brief. On April 23, 2014, this Court stated it would consider Appellant's Notice of Appeal as his opening brief and ordered Appellee to file its responsive brief within thirty (30) days. Appellee has not filed a responsive brief or pleading contesting the issues raised by Appellant.

The appeal presents the following issues:

I. Whether Appellant had a reasonable opportunity to retain an attorney to represent him in defense of the charges against him.

II. Whether Appellant was afforded the right of access to the court, including access to official documents in his case, the opportunity to call witnesses on his behalf, and access to legal materials to prepare for his own defense.

FACTS

This recitation of facts is based on the record in the Trial Court and the uncontroverted statements in Appellant's Notice of Appeal.

This an appeal from a conviction under Criminal Complaint Number 2013-2813/2814 CR, charging Appellant with arson and burglary in violation of the Tohono O'odham Code, Title 7, Chapter 5, Sections 5.3 (a) and 5.4 (a) (1), respectively. The charge of arson carries a penalty of up to 360 days and the charge of burglary carries a penalty of up to 180 days. The total possible imprisonment amounted to 540 days. On October 21, 2013, the Nation informed the Trial Court that the Nation sought to impose a total term of imprisonment of more than one year. The Trial Court found that the Appellant was unemployed, indigent, and facing a term of over one year imprisonment and appointed the Advocate Program to represent Appellant.

The Advocate Program did not contact Appellant from the time of its appointment on October 21, 2013, to December 9, 2013. The record does not show that a state-licensed attorney ever contacted Appellant, and in any event no such attorney ever appeared to represent Appellant.

On December 9, 2013, the Nation informed the Trial Court, on the record, that the Nation had decided *not* to seek more than one year in this case, relying on Tohono O'odham Code Title 6, Ch. 1, Section 1108(C) (requiring Nation to notify court no later than 30 days before trial of intent to seek imprisonment of more than one year). The Trial Court contemporaneously vacated the order appointing the Advocate Program. Appellant did not object to this change in sentencing goals.

Appellant alleges, and the Nation has not refuted, that while he was awaiting trial, he was not permitted to use the telephone to contact an attorney, that he did not have access to legal materials because the Law Library computer was "blocked" from access to online legal sites when appellant tried to conduct research; that he expressed his desire to call witnesses on his behalf but did not know the procedure for obtaining a subpoena; and that he was not given access to his police reports and other official documents.

After a bench trial on February 6, 2014, Appellant was found guilty of arson and burglary and sentenced to 360 days on the arson conviction and 180 days on the burglary conviction, the sentences to run concurrently. During the bench trial, Appellant stated in court that he had wanted to call witnesses and better prepare for his defense but was not able to do so because of his lack of access to legal materials and his lack of legal knowledge.

On March 24, 2014, the Trial Court ordered that "[o]utstanding fines are stayed pending the Defendant's appeal and he is released immediately on his own recognizance to afford him the right and opportunity to retain counsel." The Trial Court also ordered Appellant "to maintain his residence within the Tohono O'odham Nation and appear for appeal proceedings." The Trial Court released him with the expectation that he would hire an attorney to represent him. He did not obtain an attorney.

DISCUSSION

The judicial power of the Tohono O'odham Nation is vested in the Tohono O'odham Judiciary and extends to all cases and matters in law and equity arising under the Constitution. Constitution of Tohono O'odham Nation, Article VIII, Sections 1 & 2. While the United States Constitution does not apply to Indian tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), the Indian Civil Rights Act requires Indian tribes to observe certain civil rights protections as it exercises self-government, including the guarantees of equal protection and due process of law. 25 U.S.C. § 1302(a)(8). The Nation's Constitution, in turn, mandates that the Nation "not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law." Constitution of Tohono O'odham Nation, Article III, Section 1.

All of the issues raised by Appellant fall within his right to due process of law. This Court is specifically charged by the Constitution of the Tohono O'odham Nation with protecting these rights and has the authority to determine the above issues.

I. REASONABLE OPPORTUNITY TO RETAIN AN ATTORNEY AT HIS OWN EXPENSE

Federal courts have recognized that as a matter of due process, a defendant in a criminal case must have "a fair opportunity to obtain the assistance of counsel of his choice and to prepare and conduct his defense." *U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969). See also *United States v. Johnston*, 318 F.2d 288, 291 (6th Cir. 1963) (stating same principle under Sixth Amendment). The Tohono O'odham Court of Appeals, moreover, has found reversible error when a defendant was informally represented by a non-certified legal practitioner and was thereby denied counsel of choice. *Manuel v. Tohono O'odham Nation*, 3 TOR3d 39 (Ct. App. 2011). A defendant alleging a denial of the opportunity to retain counsel has the burden of demonstrating that the denial occurred and that the defendant suffered injury as a result. See *Lewis v. Casey*, 518 U.S. 343 (1996) (addressing alleged denial of access to legal materials).

In this case, Appellant contends that he "was not given the opportunity to obtain legal counsel at his own expense." Appellant's Notice of Appeal, Feb. 25, 2014. More particularly, he alleges that he "was not allowed to use the phone here in corrections to call lawyers, when requested." *Id.* We note that Appellant had almost two months in which to seek counsel and did not request a continuance from the Trial Court for purposes of retaining counsel. On the other hand, the Nation has not filed a responsive brief and thus has not refuted Appellant's central contention that his request to use the telephone was denied, nor has the Nation suggested that Appellant was offered any alternative. Also, from October 21, 2013, until December 9, 2013, Appellant was under the impression that appointed counsel would be provided. When the Nation then announced that it would not seek a sentence in excess of one year, Appellant may have been confused at that point about his right to retain an attorney at his own expense. Later, when Appellant was not permitted to use the telephone to contact outside

counsel, he could have reasonably concluded that his only option was to represent himself.

In the absence of a responsive brief from the Nation, this Court concludes that Appellant was denied a reasonable opportunity and means to retain counsel of his choice. The Court further finds that the absence of counsel undoubtedly impaired Appellant's defense of his case, a disadvantage Appellant alluded to during the bench trial on February 6, 2014.

II. ACCESS TO THE COURT

Incarcerated individuals have a due process right of access to the court that includes access to legal materials or assistance. *Lewis v. Casey*, 518 U.S. 343 (1996); *Younger v. Gilmore*, 404 U.S. 15 (1971), affirming *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970). While neither the Constitution nor the Code of the Tohono O'odham Nation expressly provides for the right of access to the court or access to legal materials, access to the court is an element of due process of law and thus applies to criminal proceedings conducted by the Nation. Constitution of Tohono O'odham Nation, Article III, Section 1. We also note that in criminal proceedings in which an Indian tribe imposes a term of imprisonment of more than one year, the Indian Civil Rights Act requires tribes, *prior to charging the defendant*, to make publicly available the criminal laws, rules of evidence, and rules of criminal procedure. 25 U.S.C. § 1302(c)(4).

The law has recognized a right of reasonable access to legal materials since *Bounds v. Smith*, 430 U.S. 817 (1977). The Supreme Court explained the nature of the requirement:

> [T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828. The Court further noted that other ways of assuring meaningful access to the courts are possible, such as the use of paraprofessionals and law students as volunteers or in law clinics. *Id.* at 830-831. In a later case, the Court clarified that the defendant must demonstrate that the deprivation of adequate legal materials caused actual injury. *Lewis v. Casey*, 518 U.S. 343 (1996). In other words, here the Appellant must show that the lack of adequate legal materials prevented him from filing meaningful pleadings with the Trial Court.

In this case, the Appellant alleges three obstructions to his right of access: the Corrections law library computer was blocked from access to the Nation's website, thus barring him from accessing Tohono O'odham law, rules of procedure, and case law; Corrections did not provide assistance by persons trained in the law to aid him with the procedures for subpoenaing witnesses; and Appellant did not have access to his own legal documents, including police reports, when Corrections placed him in a facility

outside the Nation, and his documents were reported as lost when he returned to the Nation.

Without access to a functioning computer, a minimally adequate law library, or a knowledgeable person to assist him, Appellant was unable to prepare for his own defense. Although he maintained at trial that a witness could have corroborated his testimony that he was at home during the time of the incident, he did not know the steps to take to compel the attendance of witnesses on his own behalf. As he alleged, "Appellant expressed his want to have witnesses testify on his behalf but did not know the procedures to contact & subpoena witnesses." Appellant's Notice of Appeal, Feb. 25, 2014.

Among the rights guaranteed by the Constitution of the Tohono O'odham Nation is a right to call witnesses in one's own defense, and the right to have compulsory process to require their appearance. Without legal materials or a knowledgeable assistant, Appellant did not know how to use the subpoena power. Appellant further complains that on the computer to which he was allowed access by Corrections, each site that he attempted to use for research purposes was blocked. The Nation's website, which contains the Constitution of the Tohono O'odham Nation and Rules of Criminal Procedure, was also blocked. Moreover, Appellant was not given enough time to access the computer for legal research.

A right of reasonable access clearly requires more than access to a computer on which a majority of legal research sites are blocked, and on which access to the Constitution and laws of the Tohono O'odham Nation is denied. In light of the Nation's failure to refute Appellant's assertions, this Court finds that Appellant suffered injury due to the denial of his right of access to the court, including his lack of access to legal materials or to someone knowledgeable in the law to assist him in preparing his own defense

Finally, Appellant alleges that he was not given access to legal documents in his own case. When he was transferred to the San Luis Regional Detention Center, there was no computer access, and Appellant had no access to his police reports and legal materials. Upon his return to Sells, he was told by Corrections that all his court documents were "lost" and the law websites on the computer were still blocked. Appellant's Notice of Appeal, Feb. 25, 2014.

The Appellant has the right to be provided court documents and police records pertaining to his case, and to retain those materials for use in his defense, no matter where he is in custody. Correction facilities must have a system for reasonable preservation and storage of Appellant's documents. If lost by Corrections, Corrections must replace the documents. If possible, the missing documents should be identified by the Appellant and new copies must be provided to him.

This Court finds that the Nation's failure to provide Appellant with access to official documents in his own criminal case deprived him of liberty without due process of law.

CONCLUSION

Appellant had the right to retain counsel at his own expense after the Nation determined it would seek a sentence of no more than 365 days. Based on Appellant's Notice of Appeal, and absent any response from the Nation, the Court finds that Appellant was not given adequate opportunity to retain private counsel since he was denied the means to contact legal practitioners. In addition, Appellant was deprived of his right of access to the court because of the unavailability of adequate legal materials or knowledgeable legal assistance. The deprivation of the right of access impaired Appellant's ability to identify and subpoena witnesses on his own behalf and to otherwise prepare his defense. The failure of the Nation to provide Appellant with official documents in his case further violated his right of access to the court. Appellant's conviction is hereby reversed.

ORDER

The Nation must provide the Appellant with legal documents pertaining to his own case, including all police reports, witness statements, and court documents. Appellant must be provided adequate legal materials or the assistance of someone knowledgeable in the law in order to adequately prepare for his own defense, including assistance in the use of subpoenas for witnesses on his own behalf.

Appellant must be given access to primary legal sources, such as applicable laws and rules of court, through a hard copy of the documents or other means, such as, but not limited to, a functioning computer. At minimum, the primary legal sources at this time should include the Constitution of the Tohono O'odham Nation, Tohono O'odham Rules of Court, Tohono O'odham Code, Title 7, Crimes, Tohono O'odham Reports, and the Indian Civil Rights Act. In so far as the Tohono O'odham Rules of Court rely on Arizona procedural rules, then Appellant must have access to the Arizona Rules of Court, particularly the Arizona Rules of Criminal Procedure and the Arizona Rules of Evidence.

In addition, Corrections must make available secondary sources to provide inmates with needed guidance in the use of the primary legal materials. Apart from the primary legal materials identified, this Court will not dictate to Corrections the precise way in which it must remedy the failure to provide adequate legal materials. To assist the Nation in determining what additional resources must be made available in compiling a minimally adequate law library, the Court has included an Addendum to this Opinion containing a suggested list.

The Addendum also includes suggested guidelines for ensuring that inmates have adequate opportunity to use the legal materials once they are made available. Corrections is the entity that must set reasonable times and days for legal research because they must accommodate the need for security with the duty to permit legal

research. We therefore defer to Corrections to set up the times and dates available for legal research, bearing in mind the preceding paragraphs.

In conclusion, Appellant suffered a violation of his right to Due Process under the Tohono O'odham Constitution and the Indian Civil Rights Act by the failure of the Nation to provide him with a reasonable opportunity to retain outside counsel and by denying him meaningful access to the court, including access to legal materials and to his official documents. The conviction is therefore reversed and the case is remanded for a new trial. Conditions of release shall be set by the trial court. Because aspects of this Order, as a practical matter, will protect other incarcerated individuals' rights of access to the court, non-compliance with this Order may result in future convictions being overturned.

SO ORDERED AND ISSUED THIS 1ST DAY OF APRIL, 2015.

Walter Marcus, Presiding Judge

Barbara Atwood, Judge Pro Tem

ADDENDUM

Suggested secondary sources:

- *Criminal Procedure: Constitutional Limitations in a Nutshell,* Gerald H. Israel and Wayne R. LaFave, West Group (most current edition)
- *Criminal Law in a Nutshell*, Harold H. Loewy, West Group (most current edition)
- *The Law of Sentencing, Corrections and Prisoners' Rights in a Nutshell*, Lynn S. Brandon, West Group (most current edition)
- *McCormack on Evidence*, John H. Strong, Editor, West Group (most current edition)
- *Law of Sentencing*, Arthur W. Campbell, Clark Boardman Callahan (most current edition)
- *A Jailhouse Lawyers Manual.* Columbia Human Rights Law Review (most current edition)
- *American Indian Law in a Nutshell,* William Canby (most current edition)
- *The Rights of Indians and Tribes,* Stephen Pevar, Oxford University (most current edition)

Suggested guidelines for access to legal materials

Inmates must be given adequate time and writing materials to make use of the legal resources. The Court suggests that two- to three-hour blocks of time are necessary to do appropriate legal research. The Court further suggests that inmates have access to paper and a typewriter (or other mechanical/electronic device) or a pen with which the inmate may draft documents to be filed with the court; paper and pencils with which to take notes; and a CD player to enable inmates to listen to recorded judicial proceedings.

ACCESS

- All library hours should include some evening and weekend (entire day) hours for the benefit of inmates who are unable to use the law library during weekday daytime hours.
- Reasonable and timely access to legal materials should be provided to inmates housed in segregation units and other isolation units who do not have physical access to the law library in accordance with the policies of the institution.
- Notary service should be available to inmates. Policies and procedures for availability of and access to notary service shall be published to the entire inmate population.

SECURITY

- The prison law library must be secure against theft and damage.

- Rules governing expected inmate behavior in the law library should be posted prominently in the Corrections' law library.

Judge Michael Brown, concurs in the results of the majority and dissents in part.

One of the issues in this case, unaddressed in the majority opinion is

'The right to counsel at the nations expense."

The Indian Civil Rights Act of 1968, 25 USC §§ 1301 to1304 and specifically § 1302 (C) states as follows:

> In a criminal proceeding in which an Indian tribe, in exercising powers of self government, imposes a total term of imprisonment of more than one year on a defendant, the Indian tribe shall—
>
> 1.) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the US Constitution.
>
> . . . .
>
> 4.) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretive documents) the rules of evidence, and rules of criminal procedure, including rules governing the recusal of judges in appropriate circumstances, of the tribal government.
>
> 5.) make a record of the criminal proceeding including an audio or other recording of the trial proceeding.

Resolution 13-390 Chapter 1, Section 1.11 provides for the appointment of an attorney for the defendant if "the Nation shall notify the Court that they are seeking in excess of one year's imprisonment, the Court shall then appoint an attorney in accordance with the Indian Civil Rights Act."

Criminal cases are commenced by the filing of a Complaint by the prosecutor — the crimes charged in the complaint have possible penalties (sentences) attached to the crimes charged. Those sentences or penalties are established by the legislative branch of the Tohono O'odham Nation, the Council.

Complaints in Appellant's case were filed by the prosecutor's office sometime prior to October 21, 2013; they charged the Appellant with burglary and arson on the reservation. The penalty for a violation of the statute prohibiting burglary is 360 days and for a violation of the statute prohibiting arson is 180 days. The total is 540 days, in excess of one year in jail. The prosecutor by filing these complaints notified the Court that the Nation was seeking more that 1 year in jail; he also notified the court that he was seeking more than a year in jail for the defendant on October 21st. The Court

appointed the Advocacy Program on the 21st of October and appointed a state-licensed attorney on November 21st; the prosecutor did not object to the appointment of either.

There was a hearing on the 9th of December; at which time the prosecutor advised the court that he was no longer seeking more than 1 year in jail for the Appellant. The Court promptly vacated the Order appointing both the advocacy Program and her order appointing a state-licensed attorney for the defendant. (This was reversible error). The Appellant did not object to this change in the sentencing possibilities (nor did the Court explain to him that he was no longer going to be entitled to a state-licensed attorney at the expense of the Nation, as a result of that change.) There are serious doubts that his "lack of objection" was the result of a knowing or knowledgeable waiver of his "right to counsel." Since neither the Advocacy Program nor a court-appointed Attorney had been to see him since the case began and certainly not since November 21st when the Advocacy Program had been appointed (which program was also responsible for obtaining a state-licensed attorney to represent the defendant.) There was no reason for him to believe that he would be supplied with counsel to represent him. His fall-back position was to attempt to hire counsel to represent him, and he attempted to do so by using the telephone. Unfortunately the Corrections Department prohibited him from using the phone; so that option was closed to him as well.

Presumably, the prosecutor was relying upon Title 6, Chapter 1, section 1108(C) which states in relevant part, "Requires the Nation to notify the Court no later then 30 days before trial if it is seeking more than 1 years imprisonment." However by filing complaints charging crimes that call for imprisonment for more than a year's the Nation has notified the Court that it was seeking more than one year in prison. That is the only notice that the Court needs, or should expect, to appoint a state-licensed attorney for the defendant.

Under the Constitution of the Tohono O'Odham Nation:

> The judicial power of the Tohono O'odham nation shall be vested in the Tohono O'odham Judiciary which shall consist of the Tohono O'odham Courts and such inferior Courts as the Tohono O'odham Council may from time to time ordain and establish.

There is no judicial power that is more sacrosanct than the power to sentence members of the Nation to jail or prison for a violation of the Nation's laws. The duty and responsibility to sentence a person for violation of any law of the Nation is the sole prerogative of the Judiciary, as sentencing is a peculiarly Judicial function.

The Judiciary, by mandate of the Constitution, is a separate branch of the government of the Tohono O'odham Nation with its own powers and responsibilities. One of those responsibilities specifically mentioned in the Constitution is to hold laws passed by the Council void if they are not constitutional. Title 6, Chapter 1 Section 1108 (c) as written is not unconstitutional, although it is clearly redundant. However, the

use of that statute to reduce the possible penalty for the crime is unconstitutional. The amount of time to which the defendant can be sentenced is set forth by statutes passed by the Tohono O'odham Council. Therefore, the amount of time the defendant is exposed to is set forth in the Complaint and may not be altered after that by the prosecutor "notifying the Court that he is seeking less than 1 year imprisonment for the crime charged." It is an infringement on the judicial power of the courts to sentence under the statute, and it is an infringement on the right of the legislative branch (the Council) to set the punishment for specific crimes. Therefore, I would hold that the Prosecutor, as an official of the Executive Branch, may not change the range of sentencing after the complaint is filed except by dismissing the complaint. There was no such dismissal in this case and the result was an unconstitutional infringement on the powers of both the Judicial Branch and the Legislative Branch.

This case should be reversed and remanded for retrial with a state-licensed attorney appointed for the defendant.

ISSUED THIS 1ST DAY OF APRIL, 2015.

Michael Brown, Judge Pro Tem



FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
07/30/15/21
DATE/TIME
L. Rios
COURT CLERK

IN THE TOHONO O'ODHAM COURT OF APPEALS

STEPHANIE RUTH MOLINA, Appellant, v. TOHONO O'ODHAM NATION Appellee.	Case No.: CTA-0128 (Ref: 2012-3273 / 3274CR) Designating Chief Appellate Judge and ORDER DISMISSING APPEAL

Before Judges Mashone Antone, Donald Harvey, and Amy Courson.

Pursuant to Rule 2(c) of the Tohono O'odham Rules of Appellate Procedure ("Appellate Rules"), Judge Mashone L. Antone has been selected as the presiding appellate judge in this matter.

Rule 12(a) of the Appellate Rules provides that "[a]n appeal shall be taken by filing a notice of appeal with the lower court within thirty days of entry of judgment by that same court." The Appellant was sentenced on February 2, 2015. The thirty (30) day filing deadline was March 4, 2015. Appellant filed her appeal on March 26, 2015. The Court finds that Appellant's appeal was not timely filed.

Pursuant to Rule 12(c) of the Tohono O'odham Rules of Appellant Procedure, "[f]ailure to file a timely notice of appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice is filed after the date set by law."

IT IS ORDERED that the appeal is DISMISSED for untimely filing.

Dated: July 29, 2015

Mashone L. Antone
Chief Appellate Judge

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Attorneys for Defendant Tohono O'odham Gaming Enterprise

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
040816/3:14pm
DATE/TIME
COURT CLERK

In The Appellate Court of the Tohono O'odham Nation

County of Pima, In the State of Arizona

BARBARA MCKINNEY-HAMILTON, a single woman, Plaintiff, v. TOHONO O'ODHAM GAMING ENTERPRISE, Defendant.	NO. CTA-0130 **ORDER OF DISMISSAL FOR APPEAL WITH PREJUDICE** (Assigned to the Honorable Violet Liu-Frank)

The Court having received Defendant Tohono O'odham Gaming Enterprise's Notice of Settlement and Withdrawal of Notice of Appeal and good cause appearing therefore;

IT IS ORDERED dismissing the above-captioned appeal, with prejudice, each side to bear their own costs and attorney's fees.

DATED this 8th day of April, 2016.

Barbara A. Atwood

Barbara A. Atwood, Judge Pro Tem,
on behalf of the Court

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
10/19/16 @ 1:35pm
DATE/TIME
COURT CLERK

IN THE COURT OF APPEALS OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, IN THE STATE OF ARIZONA

ROSETTE, LLP.,	**Case No. CTA-0132**
Appellant,	**Case No. 2015-0236AV**
vs.	**ORDER DISMISSING APPEAL**
GU VO GOVERNING DISTRICT COUNCIL, the governing body of the Gu Vo District of the Tohono O'odham Nation,	
Appellee.	

Appellant having moved for voluntary dismissal of this appeal under Rule 36 of the Tohono O'odham Rules of Appellate Procedure and Appellee having agreed to the dismissal under the conditions set forth in the Notice of Motion for Voluntary Dismissal, this Court pursuant to Rule 36(b) grants the dismissal of the appeal with prejudice as to any and all allegations, rights, or claims that Appellant may hold against Appellee related to the non-payment of fees for attorney services.

Dated this 19th day of October, 2016.

On behalf of the Court:

Barbara A. Atwood, Judge Pro Tem

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
11/22/16 @ 1054 AM
DATE/TIME
COURT CLERK

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK,
Petitioner -Appellee

v.

TOHONO O'ODHAM NATION,
Respondent - Appellant

CTA-0131
Case No.: 2014-001HC-AV
(Ref. Case No. : 2009-6329CR)

ORDER VACATING LOWER COURT ORDER AND REMANDING FOR FURTHER PROCEEDINGS

Before Judges Amy Courson, Veronica Darnell, and Robert Hershey.

Respondent - Appellant Tohono O'odham Nation ("Appellant"), through its legal counsel, appeals the Order of the Judicial Court of the Tohono O'odham Nation, rendered on or about December 15, 2015. Appellant's Opening Brief, which was filed on August 12, 2016, presents one question on appeal. "Did the lower court act lawfully when it entered its December 15, 2015 Order directing the Tohono O'odham Department of Corrections to provide a specific list of printed materials, as well as a computer/word processor with an attached printer, to all inmates housed at the Correctional Facility?" Appellee did not file a Response Brief.

I.
STATEMENT OF THE CASE

The matter on appeal has a long, complicated history. The relevant history for this matter in essence began on or about May 5, 2011 with the criminal conviction of Petitioner – Appellee ("Appellee") of various crimes. After that conviction, Appellee filed various documents with the Court. One of the documents, which Appellee filed pro se with the Court, on December 9, 2013, was ultimately deemed by the Court to be a Petition for Writ of Habeas Corpus.

On July 8, 2015, after Appellee retained counsel through the Tohono O'odham Advocate Program, Appellee's legal counsel filed an Amended Petition for Writ of Habeas Corpus ("Amended Habeas Petition"). In the Amended Habeas Petition, Appellee's counsel articulated five separate claims challenging the validity of Appellee's conviction. One of these claims was that Appellee was denied basic constitutional rights when he was denied access to legal materials to assist in his defense at trial, despite repeated requests for such materials. The Amended Habeas Petition ultimately sought to have the court vacate the sentence and conviction of the Appellee. Further, the Amended Habeas Petition asked that the Appellee be immediately released and that the matters be dismissed or, in the alternative, remanded for a new trial.

On July 16, 2015, the court issued an Order to Show Cause ("OSC"). The OSC ordered that various named employees of the Nation appear before the court to show cause, if any, for why

Appellee had not been furnished with adequate access to legal materials. The OSC referenced an August 8, 2011 Tribal Record Entry which stated:

> The parties have agreed to a resolution of access to library legal materials on-line. The Nations corrections staff believes that w/in 60 days; there will be computer access for [Appellee]. The Attorney General's office will provide Rules of Appellate Procedure to [Appellee]. The Corrections Office will allow [Appellee] to listen to remainder of CDs oral recording of trial." (Exact wording of the judge with no corrections.)

On July 17, 2015, counsel for Appellant and Appellee submitted a Joint Motion to Dismiss Petition for Writ of Habeas Corpus ("Joint Motion"). The record on appeal transmitted to the Appellate Court does not include any record that the court ever ruled on the Joint Motion.

On December 15, 2015, the court entered its Order that is the subject of this appeal. On January 12, 2016, Appellant timely filed its Notice of Appeal.

II.
ANALYSIS

In this case, Appellee filed a habeas proceeding which sought to have his conviction and sentence overturned. Although Appellee did claim that his lack of access to legal materials resulted in an unlawful conviction and sentence, Appellee also challenged his conviction on other grounds. Access to legal materials was not the pivotal issue of the habeas challenge. As such, resolution of the issue of Appellee's access to legal materials will not be dispositive of Appellee's entire Amended Habeas Petition.

Even if securing the Appellee's access to legal materials was the sole issue raised by the Amended Habeas Petition, the court's Order is overly broad. When the lower court issued its OSC, it sought an explanation for why the Nation had not provided the ***Appellee*** with legal materials. The resulting Order orders the Corrections Department to furnish the Appellee "***and all inmates***" with certain listed materials and resources. The matter on appeal is a habeas petition, not a constitutional matter. As such, any order by the court should not address the rights of persons other than the confined person who is the subject of the habeas petition.

III.
CONCLUSION

Based upon the foregoing, we find that the Order is overly broad in its scope. Further, the Order is not dispositive of Appellee's Amended Habeas Petition. Thus, there is good cause to vacate the Order and remand the matter to the lower court. The lower court shall consider the Appellee's Amended Habeas Petition and the Joint Motion.

For the reasons set forth above, the Court declines to rule on the constitutional issues set forth in appellant's brief.

IT IS THEREFORE ORDERED THAT the Order is vacated and the matter is remanded to the lower court for further proceedings consistent with this Order forthwith.

ORDERED this 22nd day of November, 2016.

Amy Courson
Chief Appellate Judge

IN THE APPELLATE COURT OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, STATE OF ARIZONA

STEPHANIE ESCALANTE and **NOLAN LOPEZ**,

Appellants,

v.

SELLS DISTRICT COUNCIL, et al,

Appellees.

APPELLATE COURT CASE NO. CTA-0133

Ref: 2014-0236AV;
2015-0140AV

DECISION ON APPEAL

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
01/27/17/1:00pm
DATE/TIME
COURT CLERK

Robert A. Rossette, Counsel for Appellants.

Robert F. Palmquist, Counsel for Appellees.

Before Judges Barbara Atwood, Veronica Darnell, and Rachel Johnson.

The Court, having reviewed the case files and appellate briefs in this consolidated appeal and having heard oral argument on October 11, 2016, reverses the Tohono O'odham Trial Court's Order of Dismissal and remands for further proceedings consistent with this decision.

Background

Plaintiff-Appellants Stephanie Escalante and Nolan Lopez are both enrolled Tohono O'odham tribal members. Appellant Lopez is a member of the Chukut Kuk District, and Appellant Escalante is a member of the Sells District. Until banishment orders were put into effect, they resided together on property within the Sells District assigned to Appellant Escalante's family.

Appellants signed a Community Conduct Agreement with the Sells Community in June 2011 after tribal police received numerous reports of illegal activity involving the Escalante property. 1st Am. Compl. Ex. C, *Escalante v. Sells Dist. Council*, No. 2015-0140AV (Trial Ct.); 1st Am. Compl. Ex. C, *Lopez v. Sells Dist. Council*, No. 2014-0236AV (Trial Ct.). On May 17,

2014, the Sells Community passed Resolution SC-073-14, formally requesting that the Sells District Council initiate banishment proceedings against Appellants and others associated with the Escalante property. 1st Am. Compl. Ex. D, *Escalante*. On August 21, 2014, the Sells District Council issued District Resolution SD-62-14, supporting the Community Resolution to start banishment proceedings against Appellants. 1st Am. Compl. Ex. E. *Escalante*. A hearing on the banishment resolution against Appellants was held on October 18, 2014, and the Sells District Council voted to permanently banish Appellants from the District, provided that Appellant Lopez would be allowed "to travel to and from and remain at his place of employment with the Department of Health Transportation." 1st Am. Compl. Ex. G (Sells Dist. Resolution S.D.-73-14), *Escalante*. The banishment went into effect as to Appellant Escalante on December 7, 2014. Appellant Lopez requested and received a second hearing before the Sells District Council at which he was represented by counsel. The Sells District Council reaffirmed the banishment order against Appellant Lopez on April 18, 2015. 1st Am. Compl. Ex. O (Sells Dist. Council Resolution S.D.-39-15), *Lopez*.

Appellant Escalante, according to her Declaration, was arrested and incarcerated in a tribal detention center on January 5, 2015 after entering the Sells District that day to retrieve her grandchildren's medical records and to check on her mail at the Post Office. The period of incarceration attributable to her violation of the banishment order was sixty days. Decl. of Stephanie Escalante ¶¶ 23-28, *Escalante*.

As a result of the banishment resolutions, Appellants are permanently barred from entering the Sells District, the capital of the Nation, with the exception of entries required for Appellant Lopez to carry on his employment with the Department of Transportation. At oral argument, counsel for Appellants stated that the banishment order deprived Appellants even of the right to

attend oral argument in their own appeal. We note that this Court is unaware of any request from Appellants for permission to attend oral argument.

Procedural History

Appellants Escalante and Lopez each filed suit against Appellees contesting the validity of the banishment orders. The Defendants-Appellees are the Sells District Council and individual Council members in their official capacity. *See* 1st Am. Compl., *Escalante*; 1st Am. Compl., *Lopez*. Appellants allege that the banishment proceedings deprived them of due process in violation of the Tohono O'odham Constitution and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(8). In general, Appellants allege that they were given inadequate notice of the charges against them, were not afforded a meaningful opportunity to defend themselves in the banishment proceedings, and were wrongly punished for the illegal conduct of others. *See* 1st Am. Compl. ¶¶ 44-60, *Lopez*; 1st Am. Compl. ¶¶ 62-75, *Escalante*. Appellants and Appellees entered into a stipulated stay of the banishment pending resolution of their cases in the Trial Court.

On Appellees' motion, the Trial Court dismissed the actions on the basis of sovereign immunity. *See* Order [Granting Defendants' Motion to Dismiss], *Escalante,* (Trial Ct. Feb. 4, 2016); Order [Granting Defendants' Motion to Dismiss], *Lopez*, (Trial. Ct. Feb. 4, 2016). The Trial Court held that the Tohono O'odham Nation had not waived its sovereign immunity from suit, and that the exception under Section 2102(A) of the Tohono O'odham Code did not apply since Appellants were not challenging the "validity of a law, rule, or regulation of the Nation." *Id.* The Trial Court concluded that it lacked subject-matter jurisdiction over the actions. When the actions were dismissed, Appellees ended the stipulated stay, and the banishment orders went into effect. Appellants moved for a stay of the Trial Court's decision pending their consolidated appeal of the Trial Court's dismissal. The Trial Court denied that motion on April 1, 2016, and this Court

affirmed the denial of the stay. *See* Order Denying Motion for Stay of Lower Court Judgment Pending Appeal, *Escalante and Lopez v. Sells District Council*, No. CTA-0133, Aug. 6, 2016.

Analysis

The only issue on this appeal is whether sovereign immunity bars the courts of the Tohono O'odham Nation from reviewing the permanent banishment orders against Appellants to determine whether Appellants received due process of law. No evidentiary hearing in the Trial Court has been held to determine the truth of the factual allegations in Appellants' pleadings. Thus, the merits of the constitutional and ICRA claims are not before us. The Trial Court's dismissal of the actions for lack of subject-matter jurisdiction turned solely on sovereign immunity and presents a question of law. As an appellate court, we exercise de novo review over questions of law, and we accept as true all alleged material facts. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989) (court of appeals is not bound by trial court's conclusions of law); *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016) (court of appeals reviews questions of statutory construction de novo).

Sovereign immunity is an essential element of tribal sovereignty and self-determination. The shield of immunity protects the autonomous political existence of the tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978). Tribal sovereign immunity is subject to express abrogation by Congress and waiver by the tribe itself. *Id.* A waiver must be a clear and unequivocal expression of intent to relinquish the immunity. *Id.* at 59-60. The United States Supreme Court recently reaffirmed the principle that tribal immunity remains intact, absent congressional authorization or a clear waiver. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).

In 2010, the Tohono O'odham Nation codified the doctrine of sovereign immunity. Title

1, Section 2101 of the Tohono O'odham Code provides, in pertinent part:

> (A) The government of the Tohono O'odham Nation ("Nation") and any person acting within the scope of his or her capacity as an office, employee, or agent of the Nation are absolutely immune from suit, court process or liability.
> (B) The Nation's sovereign immunity extends to the Nation's districts, enterprises, entities, and the officials, employees, and agents thereof.
> (C) Sovereign immunity cannot be waived except by a resolution or other official action of the Tohono O'odham Legislative Council expressly waiving, or authorizing a waiver of, sovereign immunity; provided that such a waiver shall be limited in accordance with its terms. . . .

1 T.O.C. § 2101.

Section 2102(A) provides, in pertinent part:

> (A) Exception: Unless provided otherwise by law, sovereign immunity does not preclude properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation.

1 T.O.C. § 2102(A).

Section 2101(A) recognizes that the Nation and its officers are immune from suit, and that broad immunity extends to the Sells District Council and its members under Section 2101(B). In addition, Section 2101(C) restates the common law principle that any waiver must be express and specific. Thus, absent a waiver or applicable exception, Appellants' lawsuits would be barred.

The Sells District Council has not expressly waived sovereign immunity from suit arising out of the banishment proceedings. The Tohono O'odham Prosecutor's Office drafted guidelines for banishments that indicate by their terms that banishments will be subject to judicial review. *See* Procedures for Banishment Action, Tohono O'odham Nation Office of the Prosecutor (Revised April 9, 2013) (*Prosecutor's Procedures for Banishment*). The Prosecutor's Procedures for Banishment state, for example, that "[t]he Nation's Constitution and the Indian Civil Rights

Act . . . require that due process procedures be observed before substantive rights of the individual are taken away. *Therefore, all banishment actions must be conducted as if the action will eventually be heard in tribal court.*" (Emphasis added.) While the Prosecutor's Procedures for Banishment provide useful guidelines for conducting banishment proceedings, they are not positive law and do not constitute an express waiver of the District's immunity.

Accordingly, unless an exception to sovereign immunity applies, Appellants' lawsuits are barred. Appellants contend that their lawsuits fall within Section 2102(A) since they seek solely declaratory and injunctive relief to determine whether the banishment resolutions complied with due process of law. There is no dispute that Appellants are asking only for injunctive or declaratory relief.[1] The issue for this Court to decide is whether Appellants are challenging the validity of a "law, rule, or regulation of the Nation." 1 T.O.C. § 2102(A). Appellants maintain that the phrase "law, rule, or regulation of the Nation" includes the banishment resolutions issued by the Sells District Council.[2] Appellees disagree, contending that "law, rule, or regulation" is a precise listing that does not include a district council resolution.

Under the circumstances of this case, the Court concludes that Appellants' constitutional challenge to the banishment resolutions passed by the Sells District Council do fall within the exception to sovereign immunity recognized in Section 2102(A).[3] While Section 2102 does not

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[1] While an initial claim for damages was included in Appellants' Complaints, the amended complaints for each appellant now include only claims for declaratory and injunctive relief.

[2] Appellants opposed the motion to dismiss in the Trial Court on multiple grounds, but it did sufficiently raise the argument that their challenge to the banishment resolutions fell within Section 2102 to preserve the argument on appeal. *See In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992-93 (9th Cir. 2010) (exercising discretion to reach issues that had been adequately raised and briefed by appellants).

[3] In the lower court Appellants advanced a theory based on the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The lower court rejected that argument, noting that Appellants had not alleged

define "law, rule, or regulation," we read the exception as a codification of the established principle that an injunctive lawsuit challenging the constitutionality of tribal governmental action is not barred by sovereign immunity. *See, e.g., Jose v. Toro*, 3 TOR3d 31 (Trial Ct., July 27, 2011) (holding that sovereign immunity does not bar a claim for equitable relief against District Council members for prospective relief for acts allegedly beyond their constitutional authority); *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005), *appeal dism'd*, 3 TOR3d 21 (Ct. App., Sept. 4, 2008) (holding that sovereign immunity does not bar declaratory or injunctive relief against a governmental agent for unconstitutional conduct).

In other words, Section 2102 recognizes the key role of the Tohono O'odham Judiciary in adjudicating claims by tribal members challenging tribal governmental conduct. The Tohono O'odham Constitution provides that the government of the Tohono O'odham Nation "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law." T.O. CONST. art. III, § 1.[4] The Constitution further provides that "the judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation." T.O. CONST. Art. VIII, §2. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 17 (Ct. App. 1989) (emphasizing the key role of the Tohono O'odham Judiciary in enforcing the

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any actions by the Appellees "that rise to the level of violations of the Tohono O'odham Constitution and the ICRA." Order, *Escalante,* (Trial Ct. Feb. 4, 2016); Order, *Lopez*, (Trial. Ct. Feb. 4, 2016). In light of our holding that Appellants' lawsuits fall within the exception under Section 2102(A), we need not address the continued viability of the *Ex Parte Young* doctrine or its applicability to this case.

[4] Similarly, ICRA provides that "[n]o Indian tribe in exercising powers of self-government shall … deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

Tohono O'odham Constitution, and noting that any law "purporting to divest the judiciary of its power of constitutional inquiry is void.").

The Tohono O'odham Legislative Branch explicitly recognized the banishment authority of districts by when it enacted the Removal and Exclusion of Nonmembers Code in 1997: "Nothing in this ordinance shall be construed to prohibit actions to banish tribal members residing within any district of the Tohono O'odham Nation based on the custom and tradition of the district." 4 T.O.C. Ch. 2, § 1.9. In these consolidated cases, the Sells District was exercising the banishment power recognized in Section 1.9, indisputably a "law" of the Nation. Moreover, the banishment resolutions in this case were voted on and issued by the Sells District Council – an arm of the Nation as defined by Section 2101(B). While district councils may pass many resolutions that do not have the force of law, the banishment resolutions in these consolidated cases carry the force of law and are enforceable through criminal sanctions, as experienced by Appellant Escalante.[5] Because the banishment resolutions carry the force of law and are the exercise of a customary power recognized by law, Appellants' constitutional challenges fall within the exception to sovereign immunity codified in Section 2012(A).

The First Amended Complaints allege that the permanent banishment orders had a significant detrimental impact on the Appellants, including dislocation from the family home and inability to attend ceremonial, governmental, commercial, or social events in Sells, the Nation's capital. Importantly, enforcement of the order resulted in the incarceration of Appellant Escalante for sixty days. The First Amended Complaints thus contain material allegations that the banishment resolutions have deprived Appellants of "liberty or property." The First Amended

[5] The Court takes notice that the Tohono O'odham Legislative Council amended the Criminal Trespass law, effective January 20, 2017, to expressly include within the offense of criminal trespass the act of entering a district after receiving notice of banishment from that district. *See* Res. No. 17-021, codified at 7 T.O.C. § 3.4(B).

Complaints likewise allege due process violations regarding the content of the notice of banishment received by Appellants and the manner in which the banishment proceedings were conducted. The Nation has committed to providing fundamental due process to its members before depriving them of liberty or property.[6] T.O. CONST. Art. III, §1. The Nation's Due Process Clause likewise applies to the actions of District Councils. *See, e.g., Throssell v. Throssell,* 1 TOR3d 34 (Tohono O'odham Ct. App. 1992). Where a banishment resolution may be enforced by the Nation through criminal charges and incarceration for a violation, is permanent or long-term in nature, and inflicts significant harm on the banished tribal members, we hold that judicial review must be available to ensure that the banishment proceedings afford the tribal members due process of law as guaranteed by the Tohono O'odham Constitution.[7]

At its core, the due process guarantee requires reasonable notice and a meaningful opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990). Under widely-accepted constitutional standards, procedural due process is a flexible doctrine that takes into account the private and governmental interests at stake and the value of procedural protections in avoiding erroneous deprivations. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Shinault v. Hawks*, 776 F.3d 1027, 1032 (9th Cir. 2015). In this case Appellants have alleged that their property and liberty interests have been significantly impaired without due process of law. The District Council, as an arm of the Nation, has an obligation not only to protect its community, but also to ensure the fairness of banishment

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[6] We rely on the Nation's Constitution and need not address the applicability of the due process guarantee under the ICRA.

[7] The Tohono O'odham Constitution does not mention banishment proceedings, but does require that the government of the Nation comply with basic due process guarantees in its dealings with tribal members. This case is, therefore, unlike *Charles v. Mashantucket Pequot Tribal Nation*, 6 Mash. App. 40, 2015 WL 1926018 (Mash. Pequot Ct. App. 2015), where the court determined that the tribal constitution and laws expressly barred judicial review of banishments.

proceedings.

This Court respects the profound importance of custom and tradition within the Tohono O'odham Nation. Banishment is a remedy that predates the Tohono O'odham Constitution. The Court takes judicial notice of the deep significance of the customary banishment power to the maintenance of social order within the community. Moreover, the maintenance of social order is clearly within the District's authority over matters of local concern. *See* T.O. CONST. art. IX § 5. The District Council thus has broad discretion in determining when a tribal member's conduct justifies exclusion from the District.

Any judicial proceeding involving a challenge to banishment must be conducted in a manner that is sensitive to the District's traditional authority to exclude tribal members who create intolerable social problems. The Preamble of the Tohono O'odham Constitution states that the Constitution was established, among other reasons, "to preserve, protect and build upon our unique and distinctive culture and traditions." In other circumstances, Tohono O'odham courts have interpreted the Nation's Constitution in such a manner that respects customary powers exercised by Districts. *See, e.g.*, *Tohono O'odham Nation v. Narcho*, 2 TOR3d 31 (1998), *appeal dismissed*, 2 TOR3d 11 (2003). This Court is confident that Appellants' due process claims can be heard and resolved without undermining the District Council's power to impose the traditional remedy of banishment. In particular, the resolution of Appellants' claims should not interfere with the District Council's customary authority to define the grounds that justify the extraordinary sanction of banishment. Appellants, however, are entitled to reasonable notice of the alleged grounds and a meaningful opportunity to challenge the factual allegations against them.

On remand, the Trial Court should hold a factual hearing to determine whether the

banishment proceedings complied with the basic due process framework described above.[8] If the Trial Court finds that Appellants received due process of law, the Sells District Council may enforce the resolutions for the permanent banishment of Appellants from the Sells District. If the Trial Court finds that either Appellant did not receive due process, then the banishment resolution affecting that individual would be void.

The Trial Court's Order of Dismissal is reversed and the actions are remanded for further proceedings consistent with this opinion.

Dated this 27th day of January 2017.

Signing for the Court:

Barbara A. Atwood

Barbara A. Atwood, Judge Pro Tem
Chief Appellate Judge

[8] On remand, the parties may once again choose to stipulate to a stay of the banishment resolutions. Absent a stipulation, the Trial Court on motion may consider whether to stay the banishment resolutions, pending a final decision.

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In the Judicial Court of the Tohono O'odham Nation
Court of Appeals

TOHONO O'ODHAM NATION
Appellant

v.

CHRISTINA C. B. ANDREWS
Appellee

Case No.: AP2016-0002
(ref: 2015-0786-0786CR)

ORDER

Marc Offenhartz, Counsel for Appellant.

Paul Tsosie, Counsel for the Appellee.

Before Judges Kyle Fields, Barbara Atwood, and Rachel Johnson

The Appellee, Christina C. B. Andrews, moved to dismiss the appeal. To support her motion, Andrews raises two arguments. First, the Court lacks jurisdiction because the Nation did not properly file a Notice of Appeal. Second, the Double Jeopardy Clause of the Indian Civil Rights Act bars this Court from addressing the appeal. The Court held oral argument on the motion, and the Court took the matter under advisement.

Although the Nation cured its premature Notice of Appeal by filing a Supplemental Notice of Appeal within thirty days of the final judgment, the Double Jeopardy Clause bars this Court from considering the merits of the appeal. Therefore, the Court grants the motion.

Factual and Procedural Background

The Nation charged Andrews with three counts of Abuse of Office and one count of Fraudulent Schemes and Practices–Willful Concealment. Before the jury trial, the Nation's primary investigator and expert witness, Charles Dimond, was hospitalized and eventually placed in a rehabilitation center. As such, the Nation moved to continue the jury trial. After

holding a hearing, the Trial Court denied the motion reasoning that Dimond was not an essential witness. In response, the Nation moved to dismiss the case without prejudice because the Nation could not proceed without Dimond's testimony. Although Andrews did not oppose dismissing the case, Andrews argued that the court should dismiss the case with prejudice. After a hearing, the court denied the Nation's motion and affirmed the date for the jury trial. The Nation filed a Notice of Appeal a few days later. The Nation did not seek a stay from either the Appellate Court or the Trial Court. On the day of the jury trial, the Nation opposed holding the jury trial. The court asked if the Nation was seeking a stay, but the Nation declined to request a stay. Although the Nation objected to going forward with the trial, the Nation participated in jury selection and exercised its peremptory strikes, which allowed the Nation to remove some people from serving on the jury. After the court sworn in the jury, the Nation presented no witnesses or evidence. Andrews moved for a judgment of acquittal that the Trial Court granted.

Shortly after the jury trial, the Nation supplemented its Notice of Appeal. Andrews moved to dismiss the appeal, and the Nation responded.

Analysis

1. Jurisdiction

a. Rule 3(c)(2)

Andrews asserts this Court lacks jurisdiction because the Nation filed an interlocutory appeal without following Tohono O'odham Rule of Appellate Procedure 14.[1] In response, the Nation asserts that the appeal was proper under Rule 3(c)(2).

We review questions involving the interpretation of court rules *de novo*, and we evaluate procedural rules using principles of statutory construction. *See generally Fragoso v. Fell*, 210 Ariz. 427, 430, 111 P.3d 1027, 1030 (Ct. App. 2005) (citation omitted). Courts must

[1] Unless otherwise specified, a Tohono O'odham Rule of Appellate Procedure is "Rule ___."

follow a rule's plain language unless it produces an absurd result. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

Rule 3(c) provides:

> The appellate court may review any:
>
> (1) Final civil judgment, order, or commitment ending litigation and requiring nothing more than execution of the judgment, and giving rise to good faith claims of an error of law or procedure affecting the outcome of the case.
> (2) Criminal matter after a judgment of guilt and sentencing, or a ruling by the trial court giving rise to good faith claims that an error of law or procedure occurred, which would have affected the outcome of the case.
> (3) Trial court action, which is not final by filing an interlocutory request for permission to appeal as permitted under Rule 14 of these rules.

Rule 14(a) states:

> A request for permission to appeal an action or an order of the lower court which is not a final judgment shall be made by filing a request with the respective lower court within fifteen (15) days of the judge signing the Record Entry (minute entry) giving rise to the appeal. A copy of the request shall be served within forty-eight (48) hours on all adverse parties.

The Nation asserts that the denial of the motion to dismiss without prejudice is a ruling, affecting the outcome, so the Nation did not have to comply with Rule 14. We disagree.

Rule 3(c)(2) provides two types of cases that can be reviewed in criminal matters. First, the court issues a judgment of guilt and sentences the defendant. Second, the court issues an order with an error of law or procedure and the order would have affected the case's result. *Id.* Although Rule 3(c)(2) gives the Appellate Court discretion to review an order in a criminal matter that would have affected the case's result, Rule 3(c) does not describe the process to appeal. *See* Rule 3(c) ("The appellate court *may* review any . . .") (emphasis added). Rule 14, however, provides that process.

The Nation argues because Rule 3(c)(3) specifically references Rule 14 while Rule 3(c)(2) does not reference Rule 14, a party need not comply with Rule 14 if the appeal is under Rule 3(c)(2).

Rule 3(c)(3), which references Rule 14, provides a general provision for appealing non-final orders. But Rule 3(c)(2) provides a specific provision for appealing non-final criminal orders. *See Gozlon–Peretz v. United States*, 498 U.S. 395, 407 (1991) (discussing that a specific provision controls over a general provision). As a result, when read together, Rule 3(c)(2) limits interlocutory appeals in criminal matters to orders that would have affected the outcome of the case, and Rule 14 provides the process for appealing those orders. *See Aguilla v. Nation*, -- TOR.3d ---, CTA-0119 (T.O. Ct. App. 2014) (discussing that Rules 3(c)(2), 3(c)(3), and 14 must be read in conjunction); *see also Nation v. Escarsega*, -- TOR.3d ---, CTA-0122 (T.O. Ct. App. 2014) (noting that a dismissal without prejudice does not affect the case's outcome because the Nation may refile the charges).[2]

In *Aguilla*, the Court noted the overlap of Rule 3(c)(2), Rule 3(c)(3), and Rule 14. -- TOR.3d ---, CTA-0119. The *Aguilla* Court held that Rule 14 applies whenever a party appeals a non-final judgment. *Id.* We agree with the reasoning in *Aguilla*, and we clarify that the second clause in Rule 3(c)(2) limits the interlocutory appeals in criminal cases to orders that would have affected the case's outcome.

If we adopted the Nation's position, Rule 14(a) ("[a] request for permission to appeal an action or an order . . . which is not a final judgment shall be . . .[,]") would be meaningless. The Court must avoid interpreting a rule in such a way that would render other rules meaningless. *See generally City of Phx. v. Superior Court*, 101 Ariz. 265, 419 P.2d 49 (1966).

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[2] Under *Escarsega*, a dismissal without prejudice does not affect the case's outcome. -- TOR.3d ---, CTA-0122. Here, the Nation is appealing a denial of a motion to dismiss without prejudice. Even if we accepted the Nation's argument, Rule 3(c)(2) would not apply because the motion or, more specifically, the denial of the motion would not affect the outcome.

Ultimately, the Nation did not file a proper interlocutory appeal, and the first notice of appeal was premature.

b. Rule 12

Because the Nation did not file a proper interlocutory appeal, Andrews reasons that the Nation's appeal was untimely; therefore, the Court does not have jurisdiction under Rule 12(c). We disagree.

Rule 12(c) provides: "Failure to file a timely appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice if filed after the date set by law." Rule 12(a) requires a party to file a notice of appeal within thirty days of the judgment.

Although the Nation filed a premature notice of appeal, *see supra*, the Nation filed a "Notice of Supplementation of Notice of Appeal Filed on August 05, 2016" within thirty days of the judgment. Filing a supplemental notice of appeal within thirty days of the judgment will cure a premature notice of appeal. *See generally Engel v. Landman*, 221 Ariz. 504, 509, 212 P.3d 842, 847 (Ct. App. 2009) (even though the first notice of appeal was premature, the timely supplemental notice of appeal allowed the appellate court to exercise jurisdiction). Therefore, the Court has jurisdiction under Rule 12 because the Nation filed a timely supplemental notice of appeal.

2. Double Jeopardy

Andrews asserts that the Double Jeopardy Clause in the Indian Civil Rights Act bars this Court from reviewing the merits of the appeal. The Nation responds that jeopardy did not attach because the trial was a sham trial and the Defendant did not face the threat of conviction.

The Indian Civil Rights Act ("ICRA") provides: "No Indian tribe exercising powers of self-government shall . . . subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. § 1302(a)(3). The Tohono O'odham Constitution explicitly adopts the ICRA. T.O. Const. Art. III, § 4. "[D]ouble jeopardy prohibits subsequent prosecution of a defendant after

acquittal of that defendant." *Nation v. Garcia*, 3 TOR.3d 50, 52 (T.O. Ct. App. 2013). With a bench trial, jeopardy attaches when the court swears in the first witness. *Id.* With a jury trial, jeopardy attaches when the court swears in the jury panel. *See Crist v. Bretz*, 437 U.S. 28, 38 (1978).

The Nation urges the Court to adopt a narrow exception to Double Jeopardy when the trial is a sham. *See generally Criminal Law - Double Jeopardy - First Circuit Upholds Reprosecution of Defendant Acquitted in "Sham" Trial. - Gonzalez v. Justices of the Municipal Court of Boston, 382 F.3d 1 (1st Cir. 2004), Vacated Mem., 125 S. Ct. 1*, 118 Harv. L. Rev. 2913 (2005) (discussing sham trials). In short, the doctrine allows a subsequent prosecution because the defendant did not risk being convicted. *Id.* The Supreme Court of the United States, however, summarily rejected the doctrine and directed courts to follow *Smith v. Massachusetts*, 543 U.S. 462 (2005). *Gonzalez v. Justices of Mun. Court of Boston*, 544 U.S. 918 (2005).[3] Under *Smith*, Double Jeopardy prevents an appellate court from reviewing a pre-verdict acquittal, even if the trial court erred in granting the acquittal. 543 U.S. at 473. Therefore, as applied to this case, 25 U.S.C. § 1302(a)(3) and Article III, Section 4 of the Tohono O'odham Constitution bars this Court from considering the appeal.

Conclusion

Although the Nation filed a premature Notice of Appeal, the Nation cured the notice by filing a Supplemental Notice of Appeal within thirty days of the final judgment. But Double Jeopardy bars this Court from considering the merits of the appeal. The Court grants the motion to dismiss.

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[3] The Nation identifies two cases where courts used the doctrine. But those cases are materially different from this case. In *People v. Deems*, 410 N.E.2d 8, 9 (Ill. 1980), the prosecutor stated that the defendant was not guilty of the charges and sought to have the charges dismissed, so the prosecutor could file the correct charges. In *People v. Graves*, 118 Cal.Rptr.3d 14, 17–18 (Cal. App. 2011) (ordered not to be published), the prosecutor did not participate in jury selection or the trial. Unlike *Deems*, 410 N.E.2d at 9, the Nation has never asserted that the Defendant is not guilty of the charged offenses. Also, the Nation participated in jury selection and exercised some of its peremptory challenges. *Cf. Graves*, 188 Cal.Rptr.3d at 17–18.

Dated March 9, 2017.

Signing for the Court:

Kyle Fields
Chief Appellate Judge

TOHONO O'ODHAM NATION
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In the Judicial Court of the Tohono O'odham Nation

In the State of Arizona

Court of Appeals

IN THE MATTER OF:	Case No.: AP2016-0001 (ref: CCV2015-0018)
J.A.	OPINION
DOB: [redacted]	

Wendell Matt, Counsel for Appellant, Tohono O'odham Nation Department of Health and Human Services, Child Welfare Division.

Rebel Harjo, Counsel for Appellee, Mr. A.

Before Judges Kyle Fields, Barbara Atwood, and Veronica Darnell.

Under the Tohono O'odham Rules of Family Law and Will Procedures, the Court must make individualized findings before attributing income to an unemployed parent. Here, the Children's Court followed an unpublished draft administrative order that mandated attributing federal minimum wage to an unemployed parent. Because the Children's Court did not make any individualized findings, we vacate the order and remand.

Jurisdiction

We have jurisdiction under Article VIII, Section 7 of the Constitution of the Tohono O'odham Nation and Tohono O'odham Rule of Appellate Procedure 12.

Preliminary Issues

Both parties moved to strike each other's briefs for various reasons. The Court denies the motions. The Court addresses the issues on the merits because this is an ongoing case involving a child. *See* 3 T.O.C. § 1201 (stating that the Court interprets the Children's Code "to facilitate the

authority of the Nation and Children's Court to protect the interests of children and families"). As a result, striking the briefs will not protect J.A.'s interests or further the interests of justice. *See id; see also Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 153, 211 P.3d 16, 31 (Ct. App. 2009) (stating that Courts prefer to resolve claims on their merits). Also, the parties fully addressed the merits of the issues during oral argument.

Factual and Procedural Background

In early 2016, J.A. became a ward of the Children's Court. The Tohono O'odham Department of Health and Human Services, Child Welfare Division ("Child Welfare") sought child support from J.A.'s natural father, Mr. A. Because Mr. A. was unemployed, Child Welfare asked the Court to impute full-time Arizona minimum wage, which is $10 an hour. The Court, however, following an unpublished draft administrative order, imputed full-time Federal minimum wage, which is $7.25 an hour. Child Welfare appealed.

We ordered additional briefing to address Proposition 2016, which raised the Arizona minimum wage incrementally to $12 by 2020.

Analysis

We review child support awards for abuse of discretion.[1] *Engel v. Landman*, 221 Ariz. 504, 510, 212 P.3d 842, 848 (Ct. App. 2009); *see also Denny v. Lopez*, 3 TOR3d 10, 10–11 (T.O. Ct. App. 2006). A court abuses its discretion when the court commits an error of law that underlies its exercise of discretion. *Kohler v. Kohler*, 211 Ariz. 106, 107, 118 P.3d 621, 622 (Ct. App. 2005). We review the trial court's interpretation of the law and the Tohono O'odham Rules of Family Law and Will Procedures ("Family Law Rules") *de novo*. *See Mead v. Holzmann*, 198 Ariz. 219, 220, 8 P.3d 407, 408 (Ct. App. 2000); *Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (T.O. Ct. App. 1989) (court of appeals is not bound by a trial court's conclusions of law); *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016) (court of appeals reviews questions of statutory construction *de novo*).

[1] In the absence of applicable Tohono O'odham law and rules, this Court may look to the laws of Arizona for guidance. *See* 4 T.O.C. §1-102; *Bahyesva v. Miguel*, 3 TOR3d 151, 152 (T.O. Trial Ct. Mar. 7, 2012).

I. Draft Administrative Order

Child Welfare argues that the Children's Court abused its discretion by relying on an unpublished draft administrative order in attributing federal minimum wage. We agree.

The Tohono O'odham Nation recognizes that a child has a right to support. 3 T.O.C. § 1511. The Children's Code provides that the Court may order child support when "the parent [is] . . . legally obligated and financially able to pay all or part of the costs and expenses for the support and treatment of the child[.]" 3 T.O.C. § 1512(E)(2). Unlike the Arizona Revised Statutes, the Children's Code does not have a comprehensive statutory system for child support. *Cf.* A.R.S. § 25-500, et seq. But Family Law Rule 2 ("Guidelines") provides how the Court calculates child support.

We interpret the Guidelines using the rules of statutory construction. *See Mead*, 198 Ariz. at 221, 8 P.3d at 409. Thus, we look to Guidelines' language as the best and most reliable indicator of its meaning. *See id.*; *see also Williams v. Chukut Kuk Dist.*, 2 TOR3d 57, 58 (T.O. Trial Ct. Jun. 9, 1999). We interpret a section of the Guidelines with the Guidelines' other provisions being mindful of the Guidelines' purpose. *See Mead*, 198 Ariz. at 221, 8 P.3d at 409.

Under Family Law Rule 2.2(b), a child support award "should permit the children a standard of living which as closely as possible approximates the one they would have had if the family remained together[.]" Additionally, the Court needs "[t]o make child support awards consistent for persons in similar circumstances[.]" Family Law Rule 2.1(b); *see* 3 T.O.C. § 1512(E)(2) (stating that a child support order is based on the parent's financial ability "to pay" the support).

The Guidelines describe how to calculate a parent's gross income. Family Law Rule 2.4. The Guidelines provide:

> If a parent is unemployed or working below full earning capacity, the court may consider the reasons. If earnings are reduced as a matter of choice and not for reasonable cause, such as caring for children, the court may attribute income to the parent up to his or her earning capacity.

Family Law Rule 2.4(e). The Guidelines do not define *earning capacity* or *full earning capacity*. *Cf.* 3 T.O.C. § 1202 (listing definitions for the Children's Code).

When a term is not defined, the Court looks to a dictionary definition. *See In re: Petition of the Judicial Branch*, 3 TOR3d 105, 119 (T.O. Trial Ct., Oct. 22, 2010) (reviewing a dictionary definition of a word not defined in the rules). Black's Law Dictionary defines *earning capacity* as:

> A person's ability or power to earn money, given the person's talent, skills, training, and experience. Earning capacity is one element considered when measuring the damages recoverable in a personal-injury lawsuit. And in family law, earning capacity is considered when awarding child support and spousal maintenance (or alimony) and in dividing property between spouses upon divorce.

Black's Law Dictionary (10th ed., 2014). Another court defined *earning capacity* as "the income the [parent] is reasonably capable of earning based upon the [parent's] age, health, education, marketable skills, employment history, and the availability of employment opportunities." *In re Marriage of Simpson*, 841 P.2d 931, 936 (Cal. 1992).

Black's Law Dictionary does not define *full earning capacity*. One Arizona court defined *full earning capacity* to be full-time employment based on the parent's regular income at his or her regular working schedule. *See McNutt v. McNutt*, 203 Ariz. 28, 32, 49 P.3d 300, 304 (Ct. App. 2002).

One purpose of the Guidelines is "[t]o comply with federal law (42 U.S.C. [§] 651 et seq., 45 C.F.R. [§] 302.56)[.]" Family Law Rule 2.1. Federal law, particularly 45 C.F.R. § 302.56, while not defining *earning capacity* or *full earning capacity*, calls for child support guidelines to:

> [consider] the specific circumstances of the noncustodial parent . . . to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.

45 C.F.R. § 302.56(c)(iii) (2017); *see also Mead*, 198 Ariz. at 221, 8 P.3d at 409 (noting that courts interpret child support guidelines being mindful of its purpose).

Based on these definitions and 45 C.F.R. § 302.56, Family Law Rule 2.4(e) requires the Court to consider the parent's specific circumstances to find the parent's *earning capacity* before attributing income.

Here, the Children's Court did not consider Mr. A.'s specific circumstances. The Children's Court stated:

> Chief Judge Lui-Frank's August 2015 draft Administrative Order states, "Unless otherwise governed by Tohono O'odham or the Tohono O'odham Rules of Court, the federal minimum wage shall be attributed when an income or other work calculation requires the use of a minimum wage." The Court will follow the draft Order.

The draft administrative order is not in the record.[2] *Cf.* Appellate Rule 19 (providing that the appellate court may remand if the record on appeal is inadequate). Also, neither party asked the Court to follow the draft administrative order.

Furthermore, the Court's reasoning is problematic even if the draft administrative order had been adopted. First, the Guidelines provide a method for the Court to attribute income; as such, the draft order does not apply because the issue was "governed by . . . the Tohono O'odham Rules of Court." *See* Family Law Rule 2.4(e) (stating that the Court find the parent's earning capacity). Second, based on the quoted text, "the federal minimum wage shall be attributed when an income or other work calculation requires the use of a minimum wage," the draft order does not apply because the Guidelines do not require using minimum wage. Instead, the Guidelines tell the Court to find the parent's earning capacity. Third, the Children's Court did not make any findings on why it was deviating from the Guidelines or why federal minimum wage was justified by the facts. *Cf.* Family Law Rule 2.3 (stating that the Court should follow the Guidelines and that if the Court does not follow the Guidelines to make specific findings).[3]

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[2] We ordered Child Welfare to provide a copy of the draft administrative order with its supplemental brief. Child Welfare was unable to get a copy of the draft order. Although Child Welfare had a duty to preserve the record, *see* Tohono O'odham Rule of Appellate Procedure 18, we are able to address the issue without the complete draft order.

[3] It would have been invited error if the Children's Court granted Child Welfare's request to impute Arizona's minimum wage without evaluating Mr. A.'s earning capacity or stating why the Court was deviating from the Guidelines.

Although Mr. A. admits that the Children's Court erred by following the draft administrative order, he argues that we should affirm because there are enough facts to support the ruling. *See generally Forszt v. Rodriguez*, 212 Ariz. 263, 265, 130 P.3d 538, 540 (Ct. App. 2006) (stating that an appellate court may affirm the trial court if it is correct for any reason obvious in the record). Mr. A. points out that at a prior custody hearing, the Court heard testimony that Mr. A. lives in a remote part of the Nation and does not have regular employment. The Court's order, nevertheless, shows an error of law that undermines its exercise of discretion. *See Kohler*, 211 Ariz. at 107, 118 P.3d at 622. Therefore, the Children's Court abused its discretion in following the draft administrative order, and we vacate the order.

II. Arizona Child Support Guidelines

On remand, Child Welfare argues that the Court must follow Arizona Child Support Guidelines, particularly A.R.S. § 25-320(N), as applicable through 4 T.O.C. § 1-102. We disagree.

Arizona Revised Statute § 25-320(N)[4] provides:

> The court shall presume, in the absence of contrary testimony, that a parent is capable of full-time employment at least at the applicable state or federal adult minimum wage, whichever is higher. This presumption does not apply to noncustodial parents who are under eighteen years of age and who are attending high school.

The Nation's Code provides: "If a Tohono O'odham Court finds that there is no Tohono [O'odham] law or custom which addresses the claims asserted, the court may in its discretion look to the law of the State of Arizona for guidance." 4 T.O.C. § 1-102.

The Tohono O'odham Nation does not have a statute similar to A.R.S. § 25-302(N). The Guidelines, however, address the issues in this case. Thus, the Court need not look to A.R.S. § 25-302(N).[5]

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[4] Previously, A.R.S. § 25-302(N) only required imputing federal minimum wage. *See* Charles Marshall Smith, et al., 3 Ariz. Prac. Marriage Dissolution Prac. § 304 (2016) (discussing the history of the statute).

[5] Based on the record, it appears that the Children's Court followed A.R.S. § 25-302(N), in part, by presuming Mr. A. is able to work full time without hearing any testimony about his ability to work.

We note that on remand the Children's Court, after considering Mr. A.'s specific circumstances, may find that the federal minimum wage is his proper earning capacity.

III. Evidentiary Issues

Under Family Law Rule 2.4(e), the Court must consider the parent's earning capacity before imputing income. Where the parent does not take part in litigation, the Court may have little or no evidence on the parent's earning capacity. *See* 45 C.F.R. § 302.56(c)(1)(iii) (2017) (stating that courts must "[consider] the specific circumstances of the noncustodial parent . . . *to the extent known* . . .") (emphasis added). Normally, the parent is the only person with that information. *See id.* (listing various factors that the court can consider). The parent has to present the reasons that he or she is unemployed or working below full earning capacity. *See* Family Law Rule 2.4(e) ("If a parent is unemployed or working below full earning capacity, the court may consider the reasons."). Also, the parent has to present evidence of his or her earning capacity. *See id.*

If the parent does not take part in the litigation or present the evidence, the parent assumes the risk that the Court will attribute income based on the information presented by Child Welfare. *See* 45 C.F.R. § 302.56(c)(1)(iii) (2017) (stating that courts must "[consider] the specific circumstances of the noncustodial parent . . . *to the extent known* . . .") (emphasis added). If the parent's location is unknown, the Court presumes the parent is living within the Nation. *See* 4 T.O.C. § 1-101(c)(4) ("Members of the Nation are presumed to be domiciled within the territorial jurisdiction of the Nation."). With no contrary evidence, the Court may presume that the parent can work full time, and the Court may impute income based on the limited information or arguments presented by Child Welfare.

Conclusion

We vacate the Children's Court's order. On remand, the Children's Court must make specific findings about Mr. A.'s earning capacity. In making those findings, the Court may consider Mr. A.'s work history, health and ability to work, the type of past work, and employment opportunities in his

place of residence. *See* 45 C.F.R. § 302.56(c)(1)(iii) (2017) (listing various factors that courts must consider when awarding child support).

DATED JUNE 29, 2017.

Judge Kyle Fields
For the Court

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
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DATE/TIME
COURT CLERK

IN THE TOHONO O'ODHAM NATION COURT OF APPEALS

LEONARD GARCIA, JR. DOB: 11/07/69, Appellant, vs. TOHONO O'ODHAM NATION, Appellee.	Case No.: CTA-0129 (Ref. 2013-0754 CR) OPINION

The appellant, Leonard Garcia, filed a notice of appeal on September 16, 2015, from a final judgment of sentencing entered in the Trial Court on August 17, 2015. On September 22, 2015, a Request to Speak with the Court was filed by appellant Leonard Garcia. The top of the page in the Request to Speak with the Court read "APPELLATE BRIEF" and consisted of one paragraph stating that the appellant wished to appeal the Court's ruling due to "inaficient (sic) counsel and excessive sentencing." No facts, cases, authorities, or citations to the record were made by the appellant in his request to speak with the Court.

The order appointing an appellate panel was signed by Chief Judge Lui-Frank on October 20, 2015. On November 23, 2015, this Court issued the Order Accepting Appeal. On December 1, 2015, a copy of this Court's Order Accepting Appeal was mailed/hand delivered to the appellant. Under the Order Accepting Appeal, the appellant was ordered to file a written brief or statement of law in support of his appeal within thirty days of being served with notice of the Order. The Appellee, the Tohono

O'odham Nation ("Nation"), within thirty days of service of Appellant's brief, was ordered to file with the Clerk of the Appellate Court an answering brief and include written certification of such service pursuant to Rule 26(b), Rules of Appellate Procedure. The appellant did not file a written brief or statement of law in support of his appeal within the thirty-day time frame. After the thirty days had lapsed with no filing of a brief or statement of law by the appellant, the Nation did not make any motion.

On May 18, 2017, the appellant filed a letter with the Tohono O'odham Nation Court of Appeals inquiring as to the status of his case. On June 20, 2017, The Court, Pursuant to Rule 31 (a) of the Tohono O'odham Rules of Appellate Procedure, sua sponte ordered that an Order to Show Cause Hearing be held and that the appellant show cause why the above captioned appeal filed should not be dismissed for failure to file a written brief or statement of law in support of his appeal. The Order to Show Cause Hearing was scheduled for July 20, 2017.

On July 13 2017, appellant filed a document entitled, "Appelant's (sic) Response to Order Show Cause." In the appellant's "Response", the appellant requested that the appeal be granted because the Nation failed to respond to the Appellant's appeal. The appellant also stated in his "Response" that the Nation failed to respond to the appellant's "appeal brief." The appellant stated in his response that he would not be present at the Order to Show Cause Hearing. No information was given regarding the reason for the appellant's plan to not appear for the Court ordered hearing and there was no request for a continuance.

On July 20, 2017, Prosecutors Philip Sanchez and Marc Offenhartz appeared on behalf of the Nation. The appellant failed to appear.

The Nation moved to dismiss the appeal citing Rule 30 (g) of the Rules of Appellate Procedure. Rule 30 (g) states that if the appellant fails to appear, the appeal may be dismissed.

Rule 30 applies to oral argument hearings. An oral argument was never scheduled in this case. In this case, the appellant failed to appear for an Order to Show Cause Hearing. Therefore, the Court denies the Nation's Motion to Dismiss as Rule 30 does not apply at this point in this case.

Under Rule 27 of the Rules of Appellate Procedure, pleadings and briefs must comply with the standards set including the submission of a statement of the case, a statement of facts, an argument in support of the issues with citations to cases, authorities, and the record, addressing all issues raised in appellant's notice of appeal, and a short conclusion. Despite bearing a handwritten heading which reads "appellate brief," what appellant filed with the Court was a Request to Speak with the Court. The Request to Speak with the Court consisted of a one paragraph statement which provided the appellant's opinion that his legal counsel was not prepared and requested that the Court overturn its ruling or grant him a new trial with new counsel. None of the requirements of Rule 27 were followed. The Court notes also that the Request to Speak with the Court, which the appellant refers to as his brief, was actually filed before the appeal was accepted.

Rule 26 (f) of the Rules of Appellate procedure permits the appellee an opportunity to file a motion to dismiss if the appellant fails to file a brief within the time allowed. During the Order to Show Cause hearing, the Court discussed Rule 26(f) with the appellee; however, when the appellee made its oral motion for dismissal, the appellee did not cite Rule 26(f).

CONCLUSION

Because the Court concludes that the appellant failed to comply with the Order issued by this Court on December 1, 2015, to file a written brief or statement of law in support of his appeal which complies with Rule 27 of the Rules of Appellate Procedure, and because the appellant failed to appear at the Order to Show Cause Hearing to explain appellant's failure to comply with the December 1, 2015 Order, the Court dismisses this appeal pursuant to Rule 31(a).

Dated this 15th day of August 2017:

Veronica Darnell
Chief Appellate Judge

TOHONO O'ODHAM NATION JUSTICE CENTER

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

COURT OF APPEALS

FILED
TOHONO O'ODHAM JUDICIARY
2018 DEC 18 P 2:54
JUDICIAL SERVICES CLERK

Gilbert S. Norris, Sr,	)	
	)	
vs.	)	
	)	Case No. AP2018-0002
In the Matter of the Estate of:	)	Ref. No. 2014-0170AV
	)	
Elizabeth P. Norris	)	ORDER DISMISSING APPEAL
DOB: 12/09/1922	)	
Decedent.	)	
	)	

Before Judges Atwood, Johnson, and Little.

Appellant Gilbert S. Norris, Sr., pro se, filed a Notice of Appeal on September 20, 2018. After he retained attorney Sidney F. Wolitzky, Appellant filed a Supplement to Notice of Appeal—Motion to Stay, on October 2, 2018. In his original Notice of Appeal and the Supplement to Notice of Appeal, Appellant challenges the order issued by the Trial Court on September 11, 2018, which removed him as personal representative of the Estate of Elizabeth P. Norris (hereinafter "Estate").

On October 3, 2018, Gerard Norris and Adrianne Tiller, Interested Parties to the Estate, filed a Motion to Deny the Notice of Appeal and Deny the Supplemental Notice of Appeal for Lack of Jurisdiction. Interested Parties contend that this Court lacks jurisdiction over this appeal under the Tohono O'odham Rules of Appellate Procedure because a final civil judgment in this case has not yet been entered by the Trial Court. Appellant did not file a response to the Motion to Deny the Notice of Appeal and Deny the Supplemental Notice of Appeal. By order of October 9, 2018, the Trial Court forwarded that Motion to this Court.

In that same order of October 9, 2018, the Trial Court denied Appellant's Motion to Stay and granted a Motion to Show Cause filed by Evelyn Juan, Personal Representative for the Estate, regarding allegations of misconduct by Appellant as personal representative. A hearing on the Order to Show Cause was held on October 23, 2018, at which Appellant and his counsel appeared and orally moved for reconsideration of the order terminating Appellant as personal representative. By order dated October 29, 2018, the Trial Court denied Appellant's motion for reconsideration and made other rulings pertaining to the Estate.

Analysis

Litigation involving the Estate is ongoing in the Trial Court. Although the order removing Appellant as personal representative terminates his right to represent the Estate, there is not yet a final civil judgment ending litigation. As we held in Aguilla v. Nation, -- TOR.3d ---, CTA-0119 (T.O. Ct. App. 2014), this Court's jurisdiction depends on whether the Court has authority under the Tohono O'odham Rules of Appellate Procedure.

Rule 3(c)(1), Tohono O'odham Rules of Appellate Procedure, authorizes appellate review of a "[f]inal civil judgment, order, or commitment ending litigation and requiring nothing more than execution of the judgment, and giving rise to good faith claims of an error of law or procedure affecting the outcome of the case." As noted, no final civil judgment has been entered in this case. Therefore, this Court cannot exercise jurisdiction under Rule 3(c)(1).

The Tohono O'odham Rules of Appellate Procedure do provide an avenue for review of interlocutory orders. Rule 3(c)(3) authorizes appellate review of "trial court action, which is not final by filing an interlocutory request for permission to appeal as permitted under Rule 14 of these rules." Under Rule 14, a litigant seeking to appeal from an interlocutory order must file a request with the trial court within 15 days of the order giving rise to the appeal, and the trial court is required to issue its order granting or denying the request within 20 days after the request is filed.

Rule 15 further limits availability of interlocutory review with the following language:

> Such appeal shall be granted only if the lower court has committed an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented which would determine the outcome of the appeal.

Rule 15(a), Tohono O'odham Rules of Appellate Procedure. Together, Rules 14 and 15 make clear that interlocutory review is not automatically available and requires the consent of both the trial court and appellate court.

Appellant in the instant case did not attempt to comply with Rule 14 of the Tohono O'odham Rules of Appellate Procedure. This Court is therefore without jurisdiction to review the interlocutory order removing Appellant as personal representative.

The case is remanded for further proceedings in the Trial Court.

It is so ordered.

Signed by Judge Pro Tem Barbara Atwood on behalf of the Court.

December 3, 2018

Barbara A. Atwood
JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2019 JUL 30 P 3:31
JUDICIARY SERVICE CLERK

Ned Norris, Jr., *ex officio* Chairman of the Tohono O'odham Nation, Appellant/Petitioner, vs. Tohono O'odham Legislative Council, Appellee/Respondent.	Case No.: AP2019-0001 (Re: AV2016-0164) ORDER

The Court of Appeals, sitting en banc, finds that it is appropriate to amend the caption to remove Edward Manuel and substitute in Ned Norris, Jr., as the Appellant/Petitioner, as Mr. Norris is the Chairman of the Tohono O'odham Nation. For the reasons stated below, the Court further finds it appropriate to grant the Joint Motion for Reconsideration filed by Ms. Reyes and Ms. Zhang, to grant Mr. Matt's pending Motion to Withdraw as counsel of record for the Appellant, and to deny Mr. Matt's request for sanctions:

1. On July 8, 2019, Ms. Reyes filed a limited Notice of Appearance on behalf of the Appellant/Petitioner, as well as a Motion to Dismiss.
2. On July 9, 2019, Ms. Zhang filed a Response in Support of Appellant's Motion to Dismiss on behalf of the Appellee/Respondent.
3. On July 24, 2019, Ms. Reyes, filed a Notice of Appearance and Notice of Substitution of Parties and Attorney.
4. As stated on page 2, paragraph 2, lines 16 through 20 of this Court's July 18, 2019 Order, the issue of standing was not properly raised in Mr. Matt's Motion to Withdraw, and it was not specified in Mr. Matt's Emergency Motion for Decision as a basis for relief.

5. Ms. Reyes' July 24, 2019 Notice of Appearance and Notice of Substitution, along with the Motion for Reconsideration, satisfies this Court's concern over the issue of standing.

6. Although Rule 25(c) of our Rules of Civil Appellate Procedure provide for 15 days from the date of a motion being served to respond, and although Rule 9(b) allows 5 more days when service is by mail, Mr. Matt filed an Emergency Motion for Decision and asked that he be allowed to withdraw immediately. No purpose would be served by delaying this Court's ruling to permit further briefing.

7. Mr. Matt's request for sanctions relies on improper service as grounds for sanctions. Ms. Reyes and Ms. Zhang's Joint Motion for Reconsideration points out that Mr. Matt did not conduct a good faith consultation to attempt resolution of the issues before seeking sanctions. Mr. Matt's motions do not allege or demonstrate that a good faith consultation took place.

IT IS THEREFORE ORDERED:

1. The Briefing Schedule stated in this Court's July 18, 2019 Order is vacated.
2. Mr. Matt's Motion to Withdraw is GRANTED.
3. Mr. Matt's request for sanctions is DENIED.
4. The Joint Motion to Reconsider is GRANTED.
5. The Appeal is dismissed.

Judges Barbara Atwood and Rachael Frazier Johnson concurring.

DATED THIS 30th DAY OF July, 2019.

Rene Alcoverde, Jr.
Presiding Appellate Judge.

TOHONO O'ODHAM JUDICIARY

In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

Evelyn Juan,
Appellant,

vs.

Maryann Ramirez,
Appellee.

Case No. AP2018-0001
Ref. No. AV2018-0010

OPINION

FILED
2018 SEP -7 A 10:40

Belinda BreMiller, Counsel for Appellant
Eric Hager, Counsel for Appellee
Chadwick Smith, Attorney General, Tohono O'odham Nation

Before Judges Barbara Atwood, Rachel Johnson, and Violet Lui-Frank.

The Court, having reviewed the case files and appellate briefs in this appeal and having heard oral argument on June 28, 2018, affirms the Tohono O'odham Civil Court's dismissal. Because the civil court dismissed the petition for judicial review without a factual hearing, there is no factual record before this Court. Nevertheless, we take account of the documentary evidence that the parties included in the appendices to the briefs.

We have jurisdiction to hear all appeals from the Tohono O'odham Courts. T.O. Const. Art. VIII § 7.

Background

On May 11, 2017, Appellant Evelyn Juan, then Director of Gaming, received a detailed Notice of Termination from the Executive Director of Gaming, Regina Isaac. Since then, Ms. Isaac has been replaced by Appellee MaryAnne Ramirez. The Notice of Termination alleged infractions by Appellant in her role as Director. Appellant disputed the allegations and initiated a formal grievance proceeding under Section X, Employee Formal Grievance and Appeals Procedures, of the Executive Branch's Personnel Policies Manual adopted by Executive Order No. 99-01 (E.O. 99-01).

A grievance hearing was held in October 2017 before the E.O. 99-01 Grievance Committee, a panel of five members of the Tohono O'odham Nation. At the conclusion of the hearing, the Grievance Committee affirmed the decision to terminate Appellant's employment as Director of Gaming. The Chairman of the Tohono O'odham Nation, Edward D. Manuel, supported the recommendation made by the Grievance Committee. Memorandum of Chairman Edward D. Manuel (Dec. 21, 2017).

Appellant filed a Notice of Appeal in the Tohono O'odham Civil Court on January 17, 2018, and requested the record from the grievance proceeding. After the civil court ordered the transmission of the record, the Nation moved to stay and quash the order, and to dismiss the action. Appellee Ramirez also moved to dismiss the petition for review, while still complying with the order to transmit records.

The civil court set a hearing on the motions for February 15, 2018. After hearing from all the parties, the civil court dismissed the action and vacated its prior order for transmittal of the record. Order Granting Mot. Dismiss (Feb. 20, 2018). The civil court reasoned that the employee grievance process was not an administrative agency within the meaning of Section 2102(B) of the Tohono O'odham Sovereign Immunity; Legislative Immunity Code ("Sovereign Immunity Code"). 1 T.O.C. Ch. 2 § 2102(B). This section bars appeals of final decisions of administrative agencies to the civil court except when expressly authorized by legislative action. The civil court further reasoned that Section 8 of the Tohono O'odham Rules of Court, Judicial Review of Administrative Decisions (Administrative Appeals), did not apply to Appellant's case since the employee grievance process was not created or authorized by specific constitutional provision. On March 15, 2018, Appellant filed a notice of appeal.

Analysis

In this case, Appellant seeks judicial review of an adverse employment decision terminating her employment as Director of Gaming. As Appellant's counsel made clear during oral argument, Appellant seeks reinstatement to her former position. She names Appellee Ramirez, the current Executive Director of Gaming, as Respondent. Despite Appellant's assertions to the contrary, Appellee Ramirez is sued in her official capacity. She is a party only because of her authority as Executive Director of Gaming to reinstate Appellant as the Director of Gaming.

In *Escalante v. Sells District Council*, CTA-0133 (T.O. Ct. App. 2017) (scheduled for publication), this Court found tribal sovereign immunity an essential element of tribal sovereignty and self-determination. The operation of sovereign immunity is spelled out in the Tohono O'odham Nation's Sovereign Immunity Code. Under Section 2101 of the Sovereign Immunity Code, the government of the Nation and governmental officials acting within their official capacity are absolutely immune from suit unless the immunity is expressly waived by official action of the Legislative Council.

Appellant's suit against Appellee Ramirez is a suit against a governmental official in her official capacity. Under Section 2101, sovereign immunity bars this suit unless Appellant can point to legislative authorization. As explained below, no provision of the Tohono O'odham Code authorizes Appellant's suit.

Section 2102 of the Sovereign Immunity Code provides exceptions to Section 2101 sovereign immunity. Section 2102(A) permits properly framed lawsuits against the Nation "to determine the validity of a law, rule, or regulation of the Nation" to be filed in the court. 1 T.O.C. Ch. 2 § 2102(A). Section 2102(B) allows final decisions of the Nation's administrative agencies to be appealed if "expressly authorized by an official action of the Tohono O'odham Legislative Council." 1 T.O.C. Ch. 2 § 2102(B). Appellant's suit does not fall within these exceptions.

Appellant repeatedly stated that she is not challenging the validity of the grievance procedure itself, but seeks judicial review on the merits of her termination from employment. Appellant, therefore, does not fall within the Section 2102(A) exception.

Even assuming *arguendo* that the Chairman's decision in the formal employee grievance procedure is a "final administrative action," Section 2102(B) bars appeals to the court except when expressly authorized by official action of the Legislative Council. Appellant, therefore, must point to official legislative authorization for her petition for judicial review. Throughout these proceedings, Appellant has relied on Section 8, Judicial Review of Administrative Decisions (Administrative Appeals), of the Tohono O'odham Rules of Court as an authorization ("Section 8"). Section 8 is not an official action of the Legislative Council. Section 8 provides, as its title states, procedural court rules governing judicial review of administrative decisions, and was created by administrative order of the Court. Appellant, therefore, does not fall within the Section 2102(B) exception.

In addition, Rule 1(a) of Section 8 defines administrative agency to include "every agency, board, commission, department or officer authorized by Tribal law to exercise rule-making powers or to adjudicate contested cases, whether created by constitutional provision or legislative enactment." Section X, the Employee Formal Grievance and Appeal Procedures of E.O. 99-01, does not meet the criteria in Rule 1(a). It was created by an Executive Branch administrative order, not by a constitutional provision or legislative enactment.

During oral argument, Appellant and Appellee Ramirez suggested that this employee grievance could have been filed under Title 16 of the Tohono O'odham Code, which governs regulation and licensure of gaming activities. Section 1204 of that Title provides for judicial review of final decisions of the Gaming Office. The Attorney General of the Nation strongly disagreed with the suggestion that Section 1204 authorized judicial review of employment decisions, noting that such an interpretation would give Gaming Department employees unique rights as compared to other Tribal employees. Because Title 16 governs regulation and licensure of gaming activities, we find no basis for interpreting its grant of judicial review to extend to adverse employment decisions of Gaming Department employees.[1]

While we recognize the significant loss that Appellant has suffered because of her termination,[2] Appellant has not identified any authorization from the Tohono O'odham Legislative

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[1] Section 1204, however, does serve as an example of express legislative authorization for judicial review of an administrative action – the critical foundation missing in Appellant's case. Other examples of express authorization for judicial review include 2 T.O.C. Sections 4701 and 4703 (Livestock Owners); 2 T.O.C. Sections 5301 and 5303 (Livestock Buyers); 6 T.O.C. Section 4108 (Suspension of Judges); 12 T.O.C. Sections 1605(D), 1792(F), 11109, 11308, and 11411 (Elections), and 13 T.O.C. Section 1114(G) (Tribal Employment Rights).

[2] Appellant argues if judicial review is denied, she will suffer a deprivation of due process of law. We note that Appellant pursued the formal grievance procedures established by E.O. 99-01. She received a Notice of Termination explaining the grounds for termination. She submitted a response with explanations of each alleged instance of misconduct. A hearing was held five months after the Notice of Termination was received. At that three-day hearing, Appellant was represented by

Council for judicial review under the circumstances of this case. Without express authorization for judicial review, Appellant's petition is barred by tribal sovereign immunity.

The order of the Tohono O'odham Civil Court dismissing Appellant's action is affirmed.

Dated this 7th day of September 2018.

Signing for the Court:

Violet Lui-Frank

Violet Lui-Frank
Chief Appellate Judge

counsel, presented evidence, called witnesses, and made her arguments before the five-person panel. She appealed her grievance to the Chairman's final decision.

JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

ORLANDO OSEQUEDA Appellant	)	Case No.: CTA-0041 and CTA-0042 (Re: CR09-1395/1396-93; CR09-1398/1399-93)
v.	)	ORDER
TOHONO O'ODHAM NATION Appellee	)	

In 1994, Orlando Osequeda, Appellant, filed a petition for post-conviction relief, and the Court assigned a case number. A few months later, Mr. Osequeda filed a notice of appeal, and the Court assigned a new case number. Then, Mr. Osequeda filed a motion to withdraw the petition, which the Nation joined. Sometime later, the trial court dismissed the underlying case.

After reviewing the record, the Court dismisses the appeal and petition as moot. The cases/files may be closed.

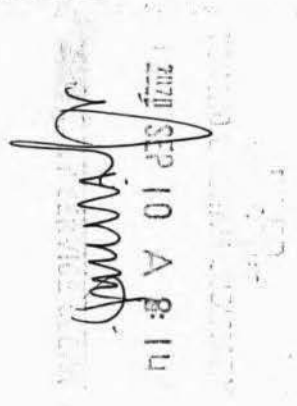
Dated this 25 day of Jun, 2020

Judge Kyle Fields

Judge Rene Alcoverde Jr.

Judge Clifford Wolf Black Sr.

In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona



Chadwick Smith, Appellant /Petitioner,	)	Case No.: AP2019-0002 (Re: AV2018-0193)
vs.	)	OPINION
Tohono O'odham Nation; Ned Norris, Chairman, in his Official Capacity; Legislative Council; and Certain Legislative Councilmembers, Appellees/Respondents.	)	

Chadwick Smith, Appellant.

Tohono O'odham Office of the Attorney General by Joshua O. Rees, Counsel for Appellees the Tohono O'odham Nation and Tohono O'odham Nation Chairman Ned Norris, Jr. P. Michael Ehlerman, Teresa W. Zhang, and Franklin Hoover, Counsel for Appellees Tohono O'odham Legislative Council and Certain Legislative Councilmembers.

Before Judges Rene Alcoverde, Jr., Barbara Atwood, and Rachel Johnson.

The Court, having considered the case file, the briefs on appeal, and oral arguments presented on August 19, 2019, affirms the judgment of the Tohono O'odham Trial Court ("Trial Court") for the reasons stated below. We have jurisdiction to hear this appeal pursuant to the Tohono O'odham Constitution, Article VIII, Section 7.

Background

For purposes of our review, we assume the truth of the following factual allegations set forth by Appellant Chadwick Smith in his petition.

On the evening of November 29, 2018, the Chairman of the Tohono O'odham Nation ("Chairman") met with Appellant, Chadwick Smith, and told him that the Tohono O'odham Legislative Council ("Council") was "mad" at Appellant and it would meet the next day to discuss Appellant. The Chairman stated that if Appellant did not resign that it would be a "black mark" on Appellant's record. Appellant asked the Chairman to speak to the Council and to let the Council know that Appellant wanted to visit with the Council and present his side of the story.

The Council held an emergency meeting and met in a closed session on November 30, 2018. The Council did not invite Appellant or give him an opportunity to be heard. Following the closed session, the Council held a vote on Resolution No. 18-453 which was then aired on the radio. Appellant was terminated as the Tohono O'odham Nation's Attorney General on November 30, 2018, by Resolution No. 18-453. His dismissal was without cause and was effective immediately. The Chairman concurred the same day, signing Resolution No. 18-453. Resolution No. 18-453 was posted on the Tohono O'odham Nation Legislative Branch website.

Proceedings below

Appellant challenged the legality of the resolution by filing a petition for declaratory and injunctive relief in the Trial Court on December 21, 2018. Appellant named as defendants the Tohono O'odham Nation; Tohono O'odham Chairman Edward Manuel, in his official capacity;[1] the Tohono O'odham Legislative Council; and certain Tohono O'odham Legislative Council Members, also in their official capacities. The Defendants appear here as Appellees.

Appellees filed motions to dismiss in the Trial Court, based on sovereign immunity, legislative immunity, and failure to state a claim upon which relief can be granted. The Trial Court denied Appellant's request for a preliminary injunction

[1]Pursuant to Rule 27(c) of the Arizona Rules of Civil Appellate Procedure, Chairman Ned Norris, Jr., the successor to Chairman Manuel, is automatically substituted as a party even though the allegations underlying the appeal concern actions taken by Chairman Manuel. *See* 4 T.O.C. § 1-102: "If a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which addresses the claims asserted, the court may in its discretion look to the laws of the State of Arizona for guidance." *See also* Rule 1(c), Tohono O'odham General Rules of Practice.

on February 19, 2019. The Trial Court dismissed Appellant's petition with prejudice on April 4, 2019, for failure to state a claim.

The Trial Court relied on *Escalante v. Sells District Council*, CTA-0133 (T.O. Ct. App. 2017) (scheduled for publication), in finding Resolution No. 18-453 to be a tribal governmental action. The Trial Court found that Appellant was challenging the constitutionality of this governmental action through an injunctive lawsuit within the exception to sovereign immunity in Section 2102(A) of the Title 1, Chapter 2 of the Tohono O'odham Code ("Sovereign Immunity Code"). The Trial Court concluded that the statement in Resolution No. 18-453 precluding judicial review of the resolution was unconstitutional and therefore severed that section.

The Trial Court then determined that even though sovereign immunity did not prohibit Appellant's lawsuit, legislative immunity under Section 2103(A) of the Sovereign Immunity Code barred Appellant's claims against the Tohono O'odham Legislative Council and Council Members. The Trial Court held that Appellant's ex post facto, bill of attainder, and due process claims against the Tohono O'odham Nation and its Chairman lacked merit as a matter of law under the Attorney General Act (20 T.O.C. Ch. 1), the Tohono O'odham Constitution (T.O. Const. Art. III, § 1), and the Indian Civil Rights Act (25 U.S.C. Ch. 15, §§ 1302(a)(8) and 1302(a)(9)). Appellant timely appealed.

Standard of Review

We review the Trial Court's interpretation of the Tohono O'odham Constitution, Indian Civil Rights Act, Attorney General Act, Sovereign Immunity Act, and Resolution No. 18-453 *de novo*. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (T.O. Ct. App. 1989) (court of appeals is not bound by a Trial Court's conclusions of law); *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016) (court of appeals reviews questions of statutory construction *de novo*). We note that the Trial Court did not permit discovery because it dismissed Appellant's petition with prejudice for failure to state a claim. Accordingly, we assume the truth of all well-pled factual allegations made in the petition in the light most favorable to Appellant. We do not, however, accept as true "allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts . . . or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005).

We review the Trial Court's denial of a preliminary injunction for abuse of discretion. *Engel v. Landman*, 221 Ariz. 504, 510, 212 P.3d 842, 848 (Ct. App.

2009); *see also Denny v. Lopez*, 3 TOR3d 10, 10–11 (T.O. Ct. App. 2006). A court abuses its discretion when the court commits an error of law that underlies its exercise of discretion. *Kohler v. Kohler*, 211 Ariz. 106, 107, 118 P.3d 621, 622 (Ct. App. 2005).

Analysis

Appellant concedes that the position of Attorney General is "at will," but he nevertheless challenges his termination by the Chairman and Council. Appellant argues that the enactment of Resolution No. 18-453 was arbitrary and capricious and in violation of his rights under the Attorney General Act, the Tohono O'odham Constitution, and the Indian Civil Rights Act, 25 U.S.C. § 1302(9). He argues that the Council is not immune from suit, that Resolution No. 18-453 is an ex post facto law and a bill of attainder, and that he was not given due process. He also contends that the Trial Court abused its discretion by denying his preliminary injunction.

The Trial Court found that the last paragraph in Resolution No. 18-453 precluding judicial review was unconstitutional. The Trial Court severed the paragraph after determining that the other sections of Resolution No. 18-453 did not logically depend on that paragraph. The Trial Court then gave effect to the remaining sections and reviewed Resolution No. 18-453 to determine if it was a bill of attainder or ex post facto law, or if the Council violated Appellant's due process rights when enacting it.

The bill of attainder and ex post facto claims are matters of first impression. The Tohono O'odham Constitution explicitly recognizes and adopts the Indian Civil Rights Act. T.O. Const. Art. 3 § 4. The Indian Civil Rights Act ("ICRA") prohibits ex post facto and bill of attainder laws. 25 U.S.C. § 1302(a)(9). It mirrors the prohibition in the United States Constitution. U.S. Const. art. I § 9. In the absence of Tohono O'odham case law, given the similarity of the ICRA and United States Constitution, we look to federal cases interpreting ex post facto and bill of attainder laws.

I. Sovereign Immunity

The Tohono O'odham Nation codified the doctrine of sovereign immunity in the Sovereign Immunity Code. 1 T.O.C. Ch. 2 § 2101. The Trial Court found that the exception to sovereign immunity in Section 2102(A) applied to Appellant's lawsuit under this Court's interpretation in *Escalante*. While Appellant's case is materially distinct from the legal challenge in *Escalante,* the Trial Court's ruling on

sovereign immunity was not appealed by Appellees. We therefore resolve this appeal without addressing the Trial Court's interpretation of Section 2102(A), or its application of *Escalante*. Instead, we treat Appellant's claim as a suit solely for injunctive or declaratory relief regarding the legality of his termination by joint action of the Chairman and Legislative Council.

II. Attorney General Act

The constitutionality of the Attorney General Act (20 T.O.C. Ch. 1) is not before the Court. Notwithstanding, the Attorney General Act is relevant to the Appellant's legislative immunity, ex post facto, bill of attainder, and due process arguments.

The Legislative Council enacted the Attorney General Act on October 1, 1989, by Resolution No. 326-89, using its constitutional authority in Article VI, Section 2(a). 20 T.O.C. Ch. 1. That article gives the Legislative Council sole power to "employ legal counsel for the protection and advancement of the rights of the Tohono O'odham Nation." T.O. Const. Art. VI, § 2(a).

The Attorney General Act provides a specific appointment method and dismissal process for the Attorney General. 20 T.O.C. § 2(C) of the Act states that "[t]he Attorney General may be dismissed only with the concurrence of the Chairman of the Nation and of a majority of the Legislative Council." Both the power to appoint and to dismiss an Attorney General is shared between the Legislative and Executive Branch. No hearing or reason is required for dismissing an Attorney General—only an agreement by both the Executive and Legislative Branches.

Resolution No. 15-286, "Appointing Deputy Attorney General as Acting Attorney General," clarifies that "when the position of Attorney General is vacant the Deputy Attorney General shall serve as Acting Attorney General until the position is permanently filled in accordance with Section 2.C of the Statute Creating the Office of the Attorney General." Res. No. 15-286 (July 21, 2015). The Attorney General, therefore, has no holdover or tenure right or expectation to remain in office. According to the Attorney General Act, the deputy attorney general, the assistant attorneys general, and other staff are subject to the Nation's personnel policy, but not the Attorney General. 20 T.O.C. § 2(C). Based on the constitutional authority used to pass the Attorney General Act, and the specific language of the Act, we need not address Article VII, Section 2(e) of the Constitution (appointment of officers and heads of governmental departments).

Based on the Attorney General Act itself: (1) the Attorney General is not entitled to remain in office for a set term; (2) dismissal of the Attorney General only requires agreement by both the Legislative and Executive Branches of government; and (3) the Attorney General is not subject to the Nation's personnel policy. We therefore review Appellant's claims of error under the express terms of the uncontested Attorney General Act.

III. Legislative Immunity

Appellant argues that legislative immunity does not shield Appellees Tohono O'odham Legislative Council and Council Members (collectively, "Council") from suit. Appellant's main argument is that the Council's enactment of Resolution No. 18-453 was quasi-judicial, and the Trial Court therefore erred in applying legislative immunity since the Council's actions were not "legislative" in nature. Appellant argues that *In Re: Petition of the Judicial Branch*, 3 TOR3d 105 (appeal dism'd, *In re: Petition of the Judicial Branch 3 TOR3d 50*), and *Harvey v. Tohono O'odham Council*, 1 TOR3d 43, support his position that legislative immunity does not apply.

The Tohono O'odham Nation codified legislative immunity in the Sovereign Immunity Code. 1 T.O.C. Ch. 2 § 2103. Legislative immunity protects the Legislative Council and individual members when performing legislative acts:

> "The Tohono O'odham Legislative Council, Legislative Council representatives and staff, and other persons engaged in legislative activity possess legislative immunity and are not subject to suit, process, or liability for the performance of legislative functions."

1 T.O.C. Ch. 2 § 2103. In voting on Resolution No. 18-453, the Council terminated the Attorney General as authorized in the Attorney General Act. *See supra* Part II. The question is whether the Council was engaged in "legislative activity" when it passed the Resolution.

Although the cases that the Appellant relies on in support of his challenge to the Trial Court's holding on legislative immunity do not apply,[2] we question whether

[2] Appellant's reliance on *In re: Petition of the Judicial Branch* as precedent to overcome legislative immunity is misplaced. *In re: Petition of the Judicial Branch* 3 TOR3d 105 (Tr. Ct., Oct 22, 2010) (*appeal dism'd, In re: Petition of the Judicial Branch*, 3 TOR3d 50). The plaintiff in that case did not file against either the Council or its individual members, but instead sued the Nation's Chairman to enjoin implementation of the Courts and Procedures statute. *Id.* The Council filed

the termination of Appellant's employment is "legislative activity" within the meaning of Section 2103. Federal and state law on legislative immunity suggests otherwise. In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), the Supreme Court explained that absolute immunity protects local governments when enacting ordinances with prospective application to benefit the public at large. On the facts before it, the Court held that the city council was protected by absolute immunity when it eliminated a position in the city's prospective budget. As the Court clarified, the city council's action "involved the termination of a position, which, *unlike the hiring or firing of a particular employee*, may have prospective implications that reach well beyond the particular occupant of the office." Id. at 55 (emphasis added). *See also State ex rel. Montgomery v. Mathis*, 290 P.3d 1226 (Ariz. Ct. App. 2012) (commission's districting decisions would be protected by absolute legislative immunity, but decision to hire a particular mapping expert was administrative in nature and outside scope of legislative immunity). Here, Resolution No. 18-453 terminated Appellant's position and was not of broad prospective application. Nevertheless, even if absolute immunity is not available to protect the actions of the Legislative Council, we note that their discretionary actions consistent with the Attorney General Act might be protected by qualified immunity. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court recognized that in determining whether qualified immunity protects government officials from liability, the plaintiff must show that the conduct was unconstitutional and that it violated clearly established constitutional standards. Significantly, the Court held that the inquiry is flexible and lower courts can proceed directly to the second element (whether the alleged constitutional violation was clearly established) and avoid reaching an unnecessary constitutional ruling.

For the reasons that follow, we do not reach what level of immunity applies—absolute or qualified—because the facts alleged in the Appellant's petition cannot establish that Resolution No. 18-453 was passed in violation of the prohibition against ex post facto laws or bills of attainder, or that he was deprived of a property

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to intervene. *In re: Petition of the Judicial Branch* addressed permissive intervention by the Council, and noted that the case's "unique fact pattern does not set precedent in making the Legislative Council a necessary or indispensable party in later actions challenging the validity of any of the Nations' [sic] laws as enacted by the Legislative Council." *Id.* at 115. The court in *In re: Petition of the Judicial Branch* expressly withheld ruling on the constitutionality of the Sovereign Immunity Code. *Id.* at 123. Although that court's statement of precedent does not bind us, the facts and posture of *In re: Petition of the Judicial Branch* does not support the Appellant's case. In addition, *Harvey v. Tohono O'odham Council*, 1 TOR3d 43 (Tr. Ct., Jan. 26, 1987) is not precedent to overcome legislative immunity. Unlike judicial office, the Attorney General position does not have a tenure or holdover provision. *See supra* Part II.

or liberty interest without due process of law. *See, e.g., Nair v. Oakland County Community Mental Health Auth.*, 443 F.3d 469 (6th Cir. 2006) (declining to resolve defendants' alternative defense of sovereign immunity in retaliatory discharge case where affirming judgment against plaintiff on the merits was more straightforward); *Robles v. Kerry,* 74 F. Supp. 3d 254 (D.D.C. 2014) (declining to decide complex issue of sovereign immunity waiver in light of plaintiff's failure to state a claim).

IV. Ex Post Facto

Appellant argues that Resolution No. 18-453 is an ex post facto law. An ex post facto law retroactively punishes conduct that was legal when originally performed. We look to federal cases for guidance because this is a case of first impression. *See supra* Analysis. A critical element of an ex post facto law is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). According to the United States Supreme Court, the critical question is whether the challenged law changes the legal consequences of acts completed before the law's effective date. *Weaver*, 450 U.S. at 28-31.

Although the ex post facto prohibition can be violated by the imposition of severe civil penalties, the civil punishment must be the equivalent of a criminal sanction. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The termination of at-will employment is not such an action. For example, in *Dehainaut v. Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994), aggrieved air traffic controllers were permanently barred from future employment with the FAA and related agencies because of their participation in a strike. The regulation in that case was challenged as an ex post facto law. The Seventh Circuit, citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952), held that the regulation was not an ex post facto law because being barred from future employment is not the equivalent of a criminal penalty.

Here, the Council, with the concurrence of the Chairman, held the authority to terminate Appellant's employment at any time, and they did so in passing Resolution No. 18-453, dismissing him without cause. Difficulties that Appellant might experience in securing future employment with the Nation is not a function of Resolution No. 18-453.

Appellant deduces, without support, that the totality of Resolution No. 18-453 is an ex post facto law because the Trial Court found the last paragraph invalid. The Trial Court properly severed the final paragraph pursuant to Tohono O'odham law.

1 T.O.C. Ch. 1 § 1101; *In Re: Petition of the Judicial Branch*, 3 TOR3d 128, 144-145 (Tr. Ct., May 18, 2011) (*appeal dism'd*, *In re: Petition of the Judicial Branch*, 3 TOR3d 50). The remaining sections of Resolution No. 18-453 do not depend on that paragraph and can be given effect.

Under the Attorney General Act, Appellant was subject to termination without cause on the concurrence of the Council and the Chairman. *See supra* Part II. Because he did not have a right to remain in his position, his termination pursuant to the terms of the Attorney General Act did not rise to a criminal punishment. We therefore conclude that Resolution No. 18-453, terminating Appellant without cause in accordance with the Attorney General Act, did not violate the prohibition against ex post facto laws.

V. Bill of Attainder

Appellant argues that Resolution No. 18-453 is a bill of attainder. A bill of attainder is the imposition of a punishment by a legislative body on one or more persons without the benefit of a trial. *Selective Service v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846–47 (1984) (quoting N*ixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977)). We look to federal cases for guidance because this is a case of first impression. *See supra* Analysis. Bills of attainder are banned by the United States Constitution. U.S. Const. Art. I § 9. The framers of the United States Constitution considered such legislative actions odious because they allowed a legislative body to take over the traditional role of a court, and let it judge an individual case and impose punishment. *See U.S. v. Brown,* 381 U.S. 437 (1965). Resolution No. 18-453 is directed at one person, Appellant, and the Council did not provide him with a trial or hearing. We therefore examine Resolution No. 18-453 to determine if it imposes a prohibited punishment.

The federal courts adopted a three-factor test to determine if an alleged bill of attainder law imposes punishment: (1) does the statute fall within the historical meaning of legislative punishment; (2) can it reasonably be said that the statute furthers non-punitive legislative purposes; and (3) does the legislative record show a legislative intent to punish. *ACORN v. U.S.*, 618 F.3d 125, 136 (2nd Cir. 2010). The three factors are weighed together to determine if a law imposes such a punishment to violate the prohibition against bills of attainder. *Id.*

Appellant's termination from employment does not fall within the historical meaning of legislative punishment. In the cases relied on by Appellant, the governmental entities imposed punitive consequences on individuals for specific

alleged misconduct. *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969) (director of DNA Legal Services excluded from Nation for unjustified reasons); *U.S. v. Lovett*, 328 U.S. 303 (1946) (government employees barred from employment for alleged un-American activities). Appellant's at-will position, in contrast, was terminated by the Executive and Legislative branches pursuant to processes spelled out by law. Appellant was not entitled to remain in office and any Executive Branch personnel policy that might restrict Appellant's employment is not a legislative punishment. *See supra* Part II. Although Appellant has not received a paycheck nor received fringe benefits since his dismissal, these are regrettable, but normal and foreseeable, consequences of losing one's job.

Resolution No. 18-453 can reasonably be said to further non-punitive legislative purposes. The Constitution empowers the Council to hire legal counsel to "promote, protect and provide for public health, peace, morals, education and general welfare of the Tohono O'odham Nation and its members." T.O. Const. Article VI § 1(c)(2). The legal representation of the Nation is a valid legislative concern. The Appellees' decision to not to give a reason for the termination does not transform their lawful act into an unlawful bill of attainder.

Last, the legislative record does not reveal an intent to punish. The Chairman of the Tohono O'odham Nation is the head of the Executive Branch of government. T.O. Const. Art. VII. Although we accept the Chairman's statements and actions in the light most favorable to Appellant, the statements and actions are not attributable to the Council. Further, even if Appellant could show that the Chairman and Council terminated Appellant from his position because of dissatisfaction with his performance, that alone would not transform Resolution No. 18-453 into a bill of attainder.

In weighing the three factors to determine if Resolution No. 453 imposes a prohibited punishment, we find that Resolution No. 453 does not impose a punishment and Resolution No. 453 is not a bill of attainder. We find no basis in law or cultural principles to extend the bill of attainder prohibition to the termination of an at-will tribal employee.

VI. Due Process

Appellant must demonstrate that he held a valid property interest in continued employment in order to present a colorable due process claim. *See Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993) (citing to *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and holding that "[a] government employee has

a constitutionally protected property interest in continued employment when the employee has a legitimate claim of entitlement to the job. . . . However, a mere expectation that employment will continue does not create a property interest."). *Id.* Here, Appellant's termination from his at-will employment as the Nation's Attorney General does not constitute a due process violation because he lacked a property interest in continued employment. *See supra* Part II.

Appellant also claims that his liberty interest under the Due Process Clause was infringed because his reputation was damaged for being terminated from employment without cause. In *Portman*, *supra*, the Ninth Circuit recognized that certain dismissals that severely damage an individual's reputation might constitute a due process violation, but the court clarified that "the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities" and the reasons must be published. *Portman*, 995 F.2d at 907. In Appellant's case, the Chairman and Council in Resolution No. 18-453 did not give reasons for terminating Appellant. Terminations without explanation are a permissible consequence of at-will employment—a possibility that the Appellant consented to at the time of accepting employment. Even if Appellant could demonstrate some inevitable damage to his reputation and impairment of future job opportunities, his termination without cause was consistent with the Attorney General Act. Although Appellant argued that publishing Resolution 18-453 hurt his reputation, the termination of a public officer without cause is of public interest, and its public announcement was the prerogative of the Council and Chairman. *See supra* Part II.

VII. Preliminary Injunction

Appellant asserts that the Trial Court erred in denying his request for a preliminary injunction and declaratory judgment by not relying on a case then on appeal, and by not applying Article VII, Section 2(e) of the Constitution. In light of Appellant's failure to establish his right to remain in office under any of the theories he advanced, the Trial Court did not abuse its discretion in denying the preliminary injunction.

For the reasons stated above, the Trial Court's order is affirmed.

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Dated this 2nd day of September, 2020.

Signing for a unanimous Court:

Rene Alcoverde, Jr.
Presiding Appellate Judge.

Judge Barbara Atwood
Appellate Judge.

Judge Rachel F. Johnson
Appellate Judge.

In the Judicial Court of the Tohono O'odham Nation

In the State of Arizona

Dale Lloyd Joaquin	)	Case No. AP2021-0001
	)	(Ref: TC-2020-0018-1/2/4/5 and
Appellant	)	CR2021-0077-1/5/7)
	)	
v.	)	
	)	**NOTICE**
Tohono O'odham Nation	)	
	)	
Appellee	)	
	)	
	)	

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2021 JUN 22 P 1:09
JUDICIARY SERVICE CLERK

Under Rule 2 of the Tohono O'odham Rules of Appellate Procedure, the Chief Judge or designee processes a notice of appeal. In processing the notice of appeal, the Chief Judge or designee determines if the appeal is properly perfected before assigning an appellate panel. Here, Mr. Joaquin's Motion for Appeal Violation of Rights Lawsuit is not a properly perfected appeal. Through an error, the Court marked the documents as filed and issued an appellate case number. Because the Court cannot process these documents, the Court strikes the filed stamp and case number. Finally, the Court returns the original documents.

Dated: June 22, 2021

Judge Kyle Fields

TOHONO O'ODHAM
JUDICIARY

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
07/10/14 9:40 A.M.
DATE/TIME
COURT CLERK

IN THE COURT OF THE TOHONO O'ODHAM NATION

COUNTY OF PIMA, IN THE STATE OF ARIZONA

CHILDREN'S DIVISION

IN THE MATTER OF:	**CASE NO. CCV-2012-0046** **DENIAL OF REQUEST TO WAIVE INVESTIGATION AND PRE-ADOPTION CERTIFICATION**
[redacted] A. V. **DOB:** [redacted]	
Minor child under the age of 18 years	

PETITIONERS, [redacted] petitions the honorable Court to be appointed as adoptive parents of the above referenced minor child.

1. The Court has jurisdiction over this matter pursuant to the Laws of theTohono O'odham Nation, Title III, Chapter Art. 11 1105. The Court denies the Petitioner's request to Waive the Investigation and Pre-adoption Certification Requirements of 3 TOC Ch.1, Art. 11 S 11105 for the reason that 3 TOC Ch. 1, ART. 11 S 11105 does not give the Court the discretion to wave the investigation and pre-adoption certification requirements.

2. 3 TOC Ch. 1 Art 11 S 11105 (A) provides that "within 30 days of the filing of the petition for adoption, the Court shall order an investigation report on the suitability of the petitioners to adopt child." 3 TOC Ch. 1, Art. 11 S 11105(A (1) provides that "the

report shall be prepared by the Division, and the Court shall notify, by Court Order, the Division of the request for investigation report. "Further, 3 TOC Ch. 1, Art. 11 S 11105 (A) (2) provides that the "Division shall investigate the suitability of the petitioners to adopt a child and submit to the Court a full report of the facts discovered by the inquiry...."

3. There are additional requirements set forth as to when the report shall be filed and what the report shall include. It is only after the Court has received the investigation report that the Court shall set a hearing on the petition to determine the acceptability of the petitioner's to adopt. 3 TOC Ch. 1, Art. S 11105 (C). It is only a finding of suitability to adopt that the Court can enter an Order of Adoption. See 3 TOC Ch. 1, Art. 11 S 11106.

4. The Legislative intent—to ensure petitioners are acceptable to adopt O'odham Children --- cannot be carried out or effectuated if the term "shall" is read as "may" in 3 TOC Ch. 1, Art. 11 S11105. Reading the obligation of "shall" as a mere permissive directive deprives then public (the Nation) of its right and duty to protect O'odham Children who are placed for adoption.

5. The Legislative Council intended that potential adoptive parents be investigated by TODHHS for their suitability to adopt and care for O'odham children. 3 TOC Ch. 1, Art. 11 S11105 operates as a mandatory obligation to this Court, and the Court does not have discretion to waive the requirements for investigation and pre-adoption certification.

WHEREFORE, The Court Orders:

1. **The Court denies The Petitioners request to waive the investigation and pre-adoption requirements of 3TOC Ch. 1, Art. 11S 11105 and Vacate the hearing set for July 23, 2014 at 9:00am.**
2. **An investigation report is to be prepared by TODHHS and filed with the Court within 120 days.**
3. **A hearing will be set on the petition within 30 days of the Court's receipt of the investigation report from TODHHS.**

Dated this 16 day of July, 2014.

Honorable Judge Donald Harvey

NATION
JUSTICE CENTER

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
07/01/14 @ 9:40am
DATE/TIME
COURT CLERK

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

CHILDREN'S COURT

[redacted] In re: J. G. **DOB:** [redacted] [redacted] **A Person under 18 years of age**	**CASE NO. CCV2010-0089** **ORDER** **MOTION FOR RECONSIDERATION & MOTION FOR FINDINGS OF NO REASONABLE EFFORTS BY DIVISION& MOTION TO VACATE ORDER** **(DENIED)**

This matter came before the Court on June 24, 2014, upon Motion of the Respondent natural mother, [redacted] represented by the Tohono O'odham Advocate Program by Leslie S. Turner. Petitioner Tohono O'odham Department of Health and Human Services (TODHHS)—Child Welfare Division, was represented by Virjinya R.A. Torrez, of the Tohono O'odham Attorney General's Office. The Respondent claims the Tohono O'odham Division of Child Welfare Services lacked the proper jurisdiction to remove the minor child, [redacted], from the Tucson Medical Center; failed to make reasonable efforts to prevent the removal of her infant son, as is required by the Tohono O'odham Children's Code, Section 1101(B)(2); and that her due process rights were violated when she was not allowed into the Tohono O'odham Justice Center for her hearing, for which she unrepresented. The Respondent asks the temporary order entered by the Court to be vacated.

The Petitioner asserts that the Court does have jurisdiction, and cites the Tohono O'odham Constitution, Article I, Section 3, which provides that the Tohono O'odham Nation ("Nation") has authority and jurisdiction over tribal members, as well as provisions of the Tohono O'odham Code, which set forth the Nation's jurisdiction in civil and children's court matters. Petitioner further contends that reasonable efforts were made and that the Respondent's due process rights were not denied to her as Respondent had notice of the dress code, and she did not indicate that she wished for a continuance.

Both parties cite the United States Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) for their arguments regarding domicile: that the child's domicile follows that of the mother where the parents are not married. The Petitioner argues that the domicile of the Respondent/natural mother is the Tohono O'odham Nation; the Respondent argues that her domicile is Tucson.

The Court finds that pursuant to the Tohono O'odham Constitution, the Tohono O'odham Civil Actions Code, and the Tohono O'odham Children's Code that the Court has jurisdiction of this matter. The Tohono O'odham Constitution provides: "The sovereign powers, authority and jurisdiction of the Tohono O'odham Nation and its government over members of the Tohono O'odham Nation shall extend beyond the geographical boundaries of the Tohono O'odham Nation." T.O. Const. Art. 1 § 3. The Civil Actions Code, in Section 1-101(d)(7), sets forth that the civil jurisdiction regarding Tohono O'odham children extends to: "Any action concerning the custody, adoption, guardianship, commitment or paternity of the Tohono O'odham child, provided that the Tohono O'odham courts shall have exclusive jurisdiction over any Tohono O'odham child who is domiciled within the territorial jurisdiction of the Nation." Section 1-101(c)(4) of the Civil Actions Code defines domicile as "a person's true, fixed and permanent home and the place to which a person intends to return even though actually residing elsewhere, and shall also mean a person's actual place of residence. Members

of the Nation are presumed to be domiciled within the territorial jurisdiction of the Nation." Section 101-1(c)(5) defines a "Tohono O'odham child" as "an individual under the age of eighteen who is a member of the Nation, eligible for membership in the Nation, or the child of a member of the Nation." The Tohono O'odham Children's Code, Title 3, Chapter 1 of the Tohono O'odham Code, sets forth in Section 1301 that:

> The Children's Court shall have exclusive jurisdiction over any Child Custody Proceeding involving a child who resides or is domiciled within the reservation of the Tohono O'odham Nation; or a child who is a ward of the Children's Court, notwithstanding the residence or domicile of the child. The Children's Court shall have concurrent jurisdiction with any other court of competent jurisdiction over a Child Custody Proceeding concerning a Tohono O'odham child who is neither domiciled within the Reservation of the Tohono O'odham Nation nor is a ward of the Children's Court. Where the Children's Court asserts jurisdiction over a child pursuant to this Chapter, the Court shall also have jurisdiction over the child's guardian(s) and any adult residing in the child's home to the extent necessary to issue any orders protecting the best interests of the child.

The Court finds that while the Respondent may reside in Tucson, that the statutory presumption that, as a member of the Tohono O'odham Nation, she is domiciled on the Tohono O'odham Nation has not been overcome. Paternity has not been established. Furthermore, the child is a Tohono O'odham child as the Respondent is a tribal member. Therefore, the presumptive domicile of the Tohono O'odham child pursuant to Tohono O'odham law is the Tohono O'odham Nation, and the Children's Court has exclusive jurisdiction. Even if the child's domicile were not the Tohono O'odham Nation, the Children's Court would still have jurisdiction, albeit concurrent.

The Court further finds, as conceded by the Respondent, that Respondent has been represented by legal counsel in the Tohono O'odham Courts in another matter, and has appeared before the Tohono O'odham Courts. The public dress code is prominently displayed

at the entrance of the courthouse and in the court lobby, and has been since 2012. Further, it is the responsibility of legal counsel to inform his or her client of applicable court policies. The Respondent was not dressed appropriately despite being aware of the public dress policy, and did not indicate that she wished for a continuance. Respondent's due process rights were not violated.

The Court finally finds that while the Respondent may have wanted legal counsel to be present at her hearing, the Children's Court has no authority over the Advocate Program and its policies regarding intake and representation of prospective litigants before the Court. The Respondent was provided the opportunity to attend the temporary custody hearing; that the Respondent did not appear due to her own actions, and that legal counsel was not present for reasons beyond the scope of the authority of the Children's Court did not deprive the Respondent of her right to due process.

Based upon the foregoing, the Court DENIES the Respondent's Motion. The Temporary Orders of June 24, 2014 remain in effect.

Dated this 30th day of June, 2014

Donald Harvey, Judge

NATION
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OF THE
TOHONO O'ODHAM
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12/10/14 @ 1:26
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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CHILDREN'S DIVISION

In the Matter of:	Case No.: CCV2010-0089
[redacted] J. G.	ORDER
DOB: [redacted]	**MOTION TO DISMISS FOR LACK OF JURISDICTION**
A person under 18 years of age	**(DENIED)**

This matter came before the Court on October 21, 2014, upon the Respondent Natural Mother's Motion to Dismiss Case For Lack of Jurisdiction. The Respondent moved to vacate the disposition hearing set for October 21, 2014 at 9:00 a.m., and dismiss the Child in Need of Care Matter (CINC). Respondent alleges this Court lacks jurisdiction over the minor child pursuant to Title 4, Chapter 1, Section 1-101(b)(7) of the Tohono O'odham Code. Section 1-101(b)(7) sets forth that the civil jurisdiction regarding Tohono O'odham children extends to

> [A]ny action concerning the custody, adoption, guardianship commitment or paternity of the Tohono O'odham children provide that the Tohono O'odham Courts shall have exclusive jurisdiction over any Tohono O'odham child who is domiciled within the territorial jurisdiction of the Nation. The jurisdiction of the Tohono O'odham courts shall also extend to any such actions concerning a child who is not Tohono O'odham when said child has been domiciled within the territorial jurisdiction of the Nation for a period of six months.

Respondent argues that this Court lacks jurisdiction over the minor child, [redacted] on the grounds that he is (1) less than six (6) months of age, thus is not domiciled on the Tohono O'odham Nation; and (2) is a member of the Navajo Nation, and is therefore not a Tohono O'odham child.

Petitioner, the Tohono O'odham Department of Health and Human Services – Child Welfare Division, responds pursuant to Section 1301 of the Tohono O'odham Children's Code (3 TOC Ch. 1, Art. 3) that this Court made explicit findings of exclusive jurisdiction on June 30, 2014, namely that (1) the child was a Tohono O'odham child; (2) paternity had not been established; (3) Respondent Natural Mother was domiciled on the Tohono O'odham Nation; and (4) that the child's domicile followed that of his mother.

Petitioner asserts that the Children's Court has jurisdiction, and that the child, despite his enrollment with the Navajo Nation, still qualifies as a Tohono O'odham child pursuant to Section 1-101(c)(5) since he is still a child of a Tohono O'odham tribal member. Petitioner also provided a letter from the Navajo Nation's Social Services Division, which stated that the Navajo Nation did not plan to intervene in the matter.

The Court Finds that on June 30, 2014 it already ruled on domicile and jurisdiction. The subsequent enrollment of the child with the Navajo Nation does not operate to retroactively change, invalidate, or void the Order of June 30, 2014. The Court further finds that the minor child, [redacted] listed on the Navajo Indian Census Roll as of August 11, 2014, is a Tohono O'odham child pursuant to

Section 1-101(c)(5) of the Civil Actions Code, Title 4, Chapter 1 of the Tohono O'odham Code on the grounds that he is an individual under the age of eighteen who is the child of a member of the Nation, and that the Respondent failed to prove that Navajo enrollment makes the child ineligible for membership in the Tohono O'odham Nation.

The Court finally finds that a party's subsequent actions during the pendency of a case do not deprive the Children's Court of its jurisdiction. Section 1301 of the Tohono O'odham Children's Code is clear that the Children's Court retains exclusive jurisdiction when the child is a ward of the court:

> The Children's Court shall have exclusive jurisdiction over any Child Custody Proceeding involving a child who resides or is domiciled within the reservation of the Tohono O'odham Nation; **or a child who is a ward of the Children's Court, notwithstanding the residence or domicile of the child**. (emphasis added)

The critical date for determining whether the Children's Court has jurisdiction is the date the proceedings were commenced. Pursuant to Section 1501 of the Tohono O'odham Children's Code, a Child in Need of Care (CINC) matter is commenced by the filing of a CINC petition with the Children's Court. The CINC petition in this matter was filed on May 30, 2014, and this Court found in its Order of June 30, 2014 that it had exclusive jurisdiction over the child at the time of the commencement of the action. The Respondent's enrollment of the minor child with the Navajo Nation does not change or deprive the Tohono O'odham Children's Court of its exclusive, on-going jurisdiction.

Based on the forgoing, the **Court Denies** the Respondent's **Motion to Dismiss Case for Lack of Jurisdiction.**

Judge, Donald Harvey

In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Children's Division

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2018 MAY 15 PM 4:23
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IN THE MATTER OF:) CASE NO. CCV2017-0048
)
[redacted] J. L.) **ORDER**
DOB: [redacted])
)
)
Minor child.)

On May 10, 2018 the Court heard the Department of Health and Human Services, Child Welfare Division's ["the Department"] Motion to Extend the Order of Detention, Issued April 26, 2018, for an additional Seven (7) Calendar Days. Attorney General Chad Smith and Assistant Attorney General Christine Reyes appeared for the Department, with Vangie Ramon, Child Welfare Supervisor. Also present was the minor, [redacted].

The Court finds that the minor, based on parental neglect, has been in the legal care, custody and control of the Department since October 19, 2017. She was adjudicated a child in need of care on November 28, 2017. The minor is held in the Juvenile Detention Center ["JDC"], a secure juvenile facility. The minor is not held for any pending juvenile offense.

On November 6, 2017, while in the temporary legal custody of the Department, the minor ran away from the group home placement arranged by the Department. The Department filed a Motion for Protective Custody Warrant on November 20, 2017, and the Court issued the Protective Custody Warrant on November 30, 2017. The Tohono O'odham Police executed the Warrant on April 25, 2018, and delivered the minor to the Juvenile Detention Center.

On April 26, 2018, the Court held a detention hearing for the minor. The Department presented its Motion to extend the child's time in detention because the Department did not have

another place for the minor. The Department also informed the Court that the minor was pregnant. The Court granted the Department two weeks to make placement arrangements, based on the Court's concern that the minor had run away before, and was likely to do so again.

On May 10, 2018 the Department again wanted more time to arrange placement for the minor, arguing that the Court had broad authority under the Children's Code to place this minor in the Juvenile Detention Center, citing Chapter 1, §1512 and §1302 of the Children's Code. As explained below, the Court does not agree that it has broad discretion to allow children, who are not alleged or adjudicated juvenile offenders, to be detained in the Juvenile Detention Center. However, the Court will extend the minor's current placement in the Juvenile Detention Center, consistent with the Court's practice up to this point in dealing with minors under the same circumstances as this minor.

The relevant law for the Court's reasoning that this practice cannot continue is based upon Chapter 1, §1404(D) of the Children's Code, and the foundational rights to the equal protection of the laws and the due process of law under Article III, sections 1 and 4 of the Constitution of the Tohono O'odham Nation, and 25 U.S.C. §1302(a)(8) of the Indian Civil Rights Act.

Chapter 1 of the Children's Code has a provision that applies to a child taken into temporary custody by the Child Welfare Worker:

> No child taken into temporary custody pursuant to this Section, who has not otherwise been arrested, charged, or adjudicated as a juvenile offender, shall be confined in any jail, adult lockup, or adult or juvenile detention facility. No such child shall be transported or detained in a secure facility in association with delinquent, criminal, or vicious persons or those accused of being such. 3 T.O.C., Ch. 1, §1404(D).

This provision for a CINC child with no pending juvenile offender matters, who is in the Department's temporary custody prior to CINC adjudication, applies equally to the same child after she / he is adjudicated a child in need of care.

The Children's Code, Chapter 1, Article 3 sets forth the Court's authority to issue orders necessary for the safety of children, "including subpoenas, orders of restriction, warrants for protective custody, and such other orders as may be appropriate." The Children's Code does not define "warrant for protective custody", nor does the Code set forth a clear procedure on what happens when a child, who "has not otherwise been arrested, charged or adjudicated as a juvenile offender", §1404(D), *supra*, is apprehended by the Police, pursuant to a protective custody warrant. The term "protective custody" is, also, not defined in the Children's Code. [1] The terms of §1404(D), *supra*, establish that children, who come under Chapter 1 proceedings meant to provide maximum safety and protection for abused, neglected, or abandoned children, and those who are at risk of such harm, must be placed in safe relative or other family care, or facilities that are not juvenile detention facilities.

Up to the present time the Court, the Police, the Juvenile Detention Center, and the Department treated the protective custody warrant situation for children in need of care runaway status the same as warrants issued for the arrest of adjudicated or alleged juvenile offenders. The child in need of care would be admitted to the Juvenile Detention Center, and brought to Court in shackles, as are detained juveniles. This practice is in direct violation of §1404(D), Chapter 1, of the Children's Code, and raises issues of the equal protection of the laws and due process under the Constitution of the Tohono O'odham Nation, *supra*, and the Indian Civil Rights Act, *supra*. This practice must stop.

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[1] The most succinct general explanation / definition of "Child protective custody" that the Court found is from the website for USLegal, https://definitions.uslegal.com/. *Child protective custody is used in the context of family law when authorities believe a child's health or welfare is in danger. A social worker or police officer can place a child into protective custody if he or she believes immediate action is needed to protect a child from abuse or neglect. ...A child taken into protective custody will often be placed into an emergency shelter, a licensed foster home or with a suitable relative.*

Protective Custody Warrants should be distinguished from Juvenile Arrest Warrants. Currently, the Court uses the Warrant to Apprehend for Protective Custody for child offenders and for a child in need of care or a runaway, who is a ward of the court. The juvenile or child offender who is arrested can be admitted to the Juvenile Detention Center. The child in need of care and/or runaway cannot be placed in JDC under the Children's Code.

IT IS ORDERED, for the reasons stated above, [redacted] a minor, is held in Juvenile Detention until Tuesday, May 15, 2018 at 4 p.m. and must be released at that time to her legal custodian, the Department of Health and Human Services, Child Welfare Division.

IT IS FURTHER ORDERED that this minor must not be admitted into the Juvenile Detention Center, again, solely on the basis of a Warrant for Protective Custody for child in need of care and/or runaway status. The Juvenile Detention Center is a secure juvenile detention facility. The Children's Court has jurisdiction to place a child in such a facility under Chapter 2, Juvenile Justice, of the Children's Code, only when the child is alleged to have committed or has been adjudicated as having committed a juvenile offense. 3 T.O.C., Ch. 2, Art. 3. A child picked up on a Warrant for Protective Custody solely for being a child in need of care and/or runaway status cannot be admitted into the Juvenile Detention Center, when the child has no juvenile charges or pending juvenile offender matters.[2] 3 T.O.C., Ch. 1, §1404(D). Such a child must be returned to the child's legal custodian, including a parent, guardian or the Department.

Issued on the 15th day of May 2018.

Violet Lui-Frank

JUDGE Violet Lui-Frank

[2] When a child offender has a warrant for juvenile offenses or juvenile disposition violations, then the child can be admitted to JDC on the juvenile offender case, even when the child has another warrant for protective custody as a child in need of care. The two matters are separate and distinct.

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Children's Division

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In the Matter of: CASE NO. COP2018-0058-1-2

TOHONO O'ODHAM NATION ORDER

v.

[redacted], E. R.
DOB [redacted]

Respondent Minor Child.

On August 1, 2018 the Tohono O'odham Nation, by Bretton Barber, Chief Prosecutor, filed the Application for Automatic Transfer to Adult Court, pursuant to Section 2406, Children's Code.

The Court finds that the transfer is automatic under 3 T.O.C. Section 2406, Children's Code, and no order is required to effectuate the transfer. The Nation will file the appropriate adult criminal complaint forms, so that the adult criminal file can be created under the appropriate criminal docket number, and the criminal case can proceed.

This Order is made only for the orderly processing and closing of the Juvenile offender file and notice to the Juvenile Detention Center, the Tohono O'odham Police Department, and the Respondent, and parent(s).

The status of the Juvenile case was that the Respondent was held by order of the Children's Court based on prior failures to appear, and parent's failure to ensure that Respondent appear.

With the filing of the Application for Automatic Transfer to Adult Court, the Respondent can be held in the Juvenile Detention Center for Initial Appearance in the Criminal Court within 36 hours of the filing of the Application for Automatic Transfer to Adult Court on August 1, 2018.[1]

IT IS ORDERED THAT the jurisdiction of the Children's Court over the Respondent in this case ceased upon the filing of the Application for Automatic Transfer to Adult Court. His detention under the Juvenile case is analogous to detention upon arrest, triggering the 36 hour period for detention order by the Criminal Court, or the defendant must be released.

A copy of this Order must be included in the criminal case, if the criminal complaint is filed.

The Child Offender case can be closed, effective with this Order.

So ordered on Aug. 2, 2018.

Violet Lui-Frank

Judge Violet Lui-Frank

FW: resp. pros. prob. JDC

[1] *See,* 7 T.O.C. §1.15, a criminal defendant cannot be held longer than 36 hours without a detention order of the Criminal Court.

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Virjinya R. A. Torrez, 025252
Assistant Attorney General
TOHONO O'ODHAM NATION
P.O. Box 830
Sells, Arizona 85634-1202
Telephone: (520) 383-3410
Counsel for Tohono O'odham Department of Health & Human Services

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF: RUBY JOLD DOB: 5/1/65 AN INCAPACITATED AND PROTECTED PERSON	**CASE NO. 2012-0184AV** **ORDER**

The Court is in receipt of the Tohono O'odham Department of Health & Human Services (TODHHS) motion asking the Court to vacate in part the Order of October 23, 2013 insofar as it applies to TODHHS' evaluation of the Ward and assistance to the Guardian/Conservator in finding a new placement and/or guardian for the Ward. Based on the facts presented in the Motion, and the argument made at hearing on December 2, 2013, the Court vacates the Order in part as it pertains to TODHHS.

The Court admonishes the Guardian/Conservator, Lorissa Fitts, that she has the following duties and responsibilities as guardian/conservator of Ms. Jold:

1. You have powers and responsibilities similar to those of a parent of a minor child, except that you are not legally obligated to contribute to the support of your ward from your own funds.

2. You are responsible for making appropriate arrangements to see that your ward's personal needs (such as food, clothing, and shelter) are met.
3. You are responsible for making decisions concerning your ward's educational, social, and religious activities. If your ward is 14 years of age or older, you must take into account the ward's preferences to the extent they are known to you or can be discovered without unreasonable effort.
4. You are responsible for making decisions concerning your ward's medical needs. Such decisions include (but are not limited to) the decision to place your ward in a nursing home or other health care facility and the employment of doctors, nurses, or other professionals to provide for your ward's health care needs. However, you are to use the least restrictive means and environment available that meet your ward's needs.
5. You may arrange for medical care to be provided even if your ward does not wish to have it, **but you may not place your ward in a level one behavioral health facility against your ward's will unless the Court specifically has authorized you to consent to such placement**.
6. You shall not accept any remuneration of any kind for placing your ward in a particular nursing home or other care facility, using a certain doctor, or using a certain lawyer. "Remuneration" includes, but is not necessarily limited to, direct or indirect payments of money, "kickbacks," gifts, favors, and other kinds of personal benefits.
7. You are required to report as ordered by the Court, in writing, with respect to your ward's residence, physical and mental health, whether there still is a need for a guardian, and your ward's financial situation.

8. If your ward dies you shall notify the court in writing of the ward's death within ten days of learning that the ward has died.
9. You must be conscious at all times of the needs and best interests of your ward. If the circumstances that made a guardianship necessary should end, you are responsible for petitioning the Court to terminate the guardianship and obtaining your discharge as guardian.
10. Immediately locate, identify, secure and inventory all of the assets of the protected person and make proper arrangements for their protection, such as changing the locks on the house, renting a safe deposit box for important documents, etc.
11. Immediately take title to all of the protected person's property. The property should be titled in the name of the conservatorship: "(Your name), as Conservator(s) of the estate of (protected person's name)" or "(protected person's name), by (your name), Conservator." Unless otherwise ordered by the court, do not put the protected person's funds into joint accounts, trust accounts ("in trust for"), or payable on death (POD) accounts. Do not list yourself as beneficiary on any bank accounts or other assets belonging to the protected person.
12. File your formal inventory with the Court no more than 90 days after your letters of conservator, whether temporary or permanent, issued. If you are filing it without an attorney, be sure to put the case name and number on all papers you file with the Court.
13. Keep detailed records of all receipts and expenditures you make on behalf of the protected person, including bills, receipts, bank statements, tax returns, bills of sale, promissory notes, etc. Open a separate conservatorship checking account for deposit

of your protected person's income and other receipts and payment of all bills and expenses. Avoid dealing in cash and do not write checks to "cash."

14. Establish a budget, pay the protected person's debts when they become due, and properly invest the protected person's assets. You may hire accountants, attorneys, and other advisors to help you carry out your duties as the size and the extent of the conservatorship estate may dictate.

15. File an accounting with the Court every year as ordered by the Court.

Each accounting must list all conservatorship property at the beginning of the accounting period and the conservatorship property at the end of the accounting period, and must describe all money and property received or disbursed by you during the accounting period. As to money and property received, you must provide the date of each receipt, the source of the receipt, the purpose of the receipt, and the amount of the receipt. As to money and property disbursed, you must provide the date of each disbursement, the payee/distributee, the purpose of the disbursement, and the amount of the disbursement. With each accounting, you also must submit a bank statement or financial account statement that supports the ending balances of each account shown on the accounting.

16. **NEVER** use any of the protected person's money or property for any reason other than the protected person's direct benefit. You may not profit in any way from access to the protected person's assets. You have a legal duty of fairness and impartiality to the protected person. Neither you, your friends, nor other family members may profit by dealing in the assets of the conservatorship estate. You must be cautious and prudent in investing the protected person's assets.

17. You must not make speculative investments. Do not purchase merchandise or services that the protected person would have considered extravagant or inappropriate for his/her lifestyle prior to your appointment. Use the assets to maintain the safety, health and comfort of the protected person, bearing in mind that the protected person may have no additional sources of income for the remainder of his/her life.
18. The guardianship and conservatorship ends only upon the filing of a petition to end the guardianship/conservatorship and entry of a Court Order if the protected person no longer needs a guardian/conservator (either because the protected person's disability has ceased or because the conservatorship estate has been exhausted), if another individual petitions the Court and is approved to act as the guardian and conservator, or after the protected person dies. Unless otherwise ordered by the court, you will need to file a final accounting with the court before you can be discharged of liability in connection with the conservatorship.
19. Record certified copies of this Court Order in each county in Arizona where the protected person owns property in order to protect title to those properties. If the protected person owns property in another state, record this Order in the county in that state in which the property is located as well.
20. If you have any questions about the meaning of this order or the duties that it imposes upon you by reason of your appointment as guardian and conservator, you should consult an attorney or petition the Court for instructions.

The Court further admonishes Ms. Fitts that failure to appear at the required annual review hearing may result in contempt of court proceedings, the issuance of a bench warrant, and ultimately, jail time.

The Court FINDS that the investigative powers of the Tohono O'odham Department of Health & Human Services—Adult Protection Services Division is properly invoked by this Court or any other party upon the making of a report, based on reasonable cause, pursuant to 17 TOC Chapter 1, Section 6.

IT IS ORDERED that:

1. TODHHS' motion for limited intervention to contest the Court's Order is GRANTED.
2. The Order of October 23, 2013 is VACATED in part as it applies to TODHHS.
3. Lorissa Fitts is to appear before this Court on the date of the continued annual review hearing, which shall be set by separate Order of this Court.

12-5-13
Date

Judge, Tohono O'odham Children's Court

Copies to be delivered to:
Tohono O'odham Attorney General's Office
Tohono O'odham Department of Health & Human Services, Adult Protective Services
Lorissa Fitts, P.O. Box 78763, Tucson, Arizona 85703

TOHONO O'ODHAM NATION
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In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Civil Division

In re the Marriage of:	Case No.: 2014-0177 AV
Adrian Antone, Petitioner,	
vs.	
Viola Carmen Antone, Respondent,	MINUTE ENTRY
[redacted]	

The Court reviewed the Child Support Guidelines and, specifically, the Schedule of Basic Child Support Obligations, and sought additional information concerning the Arizona 1987 Child Support Guidelines and Schedule. The Arizona 1987 Child Support Guidelines and Schedule were adopted as a guide for this Court, and continue to be used in the same amounts as established in 1987. The 1987 Arizona Schedule does not include amounts for Combined Adjusted Gross Income [hereinafter, "CAGI"] higher than $7500, nor for child support for more than four children.

The Court then reviewed the Schedule of Basic Child Support Obligations and noted that the CAGI increases by increments of $100 for the lowest amount of CAGI, $500, up to $4000. The next incremental increase is $250 to $4250 and continues to

increase by $250 increments, up to $7500. The Court applied the same incremental increase to get to $8000 CAGI.

The CAGI for the Petitioner and Respondent in this case is $8,051.00, and they have five children. The Schedule of Basic Child Support Obligations can be extended as shown in the attached table with explanatory notes. According to this Extended Schedule, when the CAGI is $8,000 the Basic Child Support Obligation for five children is $1936.00.

The parties are instructed to review the attached Extended Schedule of Basic Child Support Obligations and make appropriate comments and arguments.

Issued on May 18, 2015.

Violet Lui-Frank, Judge

TOHONO O'ODHAM

*EXTENDED SCHEDULE OF BASIC CHILD SUPPORT OBLIGATIONS (2015)[1]

Combined Adjusted Gross Income	One Child	Two Children	Three Children	Four Children	*Five Children
7500	770	1224	1580	1780	*1887
	$1224 - $770= $454 $454 ÷ $770= 58.96% Increase for second child; round to 59%.	Increase is $356 to the 3rd child or 29%.		Increase is $200 or 12.7%.	Increase is $107 or 6%.
*7750	*780	*1240	*1599	*1802	*1910
*8000	*790	*1256	*1620	*1826	*1936

[1] The asterisked column and dollar amounts are added to the Schedule to create the *Extended Schedule of Basic Child Support Obligations", based on the 1987 Arizona Schedule in use in the Tohono O'odham Courts, for use in 2015 and going forward. This Extended Schedule does not change the current schedule, but adds child support amounts for Combined Adjusted Gross Income amounts in excess of $7500, up to $8000, and provides for as many as five children.

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In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Adult Civil Division

BARBARA MCKINNEY-HAMILTON, a single woman Plaintiff, v. TOHONO O'ODHAM GAMING, Defendant.	)	Case No.: 2013-0073AV FINAL JUDGMENT ORDER FOR DAMAGES

Judgment was granted to Plaintiff on March 11, 2015 for injury to her right knee. Judgment was entered for Defendant on the claim for aggravation of Plaintiff's back. At this time the Court is ready to enter judgment for the amount of compensation for Plaintiff's pain, loss of use of her leg as it was before she fell on May 9, 2012, the limitations in her activities of daily living as a result of that injury and her medical and treatment costs.

Tohono O'odham law is clear that money damages are appropriate for an injured party. 4 T.O.C., Civil Actions, Title III, §1-103. "Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he *[sic]* has suffered." *Ibid.* It was clear to the Court from the video of the incident both before and after the fall that Defendant did not exercise reasonable care with regard to the rug that the wind repeatedly raised up as the doors slid open when a person entered or exited the Casino. The Plaintiff tripped over the blown up part of the rug and sustained injury to her knee.

Costs of a case may be assessed against the party against whom judgment is given. 4 T.O.C., Title III, §1-104. The Tohono O'odham Legislative Council has not

identified what costs are compensable at this time, in contrast to the provision in the Arizona Revised Statutes, §12-322, cited by the Defendant. Tohono O'odham law allows the Court to look to the laws of the State of Arizona for guidance, 4 T.O.C., Title III, §1-102, if the Court finds that there is no Tohono O'odham law or custom which addresses the claims asserted. The Court is not able to make such a finding, and relies upon the Tohono O'odham Legislative Council's statement in Title 4 of the Tohono O'odham Code of the Nation's policy that fair compensation be awarded for injury caused by negligence, and costs may be assessed. These statements of policy are to apply to all plaintiffs before this Court, whether they are from all corners of the Tohono O'odham Nation, or are present in the Nation as part of a business, a customer or other status. The Court can assess reasonable costs of the suit.

The credible evidence at trial established that the Plaintiff had a reasonably active and independent lifestyle prior to the injury, caring for her husband and ward, hosting her family for special events, travelling with her daughters, and enjoying the entertainment at the Defendant's Casino operation, although she had pain and limitations from arthritis and other ailments. Her loss due to the knee injury has been significant.

The Court considered the evidence at trial, and the arguments of counsel on the amounts for damages and costs. Liability for the knee injury was never an issue; Defendant admitted liability from the start. A significant part of the work on Plaintiff's behalf was on the issue of Defendant's liability for the aggravation of Plaintiff's back condition. On that issue the Defendant prevailed.

"Fair compensation" has not been litigated in the Tohono O'odham Courts. The parties agree that the accrued medical costs for the knee are $18,415.19. In response to

the Court's Order of June 30, 2015, and in addition to the accrued medical costs, the Plaintiff submitted its statement of reasonable costs for future treatment of the knee injury in the amount of $306,578.00. Defendant submitted its statement regarding Plaintiff's right knee damages, and objected to the Plaintiff's claims for injection therapy or knee replacement.

The Court agrees that the evidence at trial did not establish that Plaintiff was a candidate for knee replacement or was electing injection therapy at the time; however, the decision of the Court relies upon Dr. Brainard's finding in his deposition testimony, which the Court quoted in relevant part in the March 11, 2015 Order, "that continued deterioration of knee function requiring further treatment would be medically attributable to the fall on May 9, 2012". Therefore, it is reasonable to make an award in damages that the Plaintiff could use for further work on the right knee, as recommended by her doctors presently.

The Court now finds that:

1. Plaintiff's accrued compensable medical costs are $18,415.19.
2. Plaintiff's Statement of Costs should be reduced by the costs the Court finds are not related to the Plaintiff's knee injury:

> 09/17/14 Lora White telephone conference with Dr. Brailsford-Gorman on 09/18/14 $100;
> 09/29/14 Deposition fee for Dr.Brailsford-Gorman $400;
> 10/27/14 Deposition 10/09/14: Caryl Smith Brailsford-Gorman – Bouley & Schippers $128.55;
> 10/31/14 Fee for court testimony for Dr. Caryl Brailsford-Gorman $4,000.
>
> Therefore, $26,926.89 is reduced by $4,628.55 = $22,341.33.

3. The amount that Plaintiff claims for future treatment of the knee is not reasonable. What Nurse White identified at trial that would be needed seemed as much attributable to Plaintiff's other conditions as to the knee injury.

4. For Plaintiff's pain and suffering, the permanent loss of a reasonably functional right knee at 74 years of age, the reduced ability to perform her own activities of daily living, the significant reduction in her ability to participate in her family's activities of daily living, in celebratory functions, and in trips with her children, and the need for ongoing care, the Court now finds that fair compensation for the knee injury, besides the medical costs accrued and the reduced costs of suit, is $150,000.00.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

Plaintiff was already awarded judgment for injury to her right knee, and is now awarded damages for that injury in the amount of $150,000, medical costs of $18,415.19, and costs of suit of $22,341.33, for a total of $190,756.52.

So ordered on November 20, 2015.

Violet Lui-Frank
Judge

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
022416 @ 8:30 AM
DATE/TIME
COURT CLERK

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

ROSETTE, LLP, Plaintiff,	CASE NO. 2015-0236AV
v.	ORDER
GU VO GOVERNING DISTRICT COUNCIL, Defendant.	

On January 19, 2016, the Defendant, the Gu Vo Governing District Council, represented by Judith M. Dworkin and Bryan J. Gottfredson of Sacks Tierney, P.A., filed a Motion to Dismiss with a Memorandum of Points and Authorities. On February 3, 2016, the Plaintiff, Rosette, LLP, represented by Helen Burtis of Rosette, LLP, filed its Response to the Motion. Defendant's Reply was filed February 16, 2016. The Court does not require oral arguments. The Court having considered the pleadings filed by the parties, grants Defendant's Motion to Dismiss.

The Court finds that at a Special Meeting held on July 14, 2011, Defendant, Gu Vo Governing District Council ("Gu Vo"), voted to approve the engagement of the Plaintiff, Rosette, LLP, and authorized Geneva Ramon and Ervina Francisco to execute an engagement letter. The engagement letter was comprised of a cover letter and a separate document entitled Terms of Engagement. A provision within the Terms of Engagement provided a limited waiver of immunity in order to arbitrate any dispute with the Plaintiff. The Terms of Engagement also provided that "the engagement is enforceable in accordance with the District's law and that no

additional tribal or other governmental consents are required, and if so, the additional consents are attached hereto." No consents were attached to the executed letter. The Tohono O'odham Legislative Council did not approve the letter of engagement with the terms of engagement, and did not waive sovereign immunity by a resolution or other official action.

Gu Vo argues that this Court lacks subject matter jurisdiction based on Gu Vo's sovereign immunity pursuant to Tohono O'odham law. The Plaintiff argues that Gu Vo waived sovereign immunity by executing the engagement letter.

The parties agree that the Tohono O'odham Code delineates sovereign immunity and its exceptions in Title 1, Chapter 2, in pertinent part:

> **Section 2101**
> (A) The government of the Tohono O'odham Nation ("Nation") and any person acting within the scope of his or her capacity as an officer, employee, or agent of the Nation are absolutely immune from suit, court process, or liability.
> (B) The Nation's sovereign immunity extends to the Nation's districts, enterprises, entities, and the officials, employees, and agents thereof.
> (C) Sovereign immunity cannot be waived except by a resolution or other official action of the Tohono O'odham Legislative Council expressly waiving, or authorizing a waiver of, sovereign immunity; provided that such a waiver shall be limited in accordance with its terms. A Legislative Council action that authorizes a Nation's district, enterprise, or entity to sue or be sued does not waive sovereign immunity unless a waiver is expressly granted in a separate written contract or other duly approved writing.

The parties also agree that Section 2101(B) grants sovereign immunity to Gu Vo. On a motion to dismiss for lack of subject matter jurisdiction, it is a plaintiff's burden to establish subject matter jurisdiction as it the plaintiff who seeks to invoke the court's jurisdiction. The Plaintiff must establish that Gu Vo's immunity was waived as required by Section 2101(C). The Plaintiff has failed to meet its burden. The purported waiver was not a waiver within the meaning

of Section 2101(C). Contrary to the assertion by the Plaintiff (that a waiver may be by a resolution or other official action by someone other than Tohono O'odham Legislative Council), the Court finds the plain meaning of Section 2101(C) is that only the Tohono O'odham Legislative Council may waive sovereign immunity, and the method and means by which sovereign immunity is waived is at the discretion of the Tohono O'odham Legislative Council. . Gu Vo's sovereign immunity was not waived by the Tohono O'odham Legislative Council; therefore, the Court lacks subject matter jurisdiction to hear the suit. The Court grants the Defendants' Motion to Dismiss with no costs awarded either party.

March 30, 2016 hearing is vacated.

Dated this 24th day of February, 2016.

Walter Marcus, Judge

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
12-22-16/11:46a.m.
DATE/TIME
COURT CLERK

Edward D. Manuel, *ex officio* Chairman of the Tohono O'odham Nation,

Petitioner

v.

Tohono O'odham Legislative Council,

Respondent

Case No.: AV2016-0164

ORDER

The Petitioner, Edward D. Manuel, *ex officio* Chairman of the Tohono O'odham Nation, filed a complaint seeking a declaratory judgment on five counts. The Respondent, Tohono O'odham Legislative Council, moved to dismiss the lawsuit arguing that the Court lacks subject matter jurisdiction and that the petition failed to state a claim for relief as a matter of law. After receiving additional briefing, the Court held a hearing on November 30, 2016 where Counsel for the Petitioner, Doreen McPaul, and Vice Chairman Verlon Jose appeared for the Petitioner, and Counsel for the Respondent, P. Michael Ehlerman, and Legislative Chairman Timothy Joaquin appeared for the Respondent. The Court took the matter under advisement. For the following reasons, the Court grants the motion to dismiss on Counts 1, 2, 4, and 5, but denies the motion on Count 3.

Subject Matter Jurisdiction

"The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation." T.O. Const. Art. VIII, § 2. The Respondent argues that the Court lacks subject matter

jurisdiction over Counts 1 and 3 for two reasons. First, the case is not ripe. Second, any controversy is moot.

1. The case is ripe for judicial review.

The Respondent argues that the case is not ripe for judicial review because there are no pending appointments or disapproved appointees serving in a position where the Council disapproved the appointee. Hence, the claims are only for hypothetical future appointments.

"Ripeness" is a justiciability doctrine that prevents courts from entangling themselves in abstract disagreements by avoiding premature adjudications. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). "Ripeness is . . . a function of the case or controversy requirement found in Article III of the U.S. Constitution," *In re: Petition of the Judicial Branch*, 3 TOR3d 105, 123 (T.O. Trial Ct., Oct. 22, 2010), and the doctrine is drawn "from prudential reasons for refusing to exercise jurisdiction," *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n.18 (1993) (citations omitted). "Plaintiffs must experience an injury or immediate threat of harm in order for their arguments to be ripe." *In re: Judicial Branch*, 3 TOR3d at 123 (citation omitted). Moreover, "[t]his harm must be actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). Declaratory judgments require "concrete legal issues, presented in actual cases." *Id.* (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

In deciding whether an issue is ripe for review, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). A challenge to a statute that has not yet been applied is fit for judicial determination if the issue raised is a "purely legal one," *id.* at 149, or where further factual development will not help resolve the issue. *W. Oil & Gas Ass'n v. United States Envtl. Prot. Agency*, 633 F.2d 803, 808 (9th Cir. 1980). On the other hand, if a

better factual record will illuminate the issue, the court should wait until the challenged statute has been applied. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143–44 (1974).

Here, the Petitioner alleged that Resolution 16-311 encroaches on the Chairman's constitutional authority to appoint executive officers under Article VII, Section 2(e) of the Tohono O'odham Constitution, which violates separation of powers and usurps the Chairman's appointment power. The Council acknowledges that Resolution 16-311 would apply to any future appointments. As alleged, the Petitioner has sustained injury from the continued encroachment on the Chairman's appointment power. *See, e.g.*, *State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997) (discussing that a violation of the separation of powers doctrine occurs when one branch of government usurps another branch's powers or prevents that other branch from exercising its authority). Likewise, the Petitioner would face a hardship in exercising its appointment power, but the Respondent would not face an unreasonable hardship by litigating the issue at this stage. *See Abbott Labs.*, 387 U.S. at 149. Finally, the raised issues are purely legal issues, and further factual development will not help resolve the issues. *See id.*; *W. Oil*, 633 F.2d at 808. Therefore, the case is ripe for judicial review.

2. The case is not moot.

The Respondent also asserts that the controversy is moot because the Petitioner reassigned the disapproved appointees to new positions. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citations and internal quotation marks omitted).

Although the disapproved appointees have been reassigned, the Petitioner alleges that Resolution 16-311 is a continued encroachment on the Chairman's appointment power. And the Petitioner seeks a declaratory judgment that Resolution 16-311 is unconstitutional, which if

granted would end the alleged encroachment. As such, the Court could grant effectual relief to the prevailing party. *See id.*

If the Court adopted the Respondent's position, then the Chairman and a disapproved appointee would have to violate Resolution 16-311 to maintain a lawsuit. *Cf. Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 497 P.2d 534 (1972) (discussing that people need not violate a statute and expose themselves to grave legal sanctions to seek a declaratory judgment). Moreover, the disapproved appointee would have to risk not being paid because Resolution 16-311 bars the Nation from paying a disapproved appointee after the Council has disapproved him or her. Likewise, under the Respondent's position, the Chairman and a disapproved appointee would have to file a complaint on the same day the appointee is disapproved to challenge the Resolution 16-311 because the appointee's termination is effective on the day the Council disapproved the appointee, which would make the dispute moot. If the Council disapproved the appointee after the Court had closed for the day, the Chairman and appointee would have no means to challenge Resolution 16-311.[1] As such, the claim would be capable of repetition, but evading review. *See S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911) (discussing that a claim is not moot if it is capable of repetition but evades review).

As a result, the Court has jurisdiction under Article VIII, Sections 2 and 10 of the Tohono O'odham Nation Constitution. *See, e.g., Francisco v. Tohono O'odham Legislative Council*, 1 TOR3d 68, 69 (T.O. Trial Ct., Mar. 7, 1989) ("Deciding whether the actions of one branch of government exceeds the authority given it by the Constitution is a delicate exercise in constitutional interpretation, and is a responsibility of this Court.").

[1] In this case, the Council's decision to not approve a few appointees happened after the Court had closed for the day.

The Respondent also argues that the Court lacks subject matter jurisdiction for Counts 4 and 5 because the Court cannot "prescribe the legislative appointment process or mandate the form of appointment resolutions," or "review Legislative Council proceedings and resolutions under inapplicable administrative agency review standards." Motion to Dismiss Petition for Declaratory Relief pages 11:16–17, 13:19–21. These arguments address the Court's jurisdiction to grant certain remedies. Because Counts 4 and 5 fail to state a claim upon which relief can be granted, *see infra* pages 11:11–14:6, the Court need not decide if it has jurisdiction to grant certain remedies.

Failure to State a Claim Upon Which Relief Can be Granted

The Tohono O'odham Rules of Civil Procedure do not address dismissals for failing to state a claim. Therefore, the Court will look to the Arizona Rules of Civil Procedure. T.O. R. Gen. Prac. 1(c) ("Where applicable, the Arizona rules will be followed to the extent they do not directly conflict with a written Tohono O'odham law or rule and are applicable to the facts and circumstances of a case.").

Under Arizona Rule of Civil Procedure 12(b)(6), dismissal is appropriate only if, as a matter of law, the plaintiff would not be entitled to relief under any well-pled facts susceptible of proof. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420, 189 P.3d 344, 347 (2008). The Court only examines the pleading itself. *Id* at 419, 189 P.3d at 346. Likewise, the Court assumes the truth of all well-pled factual allegations and resolves all reasonable inferences in favor of the non-moving party, but mere conclusory statements are insufficient to state a valid claim. *Id.*; *Francisco v. Manuel*, 1 TOR3d 88, 88 (T.O. Trial Ct., Nov. 9, 1989) ("in considering Respondent's motion for dismissal, the Court is required to review the evidence in the light most favorable to the Petitioner. . .").

1. Count 1

In any case involving constitutional interpretation, the Court begins with the text of the Constitution. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). This is so because the best and most reliable index of the Constitution's meaning is the plain text of the Constitution. *Id.* When the text is clear and unambiguous, there is no need to resort to other methods of constitutional interpretation. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994). "As nearly as possible [the Constitution] must be construed within the limits of the document itself." *Harvey v. Tohono O'odham Council*, 1 TOR3d 43, 46–47 (T.O. Trial Ct., Jan. 26, 1987).

Article VII, Section 2(e) of the Tohono O'odham Nation Constitution provides:

> The chairman shall be the chief executive officer of the Tohono O'odham Nation and shall exercise the following powers . . . :
>
> With the approval of the Tohono O'odham Council, to appoint the treasurer, and other officers and heads of all governmental departments, who shall serve until replaced at the request of the chairman.

The Petitioner asserts that the tenure clause, "who shall serve until replaced at the request of the chairman[,]" vests the Chairman with the exclusive power to remove appointees. The Petitioner concludes that Resolution 16-311, which terminates an appointee on the day that the Council disapproves an appointee, encroaches on the Chairman's power to remove an appointee under the tenure clause. In short, the Petitioner asserts that the tenure clause attaches when the Chairman makes the appointment because the tenure clause uses the words "shall serve."

The Court must interpret a constitutional section as a whole. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989); *Kilpatrick v. Superior Court In & For Maricopa Cnty.*, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970). Likewise, Courts must give effect to every clause and word in the Constitution. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *Harvey*, 1

TOR3d at 46–47. Furthermore, in construing the Constitution, courts should actively avoid interpretations that render other constitutional provisions or clauses inconsistent, meaningless, or superfluous. *See Boise Cascade Corp. v. United States Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir.1991); *Throssell v. Throssell*, 1 TOR3d 34, 36–39 (T.O. Ct. App. 1992).

Here, the approval clause, "[w]ith the approval of the Tohono O'odham Council," is a prepositional phrase that modifies the "to appoint" verb phrase in the appointment clause ("to appoint the treasurer, and other officers and heads of all governmental departments"). The tenure clause ("who shall serve until replaced at the request of the chairman"), applies to preceding noun phrase "the treasurer, and other officers and heads of all governmental departments." In this context, the words "shall serve," in the tenure clause, are a future modal verb phrase that applies to an appointee who has satisfied the appointment clause and the approval clause. In other words, the person has been appointed by the Chairman and approved by the Council. *See Elliott v. Martinez*, 740 F.Supp.2d 1269, 1272 n.1 (D.N.M. 2010), *aff'd*, 675 F.3d 1241 (10th Cir. 2012) (noting that "shall" is commonly used as a future-tense modal verb).

If the Court adopted the Petitioner's position, the tenure clause would attach when the Chairman makes the appointment, which would make the approval clause meaningless because only the Chairman could remove the officer even if the Council did not approve the appointment. *Cf. Prout v. Starr*, 188 U.S. 537, 543–44 (1903) (discussing that all parts of the Constitution are of equal weight and that the Constitution must be regarded as one whole).

As a practical matter, the Chairman exercises the appointment power to present an applicant to the Council. Then the Council, as a check and balance to the Chairman's appointment power, decides whether to approve the appointee. Once the appointee is approved, the tenure clause applies and only the Chairman may remove the officer. *See Francisco*, 1 TOR3d at 73–75 (stating that the Council's approval of people not appointed by the chairman were

recommendations for appointments). *Cf.* 12 T.O.C. Ch. 1, §§ 11001–11002 (providing that "[a]ny elected officer or judge" may be removed from office); 12 T.O.C. Ch. 1, § 1201(I) ("Elected 'officer' means a person who holds office either by appointment or election as the chairperson or vice-chairperson of the Nation or a district council, or as a representative or alternate of the Legislative Council or district council.").

Therefore, Resolution 16-311, which establishes that an appointee may no longer serve in a position for which he or she was disapproved, does not violate the Article VII, Section 2(e) of the Tohono O'odham Constitution.

At oral argument, the Petitioner argued that Article VII, Section 2(e) would allow an officer, who was appointed and approved under a prior administration, to continue serving under a new administration until the officer was replaced by the Chairman. The Court declines to address the argument. First, without a doubt the tenure clause allows the Chairman to replace governmental officers at will. Any claim that the tenure clause creates a private right for continued employment under a new administration is an argument that the individual seeking to assert the right would have to raise. Second, the issue is not adequately presented. *See generally Joaquin v. Goodnight*, 1 TOR3d 29 (T.O. Ct. App. 1991) (conducting a fact-intensive analysis if Article VII, Section 2(e) created a private right of continued employment for the chief of police).

Although the Executive Branch needs an orderly transfer of disapproved appointees, the Court as a matter of Constitutional law cannot dictate a timeframe for the transition. The parties, however, may agree to a reasonable timeframe to allow an orderly transfer of governmental officers. *See Francisco*, 1 TOR3d at 76 ("There must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive and Judicial. There is no guarantee that friction will not occur, but by means of the friction, and reason, wisdom and self-restraint, the formation of a working government can be achieved.").

2. Count 2

Respondent argues that Count 2 is a legal impossibility because the Council did not amend the Constitution. With a Rule 12(b)(6) motion to dismiss, the Court makes all reasonable inferences in favor of the non-moving party. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, 284 P.3d 863, 867 (2012); *Francisco*, 1 TOR3d at 88.

Here, the Petitioner used persuasive language such as "purport to" and "effect of" to argue that the Council's resolutions violated the Constitution by adding requirements. When read in the light most favorable to the Petitioner, the complaint does not assert that Council actually amended the Constitution.

The Petitioner's argument, however, is a derivative claim from the argument in Count 1. Because the approval clause in Article VII, Section 2(e) creates a check and balance on the Chairman's appointment power, the Council may set the effective date that approval was denied. Although the Council has allowed some disapproved officers to stay in office for a short period, Article VII, Section 2(e) gives the Council the power not to approve appointments; and inherent with that power is the ability to state when it is effective. Moreover, the Council has not abdicated that inherent power by failing to set specific dates when it is effective in the past. *See San Xavier Dist. v. Francisco*, 1 TOR3d 50, 51 (T.O. Trial Ct., Feb. 1, 1988) ("It is axiomatic that these functions are inherent police powers constitutionally vested in the Council because of the sovereign status of the Tohono O'odham Nation. Inherent police powers can neither be abdicated, bargained away and are inalienable.").

3. Count 3

With a Rule 12(b)(6) motion to dismiss, the Court accepts the truth of all well-pled allegations. *Coleman*, 230 Ariz. at 356, 284 P.3d at 867. Under Article VII, Section 2(e), "the treasurer, and other officers and heads of all governmental departments" must be appointed by

the Chairman and approved by the Council. The term "other officers and heads of all governmental departments" is a single noun phrase based on the comma between "treasurer" and "and other officers" as well as the use of the two *ands*. T.O. Const. Art. VII, § 2(e) ("to appoint the treasurer, ***and*** other officers ***and*** heads of all governmental departments . . .") (emphasis added); *see United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) (per Souter, J.) ("[T]he meaning of a statute will typically heed the commands of its punctuation."). In other words, the punctuation and the two "ands" show that the list has two categories (1. treasurer, 2. other officers and heads of all governmental departments), not three categories. *See* Bryan Garner, *Garner's Modern American Usage*, "Punctuation, D. Comma" 676–77 (3rd ed., 2009) (discussing that a comma and multiple "ands" makes the items in the list compound items instead of a list with single items and an omitted serial comma).

The Constitution does not define the term "other officers and heads of all governmental departments." When a term is not defined, the Court may look at a dictionary definition. *See In re: Judicial Branch*, 3 TOR3d at 119 (reviewing a dictionary definition of a word not defined in the procedural rules). Black's Law Dictionary (10th ed., 2014) defines "officer" as: "1. Someone who holds an office of trust, authority, or command. In public affairs, the term refers esp. to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function."

Here, the Petitioner asserts that the Chief Administrative Officer ("CAO") is not subject to Article VII, Section 2(e) clause because the CAO is an executive staff member who works at the directive of the Chairman and reports to the Chairman. Moreover, the Petitioner asserts that the CAO is not a department head, and the Petitioner states that the CAO does not have an independent budget, any hiring or firing authority, nor any subordinates or staff. In addressing a similar issue, Federal Courts have identified various factors to determine if a person must

appointed or if the person is an employee. *See United States v. Germaine*, 99 U.S. 508, 511–12 (1878) (discussing the difference between an officer or head of department, who needs to be appointed by the President, and an employee); *see generally* Ann K. Wooster, *Construction and Application of Appointments Clause of United States Constitution, Article II, Section 2, cl.2*, 59 A.L.R. Fed.2d 1 (Originally Published in 2011) (discussing officers and heads of departments subject to appointment under the U.S. Constitution); L.B.K., *Distinction Between Office and Employment*, 53 A.L.R. 595 (Originally Published in 1928) (surveying cases discussing the distinction between a public office and employment as well as the distinction between an employee and an officer). When read in the light most favorable to the Petitioner, Count 3 states a valid claim.

4. Count 4

The Respondent asserts that Count 4 fails to state a claim because the veto power does not apply to disapproved legislation. In the response to the motion to dismiss, the Petitioner clarifies its position by stating: "Petitioner is asking the Court to determine whether the Appointment Clause requires action, pursuant to the Council's Article VI powers, as opposed to a passive failure to act. Petitioner alleges that the Constitution requires the Council to act and that Respondent's inaction improperly circumvents the Constitution's veto process." Petitioner's Response to Respondent's Motion to Dismiss Petition for Declaratory Relief page 10:11–13.

The approval clause in Article VII, Section 2(e) provides: "With the approval of the Tohono O'odham Council . . . ." "Approval" means "an act or instance of approving." Merriam-Webster Online Dictionary, *Approval*, https://www.merriam-webster.com/dictionary/approval. In this context, "approving" means "to give formal or official sanction to." Merriam-Webster Online Dictionary, *Approving*, https://www.merriam-webster.com/dictionary/approving. The Council must act, by appropriate legislation, to

approve an appointee. Under Article VII, Section 2(e), the Council does not have to positively disapprove an appointee because the tenure clause only attaches if the Council approves the appointee. Technically, the logical opposite of *approval* is "non-approval or not approval" not "disapproval." Disapproval requires a positive act. *See* Random House Dictionary.com, *Disapproval*, http://www.dictionary.com/browse/disapproval ("the act or state of disapproving . . . ."). Non-approval or not approval means that approval was not given, so non-approval or not approval can happen from positive action (actively saying no) or from passive action (refusing to say yes). As applied to this case, the Council gave non-approval or not approval, by passive action. In other words, by refusing to say yes to the Resolutions appointing the appointees, the Council did not approve the appointees, which prevented the tenure clause from attaching.

The Petitioner also asks the Court to determine whether Defeated Resolutions No. 16-301, 16-302, 16-304, and 16-314 are effective exercises of Legislative authority under the Constitution. Petitioner's Response to Respondent's Motion to Dismiss Petition for Declaratory Relief page 10:13–16. Article VII, Section 2(e) gives the Council the power to approve appointees. Inherent in this approval power is the power to not approve appointees, which functions as a check and balance to the Chairman's appointment power. The Petitioner is correct that defeated or failed resolutions normally do not have any consequence, but in the appointment context failing to get approval of the Council has the consequence of preventing the appointee from gaining tenure and serving in office. *See generally Construction and Application of Appointments Clause of United States Constitution, Article II, Section 2, cl.2*, 59 A.L.R. Fed.2d at §§ 10–13 (discussing the Federal appointment and Senate confirmation processes).

Also, if the Court adopted the Petitioner's position (the Council must affirmatively disapprove an appointee), an appointee would have the Council's approval unless the Council

actively disapproved the appointee. Article VII, Section 2(e) requires the Council to give approval for the appointee to gain tenure. Consequently, Section 2(e) does not require the Council to actively disapprove an appointee for the appointee to not gain tenure. *See Bailey v. Maryland*, 294 A.2d 123, 129 (Md. Ct. App. 1972) (discussing that negative or contrapositive inferences are not always applicable). On the contrary, not getting approval from the Council prevents the appointee from gaining tenure.

Notably, the Council could create Legislative rules requiring findings on why an appointee was not approved. This without a doubt would help the Chairman locate and present qualified appointees that the Council would approve, but the Court as a matter of Constitutional law cannot require the Council to do so. *See generally Tohono O'odham Council v. Garcia*, 1 TOR3d 10 (T.O. Ct. App. 1989); *Francisco v. Legislative Council of the Tohono O'odham Nation*, 1 TOR3d 76 (T.O. Trial Ct., Mar. 7, 1989).

5. Count 5

With Count 5, the Petitioner asserts that Resolution 16-304 violated Title 16, Chapter 1, Section 402(c) of the Tohono O'odham Code because the Council did not list a reason related to Section 402(c) in disapproving the appointee. Section 402(c) establishes qualifications for the Executive Director of the Gaming Office; it provides:

> The Executive Director shall be an individual (i) of the utmost honesty and integrity, (ii) who has not been convicted of any felony or of a misdemeanor involving theft or embezzlement or a crime involving moral turpitude, and (iii) whose prior activities, reputation, habits, and associations do not pose a threat to the public interest or to the effective regulation of Gaming Activities.

16 T.O.C. Ch. 1, § 402(c).

A plain reading of the statute provides that Section 402(c) qualifications are the minimum qualifications for the Executive Director of the Gaming Office. For instance, Section 402(c) does not provide that these qualifications are the only or exclusive qualifications the Chairman or the Council may consider. The Chairman and the Council may, and as a practical matter do,

consider other relevant qualifications when appointing the Executive Director of the Gaming Office, *i.e.*, work experience, education, etc. Absent bribery or abuse of office allegations, the Court will not inquire into a Council member's motives on why he or she voted against a particular appointee. *See Francisco*, 1 TOR3d at 77; 7 T.O.C. Ch. 1, §§ 2.7 and 2.8 (criminalizing bribery and accepting a bribe); 7 T.O.C. Ch. 1, § 2.14 (criminalizing abuse of office).

Conclusion

The Court grants the motion to dismiss on Counts 1, 2, 4, and 5. The Court, however, denies the motion to dismiss on Count 3. The Court sets a Status Hearing on February 7, 2017 at 9:00am.

Dated this December 22, 2016.

Judge Kyle Fields

TOHONO O'ODHAM NATION JUSTICE CENTER

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In re the Matter of: Evelyn Juan Petitioner v. Maryann Ramirez Respondent	Case No.: AV2018-0010 ORDER

At the February 15, 2018 hearing, Evelyn Juan, Petitioner, Belinda BreMiller, Petitioner's Attorney, Chadwick Smith, Attorney General for the Tohono O'odham Nation, and Eric Hager, Respondent's Attorney, appeared.

The Court must decide whether the employee grievance process created by Executive Order 99-01 is an administrative agency under 1 T.O.C. § 2102(B) or an administrative agency under Tohono O'odham Judicial Review of Administrative Decisions (Administrative Appeals).[1] The Court holds that the employee grievance process is not an administrative agency under either § 2102(B) or the Rules of Administrative Appeals because an executive order, which did not rely on any legislation, created the employee grievance process. As a result, this case is not properly before the Court. Therefore, the Court grants the motions to dismiss.

Background

Earlier this year, the Tohono O'odham Gaming Department ended Evelyn Juan's employment. In response, she filed a formal grievance under the Personnel Policies Manual that was created by Executive Order 99-01. Eventually, Edward Manuel, Chairman of the Tohono O'odham Nation, found that Evelyn violated the Personnel Policies Manual. Evelyn filed a

[1] The Tohono O'odham Judicial Review of Administrative Decisions (Administrative Appeals) will be referred to as the "Rules of Administrative Appeals."

notice of appeal. The Court ordered the Tohono O'odham Human Resources Department and the Tohono O'odham Gaming Department to file the record with the Court. The Nation filed a motion to stay and a motion to dismiss. The Respondent, Maryann Ramirez, filed a copy of the record and a motion to dismiss. Evelyn filed responses to the motions. The Nation and Maryann filed replies. The Court held oral argument on the motions to dismiss.

Analysis

1. Section 2102(B)

Under the Sovereign Immunity Code, "Final decisions of the Nation's administrative agencies shall not be appealed to the Judicial Court except when expressly authorized by an official action of the Tohono O'odham Legislative Council." 1 T.O.C. § 2102(B). The Nation and Maryann argue that the Court lacks jurisdiction because the Code does not provide for appeals from the employee grievance process.

When interpreting a statute, the Court looks at the plain language of the statute. *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993). Section 2102(B) applies to administrative agencies. The Sovereign Immunity Code does not define administrative agency. *See* 1 T.O.C. Title 1, Ch. 2. When the Code does not define a term, the Court looks to a dictionary definition. *See In re: Petition of Judicial Branch*, 3 TOR3d 105, 1119 (T.O. Tr. Ct., 2010) (using a dictionary to define a term). An administrative agency is "An official body, especially within the government, with the authority to implement and administer particular legislation." Black's Law Dictionary (10th ed., 2014); *see* Glenda Harnad, et al., 2 Am. Jur. 2d Administrative Law §§ 127, 129 (2018) (discussing that an administrative agency's existence and authority stems from its enabling statute). Here, Executive Order 99-01 created the employee grievance process. And Executive Order 99-01 does not rely on any enabling legislation to create the employee grievance process. Therefore, the employee grievance process is not an administrative agency under 1 T.O.C. § 2102(B).

2. *Tohono O'odham Judicial Review of Administrative Decisions (Administrative Appeals)*

The Nation and Maryann assert that this case is not properly before the Court under the Rules of Administrative Appeals. The Court agrees.

The Rules of Administrative Appeals applies to "[e]very action to review judicially, a final decision of an administrative agency[.]" Rule 2(a). The Rules define an administrative agency as "every agency, board, commission, department or officer authorized by Tribal law to exercise rule-making powers or to adjudicate contested cases, whether created by constitutional provision or legislative enactment." Rule 1(a). Like the dictionary definition of administrative agency, *see* above, the definition in the Rules of Administrative Appeals specifies that the legislature creates an administrative agency.

Evelyn argues that the Chairman created Executive Order 99-01 under his Article VII constitutional powers; therefore, the employee grievance process is an administrative agency under the Rules of Appellate Procedure.

The Court notes that Rule 1(a) requires that the agency was "created by constitutional provision." In this context, "created by constitutional provision," means that a specific constitutional provision either created or specifically authorized creating the agency. *See, e.g.,* T.O. Const. Art. XVII, § 2(d) (allowing the Legislative Council to create a water commission or board); U.S. Const. Art. I, § 8 (allowing Congress to create the Post Office); Ariz. Const. Art. 15 (creating the Arizona Corporation Commission). Here, Executive Order 99-01 created the employee grievance process, and a specific constitutional provision did not create or specifically authorize creating the employee grievance process. As a result, the Rules of Administrative Appeals do not apply to this case.

3. Other Avenues

Evelyn argues that if the Court does not hear the administrative appeal she will have no remedy or judicial recourse. The Sovereign Immunity Code provides a limited exception for suing the Nation or its officials. Section 2102(A) provides: "Unless provided otherwise by law, sovereign immunity does not preclude properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation." Under § 2102(A), a party must bring a properly framed lawsuit "exclusively in the Tohono O'odham Judicial Court[,]" and the party must name the Nation or the governmental official, in his or her official capacity.

The *Escalante v. Sells District Council* decision is helpful. CTA-0133 (T.O. Ct. App., 2017) (scheduled for publication). In *Escalante*, the Sells district banished Escalante. *Id.* at 1–2. Escalante filed an injunction asking the Court to enjoin the district from enforcing the banishment. *Id.* at 3. The trial court ruled that sovereign immunity applied. *Id.* Escalante appealed. *Id.* at 3–4. The Appellate Court held that sovereign immunity did not bar the Court from reviewing the banishment decision to see if Escalante received basic due process. *Id.* at 11. The Appellate Court warned that with these cases, the Court does not reevaluate the evidence; instead, the Court only makes sure the parties received basic due process. *Id.* at 10.

Finally, Evelyn contends that if the Court does not hear the administrative appeal, she will not be able to get a copy of the record. The Tohono O'odham Rules of Civil Procedure provide for discovery, which Evelyn can use to get a copy of the record, if she decides to file a lawsuit under § 2102(A).

Conclusion

The Court grants the motions to dismiss, and the Court vacates the January 18, 2018 order.

Dated February 20, 2018.

Judge Kyle Fields

2018 MAR 26 PM 1:56
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IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CIVIL DIVISION

In the Matter of:	)	**Case No.: AV2018-0036**
	)	
A Subpoena from Harris County, Texas	)	**Order**
	)	
	)	
	)	

On March 5, 2018 this Court received a Petition to Recognize and Enforce Foreign Subpoena from Harris County, Texas, filed by the State of Texas through Assistant District Attorney James Horn. The grand jury of Harris County, Texas issued the subpoena in connection with a criminal investigation of a citizen of Texas who transacted business at the Desert Diamond Casino. The subpoena is directed to the Tohono O'odham Gaming Enterprise.

The Petition references the Tohono O'odham Rules of Court, Recognition and Enforcement of Foreign Judgments, to support its Petition, but these rules do not include recognition and enforcement of grand jury subpoenas or any other subpoenas. The Tohono O'odham Nation does not have a grand jury process. Criminal charges are brought by complaint through the Office of the Prosecutor of the Tohono O'odham Nation.

The Court finds that the Petition invokes the civil jurisdiction of the Tohono O'odham Courts over persons who file an action in the Courts. 4 T.O.C. Title III, Civil Actions, §1-101(b) (9). The subject matter is the investigative subpoena directed to the Tohono O'odham Gaming Enterprise for information on the activities of an individual participating in the gaming activities offered in the casino

run by the Tohono O'odham Gaming Enterprise. *Id.*, at §1-101(b) (10). *See,* Constitution of the Tohono O'odham Nation, Art. I, Sec. 2.

ORDER

Based upon the foregoing, the Court:

(1) Recognizes and Enforces the Subpoena from Harris County, Texas;

(2) Orders Petitioner to serve the Subpoena and related documents on the Tohono O'odham Gaming Enterprise under the Tohono O'odham Rules of Civil Procedure;

(3) Orders the Tohono O'odham Gaming Enterprise to comply with the Subpoena and related documents, complying with the restriction on disclosure of the subpoena or the petition for recognition and enforcement to the individual whose activities are the subject of the Texas investigation. Any objections or motions must be promptly filed with this Court; and

(4) Places this file and all documents and pleadings filed under seal, not subject to disclosure to anyone, unless specifically authorized by this Court.

Dated this 26th day of March, 2018.

Violet Lui-Frank

Hon. Violet Lui-Frank

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Estate of:	)	Case Number: 2014-0170AV
	)	
Elizabeth P. Norris	)	Order
DOB: 12/09/1922	)	
	)	
Decedent	)	

At the January 23, 2018 settlement conference, interested party, Gerard Norris, Counsel for interested parties Gerard Norris and Adrianne Tiller, Rebel Harjo; and Personal Representative, Gilbert S. Norris, Sr., represented by Madeline Francisco, appeared.

Discovery Issues

The Court orders Gilbert Norris, Sr., to provided copies of the bank statements, cattle sales, and branding slips from June 2016 to April 2018 to Counsel for interested parties, Ms. Harjo by May 18, 2018.

Notice about Roundups

Gilbert Norris, Sr. must provide notice about roundups to the other owners of the cattle, Gerard N. Norris, Paul D. Norris, and Michael J. Norris. Gilbert Norris, Sr. may provide notice by emailing Counsel for interested parties, Ms. Harjo. For the roundups that Gilbert Norris, Sr. is organizing, he must give at least 3 days' notice. For the roundups conducted by other range bosses, in which Gilbert Norris, Sr. plans to participate, he must give notice as soon as possible under the circumstances.

Contact Information

The parties must exchange contact information.

Trial

Because the parties cannot reach a consensus, the Court sets a Trial on June 12, 2018 at 1:00 pm. The parties must disclose witnesses and evidence by May 18, 2018. If a party fails to disclose a witness or evidence by May 18, the Court may exclude the witness or evidence.

To limit the issues, the Court is only addressing two issues:

(1) whether the claimed expenses are valid, and

(2) whether the estate's brand should receive (or be included in the rotation or distribution) of the mavericks/slicks at a roundup when the estate is paying people to participate in the round up?

Family Impact Statements

At the hearing, the Court heard family impact statements from Gerard Norris, Gilbert Norris Sr., Adrianne Tiller, Rayleen Norris, and Mrs. Gilbert Norris Sr. Generally, the statements expressed frustration over the prolonged litigation, and the division within the family. The family statements repeated that Elizabeth Norris would be upset with how family members are treating each other.

The parties, specifically Elizabeth Norris's ma:maḍ (children), should think about the family impact statements and think about what ha-je'e (their mother) would have wanted. *See In re: Miguel*, 2 TOR3d 75-76 (T.O. Tr. Ct., 2004) ("The custom of the Tohono O'odham Nation is to follow and honor the wishes of the Decedent."). The parties need to remember they are famihlia (family). The parties also need to remember O'odham himdag, which encourages chekaithag (cooperating) and pi'a 'o wehm cheggia m-famihlia (not fighting with your family). Finally, the parties need to decide whether the final decisions about ha-je'e hahaiwañ (their mother's cattle) will come from the famihlia reaching a consensus or from the Court.

Professionalism and Civility

In the courtroom, all parties must be civil and professional to the Court and each other. Yelling, speaking over another person, or back talking is unacceptable and disrespectful to the Court. If the parties or the advocates act unprofessionally during a hearing, the Court will issue sanctions, including but not limited to removal, fines, or jail.

March 12, 2018 Order

The Court amends the March 12, 2018 Order to have the correct case number of 2014-0170AV.

Dated April 12, 2018.

Judge Kyle Fields

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

Edward D. Manuel, *ex officio* Chairman of the Tohono O'odham Nation, Petitioner v. Tohono O'odham Legislative Council, Respondent	Case No.: AV2016-0164 ORDER

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2018 MAY 22 AM 9:49
JUDICIARY SERVING CLERK

At the May 16, 2018 hearing, Petitioner, Edward D. Manuel *ex officio* Chairman of the Tohono O'odham Nation; Petitioner's Counsel, Wendell Matt; Respondent's representative, Quintin Lopez, Vice Chairman of the Tohono O'odham Legislative Council; and Respondent's Counsel, Teresa Zhang, appeared.

Background

The Respondent served 29 non-uniform interrogatories. The Petitioner raised 15 general objections, and specifically objected to each interrogatory. The parties met. In response, the Petitioner filed corrected responses to the interrogatories, where the Petitioner objected to the interrogatories but answered a few of the interrogatories. About a week later, the Respondent filed a motion to compel. The Petitioner filed a response and the Respondent filed a reply. After a stipulated continuance, the Court held a hearing.

Motion to Continue

At the hearing, the Petitioner asked for a continuance because the Petitioner moved for default judgment earlier in the morning. The Court denied the request because the parties

stipulated to hold the hearing on May 16, 2018 and the Respondent filed an answer on January 9, 2017.

Motion to Compel

On most of the interrogatories (1-7, 9-14, 16-29), the Petitioner raised two objections. First, the Petitioner answered it in previous discovery. Second, answering the interrogatory would be unreasonably burdensome because the information is equally available to the Respondent. Despite those objections, the Petitioner answered interrogatories 8, 12, 14, 20, 23, 24, 25, and 27. On interrogatories 8 and 15, the Petitioner objected that the discovery is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Finally, on interrogatories 9, 10, and 11, the Petitioner objected because the term "policy request" is vague.

Answered in Previous Discovery and Unreasonably Burdensome

(Interrogatories 1-7, 9-14, 16-29)

The Tohono O'odham Rules of Civil Procedure do not address motions to compel. Therefore, the Court will look to the Arizona Rules of Civil Procedure. T.O. R. Gen. Prac. 1(c) ("Where applicable, the Arizona rules will be followed to the extent they do not directly conflict with a written Tohono O'odham law or rule and are applicable to the facts and circumstances of a case.").

The party objecting to discovery has the burden of showing that discovery should not be made. *State ex rel. Babbitt v. Arnold*, 548 P.2d 426 (Ariz. App. 1976). The Court finds that the Petitioner has not met his burden. Some interrogatories are close-ended questions, meaning that the Petitioner could answer them with a yes or no. For instance, during the hearing, the Petitioner answered one interrogatory with a simple "no." For another interrogatory, the Petitioner answered the interrogatory with a single sentence during the hearing.

The interrogatories, generally, ask about the Chief Administrative Officer's work and authority. Considering that the Petitioner alleges, "the Chief Administrative Officer works at the

directive of the Chairman and reports directly to the Chairman[,]" *see* Comp. Page 11, Par. 56, it is reasonable for the Petitioner to provide the information. Therefore, the Court overrules the objections.

Not Relevant or Reasonably Calculated to Lead to Admissible Evidence

(Interrogatories 8 and 15)

For discovery, the information sought only needs to be reasonably calculated to lead to the discovery of admissible evidence. *Brown v. Super. Ct. In & For Maricopa Cnty.*, 670 P.2d 725, 730 (1983); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2008, at 41 (1970). Arizona's civil discovery rules – applicable through Rule 1(c) of the Tohono O'odham General Rules of Practice – provide that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." Ariz. R. Civ. Pro. 26(b)(1)(A). Here, the interrogatories are reasonably calculated to lead to the discovery of admissible evidence because they address the Chief Administrative Officer's authority and power to (1) approve posts on the Nation's website, and (2) attend certain meetings. Therefore, the Court overrules the objections.

Vague Term "Policy Request" (Interrogatories 9, 10, and 11)

At the hearing, the Respondent said that a policy request is a recommendation from an executive or employee to the Chairman to create or enforce a policy, instruction, or directive. The Respondent also provided an example. The Court finds that the Respondent's definition and example clarifies any ambiguity from the term "policy request." At the hearing, the Respondent asked for two substantive examples to interrogatory 11. Therefore, the Court overrules the objections. The Court also limits interrogatory 11 to two substantive examples.

Interrogatories with Answers (8, 12, 14, 20, 23, 24, 25, and 27)

On some interrogatories, the Petitioner objected, but ultimately answered the interrogatory. The Respondent did not raise any issues with those answers in its Motion to Compel or at the hearing.

Order

The Court grants the Motion to Compel with the limit to two substantive examples for interrogatory 11. The Court orders the Petitioner to answer interrogatories: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 15, 16, 17, 18, 19, 21, 22, 26, 28, and 29 by June 8, 2018.

The Court sets a status hearing on June 19, 2018 at 10:00 am.

Dated: May 22, 2018.

Judge Kyle Fields

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Chadwick Smith Petitioner v. Tohono O'odham Nation, Edward Manuel, Chairman, in his Official Capacity; Legislative Council; and Certain Legislative Council Members in their Official Capacity Respondents	Case No.: AV2018-0193 ORDER

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TOHONO O'ODHAM JUDICIARY
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JUDICIARY SERVICE CLERK

On February 13, 2019, the Court heard oral argument on Tohono O'odham Nation's and the Legislative Council's motions to dismiss and on Chadwick Smith's motion for preliminary injunction. The Court took the matter under advisement. With a motion for preliminary injunction, the Court expedites the matter.

In reviewing a motion for preliminary injunction, the moving party must prove that:

1. There is a strong likelihood that he will succeed on the merits at trial.
2. There is strong possibility that irreparable injury will result to him should an injunction not issue.

Tohono O'odham Legislative Council v. Manuel, 2 T.O.R.3d 64 (Oct. 18, 2000). The Court also considers a balance of hardships favoring the plaintiff/petitioner, and in certain cases, advancement of the public interest. *See id.* at 64-65.

The first factor, a strong likelihood of success on the merits, is an indispensable condition for a preliminary injunction. *See Arborjet, Inc. v. Rainbow Treecare Scientific Advancements, Inc.*, 794 F.3d 168 (1st Cir. 2015). Likewise, there can be no strong likelihood of success on the

merits if there are complex issues of law where the resolution is not free from doubt. *See Miller v. American Tel. & Tel. Corp.*, 344 F. Supp. 344 (E.D. Pa. 1972).

Here, the Court finds that Mr. Smith has not shown a strong likelihood of success on the merits. The Court need not review the other three factors. *See New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.").

Therefore, the Court denies the motion for preliminary injunction. The Court will address the motions to dismiss in a separate order.

Dated February 19, 2019.

Judge Kyle Fields

TORONO O'DHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

Edward D. Manuel, *ex officio* Chairman of the Tohono O'odham Nation, Petitioner v. Tohono O'odham Legislative Council, Respondent	Case No.: AV2016-0164 ORDER

Under the Tohono O'odham Constitution, the chairman has the power, "[w]ith the approval of the Tohono O'odham Council, to appoint the treasurer, and other officers and heads of all governmental departments . . . ." T.O. Const. Art. VII, § 2(e). The Court finds that, under the 2015-2019 Administrative Plan, the Chief Administrative Officer is an officer and head of a governmental department. Therefore, the Chief Administrative Officer must be appointed by the Chairman of the Tohono O'odham Nation and approved by the Tohono O'odham Legislative Council.

Background

Edward D. Manuel, *ex officio* Chairman of the Tohono O'odham Nation ("Chairman") filed a petition with six counts asking for a declaratory judgment and an injunction. The Tohono O'odham Legislative Council ("Legislative Council") filed a motion to dismiss, and the Court granted the motion on five counts. The Court denied the motion on the claim that "Resolution No. 16-301 violated the Tohono O'odham Constitution by unilaterally extending the authority of the Legislative Council to approve executive appointments to include the Chairman's Chief Administrative Officer" ("CAO"). Both parties moved for summary judgment, and both parties

filed extensive supporting documents. In short, the Chairman argues that the Court should adopt the federal standard for defining a department and that neither the Legislative Council nor the Chairman created a department under the federal standard. The Legislative Council asserts that the Court should adopt a functional definition for department, meaning that the Court should review the Administrative Plan and the functional operation. After receiving the responses and replies, the Court set a hearing.

At the January 29, 2019 hearing, Edward Manuel, Chairman of the Tohono O'odham Nation, and Wendell Matt, Special Counsel for the Chairman of the Tohono O'odham Nation, appeared for the Petitioner. Timothy Joaquin, Chairman of the Tohono O'odham Legislative Council, and Teresa Zhang, Legislative Attorney for the Tohono O'odham Legislative Council, appeared for the Respondent.

Analysis

1. Motion for Summary Judgment

The Court may grant summary judgment when the moving party shows that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. *Hansen v. Tohono O'odham Gaming Enter.*, 3 T.O.R.3d 147, 147 (Trl. Ct. 2012); Arizona Rule of Civ. Pro. 56(a).[1] The moving party must show there is no genuine issue of material fact, and the moving party must show why the Court should enter a judgment in its favor. *Hansen*, 3 T.O.R.3d at 148. The Court must view all facts and make all reasonable inferences in the light most favorable to the non-moving party. *Prince v. City of Apache Junction*, 912 P.2d 47 (Ariz. App. 1996).

[1] The Tohono O'odham Rules of Civil Procedure do not address motions for summary judgment. Therefore, the Court will look to the Arizona Rules of Civil Procedure. *See* 4 T.O.C. Ch. 1 § 1-102 *and* T.O. R. Gen. Prac. 1(c). The Court previously ordered that the Court will use the Arizona Rules of Civil Procedure that were in effect when the Chairman filed this lawsuit. June 28, 2018 Order.

An opposing party may defeat a motion for summary judgment by showing that a genuine issue of material fact exists or that the moving party is not entitled to a judgment as a matter of law. *Hansen*, 3 T.O.R.3d at 149. The non-moving party needs to present admissible evidence showing a genuine issue of material fact, so the non-moving party cannot rely on mere allegations in the complaint to show a genuine issue of material fact. *Id.* at 150.

When the parties file cross-motions for summary judgment, the Court must consider the appropriate evidentiary material in both motions and in opposition to both motions before ruling on either motion. *Fair Hous. Council of Riverside Cnty, Inc. v. Riverside Two*, 249 F.3d 1132, 1135 (9th Cir. 2001). Likewise, the Court must consider each motion on its own merits. *Id.* at 1136. Even though the parties file cross-motions for summary judgment, the Court may only grant summary judgment if there is no genuine issue of material fact and one party is entitled to judgment as matter of law. *Grain Dealers Mut. Ins. Co. v. James*, 575 P.2d 315, 317 (Ariz. 1978).

2. Appointment Clause

When interpreting the constitution, the Court begins with the text of the Constitution. *Harvey v. Tohono O'odham Council*, 1 T.O.R.3d 43, 45-46 (Trl. Ct. 1987); *Zamora v. Reinstein*, 915 P.2d 1227, 1230 (Ariz. 1996). The best and most reliable index of the Constitution's meaning is the plain text of the Constitution. *Zamora*, 915 P.2d at 1230. When the text is clear and unambiguous, there is no need for other methods of constitutional interpretation. *Hayes v. Cont'l Ins. Co.*, 872 P.2d 668, 672 (Ariz. 1994). Finally, the Constitution must be construed as a whole. *See Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

The Tohono O'odham Constitution provides that:

> The chairman shall be the chief executive officer of the Tohono O'odham Nation and shall exercise the following powers, subject to all the express limitations contained in this constitution: . . . With the approval of the Tohono O'odham

> Council, to appoint the treasurer, and other officers and heads of all governmental departments, who shall serve until replaced at the request of the chairman.

T.O. Const. Art. VII, § 2(e) ("Appointment Clause").

The plain meaning "will typically heed the commands of its punctuation." *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). Previously, this Court ruled that "other officers and heads of department" was a single noun phrase. *See* December 22, 2016 Order 10:7-12. For the CAO[2] to be subject to the Appointment Clause, the person must be (1) an officer and (2) a head of a governmental department.

a. Who is an Officer?

The Constitution does not define "officer." When a term is not defined, the Court may look at a dictionary definition. *See In re: Judicial Branch*, 3 T.O.R.3d 104, 119 (Trl. Ct. 2010) (reviewing a dictionary definition of a word not defined in the procedural rules). *Black's Law Dictionary* (10th ed., 2014) defines "officer" as: "1. Someone who holds an office of trust, authority, or command. In public affairs, the term refers esp. to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function."

Under Title 4, Section 1-102 of the Tohono O'odham Code, the Court may look to Arizona law as a persuasive authority. *See, e.g., Garcia v. Garcia*, 1 T.O.R.3d 108, 110 (Trl. Ct. 1994). In Arizona, officers of the executive department are elected officials. *See* Ariz. Const. Art. 5, § 21. And the Arizona Constitution does not have a comparable appointment clause. *See State ex rel. Woods v. Block*, 942 P.2d 428 (Ariz. 1997). The Court, accordingly, will look to other persuasive authorities. *See In re: Judicial Branch*, 3 T.O.R.3d at 109 (reviewing federal case law as persuasive authority); *United Linings, Inc. v. Vi-ikam Doag Indus., Inc.*, 2 T.O.R.3d 39, 42-45 (Trl. Ct. 1998) (reviewing federal case law and other tribal statues as persuasive authority).

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[2] The Tohono O'odham Constitution only uses the title "chief administrative officer" in Article VIII, Section 5, which states that the chief judge is the "chief administrative officer of the Tohono O'odham Judiciary."

The Chairman argues that the Court should adopt the federal definition of department under the United States Constitution. Pet'r's Mem. Law Supp. Summ. J. 9:1-12:8. As a preliminary matter, Article II, Section 2, clause 2 of the United States Constitution ("Federal Appointment Clause"), is textually different from the Tohono O'odham Appointment Clause. The Federal Appointment Clause reads:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2. The Federal Appointment Clause distinguishes between Officers of the United States and inferior Officers. Whereas, the Tohono O'odham Appointment Clause requires that person be an officer and a head of department. *Compare id.*, *with* T.O. Const. Art. VII, § 2(e). Cases analyzing the Federal Appointment Clause will only be helpful if the language in the United States Constitution is reasonably related to the language in the Tohono O'odham Constitution. *See In re: Judicial Branch*, 3 T.O.R.3d at 109; *Egan v. Fridlund-Horne*, 211 P.3d 1213, 1223 (Ariz. App. 2009) (discussing that different wording creates a different meaning and that the court must give weight to the language).

The definition of "officer" as used in the Federal Appointments Clause embraces the idea of tenure, duration, salary, and duties. *United States v. Germaine*, 99 U.S. 508, 511 (1878). Also, the position is continuous and permanent. *Id.* Finally, an officer must exercise significant authority under the law. *See Freytag v. C.I.R.*, 501 U.S. 868 (1991); *Edmond v. U.S.*, 520 U.S. 651 (1997); *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018).

Under the federal system, a law must establish an officer's position, duties, salary, and means of appointment. *See Burnap v. United States*, 252 U.S. 512, 516-17 (1920); *Freytag*, 801 U.S. at 881-83. The reasoning in *Burnap* and *Freytag* is based on the phrase "which shall be established

by Law" in the Federal Appointment Clause. *Id.* The Tohono O'odham Appointment clause, however, has no comparable language to "which shall be established by Law." Therefore, *Burnap* is not applicable.[3]

Under the dictionary definitions and relevant persuasive authority, an "officer," for the Tohono O'odham Appointment Clause, is a person who holds an office of trust, authority, or command. The position must have some element of tenure, duration, salary, and duties. The position is continuous and permanent. Finally, the position must allow the exercise of significant authority under the law.

b. Is the Chief Administrative Officer an Officer?

Here, the CAO holds an office of trust, authority, or command because the CAO "[s]upervises and manages Executive Directors, General Support Services Managers and other staff." Resp't's SOF, Ex. I. The CAO also "[p]rovides overall organization leadership and promotes the strategic vision of the Executive Office." *Id.* In performing those duties, the CAO does not have "specific policies, procedures and guidelines . . . except for executive directives and accepted professional standards." *Id.* The CAO is a full-time position and is paid on a pay grade for full-time employees. *Id.* The CAO reviews and approves budget requests, financial reports, procurement requests, and fund transmittals. Resp't's SOF, Exs. I, L, M, O, P, and Q. Also, the CAO approves certain programs closing for the day. Resp't's SOF, Exs. CC-GG.

The Legislative Council asserts that the CAO approved program director's leave requests. Resp't's SOF, Exs. Y, Z, and AA. The Chairman, however, asserts that the Chairman would approve or disapprove the program director's leave requests and that the CAO would enter the

[3] Likewise, *Freytag* to the extent that its reasoning is based on *Burnap* is not applicable.

Chairman's response into the payroll software.[4] Pet'r's Supp. Answer Non-Uniform Interrogs. No. 17-19.

Issues of fact do not preclude summary judgment unless they are material to the substantive claim, that is, unless they "might affect the outcome of the suit under the governing law." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The factual dispute is material if its resolution will alter whether the CAO was an officer. Here, accepting that the CAO would get approval from the Chairman about a director's leave request, it would not negate or create an inference that would negate the CAO's other undisputed duties listed above. Thus, the fact would not change the result, so there is no material dispute if the CAO is an officer. The Court finds that the CAO is an officer.

c. What is a Governmental Department?

The Tohono O'odham Constitution does not define "governmental department." When a term is not defined, the Court may look to a dictionary definition. *See Tohono O'odham Advocate Program v. Norris*, 3 T.O.R.3d 60, 61 (Trl. Ct. 2005) (reviewing a dictionary definition). *Black's Law Dictionary* (10th ed., 2014) defines "department" as:

> 1. A division of a greater whole; a subdivision <a legal department>. . . . 3. A principal branch or division of government <legislative department>; specif., a division of the executive branch of the U.S. government, headed by a secretary who is a member of the President's cabinet <Department of Labor>. — Also termed *government department*; *governmental department*.

When a dictionary provides multiple definitions, the Court, considering the word's context, may look to other instances of the word in the document to determine a word's definition. *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1937) ("[T]here's a natural

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[4] The Chairman did not present any other admissible evidence challenging or contesting the Legislative Council's other factual claims. *See Hansen*, 3 T.O.R.3d at 149 (requiring that the Court only consider admissible evidence with a motion for summary judgment).

presumption that identical words used in the different parts of the same act are intended to have the same meaning."). The Tohono O'odham Constitution, uses the word *department* in Article VI, Section 1(f). The Section provides that the Legislative Council may make agreements and contracts "with Federal, State and local governments and other Indian tribes or their departments, agencies, or political subdivisions . . . ." T.O. Const. Art. VI, § 1(f). When a word is part of a series, the Court must interpret every word so each word has effect, and the Court must avoid an interpretation that causes the word to duplicate another word or to have no effect. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (stating that it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Consequently, a department is distinct from an administrative agency or a political subdivision.

The Constitution creates a structure where the departments are accountable to the chairman. *See* T.O. Const. Art. VII, § 2 (providing that "[t]he chairman shall be the chief executive officer of the Tohono O'odham Nation"); T.O. Const. Art. VII, § 2(a) (stating that the chairman has the power to "oversee the administration and management of the government"); *see also* T.O. Const. Art. VII, § 2(e) (stating that officers and heads of all governmental departments, "who shall serve until replaced at the request of the chairman").

The term "governmental department" also indicates that it must be created by law. *See Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018); 16 C.J.S. *Constitutional Law* § 383 (Feb. 2019) (discussing that *governmental departments* implies departments that are lawfully created).

A department is a freestanding part or division of the Executive Branch, and the department is not subordinate to or contained within any other department. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 481 (2010). Simply put, a department cannot be a part of a different department. *See id.*

Ultimately, for the Appointment Clause, a "governmental department" is: (1) a subordinate part or division of the executive branch; (2) directly accountable to the chairman as a matter of

structure; (3) created by law; (4) not a part or component of a different department; and (5) distinct from an administrative agency or political subdivision of the Tohono O'odham Nation.

d. Is General Services a Governmental Department?

Under *Francisco v. Torro*, an Administrative Plan clarifies "the powers, functions and roles of the various departments under the Executive branch as well as set policy." 1 T.O.R.3d 68 (Trl. Ct. 1989) (appeal dism'd, *Francisco v. Torro*, 3 T.O.R.3d 17 (Ct. App. 2008)). "The Constitution delegated the responsibility of drafting the administrative plan to the Executive branch, specifically to the Chairman." *Id.* at 72. The Court, as a result, will review the 2015-2019 Administrative Plan to determine the Executive Branch's structure and organization.

The 2015-2019 Administrative Plan organizational chart shows departments on the left side of the chart with a line going directly to a box with the Chairman and Vice Chairman. Resp't's SOF, Ex. H. On the right side of the chart, eight programs are listed with a line that goes to the CAO, then there is a line between the CAO and the box with the Chairman and Vice Chairman. *Id.*

The 2015-2019 Administrative Plan does not identify a General Services Department. Resp't's SOF, Ex. H. And the Chairman asserts that he has not created a General Services Department. Pet'r's Mem. Law Supp. Summ. J. 10:18-11:7; Pet'r's Supp. Answer Non-Uniform Interrogs. No. 7. The Court, however, is not limited to a party's legal conclusion. *See* T.O. Const. Art. VIII, § 10(a) ("The Tohono O'odham Judiciary shall the power to: (a) Interpret, construe and apply the laws of, or applicable to, the Tohono O'odham Nation."); 49 C.J.S. *Judgments* § 332 (discussing that with motions for summary judgment the court must consider statements of fact and is not bound by conclusions of law or legal opinions). The Court, using the objective test listed above, decides whether a department exists.

i. a subordinate part or division of the executive branch

The 2015-2019 Administrative Plan identifies the eight programs as subordinate parts of the Executive Branch. Resp't's SOF, Ex. H. And for budgetary purposes, the eight programs have been identified as subordinate parts of the Executive Branch. Resp't's SOF, Exs. L-W. Therefore, the eight programs are subordinate parts of the executive branch.

ii. directly accountable to the chairman as a matter of structure

The 2015-2019 Administrative Plan provides a hierarchy where the programs report to the CAO, and the CAO is directly accountable to the chairman. Resp't's SOF, Exs. H, J, and K. The eight programs individually are not departments because the programs reported to the CAO. *See Free Enter. Fund*, 561 U.S. at 481 (distinguishing between a department and a component to a department). The eight programs are components to General Services, which is a functional division or subordinate part of the executive branch. Thus, General Services is directly accountable to the Chairman as a matter of structure.

iii. created by law

The Chairman argues that General Services is not a department because there is no law establishing the department. Pet'r's Mem. Law Supp. Mot. Summ. J. 9:1-12:8. Specifically, the Chairman asserts that a department can only be created through an ordinance and not through a resolution. Pet'r's Mem. Law Supp. Mot. Summ. J. 5:3-8:25.

Under the common law, an ordinance and a resolution were terms of art. *See generally Nation v. Delores*, 2 T.O.R.3d 26, 28 (Trl. Ct. 1997) (discussing the difference between an ordinance and a resolution at common law). Normally, when a statute uses a common-law term, without defining the term, the Court presumes that the law adopted the common-law definition. *See Gilbert v. United States*, 370 U.S. 650, 655 (1962) (stating that "[f]or in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law

sense"). This presumption, however, may be overcome if the usage and context of the law show that the law did not adopt the common-law definition. *See id.*

The Tohono O'odham Constitution did not adopt the common-law terms of art for ordinance and resolution. For instance, the Constitution uses the terms interchangeably. *See* T.O. Const. Art. V, § 6; T.O. Const. Art. VI, § 1(c), (d)(2), (g), (h), (i), (l); T.O. Const. Art. V, § 2(c); T.O. Const. Art. VII, §§ 2(c)-(d), 5; T.O. Const. Art. XIX, § 1. Therefore, the Court will not adopt the common-law distinction between an ordinance and a resolution.

If the Court held that only an ordinance could create a department, then none of the traditionally recognized departments would be a department. *See Joaquin v. Goodnight*, 1 T.O.R.3d 29, 30-32 (Trl. Ct. 1991) (noting that chief of police was subject to the appointment clause; even though, the police department was not created by an ordinance). At oral argument, the Chairman conceded that most departments in the 2015-2019 Administrative Plan do not have an ordinance creating the department. Resp't's SOF, Ex. H; *but see* 25 T.O.C. Ch. 3 §§ 3201-3204 (creating the water resources department).

Under Tohono O'odham law, the Chairman has the power and responsibility to draft the administrative plan. T.O. Const. Art. VII, § 2(a); *Francisco*, 1 T.O.R.3d at 68. The administrative plan has the force of law because once the legislative council approves it, the chairman must follow it. T.O. Const. Art. VII, § 2(a) (stating that the chairman must manage the government "in accordance with an administrative plan . . ."). Also as a matter of practice, the administrative plan has been used to create and organize departments. *See Francisco*, 1 T.O.R.3d at 76 ("There must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive and Judicial. There is no guarantee that friction will not occur, but by means of the friction, and reason, wisdom and self-restraint, the formation of a working government can be achieved."); Resp't's SOF, Ex. H (noting that most departments in the 2015-2019 Administrative

Plan do not have a statute creating the department). Thus, the administrative plan has the force of law; as a result, general services was created by law.

iv. not a part or subordinate component of a different department

The Chairman argues that the CAO and the eight programs are part of the Office of the Chairman. Pet'r's Reply & Resp. Cross Mot. Summ. J. 4:19-6:3. Consequently, the programs are administrative components, which would prevent them from being independent departments. *Id.*

The Tohono O'odham Constitution divides the government into three branches. T.O. Const. Art. IV. Article IV provides: "The government of the Tohono O'odham Nation shall be composed of three independent branches: the LEGISLATIVE, consisting of the Tohono O'odham Council; the EXECUTIVE, consisting of the office of Chairman of the Tohono O'odham Nation; and the JUDICIAL, consisting of the Tohono O'odham Judiciary." The Constitution also vests the executive power in the office of the Chairman. *See* T.O. Const. Art. VII, § 1 ("The executive power of the Tohono O'odham Nation shall be vested in the office of the Chairman of the Tohono O'odham Nation."). No one disputes that administrative and clerical staff (e.g., special counsel, office manager, and receptionist) are part of the Office of the Chairman.

Here, the eight programs and the CAO are paid out of separate budgets. For instance, the CAO's salary is paid from the Accounting Program's budget. Resp't's SOF, Exs. L, M, and N. Each of the eight programs has its own budget. Resp't's SOF, Exs. L-W. And on the coversheet for each of each budget, the program is listed as being a part of the "General Services" department. Resp't's SOF, Exs. L-W. Therefore, the eight programs and the CAO are not part of Office of the Chairman. Similarly, General Services comprises eight programs whose managers report to the CAO. Resp't's SOF, Ex. H. And no evidence or reasonable inference shows that General Services is a part or subordinate component of a different department.

v. distinct from an administrative agency or political subdivision of the Tohono O'odham Nation

Under the Constitution, districts are political subdivisions of the Tohono O'odham Nation. T.O. Const. Art. IX. An administrative agency is "An official body, especially within the government, with the authority to implement and administer particular legislation." *Black's Law Dictionary* (10th ed., 2014); *see* Glenda Harnad, et al., 2 Am. Jur. 2d *Administrative Law* §§ 127, 129 (2018) (discussing that an administrative agency's existence and authority stems from its enabling statute). Likewise, administrative agencies are created by statute and not created by executive order. *See Juan v. Ramirez*, __ T.O.R.3d ____, AP2018-0001 (Ct. App. 2018) (scheduled for publication) (discussing that an employee grievance commission created by an executive order is not an administrative agency); *see also* T.O. Const. Art. XVII, § 2(d) (allowing the Legislative Council to create a water commission or board). Here, the 2015-2019 Administrative Plan created General Services; thus, General Services is distinct from an administrative agency or political subdivision of the Tohono O'odham Nation.

Ultimately, using the objective test, General Services is a department under 2015-2019 Administrative Plan for the Appointment Clause.

e. Who is a Head of a Governmental Department?

The Constitution does not define "head of governmental department." The *Merriam-Webster Dictionary* (2016) defines "head" as: "6(b). One in charge of a division or department in an office or institution." The Constitution contemplates that the heads of the governmental departments are directly accountable to the chairman. *See* T.O. Const. Art. VII, § 2(e) (stating that officers and heads of all governmental departments, "who shall serve until replaced at the request of the chairman"). Thus, the person must be in charge of the department, and the person managing the department must be directly accountable, as a matter of the chain-of-command, to

the chairman, meaning there is not an intermediary between the head of the department and the chairman.

f. Is the Chief Administrative Officer a Head of a Governmental Department?

Absent a statute creating a special office or administrative agency, *see* 25 T.O.C. Ch. 3 § 3201 *and* 20 T.O.C. Chs. 1-2, the chairman has the power to establish the chain-of-command in the executive branch. T.O. Const. Art. VII, § 2 ("The chairman shall be the chief executive officer of the Tohono O'odham Nation . . . ."); T.O. Const. Art. VII, § 2(a) (stating that the chairman has the power "[t]o oversee the administration and management of the government . . ."). Normally, the chairman creates the chain-of-command through the administrative plan. *See Francisco*, 1 T.O.R.3d at 68. The Constitution balances this executive power in two ways. First, the Legislative Council must approve the administrative plan. T.O. Const. Art. VII, § 2(a) (requiring that the administrative plan be "adopted by the Tohono O'odham Council"). Second, once the Legislative Council approves the administrative plan, the chairman must comply with it. *Id.* (stating that the chairman must "oversee the administration and management of the government *in accordance with an administrative plan*") (emphasis added).

Here, the directors of the eight programs reported to the CAO, and the CAO reported to the chairman. Resp't's SOF, Ex. H. The CAO "[s]upervises and manages Executive Directors, General Support Services Managers and other staff." Resp't's SOF, Ex. I. Finally, the programs directors/managers view the CAO as their boss. Resp't's SOF, Exs. F, J, and K. As a result, the CAO is a head of a governmental department.

Conclusion

Because the CAO is an officer and head of a governmental department under the Appointment Clause, the Court grants the Legislative Council's Motion for Summary Judgment. And the Court denies the Chairman's Motion for Summary Judgment.

Dated: February 22, 2019.

Judge Kyle Fields

TOKONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Chadwick Smith Petitioner v. Tohono O'odham Nation, Edward Manuel, Chairman, in his Official Capacity; Legislative Council; and Certain Legislative Council Members in their Official Capacity Respondents	Case No.: AV2018-0193 ORDER

Under Title 20, Chapter 1, Section 2(C) of the Tohono O'odham Code, the attorney general may only be terminated "with the concurrence of the Chairman of the Nation and of a majority of the Legislative Council." The Court must decide whether the Tohono O'odham Legislative Council violates the Tohono O'odham Constitution or the Indian Civil Right Act when it, without holding a hearing, passes a resolution terminating the attorney general, which has a paragraph stating notwithstanding the sovereign immunity law or any other law no one may file a declaratory judgment or injunction about the resolution. For the reasons stated below, the Court grants the motions to dismiss.

FACTS

On November 29, 2018, Edward Manuel, Chairman of the Tohono O'odham Nation, ("Chairman") told Chadwick Smith, the Attorney General of the Tohono O'odham Nation, that the "committee" was mad at him. Petition, December 21, 2018 at 3. The Chairman stated that Mr. Smith could resign to avoid a "black mark" on his record. *Id.* The Chairman also said that the Tohono O'odham Legislative Council ("Council") would meet the next day to discuss Mr.

Smith. *Id.* Mr. Smith stated that he wanted to visit with the Council and present his side of the story. *Id.*

The next day, November 30, 2018, the Council had a closed emergency council meeting. *Id.* The Council did not invite Mr. Smith to the meeting. *Id.* The Council, unanimously, passed Resolution 18-453, to terminate Mr. Smith's employment. *Id.* The Chairman signed Resolution 18-453 within an hour of receiving it. *Id.* at Ex. A. The Council and the Chairman terminated Mr. Smith's employment on November 30, 2018. *Id.* at 3. Resolution 18-453 was published on the Internet. *Id.* at 3-4.

Mr. Smith sued and asked for a preliminary injunction on December 21, 2018. The Chairman and the Tohono O'odham Nation, represented by and through the Office of the Attorney General, and the Council filed motions to dismiss on sovereign immunity and failure to state a claim grounds. Mr. Smith filed a response to each motion, which the Nation and Council filed their replies. The Court scheduled an oral argument hearing. Just before the hearing, Mr. Smith filed sur-replies, and a request for the court's permission to file the sur-replies.

At the February 14, 2019 hearing, Mr. Smith, pro se, appeared. The Nation and the Chairman (collectively, "Nation"), represented by Acting Attorney General Joshua Rees, appeared. And the Council, represented by P. Michael Ehlerman, appeared. The Court heard arguments from all parties and took the matter under advisement. The Court did not hear arguments about the sur-replies. After the hearing, the Nation and the Council filed motions to strike the sur-replies. The Court denied the motions to strike and allowed Mr. Smith's sur-replies. On February 19, 2019, the Court denied Mr. Smith's motion for preliminary injunction. Three days later, the Court requested additional briefing on sovereign immunity and legislative immunity.

ANALYSIS

The Tohono O'odham Rules of Civil Procedure do not address motions to dismiss. Therefore, the Court will look to the Arizona Rules of Civil Procedure. *See* 4 T.O.C. Ch. 1, § 1-102 *and* T.O. R. Gen. Prac. 1(c) ("Where applicable, the Arizona rules will be followed to the extent they do not directly conflict with a written Tohono O'odham law or rule and are applicable to the facts and circumstances of a case.").

Under Arizona Rule of Civil Procedure 12(b)(6), dismissal is appropriate if, as a matter of law, the plaintiff would not be entitled to relief under any well-pled facts susceptible of proof. *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 347 (Ariz. 2008). The Court only examines the pleading.[1] *Id* at 346. The Court also assumes the truth of all well-pled factual allegations and resolves all reasonable inferences in favor of the non-moving party, but mere conclusory statements do not state a valid claim. *Id.*; *Francisco v. Manuel*, 1 TOR3d 88, 88 (Trl. Ct. 1989) ("in considering Respondent's motion for dismissal, the Court is required to review the evidence in the light most favorable to the Petitioner . . ."). The Court "do[es] not accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, . . . or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005).

Sovereign and Legislative Immunity

The Nation and the Council both argue that sovereign immunity bars Mr. Smith's lawsuit. The Council also argues that legislative immunity bars Mr. Smith's claims against the Council.

1. Sovereign Immunity

Tohono O'odham case law has long recognized sovereign immunity. *See, e.g., Joaquin v. Goodnight*, 1 TOR3d 29 (Ct. App. 1991); *Evans v. Nation*, 2 TOR3d 35 (Trl. Ct. 1998); *United*

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[1] As such, the Court will not consider Mr. Smith's affidavit that he attached to his Memorandum in sur-response to Tohono O'odham Nation's Motion to Dismiss.

Linings, Inc. v. Vi-ikam Doag Indus., 2 TOR3d 39 (Trl. Ct. 1998). "Sovereign immunity is an essential element of tribal sovereignty and self-determination." *Escalante v. Sells Dist.*, __ TOR3d ___, CTA-0133 (Ct. App. 2017) (scheduled for publication). "The shield of immunity protects the autonomous political existence of the tribe." *Id.* (citations omitted). Recently, the Supreme Court of the United States affirmed that tribal immunity remains intact, absent congressional authorization or the tribe's clear waiver of immunity. *Id.* (citing *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014)). In 2010, the Tohono O'odham Nation enacted the Sovereign Immunity; Legislative Immunity Code ("Sovereign Immunity Code"), codifying the sovereign immunity doctrine. *See* 1 T.O.C. Ch. 2.

Courts have reached different conclusions on whether sovereign immunity deprives the court of subject matter jurisdiction or if sovereign immunity is a personal jurisdiction defense. *Compare Escalante*, CTA-0133 (noting that the trial court found it lacked subject matter jurisdiction); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) *with Escalante v. Sells Dist.*, CTA-0133 (finding that the Appellate Court had subject matter jurisdiction to review the case); *Filer v. Tohono O'odham Nation Gaming Enter.*, 129 P.3d 78 (Ariz. Ct. App. 2006). Any law "purporting to divest the judiciary of its power of constitutional inquiry is void." *Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 17 (Ct. App. 1989); *see Escalante*, CTA-0133; *see also* 1 T.O.C. Ch. 2, § 2101(A) (noting that the Nation is "immune from suit, court process, or liability"). In light of those holdings and the statute, sovereign immunity is a personal jurisdiction affirmative defense.

Under Section 2101 of the Sovereign Immunity Code, the party raising sovereign immunity has the initial burden of showing that sovereign immunity applies. The Court looks to relevant pleadings to discover the status of the party. *See Juan v. Ramirez*, __ TOR3d ___, AP2018-0001 (Ct. App. 2018) (scheduled for publication). Here, the Respondents are the Tohono

O'odham Nation, governmental entities, or individuals acting in their official capacity. As a result, Section 2101 applies.

Once the party raising sovereign immunity meets its burden, the opposing party has the burden to show that an exception applies. *See* § 2102(A), (B); *Escalante*, CTA-0133; *Juan*, AP2018-0001. The Sovereign Immunity Code provides: "Unless provided otherwise by law, sovereign immunity does not preclude properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation." § 2102(A).

The Nation argues that Mr. Smith's lawsuit is not solely for injunctive or declaratory relief because a ruling in Mr. Smith's favor would require the Nation to reinstate Mr. Smith, resulting in back pay – monetary damages. When evaluating if an action is solely for injunctive or declaratory relief, the Court looks at the allegations in petition or complaint, and the Court looks at the party's request for relief. *See Harvey v. Tohono O'odham Council*, 1 TOR3d 43 (Trl. Ct. 1987) (enjoining a resolution, which resulted in an award of back pay). Here, Mr. Smith is only seeking an injunction and declaratory judgment. As, such, this lawsuit is solely for injunctive or declaratory relief.

Both the Nation and Council also assert that Mr. Smith's lawsuit is not challenging a law, rule, or regulation because the decision was, in essence, an employment decision.

Although the Sovereign Immunity Code provides a right to intervene and notice requirements for actions challenging the Council's decision or action, the exception is limited to actions "to determine the validity of a law, rule, or regulation of the Nation." *Compare* § 2102(A) *with* § 2102(D)(2), (E)(2). Recently, the Tohono O'odham Appellate Court read "law, rule, or regulation" as "a codification of the established principle that an injunctive lawsuit challenging the constitutionality of tribal governmental action is not barred by sovereign immunity." *Escalante*, CTA-0133. Here, Mr. Smith alleges that the Nation and Council violated Article III,

Section 4 of the Tohono O'odham Constitution, which adopts the rights and protections in the Indian Civil Rights Act ("ICRA"), by passing a resolution that was a bill of attainder, an ex post facto law, and violated his due process rights.

Neither the Nation nor the Council contest that the resolution was tribal governmental action. Under the reasoning in *Escalante*, Mr. Smith's lawsuit is challenging the constitutionality of a law, rule, or regulation of the Nation. Therefore, sovereign immunity does not bar Mr. Smith's lawsuit.

2. Legislative Immunity

The Council argues that the Court should dismiss the claims against the Council and the named Council members under legislative immunity. Mr. Smith argues that the Court has jurisdiction over the Council members "in their official capacity in accordance with *In re: Petition of the Judicial Branch*." Petition, December 21, 2018 at 2. The Sovereign Immunity Code in its Legislative Immunity Statute provides: "The Tohono O'odham Legislative Council, Legislative Council representatives and staff, and other persons engaged in legislative activity possess legislative immunity and are not subject to suit, process, or liability for the performance of legislative functions." 1 T.O.C. Ch. 2, § 2103(A).

Here, the Council and the named Council members were performing legislative functions because the members were voting on Resolution 18-453. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (noting that a legislator voting for an ordinance is quintessentially a legislative function). Moreover, the exception in § 2102(A) does not apply to legislative immunity in § 2103(A). *See* § 2102(A) ("Unless provided otherwise by law, *sovereign immunity* does not preclude . . . .") (emphasis added). Also, Mr. Smith's reliance on *In re: Petition of the Judicial Branch* is misplaced because the lawsuit in that case was not against the individual Council members acting in their official capacity. Therefore, the Court dismisses the claims against the Council and the named Council members.

Bill of Attainder, Ex Post Facto, and Due Process Claims

1. Preliminary Issues

Before reviewing Mr. Smith's claims, the Court must address two preliminary issues, which are necessary presuppositions to determine whether Resolution 18-453 is a bill of attainder, an ex post facto law or whether the Council violated Mr. Smith's due process rights. First, the Court must decide whether Mr. Smith was an at-will employee. Second, the Court must determine the legal effect of the last paragraph in Resolution 18-453.

A. At-Will Employment

Generally, Tohono O'odham officials are at-will employees, who the chairman can terminate at any time. T.O. Const. Art. VII, §§ 2, 2(e) (stating that the chairman is the Chief Executive Officer of the Nation and that officers and heads of governmental departments serve until replaced at the request of the chairman); *Joaquin*, 1 TOR3d at 29.

Although the Tohono O'odham Executive Branch Personnel Policies adopted by Executive Order 99-01 creates special protections and procedures for Executive Branch employees, it specifically exempts the Attorney General from those protections and procedures. The Attorney General statute creates a special office. 20 T.O.C. Ch. 1. Under Section 2(C), the attorney general may only be terminated "with the concurrence of the Chairman of the Nation and of a majority of the Legislative Council." 20 T.O.C. Ch. 1, § 2(C). The Attorney General is an at-will employee, who can be terminated with the concurrence of the Chairman and Council.

B. The Final Paragraph of Resolution 18-453

(1) Avoidance of Doubt

Mr. Smith argues that the last paragraph in Resolution 18-453 removed his ability to sue under the sovereign immunity exception, 1 T.O.C. Ch. 2, § 2102(A). The Nation and Council state that the last paragraph was an avoidance of doubt clause. When interpreting a statute, the Court starts with the text and proceeds from the understanding that unless otherwise defined,

statutory terms are generally interpreted by their ordinary meaning. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citations omitted).

Resolution 18-453 provides: "BE IT FINALLY RESOLVED by the Tohono O'odham Legislative Council that, notwithstanding 1 T.O.C. Chapter 2, Section 2102(A) or any other law, sovereign immunity is not waived for any injunctive or declaratory action, or any other action arising from or related to this resolution."

Avoidance of doubt clauses are used to clarify a neighboring clause. *See generally* Carl S. Bjerre & Stephen L. Sepinuck, *Spotlight on in Re Fair Finance Co.*, 834 F.3d 651 (6th Cir. 2016), Bus. L. Today, January 2018, at 1, 3 (2018). Normally, an avoidance of doubt clause has certain qualifying language, such as: "For the avoidance of doubt (if any)," "To avoid doubt," "For clarity," and "To specify." *See*, *e.g.*, *Geist v. Hispanic Info. & Telecomm. Network, Inc.*, No. CV PX-16-3630, 2018 WL 1169084 (D. Md. Mar. 6, 2018). Here, the paragraph does not have any comparable language that makes the clause an avoidance of doubt clause. The paragraph is not an avoidance of doubt clause.

Based on a plain reading, the final paragraph in Resolution 18-453 prevents Mr. Smith from filing a lawsuit as it specifically prevents Mr. Smith from seeking injunctive or declaratory relief despite Section 2102(A) of the Sovereign Immunity Code. *See* Resolution 18-453 ("*notwithstanding* 1 T.O.C. Chapter 2, Section 2102(A) or *any* other law, sovereign immunity is not waived for *any* injunctive or declaratory action, or *any* other action arising from or related to this resolution") (emphasis added). Thus, the final paragraph is unconstitutional because it divests the judiciary of its power to review alleged constitutional violations. *See Garcia*, 1 TOR3d at 17 (stating that any law "purporting to divest the judiciary of its power of constitutional inquiry is void"); *see also Escalante*, CTA-0133.

(2) Severability

Even though the final paragraph is unconstitutional, Mr. Smith is not entitled to his requested relief. Under Title 1, Chapter 1, Section 1101 of the Tohono O'odham Code:

> The Nation's laws are severable. If any word, clause, phrase, sentence, subsection, section, or other provision (hereinafter, "provision") of a Nation's law or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity shall not affect any other provisions or applications of the law that can be given effect without the invalid provision or application.

The Court determined that "[t]his severability clause empowers the Court to eliminate unconstitutional provisions from otherwise constitutional statutory schemes." *In re: Petition of the Judicial Branch*, 3 TOR3d 128, 145 (Trl. Ct. 2011). As a result, the Court must uphold the constitutional portions of Resolution 18-453 if the unconstitutional portions can be severed. Severability embraces the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *See id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

Here, the last paragraph is unconstitutional because it divests the judiciary of its power to review alleged constitutional violations. The Court, however, can give effect to the remaining sections because the other sections do not logically rely on the final paragraph. And the other sections of Resolution 18-453 are operative and sufficient to carry out their purpose, which terminated Mr. Smith's employment. *See Brockett*, 472 U.S. at 502. As a result, the Court can still give effect to the rest of Resolution 18-453. Therefore, the Court will review if the rest of Resolution 18-453 is a bill of attainder, an ex post facto law, or if the Council violated Mr. Smith's due process rights.

2. Bill of Attainder

Mr. Smith states that Resolution 18-453 is a bill of attainder. The ICRA bans bills of attainder. 25 U.S.C. Ch. 15, § 1302(a)(9). Federal Courts have interpreted Section 1302(a)(9)

using the same analytical framework as the Bill of Attainder clause in the U. S. Constitution. *See, e.g., Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004) (using case law interpreting Article 1, Section 9, Clause 3 of the U.S. Constitution as authority for interpreting Section 1302(a)(9)). A bill of attainder is a legislative act that applies either to named individuals or to easily identifiable members of a group as to inflict punishment on them without a judicial trial. *United States v. Lovett*, 328 U.S. 303 (1946); 16B Am. Jur. 2d *Constitutional Law* § 716. A bill of attainder has three requirements: (1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial. *See Consolidated Edison Co. of New York, Inc. v. Pataki*, 292 F.3d 338 (2d Cir. 2002); *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005).

The Nation and the Council assert that Resolution 18-453 did not inflict any punishment. To decide whether a statute imposes punishment, a court conducts a three-part inquiry:

A. whether the challenged statute falls within the historical meaning of legislative punishment;

B. whether the statute, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further non-punitive legislative purposes; and

C. whether the legislative record evinces a legislative intent to punish.

Palmer v. Clarke, 408 F.3d 423 (8th Cir. 2005); *SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir. 2002).

A. Legislative Punishment

Mr. Smith states that he was punished by being terminated. Legislative punishment refers to situations where the injury is of a criminal nature and not of a civil nature. *See Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956). To show that a termination, a civil matter, is punishment, Mr. Smith relies on *Crain v. City of Mountain Home, Ark.*, 611 F.2d 726 (8th Cir. 1979) and *Fulton v. Baker*, 410 S.E.2d 735 (Ga. 1991). Those cases, however, are not applicable

because in those cases the legislature took more action besides just terminating the individual's employment.

For instance, in *Crain*, the Plaintiff was a sole candidate in an election for the city attorney position. 611 F.2d at 727. But the day before the election, the city council reduced the city attorney's salary from $8,400 a year to $1.00 a year, and the city council restricted the city attorney from engaging in the private practice of law. *Id.* at 728. In *Fulton*, the Plaintiff was appointed to fill the unexpired term of a deceased commissioner. 410 S.E.2d at 736. The day after the Plaintiff was named; the legislature passed a law stating that any appointments to an unexpired term would be temporary until an election was held. *Id.* at 736-37.

Here, the resolution only terminated Mr. Smith's employment and did not have any other punishments like *Crain* or *Fulton*. As a result, *Crain* and *Fulton* are not applicable. And Resolution 18-453 does not have any other language showing a legislative punishment.[2] *See Palmer*, 408 F.3d at 424-25 (noting that the Court only looks at the statute).

B. Non-Punitive Legislative Interests

Resolution 18-453 furthers non-punitive purposes in that the Council is following Title 20, Chapter 1, Section 2(C) and exercising a right to terminate the Attorney General, an at-will employee.

C. Intent to Punish

Mr. Smith also argues that the Nation had an intent to punish him because the Chairman said that Mr. Smith should resign to avoid a "black mark" on his record. First, isolated statements are not sufficient to evince punitive intent by the legislature for the claim that the statute is an unlawful bill of attainder. *BellSouth Corp. v. F.C.C.*, 162 F.3d 678 (D.C. Cir. 1998). Second, the Chairman is not a member of the Council, and the record does not show that the Chairman

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[2] Even if the Court held that the last paragraph was a punishment, the last paragraph would be severable from the remaining parts of Resolution 18-453, as discussed above. Therefore, the remaining parts of Resolution 18-453 would not amount to a bill of attainder as a matter of law.

was present or participated in the legislative discussion. Originally, Mr. Smith pled that the session was on the radio, but at oral argument, Mr. Smith clarified that the Council discussed Resolution 18-453 in closed session, and the Council's vote was on the radio. The record does not show that the Council had an intent to punish.

Ultimately, Resolution 18-453 does not contain a punishment, and Resolution 18-453 furthered non-punitive legislative interests. Finally, the record does not show an intent to punish. Therefore, Resolution 18-453 is not a bill of attainder.

3. Ex Post Facto

Mr. Smith asserts that Resolution 18-453 is an ex post facto law. *See* 25 U.S.C. Ch. 15, § 1302(a)(9). An ex post facto law reaches back in time to punish acts that occurred before enactment of the law. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The early and classic definition of the phrase "ex post facto law" is (1) every law that makes an action done before passing the law, which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than it was when committed; (3) every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence and receives less or different testimony than the law required during the commission of the offense to convict the offender. *Calder v. Bull*, 3 U.S. 386 (1798); *see* Neil Duxbury, *Ex Post Facto Law*, 58 Am. J. Juris. 135, 138 (2013). The phrase "ex post facto" relates to criminal or penal statutes. *See Hendricks*, 521 U.S. at 368; *Lynce v. Mathis*, 519 U.S. 433 (1997); *Collins v. Youngblood*, 497 U.S. 37 (1990); *In re DNA Ex Post Facto Issues*, 561 F.3d 294 (4th Cir. 2009).

In evaluating ex post facto claims, the Court applies the "intent-effects" test, which looks at if (1) the legislature intended to impose a punishment or (2) the legislature intended a non-punitive regulatory scheme, which is so punitive that it transforms into a criminal penalty. *U.S.*

v. May, 535 F.3d 912 (8th Cir. 2008), cert. denied, 129 S. Ct. 2431 (2009); *U.S. v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008).

As discussed above, Resolution 18-453 does not have a punishment, and there is no legislative intent to punish Mr. Smith.[3] While uncomfortable, an employment termination is not so punitive to transform it to a criminal penalty. *See generally Dehainaut v. Pena*, 32 F.3d 1066 (7th Cir. 1994) (discussing that termination, which included an indefinite ban for being eligible for rehire, did not amount to a criminal penalty).

Therefore, Resolution 18-453 is not an ex post facto law.

4. Due Process

Mr. Smith alleges that the Council violated his due process rights. Specifically, Mr. Smith states that he is entitled to procedural due process before dismissal including: "a) quasi-judicial open hearing, b) notice of the hearing, c) notice of the allegations in advance of the hearing, d) opportunity to appear at the hearing, present witness and evidence, e) and notice of the Council's findings." Petition, December 21, 2018 at 4-5. The Tohono O'odham Constitution provides that the Nation shall not "deprive any member of liberty or property without due process of law." T.O. Const. Art. III, § 1. The ICRA states that an Indian tribe cannot "deprive any person of liberty or property without due process of law." 25 U.S.C. Ch. 15, § 1302(a)(8). To have procedural due process, Mr. Smith must have a protected interest. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). As such, the Court will decide whether Mr. Smith had a property or liberty interest entitling him to procedural due process.

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[3] As noted above, even if the Court held that the last paragraph was a punishment, the last paragraph would be severable from the remaining parts of Resolution 18-453. Thus, the remaining parts of Resolution 18-453 are not an ex post facto law.

A. Property Interest

At-will employment contracts alone do not create a protected property interest. *See Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir.1991); *Carroll v. Robinson*, 874 P.2d 1010, 1016 (Ariz. App. 1994). Mr. Smith had an at-will contract. Mr. Smith does not have a property right recognized by law. Therefore, the Nation and Council could not have deprived him of a protected property interest.

B. Liberty Interest

A person has a liberty interest in his or her good name, and if governmental action besmirches the person's reputation, he or she may be entitled to a name-clearing hearing. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437–39 (1971) ("[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 446 (2d Cir. 1980). The person's liberty is at stake when governmental action places "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573. To prevail on such a liberty-interest claim, a plaintiff must establish that the information was stigmatizing, false, and publicized by the governmental actor. *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 43 (2d Cir. 1987); *Quinn*, 613 F.2d at 446; *Gentile v. Wallen*, 562 F.2d 193, 197 (2d Cir. 1977).

Mr. Smith asserts that Resolution 18-453 stigmatizes him because the Council: (1) voted on the resolution during an emergency session; (2) passed the resolution unanimously; and (3) made the termination effective immediately. The Council discussed and voted on Resolution 18-453 in closed session. And as noted above, Resolution 18-453 does not contain any allegations. Therefore, the Nation or Council has not published any false statements. *Cf. Lovett*, 328 U.S. at 303 (a legislator on the floor during an open session accused the government employee of being affiliated with communist front organizations); *Segal v. City of New York*, 459 F.3d 207, 210 (2d

Cir. 2006) (school principal accused teacher of inflicting corporal punishment on a kindergartner and the principal told the state licensing authority about the allegations); *McNeil v. Butz*, 480, 480 F.2d 314 (4th Cir. 1973) (employer accused federal employee of getting unauthorized benefits from a lease and reported the allegations to a different federal department); *Carroll*, 874 P.2d at 1017 (employer accused employee of child molestation and reported the allegations to a different state department).

In this case, the Nation simply provided no reason for the employment termination. While the employment termination became public knowledge when the Council published Resolution 18-453 on the Internet, the record does not show anything false or sufficiently stigmatizing flowing from Mr. Smith's without-cause employment termination that would amount to a deprivation of a liberty interest. Simply put, the Court cannot agree that a without-cause employment termination is equal to a stigmatizing, false accusation by the Nation.

Courts have cautioned against extending overbroad constitutional protections to governmental contracts. *S & D Maint. Co., Inc. v. Goldin*, 844 F.2d 962, 970–71 (2d Cir. 1988). A free-floating liberty interest cannot rest on speculation that negative implications flow from a termination without cause. *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991). As a result, Mr. Smith's alleged consequences are too attenuated from the Nation's action. Notably, if the Court adopted Mr. Smith's position, the Nation would be subject to a liberty-interest claim whenever the Nation terminated an at-will employee. *See id.*

Therefore, the Nation did not deprive Mr. Smith of a liberty interest.

CONCLUSION

Sovereign Immunity does not bar this lawsuit. But legislative immunity bars the lawsuit against the Council and the named Council members. Mr. Smith is an at-will employee. Although the last paragraph of Resolution 18-453 is unconstitutional, the other parts of

Resolution 18-453 are severable and constitutional. Resolution 18-453 is not a bill of attainder nor an ex post facto law. Finally, the Nation did not violate Mr. Smith's due process rights.

ORDER

The Court grants the Nation's and the Council's motions to dismiss. The Court dismisses Mr. Smith's petition with prejudice.

Dated March 29, 2019.

Judge Kyle Fields

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2019 DEC -9 P 2:54
JUDICIARY SERVICE CLERK

In the Matter of the Estate of:	)	Case Number: 2014-0170AV
	)	
Elizabeth P. Norris	)	Final Distribution Order (1)
DOB: 12/09/1922	)	
	)	
Decedent	)	

At the December 3, 2019 hearing, Evelyn Juan, Special Trustee; Rebel Harjo, Counsel for Interested Parties Gerard Norris and Adrianne Tiller; Gilbert Norris, Interested Party; and Sidney Wolitzky, Counsel for Gilbert Norris, appeared.

Gilbert Norris, Sr. testified. The Court admitted Exhibits A, B, and C.

Background

On November 12, 2014, the Court entered Elizabeth Norris's will into probate. Based on the will, the Court appointed Gerard Norris as personal representative, and the Court followed the distribution in the will. The parties completed the bequests in the will except Specific Gift Six. The will provided:

> **Specific Gift Six**. I give Gerard N. Norris, Paul D. Norris, Gilbert S. Norris, and Michael J. Norris the cattle for their equal use and ownership. All have equal use and own equal shares after the Executor; Gerard N. Norris gives cattle at his discretion to;
>
> 1. Head Cowboy-Gilbert S. Norris
> 2. Jay D. Norris
> 3. Rayleene E. Norris
> 4. [Adrianne] Tiller
> 5. Jaden Tiller
> 6. Nadine V. Norris
> 7. Edward R. Norris
> 8. Bertram G. Norris
> 9. Debbie Norris (when she becomes of age)

Sometime later, the case was assigned to a new judge. Over the next 17 months, both parties filed extensive motions and affidavits detailing how other family members were preventing Gerard Norris from working the range. The Court ordered the parties to cooperate, but the parties could not complete any roundups.

(1) EDITOR'S NOTE: The Court attached Spreadsheets A, B, and C are not official court forms and should not be used as templates.

In May 2016, the Court removed Gerard Norris as personal representative, and the Court named Gilbert Norris as personal representative. The Court reasoned that the will gave the personal representative the power to make a discretionary distribution. So the Court authorized Gilbert Norris to roundup the cattle and make a discretionary distribution. The Court also ordered that any remaining cattle be equally divided between Gerard Norris, Paul Norris, Gilbert Norris, and Michael Norris.

A few weeks later, Paul Norris filed an affidavit where he waived his interest in the cattle and any sale proceeds. Likewise, Gerard Norris, Paul Norris, and Mike Norris filed objections and motions to reconsider the Court's ruling giving Gilbert Norris the power to make a discretionary distribution. The Court ordered Gilbert Norris to file a response, and the Court set the matter for a hearing.

Over the next year, Gilbert Norris completed many cattle sales. Gilbert Norris completed the roundups by trapping the cattle.[1] Trapping is more effective during the dry season when water sources are scarce. During the dry season, Gilbert Norris would periodically check the traps. When cattle were trapped, Gilbert Norris would work all the cattle. Gilbert Norris also owns cattle; Gilbert Norris would frequently work his own cattle at the same time he was working the estate's cattle.[2] Gilbert Norris would take the cattle to the livestock inspector's office. Because the livestock inspector takes a few days to issue a certificate, Gilbert Norris would pen the cattle, and he would pen the estate's cattle with his own cattle. While the cattle were being penned, Gilbert Norris would feed and water them, which increased their weight and market value. After receiving the inspection certificate, Gilbert Norris would auction the cattle at Marana stockyards.

Over the course of the same year, the Court continued the hearing on the motions to reconsider. Ultimately, Andreas Pasqual, Gilbert Norris's advocate, stopped communicating with Gilbert Norris and the Court.

In April 2017, the case was assigned to a third judge. The parties continued to have disclosure disputes over the number of estate cattle that Gilbert Norris sold as well as the number of personal/non-estate cattle he was simultaneously working. The parties also asked the Court to review the will and to follow the distribution as listed in the will. Ultimately, the Court compelled Gilbert Norris to disclose the documents and stated that it would follow the will's distribution. On November 29 2017, Gilbert Norris asked for reimbursement for $9,051.36 for hay and $5,410.00 for labor costs, which the Court granted.

Eventually, Gerard Norris and Adrianne Tiller moved to remove Gilbert Norris as a personal representative for commingling assets, failing to provide documents, and failing to

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[1] Gilbert Norris is also a range boss for his community. A range boss coordinates roundups, maintains the traps and fence line, ensures that there is water in the traps, and completes other tasks related to managing cattle. Range bosses, as a matter of tradition and custom, also decide who gets any unbranded mavericks caught during the roundup.

[2] Gilbert Norris's hired workers also owned their own brands, and they worked those cattle at the same time as working the estate's cattle.

account for estate's funds. The Court granted the motion and appointed Evelyn Juan as a personal representative.

Gilbert Norris sought reimbursement for various expenses. The Court, after reviewing the objections, granted the reimbursement in part. The Court prorated the expenses based on the number of estate cattle that Gilbert Norris sold with the number of non-estate cattle that he sold during the same roundup. The prorating of expenses resulted in a balance due to the estate from the original November 2017 reimbursement. The Court also stated that it would offset the outstanding balance from the final distribution. *See* Order dated September 12, 2018.

Vehicle Expenses

Gilbert Norris sought reimbursement for vehicle expenses. Evelyn Juan, Gerard Norris, and Adrianne Tiller objected. In the May 14, 2019 order, the Court stated that the estate is responsible for reasonable expenses related to managing the estate. The Court also found that Gilbert Norris also engaged in personal/non-estate related work at the same time he was doing estate related work.[3] As a result, the estate is only responsible for a part of the expenses. Like the other expenses, the Court will prorate the expenses based on the number of estate cattle that Gilbert Norris sold with the number of non-estate cattle that he sold during the same month. *See* Attached Spreadsheet A.

Based on the calculations, the Court awards Gilbert Norris $654.59 for vehicle expenses.

Repayment for Unauthorized Withdrawals

Evelyn Juan asked the Court to withhold $14,197.00 of the unauthorized withdrawals from Gilbert Norris's share of the estate. Gilbert Norris asserts that he used the money to pay for hay while he was penning the estate's cattle.

Gilbert Norris stated that he withdrew the money after his advocate, Andreas Pasqual, said that he could make the withdrawals and that Andreas Pasqual would file the paperwork. Andreas Pasqual never filed the paperwork. While Gilbert Norris was mistaken in relying on Andreas Pasqual's advice, the Court notes that the estate received some benefit from having the cattle fed because it increased their value. But Gilbert Norris was also feeding his personal/non-estate cattle at the same time. As a result, the estate is only responsible for the hay that the Court can trace to the estate's cattle. Like the other expenses, the Court will prorate the expenses based on the number of estate cattle that Gilbert Norris sold with the number of non-estate cattle that he sold during the period. *See* Attached Spreadsheet B.

Based on the calculations, Gilbert Norris over withdrew $7,838.19. As a result, the Court will offset the amount from Gilbert Norris's share in the estate.

[3] Some of the expenses could be partially attributable to his responsibilities as a range boss.

Attorney's Fees

Gilbert Norris asked for $2,940.00 in attorney's fees. Evelyn Juan, Gerard Norris, and Adrianne Tiller objected. Tohono O'odham Law does not address attorney's fees. So the Court will look to Arizona law for guidance. *See* 4 T.O.C. Ch. 1, § 1-102.

Under Arizona Revised Statute Section 14-3720, a personal representative "defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." Here, Gilbert Norris incurred the attorney's fees after the Court removed him as personal representative on September 12, 2018. Similarly, most of the legal work relates to defending against claims of malfeasance and mismanagement. *See Matter of Estate of Shano*, 869 P.2d 1203 (Ariz. Ct. App. 1993) (discussing that an estate is not responsible to pay for attorney's fees for defending claims of the personal representative's wrongdoing and violating legal duties).

The Court, however, notes that Gilbert Norris's attorney, Sidney Wolitzky, helped transferring the estate's assets to the new personal representative, Evelyn Juan. And Sidney Wolitzky provided necessary paperwork to Evelyn Juan, which facilitated opening a bank account for the estate. These expenses are reasonably related to managing the estate. *See* L.S.T. *Right of Personal Representative to Allowance, Out of Property Involved, for Attorneys' Fees or Other Expenses Incurred in Unsuccessful Effort to Claim the Property for the Estate*, 126 A.L.R. 1349 (Orig. Pub. 1940). And the Court finds that those efforts directly benefited the estate. The Court finds that $800 is reasonable for the work to transfer the estate assets to Evelyn Juan. *See In re Elerick's Estate*, 466 P.2d 778 (Ariz. Ct. App. 1970). The Court finds that the other $2,140.00 is for Gilbert Norris's representation against claims of mismanagement, and it did not benefit the estate. *See Matter of Estate of Shano*, 869 P.2d at 1203.

The Court awards Gilbert Norris $800 in attorney's fees. Evelyn Juan will pay the $800 directly to Sidney Wolitzky.

Personal Representative's Discretionary Distribution (Limited Power of Appointment)

In construing a will, the Court must follow the language used by the testator, the person who made the will. *Newhall v. McGill*, 212 P.2d 764, 766 (Ariz. 1949) ("The cardinal rules for construction of all wills is to ascertain the intention of the testator, and this intention is to be ascertain from the words of his will[.]"). The Court cannot rewrite the will for the testator or change it by construction. 96 C.J.S. Wills § 878. The Court must carry out the plain provisions of a will. *Id.*

In the May 25, 2016 order the Court reasoned that the will gave a discretionary power to the executor/personal representative. The will provides: "All have equal use and own equal shares after the Executor; Gerard N. Norris gives cattle at his discretion to; . . . ." The order viewed the clause "Gerard N. Norris gives cattle at his discretion to" as a nonrestrictive clause for the word "Executor." A nonrestrictive clause is "one that could be taken out of the sentence without changing the essential meaning. It gives additional description or information without changing the essential meaning." *See* Bryan Garner, The Redbook: a Manual on Legal Style 6 §

1.6 (3rd ed., 2013). In short, the order changed the semicolons to commas, which resulted in the clause, "gives cattle at his discretion," to be categorized as something that the executor/personal representative has the power to do.

But the will uses semicolons. The first phrase in the sentence, "All have equal use and own equal shares after the Executor[,]" is a dependent clause, which means the clause cannot stand alone as a sentence. Lester and Beason, The McGraw-Hill Handbook of English Grammar and Usage 48 (2nd ed., 2013). As a result, the semicolon use shows that the second clause, "Gerard N. Norris gives cattle at his discretion to[,]" is a restrictive appositive or elaboration at the end of the sentence. *See* Redbook 16 § 1.20. In short, the second clause provides essential information to make the sentence's meaning clear. *Id.*

The O'odham language frequently uses appositives to add additional meaning and context to a sentence. *See generally* Ofelia Zepeda, Tohono O'odham Grammar 129-36 (4th ed. 1998). And Elizabeth Norris spoke O'odham. While English grammar normally requires introductory words for restrictive appositives (i.e. *that is, for example, namely...*), O'odham does not have the same restriction. Ultimately, the second clause states what needs to happen, who needs to do it, and how it needs to be done. As a result, the clause is not a description of the executor/personal representative's responsibilities.

A limited power of appointment is a power created by a will that names a person who has the authority and discretion to give property to a limited class of individuals. *See* Limited Power of Appointment, Black's Law Dictionary (11th ed. 2019); *See also Estate Planning—Powers of Appointment*, 64 Harv. L. Rev. 185, 185-86 (1951) ("A power of appointment exists whenever a person has the discretion to determine what person are to receive beneficial interests in property or to determine the amount of beneficial interest in property to be received by certain persons"). No special words are needed to create a power of appointment. *See In re Rowlands' Estate*, 241 P.2d 781, 784 (Ariz. 1952). Instead, the Court reviews the will's grant of authority and discretion to distribute property. *See* 97 C.J.S. Wills § 1769 (describing powers of appointment). Powers of appointment, like a specific gift, are restricted to the named individual. *Id.* at § 1770. Here, the will specifically named Gerard Norris, and it gave him the authority and discretion to distribute cattle to nine individuals. As a result, Elizabeth Norris gave Gerard Norris a limited power of appointment. And the Court erred in giving Gilbert Norris the power to give cattle at his discretion. The Court vacates the May 25, 2016 order.

The will expects a limited amount of time for Gerard Norris to exercise the limited power of appointment because the phrase "after the Executor" is a condition precedent for the clause "[a]ll have equal use and own equal shares[.]" *See* J.R. Shepard, *Determination Whether Will is Absolute or Conditional*, 1 A.L.R. 1048 (Orig. Pub. 1965). Simply put, Gerard Norris has the power to conduct a roundup and then distribute the cattle at his discretion. After he completed it, any remaining cattle would equally belong to Gerard Norris, Paul Norris, Gilbert Norris, and Michael Norris.

Here, the parties have completed many sales over the past few years, and the funds are in the estate's bank account. The parties did not follow the process contemplated by the will. When

the parties cannot exactly follow the terms of the will, the Court must follow the testator's expressed intent to the extent reasonably possible. *See Newhall*, 212 P.2d at 766 ("The court will determine from the context of the will what the testator intended and give that intention effect."); *see also In re Estate of Shumway*, 9 P.3d 1062, 1065 (Ariz. 2000) ("Once the testator's intent is known, doubts should be resolved on the side of carrying out the testator's intent.").

Because of the many sales, the Court orders that the $4,928.09 in earnings from the first cattle sale on June 8, 2016 is subject to Gerard Norris's limited power of appointment.

The Court orders that Gerard Norris must chose who and how the $4,928.09 is distributed. The distribution can only go to Gilbert S. Norris, Jay D. Norris, Rayleene E. Norris, [Adrianne] Tiller, Jaden Tiller, Nadine V. Norris, Edward R. Norris, Bertram G. Norris, and/or Debbie Norris. Gerard Norris must exercise the limited power of appointment by January 3, 2020.

Gerard Norris only needs to file a notice with the Court stating who is getting some of the funds and how much each person is getting. Gerard Norris may file a notice stating that he does not want to exercise the limited power of appointment, and the Court will divide the funds equally between Gerard Norris, Gilbert S. Norris, and Michael Norris.[4] After the Court receives Gerard Norris's filing, the Court will order Evelyn Juan to issue those funds.

Final Distribution

The Court affirms its prior orders about the distribution of the estate. The Court also notes that the offsets for the overpayments to Gilbert Norris belong to the estate. These funds were from the sale of cattle, which Elizabeth Norris specifically gifted in the will. As a result, the funds belong equally to Gerard Norris, Gilbert Norris, and Michael Norris.

The Court incorporates the attached spreadsheet C, which includes a full accounting of the distribution. Based on the calculations, the Court distributes the $41,702.80 as follows:

Gerard Norris's Limited Power of Appointment	$4,928.09
Gerard Norris	$15,761.61
Gilbert Norris	$4,451.50
Michael Norris	$15,761.60
Attorney's Fees to Sidney Wolitzky	$800.00

Evelyn Juan may issue checks to Gerard Norris, Gilbert Norris, Michael Norris, and Sidney Wolitzky. Once the Court receives Gerard Norris's exercise of the limited power of appointment, the Court will order Evelyn Juan to distribute those funds.

[4] Paul Norris waived his interest in the cattle and the sale proceeds. If Gerard Norris does not exercise his limited power of appointment by January 3, 2020, the Court will divide the amount equally between Gerard Norris, Gilbert Norris, and Michael Norris.

Dated December 9, 2019.

Judge Kyle Fields

JUDICIARY

Attachment A-Vehicle Expenses

Date	Expense	Estate Cattle for the Month	Non-estate Cattle for the month	Total Cattle for the Month	Percentage	Amount owed by the Estate	Reason for denial
6/27/2015	$ 1,325.17						Denied. The expense predates Gilbert Norris being appointed as a personal representative.
6/1/2016	$ 702.00	32	19	51	62.75%	$ 440.47	
7/19/2016	$ 13.64	12	23	35	34.29%	$ 4.68	
10/25/2016	$ 55.28	14	18	32	43.75%	$ 24.19	
12/4/2016	$ 521.18	15	37	52	28.85%	$ 150.34	
5/29/2017	$ 22.73	50	39	89	56.18%	$ 12.77	
7/10/2017	$ 150.00	3	18	21	14.29%	$ 21.43	
7/13/2017	$ 5.00	3	18	21	14.29%	$ 0.71	
				Total		**$ 654.59**	

Attachment B-Withdrawals

Date	Withdrawal	Estate Cattle Worked	Non-Estate Cattle Worked	Total Cattle Worked	Percentage	Authorized Amount	Overpayment Amount	Reasoning
12/23/2016	$ 5,748.00	108	76	184	58.70%	$ 3,373.83	$ 2,374.17	
1/25/2017	$ 1,500.00						$ 1,500.00	No estate cattle were sold during that period and a prior court report stated that no estate work was done
2/24/2017	$ 1,000.00						$ 1,000.00	No estate cattle were sold during that period and a prior court report stated that no estate work was done
5/19/2017	$ 1,500.00	48	30	78	61.54%	$ 923.08	$ 576.92	
6/2/2017	$ 2,000.00	18	9	27	66.67%	$ 1,333.33	$ 666.67	
6/21/2017	$ 1,500.00	17	18	35	48.57%	$ 728.57	$ 771.43	
12/7/2017	$ 949.00						$ 949.00	No estate cattle were sold during that period
						Total	**$ 7,838.19**	

Attachment C

Base Distributions		
Funds in Estate Bank Account	$	41,702.80
Estate Expenses		
Attorney's Fees to Sidney Wolitzky	$	(800.00)
Vehicle Expenses to Gilbert Norris	$	(654.59)
Available for distribution to parties listed in the will	*$*	*40,248.21*
Less Gerard Norris's Limited Power of Appointment	$	(4,928.09)
Available for distribution to Gerard Norris, Gilbert Norris, and Michael Norris	$	35,320.12
Gerard Norris's base distribution		$11,773.38 *
Gerard Norris's adjusted base distribution	*$*	*11,773.38*
Gilbert Norris's base distribution	$	11,773.37
Reimbursement for Vehicle Expenses	$	654.59
Adjustment for overpayment from May 14, 2019 order	$	(4,126.50)
Adjustment for overpayment from December 6, 2019 order	$	(7,838.19)
Gilbert Norris's adjusted base distribution	*$*	*463.27*
Michael Norris's base distribution	$	11,773.37
Michael Norris's adjusted base distribution	*$*	*11,773.37*

Secondary Distribution (Distribution of Reclaimed Overpayments)		
Credit for Adjustment for overpayment from May 14, 2019 order	$	4,126.50
Credit for Adjustment for overpayment from December 6, 2019 order	$	7,838.19
Amount available for second distribution to Gerard Norris, Gilbert Norris, and Michael Norris	$	11,964.69
Gerard Norris's secondary distribution	*$*	*3,988.23*
Gilbert Norris's secondary distribution	*$*	*3,988.23*
Michael Norris's seconday distribution	*$*	*3,988.23*

Gerard Norris's share (adjusted base distribution plus secondary distribution)	***$***	***15,761.61***
Gilbert Norris's share (adjusted base distribution plus secondary distribution)	***$***	***4,451.50***
Michael Norris's share (adjusted base distribution plus secondary distribution)	***$***	***15,761.60***

*(due to rounding to the nearest cent)

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE COUNTY OF PIMA, STATE OF ARIZONA

TOHONO O'ODHAM NATION, Plaintiff,	CASE NO. CR07-2409-96 RE: CR-46303
vs.	
MARLON A. DICKENS, Defendant.	**ORDER**

The above captioned matter comes before the Judiciary on Defendant's MOTION TO DISMISS FOR LACK OF JURISDICTION pursuant to a WARRANT FOR ARREST issued by this Court.

Parties present: Tohono O'odham Nation's (hereinafter Nation) Assistant Prosecutor, Robert Bushkin; Defendant, Marlon Dickens, with Defense Counsel, Faithe Seota.

ISSUES BEFORE THE COURT

The Defendant contends that the Warrant for Arrest issued by this Court in response to receipt of a warrant issued by the Pima County Superior Court, State of Arizona, infringes upon the Defendant's rights as a member of this Nation; that in acquiescing to the State of Arizona the Court also infringes upon the sovereignty of this Nation; and that absent an extradition compact with the State of Arizona, this court lacks jurisdiction to issue the warrant.

The Nation objects to the dismissal of the warrant and argues that the Court does have jurisdiction. The Nation further argues that the absence of an extradition ordinance from the governing body of the Nation does not limit the power of the Court to recognize (outside warrants) pursuant to the doctrine of comity.

Issues before this Court: A) does this Court have authority to issue extradition warrant in response to warrants issued from the State Courts of Arizona or other jurisdictions absent any statue concerning the granting or prohibiting of extradition of defendants from within the boundaries of the Nation; b) in its practices of extraditing defendants, is this Court infringing upon the rights of the Nation's members; c) is this Court infringing upon the Nation's sovereignty of self-governance.

OPINION, FINDINGS AND ORDER

In its September 21, 1988 Order in Tohono O'odham Nation v. Garcia, #CR-8-1076-88, the Honorable Hilda Manuel addressed the issue of extradition. This Court has not revisited the issue until now. The present Defendant raises the additional issues that were not addressed by the Court in its 1988 Order regarding whether extradition infringes upon the Defendant's rights or on the Nation's sovereignty.

In accordance with the doctrine of comity, since the 1960's this Court has historically honored and executed warrants issued by the State Courts of Arizona for the Nation's members or other individuals within the jurisdiction of this Court who have been accused of violating state laws.

The Constitution of the Tohono O'odham Nation delineates powers of each of the Nation's branches.

Section VI of the Constitution states in applicable part:

> VI. Powers of the Tohono O'odham Council
>
> (c) To exercise the inherent powers of the Tohono O'odham Nation by providing laws, ordinances or resolutions:

> (6) To provide for the maintenance of law and order and the administration of justice; to establish law enforcement agencies; to enact law enforcement agencies; to enact criminal and civil laws governing the conduct of any person within the Tohono O'odham Nation consistent with federal laws . . .

In accordance with the powers described in the Constitution, the legislative council passed Title III of the Nation's Civil Code. Chapter I, Section 102 (1-102) entitled Tohono O'odham Law:

> ...If a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which addresses the claims asserted, the Court may in its discretion look to the laws of the State of Arizona for guidance.

This section of the civil code provides the Courts with the ability to utilize, when appropriate, the laws of the State of Arizona. It has been the customary practice of this Nation's Courts to use the extradition statutes of the State of Arizona upon receipt of a request to surrender an individual who has been accused or convicted of any offense outside the territorial boundaries of the Tohono O'odham Nation.

The practice of extradition is a matter of courtesy and goodwill between this Nation and other jurisdictions. It is done on a case by case basis after a hearing before a tribunal. The formal process encompassed in the procedure used by the Court to recover wanted fugitives affords protection to individual rights and encourages respect for the territorial integrity of our Nation.

This practice has developed out of a recognition that effective law enforcement is needed to protect everyone within state and tribal boundaries and to bring to justice those who commit crimes anywhere within state or tribal boundaries.

The Court therefore rejects the arguments that the Court lacks authority to extradite without passage by the Council of a specific extradition statute or that the extradition infringes upon the rights of defendants or upon the sovereignty of this Nation, and sets this matter for hearing on December 30, 1996.

SO ORDERED THIS 5TH DAY OF DECEMBER, 1996.

Rose Johnson

JUDGE, ROSE JOHNSON

In the Judicial Court of the Tohono O'Odham Nation
County of Pima, State of Arizona
Criminal Division

Tohono O'odham Nation Plaintiff	]	Case No. CR09-3612-00
v.	]	ORDER Hon. Pogo Overmeyer
Lemuel T Vincent Defendant.	]	Criminal Division

This matter came before this Court on a writ for habeas corpus hearing. Present for the Nation was George Traviolia. Defendant was present and was represented by Delbert W Ray. Court heard oral arguments on the writ of habeas corpus.

PROCEDURAL AND FACTUAL BACKGROUND

On November 2, 1998, the Defendant entered into a plea agreement in case number CR08-2375-2377-98 in which he pled guilty to one count of aggravated assault and the other two counts were dismissed. Per the terms and conditions of the plea agreement, the Defendant was to serve three hundred sixty days of detention, which was suspended for two years of supervised probation; he was to complete 200 hours of community service; he was to obtain alcohol and substance abuse evaluation and counseling; he was to maintain full time employment; he was subject to random breathalyzer checks; and he was to have no contact with Richard Felix for a period of two years. Further

conditions of probation were imposed upon the Defendant when he signed his probation conditions with the probation department on November 2, 1998. The conditions and regulations of probation of the Tohono O'odham Nation are similar to the terms and conditions of probation which are imposed on probationers in state and federal cases.

On June 12, 2000, the Tohono O'odham Adult Probation Department filed a Petition to Revoke Probation. That petition was ultimately dismissed on July 3, 2000.

On September 7, 2000, the Tohono O'odham Adult Probation Department filed a second Petition to Revoke Probation. It was alleged that the Defendant had violated the terms and conditions of probation by having been arrested and convicted in another court, that the Defendant failed to inform his probation officer of the incident and conviction, that the Defendant had failed to complete the court ordered 200 hours of community service, and that the Defendant had failed to submit himself to alcohol counseling as ordered by the court.

An arrest warrant for the Defendant was issued by the Tohono O'odham Court. The Defendant was arrested on the warrant on the Ak-Chin Nation, where he unsuccessfully fought extradition. The Defendant was brought to the jurisdiction of the Tohono O'odham Court on January 25, 2001, and the Defendant was held without bond pending his arraignment on January 29, 2001. At arraignment his release conditions were affirmed pending his probation

revocation hearing. On January 29, 2001, Counsel for Defendant filed the Writ of Habeas Corpus and this Court heard oral argument on February 6, 2001. At that time the Defendant's release conditions were modified and this Court took the writ under advisement.

LEGAL ARGUMENTS

Defendant argues in the writ of habeas corpus that this Court unlawfully sentenced the Defendant to a term of probation which exceeded the lawful statutory term of imprisonment. Defendant argues that the probationary period of two years is in violation of the Indian Civil Rights Act, 25 U.S.C. §1300, et. al, since the Act limits the imprisonment term of tribal courts to one year.

In support of his argument, Defendant states that the Indian Civil Rights Act, 25 U.S.C. §1302(7), hereinafter ICRA, limits the tribal courts from imposing any punishment greater than a term of one year imprisonment or a fine of $5,000 or both. Defendant argues that the Tohono O'odham Tribal Council, in exercising its proper powers pursuant to the Tohono O'odham Constitution, Art. V, Art. VI(c)(6), limited the court's ability to punish any person beyond the prescribed statutes as written in the Tohono O'odham Criminal Code. The criminal code specifically recognizes the limitations of ICRA and requires that the courts follow ICRA's mandates. Criminal Code of the Tohono O'odham Nation, Res.No. 107-88.

Defendant states the court is even further limited by §7.2(B) of the code. supra. That section states that the maximum punishment upon a finding of guilt for aggravated assault is imprisonment for 360 days. Therefore, Defendant argues the court overreached its statutory authority by imposing two years of probation for the suspended 360 days of detention.

Defendant then argues that this Court must follow the legislative history of the Tohono O'odham Legislative Council. Defendant points to the legislative history found in the Criminal Code of the Tohono O'odham Nation, §1.11. Defendant argues §1.11 is controlling in that it allows the courts discretion to impose other remedies but only within the limitations of ICRA. This is due to the fact that pursuant to §1.11(A), the court is limited to the limitations of imprisonment and fines imposed by ICRA for those offenses under the Tohono O'odham Criminal Code which have no specific penalty. Thus §1.11(A) must be read to control all other paragraphs of the section. Defendant argues no state or federal law is controlling in this case nor can it be considered by the court, since state and federal case law does not interpret the mandates of ICRA.

Defendant agrees there is no federal legislative history concerning the limitations of tribal courts in imposing probation pursuant to ICRA. However, Defendant argues the tribal courts of the Salt River Nation, the Gila River Nation and the Fort McDowell Nation use consecutive sentences in order to extend

probation beyond the 360 day limitation imposed by ICRA. Defendant argues that these tribal nations recognize that ICRA allows for consecutive sentences but does not allow for extended probation beyond the statutory limitation of ICRA's sentences for imprisonment. Defendant could not provide this Court any documentation beyond Defense Counsel's own experience in his practice on those nations.

Counsel for the Nation agrees with Defendant that ICRA limits the imprisonment and fines that a tribal court may impose. However, the Nation argues the Court did not overreach its statutory authority in the case because the Criminal Code of the Tohono O'odham Nation, §1.11(B)(3) gives the Court discretion to impose probation in lieu of imprisonment. The Nation further argues that there is no language in the criminal code limiting the length of probation time that may be imposed by the Court. The Nation presented no federal legislation or case law on ICRA concerning the issue of probation.

The Nation argues that it has been the practice of this Court, as well as other federal and state courts, to impose a period of probation which is in excess of the statutory term of imprisonment for a criminal charge. This is due to the fact that the purpose of probation is to give a defendant a chance for rehabilitation.

In support of this argument, the Nation states that the Colorado Court has held that probation can exceed the maximum

presumptive sentence because the purpose of probation is to be rehabilitative and not punitive. People v. Flenniken, 749 P.2d 395 (Colo. 1988). The Nation also argues that the United States Supreme Court, in Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503 (1969), has held that the purpose of probation is to afford a person an opportunity to rehabilitate himself without confinement to an institution. Furthermore, the United States Supreme Court has held that probation, including any accompanying conditions on probation, is far less intrusive than incarceration. United States v. Nachtigal, 507 U.S. 1, 113 S.Ct. 1072 (1993).

The Nation argues that while federal and state case law does interpret specific statutes that impose limitations on the amount of time to which a person may be sentenced to probation, the Tohono O'odham criminal statute is silent on that issue. Nation argues that the term ''discretion'', as used in the criminal code statute means the court is free to determine how long the probationary period should be. The Nation argues that if this court were to adopt the Defendant's position in the reading of §1.11(A), then it would divest the court of any discretion in imposing other remedies listed under §1.11(B).

LEGAL ANALYSIS:

In analyzing the legal issue presented, the Court rejects the Defendant's argument that this Court cannot look to federal or state law in determining the issue. This Court notes that the

interpretation of ICRA to allow for the consecutive sentencing (as was argued by Defendant) was determined and ruled upon by a federal court. See Ramos v. Pyramid Tribal Court, Bureau of Indian Affairs, 621 F.Supp. 967 (D.Nev. 1985). Matters involving ICRA can and are routinely ruled upon by federal courts.

The ICRA proscribes limitations upon tribal courts when exercising criminal jurisdiction over Indian peoples in tribal courts. In doing so, the federal courts have held that when language of ICRA closely tracks the language of the United States Constitution, Bill of Rights, federal law is to be controlling. Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1975). However, in determining issues involving civil liberties, federal courts have taken the position that interpretation of ''…those guarantees [basic liberties] incorporated by the ICRA not be unduly disruptive of tribal culture…[and should], where possible, be harmonized with tribal cultural and governmental autonomy.'' Confederated Tribes v. Bureau of Indian Affairs, 353 F.Supp 629, 633 (1973).

In the case of criminal punishments, ICRA proscribes that tribal courts may not impose a fine of more than $5000.00 and/or impose a detention sentence of 360 days. 25 U.S.C. §1301(7). However, ICRA is silent on the issue of probation and the length of probation which may be imposed. When a statute is silent on a particular issue, the Court looks to the legislative intent in

passing laws and in particular when viewing a statute. In the instant case, the Court has researched and been unable to locate any legislative history concerning Congress' position on probation under ICRA. Felix Cohen's authoritative handbook regarding Federal Indian Law states that there are three principals of federal Indian law: 1) tribes possess all powers of sovereign state; 2) the conquest of the tribes terminated their external sovereignty and rendered their internal sovereignty subject to Congress; 3) absent congressional or treaty qualifications to the contrary, tribes continue to possess all the attributes of internal sovereignty. Felix Cohen's Handbook on Federal Indian Law, pg. 123, (Univ. of N.M. photo.reprint, 1970)(1942). Counsels have not presented this court with any treaty, other federal congressional statute or federal case law which divests the Tohono O'odham Nation of the power to impose probation. This leaves the Court of the firm opinion that since there is no specific statute or legislative history directly proscribing the authority of the tribal nation to impose probation, then the tribal authority to impose probation and other forms of sentencings remains intact. This is consistent with tribal governmental autonomy which is the very essence of tribal sovereignty.

Because this issue involves a possible interpretation of ICRA, this Court looks to federal law for guidance. In cases in which the federal courts have interpreted the various federal

probation statutes, the federal courts have held that the period of probation may exceed the maximum incarceration allowable for the offense. Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503 (1969) reh. denied 396 U.S. 869, 90 S.Ct. 34; United States v. Nunez, 573 F.2d 769 (2nd Cir., 1978), cert. denied 436 U.S. 930, 98 S.Ct. 2828. In these cases, the federal courts were confronted with statutes that were similar to the statute at issue in this case.

Many of the federal statutes that allow for federal probation did not proscribe a time period. Thus federal courts needed to look to statutory construction for their opinions. Probation is a statutory creature, thus probation statutes are remedial and statutes are to be construed liberally. Reeves V. U.S. 35 F.2d 323 (8th Cir., 1929). When a court sentences a defendant to probation, it may impose any conditions that are authorized by statute or are reasonably related to protecting the public and rehabilitating the defendant. U.S. v. Hussong, 778 F.2d 567 (10th Cir. 1985); U.S. v. Holloway, 740 F.2d 1373, (6th Cir., 1984), cert. denied 469 U.S. 1021, 105 S.Ct. 440.

In reading the statute as is found in the Criminal Code of the Tohono O'odham Nation, §1.11 the Court finds that the entire section must be read as a whole. It is not consistent to read only one part of a statute when there are several sections to the statute. To accept Defendant's argument that Section 1.11(A) controls all the other paragraphs would mean that the rest of the

section would be null and void. The Court does not accept this argument as it does not believe that the framers of the Tohono O'odham Criminal Code would have written and passed the rest of the section had their true intent meant to be that there would only be fines and imprisonment.

Using this approach, the Court notes that other types of remedies are allowed under the tribal criminal code, namely labor for the public purpose of the tribal nation, restitution, rehabilitation by an agency approved by the court, parole or equitable relief that includes temporary or permanent injunctions and a peace bond. supra, §1.11(B)(1),(2),(3),(4),(5),(6). ICRA does not address the issue of whether or not a tribal court, in exercising criminal jurisdiction, may impose any of these other types of remedies. The Tohono O'odham Court of Appeals has not issued an opinion determining this issue. Thus making this a case of first impression for the Court. It is this court's opinion that all the remedies listed under Section 1.11, as well as other probation requirements are also allowed under ICRA as a function of the internal sovereign powers of the tribal nation.

The Court then turns to Section 1.11(B), which states ''[t]he court *may in its discretion*,…order in addition to, or in lieu of…any of the following rememdies.'' Supra, italics added for emphasis. The Tohono O'odham Criminal Code does not define the word ''discretion'' and thus the Court looks to the word's common meaning. The word ''discretion'' is defined in The

American Heritage College Dictionary as ''…the ability or power to decide responsibly and the freedom to act or judge on one's own.'' Given this definition, it is this Court's opinion that as long as a judge gives proper consideration in her determination to place a Defendant on probation, even for a period longer than the proscribed jail sentence, the judge has not violated ICRA or any tribal authority. Of course, the length of time and other proscriptions that come with probation must be rationally related to a proper governmental purpose, which is the restoration of the Defendant to be a good citizen of his tribal nation.

The Court then turns to the argument by Defendant that probation is a form of punishment, thus requiring that the probation period not be longer than the jail sentence which could be imposed by the criminal statute. Probation is ''…an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.'' Cooper v. United States, 91 F.2d 195 (5th Cir. 1937). Probation, like parole, is intended to be a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency. Zerbst v. Kidwell, 304 U.S. 359, 58 S.Ct. 872 (1938). In either case, ''…the liberty of the individual…is abridged in the public interest.'' Korematsu v. United States, 319 U.S. 432, 434; 63 S.Ct. 1124, 1126 (1943). Probation provides the defendant with ''…an opportunity to rehabilitate himself without institutional confinement under the tutelage of a

probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity.'' Roberts v. United States, 320 U.S. 264, 272, 64 S.Ct. 113, 117 (1943). Given that probation is considered a mild form of punishment and given that federal courts have adopted the position that probation may be longer than the statutory prison sentence, this Court finds that Defendant's argument fails. It would be virtually impossible for someone to receive long term rehabilitative in-patient treatment, followed by long term outpatient treatment, if the penalty for the crime were only for ninety days. This would be true whether the treatment were for drug abuse, alcohol abuse or for domestic violence. It is these situations, and many others, which are most likely contemplated by courts when placing a defendant on probation for a period of time.

IT IS HEREBY ORDERED by this Court:

1. This Court had proper personal and subject matter jurisdiction to hear the matter.
2. This writ of habeas corpus was the proper action to be taken by the Defendant upon the legal arguments made to the court.
3. The Defendant is hereby ordered to appear in court for the probation violation hearing which is set for September 10, 2001 at 10:00 a.m.

Done in open court this 31st day of July 2001.

Patricia Overmeyer

Judge Patricia "Pogo" Overmeyer
Tohono O'odham Judicial Center

In the Judicial Court of the Tohono O'Odham Nation
County of Pima, in the State of Arizona

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Lemuel Theodore Vincent
Defendant

TRIAL RECORD ENTRY

Case No. CR09-3612-00

OFFENSE(S) ____
COURT DATE: ~~September 24, 2001~~ TIME: ____ BOND POSTED:
CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☐ Hearing
☐ Jury Trial ☐ Bench Trial ☐ Pretrial
☐ Sentencing ☐ Parole Hearing ☒ Other
Probation Violation

DEFENDANT: (x) Present ( ) Not Present
DEFENSE COUNSEL: (x) Present D Ray ( ) Not Present ( ) Pro Se
PROSECUTORS: (x) Present A Osborne ( ) Not Present
PROBATION OFFICER: (x) Present L Chavez ( ) Not Present

IT IS ORDERED:

____ The Defendant is found Guilty of:

____ The Defendant is found Not Guilty of:

__x__ The Defendant Pled: ( ) Guilty ( ) Not Guilty ( ) No Contest
(x) Admit ( ) Deny

TO: CR09-3612-00 Probation Violation

__x__ Set for: Disposition Hearing October 22, 2001 at 1:30 p.m.

____ The following charges are dismissed:

( ) with prejudice ( ) without prejudice

____ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Lemuel Theordore Vincent
CASE NO. CR09-3612-00

IT IS FURTHER ORDERED that the Defendant:

_____ Pay a fine of $_____. ( ) Suspended ( ) Fine Agreement allowed

_____ Pay $_____ Per month beginning _____ until fine is paid in full.

_____ Shall complete _____ hours of community service by:

_____ Be committed to tribal jail for a period of:

_____ Be placed on: ( ) supervised ( ) unsupervised probation ( ) Deferred Sentence ( ) Parole Granted

For:

_____ Shall attend: ( ) Defensive Driving ( ) Alcohol/Drug Evaluation

( ) Alcohol/Drug Education ( ) Alcohol/Drug Treatment

BY:

_____ Shall enroll in:

Counseling by:

And shall show proof of completion to Court by:

_____ Defendant not eligible for parole/work credit during first _____ days.

_____ Defendant eligible for work release from _____ ___.m. to _____ ___.m.

_____ Defendant may drive a motor vehicle between hours of _____ ___.m. and _____ ___.m.

AND THAT: Bond in the amount of: _____ is hereby.

( ) exonerated ( ) converted ( ) forfeited ( ) All processing fees be paid by

Defendant. ___Money Order = $0.85
___Postage = $0.32
___Certified Mail = $2.45

_____ Refund BOND in the amount of $

( ) Issue Bench Warrant ( ) Quash Bench Warrant ( ) Conditions:

ADDITIONAL ORDERS: Defense Counsel Motion to Dismiss for the reason that the Nation has not provided the Court with a certified copy of the Ak-Chin Tribal Court Record Entry showing the conviction of the Defendant while he was on probation. Defense Counsel argues that the Ak-Chin conviction is the underlying charge for the revocation of probation. Defense Counsel argues the Nation had plenty of time to produce the document if they were to use it. Nation argues that now is the time to submit the proof of the violations and that they are not required to use the certified copy of the tribal court conviction as they have others who can testify to the conviction.

Defense Counsel then argues that the certified copy of the conviction perfects the petition to revoke probation, thus it is necessary for the petition to revoke probation. Defense Counsel Motion to Preclude the witnesses from testifying as he was not properly apprised by the Nation that they would be called to testify.

Court notes that pursuant to Administrative Order III, this Court follows the Arizona Rules of Criminal Procedure and Arizona Rules of Evidence in the absence of any Tohono O'odham Court Criminal Rules of Procedure or Rules of Evidence. This Court is not aware of any Tohono O'odham Criminal Rules of Procedure or Rules of Evidence governing the disclosure of witnesses, etc. for probation violation hearings. Thus the Court looks to the Arizona Rules of Criminal Procedure and the Arizona Rules of Evidence.

Pursuant to Rule 27.7(b)(3), Ariz.R.Crim.P., the standard of evidence for probation violation hearings is a preponderance of the evidence and that the judge may receive ***any reliable evidence not legally privileged, including hearsay.*** Italics added for emphasis. The Court finds that the Ak-Chin Tribal Court Record Entry concerning the conviction is not certified in any way, therefore the Court bars its admittance into evidence.

TOHONO O'ODHAM NATION VS. Lemuel Theordore Vincent
CASE NO. CR09-3612-00

However, the Court holds that the Nation may produce witnesses who can testify as to the conviction from Ak-Chin Tribal Court and that they may refer to the document. The Court further notes that the Ak-Chin arrest and conviction is not the only allegation of probation violation filed with the court. Other allegations include the failure of the Defendant to perform community service hours and to attend alcohol counseling. The Court therefore denies the Defendant's Motion to Dismiss.

As to the Defendant's Motion to Preclude Witnesses, the Court looks to Rule 16.2(b) & (c), Ariz.R.Crim.P. concerning the filing of timely motions. The Court notes that Rule 16.1(b) pertains to the filing of motion prior to trial and that the time limits for those motions would be different concerning probation revocation hearings if the Defendant had not waived the time frames required under Rule 27, Ariz.R.Crim.P. concerning the setting of the revocation hearing. The Court then notes that Rule 16.1(c) requires that any motion, defense, objection, etc. that is not timely raised is hereby precluded unless the basis would not have been known and by the exercise of reasonable diligence the party would not have known about it. The Court notes that Defense Counsel had filed a Notice of Appearance on January 26, 2001 and that Defense Counsel was aware of the allegations surrounding the Petition to Revoke from that time. The Court further notes that Defense Counsel was informed of the instant hearing in early August, such that he had requested a continuance of this hearing. Court notes that Defense Counsel had plenty of time to file the proper motions to request all disclosure and to determine what witnesses would have been called. The Court therefore denies the Defendant's Motion to Preclude Witnesses.

Court took a brief recess.

Upon reconvening, the Court was informed that the Defendant would change his plea. Court proceeded with change of plea. Court finds that the Defendant knowingly, voluntarily and intelligently waived his rights and changed his plea. Court has personal jurisdiction, proper venue and finds factual basis. Court accepts plea. Court grants Defense Counsel's motion to allow the Defendant to remain out of custody pending the Disposition hearing. All conditions of release previously ordered hereby remain in full force and effect. Defendant given oral notice of Disposition Hearing.

September 24 2001
DATE

Patricia Kennedy
JUDGE

DISTRIBUTION: (1) COURT (2) PROBATION (3) DEFENDANT (4) PROSECUTOR (5) DEFENSE ATTORNEY

092501

TOHONO O'ODHAM NATION
JUSTICE CENTER

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
100312 | 11:30am
DATE/TIME
COURT CLERK

In the Judicial Court of the Tohono O'odham Nation

County of Pima, In the State of Arizona

Adult Criminal Division

TOHONO O'ODHAM NATION Plaintiff, vs. MARTIN MANUEL, Defendant.	Case No.: 2011-4247-4253CR ORDER

The hearing on the Defendant's Motion to Dismiss was held on September 20, 2012. Present were David Oliver, Tohono O'odham Advocate Program attorney for Defendant, Martin Manuel, and Cindy Burnett, Assistant Prosecutor, the Tohono O'odham Nation.

The Defendant moves to dismiss the charges that are alleged to have occurred between 1985 and 1987. The complaint was filed on December 13, 2011. The Defendant's argument is that there was a one year statute of limitation for criminal charges at the time of the commission of the offenses, and the one year period expired well before the filing of the charges.[1] It appears that the Defendant assumes that the one year period began to run as of the date of the commission of the offense. The Defendant does not present evidence or

[1]Criminal Code of the Tohono O'odham Nation, Chap 1, §1.5. A. No person shall be prosecuted,...unless a complaint has been filed against the alleged offender within one year after discovery an offense has been committed. (Pre-2009 law.)

argument that the Tohono O'odham Police were informed of the offense(s) prior to the time the Nation claims the alleged victim reported the incident.

The Nation argues that the applicable statute of limitation at the time the complaint was filed provides:

> No person shall be prosecuted, fined or punished for any criminal offense unless a complaint has been filed against the alleged offender within three years after discovery of the offense by the Tohono O'odham Nation Police Department, or the reporting of the offense to Tohono O'odham Nation Police Department. When the offense is based on a series of acts performed at different times, the period of limitation prescribed by this section will begin at the time when the last act alleged to have been committed is discovered." §1.5.A., Chap. 1, Tohono O'odham Nation Criminal Code. (Effective September 16, 2009, Leg. Council Res. No. 09-494).

Defendant cites *Stogner v. California*, 539 U.S. 607 (2003) in support of his argument that the pre-2009 statute of limitation period applied, and that application of the 2009 amended provision would constitute a violation of the *ex post facto* clause of the Indian Civil Rights Act ["ICRA"], 25 U.S.C. §1302(9).

The ICRA imposes some of the same restrictions upon Tribal governments that the Bill of Rights of the United States Constitution imposes upon the federal government. 25 U.S.C. §1302(9) provides that "no Indian tribe in exercising powers of self-government shall pass any bill of attainder or ex post facto law."

The Constitution of the Tohono O'odham Nation provides in Article III, §4, that the rights specifically listed in Article III are not meant to deny or abridge other rights of the people guaranteed by the ICRA.

The *Stogner* case is distinguished from the instant case, because there was no question that the statute of limitations had expired and California could

not prosecute Stogner. However, California proceeded against Stogner for sex-related child abuse under a new law that authorized the state to prosecute such crimes where the prior limitation period had expired, if the following applied: (1) a victim reported the allegation to the police; (2) there was independent evidence clearly and convincingly corroborating the allegation; (3) and the prosecution began within one year of the report to the police. The United States Supreme Court held that this statute violated the *Ex Post Facto* Clause of the United States Constitution. California could not prosecute Stogner once the original statute of limitations period had expired, and the law intended to revive the time-barred prosecutions was an *ex post facto* law, invalid under the U.S. Constitution.

In the instant case there is no evidence that the offenses were discovered by the Tohono O'odham Police prior to November 19, 2010, when the Nation claims that the police were notified of the offense. Discovery of the offenses is the trigger that would have begun the running of the limitations period under the pre-2009 law and the current law.

The Trial Court decision in *Tohono O'odham Nation v. Max A. Chavez*, 3 TOR 53 (2010), is applicable and persuasive. The *Chavez* decision construed the pre-2009 §1.5.A. to mean that the offense had to be discovered by the authorities before the limitations period would begin to run. *Id.*, 3 TOR at 55. The court believes that is the correct reading of the provision.

The statute of limitations period under the pre-2009 law had not expired when the amendments to the Criminal Code, including §1.5.A, were made in

2009. The 2009 amendment to §1.5A, creating a three year period from the date of the report to police for prosecution of the offenses, does not appear to have been adopted to revive any prosecutions barred by time. This case was not time-barred when the amendment became effective, and the new statute of limitations applies to this case. *Stogner*, *supra,* does not apply, and Defendant has not presented any other evidence or precedent that would support a finding that the e*x post facto* clause of the ICRA was violated in this case.

The Defendant also argues that due process would require dismissal given the passage of time and the hardship involved. Defendant has not provided support for this claim and, therefore, the Court is not persuaded that these concerns, although serious, are sufficient to require dismissal of the complaint.

IT IS ORDERED denying the Defendant's Motion to Dismiss. The Bench Trial in this matter remains on schedule for January 9 and 10, 2013 at 9 a.m.

ISSUED ON OCTOBER 3, 2012.

Violet Lui-Frank, Judge

Fwd: Def. Dr. Dmc Prob 10/23/12

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IN THE
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OF THE
TOHONO O'ODHAM
NATION
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In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Adult Criminal Division

TOHONO O'ODHAM NATION, Plaintiff, vs. FERNANDO BENITEZ OCHOA. Defendant.	Case No.: CR12-3607-3611-02 ORDER

Court Finds as follows:

1. On January 1, 2003, Defendant was initialed and arraignment was set for January 13, 2003. He received and signed a copy of the Release Conditions and Order. Court ordered a $500 bond.
2. On January 11, 2003, Rachel Ross, the victim, posted a $500 bond and the Defendant was released.
3. On January 13, 2003, Defendant failed to appear at arraignment. Defendant claims he was in custody and not brought to court. The Defendant had been released on January 11, 2003, and there was no indication he was being held on other charges or by another court.
4. On January 13, 2003, the Court ordered a bench warrant for the Defendant and a bond forfeiture hearing on January 27, 2003. Defendant was mailed a copy of the Advice of Rights Trial Record Order. The copy was mailed to 5626 W. Louisiana, Tucson, AZ 85746.
5. There is nothing in the court file indicating the copy was returned to the court.
6. The bond forfeiture hearing was rescheduled for May 1, 2003, and a copy of the summons was mailed to Defendant at 5626 W. Louisiana, Tucson, AZ 85746, certified receipt requested, and was signed for by Gloria Ochoa on April 12, 2003.
7. After numerous continuances, hearings, and an appeal, the $500 bond was exonerated. There is no indication in the file that the Defendant attended any of the proceedings.
8. On September 17, 2012, the January 13, 2003 bench warrant was served on the Defendant. He was initialed again on September 17, 2012 and was arraigned on

September 24, 2012. The September 24, 2012 arraignment begins the speedy trial clock pursuant to Rule 5 of the Tohono O'odham Rules of Criminal and Traffic Procedure.

9. On December 21, 2012, a pretrial hearing was held and the Defendant requested a continuance to obtain representation. The time between September 24, 2012 and December 21, 2012 is included time of 88 days.
10. The December 21, 2012 request for a continuance by the Defendant tolled the speedy trial clock.
11. On February 14, 2013, David Oliver filed an appearance for the Defendant and appeared at the pretrial hearing held on February 15, 2013. Trial was scheduled for May 2, 2013. The record does not show the Defendant waived a speedy trial at that hearing.
12. On April 26, 2013, Defendant filed a Motion to Dismiss based on the speedy trial rule.
13. On May 1, 2013, the parties filed a stipulated motion to continue the bench trial, which once again stopped the clock. The time between February 15, 2013 and May 1, 2013 is included time of 75 days, for a total of 163 days.
14. Rule 5 of the Tohono O'odham Rules of Criminal and Traffic Procedure states in part as follows:

> (a) Speedy Trial. Every person against whom a complaint is filed shall be tried within 120 days from the person's arraignment, except for those excluded periods set forth in Subsection (b) of this Rule.
> (b) Excluded Periods. The following periods shall be excluded from the computations of the time limit set forth in Subsection (a) above.
> (1) Delays occasioned by or on behalf of the defendant, including, but not limited to delays caused by an examination and hearing to determine competency or mental retardation, the defendant's absence or incompetence, or his or her inability to be arrested or taken into custody on the Tohono O'odham Nation.

Discussion:

Defendant argues that the burden was on the Nation to continually notify the Defendant of court dates after he did not appear at the January 13, 2003 arraignment and that he is not considered absent if not continually advised by the Court of court dates. The Court does not find this argument either persuasive or relevant. While an analysis by the parties of their interpretation what time periods were included time periods and which were not was omitted in their arguments, a plain reading of Rule 5 provides that the 120-day clock does not start until a defendant is arraigned. Since the Defendant was not arraigned on January 13, 2003, the 120 day clock did not start until he was actually arraigned on September 24, 2012. Furthermore, the rule clearly states the delays occasioned by the Defendant, including the absence of the Defendant, are excluded when calculating the 120 days. If the Defendant had been arraigned on January 13, 2002, the clock would have stopped because of his absence. The speedy trial clock was again tolled between the Defendant's requests for a continuance on December 21, 2012 until the pretrial hearing on February 15, 2013. The number of days between the Defendant's arraignment on September 24, 2012 until his request for a continuance to obtain

representation on December 21, 2012 is 88 days. The time between the pretrial hearing on February 14, 2013 when he had obtained representation and the stipulated continuance granted on May 1, 2013 is 75 days. The total included time is 163 days.

Court Orders as follows:
The Defendant was not tried within 120 days as required by Rule 5 and the charges are dismissed.

Dated this 22th day of July, 2013.

Walter Marcus, Judge

fwd: TT; Prob; DC; Det; Def. 072313 TC

TOHONO O'ODHAM NATION JUSTICE CENTER

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M. Sanchez
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In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Adult Criminal Division

TOHONO O'ODHAM NATION,

Plaintiff,

vs.

JALEN JUSTIN JUAN

Defendant.

Case No.: 2012-0838CR

COURT ORDER

Defendant has been charged with a probation violation. The charge was initiated by a petition to revoke probation filed by a Probation Officer, and not by a complaint pursuant to Section 2.15 of the Tohono O'odham Criminal Code. In cases 2010-1717/1718/1720/1721CR, 2010-1595CR, and 2010-3458/34593460CR the Defendant was sentenced to 320 days in Correction to be served, and 460 days as indicated in the summary, suspended for one year of supervised probation. The suspended days are allocated in the three separate incidents as follows: 2010-1717/1718/1720/1721CR – 200 days, 2010-1595CR – 50 days, and 2010-3458/3459/3460CR – 270 days for a total of 520 days. This total is different than the total in the summary of the plea agreement of 460 days. In the event the Defendant is found to have violated his probation, the suspended sentence of 520 days could be imposed.

The Defendant has admitted the probation violation and the case is scheduled for disposition. The Defendant has indicated that he would like the Court to appoint a state-licensed attorney to represent him pursuant to Section 1108 of Title 6, Chapter 1, Article 1 of the Tohono O'odham Code, and Rules 3 and 4.2 of the Tohono O'odham Rules of Criminal and Traffic Procedure.

The Indian Civil Rights Act as amended by the Tribal Law and Order Act provides that an indigent defendant has the right to effective assistance of legal counsel in a criminal proceeding at the expense of the tribal government when the tribe imposes a total term of more than one year on the defendant. 15 U.S.C. §1302(c)(1). The Tohono O'odham Code in Title 6, Chapter 1, Article 1 §1108(B)(1) guarantees that "[A]n indigent defendant shall have the right to a state-licensed attorney at the expense

imprisonment of more than one year is actually imposed." Although similar to the Bill of Rights in the United States Constitution, the Indian Civil Rights Act does not provide the same guarantees. The right to legal counsel at the Nation's expense in a criminal proceeding is only triggered when a defendant is indigent, and when the sentence imposed is greater than one (1) year.

The Nation has not determined if it will seek a sentence of more than one year, but with the understanding that it still objects to the Court appointing a state-licensed attorney to represent a Defendant in a probation revocation. The Nation argues that the Defendant is not entitled to have the Court to appoint a state-licensed attorney to represent the Defendant since the Code and Rules allow appointment only in "criminal proceedings" and that the sentence was previously imposed.

Defendant's cases represent three separate incidents and none of the sentences in each separate incident total more than a year in Corrections Therefore, the Defendant is not eligible for a court-appointed state-licensed attorney at the Nation's expense. The Court finds that the Defendant does not meet the criteria of to Section 1108 of Title 6, Chapter 1, Article 1 of the Tohono O'odham Code and Rules 3 and 4.2 of Rules of Criminal and Traffic Procedure, and the Court may not appoint a state-licensed attorney to represent him at the Nation's expense.

Dated this 19th day of June, 2014.

Walter Marcus, Judge

NATION
JUSTICE CENTER

Fwd: TI, Prob. Def., Det. 061914 MP

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Adult Criminal Division

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JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
03/17/15 @ 2:30pm
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TOHONO O'ODHAM NATION,

Plaintiff,

vs.

ERIC GARCIA,

Defendant.

Case No.: 2014-1092-1096CR

COURT ORDER

On August 20, 2014, the Defendant, Eric Garcia, by and through his legal counsel, David Oliver of the Tohono O'odham Advocate Program, filed a Motion to Compel Disclosure requesting the victim's "juvenile criminal record". On October 24, 2014, the Nation responded, by and through George Traviolia, Chief Prosecutor. On February 27, 2015, the Court heard oral arguments.

The Court has reviewed the written and oral arguments of the Defendant and the Nation, as well as the cases and code sections cited. The Court does not address the Nation's proposition regarding the Defendant's lack of disclosure. Request for discovery penalties or sanctions should be filed as a motion, not initiated within a responsive pleading.

The Tohono O'odham Children's Code, 3 TOC Ch.2, in Sections 21701 and 21702 provides that the Court and law enforcement records of juveniles are confidential, and sets forth the categories of individuals who may view the juvenile records without a court order. These Sections also provide the standard by which a person not specifically

named may seek a court order to inspect a case. Section 21701 provides, in pertinent part:

> A record of all hearings under this Code shall be made and preserved. All juvenile Court records shall be confidential and shall not be open to inspection to any but the following:
> (E) by order of the Court, any other person having a legitimate interest in the particular case or work of the Court.

Section 21702 provides, in pertinent part:

> Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement records shall be confidential and shall not be open to inspection to any but the following:
> (G) by order of the Court, any other person having a legitimate interest in the particular case or the work of the Court.

The Court finds that *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) concerns a similar fact pattern and is the most dispositive case in this matter. As in *Pennsylvania v. Ritchie*, the Defendant is requesting the juvenile records of the minor victim. The Nation's laws regarding juvenile records, like the laws of Pennsylvania, provide that the information may be disclosed in certain circumstances by court order. (See 3 TOC Ch. 2 §§ 21701(G), 21702(G); *Pennsylvania v. Ritchie*, at 57-58).

The United States Supreme Court held in *Pennsylvania v. Ritchie* that

> [a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files. Although the eye of an advocate may be helpful to a defendant in ferreting out information, this Court has never held – even in the absence of a statute restricting disclosure – that a defendant alone may make the determination as to the materiality of the information. *Pennsylvania v. Ritchie*, at 59 (internal citations omitted).

The Supreme Court determined that the best method of preserving the defendant's interest as well as that of the Commonwealth was for the juvenile files "to be submitted only to the trial court for *in camera* review." *Id.*, at 58.

This Court finds based on the previous that the Defendant has a right to discover exculpatory evidence, which includes juvenile records if the Defendant establishes, pursuant to the Children's Code, a legitimate interest in the particular case. The Court finds that to properly balance the interests of the Defendant and the compelling interest of the Nation in protecting its youth, the juvenile records are subject to *in camera* inspection by the Court prior to disclosure in this matter. The Court also notes that while the juvenile records are not "juvenile criminal records" pursuant to the Tohono O'odham Children's Code, the context for the purposes of Defendant's motion is clear and the incorrect terminology is not grounds for dismissal.

The Court Orders that the juvenile records may be disclosed, subject to the following procedure:

1. By March 25, 2015, the Nation shall provide to the Defendant a written list of the types, categories, and correct names of the juvenile records it possesses or controls in the course of regularly conducted activity.

2. Within ten (10) days of receiving the list from the Nation, if the Defendant seeks disclosure of any of the documents listed, the Defendant shall file a motion for such disclosure. The motion must set forth grounds supporting legitimate interest, identify the records requested, set forth how the records may contain information material to the Defendant's defense, the exact purpose the record will be used for – including, but not limited to the defense the record relates to, and the legal authority for the defense. Defendant must also show by an offer of proof that the probative

value of the information sought outweighs the danger of unfair prejudice. Defendant must also show he cannot obtain the information any other way.

3. Within ten (10) days of receiving the motion from the Defendant, the Nation will compile a list of the requested records regarding the victim that are in the Nation's possession or control, and provide the list and requested information to the Court for *in camera* review. If the Nation does not possess or control a requested record, the Nation shall so state on the list.

4. Within ten (10) days of receiving the requested information, the Court will review the record *in camera*, decide if the record may be disclosed, Order any limitation on the use of the record, and provide the information to the Nation and Defendant.

5. The requested information will be sealed; Defendant and Defense Counsel shall not show the record to anyone else without the Court's permission.

6. The Nation maintains the right to evidential objections at trial to the use of any material disclosed to the Defendant.

Dated this 16th day of March, 2015.

Walter Marcus, Judge

Fwd: Pros ✓ Prob ✓ Def ✓ Det ✓
3/17/15 JR DC ✓

TOHONO O'ODHAM NATION
JUSTICE CENTER

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Dec 15 2015 10:00 AM
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In the Judicial Court of the Tohono O'odham Nation

County of Pima, In the State of Arizona

Adult Criminal Division

TOHONO O'ODHAM NATION

Plaintiff,

vs.

LAXIA ROBERTA HARRISON,
Dob: 07/26/72,

Defendant.

Case No.: 2012-3973-3985CR

ORDER MOTION TO RECONSIDER

COURT FINDS AS FOLLOWS:

On December 30, 2015, the Defendant filed a Motion to Dismiss for Lack of Jurisdiction. The Nation did not file a response. The Judge granted the motion on January 21, 2015 in chambers, without a hearing. The Judge's January 21, 2015 Order, issued without findings, dismissed the case with prejudice. On January 29, 2015, the Nation filed a Motion to Reconsider and Request for Evidentiary Hearing. Although the Nation offered no explanation why it did not respond to Defendant's motion, it did state:

> In its Motion to Reconsider and Request for Evidentiary Hearing, the Nation established "good cause" when it showed the trial Court: a. The situs of the crime as asserted by the Nation was questioned by the Defendant. b. The jurisdiction of the Court as asserted by the Nation was questioned by the Defendant. c. The trial Court failed to make a record of its order of dismissal as required under the rule governing dismissals.

The Nation's statement of "good cause" does raise questions for the Court. The

Defendant, in her Response, raised the issue of double jeopardy. Jeopardy had not attached when the January 21, 2015 dismissal was ordered.

The Court requested the parties to submit briefs on whether the Court could hear a motion to reconsider. The parties did so, and the Court heard oral arguments on June 1, 2015. The Court is satisfied that it can hear motions to reconsider.

The remaining issue for the Court is whether a motion to dismiss that is granted with prejudice may be reconsidered by the Court if the Court made no findings when it granted the motion to dismiss. This issue was raised by the Nation in its Motion to Reconsider. Review of pertinent laws and rules shows that Article VIII, Section 3 of the Tohono O'odham Constitution states, "In the determination of causes, all decisions of the courts shall be in writing, and the grounds of the decision shall be stated." The Tohono O'odham Code, Title 6, Section 1107 states, "In the determination of causes, all decisions of the Court shall be in writing, and the grounds of the decision shall be stated." As permitted by Rule 1 of the Tohono O'odham General Rules of Practice, reference to Rule 16.6 of the Arizona Criminal Rules of Procedure provides, "The Court, on motion of the defendant, shall Order that a prosecution be dismissed upon finding that the indictment, information, or complaint is insufficient as a matter of law."

DISCUSSION:

The Judge was required to make a finding or state the grounds for his decision. He did not do so. Rule 5 of the Tohono O'odham General Rules of Practice states, "If a party fails to respond within ten (10) days, absent a showing of good cause, the motion shall be deemed submitted on the record before the Court." This rule does not obviate the requirement for the Court to

make a finding or state the grounds for the decision. The basis of the Court's decision relies on its findings. There are no Tohono O'odham Nation cases directly on point that state what happens if Court the does not make findings or state the grounds for the decision in a criminal case where the motion was granted with prejudice, but the Arizona Court of Appeals in *State v. Willis*, 177 Ariz. 592 (1993) addresses a similar dismissal. In *State v. Willis*, the Arizona Appellate Court vacated a trial court's order dismissing a case for the reason that the trial court failed to set forth sufficient grounds for the dismissal with prejudice:

> In our opinion, the rule requires the trial court to state on the record its reasons for concluding that dismissal with prejudice is in the interests of justice. This statement must be based on a particularized finding that to do otherwise would result in some articulable harm to the defendant. Therefore, we hold that the trial court's perfunctory statement that the "interests of justice" required dismissal with prejudice in this case does not constitute the "reasoned finding" required by Rule 16.5(d) to support dismissal with prejudice. *Id.*, at 594.

The Court finds the reasoning in *State v. Willis* persuasive. The grounds or findings are required in this case. However, reconsideration or reversal is not required in all instances where findings are omitted from the order. Each case must be considered on its merits. The preferred remedy in this particular case would normally be for the Judge to amend his order to state his findings. As that Judge is no longer a judge for the Tohono O'odham Nation, this is not possible. The next best remedy is for an evidentiary hearing to be held on the jurisdiction issue raised by Defendant's Motion to Dismiss for Lack of Jurisdiction.

THE COURT ORDERS AS FOLLOWS:

For the reasons stated herein the Nation's Motion to Reconsider is granted. An evidentiary hearing on Defendant's Motion to Dismiss for Lack of Jurisdiction is Ordered for Tuesday, July 7, 2015 at 10:00 a.m.

Dated this 8th day of June, 2015.

Walter Marcus, Judge

TOHONO O'ODHAM NATION JUSTICE CENTER

FWD to TT/DC/Prob/Def. 060845

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Adult Criminal Division

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TOHONO O'ODHAM NATION, Plaintiff, vs. AARON CULLEN COBY, Defendant.	Case No.: 2015-1991CR MINUTE ENTRY

Defendant appeared, pro se, before the Court on July 27, 2015 to be arraigned on a Petition to Revoke Probation. Chief Prosecutor George Traviolia appeared for the Nation. The revocation petition included among its allegations that the Defendant had violated the laws of the Tohono O'odham Nation, and had pled guilty to the charges in Case No. 2015-1950-1954CR on July 20, 2015. The Defendant was not represented at the July 20, 2015 hearing, which was heard by a different judge, and was not advised that if he pled guilty there would be a strong presumption that the Defendant would be found responsible of violating his probation.

Although the Defendant indicated he wished to plead responsible to the Petition to Revoke Probation at the July 27, 2015 arraignment, the Court did not accept his plea. The Court entered a plea of denial based on the Court's concern that the Defendant had not understand on July 20, 2015 that his guilty plea would likely have the result of the Court finding him responsible of violating his probation and imposing the sentence of 570 days in Corrections. The Court indicated it would review the Defendant's file and the law to avoid any injustice. The Court has reviewed the Defendant's file and

applicable law.

The Court finds it is not obligated to warn a defendant of collateral consequences prior to an admission of guilt, except as regards deportation. Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010). Collateral consequences of a criminal conviction are the indirect implications or penalties that may attach to criminal convictions. They are not part of the direct consequences of criminal conviction, such as incarceration and fines. In Parry vs. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995), that Court held that:

> The sentence Parry received when his probation was revoked was not a direct consequence of his guilty plea. Accordingly, due process did not obligate the judge who accepted the plea and sentenced Parry to a term of probation to advise Parry of the consequences of revocation of probation, and her failure to do so does not form a basis for invalidating the plea for violation of Parry's Fifth Amendment rights…While provision of information concerning a collateral consequence like revocation of probation might be useful to defendants and our opinion today should not be read as discouraging sentencing judges from providing such information…

The Defendant had also received and signed the Conditions and Regulations of Probation on February 26, 2014, which provided notice to the Defendant of the 570 day suspended sentence and that a violation of any of the conditions or regulations could result in the revocation of his probation. Furthermore, there are also additional grounds for revocation set forth in the Petition to Revoke Probation.

The July 20, 2015 Order in Case No. 2015-1950-1954CR remains in effect, and the Probation Revocation Hearing on August 17, 2015 at 10:00 a.m. will go forward as scheduled.

Dated this 31st day of July, 2015.

Walter Marcus, Judge

NATION
JUSTICE CENTER

Fwd to My Prob/Def/Det. 073115

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IN THE
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OF THE
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IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff, v. SHARLENE SEGUNDO, Defendant.	)	CASE NO. 2013-1561-1568CR; TR2013-0382/0383 ORDER

COURT FINDS AND ORDERS AS FOLLOWS:

On January 12, 2016, a hearing was held on the Defendant's Motion to Dismiss. Defendant was represented telephonically by Michael L. Brown. Chief Prosecutor George Traviolia of the Tohono O'odham Office of the Prosecutor appeared for the Nation. At the hearing, the Nation stated that it had not complied with the Court's November 9, 2015 Order. The Nation had not disclosed the contents and nature of the medical testimony and other testimony, nor reasonably scheduled witness interviews with the Defendant by December 15, 2015. The Court had warned in its November 9, 2015 Order that the Nation's failure to comply with the order would result in preclusion of the Nation's witnesses. On January 12, 2016, the Court precluded the Nation's witnesses from testifying, and the Nation moved to dismiss the case. The Court granted the Nation's motion. The Nation then moved for the cases to be dismissed without prejudice, and the Defendant objected, moving for the cases to be dismissed with prejudice. The Nation and Defendant presented arguments supporting their motions. The

Court reserved decision and ordered the Nation and Defendant to file briefs by February 15, 2016, and responses by February 29, 2016.

The Nation and the Defendant filed their briefs on February 16, 2016, but only the Defendant filed a response on February 29, 2016. The Court does not require further oral arguments. The Court, having considered the briefs and oral arguments, Orders the cases dismissed with prejudice.

The Tohono O'odham Rules of Court permit the use of the Arizona Rules of Criminal Procedure when there is no Tohono O'odham law or rule, and the Arizona rule is applicable to the facts and circumstances of the case. Tohono O'odham General Rules of Practice, Rule 1. The Court finds the application of Rule 16.6 of the Arizona Rules of Criminal Procedure appropriate in this matter as it concerns whether it is in the interests of justice for the Court to dismiss Defendant's cases with prejudice. Further, the cited Arizona cases' discussion and analysis of Rule 16.6(d)'s "in the interest of justice" are helpful to this Court in its balancing of the conflicting interests of the Nation and Defendant.

The Nation and the Defendant both agree that it is within the Court's discretion to dismiss with or without prejudice. Before a dismissal with prejudice can be ordered, the Court must make a reasoned finding that the interests of justice require that the dismissal be with prejudice. The Nation and Defendant also agree that the trial court must weigh all the parties' interests before dismissing a case with prejudice.

The Court agrees with the Defendant that the following factors are appropriate in determining if this case should be dismissed with or without prejudice:

1. Were the parties diligent and professional in complying with their responsibilities under the Tohono O'odham rules regarding discovery, and the Court's orders?
2. Is there actual and/or potential prejudice to the Defendant?

3. Is the Nation acting with the motive of simply harassing the Defendant?
4. Is the Nation seeking a dismissal without prejudice to obtain a tactical advantage?

1. Were the parties diligent in complying with their responsibilities under the Tohono O'odham discovery rules, and the Court's orders?

The Court finds that it is undisputed that the Defendant made appropriate requests and motions for witness interviews. The Court finds that it is also undisputed that the Nation was not diligent in complying with the Tohono O'odham Rules of Criminal and Traffic Procedure's discovery provisions, nor did the Nation comply with the Court's explicit order of November 9, 2015 to disclose the content of witness testimony, and schedule interviews by December 15, 2015. The Nation was aware of its obligations under the Rules, and of the serious penalty it faced if it continued to neglect its responsibilities. Despite this awareness, the Nation failed to provide any explanation for its non-compliance, much less good or substantive grounds.

2. Is there actual or potential prejudice to the Defendant?

The Court finds that a dismissal without prejudice does harm the Defendant's ability to defend herself, and there are additional expenses, prejudice, and anxiety experienced by the Defendant in waiting for reprosecution. Cases become stale and all too often witnesses are no longer available which result in detriment to defendants. Furthermore, much of the delay in this case was due to the Nation's inaction.

3. Is the Nation acting motive to simply harass the Defendant?

There has been no showing that the Nation's motive was simply to harass the Defendant.

4. Is the Nation seeking a dismissal without prejudice to obtain a tactical advantage?

Although the Nation may not have acted with intent to obtain a tactical advantage, a

dismissal without prejudice is, in essence, a second bite of the apple for the Nation after it determined it could no longer prosecute its case due to the preclusion of its witnesses. There are no "teeth" in this Court's November 9, 2015 Order if it can be simply circumvented by a dismissal without prejudice, and allowing the Nation a "mulligan."

Therefore, the Court finds that it is in the interests of justice for the cases to be dismissed with prejudice based upon the Nation's continued failure to provide disclosure of witnesses, prejudice to the Defendant given the length of time the case has been pending due to the Nation's delay, and the unjust tactical advantage to the Nation should it refile. Court finds for the reasons stated here in that the interests of justice require that cases 2013-1561-1568CR and TR2013-0382/0383 be dismissed with prejudice.

Court Orders cases 2013-1561-1568CR and TR2013-0382/0383 dismissed with prejudice.

Dated this 10th day of March, 2016.

Walter Marcus, Judge

NATION
JUSTICE CENTER

Fwd to: Pros: Prob; Def; Def Cnsl. 03116

In the Judicial Court of the Tohono O'Odham Nation
County of Pima, in the State of Arizona

TOHONO O'ODHAM NATION,
Plaintiff

vs.

GLEN FRANK
DOB: 12/31/88
Defendant

TRIAL RECORD ENTRY

Case No. 2010-1764CR; 2010-0506/0507CR
CR2016-0548-1-3

OFFENSE(S) 2010-1764CR 7.1A1; 2010-0506CR 7.2A, 2010-0507CR 14.1A3;
Ct 1. 12.4, Ct 2. 12.2, Ct 3. 2.9

COURT DATE: July 5, 2016 TIME: 9:00am BOND POSTED: _____

CALENDER EVENT:
- ☐ Arraignment
- ☐ Pre-Trial
- ☒ Hearing
- ☐ Jury Trial
- ☐ Bench Trial
- ☒ Other MOTION
- ☐ Sentencing
- ☐ Parole Hearing

DEFENDANT: ☒ Present In custody ☐ Not Present
DEFENSE COUNSEL: ☒ Present Oliver ☐ Not Present ☐ Pro Se
PROSECUTORS: ☒ Present Tranoda ☐ Not Present
PROBATION OFFICER: ☒ Present Jaquin ☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☒ Set for: Bench Trial 8/31/16 at 9am for case CR2016-0548-1-3.

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. GLEN FRANK DOB: 12/31/88
CASE NO. 2010-1764CR; 2010-0506/0507CR; CR2016-0548-1-3

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____ until fine is paid in full.

☐ Shall complete _____ hours of community service by:

_____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐)supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐)Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐)Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐)Defendant not eligible for parole/work credit during first days.

(☐)Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐)Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ ___ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐)exonerated (☐)converted (☐)forfeited (☐)All processing fees be paid by

Defendant ☐ Money Order = $0.85
☐ Postage = $0.32
☐ Certified Mail = $2.45

☐ Refund BOND in the amount of $ _____

(☐)Issue Bench Warrant (☐)Quash Bench Warrant (☐)Conditions:

ADDITIONALORDERS: See the attached continuation order.

July 5, 2016
DATE

TOHONO O'ODHAM

JUDGE, ~~Donald Harvey~~ Kyle F. Gibbs
JUSTICE GUNTER

DISTRIBUTION: ☐ COURT ☑ PROBATION w/attached mnt 070616 DR ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☑ DETENTION

CONTINUATION OF ORDER

NATION VS. FRANK, GLEN
CASE NUMBER: 2010-1764CR; 2010-0506/0507; CR2016-0548-1-3

I. Defendant moved for a continuance on the bench trial on case number CR2016-0548-1-3. And the Defendant requests a jury trial. The Nation states that it is no longer seeking any imprisonment for the case. The Indian Civil Rights Act only requires a jury trial when the defendant is facing the possibility of imprisonment. *See* 25 U.S.C. § 1302(a)(10). Therefore, the Court grants the continuance and denies the request for a jury trial. The bench trial is continued until 8/31/16 at 9 am.

II. Defendant moved to strike Nation's response to the Defendant's Motion for New Trial as it was untimely under Rule 5(c) of the Tohono O'odham General Rules of Practice. Rule 5(c) provides: "If a party fails to respond to a motion within ten (10) days, absent a showing of good cause, the motion shall be deemed submitted on the record before the court."

Here, the Nation filed the Response to the Defendant's motion 41 days after the Defendant filed the Motion for New Trial. Rule 5(c) provides a cut-off date for the opposing party to move to strike the filing because it failed to comply with procedural rules. The Arizona Rules of Criminal Procedure use the same language. *See, e.g.*, Ariz. R. Crim. Pro. 35.1 (stating that "[i]f no response is filed, the motion shall be deemed submitted on the record before the court," but discussing that the opposing party loses the right to object to the form and content of the motion). The Nation is not seeking to strike the Defendant's motion for new trial, and the Nation is not seeking to exclude the motion because of its form, content, or procedural deficiencies. Instead, the Nation is challenging the merits of the Defendant's argument. Moreover, the late response does not present a situation where the Defendant has been unfairly prejudiced by the tardy response. *See generally*, C.J.S. Pleading § 624–25 (surveying cases discussing the grounds for a motion to strike). Thus, the Motion to Strike is denied.

III. Based on the oral argument presented in Court, the Court finds that supplemental briefing would be helpful in this matter. Therefore, the Court orders that the parties prepare and file supplemental briefs by July 22, 2016 addressing the following issues:

a. The definition of "a criminal proceeding" as used in 25 U.S.C. § 1302(c) and 6 T.O.C. § 1108(B)(1).
b. The interplay between 25 U.S.C. § 1302(a)(7)(B)–(C), which limits Indian tribes' powers in exercising self-government in imposing a conviction for one offense for a term greater than one year, with 25 U.S.C. § 1302(c), which provides right to

effective assistance of counsel when in a criminal proceeding the Indian tribe imposes a total term of the imprisonment of more than one year.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

TOHONO O'ODHAM NATION, Plaintiff, V. GLEN FRANK, Defendant.	) Case no.	2010-1764CR 2010-0506/0507CR CR2016-0548-1-3

ORDER

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
10/31/16 @ 11:54am
DATE/TIME
COURT CLERK

The Defendant's motion for new trial is denied in part and granted in part.

Background Facts

The Nation charged the Defendant for Assault/Complicity in case 2010-0307CR regarding an incident that happened on February 2, 2010 involving Randy Tucker. Later in cases 2010-0506CR and 2010-0507CR, the Nation changed the Defendant for Aggravated Assault and Misuse of a Weapon for an incident occurring on February 25, 2010, which involved Detention Officer V. Romero. Four months later, the Nation charged the Defendant for Assault, case 2010-1764CR, for an incident that occurred on June 25, 2010, involving Detention Officer B. Hendricks.

About two years later, the parties entered into a consolidated plea agreement. Throughout the proceedings, the Defendant never retained counsel, and the Court never appointed counsel. The Court heard the consolidated plea agreement and sentenced the Defendant to 1140 days in jail (210 days to serve, 930 days suspended for three years of supervised probation).

After the Defendant was released and placed on supervised probation, the Nation moved to revoke his probation and sought to impose the suspended sentence. The Defendant moved for a new trial, and the Nation responded. After hearing oral argument on the motion, the Court ordered supplemental briefs.

Motion for New Trial

The Tohono O'odham Rules of Criminal Procedure do not address post-trial motions. Therefore, the Court will review the Arizona Rules of Criminal Procedure. *See* T.O. R. Gen. Prac. 1(c). Under Arizona Rule of Criminal Procedure 24.1(b), a party may move for a new trial within 10 days of a verdict. The Rule also provides the grounds for a motion for new trial. *See* Ariz. R. Crim. P. 24.1(c).

Here, the Defendant moved for new trial well after the 10-day limit, and the grounds in his motion differ from the grounds in Rule 24.1(c). Instead, the motion for new trial raises arguments normally found in a petition for post-conviction relief. The Court, however, is not bound by the party's title of the motion. And the Court may look at the substance of the motion to categorize the motion. *See, e.g., Hegel v. O'Malley Ins. Co., Inc., Agents & Brokers*, 117 Ariz. 411, 412, 573 P.2d 485, 486 (1977) (discussing that Courts look at the substance in deciding how to treat a mistitled motion). So, the Court will treat the Defendant's motion as a petition for post-conviction relief.

Post-Conviction Relief

Arizona Rule of Criminal Procedure 32.1 provides:

> Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief.
>
> Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.
>
> Grounds for relief are:
>
> a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;

b. The court was without jurisdiction to render judgment or to impose sentence;

c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

. . .

f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or

g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or

. . .

Claims filed under subsection (a), (b), or (c) of Rule 32.1 must be filed within 90 days of the final judgment or within 30 days of a final appellate decision. *See* Ariz. R. Crim. P. 32.4(a). But claims filed under subsection (f) or (g) of Rule 32.1 may be filed after the deadline. *Id.*

Here, the Defendant arguably raises claims under subsections (a), (b), (c), (f), and (g). The claims under subsections (a), (b), and (c) are untimely because he filed the petition after the 90-day deadline. Thus, the Court denies the motion in part as to those claims.

With subsection (f) and (g), the Court finds a sufficient basis to address the merits of the Defendant's claims. In particular, he asserts that the Tribal Law and Order Act, when applied retroactively, is a significant change in the law, which justifies overturning his conviction.

Rule 32.1 does not define "a significant change in the law." But plainly a "change in the law" requires some transformative event, a "'clear break' from the past." *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

Retroactivity of the Tribal Law and Order Act

The Tribal Law and Order Act ("TLOA") amended the Indian Civil Rights Act ("ICRA"). TLOA allows tribes to have enhanced sentencing and provides criminal defendants specific rights. One of those rights is the right to counsel when an "Indian tribe . . . imposes a total term of imprisonment of more than 1 year . . . ." 25 U.S.C. § 1302(c). Congress enacted TLOA in 2010. Pub. L. No. 111-211, Tit. II § 234(a), 124 Stat. 2258, 2279–80.

The Defendant urges this Court to follow the reasoning in *Johnson v. Tracy*, 2012 WL 4478801 (D. Ariz., Sep. 28, 2012). In that case, Johnson committed an offense before Congress enacted TLOA, but he was tried after TLOA was enacted. *Id.* Johnson filed a writ of habeas corpus arguing that TLOA should be retroactively applied. *Id.* Ultimately, the Court held that the rights in TLOA were to be retroactively applied.

This Court agrees with the reasoning in *Johnson* in so much as the rights listed 25 U.S.C. § 1302(c) apply to criminal proceedings conducted after TLOA was enacted, even though the criminal act happened before Congress enacted TLOA.

The Court finds that *Johnson* is a significant change of the law. Because the Court finds a basis to address the merits of his claims under Rule 32.1(g), the Court declines to address the Defendant's argument about Rule 32.1(f).

The Defendant committed the offenses before Congress passed TLOA, but he entered into the plea agreement and was sentenced after TLOA went into effect. As such, the Court will retroactively apply the rights listed in 25 U.S.C. § 1302(c) to the Defendant's case.[1]

Jurisdiction

The Defendant argues that the Court did not have jurisdiction to sentence him, as the total sentence from the combined plea agreement was more than a year. Specifically, the Defendant asserts that the three incidents became one *criminal proceeding* when the Court held the combined plea agreement hearing.

---

[1] The Court notes that in other cases Arizona Rule of Criminal Procedure 32.2(b) could limit petitions for post-conviction relief filed under Rule 32.1(g) raising the same argument about TLOA being retroactively applied.

Jurisdiction of Consecutive Charges

Under 25 U.S.C. § 1302(a)(7)(B), subject to TLOA's enhanced sentencing, an Indian tribe cannot "impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year . . . ." As the Nation properly notes, none of the sentences exceeded one year for any single offense.

As other courts have noted, ICRA's jurisdictional limits apply to any single charge. *See Bustamante v. Valenzuela*, 715 F. Supp. 2d 960, 966 (D. Ariz. 2010) (discussing that ICRA's jurisdictional limits apply to violation of criminal law and rejecting that the limits apply to all the offenses arising from a common nucleus of operative facts); *see also Alvarez v. Tracey ex rel. Gila River Indian Cmty. Dept. of Rehab. & Supervision*, 2011 WL 1211549 (D. Ariz., Mar. 31, 2011) (noting that "the term 'offense' means a crime, not an event"); *see generally Tohono O'odham Nation v. Antone*, 3 TOR3d 67 (Trial Ct., Sep. 25, 2007) (discussing consecutive sentences); *Tohono O'odham Nation v. Vincent*, CR09-3612-00 (Trial Ct., Jul. 31, 2001) (same) (scheduled for publication). Therefore, the Court had jurisdiction to impose the sentences.

Definition of Criminal Proceeding

In 25 U.S.C. § 1302(a)(6), a tribe cannot:

> deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b).

Subsection (b) provides:

> Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000
>
> A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

> (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
>
> (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

ICRA does not define the words criminal proceeding. But the Tohono O'odham Court of Appeals implicitly addressed the definition of criminal proceeding in a different case involving the same Defendant. In that case, the Court stated: "If the total sentences for all the crimes charged for the criminal proceeding or incident exceed one year, then the requirement for effective assistance of counsel at the expense of the Nation applies. It is our opinion that it applies to criminal proceeding or incident." *Frank v. Nation*, CTA-0116 (T.O. Ct. App., Aug. 11, 2014) (scheduled for publication). As such, the *Frank* court viewed criminal proceeding and incident to be functionally equivalent to each other.

The dictionary definitions of "criminal proceeding" also support this interpretation. In the absence of statutorily defined terms, courts may look at dictionary definitions. *See State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343, 344, 322 P.3d 160, 161 (2014). Black's Law Dictionary (10th ed. 2014) defines a "criminal proceeding" as: "A judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial." Collins English Dictionary (2016) defines "criminal proceedings" as: "action taken in a court to bring a criminal prosecution against someone." Both definitions address a prosecution of a crime(s) that arose from a single transaction or incident.

Here, the consolidated-plea-agreement hearing did not result in a single criminal proceeding as the Nation was prosecuting three separate incidents. And the Court holding a consolidated plea agreement did not transmute the three separate incidents (with different victims) into one criminal proceeding for ICRA jurisdictional purposes. Therefore, the Court denies the Defendant's motion in part as to those claims.

Right to Counsel

The Defendant argues that the sentences in cases 2010-0506CR and 2010-0507CR violated his rights under 25 U.S.C. § 1302(c) because the sentences arose from the same incident, he was sentenced for more than one year, and he was not provided counsel. The Court agrees.

The rights in § 1302(c) are retroactive, *see supra*. The statute provides:

> In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—
>
> (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
>
> (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

25 U.S.C. § 1302(c)(1)–(2). Based on the plain language of the statute, when a tribe imposes a total term of imprisonment for more than one year arising from the same criminal proceeding, i.e., transaction/incident, the Nation must provide an indigent defendant a licensed defense attorney.

Here, the charges in 2010-0506CR and 2010-0507CR arose from the same incident involving Detention Officer V. Romero. On the first charge, Aggravated Assault, 2010-0506CR, the Court sentenced the Defendant to 360 days in jail with 60 days to be served and 300 days suspended for three years of supervised probation. On the second charge, Misuse of a Weapon/Dangerous Instrument, 2010-0507CR, the Court sentenced the Defendant to 360 days in jail that was suspended for three years of supervised probation. Currently, the Nation is seeking to revoke his probation and have the Court impose both suspended sentences to run consecutively.

The record shows that the Defendant was indigent and that he was not provided counsel. As such, the sentences violated the Defendant's ICRA rights.

Harmless Error

But an ICRA violation does not automatically warrant vacating the sentences; instead, the Court must decide whether the ICRA violation was a harmless error. *See State v. Hickman*, 205 Ariz. 192, 198, 68 P.3d 418, 424 (2003) ("most trial error, and even most constitutional error, is reviewed for harmless error"). Under that standard, the Court requires the Nation to show that the error was harmless beyond a reasonable doubt. *State v. Valverde*, 220 Ariz. 582, 585, 208 P.3d 233, 236 (2009).

Here, the Defendant entered a plea agreement without the assistance of legal counsel when he was entitled to counsel. Therefore, the error is not harmless. *See, e.g., State v. Ring*, 204 Ariz. 534, 565, 65 P.3d 915, 946 (2003) (J. Feldman Concurring) (discussing that under the Sixth Amendment denying the right to counsel is never harmless error). Although the right to counsel in ICRA is not coextensive with the right to counsel under the Sixth Amendment, when ICRA mandates the right to counsel—failing to provide it is rarely, if ever, harmless. *See United States v. Bryant*, 136 S. Ct. 1954 (2016); *Frank*, CTA-0116.

Remedy

The Court grants the Defendant's motion on 2010-0506CR and 2010-0507CR. The Court denies the Defendant's motion on 2010-0307CR and 2010-1764CR.

The Court, in exercising its discretion, amends the sentences in 2010-0506CR and 2010-0507CR to comply with 25 U.S.C. § 1302(c) and remedy any ICRA violation. *See generally Kennedy v. Hughes*, 60 Fed. Appx. 734, 738 (10th Cir. 2003) (discussing that tribal courts may amend its prior order to ensure that they are ICRA compliant). Therefore, the Court amends the sentences as follows:

2010-0506CR: 180 days in jail with the Defendant serving 60 days and the remaining 120 days suspended for three years of supervised probation. The Defendant is to receive credit for time served when he served the 60 days on the original sentence.

2010-0507CR: 180 days in jail suspended for three years of supervised probation.

Finally, the Nation may seek to impose this amended suspended time at the revocation hearing on October 10, 2016.

September 29, 2016

Judge Kyle Fields

FWD: Pros.Prob.Dewt. Def.Counsel.100316

In the Judicial Court of the Tohono O'Odham Nation
County of Pima, in the State of Arizona

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Glen Frank
DOB: 12/31/88
Defendant

TRIAL RECORD ENTRY

Case No. 2010-1764CR

OFFENSE(S) 7.1A1

COURT DATE: October 10, 2016 TIME: 10:00AM BOND POSTED: _____

CALENDER EVENT:
- ☐ Arraignment
- ☐ Pre-Trial
- ☒ Hearing
- ☐ Jury Trial
- ☐ Bench Trial
- ☒ Other Revocation
- ☐ Sentencing
- ☐ Parole Hearing

DEFENDANT:	☒ Present In Custody	☐ Not Present	
DEFENSE COUNSEL:	☒ Present Olivo	☐ Not Present	☐ Pro Se
PROSECUTORS:	☒ Present Offenbecher	☐ Not Present	
PROBATION OFFICER:	☒ Present Joaquin	☐ Not Present	

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Glen Frank; DOB: 12/31/88
CASE NO. 2010-1764CR

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____ until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐)supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐)Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education (☐)Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐)Defendant not eligible for parole/work credit during first days.

(☐)Defendant eligible for work release from _____ m to _____ m.

(☐)Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐)exonerated (☐)converted (☐)forfeited (☐)All processing fees be paid by

Defendant ☐ Money Order = $0.85
☐ Postage = $0.32
☐ Certified Mail= $2.45

☐ Refund BOND in the amount of $ _____

(☐)Issue Bench Warrant (☐)Quash Bench Warrant (☐)Conditions:

ADDITIONALORDERS: See the attached continuation order.

~~10/10/16~~ Nov. 9, 2016
DATE

JUDGE, Kyle Fields

DISTRIBUTION: ☐ COURT ☒ PROBATION ☒ DEFENDANT ☒ PROSECUTOR ☐ DEFENSE ATTORNEY ☒ DETENTION

11/14/16 AP

Continuation Order

Nation v. Glen Frank

2010-1764CR; 2010-0506/0507CR

The Nation filed a motion to revoke probation seeking to impose all the suspended time. The Defendant filed a motion for new trial because the sentences did not comply with the Indian Civil Rights Act ("ICRA"), which the Court granted in part and denied in part. Thus, the Court amended the sentences to ensure ICRA compliance. The Court then held this probation revocation hearing.

The parties agree that there is a substantive basis for the probation revocation. The parties also agree that the proper sentence to impose is the amended ICRA-compliant sentences, and the parties agree to the amount of community service hours remaining. The Court finds that the Defendant violated his probation, and the Court imposes the following sentences:

2010-1764CR: 270 days in jail

2010-0506CR: 120 days in jail

2010-0507CR: 180 days in jail and 64.5 hours of community service

The parties, however, disagree on the calculations for credit for time served, and if the sentences should run concurrent or consecutive to each other.

Credit for Time Served

The Nation asserts that the Defendant should only receive credit for time served since he was taken into custody on these cases. The Defendant argues that he should receive credit for time served that happened on other, unrelated cases where he served jail time, but the appellate court ultimately overturned the conviction.

Regarding credit for time served, the code provides: "The Court may, in its discretion, give full credit towards any sentence ordered of any time spent in confinement prior to arraignment of final commitment in connection with the same offense." 7 T.O.N. § 1.12.

As a general rule, the Court looks to the plain language of the Code because it is the best evidence of the Council's intent. *See Nation v. Delores*, 2 TOR3d 26, 28 (Trial Ct., 1997)(citing related Arizona cases); *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Also, when possible, the Court interprets statutory language in a way that gives meaning to each word and clause, and avoids making any part of a statute superfluous, contradictory, void, or insignificant. *See Williams v. Chukut Kuk District*, 2 TOR3d 57, 58 (Trial Ct., 1999)(citing related Arizona cases); *Nation v. Gilmore*, 1 TOR3d 111, 111-113 (Trial Ct., 1994) (same).

The term "arraignment of final commitment" is not defined, and the Court was unable to find a definition in any published statute, case, or treatise. "Arraignment" means: "The initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea." Black's Law Dictionary (10th ed. 2014). But "final commitment" as used in § 1.12 means: "The order directing an officer to take a person to a penal or mental institution." Commitment 10, Black's Law Dictionary (10th ed. 2014). When read together and in context of § 1.12, the term "arraignment of final commitment" means final judgment as reading it as arraignment would prevent the Court from giving a Defendant credit for time served during the pretrial process.[1] *See State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 152, 548 P.2d 1148, 1149 (1976) (noting that Courts interpret statutes to avoid absurd results); *see also* Wade R. Habeeb, Annotation, *Right to credit for time spent in custody prior to trial or sentence*, 77 A.L.R.3d 182 (Orig. Pub. 1977) (discussing that credit for time served allows Defendants, who are held during the pretrial process, to have the time applied to their sentence).

With this definition, a plain reading § 1.12 provides that credit for time served is discretionary. *See* H. H. Henry, Annotation, *Withdrawal, forfeiture, modification, or denial of good-time allowance to prisoner*, 95 A.L.R.2d 1265 (Orig. Pub. 1965) (surveying cases where Court did not allow credit for time

[1] "Final judgment" means: "A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment. — Also termed final appealable judgment; final decision; final decree; definitive judgment; determinative judgment; final appealable order." Judgment, Black's Law Dictionary (10th ed. 2014).

served). In its discretion, the Court may apply some or all of the time to a sentence. 7 T.O.N. § 1.12 ("give full credit towards *any sentence* ordered of *any time spent in confinement* . . .") (emphasis added). Moreover, § 1.12 provides that credit for time served applies to time served in custody before the Court issued a final judgment. *Id.* ("*prior to* arraignment of final commitment...") (emphasis added). Finally, the Court must apply the time served to a sentence that is related to the offense that the defendant was held on. *Id.* ("in connection *with the same offense*") (emphasis added).

Here, the credit for time served that the Defendant is trying to use in this case is not connected with the offenses in this case. For example, the conduct in this case happened on a different date and involved different victims. Another jurisdiction addressing a similar issue concluded that credit for time served applies to offenses arising from the same criminal conduct. *See Tittle v. State*, 169 Ariz. 8, 816 P.2d 267 (App. 1991) (discussing that credit for time served applies to offenses that arose from the same criminal conduct).

Therefore, the Court denies the Defendant's request. Based on § 1.12, the Court orders that the Defendant is to receive credit for time served since he has been in custody in this case.

Concurrent or Consecutive time

The Nation argues that the sentences should run consecutively to each other. But the Defendant urges the Court to have the sentences run concurrently.

During plea agreement negotiations, the parties are free to negotiate if jail time will run consecutively or concurrently. If the Court does not specify that the sentence runs concurrently, then the sentences run consecutively. *See* Rule 1(c), T.O. R. Gen. Prac. (providing that the Court looks at the Arizona Rules of Criminal Procedure when "the Arizona rules will be followed to the extent they do not directly conflict with a written Tohono O'odham law or rule and are applicable to the facts and circumstances of a case"); Rule 26.13, Ariz. R. Crim. Pro. (stating that sentences "run consecutively unless the judge expressly directs otherwise"). Here, the consolidated plea agreement provides:

> 210 days jail to serve, with 60 days thereof to be served concurrently with 2010-0424CR; (150 days of 210 days to be served *consecutively* to any and all other sentences in this or other cases); 930 addt'l. days jail suspended for 3 years supervised probation . . . .

(emphasis in original).

Based on the plea agreement and the Court's order adopting the plea agreement, the suspended 930 days run consecutively for three reasons. First, the days are aggregated as a total 930 days. Second, the days are described as additional days. Third, the Court's order specifically identifies the sentences that are to run concurrently. As such, the suspended sentences that are not specifically identified as concurrent sentences run consecutively. *See* Rule 26.13, Ariz. R. Crim. Pro. Therefore, the above listed sentences are to run consecutively.

Conclusion

The Court finds that the Defendant violated his probation, and the Court imposes the following sentences:

2010-1764CR: 270 days in jail

2010-0506CR: 120 days in jail

2010-0507CR: 180 days in jail and 64.5 hours of community service

The sentences run consecutively, and the Defendant is to receive credit for time served since he has been in custody in this case.

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE COUNTY OF PIMA, STATE OF ARIZONA
ADULT CRIMINAL COURT

TOHONO O'ODHAM NATION,
Plaintiff,
V.
LEO ANTONE
Defendant.

Case No. CR2017-0287-1
MOTION FOR PROBABLE CAUSE

FILED
TOHONO O'ODHAM JUDICIARY
2017 DEC 14 PM 2:44
JUDICIARY SERVICE CLERK

ORDER AND NOTICE

ORDER

This motion having come before the Tohono O'odham Judiciary Court and the Court acknowledging jurisdiction over these matters, sustains the same.

Therefore, the Motion for Probable Cause Hearing is hereby:

_____GRANTED __X____DENIED

In April 2017, the Defendant requested a Probable cause hearing. The ~~Court~~ Defendant then requested

IT IS HEREBY ORDERED that the above captioned matters is

Dated this____day of_____, 2017.

~~Probable Cause Hearing to be set for:~~

~~___day, of _____month, 2017/18 @ ____am/pm.~~

The Court to vacate the Probable Cause hearing a month later. The Court has already started jury selection. Therefore, the Court denies the motion

_____
JUDGE, Tohono O'odham Judiciary Court

COPY TO:
PROSECUTOR,TOHONO O'ODHAM NATION
ADVOCATE,CLIFFORD H. WOLF BLACK SR.

Prob 12/14/17

In the Judicial Court of the Tohono O'Odham Nation
County of Pima, in the State of Arizona

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Owen Alvarez
DOB: 09/24/82
Defendant

TRIAL RECORD ENTRY

Case No. CR2018-0424-1-4

OFFENSE(S) Ct. 1: 7.1A1/8.9, Ct. 2: 8.4A3, Ct. 3: 5.1A1, Ct. 4: 2.1

COURT DATE: TIME: BOND POSTED: _____

CALENDER EVENT:
- ☐ Arraignment
- ☐ Pre-Trial
- ☐ Hearing
- ☐ Jury Trial
- ☐ Bench Trial
- ☒ Other Clarification on May 21, 2018 TRE
- ☐ Sentencing
- ☐ Parole Hearing

DEFENDANT: ☐ Present _____ ☐ Not Present

DEFENSE COUNSEL: ☐ Present _____ ☐ Not Present ☐ Pro Se

PROSECUTORS: ☐ Present _____ ☐ Not Present

PROBATION OFFICER: ☐ Present _____ ☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Owen Alvarez DOB: 09/24/82
CASE NO. CR2018-0424-1-4

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____ until fine is paid in full.

☐ Shall complete _____ hours of community service by:

_____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐)supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐)Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education (☐)Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐)Defendant not eligible for parole/work credit during first days.

(☐)Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐)Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ ____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐)exonerated (☐)converted (☐)forfeited (☐)All processing fees be paid by

Defendant ☐ Money Order = $0.85
☐ Postage = $0.32
☐ Certified Mail= $2.45

☐ Refund BOND in the amount of $ _____

(☐)Issue Bench Warrant (☐)Quash Bench Warrant (☐)Conditions:

ADDITIONALORDERS: See the attached document.

23
May 22, 2018
DATE

JUDGE, Kyle Fields

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☑ DETENTION

05 23 18

Continuation Order

Nation v. Owen Alvarez

CR2018-0424-1-4

On the May 21, 2018 TRE, the Court generally referenced O'odham common law and other grounds supporting a probable cause hearing. Due to space limitations, the Court did not cite the O'odham common law cases nor fully explain its reasoning. Therefore, the Court issues these clarifications.

As a matter of terminology, the O'odham Courts have a special definition of a probable cause hearing. Other jurisdictions treat a probable cause hearing as a determination to continue holding a person after a warrantless arrest. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also* 5 Am. Jur. 2d Arrest § 78 (2018) (discussing that a probable cause hearing is required within 48 hours of arrest). Under O'odham law, a probable cause hearing is more akin to a preliminary hearing in other jurisdictions. Because O'odham case law uses the term "probable cause hearing," the Court will continue to use that terminology.

The Tohono O'odham Criminal Code and the Rules of Criminal Procedure do not directly for a probable cause hearing. The probable cause hearing, however, arises from O'odham common law. The Rules of Criminal Procedure implicitly reference probable cause hearings.

Probable cause is a common sense determination under the totality of the circumstances that would lead a reasonable person to believe that a crime has been committed and that the defendant committed it. *See Aguilla v. Tohono O'odham Nation*, CTA-0127 (T.O. Ct. App. 2015) (scheduled for publication) (adopting the totality of the circumstances test); *see also Tohono O'odham Nation v. Emily Fasthorse*, 1 TOR3d 81 (Trial Ct., Oct. 23, 1989) (discussing probable cause for checkpoints and road stops); 21 Am. Jur. 2d *Criminal Law* § 518 (2018) (stating that the purpose of the hearing "is to determine whether there is probable cause to believe that a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it"). A prosecutor has a duty to only prosecute a case

that is supported by probable cause. T.O. Code of Ethics for Attorneys and Advocates R. 18(a).

When a defendant believes that the charge is not supported by probable cause, a defendant has two options.

First, the Defendant may file a Motion to Dismiss for lack of probable cause. *See Tohono O'odham Nation v. Melvin Jose*, 2 TOR3d 19 (Trial Ct., Aug. 14, 1995) (discussing that the defendant moved to dismiss and the Court evaluated probable cause based on the affidavit of probable cause). With a motion to dismiss, the Court may set a hearing, but the Court focuses on the complaint and the affidavit of probable cause.

Second, the Defendant can ask for a probable cause hearing. *See Tohono O'odham Nation v. Max A. Chavez*, 3 TOR3d 95 (Trial Ct., Mar. 12, 2010). Simply put, the probable cause hearing is a hearing where the Nation must show that there's enough evidence to charge the defendant and justify a trial. *See* 21 Am. Jur. 2d *Criminal Law* § 518. Because the Nation has the burden to prove the allegations in the complaint, the Nation has the burden to show probable cause. *See id.* at § 523 (discussing the burden of proof). The Nation may use extrinsic sources to show probable cause. *Chavez*, 3 TOR3d at 97 (discussing that the victim's attorney testified at the probable cause hearing). If the defendant requests a probable cause hearing, the time for speedy trial is tolled. *See* T.O. R. Crim. Pro. 5(b)(2) (providing that new probable cause determinations toll the speedy trial period).

O'odham common law also provides some other guidance on probable cause hearings. For instance, a probable cause hearing needs to be requested before the Court schedules a trial. *See Tohono O'odham Nation v. Leo Antone*, CR2017-0287 (Trial Ct., Mar. 2018) (denying a motion for a probable cause hearing because the Court already set a jury trial even though the jury trial was rescheduled). A different judge presides over the probable cause hearing. *See Tohono O'odham Nation v. Sharlene Ignacia Segundo*, 2013-1561-1568CR (Trial Ct. Jan. 12, 2016). The defendant must request the probable cause hearing. *See Chavez*, 3 TOR3d at 97; *see also* Wright, et al., 1 Fed Prac. & Proc. Crim. § 92 (4th ed., 2018) (surveying practices and procedures in federal courts).

As a result, the Court finds that O'odham common law provides a basis for a defendant to request a probable cause hearing.

TOHONO O'ODHAM REPORTS



VOLUME 4, Edition 3:
July 2021-September 30, 2024

Fourth Publication, December 2024

PREFACE TO FOURTH VOLUME

The December 11, 2024, Fourth Volume of the Tohono O'odham Reports includes appellate cases decided after the publication of the 2021 Supplement and trial court cases in which the lower court resolved significant issues or issues of first impression.

December 11, 2024

/s/

_____

Rene Alcoverde, Jr.
Chief Judge

PREFACE TO THIRD EDITION

The January 1, 2014 third edition of the three volumes of the Tohono O'odham Reports includes appellate cases decided after the January 1, 2013 second edition publication, earlier appellate decisions not included in the prior editions, and also includes both recent and older trial court cases where the lower court cases resolved significant issues.

The third edition also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports.

January 1, 2014

Violet Lui-Frank
Chief Judge

PREFACE TO SECOND EDITION

The January 1, 2013 second edition of the Tohono O'odham Reports updates the cases in Volume 3 to include appellate cases decided after the November 1, 2011 first edition publication and their related trial court cases when the lower court cases resolved significant issues. Other trial court cases with precedential value in 2012 have also been included.

The second edition of all the volumes also includes revisions to internal citations of Tohono O'odham case law to reflect the current location of published cases in the Tohono O'odham Reports to aid readers in finding them.

January 1, 2013

Teresa Donahue
Chief Judge

PREFACE TO FIRST EDITION

November 1, 2011 marks a milestone for the Tohono O'odham Judicial Branch with its first publication of cases from 1985 to the present. The cases are divided into three volumes and include both appellate and trial court decisions with precedential value.

Appellate cases lacking precedential value have been published as summaries. Additionally, in order to preserve confidentiality as required by the Tohono O'odham Children's Code, Section 62, all cases arising in whole or in part from a Children's Court matter have been redacted. As appropriate in a given case, initials or the individual's relationship to the child have been substituted for the name of an individual so that information identifying the child or parties is removed. The names of case workers and legal counsel have not been altered.

Further, obvious misspellings and punctuation errors have been corrected, such as misspellings of "O'odham" and double periods. No grammatical changes have been made.

November 1, 2011

Teresa Donahue
Chief Judge

APPELLATE CASES					
Case Name	**Case Number**	**Document Date**	**Type of Document**	**Judge**	**Citation Number**
Gloria Chavez vs. Sells Community Land Committee, et. al.	AP2021-0002	5/25/2022	Opinion	Fields, Hardy, Frazier	4 TOR3d 1
In the Matter of the Estate of Willard Henry Anita	AP2022-0001	2/8/2023	Opinion	Fields, Atwood, Hardy	4 TOR3d 10
In the Matter of the Estate of Cecelia Mae Miller	AP2022-0002/ AP2022-0003	1/24/2023	Opinion	Osterfeld, Atwood, Antone	4 TOR3d 15
Tohono O'odham Gaming Enterprise v. Tohono O'odham Gaming Office, et, al.	AP2022-0004	5/1/2024	Opinion Re: Sovereign Immunity	Osterfeld, Atwood, Dysart	4 TOR3d 35
Tohono O'odham Nation v. Francisco Augustine Salcido, Jr.	AP2023-0001	6/29/2023	Order Re: Interlocutory Appeal	Dysart, Fields, Alcoverde	4 TOR3d 55
In the Matter of the Estate of Verna Ann Miguel	AP2023-0002	8/31/2023	Order Re: Interlocutory Appeal	Alcoverde, Atwood, Dysart	4 TOR3d 57
In the Matter of the Estate Susie Siquieros	AP2023-0003	8/22/2023	Order Re: Request for Interlocutory Appeal	Alcoverde, Atwood, Dysart	4 TOR3d 60
Tohono O'odham Nation v. Dale Lloyd Joaquin	AP2023-0004	1/3/2024	Decision Re: Review of Trial Court's Conclusion re: right to appointed Counsel	Doll, Juan, Atwood	4 TOR3d 62
Tohono O'odham Nation v. Tyrone Miles	AP2023-0005	5/1/2024	Opinion Re: Double Jeopardy	Dysart, Atwood, Courson	4 TOR3d 67
Tohono O'odham Nation v. Lorna Cipriano	AP2023-0006	1/09/2024	Order Re: Terms of Probation (consecutively v. concurrently)	Alcoverde, Courson, Dysart	4 TOR3d 71
Tohono O'odham Nation v. Lorna Cipriano	AP2023-0006	3/28/2024	Order Re: Motion to Dismiss	Alcoverde, Courson, Dysart	4 TOR3d 73

TRIAL COURT CASES					
Case Name	**Case Number**	**Document Date**	**Type of Document**	**Judge**	**Citation Number**
In the Matter of the Guardianship and Conservatorship of Mavis Manuel	2009-0178AV	3/15/2024	Order Re: Annual Review Hearing and Ward's Voting Rights	Hardy	4 TOR3d 74
Gloria Chavez vs. Sells Community Land Committee, et. al.	AV2019-0091	8/23/2021	Order Re: Dismissal Without Prejudice - lack of subject matter jurisdiction	Osterfeld	4 TOR3d 79
In the Matter of the Estate of Cecelia Mae Miller	AV2020-0054	8/10/2022	Order Re Final Decision	Alcoverde	4 TOR3d 98
In the Matter of the Estate of Cecelia Mae Miller	AV2020-0054	8/15/2022	Amended Order Re 220810 Final Decision	Alcoverde	4 TOR3d 118
In the Matter of the Estate of Cecelia Mae Miller	AV2020-0054	8/25/2022	Order Re Motion for Reconsideration	Alcoverde	4 TOR3d 123
In the Matter of the Estate of Cecelia Mae Miller	AV2020-0054	2/28/2023	Order on Remand	Alcoverde	4 TOR3d 132
In the Matter of the Estate of Cecelia Mae Miller	AV2020-0054	5/31/2022	Order Re: Motion to Dismiss for Lack of Subject Matter Jurisdiction	Alcoverde	4 TOR3d 134
Johnny M. Sam v. Trina A. Sam	AV2020-0062	7/29/2021	Order Re: Division of Debt & Spousal and Child Support	Alcoverde	4 TOR3d 140
In the Matter of the Estate of Willard Henry Anita	AV2021-0033	12/30/2021	Order Re: Distribution of HUD Home	Alcoverde	4 TOR3d 156
In the Matter of the Estate of Willard Henry Anita	AV2021-0033	1/20/2022	Order Re: Stay, Interlocutory Appeal re: HUD Home	Alcoverde	4 TOR3d 163
In the Matter of the Estate of Willard Henry Anita	AV2021-0033	3/20/2023	Order Re: Remand from Appellate Court Re: Distribution of HUD Home	Alcoverde	4 TOR3d 170
In the Matter of the Estate of Lucinda Anita Hughes-Juan	AV2021-0104	1/19/2023	Order Re: Application of AZ law regarding surviving spouse allowances and exemptions	Hardy	4 TOR3d 172
Wesley Valentine v. Shaunee Quasula; Shaunee Kyla Quasula v. Attorney General Tohono O'odham Nation	AV2021-0123, AV2021-0127	12/16/2021	Order Re: ICWA child, parental rights	Alcoverde	4 TOR3d 178

Case Name	Case Number	Document Date	Type of Document	Judge	Citation Number
Wesley Valentine v. Shaunee Quasula; Shaunee Kyla Quasula v. Attorney General Tohono O'odham Nation	AV2021-0123, AV2021-0127	1/6/2022	Order Staying Enforcement of Foreign Order, ICWA child	Alcoverde	4 TOR3d 182
Shaunee Kyla Quasula v. Attorney General TON	AV2021-0127	9/20/2022	Order Setting aside the Dec 16, 2021 Order, ICWA child	Alcoverde	4 TOR3d 184
Wesley Valentine v. Shaunee Quasula; Shaunee Kyla Quasula v. Attorney General Tohono O'odham Nation	AV2021-0123, AV2021-0127	10/6/2022	Order Re AZ Order to terminate parental rights, ICWA child	Alcoverde	4 TOR3d 186
Tohono O'odham Gaming Enterprise v. Tohono O'odham Gaming Office, et, al.	AV2022-0056	7/15/2022	Order Re: Motion for Immediate Stay addressing "good cause" standard for stay in administrative appeal	Hardy	4 TOR3d 188
Tohono O'odham Gaming Enterprise v. Tohono O'odham Gaming Office, et, al.	AV2022-0056	8/23/2022	Order Re: Partially Staying Final Decision addressing final agency actions, sovereign immunity, and applying the good cause standard for staying an administrative decision	Hardy	4 TOR3d 191
Tohono O'odham Gaming Enterprise v. Tohono O'odham Gaming Office, et, al.	AV2022-0056	10/26/2022	Order Re: Granting TOGE's Objection to Affidavit and TOGO's Motion to Dismiss addressing sovereign immunity, separation of powers, and due process	Hardy	4 TOR3d 201
Jason Francisco v. Tohono O'odham Gaming Office	AV2022-0092	12/20/2022	Order of Dismissal with Prejudice	Osterfeld	4 TOR3d 212
In the Matter of the Estate Susie Siquieros	AV2022-0116	7/19/2023	Order Re: Stay, Interlocutory Appeal	Osterfeld	4 TOR3d 217
In the Matter of the Estate Susie Siquieros	AV2022-0116	10/3/2023	Order Re: Remand from Appellate Court	Osterfeld	4 TOR3d 221
Mary Lucy Zazueta, et al. v. Tohono O'odham Nation, et al.	AV2022-0122	4/14/2023	Order Re: Motions to Dismiss	Osterfeld	4 TOR3d 222
In Re: Tohono O'odham Nation Health Care, In the Matter of the Investigation Action Against RN Shannon-Elizabeth Ibrahim	AV2022-0162	12/22/2022	Order Re: Arizona Subpoena for Release of Medical Records	Osterfeld	4 TOR3d 240
In the Matter of the Estate of Verna Ann Miguel	AV2022-0165	7/19/2023	Order Granting Interlocutory Appeal	Osterfeld	4 TOR3d 242
In the Matter of the Estate of Verna Ann Miguel	AV2022-0165	10/3/2023	Order Re: Remand from Appellate Court, lifting stay	Osterfeld	4 TOR3d 245

Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	Case Number	Document Date	Type of Document	Judge	Citation Number
In the Matter of the Estate of Verna Ann Miguel	AV2022-0165	11/30/2023	Order Re: DWOP	Fields	4 TOR3d 246
Elliott Hector Bustamante v. Anika Nerisse Joaquin	AV2023-0120	4/1/2024	Order Regarding Legal Decision-Making, Parenting Time and Child Support, with limited, discretionary use of AZ law—best interests of the child generally and when domestic violence is alleged	Hardy	4 TOR3d 247
Erick Brown v. Tohono O'odham Gaming Office	AV2023-0138	3/19/2024	Order Re: Motion to Dismiss	Osterfeld	4 TOR3d 272
Dorinda Miguel and Francisco J. Enriquez v. Emmerson Luther Miguel	AV2024-0082	9/5/2024	Order Re legal decision-making and parenting time rights of aunts & uncles	Hardy	4 TOR3d 275
Jacqueline Marie Lopez v. Jermaine Charles Lopez	AV2024-0088	9/26/2024	Order Re: Child Support and Child's Name Change without consent of both parents	Hardy	4 TOR3d 278
Joseph L. Delgado v. Tohono O'odham Gaming Office, et al.	AV2024-0100	8/21/2024	Order Denying Petitioner's Motion to Stay the Gaming Office's Final Decision addressing controlling law in Tohono O'odham courts and "good cause" standard for stay in administrative appeal, constitutional delegation of authority to agencies, compliance with Gaming Ordinance procedures, claimed property interest in gaming license, due process, "void for vagueness"	Hardy	4 TOR3d 283
Joseph L. Delgado v. Tohono O'odham Gaming Office, et al.	AV2024-0100	8/23/2024	Notice of Errata for 8/21/24 Order	Hardy	4 TOR3d 303
In the Matter of J. Y.	CCV2009-0070	5/1/2024	Order Re Release of Former Minor's Records	Doll	4 TOR3d 304
In the Matter of N. V. S.	CCV2021-0020	10/10/2022	Order to Establish Child Support	Alcoverde	4 TOR3d 307
In the Matter of M. R. S	CCV2021-0021	10/10/2022	Order to Establish Child Support	Alcoverde	4 TOR3d 307
In the Matter of A. E. C.	CCV2021-0022	10/10/2022	Order to Establish Child Support	Alcoverde	4 TOR3d 307

Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	Case Number	Document Date	Type of Document	Judge	Citation Number
In the Matter of H. D. C.	CCV2021-0023	10/10/2022	Order to Establish Child Support	Alcoverde	4 TOR3d 307
In the Matter of Y. L. Z.	CCV2023-0057	07/03/2024	Order Re Guardianship	Juan	4 TOR3d 325
Tohono O'odham Nation v. Adrian Joseph Valdez	CR2010-1926CR	6/17/2022	Order Re: prospective vs. retroactive application of sentencing judge qualifications under T.O. Code and TLOA	Hardy	4 TOR3d 329
Tohono O'odham Nation v. Johnny Garcia	CR2017-0951-1-2	4/3/2023	Opinion on Reconsideration Re: Case Notes Disclosure for Probation Revocation Hearing	Hardy	4 TOR3d 339
Tohono O'odham Nation v. Johnny Garcia	CR2017-0951-1-2	11/1/2023	Order Re: Nation's Request to Have a Petition for Special Action Decided by a Three-judge Panel	Fields	4 TOR3d 347
Tohono O'odham Nation v. Laurinda Smith	CR2019-1400-1-3; CR2022-0439-1-4	2/21/2023	Trial Record Entry Re: Convert Work hours to days served	Hardy	4 TOR3d 351
Tohono O'odham Nation v. Timothy Lorentine Ortega	CR2021-0234-1-6	12/16/2021	Trial Record Entry Re: Motion to Dismiss for lack of disclosure of police report	Fields	4 TOR3d 354
Tohono O'odham Nation v. Dalton Saraficio	CR2021-0261-1-4	1/26/2023	Order Re: Defendant's Motion to Dismiss based on probable cause, lack of police report, and late disclosure of drug analysis reports	Hardy	4 TOR3d 357
Tohono O'odham Nation v. Michael James Miguel	CR2021-0346-1-3	4/11/2023	Order Re: Defense Counsel Withdrawal- T.O. ethics rules vs. AZ Bar ethics rules	Hardy	4 TOR3d 360
Tohono O'odham Nation v. Christopher Moreno	CR2022-0077-3	5/21/2022	Order Re: Motion to Amend to Clarify Plea Agreement	Osterfeld	4 TOR3d 362
Tohono O'odham Nation v. Alyus Amury Encinas	CR2022-0175-1-8	7/15/2022	Order Re: Appointment of Standby Counsel for Self-Represented Def.	Osterfeld	4 TOR3d 366
Tohono O'odham Nation v. Sonny DeAngelo Patricio	CR2022-0277-1-4	10/2/2023	Order Re: Nation's Motion to Continue Trial	Hardy	4 TOR3d 368
Tohono O'odham Nation v. Jalen Justin Juan	CR2022-0292-1-16	10/14/2022	TRE & Continuation Order Re: Appointment of Counsel	Osterfeld	4 TOR3d 374

Case Name	Case Number	Document Date	Type of Document	Judge	Citation Number
Tohono O'odham Nation v. Camillus Nunez	CR2022-0362-1-4	2/6/2023	Order Re: Appointment of Counsel After Critical Stage	Fields	4 TOR3d 386
Tohono O'odham Nation v. Lamuel Emilio Luz	CR2022-0380-2	2/15/2023	Order - Re: Convert Work Hours to Credit for Detention Days Served	Hardy	4 TOR3d 389
Tohono O'odham Nation v. Jaime R. Hendricks	CR2022-0389-1; CR2022-0376-1	1/25/2023	Order Re: Defendant's Motion in Limine addressing permissible uses of prior wrongful acts	Hardy	4 TOR3d 391
Tohono O'odham Nation v. Elijah Valencia	CR2022-0400-1-5	4/3/2023	Opinion - Re: Speedy Trial Time Limits & Delays in Appointment of Counsel	Hardy	4 TOR3d 394
Tohono O'odham Nation v. Francisco Salcido	CR2022-0423-1-4	4/10/2023	Order Re: Motion to Dismiss Re: Speedy Trial Time Limits & Delays in Appointment of Counsel	Hardy	4 TOR3d 405
Tohono O'odham Nation v. Francisco Salcido	CR2022-0423-1-4	4/27/2023	Order Re: Nation's Motion to Appoint a State-Licensed Attorney	Hardy	4 TOR3d 416
Tohono O'odham Nation v. Francisco Salcido	CR2022-0423-1-4	5/26/2023	Order Denying Motion to Appoint New Conflict Attorney, Addressing Critical Stages of Proceedings	Hardy	4 TOR3d 419
Tohono O'odham Nation v. Clement Soto	CR2022-0426-1	8/31/2023	Order Re: Defendant's Motion to Convert Work Hours to Credit for Detention Days Served, Implementation & Amendment of Court Rules	Hardy	4 TOR3d 425
Tohono O'odham Nation v. Clement Soto	CR2022-0426-1	9/13/2023	Trial Record Entry Re: Defendant's Motion to Convert Work Hours to Credit for Detention Days Served	Hardy	4 TOR3d 431
Tohono O'odham Nation v. Lorna Cipriano	CR2022-0440-1, CR2023-0197	2/20/2024	Trial Record Entry Re: AP2023-0006 Remand, Probation Issue (consecutive v. concurrent)	Hardy	4 TOR3d 435
Tohono O'odham Nation v. Dale Joaquin	CR2022-0483-1/2/5-9	8/31/2023	Order Denying Defendant's Motion to Drop Charges (addresses when right to appointment of counsel attaches)	Hardy	4 TOR3d 438

Case Name	Case Number	Document Date	Type of Document	Judge	Citation Number
Tohono O'odham Nation v. Tyrone Miles	CR2023-0037-1-8	8/30/2023	Trial Record Entry Re: Bench Trial	Fields	4 TOR3d 443
Tohono O'odham Nation v. Tyrone Miles	CR2023-0037-1-8	9/25/2023	Trial Record Entry Re: Sentencing	Fields	4 TOR3d 445
Tohono O'odham Nation v. Mario Robert Figueroa, Jr.	CR2023-0074-1/6/8	6/13/2023	Order Denying Motion to Revoke Probation	Hardy	4 TOR3d 447
Tohono O'odham Nation v. Hilarion Enos, Jr.	CR2023-0284-2-4	9/13/2023	Trial Record Entry Re: Nation's Notice to Seek More than One Year Incarceration, addressing when right to appointment of counsel attaches	Hardy	4 TOR3d 449
Glen Frank v. Tohono O'odham Nation	HC2022-001	3/6/2023	Order - Habeas Corpus, addressing double jeopardy, right to court-appointed counsel, and due process	Hardy	4 TOR3d 451
Tohono O'odham Nation v. Natasha L. Matthews	TR2022-0007-1-2	06/05/24	Order Re Prosecutors OTSC	Juan	4 TOR3d 458
In Re: Prosecutor's Petition for Administrative Order Dated April 18, 2024	No Case Number	6/28/2024	Order Re: Denial of Request for Automatic 72-hour Hold for In-custody Defendants	Alcoverde	4 TOR3d 461

APPELLATE DECISIONS

In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
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JUDICIARY SERVICE CLERK

GLORIA CHAVEZ, Appellant, Vs. SELLS COMMUNITY LAND COMMITTEE, the regulatory body Overseeing land assignments in Sells District; OLGA ARMENTA, LARRY WILSON, MARILYN IGNACIO, LOUELLA MARTINEZ, CATHERINE WHITMAN. In their official capacities as Sells Community Land Committees Members; and John Doe and Jane Doe 1-20; and other John Doe Entities 1-10, All whose names are unknown. Appellee.	Case No.: AP2021-0002 (Ref: AV2019-0091) Opinion

Margaret Hirchak, Counsel for Appellant.

Katosha Nakai and William E. Strickland Jr., Counsel for Appellee.[1]

Before Judges Kyle Fields, Joseph Hardy Jr., and Rachael Frazier Johnson:

Under Tohono O'odham law, a district may assign homesites in unallotted lands to individuals under various conditions with one condition being that it cannot be an unending perpetual assignment. All other control and management of the Nation's unalloted lands, being held in common as a national public resource, are vested in the Tohono O'odham Council. Here, Gloria Chavez, Appellant, asserts that she has a vested property interest in unallotted land occupied

[1] Counsel entered a limited appearance to challenge jurisdiction and raise the issue of sovereign immunity.

by her relatives, and in which her deceased mother had an assigned homesite. We must decide whether Gloria Chavez, as an heir, has a protected property right to challenge the Sells Community Land Committee's decision to reclaim her mother's assigned homesite.

Background

Sells District Parcel 335 ("the Lot") is a parcel of unallotted land within the Tohono O'odham Nation. Gloria Chavez traces her relatives' occupation of the Lot to at least the 1940's when Julianna Garcia Pino lived on the Lot. When Ms. Pino passed away, she left the house on the Lot to her grandson, Ramon Jose Garcia. Mr. Garcia eventually passed away. Sometime later, the Sells District assigned the Lot to Melissa Chavez, Mr. Garcia's aunt. During a probate of Mr. Garcia's estate, the Court awarded the house to Ella Garcia, Mr. Garcia's surviving spouse. The Court gave Ella Garcia ten months to remove the house from the Lot or turn over the house to Melissa Chavez. Eventually, Melissa Chavez lived in the house on the Lot with her husband, Ivan Chavez, and children, Gloria Chavez and Ira Chavez.

In November 1976, Melissa Chavez signed a designation of beneficiary form, which named Ivan Chavez and Ira Chavez as beneficiaries "to have and hold all developments upon my property pertaining to this land assignment[.]" Aff. of Gloria Chavez in Supp. of Ex Parte Appl. for TRO and Compl. for Decl. and Inj. Relief, Ex. F.[2] Ivan Chavez passed away. Sometime later, Melissa Chavez passed away without a will. No one opened a probate case for Melissa Chavez's estate.

In September 2017, the Sells Community Land Committee ("the Committee") mailed Gloria Chavez a notice stating that the Committee intended to reclaim the Lot in order to re-assign the homesite to someone else.[3] Gloria Chavez appealed, and the Committee set a meeting. But at the meeting, the Committee did not allow Gloria Chavez to speak. The Committee reasoned that it

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[2] On appeal, Gloria Chavez asserts that the trial court erred by considering the designation of beneficiary form because it was not properly authenticated. This argument, lack of authentication, was not raised in the trial court. Therefore, it is waived. *See Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1086 (Ariz. 1987) (stating "an appellate court will not consider issues not raised in the trial court").

[3] As noted by the trial court, the Sells Community Land Committee operates from a delegation of authority from the Sells District.

should notify Ira Chavez because he was on the designation of beneficiary form. In June 2018, the Committee notified Ira Chavez about the potential reclamation. Ira Chavez appealed, and the Committee met.

At the meeting, the Committee did not allow Ira Chavez or his attorney to speak or present any evidence. During the meeting, the Committee stated that a person must be a Sells District member to be eligible for a land assignment. Ira Chavez and Gloria Chavez are members of the Chukut Kuk District. After the meeting, the Committee issued a resolution, which gave Ira Chavez one year to improve the Lot and to apply for land assignment. Ira Chavez did not apply for a land assignment. Three months before the deadline, Ira Chavez passed away without a will. No one opened a probate case for Ira Chavez's estate. Gloria Chavez did not apply for a land assignment.

In July 2019, Gloria Chavez and Ira Chavez's children filed a complaint asking the trial court to find that the Committee violated their constitutional rights to due process, equal protection, and right to live and beneficially use land in any district regardless of district boundaries. A few months later, the plaintiffs amended the complaint adding a fourth count, alleging that the Committee lacked regulatory authority because the Lot was in a BIA reserve.

The Committee filed a motion to dismiss, which the trial court granted to the claim that the Lot was in a BIA reserve. The trial court also dismissed all the other plaintiffs, except Gloria Chavez, for lack of standing and capacity.

After asking for additional briefing, the trial court converted the motion to dismiss to a motion for summary judgment because the parties were presenting information outside the pleadings. The trial court ordered Gloria Chavez to notify the Tohono O'odham Nation and the Tohono O'odham Legislative Council.

Sometime later, Gloria Chavez asked the Court to reconsider dismissing the count that the Lot was in a BIA reserve. In April 2021, the Court restored the count. The trial court held oral argument, and entered judgment for the Committee on the grounds of sovereign immunity, lack of standing, the political question doctrine, and failure to join an indispensable party. Gloria Chavez appealed. The other Plaintiffs did not appeal.

Standard of Review

The Court of Appeals reviews a trial court's grant of summary judgment *de novo*, and the Court examines the record and all reasonable inferences in the light most favorable to the non-moving party. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (T.O. Ct. App. 1989); *Smith v. Nation*, 2021 TOR Supp. 75, 77 (T.O. Ct. App. 2020).

Analysis

Gloria Chavez asserts that the trial court erred in ruling that she does not have standing. We disagree.

Standing

Standing is a requirement under the Tohono O'odham Constitution Article VIII, Section 2, which provides: "The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity[.]" Standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 407 (2013). The plaintiff, as the party invoking the court's jurisdiction, bears the burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). To prove standing, a plaintiff must show:

> 1. The plaintiff suffered an injury in fact—an invasion of a legally protected interest that is: (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> 2. There is a causal connection between the injury and the alleged conduct; and
>
> 3. It is likely, as opposed to merely speculative, that a favorable decision will redress the injury.

See In Re: Petition of the Judicial Branch, 3 TOR3d 105, 122 (T.O. Tr. Ct., Oct. 22, 2010); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Here, all of Gloria Chavez's claims are based on the premise of having a vested substantial property interest in the Lot and a right to maintain the Lot. *See* Am. Compl. at 12 ¶¶ 82–84; 13 ¶¶

95–97; 14 ¶¶ 104–05; 15 ¶¶ 111–13. To establish standing, Gloria Chavez must show that she has a legally protected interest in the Lot.

Does Gloria Chavez have a legally protected interest in the Lot?

It is undisputed that the Lot sits on unallotted lands of the Tohono O'odham Nation. Section 1 of the Tohono O'odham Constitution provides that "[t]he unallotted lands of the Tohono O'odham Nation . . . are a valuable public resource and shall be held as national lands forever." T.O. Const. Art. XVI, § 1.[4]

The Constitution further provides that "Control and management [of the unallotted lands of the Tohono O'odham Nation] are vested in the Tohono O'odham Council, which may enact laws governing the use, assignment, permit, lease, or other disposition of lands, interests in land and resources of the nation consistent with Federal law." *Id.* at § 1.

While the Constitution vests in the Tohono O'odham Council this broadest authority over the use, assignment, and other disposition of unallotted lands, and interests in those lands, the Constitution also vests some authority in the districts. The districts may assign homesites to individual members "under the customary procedures of their respective communities[.]" *Id.* at § 4(a). The Constitution also limits districts' power to make assignments. The district must make the assignment to a member of the nation. *Id.* at § 4. The assignment must be for "beneficial use and occupancy[.]" *Id.* at § 4(a). Finally, the district cannot grant an unending perpetual property interest in unallotted lands. *Throssell v. Throssell*, 1 TOR3d 34 (T.O. Ct. App. 1992).

Notably, the Constitution distinguishes between assignments of land and the developments on lands of the Tohono O'odham Nation. Under Article XVI, Section 6, of the Tohono O'odham Constitution, all individual developments, such as water developments, farms, and homes, on land of the Tohono O'odham Nation are personal property, which are "subject to disposal in accordance

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[4] Allotted lands are treated differently. *See* T.O. Const. Art. XVI, § 2; *see generally* Cohen's Handbook of Federal Indian Law §§ 16.01–16.05, at 1068–1104 (discussing the history and differences between allotted lands and unallotted lands).

with the customary procedures of the district council[.]" T.O. Const. Art. XVI, § 6.[5] This distinction is important because it implies that developments on the assigned land are inheritable; whereas, the land assignments are not. *See State v. Roscoe*, 912 P.2d 1297, 1299 (Ariz. 1996) (discussing the rule of statutory construction that the expression of one thing is the exclusion of another); *see generally* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 107–11 (discussing the Negative-Implication Canon).

In this case, Gloria Chavez argues that she has an interest in the Lot because, under the traditions and customs of the nation, her ancestors occupied the Lot since at least the 1940's and that she may now therefore inherit the Lot from Melissa Chavez's estate. Unfortunately, this argument: (a) conflates the constitutional distinction between a land assignment with the ownership of developments on the assigned land; and (b) places her claimed interest—based on custom and tradition—above the Constitution.

The record shows a long-running distinction between the land assignment and the developments on the land:

- Julianna Garcia Pino's Will: leaving "my house" to Ramon Jose Garcia. Aff. Of Gloria Chavez in Supp. Of Ex Parte Appl. For TRO and Compl. For Decl. and Inj. Relief, Ex. A.
- Ramon Jose Garcia's Letter: stating that he wants Melissa Chavez to get "my house." *Id.* at Ex. B.
- *In re: Ramon Jose Garcia*, Case No. 2438 (T.O. Tr. Ct. Jan. 23, 1976): awarding the house to Ella Garcia, but giving Ms. Garcia ten months to remove the house from the Lot. While the order identifies the Lot as the "lot of Melissa Chavez," the order does

[5] As such for unalloted lands, Tohono O'odham law does not adopt the common-law doctrines of fixtures or similar doctrines that convert personal property to real property when it is attached to the land. *See generally* 35A Am. Jur. 2d Fixtures § 2 (discussing fixtures and improvements to land).

not specifically award the Lot to Melissa Chavez.[6] Aff. Of Gloria Chavez in Supp. Of Ex Parte Appl. For TRO and Compl. For Decl. and Inj. Relief, Ex. B.

- Melissa Chavez's Designation of Beneficiary: stating "to have and hold *all developments* upon my property pertaining to this land assignment pursuant to Land Assignment Code[.]" *Id.* at Ex. F (emphasis added). Notably, the form does not attempt to pass the Lot *assignment* with those developments.

While the developments on the Lot were passed down multiple generations and the Sells District assigned the land to Gloria Chavez's ancestors, those acts do not create a vested property interest in either the land assignment or the land itself that Gloria Chavez, as an heir can assert.[7] Absent a law creating or recognizing such a right, the Court, based on the Constitution, cannot recognize a vested property interest by virtue of being an heir of a person who was granted an assignment or of being a descendent of a family that has occupied the Lot, for any amount of time. *See* T.O. Const. Art. XVI, § 1 (providing that control and management of unallotted lands are vested in the Tohono O'odham Council, which may enact laws governing assignments); *Id.* at § 4(a) (providing that assignments can be made "in accordance with ordinances enacted by the Tohono O'odham Council and approved by district councils"); *see also Clapper*, 568 U.S. at 407 (recognizing that standing "serves to prevent the judicial process from being used to usurp the powers of the political branches").

If the Court adopted Gloria Chavez's position, it could cause all the districts' land assignments to become perpetual. *C.f. Throssell*, 1 TOR3d at 34–38 (discussing that a district cannot grant an unending perpetual assignment). In fact, since Ms. Chavez bases her claimed interest on the custom and tradition of familial land occupation, any other family in a similar situation could also claim a perpetual inheritable interest in unalloted lands, with or without a homesite assignment.

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[6] The record shows that other parties used loose identifications for the Lot. For instance, the original notice that the Committee gave to Gloria Chavez identified the Lot as the "Chavez Lot in Sells AZ." Aff. of Gloria Chavez in Supp. of Ex Parte Appl. for TRO and Compl. for Decl. and Inj. Relief, Ex. C.

[7] At oral argument, the Committee conceded that a person who was granted an assignment would have a vested protected interest for the purposes of standing.

That would make both the districts' power to assign homesites to individual members, and the Tohono O'odham Council's authority to manage all land dispositions, meaningless. *See* T.O. Const. Art. XVI, § 1 (providing that the lands of the Tohono O'odham Nation are national lands forever); *id.* at § 3 (unallotted lands held in common); *id.* at § 5 (unallotted lands not under district assignment or under other use or disposition authorized by the Tohono O'odham Council may be used for communal pastures or for public purposes). While custom and tradition are important aspects of Tohono O'odham law, Gloria Chavez cannot use them to contradict express terms in both the Constitution and the Nation's laws to create a perpetual private interest in unallotted lands. *See* 4 T.O.C. § 1-102 ("In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation."). As a result, Gloria Chavez does not have a vested legally protected interest in the Lot.

Because Gloria Chavez does not have a protected interest, the Court need not consider the two remaining elements for standing. *See In Re: Petition of the Judicial Branch*, 3 TOR3d at 122; *see also Lujan*, 504 U.S. at 560–61. Therefore, Gloria Chavez does not have standing.

Finally, even assuming the Lot was in a "BIA reserve", and such status removed the district's authority to regulate the Lot, Gloria Chavez would not have standing because she would not have a vested legally protected interest in the land by virtue of intestate succession from Melissa Chavez.[8]

Alternative Grounds

Because the Court affirms the trial court's decision that Gloria Chavez lacks standing, the Court declines to address her arguments that the trial court erred granting judgment on the grounds of sovereign immunity, the political question doctrine, and failure to join an indispensable party.

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[8] The Court specifically notes that it is not ruling on the merits of the claim that the Lot is in a "BIA reserve" or what effects that it would have.

See Hawkins v. State, 900 P.2d 1236, 1239 (Ariz. Ct. App. 1995) (discussing that an appellate court will affirm the entry of summary judgment if it is correct for any of the alternative grounds).

Conclusion

The Court affirms the trial court's judgment that Gloria Chavez lacks standing. The Court also lifts the stay that the trial court entered on October 8, 2021.

DATED: May 25, 2022.

Judge Kyle Fields

Judge Joseph Hardy Jr.

Judge Rachael Frazier Johnson

JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Court of Appeals

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 FEB -8 A 8:00
Tiffany Muse
JUDICIARY SERVICE CLERK

In the Matter of the Estate of:	Case No.: AP2022-0001 (Ref: AV2021-0033)
Willard Henry Anita (D.O.B. Jul. 2, 1954) Decedent	OPINION

Belinda BreMiller and Suzanne Laursen, Counsels for the Appellant.

Before Judges Kyle Fields, Barbara Atwood, and Joseph Hardy Jr.

In this case, the Court must decide whether a surviving spouse, who is not currently a member of the Tohono O'odham Nation, may inherit a home that is attached to an assigned homesite. For the reasons listed below, we vacate the Trial Court's decision and remand with instructions.

Background

Mr. Anita passed away on August 18, 2020. When Mr. Anita passed away, he did not have a will. His heirs are Melva Anita Lopez, Mr. Anita's estranged spouse; Rose Martin, Mr. Anita's sister; Evelyn Ortiz, Mr. Anita's sister; and the children of Mr. Anita's deceased sisters, Marlene Baptisto and Darlene Miguel.

Eventually, a family member filed a petition to probate Mr. Anita's estate. The Trial Court appointed a personal representative and distributed the personal property to Ms. Lopez, which

included a vehicle, a bank account, and a pending per capita distribution. The parties, however, disagreed about the distribution of a HUD home, N-026-0028-01, in the Gu Achi District.

The other heirs asserted that Ms. Lopez could not take the HUD home because she is not a member of the Nation. In response, Ms. Lopez stated that her mother submitted an application on her behalf about 10 to 15 years ago, but she has yet to hear anything about her membership application. After an evidentiary hearing, the Trial Court awarded Ms. Lopez a lifetime occupancy of the house with the condition that the house would become hers if she became a member. If Ms. Lopez passed away before becoming a member, the house would go to the other heirs.

The personal representative filed an interlocutory appeal and the Trial Court stayed its order. We accepted jurisdiction. The Trial Court clarified that Ms. Lopez had a power of appointment to distribute the HUD home to anyone who is eligible to own the HUD home.

This Court set the briefing schedule, including multiple extensions of time for filing the briefs. Ms. Lopez did not file a responsive brief.

Analysis

We review the Trial Court's interpretation of law de novo. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989).

A. Attached Structures to Unallotted Land

Under the Tohono O'odham Constitution, all individual developments on the lands of the Tohono O'odham Nation are personal property. T.O. Const. Art. XVI, § 6; *see Chavez v. Sells Comm. Land Comm.*, -- TOR --- (Ct. App. May 25, 2022), AP2021-0002 (publication forthcoming). The Constitution provides two functional classifications for unallotted lands. *See* T.O. Const. Art. XVI § 5 (1. Unallotted lands under use, lease, disposition authorized by the Tohono O'odham Council, or assignment made by a district counsel. 2. All other unallotted lands not in the first category, which may be used for "communal pastures and gardens . . . or for public

purposes of any sort.").[1] The Constitution also provides that the attached structures to unallotted land are subject to disposal according to the customary procedures of the District or enacted Tohono O'odham law. *Id.* § 6.

The Constitution states that the Districts have the power to assign homesites for beneficial use and occupancy to members of the Tohono O'odham Nation. *Id.* § 4(a). When interpreting the Constitution, the Court reads all the sections as a whole. *See Manuel v. T.O. Legislative Council*, 2021 TOR Supp. 121, 126 (Tr. Ct. Dec. 22, 2016). Likewise, the Court must avoid any interpretation that would render one section void or superfluous. *Id.* at 127.

When reading Sections 4(a) and 6 together as a whole, the Constitution provides that structures attached to unallotted land can be owned only by members. Because the Constitution limits beneficial homesite use and occupancy on unallotted lands only to members, it follows that beneficial use and occupancy of any residential structure permanently attached to a homesite must also be limited to members. *See* T.O. Const. Art. XVI, § 4(a). For instance, one could not use and occupy a residential structure permanently attached to a homesite without having to use and occupy the homesite. The Court notes that mobile homes or other removable items would be personal property that would not have the same restrictions limiting ownership to members. *See id.* (providing that the District has the power to assign homesites to members to use and occupy).

In this case, Mr. Anita's HUD home is attached to an assigned homesite in the Gu Achi District. As such, the Court can only distribute it to members of the Tohono O'odham Nation.

B. Determining Membership in a Probate Case

The Constitution lists the requirements for membership. T.O. Const. Art. II, § 1. In a probate case, the Court will determine heirs or identify people named in a will at the beginning of the case. *See generally* 95 C.J.S. Wills § 657 (discussing the start of a probate case). When distributing the estate's assets, the Court must distribute the assets in accordance with the

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[1] Tohono O'odham Constitution Article XVI Section 2 addresses allotted lands.

Constitution. Tohono O'odham law does not specify when the Court must determine if an heir is a member. As a result, the Court will look to Arizona law. *See* 4 T.O.C. Ch. 1 § 1-102 and T.O. R. Gen. Prac. 1(c).

Under Arizona Law, heirs are determined if they survive the decedent (the person who passed away) for 120 hours. *See* A.R.S. §§ 14-2103 & 14-2104. Moreover, Arizona law often uses "time of the decedent's death" for determining if a person meets the particular qualifications. *See* A.R.S. § 14-1201 (defining multiple terms in accordance with a judicial determination at the time of death). As it can take many years for a person to become a member, the Court finds that determining membership for a potential heir is at the time of the decedent's death. This would avoid prolonging the finalization and closure of the person's estate. *See generally* 42 C.J.S. Indians § 21 (discussing the process to become a member of a tribe). As a practical matter, the heir would be in the best position to know if he or she is a member.[2] Therefore, the potential heir has the burden to show that he or she is a member or in the case of a minor that he or she is eligible to become a member of the Tohono O'odham Nation.

Here, Ms. Lopez stated that her mother submitted a membership application on her behalf 10 to 15 years ago. Ms. Lopez's parents are not members of the Tohono O'odham Nation, and Ms. Lopez is not a minor. While Ms. Lopez may eventually become a member, the Court must determine membership as of the time of Mr. Anita's death. Therefore, Ms. Lopez is not a member of the Tohono O'odham Nation for this probate proceeding.

C. Distributions when the Surviving Spouse is not a Member

Under Tohono O'odham case law, the Court distributes an estate to the surviving spouse and to any children of the decedent who are not children of the surviving spouse. *See, e.g., In re Francisco*, 1 TOR3d 55, 56 (Tr. Ct. Jun. 3, 1988).

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[2] An adult has the burden of showing that he or she is a member of the Nation at the time of the decedent's death. As a practical matter, a minor would have the burden of showing that he or she is eligible to become a member at the time of the decedent's death.

Because the attached structures are on a homesite assignment and the surviving spouse is unable to establish membership, the Court must treat the surviving spouse as if he or she predeceased the decedent as to that asset. *See id.* (discussing how heirs are determined under both Arizona law and Bureau of Indian Affairs' regulations). Under Arizona law, the results are the same. *See* A.R.S. § 14-2103 (providing that if a surviving spouse cannot take an asset, the court distributes the asset to other heirs).

In this case, the HUD home can only be distributed to members. Ms. Lopez is not a member. Therefore, the Trial Court erred in granting Ms. Lopez any interest in the HUD home. The Trial Court also erred in granting a power of appointment to Ms. Lopez as the Trial Court should have distributed the HUD home to other heirs by representation.

Conclusion

The Court vacates the orders entered on December 30, 2021 and January 20, 2022. This Court directs the Trial Court to award the HUD home to the other surviving heirs, who are members of the Tohono O'odham Nation. The Court remands the case to the Trial Court.

Dated February 8, 2023.

Judge Kyle Fields, for the Court

TOHONO O'ODHAM JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

FILED
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JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
1/24/23 @ 3:43pm
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Tiffany Mease
COURT CLERK

In the Matter of the Estate of: Cecelia Mae Miller DOB: 06/25/1938 DOD: 05/06/2020 Decedent	Case Nos.: AP2022-0002 AP2022-0003 (Ref: AV2020-0054) OPINION

Colin Bradley and Associated Counsel Alisa Gray for Appellants Jennifer E. Miller and Richard J. Perry.

Roberta Armstrong and Associated Counsel Christopher Jeffery for Appellee Sandra Miller.

Before Judges David M. Osterfeld, Barbara Atwood, and Mashone Antone.

Having considered the Tohono O'odham Nation Trial Court ("Trial Court") record, the filings on appeal, and argument presented December 13, 2022, this Court finds the Trial Court is not a convenient or practical forum for the probate of the Cecelia Mae Miller Estate ("Estate"), as the decedent was domiciled in Maricopa County, most assets are located there, most heirs live there, and ancillary probate proceedings have begun in Maricopa County Superior Court. This Court therefore directs the Trial Court to stay further proceedings in the probate of the Estate and to take all steps necessary to enable the Maricopa County Superior Court to move forward as the main probate of the Estate.

While this Court has consolidated AP2022-0002 and AP2022-0003 for this appeal, this decision addresses only AP2022-0002. For reasons explained below, we strike the Trial Court

orders issued between August 27, 2021, to and including, the order denying Appellants' Motion to Dismiss filed May 31, 2022, except for the specific order to open probate in Maricopa County Superior Court included within the order filed November 8, 2021. Also, given this decision in AP2022-0002 and the stayed briefing and argument on the second appeal AP2022-0003, we direct the Trial Court to reconsider its orders issued before August 27, 2021, and after May 31, 2022. Appellants are not foreclosed from pursuing their appeal in AP2022-0003 after the Trial Court rules on reconsideration of the remaining Orders.

We have jurisdiction to hear this appeal under the Constitution of the Tohono O'odham Nation (the Nation's Constitution), Article VIII, § 7. The judicial power to adjudicate is in Art. VIII, Sections 2 and 10 of the Nation's Constitution.

I. FACTUAL BACKGROUND

Cecelia Mae Miller, a member of the Tohono O'odham Nation, died on May 6, 2020. On July 8, 2020, Ms. Miller's family, through Appellants, filed a Petition to Appoint Personal Representative and Probate the Estate, attaching a copy of Ms. Miller's death certificate, proof of enrollment, and a copy of her Last Will and Testament, dated January 7, 2003.

The Trial Court held the initial hearing on August 26, 2020. In its resulting Order filed August 27, 2020, the Trial Court found Cecelia died with a valid will, appointed Appellants as co-personal representatives (also separately ordered on August 27, 2022), required filing of an inventory and appraisement by November 24, 2020, directed filing of the Perry Miller Trust documents, and set a review hearing for February 24, 2021.[1] The Court issued letters of administration on September 9, 2020.

Appellants filed the Perry Miller Trust documents on October 29, 2020. They also filed a Preliminary Probate Report on January 11, 2021, noting Cecelia Mae Miller signed her will

[1] The Trial Court misstated the review hearing date as February 24, 2020, and corrected that date to February 24, 2021, in a separate Order filed September 15, 2020.

when she signed the Perry Miller Trust ("Trust"). Although Cecelia had consulted an attorney in 2019 to draft a new will and Power of Appointment Trust, the Report said she died before approving and signing those documents. The Appellants also reported that all bank accounts and real estate were located off the Tohono O'odham Nation lands, listed the assets not yet transferred into the Trust, and documented the receivables and debts for the Estate.

The Trial Court issued a Letter of Appointment on January 14, 2021, letting the co-personal representatives act for the Estate, even independent of each other, and let them transfer and convey title to any Estate property. On February 24, 2021, the same day of the review hearing, Sandra Miller, Appellants' sister, and heir to the Estate, appeared through counsel Roberta Armstrong and objected to any transfer of Cecelia Miller's 641 W. Linger Lane ("Linger Lane") home to the Perry Miller Trust. Sandra Miller also objected to any change to the operation and ownership of the Fry Bread House, L.L.C. Before Cecelia Mae Miller's death, she and Sandra Miller lived together at the Linger Lane home and Sandra managed and ran the Fry Bread House business.

In its resulting Order from the February 24, 2021 review hearing, the Trial Court found Cecelia died with a valid will and testament, found the Linger Lane property was in Maricopa County, Arizona, and asked the parties to brief five issues. First, whether Cecelia Miller had issued any written direction on acts related to the Linger Lane property and the Fry Bread House. Second, whether Cecelia Mae Miller owned the Linger Lane property at her death. Third, whether the statute of frauds would bar Sandra Miller's claim to the Linger Lane property. Fourth, whether the Maricopa County Superior Court should resolve the dispute over the Linger Lane property given that the property is in Maricopa County and "[the trial] [c]ourt's subject matter jurisdiction is limited since it cannot entertain a quiet title action". Fifth and final, whether the Linger Lane property and the Fry Bread House L.L.C. were subject to equal division among the heirs or were subject to the pour over provisions of the existing will. The Trial Court also scheduled a Status Hearing for August 25, 2021.

The parties finished briefing their answers to the Trial Court's questions in late August and the Court held the scheduled August 25, 2021, Status Hearing. The resulting Order recognized the Linger Lane property was not within the Nation's jurisdictional boundaries and held it would "likely overstep its subject-matter jurisdiction by ordering the Linger Lane property is subject to being poured over"[2] to the Perry Miller trust. The Court then set a Status Hearing for October 13, 2021.

On November 8, 2021, the Trial Court issued its Order reviewing the October 13, 2021, Status Hearing. The Court found that it lacked subject matter jurisdiction over the Linger Lane property and directed the parties to file an ancillary probate in the Maricopa County Superior Court. The Court set a status hearing on January 12, 2022, to review the probate's progress.

After the January 12, 2022, status hearing, the trial court denied Appellants' request for a stay of its Order directing the parties to open an ancillary probate for the Linger Lane property in Maricopa County. The Court also set a status hearing for February 16, 2022, at 1:30 p.m.

On February 22, 2022, the Trial Court issued its status hearing order reviewing the case and expressed concern the Appellants had not yet started the ancillary probate in Maricopa County as it had directed on November 8, 2021. The Court repeated that it lacked subject matter jurisdiction over the Linger Lane property and reviewed the basis for its conclusion that Sandra Miller had a claim for unjust enrichment because Appellants had caused an undue delay. Based on these conclusions, the Trial Court directed Sandra Miller's attorneys, Roberta Armstrong and Christopher Jeffery, to file an Affidavit of Attorney's Fees and to serve it on the Appellants. The Trial Court also ordered the parties to exchange specific information it believed would help

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[2] *See* Trial Court Order filed August 27, 2021. The Court next stated the parties could stipulate to the Court's decision to pour over the Linger Lane property into the trust, and that the stipulation "would result in a fix to the jurisdictional issue." When a court lacks subject matter jurisdiction over all or part of an action, however, the parties cannot "by agreement or consent, confer subject matter jurisdiction on a court where it would not otherwise exist." *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 596 (App. 2009).

further claims before the Maricopa County Superior Court. Finally, the Court set a status hearing for March 9, 2022.

On March 7, 2022, Appellants filed their request for the Court to issue certified, embossed copies of Cecelia Miller's Last Will and Testament, Letters of Administration issued August 27, 2020, and an Order of the same date finding Cecelia Miller died leaving a valid will. Then, on March 8, 2022, Appellants filed notice they had hired an attorney to help them file the ancillary probate in Maricopa County as ordered, and reported they expected to file it that week.

At the March 9, 2022, status hearing, the Court heard Appellants' request for certified, embossed copies of documents from the record and explained Appellants would receive certified copies of the copy of the will, not the original. At this notice, attorney Roberta Armstrong asked if the Court opened probate with a copy of the will and not the original version. The Court confirmed, noting that Appellants' Petition clarified they filed a copy of the will. The Court offered to have the Appellants testify under oath about the copy of the will they filed and if they knew where the original version of the will was located. The testimony from Appellants and Sandra Miller revealed no one knew the location of Cecelia Miller's original will.[3]

The Court then noted that Roberta Armstrong entered the case after the initial hearing. The Court confirmed it had elicited testimony, to its satisfaction, to open the probate. The Court also affirmed its power to open probate with a copy of the will. The Court let every party present ask questions of the Appellants to elicit testimony and information to determine whether the copy of the will could sustain the probate. After the questioning and having evaluated the testimony, the Court found the copy of the will sufficient to move forward with the probate. No party objected to that finding. The Court then scheduled a continued Status Hearing on March 16, 2022.[4]

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[3] *See* recording of March 9, 2022, hearing. *See also* Trial Court Order filed March 11, 2022.
[4] *See* recording of March 9, 2022, hearing. *See also* Trial Court Order filed March 11, 2022.

At the continued Status Hearing on March 16, 2022, the Court again confirmed it lacked subject matter jurisdiction over the Linger Lane property and again requested an affidavit of attorneys' fees from Sandra Miller. The Court also placed Richard Perry, Jennifer Miller, and Sandra Miller under oath and asked them questions, and allowed questioning from the parties and counsel present, to determine facts to order payment of the Linger Lane mortgage pending resolution of Sandra Miller's creditor claim. Because of that testimony, the Court ordered Appellants to pay the Linger Lane mortgage from Estate funds pending resolution of Sandra Miller's creditor claim and ordered Sandra Miller to pay for upkeep and utilities on that property.[5]

Roberta Armstrong then followed the Trial Court's direction and on April 4, 2022, filed her affidavit claiming attorney's fees of $24,825.00, and $1,345.37 in miscellaneous costs. Ms. Armstrong avowed she would resolve her claims in full for payment of $15,500 in fees plus costs, if uncontested.

On April 20, 2022, Sandra Miller asked the Trial Court to reconsider its decision to probate a copy of the will, citing Arizona law, at A.R.S. § 14-3415(A), for the rebuttable presumption that a lost original will presumes its destruction and revocation. Ms. Miller also asked the trial Court to terminate the appointment of Appellants as co-personal representatives and to order supervised administration of the Estate. Finally, Sandra Miller asked the Trial Court to allow an emergency partial distribution of the Estate for $30,000. The Trial Court set these pending motions for hearing on May 19, 2022 and ordered the parties to provide authority for their positions related to Sandra Miller's requests.

On April 22, 2022, Sandra Miller withdrew her request to remove the Appellants as co-personal representatives and withdrew her request for supervised administration. Three days later, Appellants filed their notice of service of the ancillary probate filings in Maricopa County

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[5] *See* Trial Court Order filed March 18, 2022.

Superior Court. Those filings showed that on April 14, 2022, Appellants had filed their application for informal ancillary probate and informal appointment of co-personal representatives in Maricopa County Superior Court, as the Trial Court had ordered. One week later, on May 2, 2022, Appellants responded and objected to the Trial Court's award of any attorney's fees, arguing that until Ms. Armstrong filed a detailed accounting of such fees, the Court should deny any award.

On May 5, 2022, the Trial Court, on its own initiative, found it had overlooked Arizona's rebuttable presumption that when a will is last seen in a testator's possession, yet cannot be found after death, it is presumed destroyed with intent to revoke. The Trial Court, *sua sponte*, declared it would correct the oversight and "mistake" it made, *nunc pro tunc*[6]. It then entered a decision with notice to the parties under Tohono O'odham Rules of Court, Section 2, Rules of Civil Procedure (T.O.R. Civ. Pro.), Rule 19(a).

The Trial Court explained it was considering prior testimony in its *sua sponte* decision. It reasoned that because Cecelia Miller hired an attorney to prepare a new will that she never signed, because she transferred property out of the Perry Miller Trust and directly to Jennifer Miller, and because she titled her newly bought Linger Lane home in her name and not that of the Perry Miller Trust, she intended to revoke her will and presumably destroyed it. The Trial Court also found Cecelia Miller's actions proved she was "not intent on funding the [Perry Miller] Trust which appears to have been the intent of the 2003 Will". It concluded Cecelia Mae Miller revoked her will and died without a will.

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[6] An order entered *nunc pro tunc* (Latin for "now for then") has little review in this Court's precedent but has extensive review in Arizona's courts which we reference as guidance. A *nunc pro tunc* order is an exercise of the court's inherent power over its records, but it is a ministerial power. A "court may not do more than make its records correspond to the actual facts; it cannot under the guise of amending a minute entry correct any judicial error it may have made or cause an order or judgment that was never in fact made to be placed [on the] record." *Rae v. Brunswick Tire Corp.*, 45 Ariz. 135, 143 (1935). A court should not use such an order "to supply omitted action by the court, but to furnish the record of an action really had, where its recording was omitted through inadvertence or mistake." *See Am. Sur. Co. of NY v. Mosher*, 48 Ariz. 552, 563 (1936). A *nunc pro tunc* order is not meant to supply judicial action but is intended to speak the truth. *See State v. Pyeatt*, 135 Ariz. 141, 143 (App. 1982).

The Trial Court further found, from the record alone, that Appellants had not rebutted the Court's presumption that Cecelia Miller intended to destroy her will. The Court then held Cecelia Miller died intestate. But the Trial Court also sustained Appellants as the co-personal representatives, affirmed they should move forward with the ancillary probate proceedings in Maricopa County, and directed them to quickly address Sandra Miller's creditor claim for her mortgage payments on the Linger Lane property in the Maricopa County action adding to $68,536.95.

Yet, in the next paragraph of its decision, the Trial Court entered judgment in Sandra Miller's favor for that $68,536.95 creditor claim bearing interest at 10 percent per year until paid. The Trial Court also entered judgment distributing the Beatitudes Assisted Living Campus entrance fee of $151,842.87 among the six heirs, ordering each to immediately receive $25,307.14. Finally, the Trial Court told Appellants that if they did not follow these orders, it would set an Order to Show Cause hearing to determine why they should not be fined, incarcerated, or both.[7]

On May 9, 2022, Appellants moved to set aside the Trial Court's May 5, 2022 Order, arguing they were denied due process and an opportunity to be heard. They argued (1) Sandra Miller's April 20, 2022, motion to reconsider probate of the will copy was untimely, (2) Appellants had no chance to file a Response to Sandra Miller's Motion for Reconsideration before the Trial Court issued its decision, and (3) the Trial Court did not give them opportunity to present evidence and rebut the A.R.S. § 14-3415(A) presumption of a destroyed will underpinning its decision.

The next day, the Trial Court entered an Order and clarified that its May 5, 2022, decision did not stem from Sandra Miller's motion, but its own *sua sponte* decision made after reviewing the audio transcripts, the pleadings, and all filings. The Trial Court explained that it

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[7] *See* Trial Court Order filed May 5, 2022.

first looked for guidance on lost wills in Tohono O'odham law and O'odham Custom and Tradition and, finding none, looked to A.R.S. § 14-3415(A). The Trial Court then told Appellants they could file a memorandum explaining why they did not tell the Court about the Arizona law and its presumption of a lost will. It also warned Appellants they should be ready at the next status hearing on May 19, 2022, to show proof the Beatitudes refund had been distributed. The Court added it was "very unlikely that the presumption will be rebutted based on the record now before the Court."[8]

The Trial Court then said it had ordered immediate distribution of the Beatitudes refund and considered its jurisdiction proper because: (1) Appellants had filed their probate action in the Nation's court; (2) they had consented to its jurisdiction; (3) the Court could look to Arizona law and enter judgment in agreement with the Nation's law; and (4) the Nation's Constitution, under Article 1, § 3, let it exercise sovereign powers, authority, and jurisdiction beyond the Nation's geographical boundaries.[9] Finally, the Trial Court changed its May 5, 2022 Order to assess Sandra Miller's $68,536.95 creditor claim against Cecelia Mae Miller's Estate and the Perry Miller Trust.

On May 10, 2022, attorney Roberta Armstrong filed her amended affidavit for award of attorney's fees. Two days later, the Trial Court let Alisa J. Gray associate as counsel with Colin Bradley for Appellants. On May 16, 2022, Sandra Miller asked the Trial Court to terminate her share as a primary beneficiary to the Perry Miller Trust.

On May 18, 2022, Appellants moved the Trial Court to dismiss the matter for lack of subject matter jurisdiction, and on May 19, 2022, moved for reconsideration of the Trial Court's orders of May 5, 2022, and May 10, 2022. On May 27, 2022, the Trial Court issued its Order reviewing the May 19, 2022, status hearing. The Trial Court denied Sandra Miller's request for emergency partial distribution of $30,000 from the Estate, finding it lacked jurisdiction because

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[8] *See* Trial Court Order filed May 10, 2022.
[9] *Id.*

the Trust required the parties file their request in Maricopa County Superior Court. After hearing argument, the Trial Court set aside the Court's previous May 10, 2022 Order directing immediate distribution of the Beatitudes Entrance Fee refund and the $68,536.95 judgment against Cecelia Mae Miller's Estate and the Perry Miller Trust.

On May 31, 2022, the Trial Court issued its Order denying Appellants' motion to dismiss the case for lack of subject matter jurisdiction. The Court based its decision on the Nation's Constitution's general grant of the Nation's power, authority, and jurisdiction over its members beyond the geographical boundaries of the Nation (Article 1, § 3), the Nation's general power vested in its courts (Article 8, § 1), the specific judicial power of the Nation's courts to decide "cases and matters in law and equity" arising under the Nation's Constitution, the laws and ordinances of or applicable to the Nation, the Nation's customs (Article 8, § 2 & 4 T.O.C. § 1-101(a)), and the specific probate law found at Title 9, Chapter 1, §§ 16 & 17 of the Nation's Code. In concluding that it could exercise subject matter jurisdiction over the probate proceedings, the Trial Court also emphasized that Appellants had petitioned in the Court, had appeared without objection, the interested heirs lodged no objection to the Court's jurisdiction, and Cecelia Mae Miller, Jennifer Miller, and Sandra Miller were members of the Nation.

On June 17, 2022, Appellants filed their timely request for permission to file an interlocutory appeal. *See* Appellate Rule 14 (a).

Appellants then timely filed a Notice of Appeal on September 9, 2022, and an Amended Notice of Appeal, on October 13, 2022, from Trial Court orders issued after May 31, 2022, now captioned AP2022-0003. This Court has consolidated matters AP2022-0002 and AP2022-0003. This decision only addresses the matters raised in AP2022-0002, the Court having found it prudent to let the Trial Court first review its orders issued before August 27, 2021, and after May 31, 2022, given the holdings in this decision.

Should concerns remain after the Trial Court addresses this Court's instructions, the parties may file notice of their intent to pursue their appeal in AP2022-0003. If so filed, this Court will establish a briefing and argument schedule.

II. STANDARD OF REVIEW AND LEGAL ANALYSIS

We review the Trial Court's interpretation of the Tohono O'odham Constitution and the Tohono O'odham Nation Tribal Code *de novo*. *See Tohono O'odham Council* v. *Garcia,* 1 TOR3d 10, 15 (T.O. Ct. App. 1989) (Court of Appeals is not bound by a Trial Court's conclusions of law). Likewise, we review the Trial Court's denial of a motion to dismiss for lack of subject matter jurisdiction *de novo*. "A court that lacks subject matter jurisdiction cannot adjudicate the action." *See State v. Maldonado*, 223 Ariz. 309, 311 (Ariz. 2010).

Appellants seek dismissal of the probate of Cecelia Mae Miller's Estate, arguing the Trial Court cannot exercise its jurisdiction to probate a Nation member's estate where all the possessions and property are outside the exterior boundaries of the Nation. Because all of Cecelia Mae Miller's property and assets lie outside the Nation's exterior boundaries, they argue the Trial Court should have dismissed the entire action on their request. And although the Trial Court believed it could not exercise subject matter jurisdiction over several parts of Cecelia Mae Miller's estate, including the Linger Lane property and the Perry Miller Trust, (*see* Orders filed August 27, 2021, November 8, 2021, February 22, 2022, March 18, 2022, May 5, 2022, May 10, 2022), it still denied dismissal in its May 5, 2022, May 10, 2022, and May 30, 2022 orders and awarded money judgments and specific relief about those properties over which it had found it had no subject matter jurisdiction.

The Tohono O'odham Nation's Constitution grants the Judicial Court power to hear "all cases and matters in law and equity" arising under the Constitution, the laws, and the ordinances of or applicable to the Nation and its customs. *See* Nation's Constitution, Article 1 § 3, and Article 8, §§ 1, 2, 7, 8, and 10. The Nation's members also gave their Legislative Council power

to guide the courts and regulate inheritance of personal property and interests in land within the Nation's territory and interests in lands other than allotments consistent with federal law. *See* Nation's Constitution, Article 6, Section 1(c)(5).

Carrying out Article 6, Section 1(c)(5), the Legislative Council has enacted laws and ordinances that describe and define the process for regulating inheritance within the Nation. In Title 9, Chapter 1, Sections 16 and 17 of the Nation's code, Nation's members and "interested" parties can ask the Judicial Court to determine the heirs and divide the estate property of a deceased Nation member. Section 16 speaks to those who die without a will, and Section 17 speaks to those who die with a will. The Judicial Court's Civil Division is charged with hearing "[a]ny action relating to an interest in real or personal property located within the territorial jurisdiction of the Nation, including descent and distribution of a deceased person's estate." *See* Title 4, Chapter 1, Section 1-101(b)(8) of the Nation's Code.

A. Subject Matter Jurisdiction

Subject matter jurisdiction refers to a Court's constitutional and statutory power to hear and decide a particular case. Whether the Trial Court has subject matter jurisdiction to decide a case is always properly before this Court on review. The Nation's Constitution vests this Court with power to hear "all appeals from the Tohono O'odham Courts." *See* Nation's Constitution at Article 8, § 7; *see also Tohono O'odham Election Board v. San Lucy District* 3 TOR3d 14, 15 (T.O. Ct. App. 2008). This Court's subject matter jurisdiction is to review the Trial Court's interpretation, construction, and application of the Nation's laws, and those laws applicable to the Nation, to a particular set of facts and decide whether the Trial Court's decision on appeal aligns with the Nation's Constitution and laws. *See* the Nation's Constitution, Article 6, Section 1(c)(5), Article 8, §§ 1, 2, 7, 8, and 10. This appeal requires nothing but that authority and this Court finds it has subject matter jurisdiction.

For the Trial Court, it can decide the heirs to an estate and divide the decedent's property among those heirs. *See* the Nation's Constitution, Article 8 generally, and the Nation's Domestic Relations Code, Chapter 1, §§ 16 and 17 and Civil Actions Code, Chapter 1, § 1-101(b)(8). This power exists when a member dies without a will, under the Domestic Relations Code, Chapter 1, § 16, or when they die with a will, under § 17. This jurisdiction is not unlimited, however. For example, the Trial Court may not probate allotments and trust property subject to United States jurisdiction[10] and may not probate interests in real or personal property located outside the Nation's territorial jurisdiction.[11]

At the start of any probate action, it can be difficult for the Trial Court to know the entire estate under review and whether all, some, or none of it falls within the Nation's jurisdiction. It is reasonable for any Nation member to ask the Nation's Trial Court to probate the estate of a deceased relative who was a Nation member, no matter the location of the property. Nation members are comfortable with their own court and may not be law trained or aware that another jurisdiction might be a more correct forum. Also, non-lawyers are often unfamiliar with the limitations on a court's jurisdiction, whether the court is tribal, state, or federal. It thus becomes the Trial Court's duty to review the filings and facts before it, which can change at various stages, and to determine its jurisdiction to begin with and as the case proceeds.

When the Trial Court learns that real property in a probate is not within the Nation's territorial jurisdiction, it must decide whether it should keep jurisdiction or dismiss it and direct the parties to file in a more convenient forum. The timing and nature of this decision can vary greatly depending on the extent of the estate and the information before the Trial Court. If the probate cannot continue because of limitations on the Trial Court's jurisdiction, the Trial Court can dismiss the action or, if appropriate under the circumstances, stay all proceedings in deference to a more convenient court with jurisdiction and authority.

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[10] *See* Tohono O'odham Code, Title 9, Domestic Relations, Chapter 1, §§ 16, 17.
[11] *See* Tohono O'odham Code, Title 4, Civil Actions, Chapter 1, Section 1-101(b)(8).

The Trial Court may also move forward through the case for a limited period, only to learn at some later date that another court can more appropriately probate the estate or resolve the problem(s) at issue. Although a court generally may not rule on the merits of a case without first determining that it has subject matter jurisdiction[12] over the cause and personal jurisdiction over the parties, it can dismiss a case without ruling on the jurisdictional questions on grounds of *forum non-conveniens*. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422 (2007).

B. Forum Non-Conveniens

The common-law doctrine of *forum non-conveniens* is a non-merits ground for dismissal and is used sparingly. *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994). It is a court's self-assessment of many considerations that ultimately serve the convenience of the parties, and it may not follow the ordinary rules of venue. As non-merit grounds, it allows consideration, and even dismissal, without resolution of subject matter or personal jurisdiction—even when the court could otherwise find it can validly exercise both forms of jurisdiction. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). It can even override a plaintiff's well-thought choice of venue if it serves the convenience of the parties collectively, the ease of litigation, the interests of judicial economy, fairness, or addresses the court's own administrative and legal difficulties to hear a case. *See American Dredging Co.* at 447-48.

Dismissal for *forum non conveniens* reflects a court's assessment of a range of considerations, most important the convenience to the parties and the practical difficulties resulting from the adjudication of a dispute in a certain locality. *Sinochem Int'l Co. v. Malaysia*

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[12] Here, the Trial Court found that it could hear matters in probate for member estates and found personal jurisdiction over Jennifer Miller and Sandra Miller, based on membership within the Nation, with personal jurisdiction over Richard Perry and the other heirs by their presence and waiver of any objection to jurisdiction. While the Trial Court found that it did not have subject matter jurisdiction over much of the Estate (including the Linger Lane property and the Perry Miller Trust), the Court reasoned that it could exercise jurisdiction over the limited remainder of the Estate but did not provide analysis of the reasons and basis for that decision.

Int'l Shipping Co., 549 U.S. 422, 429 (2007). In deciding whether to dismiss, a court should evaluate private and public factors that impact the efficiency of the court action. The private factors include the ease of access to evidence, the interest of the parties in their connections with the forums, the burden that plaintiff's chosen forum places on the defendant, the ease of obtaining witnesses, the enforceability of judgments, and other practical problems in the case that would interfere with judicial economy. *See generally, Parra v. Continental Tire N. Am., Inc.*, 222 Ariz. 212, 215 (Ariz. App. 2009), references omitted. The public factors include the impact on the court's docket and the local interest in deciding local cases[13]. *Id.* at 217. *See also Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507-09 (1947).

The test that trial courts should use to determine whether an adequate alternate forum is available is simply whether there is an alternate forum with subject matter and personal jurisdiction and whether it can provide the Plaintiff a remedy. Typically, a court will invoke *forum non conveniens* on its own, *sua sponte*, if retaining jurisdiction would consistently create more expense, delay, and practical problems with enforcement compared to the alternate forum. A court may dismiss on *forum non conveniens* grounds without first deciding whether it has jurisdiction to hear the action.

Here, when Appellants filed their first petition to probate Cecelia Mae Miller's Estate, the Trial Court did not have a full accounting of the Estate. Although the Trial Court could determine Cecelia Mae Miller's home and that of the heirs and could also locate most assets identified in the early stages, no party raised concern about the inconvenience or impracticality of the forum. In probate proceedings, the Nation's Courts must always have the power to hear preliminary matters to identify the claims and relevant parties and require an initial inventory and

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[13] Additional factors, in general, are whether the case would cause docket congestion for the Court where filed, if trial would involve using multiple sets of laws and risk confusing a jury, the need to have juries with connection to the case, the local interest in deciding local cases, and holding trial and hearings where the proper law governs. See *Parra v. Continental Tire North America, Inc.*, 222 Ariz. 212, 217 (Ariz. App. 2009), *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507-09 (1947).

accounting. The Nation's Constitution, Article 8, and the Nation's Domestic Relations Code, Chapter 1, §§ 16 and 17 and Civil Actions Code, Chapter 1, § 1-101(b)(8) grant the Trial Court this subject matter jurisdiction.

As a case moves forward, however, it may become clear the Court could not render a final and effective judgment about all matters raised in the probate of the estate and that a more convenient forum is available that would serve the interests of the parties and the administration of justice. Here, the Trial Court could recognize the difficulties it faced in giving complete relief along with the burdens and expense the parties have in litigating within the Tohono O'odham Judiciary compared to the Maricopa County Superior Court. The record and information before the Court at the start of the case gave early notice that most of the Estate assets and debts were located outside the Nation's exterior boundaries, including all the real property. The residence of all parties and decedent reflected locations in central Phoenix and California, rather than within the Nation or its surrounding areas of Tucson, Casa Grande, and Ajo.[14]

On January 11, 2022, Appellants filed their Preliminary Probate Report and avowed that all the real property was located outside the Nation's exterior boundaries, including the Linger Lane property, the single family, three-bedroom house at 4125 N. 6th Avenue in Phoenix, Arizona, and the 10-acre plot of land in Pinal County, Arizona. At the time of that report, the only connections the Estate had with the Nation were (1) a secured loan debt agreement between the Community Development Financial Institution of the Tohono O'odham Nation and the FryBread House, L.L.C., an Arizona Corporation based in Phoenix, Arizona, and (2) the membership status of the decedent and two heirs to the Estate.

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[14] At oral argument on December 13, 2022, Sandra Miller argued she had incurred considerable investments of time and expense travelling from her home in Maricopa County each time there was a hearing in the Trial Court. These burdens of travelling to a jurisdiction far from her domicile and the properties in question, along with the consistent application of Arizona law and the location of all estate assets and the heirs outside the Nation's exterior boundaries, illustrates that the Maricopa County Superior Court is the most convenient forum for the action.

In its May 19, 2021, Order, the Trial Court asked the parties to brief whether "the Linger Lane property should be addressed in the Maricopa County Superior Court, since the real property is located in said county". Based on the parties' response to its questions and its own review of the record the Court questioned its ability to probate at least part of the Estate because it recognized the property was outside the exterior boundaries of the Nation. In its August 27, 2021, order, the Trial Court told the parties they would need to address probate proceedings related to the Linger Lane property, including Sandra Miller's creditor claim, in the Maricopa County's Superior Court because that property was "not located within the jurisdictional boundaries of the Tohono O'odham Nation" and its action would "likely overstep its subject-matter jurisdiction".

Even more convinced it lacked jurisdiction, on November 8, 2021, the Trial Court unconditionally declared it did not have subject-matter jurisdiction over the Linger Lane property because it was in Maricopa County and the Court ordered Appellants to file an ancillary probate in the Maricopa County Superior Court, specifically to address Sandra Miller's creditor claim on the Linger Lane property. The Trial Court then repeated this order and reminded the parties of this finding in its Orders filed February 22, 2022, March 18, 2022, and May 5, 2022.

Because of the Trial Court's legitimate questions about its jurisdiction over several estate assets and its order that Appellants open an ancillary proceeding in Maricopa County Superior Court, the jurisprudential common-law considerations of dismissal for *forum non-conveniens* were implicated. This Court finds the Trial Court, having evaluated the facts before it and doubting its jurisdiction to probate property within Maricopa County, had a basis for dismissal *sua sponte*, even over Appellants' early objection and, when Appellants, the filing parties who chose the jurisdiction, moved to dismiss on May 20, 2022.

The Trial Court could have appropriately dismissed the action or stayed all proceedings and tried to help with Maricopa County Superior Court's assumption of primary probate jurisdiction. But after concluding that it lacked jurisdiction over the main assets of the Estate

and having learned that ancillary probate proceedings had been filed, the Trial Court discussed several issues on the merits that pertain to those assets (the subject of AP2022-0003). While the Trial Court may have delayed dismissal to ensure the ancillary probate was underway, the Court lacked jurisdiction over those properties it found outside its subject matter jurisdiction.

Here, Appellants told the Trial Court that ancillary proceedings were underway in Maricopa County on April 25, 2022. That notice showed that on April 14, 2022, Appellants had filed their application for informal ancillary probate and informal appointment of co-personal representatives in Maricopa County Superior Court, as the Trial Court had ordered. Thus, in late April 2022, before the Trial Court issued its merits rulings affecting properties located outside the Nation's exterior boundaries, the private and public interest factors supported a dismissal of all proceedings on *forum non conveniens* grounds.

III. RULING

We take *de novo* review of the Tohono O'odham Constitution and the Tohono O'odham Nation Tribal Code as applied to these facts, including review of a trial court's denial of a motion to dismiss for lack of subject matter jurisdiction. A court that lacks subject matter jurisdiction cannot adjudicate the action. *See Maldonado*, 223 Ariz. at 311, T.O. Rules of Court, Rule 11(h)(3). Under the Nation's Code, the Judicial Court has jurisdiction over probate actions involving the estates of deceased Nation members, but that jurisdiction may be lost if all assets of an estate are located outside the Nation's lands. *See* Title 9, Chapter 1, Sections 16 & 17; Title 4, Chapter 1, Section 1-101(b)(8). Thus, while the Trial Court properly exercised jurisdiction over the initial probate action involving the Miller Estate, when it became clear that all assets in the Estate were located outside the territorial jurisdiction of the Nation, the Trial Court had a duty to determine whether it should continue as the primary forum for probate of the Estate. Given that the doctrine of *forum non conveniens* provides a basis for dismissal or stay, we need not decide the question of subject-matter jurisdiction over the probate proceeding as a whole.

We find there was enough information in the record, as early as May 2021, for the Trial Court's *sua sponte* decision it was not a convenient or practical forum to probate the Miller Estate and that a more convenient forum was available. Without question, the Trial Court's ensuing orders on August 27, 2021, and November 8, 2021, recognized that the Maricopa County Superior Court was the more appropriate forum to probate the Linger Lane property and given similar proximity, the rest of the assets in the estate.

Reviewing the Trial Court's orders issued between the notice of ancillary probate filed April 25, 2022, and the denial of Appellants' Motion to Dismiss filed May 31, 2022, this Court finds the Trial Court lacked subject matter jurisdiction to issue orders affecting property situated outside the exterior boundaries of the Nation. This Court further holds that the most convenient forum to probate Cecelia Mae Miller's estate was and remains in the Superior Court of Maricopa County, as Maricopa County is where most heirs and interested parties live, where all the assets are located, and where the decedent was domiciled.

This Court therefore strikes the Trial Court's orders issued between August 27, 2021, to and including the order denying Appellants' Motion to Dismiss filed May 31, 2022, except for the specific order to open probate in Maricopa County Superior Court included within the order filed November 8, 2021. And the Trial Court is directed to take all necessary steps to transfer the probate proceeding to the Maricopa County Superior Court where the pending open probate of the Estate awaits further resolution.

Recognizing that the consolidated appeal AP2022-0003 seeks review of the Trial Court's orders issued after May 31, 2022, we direct the Trial Court to reconsider those orders and all applicable orders issued before August 27, 2021, given this decision. That appeal is stayed for 60 days to allow the Trial Court's review and notice of its decision on review and reconsideration. Once those 60 days have run, if appealable issues remain in AP2022-0003, the parties may file notice asking this Court to resume the pending appeal, or, if no appealable issues remain, the Appellants may dismiss the appeal.

To protect each party's interests and enable the Maricopa County Superior Court to probate Cecelia Mae Miller's Estate without delay, the parties must file, within 90 days of the date of this order and in the Trial Court, a certificate of compliance they have;

1. submitted to service of process and jurisdiction in Maricopa County Superior Court,

2. waived any defense under the statute of limitations in the open probate in Maricopa County Superior Court,

3. made the entire case file in the Nation's Trial Court available to the Maricopa County Superior Court,

4. waived objection to using any product of discovery made until now which they will use in the Maricopa County Superior Court and told the Maricopa County Superior Court they will follow discovery obligations in that Court,

5. lodged notice in the Maricopa County Superior Court of all claims they have against the other party, including attorney's fees and costs, and

6. lodged notice in the Maricopa County Superior Court of all payments they have made and received from Cecelia Mae Miller's estate for any creditor's claim and judgment awarding fees and costs related to this probate.

Dated this January 24, 2023.

Judge David M. Osterfeld

Judge Barbara Atwood

Judge Mashone Antone

JUDICIARY

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In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

Tohono O'odham Gaming Enterprise, Appellant, v. Tohono O'odham Gaming Office, et. al., Appellee.	Case No.: AP2022-0004 (Re: AV2022-0056) OPINION

Erin F. Byrnes, Counsel for Appellants Tohono O'odham Gaming Enterprise.

Howard Shanker, Tohono O'odham Nation Attorney General, Counsel for Appellee, Tohono O'odham Gaming Office.

Before Judges David M. Osterfeld, Barbara Atwood, and Tessa L. Dysart.

Having considered the Tohono O'odham Nation Trial Court record, the filings on appeal, and argument presented February 15, 2024, this Court affirms the Trial Court's decision that sovereign immunity bars this lawsuit but modifies the Trial Court's interpretation of the Tohono O'odham sovereign immunity provisions.

I. FACTUAL BACKGROUND

The Tohono O'odham Nation ("Nation") owns and runs several gaming facilities within its boundaries. These gaming activities are federally regulated under the Indian Gaming Regulatory Act ("the Act"). *See* 25 U.S.C. §§ 2701-21.

In 1993, the Nation's Legislative Council enacted the Nation's Gaming Ordinance ("the Ordinance") to provide for the "orderly and honest" conduct of gaming activities within the Nation. *See* Tohono O'odham Code, Title 16, Chapter 1, §101(a). The Ordinance requires "comprehensive regulation of all people, practices, and activities related to the operation of the Nation's gaming facilities." *Id.* at §101(c). In addition, the Ordinance requires the Nation to maintain an office dedicated to this regulatory duty, which the Nation identified as the Tohono O'odham Gaming Office ("Gaming Office" and "TOGO"). *Id.* at §§ 401, 403(a). The Gaming Office has authority to license the people and facilities that conduct gaming activities, and through that licensing, the Nation regulates those parties. *Id.* at §101(d).

a. The TOGO and TOGE

TOGO is housed within the Nation's Executive Branch and "[has] overall civil regulatory authority over gaming activities within the Nation and the Gaming Facility Operator" as provided in the Ordinance. *Id.* at § 401. TOGO's regulatory functions primarily include licensing the following: gaming facility operators, an operator's board of directors, gaming device manufacturers, distributors, gaming vendors, financers, and employees. *Id.* at §§ 501, 502, 601, 701, 801.

The Gaming Facility Operator is the Tribal Enterprise that the Nation designates as having authority and responsibility for conducting gaming activities

in the Nation. *Id.* at §201(n). The Tribal Enterprise is defined as a wholly-owned enterprise of the Nation authorized and chartered under the Nation's Constitution, which the Nation's Legislative Council designates as the Gaming Facility Operator. *Id.* at §201(gg). The Nation's Legislative Council created the Tohono O'odham Gaming Enterprise ("Enterprise" and "TOGE") as the Nation's operator for its gaming facilities. 16 T.O.C. Ch. 2, §1.

TOGE is established according to a plan of operation that the Legislative Council adopts. *Id.* at § 502(a). TOGO must license all of TOGE's Board of Directors, gaming device manufacturers, distributors, gaming vendors, financers, and employees. *Id.* at §§ 501, 502, 601, 701, 801.

b. <u>The Food and Beverage Director</u>

In September 2021, TOGE advertised for a Food and Beverage Director for its West Valley casino (F&B Director). Two months later, the Nation's Legislative Council amended TOGE's Charter to require that it "give preference to qualified Indians, with first preference to enrolled members of the Tohono O'odham Nation and then to other local Indians, in all hiring, promotion, training, layoffs, and all other aspects of employment." 16 T.O.C. Ch. 2, § 6(l)(1). The Nation's Legislative Council made no similar amendment to the Gaming Code. A "local Indian" was defined as "any member of a federally-recognized tribe" who either lives within the exterior boundaries of the Tohono O'odham Nation or who has lived near the

Nation for not less than 60 days before the "start of the project at issue." 13 T.O.C. Ch. 1, §§ 1102(I) and 1104. This definition is found in the Tohono O'odham Nation's law implementing the Tribal Employment Rights Office and Commission.

After three months, TOGE had received only 19 applicants for the F&B Director position. While one applicant met the Tohono O'odham preference requirements, TOGE concluded that the applicant did not meet all other minimum qualifications. TOGE eventually selected a non-Indian applicant, Jeffrey George, for the position. On or about January 17, 2022, TOGE submitted Mr. George's name to TOGO for licensing.

After receiving TOGE's request for licensure for this applicant, TOGO told TOGE it was concerned the Indian preference requirements had not been followed. TOGO asked for more information on this applicant and an explanation as to why the Nation's member applicant had not been selected. In response, TOGE gave TOGO the Nation's member's application material and cited his lack of experience as the reason he did not qualify.

c. <u>TOGO's Final Decision</u>

On March 30, 2022, the Gaming Office issued a memorandum with the subject "Final Decision: 'In re: TOGE WVR Food & Beverage Director Hiring Matter.'" The Final Decision found that TOGE did not follow TOGE's charter in

preferring qualified Indians, with first preference to members of the Nation and then other local Indians.

TOGO declared it would license no applicant if it concluded on review that TOGE had not followed the Nation's hiring preference laws. This declaration was based largely on a November 2021 amendment the Nation's Legislative Council had made to TOGE's Charter to require preference for qualified Indians and first preference for enrolled members of the Nation.

On May 25, 2022, the Gaming Office amended its final decision for the F&B Director ("Amended Final Decision") and temporarily withdrew it for 120 days to let TOGO and TOGE discuss ways to settle their disagreement on the application of hiring preference. On May 27, 2022, the Enterprise filed its notice of appeal, asking for judicial review/administrative appeal of the Final Decision, under Section 1204 of the Nation's Gaming Ordinance[1] (judicial review of a final Gaming Office decision) and Section 8 (Administrative Appeals) of the Tohono O'odham Rules of Court. The Enterprise also moved for immediate stay of the TOGO's Final Decision on June 28, 2022.

In its subsequent Complaint, the Enterprise alleged that TOGO (1) acted in excess of its lawful authority, (2) exceeded its legal authority in issuing its final decision, (3) refused to carry out its statutory duty to issue a license to the preferred

[1] 16 T.O.C. Ch. 1.

applicant, and (4) violated TOGE's right to procedural due process. TOGE asked the Trial Court to take *de novo* review of TOGO's final decision issued in its letter dated March 30, 2022. The Gaming Office filed its Motion to Dismiss TOGE's Complaint on August 18, 2022.

d. Stay of Final Decision in Favor of the Enterprise

After briefings and oral argument on TOGE's Motion to Stay the Final Decision, the Trial Court granted TOGE's motion and issued an order on August 23, 2022, ("Stay Order") partially staying the Final Decision under Chapter 1, Section 1204(b) of the Gaming Ordinance and the Tohono O'odham Rules of Court Section 8, Rule 10(1). On September 1, 2022, TOGO issued another letter, stating the Final Decision and Amended Final Decision "are hereby rescinded and the Gaming Office will be closing this file." In that letter, TOGO recognized that Jeffrey George was no longer interested in the F&B Director position, given he had accepted employment with another casino.

e. Subsequent Filings on the Motion to Dismiss

The Trial Court held oral argument on the TOGO's Motion to Dismiss on October 25, 2022. Based on the hearing, the Trial Court concluded that because TOGO had fully and unconditionally rescinded its decisions on March 30 and May 20 of 2022, it could not review TOGE's claims that TOGO had exceeded its legal authority in issuing those decisions and had violated TOGE's right to procedural

due process. The Trial Court also held that sovereign immunity barred TOGE's claims that TOGO had acted in excess of its lawful authority and had refused to carry out its duty to issue a license to the preferred applicant. The Trial Court dismissed all of TOGE's claims.

f. TOGE Appeals the Trial Court's Decision

TOGE filed this appeal on November 23, 2022. On November 30, 2022, TOGO objected to this Court's jurisdiction, arguing that TOGO's sovereign immunity barred jurisdiction over TOGE's claims and, therefore, this Court had no jurisdiction. On February 21, 2023, this Court held that it had jurisdiction to hear this appeal under the Tohono O'odham Nation Constitution, Article VIII, Section 7, and the Tohono O'odham Nation Rules of Appellate Procedure 3(c)(1). The Court also narrowed the issues on appeal, directing the parties to answer whether TOGE's action for declaratory judgment was barred by sovereign immunity and whether TOGE's action for declaratory judgment was moot because the original applicant under review was no longer seeking employment with TOGE.

As this matter progressed on appeal, the parties filed notice that on March 8, 2023, the Tohono O'odham Legislative Council had amended TOGE's Charter to show that the Tohono O'odham Nation Gaming Office "is vested with authority to adopt licensing or other regulations enforcing the Gaming Enterprise's implementation and application of 'preference' as defined herein . . . ." *See*

Resolution No. 23-070. That same Resolution also found that TOGO, through its broad civil oversight authority over TOGE, was responsible for overseeing TOGE's implementation and application of the preference mandate described under Section 6(l)(1) of TOGE's Charter.

TOGE filed its Opening Brief on May 8, 2023, TOGO filed its Response Brief on June 6, 2023, and TOGE filed its Reply Brief on June 6, 2023. This Court held oral argument on February 15, 2024.

2. ISSUES

I. Whether sovereign immunity bars TOGE's action for declaratory judgment.

II. Whether TOGE's action for declaratory judgment was moot because the original applicant, Jeffrey George, was no longer seeking employment with TOGE.

3. STANDARD OF REVIEW

Here, TOGE has argued the Trial Court wrongly decided the legal issue of sovereign immunity as promulgated under 1 T.O.C. Ch. 2, §2102(A), a question of law. We exercise *de novo* review over questions of law. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989). TOGE has also argued the Trial Court erred when it found that, because the original applicant, Jeffrey George, was no longer seeking employment, the action was moot. This is a mixed question of law and fact. When we have a mixed question of law and fact, "we defer to the trial court's factual findings but review *de novo* all legal conclusions." *See*

Helvetica Servicing, Inc., v. Pasquan, 249 Ariz. 349, 352, ¶ 10, 470 P.3d 155, 158 (2020). Based on these challenges, the Court defers to the Trial Court's factual findings but decides, *de novo*, questions of law and legal conclusions. This Court's review need only extend to the existing record and the accepted filings on appeal, as that is enough to resolve this appeal.

4. ANALYSIS

The first issue before this Court is whether the Nation's and TOGO's sovereign immunity bar a claim for declaratory judgment that TOGO lacks legal authority over all matters of Indian preference, including Tohono O'odham preference, in TOGE employment decisions. This Court affirms that sovereign immunity is a bar to this action but for reasons different from those relied on by the Trial Court.

The Nation's Sovereign Immunity

In April 2010, the Nation enacted its sovereign immunity law. That law declares the Nation is absolutely immune from suit, court process, or liability and includes the Nation's districts, enterprises, entities, and any officials, employees, and agents acting within the scope of their capacity for such entities. *See* 1 T.O.C. Ch. 2, § 2101(A), (B). While this absolute immunity can be waived, waiver occurs only through the Tohono O'odham Legislative Council's express written act and is

limited in strict conformity with the terms of that written waiver. The Gaming Office is a department of the Nation's Executive Branch, *see* 16 T.O.C., Ch. 1, § 401, and is covered within that sovereign immunity.

Here, there is no direct, written waiver of the Nation's or TOGO's absolute immunity from suit specifically tailored to the facts of this case. But there are two general exceptions to this absolute immunity within the Nation's sovereign immunity law.

a. Appeals from Administrative Agency Final Decisions

The first general, conditional exception is the right to appeal final decisions of the Nation's Administrative Agencies to this Court when the Tohono O'odham Legislative Council authorizes such suit. *See* 1 T.O.C. Ch. 2, § 2102(B). This express permission is seen in the right of TOGE to challenge TOGO's licensing decisions as described in 16 T.O.C. Ch. 1, § 1204(b).

Specifically, the Enterprise challenged TOGO's March 30, 2022, final decision denying licensure to TOGE's chosen applicant for F&B Director, Jeffrey George. Because the Enterprise must be licensed to conduct gaming activities within the Nation, *see* 16 T.O.C. Ch. 1, § 501, it can qualify as a party allowed to seek judicial review of the TOGO's final actions such as the decision of March 30, 2022. *See* 16 T.O.C. Ch. 1, § 1204(b).

That controversy was live when TOGE first filed its challenge to TOGO's March 30, 2022, Final Decision. But TOGO then withdrew that final action for 120 days through an "Amended Final Order" designed to let the parties meet and discuss settlement. As that time ran, TOGO then permanently rescinded the Final Decision and the Amended Final Order on September 1, 2022, closing the file.

Because of the rescission, no final action of TOGO affecting TOGE remained open. The rescission thus removed the issue on review before the Trial Court, as the Court found in its decision dismissing TOGE's action. *See* Order Granting TOGO's Motion to Dismiss, filed October 26, 2022, at 8-9. Absent administrative review, there must be some other basis for the Trial Court to continue exercising subject matter and personal jurisdiction over TOGO, part of the Nation's Executive Branch. That other basis could come through (1) the Nation's Legislative Council's express written waiver of TOGO's sovereign immunity when TOGE sues, (2) any general waiver of immunity allowing suit against the Nation that includes TOGO, or (3) an equitable relief exception to sovereign immunity recognized under common law through this Court's precedent.

b. No express written waiver of TOGO's sovereign immunity for TOGE suits

The Nation's Legislative Council gave the Enterprise the right to sue and be sued, including the right of the Nation and its regulatory agencies and departments to sue the Enterprise. *See* 16 T.O.C. Ch. 2, § 8(a). But the Nation's Legislative

Council also expressly provided that the Nation, including TOGO, retained immunity from suit. *Id.* This clarifies that the Gaming Code only lets TOGE sue TOGO for administrative review of licensing decisions affecting TOGE. As explained above, no final agency action remains subject to review.

c. General Waiver of the Nation's Immunity

According to the Nation's sovereign immunity law, a party, including TOGE, can seek injunctive or declaratory relief to determine the validity of a law, rule, or regulation. *See* 1 T.O.C. § 2102(A). The Enterprise's complaint and the Trial Court's decision on appeal identified no such law, rule, or regulation under challenge. Instead, the Enterprise challenged TOGO's Final Decision issued March 30, 2022, throughout its Complaint. That document is not a law, rule, or regulation, and its author, the Gaming Office, rescinded it on September 1, 2022.

On March 8, 2023, the parties filed notice that the Tohono O'odham Legislative Council had, via Resolution No. 23-070, amended TOGE's Charter to provide that the Tohono O'odham Nation Gaming Office is "vested with authority to adopt licensing or other regulations enforcing the Gaming Enterprise's implementation and application of 'preference' as defined herein . . . ." That same Resolution also found that TOGO, through its broad civil oversight authority over TOGE, was responsible for overseeing TOGE's implementation and application of the preference mandate described under Section 6(l)(1) of TOGE's Charter.

The Enterprise, by its own admission at argument, brought no claim against the Nation or TOGO based on Resolution No. 23-070. The original complaint and the bases for this appeal come from the TOGO's now-rescinded Final Decision issued March 30, 2022. With no challenge to a law, rule, or regulation, the exception to the Nation's sovereign immunity under § 2102(A) is not available.

The Enterprise relies on *Escalante v. Sells District Council*, 2021 TOR Supp. 36 (Ct. App. 2017), as authority for why TOGO's Final Decision letter to enforce Tohono O'odham and Indian preference carries the force of law through the "Nation's coercive powers." *See* TOGE's Opening Brief, filed May 8, 2023, ("Opening Brief"), at 15. *Escalante* dealt with a Sells District resolution permanently banishing two tribal members from entering Sells District, the place where they both lived and where one was a registered member of that District. *Escalante*, 2021 TOR Supp. at 1-2. There, this Court reasoned that because any violation of the resolution could be the basis of criminal sanctions subjecting the violator to jail and fines, the resolution carried the force of law through the Nation's coercive powers and the challengers had the right to due process review. This Court thus recognized a narrow exception to the Sells District Council's sovereign immunity under 1 T.O.C., Ch. 2, § 2102(A), for that purpose only. *Id.* at 6-8.

Here, the facts do not include a District Council resolution imposing banishment or potential criminal sanctions. This Court does not find a correlation

sufficient between the *Escalante* holding and the facts of this case, especially when there is no resolution, law, rule, or regulation challenged in the Trial Court. Instead, there is only a challenge to a rescinded Final Decision of the Gaming Office. Because of the rescission of the Final Decision on September 1, 2022, the Final Decision has no continued application, let alone the force of law.

d. Equitable Relief Exceptions to Sovereign Immunity

The final option for TOGE to overcome the Nation's and TOGO's sovereign immunity is an equitable relief exception. The Court's analysis of the equitable relief theory necessarily addresses elements that are also relevant to the analysis of Section 2101(A). Both exceptions to sovereign immunity require a claim that a Tohono O'odham law, rule, or regulation is beyond constitutional or statutory authority. This Court has recognized such exceptions in challenges to the Nation's laws on compelling facts, and those decisions have authority as common law. *See In re Petition of the Judicial Branch*, 3 TOR 3d 105, 117 (Ct. App. 2010); *Escalante v. Sells District Council*, 2021 TOR Supp. 36, 39 (Ct. App. 2017); and *Jose v. Toro*, 3 TOR3d 31 (Trial Ct. 2011). Each case, however, gives no support for this Court to find an equitable relief exception on the facts of this case.

First, TOGE argues that administrative agency pronouncements have the "force of law." *See* Opening Brief at 13. The Enterprise points to TOGO's Final Decision on March 30, 2022, where it declares it would regulate Tohono O'odham

and Indian preference, as an example of an administrative decision with such coercive effect resulting in unauthorized formal rulemaking that can carry the force of law. *Id.* at 12-13.

While TOGO can still argue it can enforce Tohono O'odham or Indian preference today, that is not a result of the Final Decision, but instead the Nation's existing law that requires "[t]he Enterprise [to] give preference to qualified Indians, with first preference to enrolled members of the Tohono O'odham Nation . . . in all hiring, promotion, training, lay-offs, and all other aspects of employment." *See* 16 T.O.C. Ch. 2, § 6(l)(1). The recent Tohono O'odham Legislative Council Resolution 23-070, effective March 8, 2023, clarifies that:

> the Tohono O'odham Gaming Office, consistent with its broad grant of civil oversight authority over the Gaming Enterprise and the Nation's Constitution Art. VII § 2(c), is responsible for overseeing the Gaming Enterprise's implementation and application of the 'preference mandate' set forth at Section 6(l)(1) of the Gaming Enterprise's Charter.

These sections of the Nation's Gaming Code and the Legislative Council's Resolution 23-070 were not before the Trial Court for its decision and are not on review here.

The Enterprise also argues the Trial Court erred in dismissing this action based on sovereign immunity because it did not recognize this Court's precedent finding an equitable relief exception to sovereign immunity similar to that found in *Ex Parte Young*, 209 U.S. 123 (1908). That decision held that sovereign immunity

did not bar judicial review of claims seeking specific relief against a government officer who has acted beyond the powers delegated to him. *Id.* at 159-60. The general theory is that if a government officer is acting beyond the authority the sovereign gives him in that official capacity, the officer is stripped of his official representative character and must answer for his individual conduct—the sovereign should not be held responsible for those acts nor should its immunity from suit be lent to that officer. *Id.*

In the matter *In re Petition of the Judicial Branch*, 3 TOR 3d 105, 117 (Tr. Ct. 2010), the Nation's trial court expounded on the *Ex Parte Young* doctrine, as interpreted in *Ex Parte Norris*,[2] and set a "bright line rule" explicitly recognizing previous decisions of this Court letting plaintiffs sue groups of government officials, "including entire branches of government," for unauthorized actions. The following year, this Court applied the *Ex Parte Young* doctrine in *Jose v. Toro*, 3 TOR3d 31, 33 (Ct. App. 2011), where we affirmed that our courts have for many years allowed suits against government officials for prospective relief when they were deemed to have acted outside the bounds of their constitutional authority.

The facts of *Jose v. Toro* required the Court to decide whether the members of the Chukut Kut District's legislative body had followed their duties to certify the

[2] *See In Re Pet. of Jud. Branch*, 3 T.O.R.3d at 117; *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60, 61-62 (Trial Ct. 2005), *appeal dism'd*, 3 TOR3d 21 (Ct. App. 2008).

winner of an election under the Nation's Election Ordinance. *Jose v. Toro*, 3 TOR3d 31, 32-33 (Ct. App. 2011). That decision held that sovereign immunity did not bar a claim alleging that a government body had exceeded its statutory authority, clarifying that the exception to sovereign immunity is not limited to claims alleging violations of only constitutional authority.

Here, the Trial Court held the principles of *Ex Parte Young* applied only to those claims where a government officer or government branch is alleged to have violated constitutional authority. *See* Trial Court's Order Granting TOGE's Objection to Affidavit, and TOGO's Motion to Dismiss, filed October 26, 2022, ("Trial Court Dismissal") at 7-8, 10. The Trial Court referred any violation of *statutory authority* to the Tohono O'odham Legislative Council for solution and relief. That reasoning overlooks this Court's precedent recognizing that sovereign immunity does not bar a challenge to a government body's alleged non-compliance with statutory authority. *See Jose v. Toro*, 3 TOR3d 31, 32-33 (Ct. App. 2011).

In its reading of our precedent to recognize an equitable relief exception to sovereign immunity only for noncompliance with constitutional powers, the Trial Court gave an overly broad construction of the powers of TOGO. The Trial Court credited the Gaming Office with the full constitutional power to "oversee the implementation of all laws, ordinances, resolutions, and rules made by the Tohono O'odham Council," powers otherwise held by the entire Executive Branch in the

Tohono O'odham Constitution, Article VII, §(2)(C). *See* Trial Court Dismissal, at 7. The Trial Court characterized TOGO's consideration of employment preference mandates for licensing-related activities as "constitutional authority," *Id.* at 8, 10, and TOGO's refusal to accept and process licensing applications as within its broad constitutional authority to "oversee the implementation of all laws, ordinances, resolutions, and rules made by the Tohono O'odham Council" (citing T.O. CONST. ART. VII, § (2)(C)). This interpretation of TOGO's authority is overly broad.

Instead, the Gaming Office's authority comes from the power the Tohono O'odham Council expressly provides through the laws it enacts, such as relevant sections of the Gaming Code directing preference for Tohono O'odham and Indian applicants. The Trial Court's broad attribution of constitutional power to TOGO would mistakenly give TOGO the powers available to the entire Executive Branch.

The Gaming Office's acts must follow the Nation's laws. This Court presumes those laws are deliberatively issued through the political calculus of soliciting and weighing the collective input of the electorate, government, and public and private industry, considering judicial opinions interpreting those subjects. We hold, as each party has argued and as the law states, that the Gaming Office has overall civil regulatory authority over Gaming Activities within the Nation and over the Enterprise as provided in the Gaming Ordinance. *See* 16 T.O.C. Ch. 1, § 401.

Nevertheless, *Ex Parte Young* and *Ex Parte Norris* have no application here. TOGO's full rescission of its Final Decision and Amended Final Decision on September 1, 2022, leaves no remaining act of government officials or of a government branch that this Court can examine. We disagree with TOGE's argument that TOGO's March 30, 2022, Final Decision was a "written announcement, and conclusive evidence, of the New Licensing Regulation," made under the "pretext of constituting a licensing decision," *See* Opening Brief at 31. Instead, the record on appeal clarifies that TOGE's Complaint is a challenge to a licensing decision for the F&B Director applicant Jeffrey George, not a challenge to a law, rule, or regulation.

Having found no waiver of the sovereign immunity afforded the Tohono O'odham Gaming Office, or that of its Executive Director and Licensing Investigative Manager under the Nation's laws, this Court need not decide the second issue on review, that being whether TOGE's action for declaratory judgment was moot because the original applicant, Jeffrey George, was no longer seeking employment with TOGE.

CONCLUSION

On review, this Court affirms the Trial Court's dismissal of TOGE's Complaint on sovereign immunity grounds but vacates the Trial Court's analysis.

This Court dismisses all four counts in the Tohono O'odham Gaming Enterprises Complaint filed in this matter under the analysis given in this decision.

Signed this 29th day of April 2024

Judge David M. Osterfeld

Judge Barbara Atwood

Judge Tessa L. Dysart

TOHONO O'ODHAM JUDICIARY

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In the Judicial Court of the Tohono O'odham Nation
County of Pima, In the State of Arizona
Court of Appeals

Tohono O'odham Nation, Appellant v. Francisco Augustine Salcido Jr., Appellee	)	Case No.: AP2023-0001 (Ref: CR2022-0423-1-4) ORDER

Before: Hon. Tessa L. Dysart, Hon. Kyle Fields, and Hon. Rene Alcoverde.

The Nation filed a Notice of Interlocutory Appeal from the Trial Court's Order on April 27, 2023. The Order denied the Nation's motion to appoint an attorney for Mr. Salcido. Per Rule 14 of Tohono O'odham Rules of Appellate Procedure, the Nation asked the Trial Court for permission to file an interlocutory appeal, which the Trial Court granted. On June 20, 2023, the Nation filed an Amended Notice of Interlocutory Appeal raising more arguments about appointment of counsel from the Trial Court's May 26, 2023, Order. Because the Trial Court did not commit an "obvious error," we deny the request for an interlocutory appeal.

Under Rule 15 of the Tohono O'odham Rules of Appellate Procedure, this Court will grant an interlocutory appeal if:

(1) the trial court has committed an obvious error;
(2) the error would render further trial proceedings useless or substantially limit the freedom of a party to act; and
(3) the error presents a substantial question of law which would determine the outcome of the appeal.

The Rules do not define "obvious error," and this Court has yet to define the term. In this context, the term "obvious error" is synonymous with "clear error." *See Puckett v. United States*, 566 U.S. 129, 135 (2009) (using the terms interchangeably). Black's Law Dictionary defines "clear error" as "[a] trial judge's decision or action that appears to a reviewing court to have been unquestionably erroneous."[1] Black's Law Dictionary (11th ed. 2019). Here, the Trial Court relied on *Nation v. Nunez*, Case No. CR2022-0362-1-4 (Tr. Ct. Feb. 6, 2023), to explain why it was denying the Nation's motion to appoint Mr. Salcido counsel. The *Nunez* case is scheduled for publication, and the Nation did not appeal the Trial Court's ruling in *Nunez*. Thus, the Trial Court's decision was not obvious or clear error.

The Nation also raises arguments related to the Trial Court's ruling on Mr. Salcido's Motion to Dismiss based, in part, on his right to a speedy trial. The Nation, however, sought an interlocutory appeal from the April 27, 2023, Order which solely addressed the Nation's Motion to Appoint a State-Licensed Attorney. The Trial Court's Order on Mr. Salcido's Motion to Dismiss was on April 10, 2023. Therefore, the speedy trial issue is not properly before this Court.

The Court denies the interlocutory appeal. The Court also denies the Nation's Motion to Stay and Motion to Extend Time to File an Opening Brief.

Dated June 29, 2023

Hon. Tessa L. Dysart
For the Panel

[1] Black's Law Dictionary defines "obvious error" as "A standard of review that applies to unobjected-to actions and omissions at trial that are so seriously prejudicial as to result in manifest injustice." Black's Law Dictionary (11th ed. 2019). That definition does not apply to this particular circumstance since the Nation did object to Trial Court's actions below.

JUDICIARY

In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

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TOHONO O'ODHAM JUDICIARY
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In the Matter of the Estate of:	)	Case No.: AP2023-0002 (Re: AV2022-0165)
Verna Ann Miguel	)	ORDER
DOB: 11/22/1956	)	
DOD: 03/23/2020	)	
	)	

Before: Hon. Rene Alcoverde Jr., Hon. Barbara Atwood, and Hon. Tessa L. Dysart.

The Appellate Court reviewed the trial court's order permitting an interlocutory appeal by the Tohono O'odham Advocate Program on behalf of Leatrice Escalante. This Court finds that interlocutory review is not appropriate. Under Rule 15(a) of the Tohono O'odham Rules of Appellate Procedure, this Court will grant an interlocutory appeal only if:

(1) the trial court has committed an obvious error;
(2) the error would render further trial proceedings useless or substantially limit the freedom of a party to act; and
(3) the error presents a substantial question of law which would determine the outcome of the appeal.

Although the Nation's Rules do not define "obvious error," *Nation v. Salcido*, AP2023-0001 (Ct. App., Jun. 23, 2023) (scheduled for publication) states that "obvious error" is synonymous with "clear error" and defines clear error as "a trial

judge's decision or action that appears to a reviewing court to have been unquestionably erroneous." A courtesy copy of the *Salcido* opinion is included.

Here, the record is devoid of obvious error in the trial court's response to the Advocate Program's Stipulation and Notice of Substitution of Counsel, filed on June 14, 2023, and the Notice of Substitution of Counsel Within the Same Office, filed on June 23, 2023. The trial court's Notice Requesting Clarification is consistent with Rule 6(b) of the Tohono O'odham Rules of Court, Rules of Civil Procedure.

The Advocate Program contended that the trial court should look to Arizona law governing substitution of counsel, specifically Rule 5.3(a)(2)(D), Arizona Rules of Civil Procedure. The Tohono O'odham courts, however, only look to Arizona law for guidance if there is no Tohono O'odham law or custom on point. See 4 T.O.C. Ch. 1, § 1-102. Likewise, Rule 1 of Section 1 of the Tohono O'odham Rules of Court provides the sequence the trial court must follow when applying Rules of Court:

> (a) Rules enacted within the laws of the Tohono O'odham Nation;
> (b) Rules of the Tohono O'odham Judicial Branch;
> (c) The Arizona Rules of Court, specifically the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Juvenile Court, and Rules of Evidence. Where applicable to the facts and circumstances of a case, the Arizona rules will be followed to the extent that they do not conflict with a written Tohono O'odham law or rule, directly or indirectly.

In this case a Tohono O'odham Rule directly addresses the question at hand. Rule 6 of Section 2 of the Tohono O'odham Rules of Court outlines what must be included in a motion to substitute counsel. These requirements conflict with Rule

5, Arizona Rules of Civil Procedure, thereby making the application of Arizona's Rule inappropriate.

Having found interlocutory review inappropriate, the stay is lifted, and the case is remanded to the trial court for further proceedings. The Appellant's Opening Brief is stricken.

Dated August 31, 2023.

Signing for a unanimous Court:

Rene Alcoverde, Jr.
Presiding Appellate Judge.

TOHONO O'ODHAM
JUDICIARY

In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 AUG 22 A 8:02
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In the Matter of the Estate of:	)	Case No.: AP2023-0003
	)	(Re: AV2022-0116)
Susie Siquieros	)	
	)	ORDER
DOB: 04/02/1912	)	
	)	

Before: Hon. Rene Alcoverde Jr., Hon. Barbara Atwood, and Hon. Tessa L. Dysart.

The Tohono O'odham Advocate Program, on behalf of Jennifer Celaya, filed a Request for Interlocutory Appeal to challenge the Trial Court's handling of the Advocate Program's two attempts to obtain a substitution of counsel from within their own office.

The Record demonstrates that the Trial Court granted the substitution of counsel. Under Rule 15 of the Tohono O'odham Rules of Appellate Procedure, this Court will grant an interlocutory appeal if:

> (1) the trial court has committed an obvious error;
> (2) the error would render further trial proceedings useless or substantially limit the freedom of a party to act; and
> (3) the error presents a substantial question of law which would determine the outcome of the appeal.

Although the Trial Court granted Ms. Celaya permission to file this Interlocutory appeal, as well as a Stay, the Court denies the interlocutory appeal as there is no appealable issue to review. The stay is lifted. The case is remanded to the Trial Court for further proceedings.

Dated this 21st day of August.

Signing for a unanimous Court:

Rene Alcoverde, Jr.
Presiding Appellate Judge.

TOHONO O'ODHAM
JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

COURT OF APPEALS

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2024 JAN -4 P 3:27
JUDICIARY SERVICE CLERK

Tohono O'odham Nation, Appellant, v. Dale Lloyd Joaquin, Appellee.	)	Case No.: AP2023-0004

DECISION

Before Debra S. Doll, Presiding Judge, and Deola Juan and Barbara Atwood, Appellate Judges.

THIS MATTER comes before the Appeals Court on Motion by the Nation, through Acting Chief Prosecutor Caroline Allen and Assistant Prosecutor Amy S. Ruskin, dated October 2, 2023, and in reference to Case Number CR2022-0483-1/2/5-9, *The Tohono O'odham Nation v. Dale Lloyd Joaquin.* In its Appeal, the Nation now seeks review of the Trial Court's conclusion as to when the right to appointed counsel does attach, or is triggered, for a defendant under the Tribal Law and Order Act and Tohono O'odham law.

JURISDICTION

The Appeals Court has jurisdiction in all matters arising from the Trial Court, as established by Section 7, Article VIII, of the Constitution of the Tohono O'odham Nation. The Appeals Court has subject matter and personal jurisdiction, under Sections 2 and 10, Article VIII, of the Constitution of the Tohono O'odham Nation.

QUESTION OF LAW

THE NATION SEEKS REVIEW OF THE TRIAL COURT'S CONCLUSION REGARDING WHEN THE RIGHT TO APPOINTED COUNSEL ATTACHES OR IS TRIGGERED.

> The Court of Appeals finds this question was answered initially on April 3, 2023 in the Court's Trial Record Entry, then again on July 31, 2023, in the Trial Record Entry, which was a final judgment by the Trial Court regarding the case. It was once again addressed by the Trial Court on August 31, 2023, in the Order Denying Defendant's Motion to Drop Charges. This Court concludes that the Notice of Appeal filed by the Nation is outside of the time prescribed under Rule 12(a), Tohono O'odham Rules of Appellate Procedure. In addition, this Appeal falls outside of the authority of this Court as it would not affect the outcome of Defendant's criminal case. See Rule 3(c)(2), Tohono O'odham Rule of Appellate Procedure.

RULES OF COURT

This Appeal is governed by several provisions in the Tohono O'odham Rules of Court. Rule 12(a), 2023 Rules of Appellate Procedure, states "[a]n appeal will be taken by filing a notice of appeal with the trial court within 30 days of entry of judgment by that same court." Rule 6(h),

Rules of Appellate Procedure, defines "final judgment or decision" to mean "a judgment or decision which affects a substantial right leaving nothing open to dispute and which ends the action between the parties in the trial court. The Rule further defines "motion" to mean "any request for an order other than the complaint, petition, or answer." Rule 6(j), Tohono O'odham Rules of Appellate Procedure.

ANALYSIS

There are three distinct topics for the Court to address in determining whether it has jurisdiction over this Appeal: (1) the question of law raised by the Nation, (2) the significance of the motion by Defendant dated August 14, 2023, and (3) the timeliness of the Notice of Appeal.

I. Question of Law

The question of law was addressed by the Trial Court and was answered at three separate times by the Trial Court. The first time the Trial Court addressed when the right of a defendant to have counsel attaches was on April 3, 2023, in the Trial Record Entry. The Court stated:

> "The Court does not have any attorneys that it can appoint at the Nation's expense. Accordingly, the Court will be unable to sentence Mr. Joaquin to more than one year in jail in this proceeding. The Court orders the parties to proceed as Mr. Joaquin is a self-represented litigant."

The second time the Court addressed the issue was in the Trial Record Entry, which was a judgment and sentence adjudicating the matter, dated July 31, 2023. There the Court stated:

> "As Mr. Joaquin was not represented by counsel throughout this proceeding, the Court is unable to impose a total term of imprisonment of more than 1 year, as the Nation request, pursuant to T.O.C. Ch. 1, 1108 and the Tribal Law and Order Act (25 U.S.C. 1302(c))."

Finally, post-conviction, the Trial Court addressed the issue for the third time in its Order Denying Defendant's Motion to Drop Charges, dated August 31, 2023. In this Order, the Court stated:

> "The Nation's Code and ICRA refer specifically and only to prison terms over one year, not overall sentences that include over one year of imprisonment. See 6 T.O.C. ch1 1108 ("An indigent defendant shall have the right to a state-licensed attorney at the expense of the Tohono O'odham Nation in a criminal proceeding in which ***a total term of imprisonment of more than one*** year is actually imposed."

The Defendant was never in jeopardy of having a prison sentence for more than one (1) year, given there was no state-licensed attorney available to represent the defendant. Thus, the question presented by the Nation would not affect the outcome of the criminal case.

II. Motion by Defendant dated August 11, 2023 and Recorded August 14, 2023.

The Motion by the Defendant, dated August 11, 2023 and entered into the record on August 14, 2023, is just that, a *Motion to Speak With the Court.* It is a motion that is post-

conviction. It is not an appeal. Therefore, when the Nation based its appeal on the Trial Court's Order Denying Defendant's Motion to Drop Charges (dated August 31, 2023), the Nation was in error to characterize this as a final judgment by the Trial Court. The final judgment by the Trial Court was entered on July 31, 2023, and the appeal process ran on August 31, 2023.

In addition, this appeal by the Nation is not brought on behalf of the Defendant and the Nation does not represent the Defendant. The Defendant moved to have the entire sentence vacated on the ground of religious freedom—an argument not advanced in this Appeal. Accordingly, the Nation does not have standing to bring this appeal.

III. Timeliness of Filing of Appeal by the Nation

The Nation filed this Appeal on or about October 2, 2023. The final judgment and sentence of the Trial Court was on July 31, 2023. Under Rule 12(a), of the Tohono O'odham Rules of Appellate Procedure, the "appeal will be taken by filing a notice of appeal with the trial court within 30 days of entry of judgment by that same court." The final day for the Nation, or the Defendant, to file a notice of appeal would have been August 31, 2023. The Court hereby finds this appeal to be untimely.

THEREFORE, THE COURT HOLDS THAT IT LACKS JURISDICTION OVER THIS APPEAL. THE APPEAL IS HEREBY DISMISSED.

Judge Deola Juan and Judge Barbara Atwood concur.

Dated this 3rd day of January, 2024

Debra S. Doll
Judge

TOHONO O'ODHAM JUDICIARY

FILED IN THE
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In the Judicial Court of the Tohono O'odham Nation
Court of Appeals

Tohono O'odham Nation	)	Case No.: AP2023-0005
	)	(Ref: CR2023-0037-1-8)
Appellee	)	
	)	OPINION
v.	)	
	)	
Tyrone Miles	)	
	)	
Appellant	)	
	)	

D. Tyler Francis, Counsel for Tyrone Matthew Miles, Appellant

Amy S. Ruskin, Counsel for the Tohono O'odham Prosecutor's Office, Appellee

Before: Hon. Tessa L. Dysart, Hon. Barbara A. Atwood, and Hon. Amy B. Courson.

Tyrone Matthew Miles appeals from his convictions and sentences for assault and abuse of a person. He argues that the abuse of person statute requires some sort of caretaking relationship, and that without such a relationship the crime of assault is "indistinguishable" from abuse of a person. For the reasons below, we affirm Mr. Miles's convictions and sentences.

STATEMENT OF FACTS

On February 20, 2023, Tyrone Matthew Miles, was charged in CR2023-0037-1-8, with eight counts related to the alleged assault of Nicollette Francisco, the grandmother of his child. At a bench trial on August 30, 2023, after the victim and the responding officer had testified, and various exhibits were placed into evidence, Judge Kyle Fields found Mr. Miles guilty of Counts 1, 2, 4, 5, 6, and 8, and not guilty of Counts 3 and 7.

Mr. Miles was sentenced on September 25, 2023, to 90 days for Count 1 – Assault (amended as a lesser included from Aggravated Assault) to run concurrently to his other convictions, and to 360 days for Count 2 – Abuse of a Person, along with convictions for four other charges. He was given

credit for time served. Mr. Miles filed his Notice of Appeal on October 20, 2023. He did not directly address the issue of double jeopardy in any of his filings with the Court of Appeals.

JURISDICTION

Having considered the parties' submissions as well as case law from the Tohono O'odham Court of Appeals, the Court determines that the Notice of Appeal was timely filed. Under Rule 3(c)(2) of the Tohono O'odham Rules of Appellate Procedure, this Court may review "a criminal matter after a judgment of guilt and sentencing," and under Rule 12(a), a notice of appeal must be filed "within 30 days of the entry of judgment." This Court has recognized that the time for filing an appeal should run from the date of sentencing. *See, e.g.*, *Narcho v. Tohono O'odham Nation*, 3 TOR.3d 13, CTA-0089 (T.O. Ct. App 2007) ("Appellant had . . . thirty days from . . . the date the Appellant was sentenced" within which to file a notice of appeal.); *Wichapa v. Tohono O'odham Nation*, 3 TOR.3d 26, CTA-0057 (T.O. Ct. App 2009) (using the date of sentencing to determine whether a request to appeal was untimely); *Molina v. Tohono O'odham Nation*, 2021 TOR Supp. 30, (T.O. Ct. App 2015) (using the date of sentencing to determine whether a request to appeal was untimely). The sentencing in this case occurred September 25, 2023, and the Notice of Appeal was filed October 20, 2023. The Court therefore concludes that it has jurisdiction over this appeal.

DOUBLE JEOPARDY

Mr. Miles argues that his conviction and sentence for abuse of a person under 7 T.O.C. § 8.4(A)(2) was improper because that statute implicitly requires a custodial or financial relationship between the parties, and that without such a relationship the "the definition of 'Abuse of a Person' is indistinguishable from simple assault." Opening Brief at 6. Although Mr. Miles did not directly address the applicability of double jeopardy in his filings with this Court, we understand his argument to raise a concern that conviction and sentencing for both abuse of person and simple assault would violate the double jeopardy prohibition.

Although the Tohono O'odham Constitution does not contain a prohibition on double jeopardy, the Indian Civil Rights Act does contain a double jeopardy provision. *See* 25 U.S.C. § 1302(a)(3). Under Tohono O'odham case law, double jeopardy prevents a person from being tried twice for the same offense or being prosecuted under two identical statutes. *Tohono O'odham Nation v. Campillo*, 1 TOR3d 105, 106–07. As the Court explained in *Campillo*, "the test that needs to [be] applied [to determine whether double jeopardy exists] is whether the elements required to prove one charge is not present in the other . . . ." *Id.* at 108.

In this case, Mr. Miles was convicted of assault under 7 T.O.C. § 7.1(A)(1) and abuse of a person under 7 T.O.C. § 8.4(A)(2). The assault statute states that "[a] person commits the offense of assault if he or she commits any of the following acts: 1. with intent to cause bodily injury to another person he or she causes bodily injury." 7 T.O.C. § 7.1(A)(1). In contrast, the abuse of a person statute provides that "[a] person commits the offense of abuse of a person if he or she intentionally causes or permits a person to be: 2. subjected to infliction of physical or mental injury." 7 T.O.C. § 8.4(A)(2).

Although similar, these two statutes punish distinct conduct, with different elements to prove each. Abuse of a person occurs when a defendant causes or allows another to be "subjected to . . . injury," and it penalizes both physical and mental injury. Assault, on the other hand, requires a defendant to "commit . . . bodily injury to another person" and is limited to physical injury. In determining whether criminal charges are the same for purposes of double jeopardy, Arizona courts "look to the elements of the offenses and not to the particular facts that will be used to prove them." *State v. Ortega*, 220 Ariz. 320, 324, ¶ 9 (Ct. App. 2008). In the absence of conflicting Tohono O'odham law, we agree with that reasoning. Here the Nation needed to prove different elements for the two counts and sufficient facts were presented at trial to support conviction on both charges. Accordingly, Mr. Miles's convictions and sentences do not implicate double jeopardy.

Because we find that the elements of the offense of abuse of a person are distinguishable from the elements of assault and there is no double jeopardy issue, we need not address Mr. Miles's

argument asking this Court to construe legislative intent and determine whether the offense of abuse of a person implies a relationship between the parties.

Therefore, this Court affirms Mr. Miles's convictions and sentences.

Dated April 25, 2024

Hon. Tessa L. Dysart
For the Panel

TOHONO O'ODHAM
JUDICIARY

In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

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TOHONO O'ODHAM JUDICIARY
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JUDICIARY SERVICE CLERK

Tohono O'odham Nation, Appellant, v. Lorna Cipriano, Appellee.	))))))))	Case No.: AP2023-0006 (Re: CR2022-0440-1 and CR2023-0197-1) ORDER

Before: Hon. Rene Alcoverde Jr., Hon. Amy Courson, and Hon. Tessa L. Dysart.

The Appellate Court reviewed the trial court record and applicable Rules of Court. Here, the Tohono O'odham Rules of Court, Section 3, Rule 14(a), authorizes the Court to order concurrent sentences at the discretion of a judge.

Because the Record is silent regarding the trial court's exercise of discretion as to why the supervised probation terms were ordered to run concurrently to one another, the Appellate Court finds good cause to stay the appeal, and to remand the case to the Trial Court, to allow a hearing on the issue of whether the Supervised Probation terms were to run concurrently or consecutive to any other sentence of probation.

A hearing consistent with this remand must be completed within 45 days. The Appellant must then advise this Court of the outcome, and whether it wishes to continue with the appeal no later than February 23, 2024.

Dated January 5, 2024.

Signing for a unanimous Court:

Rene Alcoverde, Jr.
Presiding Appellate Judge.

TOHONO O'ODHAM
JUDICIARY

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In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

Tohono O'odham Nation, Appellant, v. Lorna Cipriano, Appellee.	))))))))	Case No.: AP2023-0006 (Re: CR2022-0440-1 and CR2023-0197-1) ORDER

Before: Hon. Rene Alcoverde Jr., Hon. Amy Courson, and Hon. Tessa L. Dysart.

The Appellate Court reviewed the Appellant's "NOTICE TO THE COURT OF APPEALS AND MOTION TO DISMISS APPEAL"—filed on March 1, 2024.

GOOD CAUSE APPEARING, the Motion is granted, and the appeal is dismissed.

Dated March 28, 2024.

Signing for a unanimous Court:

Rene Alcoverde, Jr.
Presiding Appellate Judge.

TOHONO O'ODHAM JUDICIARY

TRIAL COURT DECISIONS

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Guardianship and Conservatorship of: Mavis Manuel DOB: 12/29/1983	Case Number: 2009-0178AV **ORDER REGARDING ANNUAL REVIEW HEARING AND WARD'S VOTING RIGHTS**

Annual Review Hearing

At the Annual Review Hearing on March 13, 2024, Yvonne Clarice Antone, Mavis Manuel's Guardian and Conservator, appeared. Mavis Manuel was not present at the hearing. The Court interviewed Yvonne Antone.

The Court finds and orders that:

1. Yvonne Clarice Antone submitted a written report and gave an oral report.
2. The Court accepts the written and oral report.
3. Specifically, the Court notes:
    a. Mavis Manuel is doing well and is happy at home.
    b. Mavis Manuel has appointments for eye, hearing, immunization, and the women's clinic. She is getting new hearing aids soon and she is excited about that.
    c. Ms. Antone submitted bank statements from January 2023 through September 2023. This period was for the time before Ms. Antone took over

as Guardian / Conservator. She explained that she was unable to print out recent statements, but did confirm that Yvonne Clarice Antone is now the SSI payee for Mavis Manuel.

d. The Court orders the bank statements sealed to protect the confidential information.

4. Mavis Manuel continues to need a Guardian and Conservator.

5. Yvonne Clarice Antone will continue to serve as Mavis Manuel's Guardian and Conservator.

6. The Court thanks Yvonne Clarice Antone for her commitment to Mavis Manuel.

Ward's Right to Vote

7. Yvonne Clarice Antone asked, in part on Mavis Manuel's interest, whether Mavis Manuel was still able to register to vote, and vote, on the Nation.

Tohono O'odham law does not address that question. In such cases, the Court may, in its discretion, look to Arizona law for guidance. 4 T.O.C. ch. 1, § 1-102. The Court finds that helpful here and therefore exercises its discretion and looks to Arizona law.

Arizona law provides that, in a general guardianship (where a person is "adjudicated an incapacitated person"), the ward loses the right to vote. ARIZ. CONST. art. VII, § 2.C. The reason for that is:

> *"The man who for any reason is exempt from responsibility to the law for his acts, who cannot be trusted to manage his own person or property, certainly as a matter of common sense cannot be trusted to make laws for the government of others, and placing him under the guardianship of another conclusively establishes that incapacity."*

Porter et. al. v. Hall, 34 Ariz. 308, 324 (1928), *overruled on other grounds*, Harrison v. Laveen, 67 Ariz. 337 (1948).

On the other hand, under a limited guardianship in Arizona, the ward may retain the right to vote *if* a petition is filed, a hearing is held, and the court determines by "clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote." A.R.S. § 14-5304.02.

The Court finds both of those Arizona provisions persuasive, and will apply them to this case.

This Court previously adjudicated Mavis Manuel an incapacitated adult, and appointed a guardian and conservator for her, finding that Mavis Manuel is "permanently impaired by reason of mental retardation," and that the appointment is necessary because Ms. Manuel is "unable to care for herself or make any medical/financial decisions." (Order Appointing Permanent Guardian and Conservator, Dec. 7, 2009, 1.)

However, the report on which the appointment relies does contain indications that Mavis Manuel retains some mental abilities and functioning:

- Performance Scale IQ score at the very low end of the *borderline* range;
- Perceptual organization and processing speed indices at the low end of the *borderline* range;
- 77.7 out of 100 chance that no significant attention problem existed;

- Math skills barely *adequate* for most daily living skills;
- *Mild* mental retardation;
- Intellectual functioning in the *borderline* range; and
- Recommended for job placement with *limited* problem solving, independent decision-making, multi-tasking, pressure, or time demands.

(Psychological Evaluation Report, Nov. 29, 2006, 5-7, attached to Pet. for Appointment for Guardian and Conservator of an Adult, Aug, 31, 2009.)

Tohono O'odham law does not formally distinguish between a general and limited guardianship as does Arizona law. However, the Court will limit a guardianship when appropriate. Thus, the distinction is relevant to this case to note that there were no limitations at the initial appointment, making it equivalent to a general guardianship under Arizona law. Accordingly, Mavis Manuel is not eligible to vote. However, the Court may limit this guardianship if it finds that Mavis Manuel, while still unable to make medical and financial decisions for herself, is capable of sufficient understanding to vote.

In other words, looking to Arizona law for guidance in this case, in the absence of Tohono O'odham law on point, Mavis Manuel currently does not have the right to vote on the Nation. However, if a petition is filed, a hearing is held, and the Court determines by clear and convincing evidence that Mavis Manuel retains sufficient understanding to exercise the right to vote, the Court will restore her right to vote on the Nation.

Miscellaneous

8. The next Annual Review Hearing is set for March 5, 2025 at 9:00 a.m.

9. Yvonne Clarice Antone must file the attached Annual Report Form at least one week before the next Annual Review Hearing.
10. This is the only notice that will be provided.

Dated: March 15, 2024

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
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JUDICIARY SERVICE CLERK

Gloria Chavez, Carlotta Chavez, Ira Chavez, Jr., Wenona May, Victoria Chavez, and Denise Chavez, Plaintiffs, v. Sells Community Land Committee, the regulatory body overseeing land assignments in the Sells District; Olga Armenta, Larry Wilson, Marilyn Ignacio, Louella Martinez, Catherine Whitman, in their official capacities as Sells Community Land Committee Members; and John and Jane Does 1-20 and other John Doe Entities 1-10, all whose names are unknown, Defendants.	Case No.: AV2019-0091 ORDER

On July 28, 2021, the Court held argument on whether it possesses proper jurisdiction over the parties and the issues in this case. Defendants specially appeared through attorney William Strickland, Jr., preserving objection to the Court's jurisdiction based on claimed sovereign immunity. Gloria Chavez appeared through her attorney, Margaret Hirchak.

Pursuant to that argument and the Court's review of the associated pleadings, to include the Amicus Curiae briefs from the Tohono O'odham Nation (Nation) and the Nation's Legislative Council, the Court issues its decision on Defendants' pending Motion for Summary Judgment.[1]

[1] The Defendants had originally moved to dismiss the action, but the Court found that it was more appropriately a Motion for Summary Judgement given the parties' request that it review filings and attached exhibits offered outside of the pleadings and the Court's interest in making sure that each side was heard and had an opportunity to present their concerns.

STANDARDS OF REVIEW

A Motion for Summary Judgment is granted when, after viewing all the material facts in the light most favorable to the opposing party, there are no genuine issues as to those material facts and the Court should grant judgment in the moving party's favor. *See In Re Petition of the Judicial Branch*, 3 TOR3d 105, 118 (Ct.App. October 22, 2010). Moreover, under Rule 11(h) of the Tohono O'odham Rules of Court, Rules of Civil Procedure, this Court must determine whether it may exercise proper jurisdiction over the parties and the subject matter before it, and if it finds at any time that it lacks subject-matter jurisdiction, the Court must dismiss the action.

FINDINGS OF FACT

On July 12, 2019, Gloria Chavez[2] filed her lawsuit challenging the Sells District Land Committee (Committee)'s regulatory authority over Sells District Parcel 335 ("the Lot") an unalloted parcel of land within the Nation. Gloria Chavez also challenged the Committee's resolution SDLC 18-18. That resolution gave Gloria's brother, Ira Chavez, one year to "do something" with the Lot, and "complete what the Sells Land Committee requires" for land assignments.[3] The Committee issued this resolution after it had initially invited Gloria to appeal the intended repossession, but then denied her the opportunity to speak and present witness at the appeal hearing.[4] The Committee had also invited Ira to appeal its intended repossession and then denied him and Gloria the opportunity to speak and present witnesses at that appeal hearing.[5] The consequence for failing to complete the requirements, as stated in both letters, was the

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[2] Gloria Chavez is the sole remaining Plaintiff because the Court dismissed all other named plaintiffs from the action in its ruling filed October 7, 2020, and it also sustained that dismissal in its ruling filed December 29, 2020. The case caption remains as originally filed.

[3] *See Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Ex. A.

[4] *See Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Affidavit of Gloria Chavez (hereafter "G. Chavez Affidavit"), Exhibits A and C.

[5] G. Chavez Affidavit, Exhibits C and D.

District's reclamation of the Lot and reassignment of the Lot to eligible Sells Community members.[6]

Article XVI of the Constitution of the Tohono O'odham Nation gives the Tohono O'odham Council control and management authority over the unalloted lands of the Nation.[7] Exercising that control and management, the Council can enact laws governing the use, assignment, permit, lease, or other disposition of lands, interests in land, and resources of the Nation, as consistent with Federal law. This power includes the authority to enact ordinances that govern how a District will assign homesites, if the District has approved the ordinance. Article XVI, Section 4 of the Nation's Constitution also grants each District the power to assign homesites under its "customary procedures".

The Sells District has delegated its assignment power to the Sells Community Land Committee ("Committee"). Neither party disputes that the Committee has this power. Plaintiffs did accurately point out, however, that the District's policy inaccurately refers to the source of power as "Section 3(a)" and not the correct Section 4(a) of Article XVI.

The Lot is important to Gloria Chavez because several of her family members had lived there. Ms. Chavez argues[8] that several probate decisions honoring that transfer and interest would support her claim to a familial "vested property interest" in the Lot "since at least the 1940s".[9] A brief review of that history shows that Julianna Garcia Pino lived on the Lot when she passed from life on October 29, 1951.[10] Her will left the land to her grandson, Ramon Jose Garcia.[11] Mr. Garcia lived on and used the Lot until he passed.[12] Mr. Garcia left the Lot to his

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[6] G. Chavez Affidavit, Exhibits C and D.
[7] *See* Constitution of the Tohono O'odham Nation, Article XVI, Section 1.
[8] Oral Argument in this case held July 28, 2021.
[9] *See* Plaintiff's *Memorandum of Points and Authorities in Support of Ex Parte Application for a Temporary Restraining Order* at 3, filed July 12, 2019.
[10] *See* G. Chavez Affidavit, Exhibit A.
[11] *Id.*
[12] *See* G. Chavez Affidavit, Exhibit B.

aunt, Melissa Chavez.[13] Mrs. Chavez, mother of Plaintiff Gloria Chavez and Ira Chavez, lived on the Lot until she passed. Before her death, Melissa Chavez named her husband, Ivan Chavez, and her son, Ira Chavez, as the beneficiaries of her interest in the Lot, but she never stated an intention to give Gloria Chavez an interest in the Lot.[14] Ivan Chavez passed before Melissa, leaving Ira as her sole beneficiary.

At some point before September 27, 2017, the Committee developed a list of abandoned and vacant Sells Community lots for reassignment.[15] The Committee wrote Gloria Chavez and told her that it had decided to repossess the Lot and that if she did not appeal that decision within 30 days, it would be final.[16] Ms. Chavez appealed the Committee's decision on October 23, 2017, and attended the subsequently scheduled hearing on November 30, 2017. Ms. Chavez brought her attorney and several Elders as witnesses on customs and traditions of land assignments in the Sells District.[17]

The Committee did not allow Gloria Chavez, her lawyer, and the several Elders that she brought with her to speak at the hearing.[18] The Committee also deemed Ira Chavez as the only beneficiary of the Lot and tabled further action until it could serve Mr. Chavez with notice of his right to challenge any repossession or reclamation of the Lot.[19] Although Melissa Chavez named Ira Chavez as a beneficiary to the Lot, there is no record that the Committee ever formally assigned the Lot to Ira Chavez.

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[13] *Id.*
[14] *See* G. Chavez Affidavit, Exhibit F.
[15] *See* G. Chavez Affidavit, Exhibit D, Letter from Chairperson Olga Armenta, dated June 19, 2018.
[16] *See* G. Chavez Affidavit, Exhibit C. At oral argument on July 28, 2021, Defendants admitted that this original notice that they sent only to Gloria Chavez was error as they did not have written information identifying her as an assignee or as having a legal interest.
[17] *See* G. Chavez Affidavit.
[18] *Id.* at ¶¶ 12-14. *See also Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Affidavit of Vanessa Minteer, (hereafter "Minteer Affidavit"), and Exhibit D attached to that affidavit.
[19] *See* G. Chavez Affidavit at ¶ 15. *See also* Minteer Affidavit, and Exhibit D attached to that affidavit. The Committee's briefing and oral argument lead the Court to conclude that the Committee sent notice to Ira Chavez under the presumption that he had an ownership interest in the Lot based on Melissa Chavez's beneficiary statement.

On June 25, 2018, the Committee sent Ira Chavez a letter stating that it deemed the Lot abandoned and would reclaim it "within thirty days of receipt of the letter" unless Mr. Chavez appealed.[20] It also stated that while the Committee could reassign the Lot to "other family members", they would "need to register with the Sells District".[21]

On July 10, 2018, Ira Chavez and Gloria Chavez appealed the Committee's decision and attended a subsequently scheduled hearing on August 30, 2018.[22] Much like the hearing held on November 30, 2017, Ira Chavez brought his attorneys and Elders to speak, but the Committee did not allow them or Ira to speak. After that hearing, the Committee issued Sells Community Land Committee Resolution SCLC-18-18, giving Ira Chavez one year from June 19, 2018, to improve the Lot and "complete what the Sells Community Land Committee requires for the land assignment" to avoid reclamation.[23] The Committee also provided Gloria and Ira with a copy of their mother's beneficiary form[24], showing that Ira was the only living beneficiary of the Lot.[25]

Ira Chavez passed from life on March 19, 2019, three months before the end of the one-year delayed reclamation period.[26] Ira Chavez died without a will and had not designated a beneficiary for the Lot before passing. Neither Ira's estate nor any appointed personal representative has appeared in this case.

On the last day of the extension, June 25, 2019, Terry Angelo, the Chukut Kuk District's administrative assistant, contacted the Committee's Chairwoman Olga Armenta, and requested that she place Ira's adult children on the Committee's agenda for its scheduled meeting on June 27, 2019.[27] Chairwoman Armenta told Terry Angelo that the Sells Committee would not

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[20] *See* G. Chavez Affidavit, Exhibit D.
[21] *Id.*
[22] *See* G. Chavez Affidavit, Exhibit E, an unsigned statement from Gloria and Ira Chavez.
[23] *See Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Affidavit of Terry Angelo, Exhibit A, a copy of Committee Resolution SCLC-18-18.
[24] The Court notes that Gloria Chavez had asked for this document but the Committee had denied the request.
[25] *See Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Exhibit F.
[26] *See* G. Chavez Affidavit, at ¶ 42.
[27] *See Ex Parte Application for Temporary Restraining Order*, filed July 12, 2019, Affidavit of Terry Angelo.

schedule the children for the meeting because the Committee cancelled it and repossessed the land on June 24, 2019.[28]

On July 12, 2019, Gloria and several of Ira's relatives filed their Complaint asking this Court to find that when the Sells Community Land Committee Defendants repossessed the Lot they violated their rights of due process and equal protection and their constitutional right to "live and beneficially use land in any district regardless of district boundaries".[29] Plaintiffs also asked for a permanent injunction against the Defendants to prevent their repossession or reassignment of the Lot, and asked for replevin of the Lot, payment of attorneys' fees and costs, and other proper and just relief. [30]

On September 10, 2019, Plaintiffs timely amended their Complaint, adding a fourth count, alleging that the Committee lacked regulatory authority over the Lot because it was part of a "BIA reserve".[31] The Plaintiffs based this new claim on statements from the BIA Papago Agency Superintendent, Nina Siqueros, and the Tohono O'odham Realty Specialist, Rebecca Ortega. Plaintiffs maintained all of their initial claims and their requested relief from the original Complaint.

On October 7, 2020, the Court issued its initial ruling on Defendants' Motion to Dismiss, and dismissed, without prejudice, Gloria Chavez's fourth count because it failed to state a claim on which relief could be granted. The Court also dismissed all named parties, except Gloria Chavez, for lack of standing and capacity. Pursuant to Rule 11(d) of the Tohono O'odham Rules of Court, Rules of Civil Procedure, the Court converted the Defendants' Motion to Dismiss the remaining counts and parties into a Motion for Summary Judgment to consider more information filed outside the pleadings. The Court also directed Gloria Chavez to serve notice of her lawsuit

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[28] *Id.*
[29] *See Plaintiffs' Complaint for Declaratory and Injunctive Relief*, filed July 12, 2019.
[30] *See Plaintiffs' Ex Parte Application for Temporary Restraining Order.*
[31] *See* Amended Complaint, filed September 10, 2019, page 11.

on the Nation through the Nation's Attorney General and its Legislative Council, set a deadline for the Nation to intervene in the action if it chose, set a briefing schedule for analysis of the Defendants' sovereign immunity claim in light of specific judicial precedent, set an evidentiary hearing to allow Plaintiff to present her witnesses in support of her claim, and directed the parties to exchange the names and contact information for their witnesses at that hearing.

On October 20, 2021, Gloria Chavez moved the Court to reconsider its dismissal of her fourth count and asked to rejoin the dismissed plaintiffs. On November 17, 2021, Defendants moved the Court to stay further discovery and proceedings to "definitively" answer whether the Lot was within a BIA reserve, as Gloria Chavez alleged, and then, if so, what jurisdiction the Court could exercise over the Committee. On November 25, 2020, Gloria Chavez filed her opposition to the requested stay.

On December 29, 2020, the Court granted the stay, vacated the January 27, 2021 evidentiary hearing, and in its place scheduled a status hearing. On January 22, 2021, the parties moved the Court to continue the scheduled status hearing to further discuss a resolution. The Court granted the request that day and continued the hearing to April 28, 2021.

On April 15, 2021, the parties advised the Court that they had not been able to resolve the dispute. The Court held the argument and status hearing on April 28, 2021, as scheduled. As a result of that hearing, the Court restored Plaintiff's fourth claim, ordered notice to the Nation and its Legislative Council of that decision while also offering them time and opportunity to file briefs for the Court's consideration. The Court also set oral argument on all remaining issues in Defendant's Motion for Summary Judgment for July 28, 2021, with focus on whether the Court possessed proper jurisdiction over the parties and issues before it, considering the impact of *Escalante v. Sells Dist.*, __ TOR3d___, CTA-0133 (Ct. App. 2017) (scheduled for publication). in that analysis.

ANALYSIS

Jurisdiction

In any action before it, this court must decide whether it has jurisdiction to hear and resolve the dispute. The Constitution of the Tohono O'odham Nation grants this Court the jurisdictional authority to hear all cases and matters in law and equity arising under the Nation's Constitution, under the laws and ordinances of or applicable to the Nation, and under the Nation's customs. *See* Tohono O'odham Nation Constitution (Nation's Constitution), Article VIII, Section 2, and Tohono O'odham Code, Title 6, Chpt 1, §1104. That jurisdiction reaches into all lands described within Article I of the Nation's Constitution and extends to all persons and activities carried on within the Nation's boundaries, as consistent with federal law. *See* Nation's Constitution, Article I.

Here, the Lot is entirely within the Nation's boundaries as described in Article I of the Nation's Constitution. The parties agree that the Lot sits within the Nation's boundaries. Plaintiff argues that the Lot is within a "BIA Reserve" established in 1935, between the United States of America and the Nation and for the purposes of this Motion for Summary Judgment, Defendants ask the Court to accept that accept that as true.

Plaintiff argues that because the Lot sits within the BIA Reserve, the Sells Community Land Committee has no regulatory authority. Her argument is based on an unauthenticated letter from a BIA agent.[32] Defendants have argued that the Lot's BIA Reserve status removes this Court's jurisdiction. Plaintiff has countered that her challenge is to the Defendants' regulatory authority over the Lot, not this Court's jurisdiction. The parties have clarified, however, that

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[32] *See* Plaintiff's Amended Complaint, para. 113; Plaintiff's Motion for Reconsideration, pgs 3-5. And while the Court recalls that Defendants had argued, during their April 28, 2021 oral argument, that the Nation and this Court would have no jurisdiction or authority within the BIA reserve, they clarified that argument in their Response to the "Amicus Curiae Brief of the Tohono O'odham Legislative Council Supporting Nation's Jurisdiction" filed June 29, 2021, and at the July 28, 2021, oral argument.

neither of them is arguing that the BIA Reserve diminished the Tohono O'odham Nation's lands as those are defined under Article I of the Nation's Constitution.

Plaintiff has also argued that the Committee violated her constitutional right to due process and to live without restraint based on a district boundary. She has further alleged violations of the Nation's custom and tradition when the Committee failed to recognize her "vested" right to the Lot as Melissa Chavez's daughter. Plaintiff has clearly invoked this Court's jurisdiction and thereby submitted to its personal and subject matter jurisdiction in effort to resolve her claims.

The Committee, on the other hand, has argued that sovereign immunity bars Plaintiff's lawsuit and that the Plaintiff's claims are not justiciable. The defense of sovereign immunity can challenge both personal and subject matter jurisdiction.[33] To determine its jurisdiction, then, the Court must resolve whether the Committee is immune from suit under the Nation's Constitution and laws.

Sovereign Immunity

a. General Overview

As a sovereign power, the Nation inherently possesses common-law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1987). This immunity "is an essential element of tribal sovereignty and self-determination". *Escalante* at 4. The Nation's laws declare the scope of its shield of sovereign immunity and the fact that it includes its officers, employees, and agents. *See* 1 T.O.C. Ch. 2, Section 2101(A). That shield extends, without diminishment, to the Nation's districts, enterprises, entities, and the officials, employees, and agents of those entities.

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[33] Any law "purporting to divest the judiciary of its power of constitutional inquiry is void" *Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 17 (Ct. App. 1989), leading to a conclusion that sovereign immunity is a challenge to personal jurisdiction; *but see Escalante* at 7-9, opining that a sovereign immunity claim challenges the subject matter of a case. The question of sovereign immunity is one of broad implication and may touch on both personal and subject matter jurisdiction.

See 1 T.O.C. Ch. 2, Section 2101(B). Section 2101(C) describes how that shield may be lifted for all matters covered under Sections 2101 (A) and (B) above. Waivers can cover virtually anything two parties negotiate, provided they follow Section 2101(C), as discussed below.

There are three ways to pierce this broad immunity from suit. First, if against the Nation, the waiver must come through an official act of the Nation's Legislative Council that expressly waives or authorizes a waiver that is limited to its terms. *Id.* at Section 2101(C). Second, if against a Nation's District, enterprise, or entity, the waiver must come through a resolution or other official act of the Tohono O'odham Legislative Council that expressly waives or authorizes a waiver that is limited to its terms *and* expressly granted in a "separate written contract or other duly approved writing." *Id.* Third, in general, sovereign immunity does not preclude "properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive and declaratory relief to determine the validity of a law, rule, or regulation of the Nation." *See* 1 T.O.C. Ch. 2, at Section 2102 (A).

b. The *Escalante* decision

The Tohono O'odham Rules of Civil Procedure add "resolution, or ordinance," to the Section 2102(A) language when describing how to serve notice of a challenge to the constitutionality of a Tohono O'odham law, rule, or regulation. *See* T.O.R. Civ. Pro., Rule 4(a). The Nation's Court of Appeals addressed that addition in *Escalante*, where it found that the Sells District Council, as all district councils, can pass resolutions interpreting ordinances or laws of the Nation which then carry the force of law – necessarily exposing that District Council to a waiver of sovereign immunity under Section 2102(A). *See Escalante* at 7. Plaintiffs argue that this finding, by implication, shows that Section 2102(A) waivers were intended to include Districts.[34]

[34] Plaintiff's Oral Argument, July 28, 2021.

Although *Escalante* found jurisdiction over the Sells District Council's banishment resolution under Section 2102(A), *the Court was careful to limit that exception exclusive to the narrowly tailored issue of banishment and the specific facts of the banishment affecting the parties in that case*. The *Escalante* Court opined that declaratory and injunctive relief was available against a District for its banishment resolution only when: (1) the banishment imposed is criminal in nature, meaning it requires incarceration as punishment for a violation, (2) the banishment is permanent or long-term in nature, and (3) the banishment in fact inflicts significant harm on the banished member. *See Escalante* at 7-9. The *Escalante* Court was also careful to respect the "profound importance" of custom and tradition related to banishment that predates the Nation's Constitution.

Fundamental principles of Indian law hold that a waiver of sovereign immunity must be express and will not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58. Acknowledging that fundamental principle, the *Escalante* court specifically found that the "Prosecutor's Procedures for Banishment", which provides guidance on banishments, was not an express waiver of immunity, but instead an "exception to sovereign immunity recognized in Section 2102(A)", limited strictly to the specific facts of that case.

But the *Escalante* Court, while referencing Section 2102(A) as support for allowing the action to move forward over the Sells District's objection based on sovereign immunity, actually used and referenced precedent that relied on the common law doctrine of *Ex Parte Norris* as it is retitled in this Court. *See Escalante* at 7; *Ex Parte Young*, 209 U.S. 123, 154 (1908); *Jose v. Toro* 3Tor 3d 31 (Ct. App., Feb 6, 1992); *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005). The *Ex Parte Norris* doctrine recognizes the Nation's common law practice of allowing suits for injunctive relief against officers of the Nation or a District, either individually or as a group, when they have acted outside of their constitutional authority. *See In Re Petition of the Judicial Branch*, 3 TOR3d 105, 115 (Ct.App., October 22, 2010).

c. These facts require a different outcome

Here, the facts are quite different from *Escalante*. The Committee was not imposing the harsh penalty of banishment, and Gloria Chavez does not face criminal penalties. Instead, the Sells Community Land Committee was deciding whether to repossess and assume control over the Lot when it could not identify any individual with a clear possessory right to the Lot. No document gave Ira or Gloria Chavez a legally-recognized interest in the Lot. As well, nothing shows that the BIA ever granted a lease or other type of legally-recognized interest in the Lot to Gloria or Ira Chavez. In short, Gloria Chavez has shown no legally-recognized right to the Lot that the Committee's repossession would violate.

Moreover, Gloria Chavez has not sued the Nation directly. This Court will therefore not examine whether the Nation expressly waived its own immunity from suit as discussed in Section 2101(C) and Section 2102(A). But even if the Court were to improperly read into Section 2102(A) an implied authorization of waiver against a District and its committees and allow the suit to proceed, or were the Court to follow the common law principle of *Ex Parte Norris*, Gloria Chavez must; (1) "properly frame" her lawsuit, (2) file that suit "against the Nation exclusively in the Tohono O'odham Judicial Court", and (3) solely seek injunctive or declaratory relief "to determine the validity of a law, rule, or regulation of the Nation".

Here, Plaintiff's lawsuit fails at all three. A properly framed lawsuit must have justiciable claims and issues, should not decide matters that are constitutionally left to other branches of the Nation's government, and must name and involve the parties that are indispensable to the action and its outcome.

Several of the issues presented are non-justiciable. To be "justiciable" a claim must be properly brought before this Court and the Court must be able to solve the dispute. Here, Gloria Chavez does not have standing even under the lenient standard required in summary judgment, the issues are political questions better left and solved outside of the court, and Plaintiff asks for

relief that the Court cannot grant in large part because of missing, indispensable parties, including the Nation, the United States of America, and the Sells District.

Justiciable Claims

a. Standing

This Court has previously used a three-prong test to determine whether a party has standing to bring suit. *See In Re: Petition of the Judicial Branch*, 3 TOR3d 105, 122 (2010). First, the plaintiff must have suffered a personal injury. *Id.* Second, there must be a causal connection between the injury and the illegal conduct complained of. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Third, it must be likely that a favorable decision will redress the Plaintiff's injury. *Id.*

A party with standing to litigate must show the "invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). A general interest in the proper application of the Constitution and laws, much like any disinterested observer, will not do. *See Defenders of Wildlife*, 504 U.S., at 573–76. Instead, one must have "a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

There is no dispute that Gloria Chavez's relatives have lived on the Lot for many years, but it is also clear that she does not have a legally protected interest to the Lot in the BIA Reserve. Material facts show that this history begins with the probate of Julianna Garcia Pino's estate, where Mrs. Pino left her home on the Lot to her grandson, Ramon Jose Garcia. *See* G. Chavez Affidavit, Exhibit A. Ramon Jose Garcia lived in that home until his death, and his intentions proved, in probate, that he gave the home to his aunt, Melissa Chavez. Melissa Chavez, Gloria Chavez's mother, then designated her husband Ivan L. Chavez, and her son, Ira Chavez, as her sole beneficiaries for the home and the Lot. *See* G. Chavez Affidavit, Exhibit F. Melissa Chavez did not name Gloria Chavez as a beneficiary. *Id.* There is no evidence that the

BIA has given Gloria Chavez any interest in the Lot or that she otherwise has any interest in the Lot.

While Gloria Chavez has offered her assumptions and theories as to why her mother, Melissa Chavez, did not include her name on that beneficiary form, the material facts provided over the course of this action show only that she does not have a legally protected and cognizable right in the Lot. After this Court dismissed Plaintiff's fourth count in her amended Complaint, that the Lot sits within the BIA Reserve, the Court initially scheduled an evidentiary hearing to allow Gloria Chavez the opportunity to present evidence and testimony from Elders that she had intended to call at the Committee meetings.

But after restoring Gloria Chavez's fourth claim and looking at the associated evidence and considering the exhibits and argument made in support of them, it is clear that the BIA reserve issued a legal right and expectation exclusively between the Nation and the United States of American for land to include the Lot. Those facts fight against and undermine any presumption that even Melissa Chavez and Ira Chavez would have the necessary and legally required interest to transfer the Lot to any heir, let alone support an award of injunctive and declaratory relief and an order allowing Gloria Chavez to retake the Lot.

To prevail on a Motion for Summary Judgment the moving party must show that even when all the material facts are viewed in the light most favorable to the opposing party, there are no genuine issues as to the material facts and judgment should be granted in the moving party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), Fed. Rule Civ. Proc. 56(a), *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Here, when the Court views the material facts, even believing Gloria Chavez's evidence and drawing justifiable inferences in her favor, there is no evidence that shows that she has any legally cognizable interest in the Lot. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255.

b. Political Question

A political question arises when the Court must rule on an issue in the face of a constitutional commitment of that issue to a coordinate political department *or* when there is a lack of judicially discoverable and manageable standards for resolving the dispute, *or* judicial resolution may result in embarrassment due to multiple departments answering the same question. *See In Re: Petition of the Judicial Branch*, 3 TOR3d 105, 120 (2010); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Stated more simply, "issues reserved for the political arena should not be decided by the judiciary", *see In Re: Petition of the Judicial Branch*, 3 TOR3d at 120, but even if they are, there should be standards for the Court's decision in that political arena.

Here, Gloria Chavez has asked that this Court would allow her to retake the Lot. Such decision would require that the Court first determine that she had an original right and interest in the Lot, which the Court has found is simply not present. But even were it to find such an interest, the Court would then have to conclude that it had the power to order the return of the Lot to Gloria Chavez despite the existing BIA Reserve and the agreements made between the United States of America and the Nation, both of whom are immune from suit.

And not only are those two essential parties absent from this action and immune from suit, the Court would also have to decide whether the political decisions that those parties made were in accord with the customary procedures of the Sells District, which is also absent from this case. Plaintiff asks the Court to second guess the regulatory decisions of the Nation and the Sells District—even those involving customary procedures—and likely interfere with the agreement that the Nation had entered with the United States of America in the political arena, under the power it is constitutionally required to exercise.

Moreover, if it were to allow the political question, it must have judicially discoverable and manageable standards to resolve this dispute. But given that the Nation and the Sells District

are not part of this action and given that they and the Sells Land Committee are immune from suit under the facts of this case, the Court cannot conceive of judicially discoverable and manageable standards required to entertain and resolve this political question.

While it is this Court's decision that Gloria Chavez's claims are non-justiciable as a political question, it does not also mean that the Committee's actions here would never violate the Nation's Constitution. That would be a decision on the merits, which the Court has not reached because it is abstaining from review due to this political question. Moreover, this abstention does not suggest that the Committee's refusal to hear from those whom it invites to meetings on matters as important as homesite assignments is free from constitutional constraint or insulated from judicial review. The particular facts of this case prevent further review, but a different set of facts may invite review in the future.

Indispensable Parties

An issue of "indispensable party" comes up when another party that is absent from the case is necessary and indispensable to the case and should be joined to provide a complete ruling and relief in that case. *See In Re Petition of the Judicial Branch*, 3 TOR3d at 114. But if that party cannot be joined, then the Court must decide whether it can still resolve the dispute in equity and good conscience or, in the party's absence, dismiss the suit. *See Makah Indian Tribe v. Verity*, 910 F.2d 555,558 (9th Cir. 1990).

a. The two-stage analysis

Plaintiff claims that the Committee cannot exercise regulatory authority over the Lot because it sits entirely within a BIA reserve established between two sovereign and immune parties—the United States and the Tohono O'odham Nation—both which are absent from this case. Viewing these facts in the light most favorable to Gloria Chavez, the Court would have to determine the interrelationship of the authority that the Nation, the Sells District, the Committee,

and the BIA can exercise over the Lot. The Court would have to hear and receive evidence from those absent parties to fully resolve the question of regulatory authority and to bind them to an order establishing that authority. But all those absent parties are immune from suit, unless waived, and any final decision that would decide who owns the Lot and who can administer and regulate its use, requires participation from those parties. These parties are indispensable parties.

The analysis comes in two stages. First, whether the party is necessary. Second, whether they are indispensable. *Makah Indian Tribe v. Verity*, 910 F.2d at 558. There are also two factors in deciding whether a party is necessary. First is whether complete relief is possible among those parties already present. *Id.* Second, is whether the absent party has a legally protected interest in the outcome of the action. *Id.*

b. Necessary Party

Here, complete relief is not possible because any judgment issued between Gloria Chavez and the Committee and its members would have no effect on the Nation and the United States of America, which are the sole parties to the land reserve agreement in which the Lot sits. Second, these parties also, undoubtedly, have a legal interest in this action and the Lot, and should they intend to express that interest and relitigate the case, any conflicting orders would entirely frustrate the orders in this case would prevent the parties from taking any steps to secure their interest or plans as a result of the judgment, and would expose all to multiple and perhaps inconsistent obligations, orders, lawsuits, and expense for some time to come.

When the Nation's legal interests are affected in a document, such as the BIA Reserve, the Nation is then a necessary party to an action seeking to enforce that agreement. *See Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498-99 (9th Cir. 1991), citing *McClendon v. United States*, 885 F.2d at 633, *Enterprise Mgt. Consultants, Inc. v. United States*, 883 F.2d 890, 893 (10th Cir. 1989), and *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986). What is more, as a general rule, "[t]he United

States, as sovereign, is immune from suit" unless it consents as Congress authorizes and those terms "define that court's jurisdiction to entertain the suit." *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). While the United States would have an interest in the BIA Reserve agreement it entered, nothing in the record shows that it has consented to suit in this Court.

c. Indispensable Party

The Nation and the United States of America are necessary parties and must be joined in this action. But when those parties are sovereign and immune from non-consensual actions, that makes it impossible to join them. *See McClendon*, 885 F.2d at 629.

A four-part test determines whether a non-party is indispensable. First, whether a decision would create prejudice to any party, including the absent party. Second, whether this Court can shape relief to lessen that prejudice. Third, whether this Court can award an adequate remedy in the absence of the third party, even if incomplete. Fourth, if the Court dismisses the case whether the plaintiff would have an adequate remedy. *See In Re Petition of the Judicial Branch*, 3 TOR3d at 114, citing Rule 19 of the Federal Rules of Civil Procedure.

Here, the first part is met because any decision issued in the Nation's and United States of America's absence would create prejudice to them. Second, this Court could not shape relief for Plaintiff and still account for the absence of two sovereign governments who are the sole parties in authority and relationship over the Lot.

Third, the Sells Land Committee's authority is not superior to the Legislative Council's authority over unalloted lands, so any relief that does not bind the absent and sovereign Nation would always be incomplete and illusory and would subject the parties to continuing litigation with little to no enforcement of any judgment or award granted in the Nation's absence. And, fourth and final, while the lack of an alternative forum weighs in Plaintiff's favor because there is likely no other forum where the Nation would be subject to suit, that does not override the

higher risk to the Nation, the United States of America, and the parties themselves if an incomplete Order would only create continuing litigation or lack of enforcement.

Viewing all the material facts in the light most favorable to Gloria Chavez, the fact remains that she has no legally-recognized interest in the Lot, her claim is not justiciable, the dispute squarely addresses a political question that this Court cannot resolve, and the United States of America and the Tohono O'odham Nation are indispensable, yet absent, from this case.

THEREFORE, because Gloria Chavez's claims are not properly framed, she has failed to join the indispensable parties—the United States of America and the Tohono O'odham Nation—and she has not overcome the factors that require dismissal including the political question this dispute must answer, the Court lacks subject matter jurisdiction and must dismiss Plaintiff's case, without prejudice

Dated this August 20, 2021.

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 AUG 10 A 11: 22
JUDICIARY SERVICE CLERK

IN THE MATTER OF THE ESTATE OF: Cecelia Mae Miller, DOB: 06/25/1938, DOD: 05/06/2020, Decedent.	Case No: AV2020-0054 ORDER

An Evidentiary Hearing took place on August 3, 2022. The purpose of the hearing was to address the fact that the original will of Cecelia Mae Miller was never found. This fact was not brought to the Court's attention by Richard Perry or Jennifer Miller before the Court admitted a copy of the will into probate. Based on the failure to disclose known facts, the Court appointed Richard Perry and Jennifer Miller as Co-Personal Representatives of the Estate, and Letters of Administration were issued.

Colin Bradley appeared for Richard James Perry and Jennifer Eileen Miller, the acting Co-Personal Representatives of the Estate. Mr. Bradley was accompanied by Alisa Gray, associated counsel. Roberta Armstrong appeared by telephone for Sandra Christine Miller, as did Christopher Jeffery, associated counsel. Richard Perry, Jennifer Miller, Sandra Miller and Nathan Allen Perry were present.

After opening remarks, John Becker (via telephone), Richard Perry and Jennifer Miller were sworn in and testified. **Exhibit 1**, a notarized Receipt from Goodson, Manley, Forakis, PLC, was admitted by stipulation. The Court

considered the filings from the parties, testimony, including prior testimony, and the closing remarks. The Court, being fully informed, finds and orders as follow:

1. Cecelia Mae Miller was a member of the Tohono O'odham Nation.
2. Jennifer Miller and Sandra Miller are members of the Tohono O'odham Nation.
3. Jennifer Miller, Sandra Miller, Richard Perry, Nathan Perry, Roger Franklin Perry and Michael Stephen Perry are the surviving children of the Decedent. They are also beneficiaries of the Perry Miller Trust and the sub-trusts that flow from it.
4. Richard Perry and Jennifer Miller are the acting Co-Trustees of the Perry Miller Trust and the sub-trusts.
5. After Cecelia died, Richard Perry and Jennifer Miller diligently searched for Cecelia's original will. They did not find it. They reached out to their siblings and asked them to provide any and all testamentary documents known to exist. None were found.
6. Richard Perry testified that he and his siblings were unable to find a copy of Cecelia's will when they went through Cecelia's personal effects, filing cabinets and banker boxes.
7. Richard Perry reached out to Joe Martin, Cecelia's accountant, for the original will or a copy of Cecelia's last will. Joe Martin had nothing to provide.
8. Richard Perry tracked someone down with ties to attorney John F. Goodson and the law firm of Goodson, Manley, Forakis, PLC. That person provided Richard Perry with a file copy of a will that Cecelia executed in 2003. This is what Richard Perry and Jennifer Miller provided

to this Court to probate. However, these facts were not shared with the Court, nor with Sandra Miller.

9. Jennifer Miller testified that her mother was not the most organized person, and that this became progressively worse with age due to her medical condition (arthritis). Jennifer Miller shared that she traveled from California to Arizona to stay with Cecelia on several occasions. Closer to Cecelia's death, Jennifer stayed with Cecelia for lengthy periods of time. At no time during these extended stays did Cecelia tell Jennifer that she had a will in effect. Prior to the extended stays, Cecelia never showed Jennifer the 2003 will or a copy of it.
10. In 2019, Cecelia hired an attorney by the name of John Becker to create a will and to draft revisions and an amendment to the Perry Miller Trust and sub-trusts. At no time did Cecelia show Mr. Becker the original or a copy of the 2003 will. In fact, Mr. Becker testified that he was unaware that a will was in existence.
11. Jennifer Miller testified that Cecelia paid a lot of money to have a will prepared in 2003. She provided no evidence as to the amount paid for the legal service, or who paid the amount. The insinuation is that payment for such legal services speaks to intent. Unfortunately, the expense paid for the preparation of a will does not establish that it was Cecelia's wish to have her estate governed by a copy of an old will. The insinuation is nullified by the fact that a file copy of the will was obtained only after a relative of the attorney who prepared the will provided it, as the original or copy of the 2003 will could not be found elsewhere.

12. Richard Perry is a legal practitioner with the Gila River Indian Court.

13. Richard Perry has filed legal briefs in this Court on behalf of himself and his Co-Personal Representative, Jennifer Miller. Throughout their filings, Mr. Perry has demonstrated an understanding of Arizona law, and he has supported the positions taken with citations to legal authority, including references to Arizona's Revised Statutes.

14. Specifically, in the Personal Representatives' Brief of Issues Related to Real Property, Richard Perry cited to Arizona Revised Statutes and case law and provided analysis. He also included **Exhibit D**, which is a two-page letter dated July 2, 2020, that reads:

> "Based on the law, the executed Perry Miller Trust, Joedd Miller's Executed Last Will and Testament and Cecelia Miller's executed Last Will and Testament are the legal documents that we will give effect to. [. . .] As mentioned in previous communication, we will not consider any Statement of Wishes which is not in writing and signed by Cecelia or any Will which is not in writing and executed validly under Arizona law."

In the letter, Mr. Perry tells his siblings what Arizona law provides for, and tells them how Arizona's probate laws apply to Cecelia's estate. Missing from the letter is any true statement that the original will was lost. Also missing from the letter is any true statement explaining how a copy of the 2003 will was obtained.

15. Richard Perry and Jennifer Miller did not advise this Court in writing in their initial Petition, or through their sworn testimony at the Initial Hearing, that they were seeking to probate a copy of Cecelia's will because the original could not be found. They also failed to disclose to the Court how they obtained a signed copy of the will that Cecelia executed in 2003.

16. At the Initial Hearing, Sandra Miller appeared and stated that she had reservations with the probate case going forward because of concerns over the operation of the Fry Bread House, L.L.C. Although Sandra Miller did not object to a copy of the will being admitted into probate, she never acknowledged being advised by Richard Perry or Jennifer Miller that the original will was lost, and she never acknowledged knowing how a copy of the will was obtained before agreeing to its admission to probate.

17. Richard Perry and Jennifer Miller are the acting Co-Trustees of the Perry Miller Trust. They manage the Trust for the benefit of the named beneficiaries, including Sandra Miller.

18. Given the trust relationship, a fiduciary relationship exists, and this includes a duty to disclose true facts to the beneficiaries. *See Ivancovich v. Meier*, 122 Ariz. 346, 348-349 (1979).

19. Arizona's Supreme Court, citing to *Crow v. Madsen*, 111 P.2d 7, 14 (Cal.App. 1941), made clear:

> "(2) That where a fiduciary relation exists such as a guardian and ward, administrator and heir, executor and legatee, trustee and beneficiary or principal and agent, there is also a duty imposed to deal fairly, not fraudulently, to disclose true facts and not to deceive the court; that a breach of this duty may constitute extrinsic fraud.
>
> (3) That when a person is appointed by the probate court as a guardian, an executor, an administrator or a trustee, he is an officer and agent of the court; that there is also a duty imposed to deal fairly, not fraudulently, with the court; to disclose true facts and not to deceive the court; that a breach of this duty may constitute extrinsic fraud." *Ivancovich*, 122 at 349.

20. Richard Perry and Jennifer Miller applied to this Court for permission to serve as co-personal representatives of the estate of their mother. They

asked this Court to recognize a copy of a 2003 will without advising that the original will was lost, and how they obtained the copy.

21. Serving in the capacity of Personal Representatives means that Richard and Jennifer Miller serve as officers and agents of this Court. They were under a duty to disclose true facts, and to deal fairly, not fraudulently, with the Court.

22. *Ivancovich*, *Id.*, at 348, recognizes as settled doctrine the trial court's inherent power to set aside a final order in a probate case at any time based on a failure to disclose if it deprived an unsuccessful party of the opportunity to present his case in court.

23. If the Court was told that the original will was lost, and the circumstances surrounding how a copy of the 2003 will was obtained, it would have put this Court on notice that further inquiry was necessary, and the Court, without further inquiry, would not have found that Cecelia died testate.

24. Only Richard Perry and Jennifer Miller knew that the original will was lost, and how a copy was obtained.

25. Sandra Miller was prejudiced from raising any concerns over the use of the copy of the 2003 will at the Initial Hearing because Richard Perry and Jennifer Miller failed to disclose true facts known to them.

26. It is uncontested that Sandra Miller has asked that this Court to reject the copy of the will after learning that the original was lost. She is asking this Court to apply the legal presumption that a testator destroyed their will with the intention of revoking it if last seen in their possession and the original is lost.

27. Whether Richard Perry and Jennifer Miller intentionally misled the Court or not, Richard Perry has demonstrated an understanding of Arizona law by virtue of his filings. He also left his siblings with the impression that he knows Arizona's laws. He and Jennifer also serve as Trustees of the Perry Miller Trust and the sub-trusts.
28. Under the lens of *Ivancovich, Id.*, the Court finds that Richard Perry and Jennifer Miller breached their duty to disclose true facts to Sandra Miller and to this Court. Sandra was deprived of a meaningful opportunity to object to a copy of the will being considered at the Initial Hearing. The Court finds that Richard Perry and Jennifer Miller have committed extrinsic fraud. Fraud is considered extrinsic when it deprives an unsuccessful party of the opportunity to present his case in court. *Ivancovich, Id.*,
29. Richard Perry and Jennifer Miller availed themselves of this Court's authority due to their lack of candor. Specifically, they were able to obtain Letters of Administration, and they were able to use these letters to transfer money on deposit in the name of Cecelia into the Perry Miller Trust that they manage. This amounts to an unjust enrichment of the Trust to the detriment of the Estate.
30. The Court sets aside the order admitting a copy of Cecelia Mae Miller's 2003 will into probate. The Letters of Administration are also set aside.
31. Based on the finding that Richard Perry and Jennifer Miller have committed extrinsic fraud, Richard Perry and Jennifer Miller are hereby removed as the personal representatives of this Estate.

32. The Court will now address whether it should adopt Arizona's statutory presumption.

33. Cecelia was a resident and domiciliary of Arizona, and she lived in Maricopa County.

34. Although Richard Perry and Jennifer Miller acknowledge that they could have filed a probate action in Maricopa County, had they filed this action there, and not here, they would not have been able to submit a copy of the will without first disclosing that the original will was lost, and they would have been required to address Arizona's statutory presumption head-on under A.R.S. § 14-3415(A). The requirements for filing a probate action under A.R.S. § 14-3402(A)(3) (formal testacy) and A.R.S. § 14-3301(B)(2)(a) (informal probate or appointment proceedings) make this clear.

35. Notwithstanding, Cecelia was a member of the Tohono O'odham Nation, and Jennifer and Sandra Miller are also members. The Nation's Code allows relatives of a deceased O'odham member to petition this Court for a determination of testacy and a determination of heirs if found intestate.

36. 9 T.O.C. § 17 is the Tohono O'odham Nation's Code section addressing the validity of wills. The Code section does not address copies of wills. No Tohono O'odham law or custom addresses the treatment of a lost, original will.

37. When there is no O'odham law or custom and tradition on point, the Court may, in its discretion, look to Arizona Law for guidance. *See* 4 TOC § 1-102.

38. Arizona has long acknowledged the common law presumption that a testator destroyed their will with the intention of revoking it if it was last seen in their possession and the original cannot be found after their death (the presumption of destruction animo revocandi). *See In re Schade's Estate*, 87 Ariz. 341, 349 (1960); *Matter of Travers' Estate*, 121 Ariz. 282, 283 (App. 1978); and *Matter of Estate and Trust of Pilafas*, 172 Ariz. 207, 209 (App. 1992).

39. Arizona's common law presumption was codified into A.R.S. § 14-3415(A), which states that "[i]f an original will that was last seen in the possession of the testator cannot be found after the testator's death, the testator is presumed to have destroyed the will with the intention of revoking it. This presumption may be rebutted by a preponderance of the evidence. If this presumption arises and is not rebutted the will is revoked."

40. The Court finds that it is appropriate to adopt Arizona's presumption here on the Tohono O'odham Nation and declares that it is presumed that a testator destroyed their will with the intention of revoking it if it was last seen in their possession and the original cannot be found. A.R.S. § 14-3415(A); *In re Schade's Estate*, supra. This presumption retires upon the receipt of evidence contradicting it, the burden of proof being a preponderance of the evidence. A.R.S. § 14-3415(A); *Matter of Travers' Estate*, 121 Ariz. at 283. This will eliminate forum shopping in the future, and will require future litigants seeking to probate a copy of a will here on the Tohono O'odham Nation to be forthright with facts known to them.

This will have the added benefit of protecting heirs and will assist in preserving judicial resources.

41. **Exhibit 1**, a notarized Receipt from Goodson, Manley, Forakis, PLC, establishes that original documents in the Joedd & Cecelia Miller Safe File of Original documents were received by Cecelia on July 10, 2009. The notarized acknowledgement was executed on September 24, 2009. The exhibit references an attached inventory, but the attached inventory was not included as part of **Exhibit 1**. **Exhibit 1** includes the following notarized acknowledgement on page 2:

> "On 9/24/2009, before me Matthew R.L. Villegas, the undersigned Notary Public, personally appeared Cecelia Miller, who is known to me or satisfactorily proven to be the person whose name is subscribed to this instrument as transferee and acknowledged executing the same for the purposes contained therein, and if subscribed in a representative capacity, then for the principal named and in the capacity indicated."

Page 1 has the effective date as July 10, 2009.

42. Colin Bradley's Motion For Reconsideration of May 5, 2022 Orders and May 10, 2022 Order, at page 8, line 23 through line 25, reads:

> "Richard is also willing to testify that before Cecelia's death, she showed him her will. He will avow that the copy of the Will that was admitted to probate was a true copy of the will he saw before his mother passed away."

43. Perry Miller testified that Cecelia showed him a will or a copy of a will in 2009. He testified that the one he reviewed is identical to the will copy executed by Cecelia in 2003.

44. Although Perry Miller does not recall seeing a wet signature, the Court finds that the original will was last seen in the possession of Cecelia in

2009, when she showed it to Perry Miller or when it was transferred to her by Matthew R.L. Villegas.

45. Even if Mr. Perry did not see the original will, Matthew R.L. Villegas, a Notary Public, acknowledged that Cecelia, as transferee, received original documents "in connection with the following matter(s): 1.1. Joedd & Cecelia Miller Safe File of Original documents as evidenced by attached inventory. 2. At the time of receipt, I inspected these items and found them to be complete and in good repair." Mr. Villegas acknowledged this with his signature and official seal: "IN WITNESS WHEREOF, I hereunto set my hand and official seal."

46. Cecelia's original will was not found after she died. The Court therefore finds that Cecelia Mae Miller destroyed the 2003 will with the intention of revoking it.

47. Although the testimony of Jennifer reflects that the Decedent was not well-organized, and that Cecelia paid money to have a will prepared in 2003, these facts does not negate the presumption that Cecelia intended to destroy the 2003 will after she took possession of the original in 2009.

48. Cecelia never showed Jennifer her original will during her lifetime.

49. During the time that Jennifer spent with Cecelia, Jennifer was not told that a will was in existence, or where such a will could be found.

50. Also significant is that no one found a copy of Cecelia's 2003 will after diligently searching.

51. John Becker, who was retained to prepare a will for Cecelia, testified that he never saw the 2003 will. He also testified that he was unaware that a 2003 will existed. He testified that he received a copy of the Trust in order

to prepare revisions. Yet he never received a copy of the 2003 will as a point of reference. Cecelia's silence is telling because she did not give any indication, or leave any impression, that she had a will in effect.

52. In March of 2019, the Decedent purchased the 641 W. Linger Lane residence in Phoenix, Arizona, and she took title in her individual name. She signed a promissory note for the property. She did this while being the grantor and lifetime beneficiary of the Perry Miller Trust. Cecelia also owned a 2013 Toyota Tacoma. The Court is unaware if the vehicle was placed in the name of the Trust or in Cecelia's name while she was alive, as a copy of the title was never presented to the Court. What is known is that Cecelia also owned other real property in her individual name (e.g., vacant land).

53. Cecelia also had money on deposit at Desert Financial Credit Union totaling $107,723.23 in her individual name. She had no pay-on-death beneficiary listed for her accounts.

54. Also, Cecelia took property out the Perry Miller Trust and transferred it to Jennifer Miller. Although Jennifer testified that this was done to help Cecelia come up with the entrance fee for the Beatitudes, and although Jennifer testified that there was an agreement between her and Cecelia related to the redemption of the property, Cecelia executed an Assignment to Third Party or Trust, and assigned the entrance fee in its entirety to the Perry Miller Trust.

55. The above findings of fact demonstrate that Cecelia intended to have some property and money go to the Perry Miller Trust, while maintaining property outside of the Perry Miller Trust. All of this strengthens the

presumption that Cecelia intended to die intestate, and demonstrates that Cecelia did not intend that anyone rely on a copy of an old will that was recovered from the file copy of John F. Goodson's relatives.

56. Richard Perry and Jennifer Miller have consistently maintained that the copy of the 2003 will's residue and pour-over to trust provision means that Cecelia wanted to have the 641 W. Linger Lane residence pour into the Perry Miller Trust. If this provision was that important to Cecelia, she would have transferred Linger Lane to the Perry Miller Trust during her lifetime.

57. The facts presented to the Court strengthen the presumption that Cecelia Mae Miller intended to destroy her 2003 will. The rebuttable presumption was not overcome. The Court therefore finds that the copy of the 2003 will has no legal effect.

58. In the case of *Matter of Estate and Trust of Pilafas*, 172 Ariz. at 209-210, Division 1 of Arizona's Court of Appeals applied the common law presumption and found that the decedent took possession of his original will after executing it, and it was presumed to have been destroyed as the original will could not be found after a diligent search. The *Pilafas* case also included a trust, which the court found could only be revoked by complying with the terms of the trust itself. The Court emphasizes this because Sandra Miller previously requested relief related to the Perry Miller Trust. This Court, consistent with Arizona's case law, directed Sandra Miller to seek its revocation in Maricopa County pursuant to the terms of the Trust. References to the Court's decisions as being inconsistent for making this clear have been made in the legal filings of the

Co-Personal Representatives. The Court clarifies that there are different standards applicable in probate cases versus the revocation of a trust.

59. Richard Perry and Jennifer Miller motioned this Court to dismiss the case as a whole while at the same time asking this Court to maintain the letters of administration. They have also made the explicit threat to Sandra Miller that a finding of partial intestacy will result in the forced sale of the Linger Lane residence, and they warned this Court of this outcome. Whether real property has to be sold or not is irrelevant to the fact that Richard Perry and Jennifer Miller failed to disclose known facts to the Court, and the concerns have no legal bearing on the finding that Cecelia Miller died intestate. Again, the Perry Miller Trust is separate and apart. The Court does not appreciate the bullying tactics of the Co-Personal Representatives.

60. Earlier in the case, on September 30, 2021, Richard Perry and Jennifer Miller filed a Notice of Submission of Deed Transferring Property to Perry Miller Trust, and they asked this Court to give legal effect to their attached Exhibit A, which is a Deed, Bill of Sale, and Assignment. The position taken was that the document has the legal effect of transferring title to the 641 W. Linger Lane residence after Cecelia's death. The Court rejected this argument because there is a recorded title that runs with the 641 W. Linger Lane residence. The title names Cecelia Mae Miller as the owner. The recording was done at the Maricopa County's Recorder's Office during Cecelia's lifetime, after the Deed Transferring Property to Perry Miller Trust was executed. The Deed Transferring Property to Perry Miller Trust reads:

> "Specific examples to which this transfer applies include (1) causes of action in the nature of legal claims against other persons, (2) property rights accrued by reason of unwritten contracts or commitments, (3) inheritances which result in property being owned by the Transferor by operation of law or documents that Transferor is not aware of, (4) devises from wills of relatives, (5) distributions from trusts, and (6) real or personal tangible or intangible property that was inadvertently forgotten or omitted from transfer to Transferee.

The acquisition and financing of real property in the name of Cecelia such as the Linger Lange residence was intentional. Thought went into locating and purchasing the Linger Lane residence. The positions taken by Richard Perry and Jennifer Miller were unreasonable.

61. On March 9, 2022, when the Court was made aware that the original will was never found, the Co-Personal Representatives were not forthright regarding the circumstances related to how they procured their copy of the will. Information had to be drawn out through cross examination.

62. When the Court issued its order of May 5, 2022, finding that it overlooked the application of A.R.S. § 14-3415(A) to the facts of this case, and that Cecelia died intestate, Richard Perry and Jennifer Miller complained that Sandra Miller's motion to reconsider was untimely and that she waived her right to object this late in the proceedings. *See* Personal Representative's Motion to Set Aside Order Dated May 6, 2022. Specific citations were made to the Nation's Rules of Court to demonstrate the untimeliness of the motion filed by Ms. Armstrong and to the order of this Court. Richard Perry was the author of the Motion. This demonstrates that Richard knows how to research, assess and apply rules of court and statutes. This suggests that Richard Perry may have known that he was unable to initiate a probate action in Maricopa County with a copy of a will, and this may

why he initiated the probate action here. This is justifiable speculation by the Court. Notwithstanding, such speculation was not relied upon in the Court's findings.

63. On May 10, 2022, the Court reaffirmed the order finding that Cecelia did not die testate. The Court did not specify that it was relying on its inherent authority to correct its own oversight. Instead, the Court cited to Section 2, Rule 19(a) of the Nation's Rules of Court. The Personal Representatives, through Collin Bradley, responded and asserted on page 7, line 1 through page 8, line 3 of the Motion for Reconsideration (filed on May 19, 2022), that the Court exceeded its authority as the error was not clerical in nature. The Court set the matter for hearing.

64. Various motions were filed, including a motion that asserted that Sandra engaged in ex parte communications with the Court, and a motion strike Sandra Miller's response to the Court's order that she expound on statements made that she engaged in ex parte communications with the Court. The motion to strike was denied as Sandra addressed the Court's concerns at length and left no question unanswered.

65. The Court's jurisdiction was also challenged.

66. A motion to continue the evidentiary hearing of August 3, was also filed just before the hearing.

67. The Court was also made aware that the money on deposit when Cecelia passed away that is subject to being probated was deposited into a Perry Miller Trust account.

68. If it is one thing that the Court wishes to clarify, it is that the Court has the inherent power to set aside or modify its own orders if the orders were

issued due to undisclosed facts that, if known, would alter the Court's decision. *See Ivancovich v. Meier*, 122 Ariz. at 348-349.

69. The Court is not concerned whether the failure to disclose true facts was intentional or not. The Court is concerned that the lack of disclosure prejudiced Sandra Miller and the other heirs, as the lack of candor has resulted in nearly two years of civil hearings and the waste of judicial resources.

70. Richard Perry and Jennifer Miller breached their duty to this Court. This is bolstered by the fact that they tried to stop the Court from exercising its inherent authority to correct itself. The Court is concerned that Richard Perry and Jennifer Miller sought to box the Court into reaffirming the finding of testacy.

71. The Co-Personal Representatives, in their closing through Ms. Gray, continued to maintain the position that this Court should reaffirm and maintain the letters of administration that were issued even though they have taken the position that this Court lacks all jurisdiction despite knowing that this Court's prior orders authorizing letters of administration were issued based on undisclosed facts.

72. Richard Perry testified that he lives in one of the properties owned by the Trust. He did not testify whether he pays rent to the trust. If he does not pay rent, this is inconsistent with the position that he is taking against Sandra Miller: That she needs to pay fair rental value for having resided in the 641 W. Linger Lane residence.

73. Richard Perry and Jennifer Miller are unfit to serve as Co-Personal Representatives of this Estate. They have taken unreasonable positions,

they failed to disclose known facts to this Court and to the other heirs of the Estate, and are therefore removed as fiduciaries of the Estate for cause for having breached their fiduciary duties to Sandra Miller as an heir of the Estate, who is also a beneficiary of the Perry Miller Trust and resulting sub-trusts.

74. The Court advised that it would take the issue of attorney's fees and costs under advisement once Sandra Miller addressed the concern that she engaged in ex parte communications with the Court. The prerequisites were complied with.

75. The Court considered the legal arguments, including the common fund doctrine, and the Nation's Code, and the unreasonable positions taken by the Richard Perry and Jennifer Miller. The Court adopts and incorporates by reference the Order filed on May 5, 2022. The order is 5 pages in length and addresses the Court's authority to award attorney's fees. The Court specifically adopts by reference paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of said order as if fully set forth herein.

76. The Court considered that Richard Perry and Jennifer Miller complained that the Affidavit filed by Roberta Armstrong is not specific enough, and that it amounts to block billing. The Court looked over the time charges, and the brief description of what legal services were performed. With the exceptions specified below, the Court finds that the descriptions are specific enough to put the Court on notice of the type of legal services performed, and the Court finds the charged amounts reasonable under the circumstances. Also, the documents prepared, once filed with the Court,

give context to the time expended in completing the legal services identified.

77. The Court, in its discretion, finds good cause to enter judgment in favor of Sandra Miller for her attorney's fees and court costs in the total amount of $25,319.35. The judgment for attorney's fees and court costs does not include the total amount of time expended in this case, as the affidavit of attorney's fees does not include the time spent by Christopher Jeffery, associated counsel, and it does not include any time spent after April 1, 2022. Also, the Court disallowed the invoiced amounts identified as item numbers 85, 89, 91, 92, 93 and 94 as they are not specific enough (e.g., no date, fails to identify the consultant, etc.). Notwithstanding, the Court finds that the judgment amount is fair given the circumstances.

78. If Roberta Armstrong wishes to submit an affidavit of attorney's fees and costs for legal services provided after April 1, 2022, and if Christopher Jeffery wishes to provide an affidavit outlining the time he expended in the matter, the Court will allow affidavits to be filed within 10 days of this order, and the Court will treat the Affidavits as a motion to reconsider under Rule 7.1(e) of Section 2 of the Tohono O'odham Rules of Court. Richard Perry and Jennifer Miller will have 10 days to respond to any such Motion to reconsider.

79. The judgment for attorney's fees shall run against the Estate, under the common fund doctrine.

80. The Court, having been advised that Richard Perry and Jennifer Miller unjustly enriched the Perry Miller Trust to the detriment of the Estate of

Cecelia Mae Miller, finds that it is appropriate to extend the judgment for attorney's fees and costs against the Perry Miller Trust.

81. The judgment for attorney's fees and court costs in the total amount of $25,319.35 is entered as joint and several as to the Estate of Cecelia Mae Miller and the Perry Miller Trust and the resulting sub-trusts.

82. IT IS FURTHER ORDERED: Richard Perry and Jennifer Miller are ordered to make the Estate whole by depositing the entire amount of money on deposit that existed at the time Cecelia passed away into the Estate account that they were required to open when they were appointed as Co-Personal Representatives.

83. Richard Perry and Jennifer Miller are directed to provide proof of this to the Maricopa County Superior Court as part of the ancillary probate matter.

84. All interested parties and heirs will need to resolve the probate of Cecelia Mae Miller's estate in Maricopa County's Superior Court.

85. This is a final, appealable order.

Dated August 10, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

WITHIN THE TOHONO O'ODHAM JUDICIARY
2022 AUG 15 P 3:12
JUDICIARY SERVICE CLERK

IN THE MATTER OF THE ESTATE OF:	)	
	)	Case No: AV2020-0054
Cecelia Mae Miller,	)	
DOB: 06/25/1938,	)	ORDER
DOD: 05/06/2020,	)	
	)	
	)	
Decedent.	)	
	)	

The Court issued a final, appealable order on August 10, 2022. Paragraphs 21, 28, 29 and 62 include typographical errors and omissions. Also, during the August 3, 2022 hearing, the Court stated that it would provide certified copies of the order to all of the interested parties, as this will assist them with what needs to be accomplished in Maricopa County's Superior Court. The August 10, 2022 order said nothing about certified copies being sent out.

Rule 19(a) of Section 2 of the Tohono O'odham Rules of Court reads:

> "**Corrections Based on Clerical Mistakes; Oversights and Omissions.** A court must correct a clerical mistake or a mistake arising from oversight or omission if one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with notice."

The Court finds good cause to amend paragraphs 21, 28, 29 and 62 of the August 10, 2022 order. The Court also gives notice that a certified copy of this order, and the order issued on August 10, 2022, will issue to all interested parties.

Paragraph 21 of the August 10th order reads:

"21. Serving in the capacity of Personal Representatives means that Richard and Jennifer Miller serve as officers and agents of this Court. They were under a duty to disclose true facts, and to deal fairly, not fraudulently, with the Court."

"Perry" was omitted from the first sentence. The paragraph is amended to read as follows:

"21. Serving in the capacity of Personal Representatives means that Richard Perry and Jennifer Miller serve as officers and agents of this Court. They were under a duty to disclose true facts, and to deal fairly, not fraudulently, with the Court."

Paragraph 28 reads:

"28. Under the lens of *Ivancovich*, *Id.*, the Court finds that Richard Perry and Jennifer Miller breached their duty to disclose true facts to Sandra Miller and to this Court. Sandra was deprived of a meaningful opportunity to object to a copy of the will being considered at the Initial Hearing. The Court finds that Richard Perry and Jennifer Miller have committed extrinsic fraud. Fraud is considered extrinsic when it deprives an unsuccessful party of the opportunity to present his case in court. *Ivancovich*, *Id.*,"

The Court's use of a comma at the end of the paragraph was in error. The paragraph is amended to read as follows:

"28. Under the lens of *Ivancovich*, *Id.*, the Court finds that Richard Perry and Jennifer Miller breached their duty to disclose true facts to Sandra Miller and to this Court. Sandra was deprived of a meaningful opportunity to object to a copy of the will being considered at the Initial Hearing. The Court finds that Richard Perry and Jennifer Miller have committed extrinsic fraud. Fraud is

considered extrinsic when it deprives an unsuccessful party of the opportunity to present his case in court. *Ivancovich, Id.*"

Paragraph 29 reads:

"29. Richard Perry and Jennifer Miller availed themselves of this Court's authority due to their lack of candor. Specifically, they were able to obtain Letters of Administration, and they were able to use these letters to transfer money on deposit in the name of Cecelia into the Perry Miller Trust that they manage. This amounts to an unjust enrichment of the Trust to the detriment of the Estate."

The Court used "authority" when it meant to use "jurisdiction" in the first sentence. The paragraph is amended to read as follows:

"29. Richard Perry and Jennifer Miller availed themselves of this Court's jurisdiction due to their lack of candor. Specifically, they were able to obtain Letters of Administration, and they were able to use these letters to transfer money on deposit in the name of Cecelia into the Perry Miller Trust that they manage. This amounts to an unjust enrichment of the Trust to the detriment of the Estate."

Paragraph 62 of the order reads:

"62. When the Court issued its order of May 5, 2022, finding that it overlooked the application of A.R.S. § 14-3415(A) to the facts of this case, and that Cecelia died intestate, Richard Perry and Jennifer Miller complained that Sandra Miller's motion to reconsider was untimely and that she waived her right to object this late in the proceedings. *See* Personal Representative's Motion to Set Aside Order Dated May 6, 2022. Specific citations were made to the Nation's Rules of Court to demonstrate the untimeliness of the motion

filed by Ms. Armstrong and to the order of this Court. Richard Perry was the author of the Motion. This demonstrates that Richard knows how to research, assess and apply rules of court and statutes. This suggests that Richard Perry may have known that he was unable to initiate a probate action in Maricopa County with a copy of a will, and this may why he initiated the probate action here. This is justifiable speculation by the Court. Notwithstanding, such speculation was not relied upon in the Court's findings."

The Court omitted "be" from the following sentence: "This suggests that Richard Perry may have known that he was unable to initiate a probate action in Maricopa County with a copy of a will, and this may why he initiated the probate action here." The paragraph is amended to read as follows:

"62. When the Court issued its order of May 5, 2022, finding that it overlooked the application of A.R.S. § 14-3415(A) to the facts of this case, and that Cecelia died intestate, Richard Perry and Jennifer Miller complained that Sandra Miller's motion to reconsider was untimely and that she waived her right to object this late in the proceedings. *See* Personal Representative's Motion to Set Aside Order Dated May 6, 2022. Specific citations were made to the Nation's Rules of Court to demonstrate the untimeliness of the motion filed by Ms. Armstrong and to the order of this Court. Richard Perry was the author of the Motion. This demonstrates that Richard knows how to research, assess and apply rules of court and statutes. This suggests that Richard Perry may have known that he was unable to initiate a probate action in Maricopa County with a copy of a will, and this may be why he initiated the probate action here. This is justifiable speculation by the Court. Notwithstanding, such speculation was not relied upon in the Court's findings."

The Court apologizes for any confusion that the errors may have caused. The Court corrects the errors as specified above. Moreover, the Court directs the Clerk of the Court to issue Certified Copies of this Order, and the Order issued on August 10, 2022 to all interested parties.

Dated August 15, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 AUG 25 A 11:03
JUDICIARY SERVICE CLERK

IN THE MATTER OF THE ESTATE OF: Cecelia Mae Miller, DOB: 06/25/1938, DOD: 05/06/2020, Decedent.	Case No: AV2020-0054 ORDER

Richard Perry and Jennifer Miller, through counsel, filed a timely Motion for Reconsideration (henceforth "MFR") of this Court's August 10, 2022 order (henceforth "Order"). In the introductory paragraph, Richard and Jennifer refer to themselves as the Co-Personal Representatives of this Estate. The Court reminds Richard and Jennifer that they no longer serve in this capacity before this Court. They are, however, interested heirs. The Court directs that future filings correctly identify the parties and their status. Having considered the arguments presented in the MFR, it is denied for the reasons specified below.

1. Section II(1) of the MFR asserts that the Court erred in finding that Richard and Jennifer committed extrinsic fraud against Sandra and the Court because there was never an intent to defraud. The argument is that extrinsic fraud requires "some ***intentional act or conduct*** by which the prevailing party prevents the unsuccessful party from having a fair submission of the controversy." (Emphasis added in MFR). *See* p.5, ll. 7 through 8 of the MFR. They further state that "fraud on the court occurs when a party obtains a judgment by concealing material facts and

[suppress] the truth ***with the intent to mislead the court***." (Internal citations omitted).

2. Richard and Jennifer are mistaken in their belief that intent to defraud or mislead is required, as the Court found that Richard and Jennifer were under a duty to disclose material facts to the beneficiaries of the Miller Trust and resulting sub-trusts, that this duty extended to the heirs at law of the Estate of Cecelia Miller, which included Sandra Miller, and that this duty also extended to this Court. Nothing in the MTR addresses these findings.

3. The Court also found: 1) that Richard and Jennifer knew that the original will could not be found; 2) only they knew how a copy of the 2003 will was obtained; and 3) they failed to disclose these facts to Sandra and this Court.

4. Paragraphs 18, 19, 22, 28 and 68 of the Order cites to *Ivancovich v. Meier*, 122 Ariz. 346, 349 (1979), wherein Arizona's Supreme Court approvingly cited to *Gale v. Witt*, Cal.App., 180 P.2d 993, 996, Rev'd on other grounds, 31 Cal.2d 362, 188 P.2d 775 (1948), which states:

> "In several of these cases confidential relations between the parties with a consequent duty to reveal the true facts was also relied on as supporting the theory of extrinsic fraud. In some of them the offending party had also acted as executor of the estate, and there had been a breach of the resulting duty to disclose the facts to the court."
>
> * * *
>
> "Under the rule, a violation of confidential relations which has the effect of preventing a party from presenting his case may be sufficient to constitute extrinsic fraud."

5. The MFR does not challenge the Court's findings that a confidential relationship existed with respect to Sandra, nor the finding that they owed

Sandra, as beneficiary of the Perry Trust and sub-trusts, and as an heir of the Cecelia Miller Estate, an affirmative duty to disclose true facts to her.

6. The MFR also fails to challenge the Court's finding that Richard and Jennifer, by seeking appointment as officers and agents of this Court, were under a duty to disclose true facts to the Court.

7. The Court reiterates its conclusion of law that intent is not required when there is a fiduciary relationship and someone fails to disclose known materials facts. The Court likewise reiterates its conclusion of law that intent is not required when someone is acting as an officer or agent of the Court, and they suppress a material fact which ought to have been brought to the knowledge of the court. See *Ivancovich*, supra, which approvingly cites to *Curtis v. Schell*, 129 Cal. 208, 215–16, 61 P. 951, 951-953 (1900). In *Curtis*, California's Supreme Court addressed a widow's actions in seeking a sum certain for a family allowance after borrowing money against estate property through mortgages. When the widow applied for the family allowance, she advised the court that she borrowed money against estate property, but failed to advise the court that she did not pay back the loans secured by the estate property. She then complained that the court's conclusions of law, which kept her from disregarding the creditors, were unjustified, as there was no finding of fraud in procuring the order for the family allowance, or in procuring the order of sale to pay the same; that, failing to find fraud, the probate court's jurisdiction was at an end. The relevant part of the opinion reads:

> "To give the appellant, under the name of 'family allowance,' the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law designed for a beneficent purpose into an instrument for the perpetration of a

> gross fraud. It is not to be supposed that a court possessed of all the facts and circumstances of the case would permit itself to be used for such purpose. 'In general, it may be stated that in all cases where, by accident or mistake or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained.' Story, Eq. Jur. § 885. In *Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362, Chief Justice Marshall laid down the rule in such cases as follows: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly appears to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chantery.' In this case the respondent was entirely helpless, as against the proceedings in the probate court initiated and carried on by the appellants. The proceeding to set aside family allowance is ex parte. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for the family allowance."

8. This Court recognizes fraud on the court as one of a variety of extrinsic fraud. *See Alvarado v. Thomson*, 240 Ariz. 12, 16, 375 P.3d 77, 81 (Ct. App. 2016), as amended (May 31, 2016).

9. When *Ivancovich*, supra, recognized that a failure to disclose true facts may constitute extrinsic fraud when there is a confidential relationship, *Crow v. Madsen*, 111 P.2d 7, 12 (Cal.App. 1941) was block quoted. The line of cases *Ivancovich* relies on to support the legal conclusion that actual intent to defraud is unnecessary for a finding of extrinsic fraud also

make clear that the existence of a confidential relationship imposes a duty to make a full, fair and complete disclosure of all material facts.

10. This Court recognized the duty that Richard and Jennifer owed to Sandra to deal fairly, no fraudulently, and to disclose true facts, and that the breach of this duty amounted to extrinsic fraud.

11. The Court's Order likewise found that when a person is appointed by the probate court as an executor or administrator or a trustee, he is an officer and agent of this Court. This imposes a duty to deal fairly, not fraudulently, with the Court, and to disclose true facts. It was the breach of this duty by Richard and Jennifer that resulted in the finding that they committed extrinsic fraud.

12. Whether Sandra Miller or this Court was the more deceived is irrelevant. Also irrelevant is the innocent, unintentional conduct of Richard or Jennifer. It is enough that this Court was deprived of a meaningful opportunity to consider whether it should admit a copy of a will to justify a finding of extrinsic fraud. The finding that Sandra was also deprived of a meaningful opportunity to object to the use of a copy of the will at the Initial Hearing serves as a separate basis to find that Richard and Jennifer committed extrinsic fraud.

13. Richard and Jennifer emphasize that they did not know the law, and did not understand the legal significance of not being able to find the original will, and reference Christopher Jeffrey's statements that there was no "ill will" or "ill intent" and that they appear to have bitten off more than they could chew. This Court's Order already gave Richard and Jennifer the benefit of this doubt. This does not, however, excuse Richard and Jennifer

from the consequences of their failure to disclose known facts. We are not in Arizona—we are in an O'odham Court. If we were in an Arizona court, the consequences may very well be more significant, as Arizona courts do not accept ignorance of the law as an excuse for failing to comply with it. *See In re Marriage of Williams*, 219 Ariz. 546, 549, ¶ 13 (App. 2008). In fact, self-represented litigants are held to the same standards as an attorney. *Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Non-lawyers are thus charged with "the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer." *Higgins v. Higgins*, 194 Ariz. 266, ¶ 12, 981 P.2d 134, 138 (App. 1999). Arizona's Supreme Court made clear that self-represented litigants are held to the same standards as practicing attorneys because "[s]uch a rule is indispensable to the orderly and efficient administration of justice." *Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963). It was not necessary for this Court to adopt Arizona's standard, as the facts sufficiently justify the finding that Richard and Jennifer committed extrinsic fraud. Whether the Tohono O'odham Nation's Appellate Court chooses to adopt Arizona's standard is not for this Court to opine on. It is sufficient that this Court attributed no ill will or intent to Richard or Jennifer, but held them responsible for breaching the duties they owed to Sandra and this Court.

14. Section II(2) of the MFR asserts that the Court erred in finding that Richard and Jennifer took unreasonable positions because they had an affirmative duty to defend the will. This argument ignores the fact that the original was not found after it was last seen in the possession of the

Decedent, thereby triggering the legal presumption that the will was destroyed with the intent to revoke it. Facts were kept from the Court. When they came to light, the positions taken included seeking to strong-arm the Court into keeping the Court from setting aside its finding of testacy, trying to keep the Court from setting aside the letters of administration, and threatening Sandra that the relief she requested would result in the forced sale of estate property. Also unreasonable is the fact that Richard and Jennifer filed a motion to dismiss the probate action on the basis that the Tohono O'odham Nation lacks subject-matter jurisdiction to probate the estate of a deceased member, while simultaneously asking this Court to maintain the letters of administration it issued, as well as the prior finding of testacy. They continually sought to avail themselves of the Court's authority, while at the same time taking the legal position that the court lacks it. The Court therefore reaffirms its finding that Richard and Jennifer took unreasonable positions.

15. Section II(3) alleges that the finding of extrinsic fraud denied Richard and Jennifer due process of law. The Court reviewed the Tohono O'odham Nation's Constitution, its cases, 25 U.S.C. §§ 1301-03 and the record. The legal analysis presented by Richard and Jennifer is unpersuasive, as they attended the August 3, 2022 hearing, they were adequately represented by attorney Colin Bradley and attorney Alicia Gray, associated counsel, and they were given a full and fair opportunity to develop the record. Also, the finding that Richard and Jennifer committed extrinsic fraud does not prejudice their rights as heirs of the Estate of Cecelia. Moreover, Richard and Jennifer asserted, through Mr. Bradley in their Motion to Dismiss, that

this Court lacks all jurisdiction over this probate matter. The only thing the Court did that Richard and Jennifer can complain about is that this Court removed them from serving as personal representatives in this Court. Notwithstanding the inconsistent legal positions taken, the Court's orders do not preclude Richard or Jennifer from participating in estate proceedings, and they have not been deprived of their right to seek appellate review if they feel that this Court erred. Lastly, there is nothing in this Court's Order that deprives Richard or Jennifer of any property or right. They both had an opportunity to serve as executors of Cecelia's estate. To serve in this capacity is a privilege they no longer have.

16. Page 8, lines 1 through 11 of the MFR points out that paragraph 72 of the findings is unsupported by the record. The Court reviewed its notes and the audio transcript of August 3, 2022, and agrees. There was some confusion with respect to the 4129 N. 6th Ave property, which is Jennifer's, and the 4125 N. 6th Ave property, which was Cecelia's.

17. Although a motion for reconsideration is not typically granted without giving the opposing party the right to be heard, the Court's error with respect to paragraph 72 is obvious based on the record and the Court's own notes. This compels the Court to strike paragraph 72 of the Order pursuant to Rule 19(a) of Section 2 of the Tohono O'odham Rules of Court, which reads:

> "Corrections Based on Clerical Mistakes; Oversights and Omissions. A court must correct a clerical mistake or a mistake arising from oversight or omission if one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with notice."

18. Page 8, lines 4 through 5 states that "this Court's August 10, 2022 Order also makes several findings unsupported by the evidence presented." This statement is insufficient to put the Court on notice of any other errors complained of that should be reconsidered.
19. The Court directs the Clerk of the Court to issue Certified Copies of this order to all interested parties.

Dated August 25, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 FEB 28 P 3:36
JUDICIARY SERVICE CLERK

IN THE MATTER OF THE ESTATE OF: Cecelia Mae Miller, DOB: 06/25/1938, DOD: 05/06/2020, Decedent.	Case No: AV2020-0054 ORDER

The Court has received and reviewed the Court of Appeals decision in AP2022-0002. In short, the Appellate Court determined this Court should have dismissed the case based on the doctrine of forum non conveniens. Both the Appellate Court and this Court note that the parties only implicitly brought up forum non conveniens when seeking to dismiss the case.

Forum non conveniens is an equitable doctrine where a court has both subject matter jurisdiction and personal jurisdiction, but for other prudential reasons (mainly, fairness and convenience) the court finds, a different court would be better suited to resolve the dispute. *See* 21 C.J.S. Courts § 82 (discussing the forum non conveniens doctrine).

This case emphasizes the importance of the parties clearly presenting their positions and arguments to the Court. Here, the parties couched the forum non conveniens argument in a broad discussion of the Court's subject matter jurisdiction. As a result, both this Court and the Court of Appeals struggled to identify the forum non conveniens argument, which ultimately led to delays and unnecessary litigation.

Therefore, the Court finds that forum non conveniens applies. The Court vacates all of its orders, and the Court dismisses the case without prejudice.

This Court believes that the alternate forum (Maricopa County Superior Court) will address the attorney's fees (as well as alleged breach of fiduciary duties) from this case. If the other forum cannot address those costs because they were incurred in this Court, the parties may ask this Court to address those fees and costs. *See generally* 21 C.J.S. § 83 (discussing that under forum non conveniens the court considers the potential remedy in the alternate forum).

Furthermore, the Court orders the parties to follow the Court of Appeals' order and file a certificate of compliance based on the provided timeline.

Dated February 27, 2023.

Judge Rene Alcoverde, Jr.

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 MAY 31 P 3:38
Jessica Contreras
JUDICIARY SERVICE CLERK

IN THE MATTER OF THE ESTATE OF: Cecelia Mae Miller, DOB: 06/25/1938, DOD: 05/06/2020, Decedent.	Case No: AV2020-0054 ORDER

Richard Perry and Jennifer Miller, the Co-Personal Representatives, ask this Court to dismiss the probate action on the basis that this Court lacks subject matter jurisdiction. The Court reviews whether the subject of this action, i.e., the administration of the estate of a deceased O'odham Member, is appropriately before this Court.

On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff generally bears the burden of establishing subject matter jurisdiction because it is the plaintiff who is seeking to invoke the Court's jurisdiction. *Juan v. Juan et al.*, 2 TOR3d 62, 63, (Case No. 96-T-6510, 2000), appeal dism'd Juan v. Juan, 3 TOR3d 1 (Jan. 4, 2005). Here, it was the Co-Personal Representatives as the Co-Petitioners who chose to invoke the Court's jurisdiction by filing the Decedent's probate case with this Court. They knew that the Decedent was a resident of Maricopa County. They now attack the Court's subject matter jurisdiction while at same time, asking through Alisa Gray, to hold off on dismissing the action in order to maintain the Letters of Appointment at least until the next hearing, so that Estate matters can be administered.

As to the timeliness of the Motion to Dismiss, the Court agrees that a motion to dismiss for lack of subject matter jurisdiction can be raised at any time. The Court reviewed the Co-Personal Representative's initial Petition, which alleges that the Court has subject matter jurisdiction based on the Decedent being a member of the Tohono O'odham Nation. Although they now take an inconsistent and contrary position, they do not contest that the Decedent was a member of the Tohono O'odham Nation. They neither contest that the Estate and the Miller Trust are indebted to Community Development Financial Institute, which is an Enterprise of the Tohono O'odham Nation established pursuant to Article VI, Section 1(e) of the Nation's Constitution. The record also establishes that Sandra Miller and Jennifer Miller, heirs of the Estate, are members of the Tohono O'odham Nation. The other heirs of the Estate who are named as beneficiaries in the copy of the Will filed with the Court are not members of the Nation, but they are the surviving children of the Decedent and they are members of another federally recognized tribe. None of them challenged the Court exercising jurisdiction when the Initial Petition was filed.

To ascertain whether this Court has subject-matter jurisdiction to continue the probate action over the estate of Cecelia Mae Miller, the Court must look to the Tohono O'odham Nation's Constitution and applicable Code sections. The fact that this matter could have been brought in a state forum is not dispositive. *See* for example, *In re Estate of Gopher*, 372 Mont. 9, ¶ 14, 310 P.3d 521 (2013) (holding that the District Court did not unlawfully infringe on the Blackfeet Tribe's right of tribal self-government when the Tribal Court expressly declined to assert jurisdiction over the Estate Property), *United Linings, Ic. V. Vi-Ikam Doag Industries, Inc.*, 2TOR3d 39, 44 (Case No. 98-C-7354, 1998) (recognizing

that the U.S. Supreme Court has consistently refrained from instructing tribal legal systems and courts on how to interpret their own constitutions, customs and traditions, or how to treat defenses under tribal law in the absence of congressional legislation), *State v. Zaman*, 190 Ariz. 208, 212 (1997) (recognizing that Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members), and *Iowa Mut. Ins. Co. v. LaPlante*, 80 U.S. 9, 15-16 (1987) (recognizing that tribal court jurisdiction must first be addressed and exhausted by the tribal appellate court before being challenged in a federal district court). The Court finds and decrees as follows:

1. Article 1, § 3 of the Nation's Constitution specifies that the sovereign powers, authority and jurisdiction of the Tohono O'odham Nation and its government over members of the Tohono O'odham Nation shall extend beyond the geographical boundaries of the Tohono O'odham Nation.
2. Article 8, § 1 of the Constitution specifies that the power of the Tohono O'odham Nation shall be vested in the Tohono O'odham Judiciary, which shall consist of the Tohono O'odham Courts and such inferior courts as the Tohono O'odham Council may from time to time ordain and establish.
3. Article 8, § 2 specifies that the judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity arising under this constitution, the laws and ordinances of or applicable to the Tohono O'odham Nation, and the customs of the Tohono O'odham Nation.

4. 4 T.O.C. § 1-101(a) specifies that the Tohono O'odham Courts are courts of record and of general jurisdiction and are empowered to hear all actions in law and equity arising under the Tohono O'odham Constitution, the laws, ordinances or customs of the Tohono O'odham Nation, actions arising under the Indian Civil Rights Act or other federal law, and actions arising under the laws of the several states when the court finds such actions cognizable as a matter of comity.

5. Title 9, Chapter 1, § 16 reads:

> "When any member of the Tribe 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 the Papago Tribal Court or any District Court 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 Superintendent 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 reservation 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.
>
> In the determination of the heirs the Court shall apply the custom of the Tribe as to inheritance.
>
> 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 Papago Tribal Court or appropriate District Court 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 Inheritance with the approval of the Secretary of the Interior if law and justice so require."

6. Title 9, Chapter 1, § 17 reads:

> "When any member of the tribe 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 Papago Tribal Court or appropriate District Court shall, at the request of any member of the tribe 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 Section 16 of this Chapter.
>
> A Will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the Will and was not subject to any undue influence or any kind from another person I and if the Will was made in accordance with the proved Tribal custom or made in writing and signed by the decedent in the presence of two witnesses who also signed the Will."

7. The Co-Personal Representatives, in their Petition for Probate, as well as in their sworn testimony, and in their various filings, have asserted that this Court has subject matter jurisdiction. They availed themselves of the Court's orders, and the letters of appointment issued by this Court. Although they now claim that this Court has no jurisdiction, it is a judicially established fact that the Decedent was a member of the Tohono O'odham Nation. It is also a fact that Jennifer and Sandra Miller are members of the Tohono O'odham Nation. The interested heirs were either served with process or they signed consent forms. As such, this Court finds that it has subject matter jurisdiction to continue the probate action under Title 9, Chapter 1, Section 16 as Jennifer was a co-petitioner and Sandra, who is a member, appeared at the Initial Hearing and objected in part but assented to the probate action moving forward. Pursuant to Section 2, Rule 1.2, Tohono O'odham Rules of Court, the Rules of Court are to be construed, administered, and employed by the court and parties to secure the just, speedy, and inexpensive

determination of every action and proceeding in light of Tohono O'odham laws, traditions, customs, and culture. It is the practice of this Court to allow a party that is summoned and served with process to appear in Court and verbally respond to a petition or complaint seeking affirmative relief. Sandra Miller met this practice when she showed up to and participated at the Initial Hearing, which is where she made her positions and concerns known.

8. It is also a fact that Richard and Jennifer are named in the copy of the Will that they asked this Court to recognize. The Court therefore finds that it also has subject matter jurisdiction to proceed with this probate action under Title 9, Chapter 1, Section 17.

The Motion to Dismiss for lack of subject-matter jurisdiction is therefore denied.

Dated May 31, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Johnny M. Sam, Petitioner, vs. Trina A. Sam, Respondent.	)	Case No.: AV2020-0062 ORDER

The Court held a trial on July 14, 2021. Prior to the trial and as part of the temporary order hearings, the Court made the following findings of fact and entered the following orders:

1. The parties have one minor child: Nakotha K. Sam (DOB: 5/13/2005). (See p. 1, line 13 of this Court's 12/17/2020 Order.)
2. The parties agreed to share joint legal decision-making authority over Nakotha, that Nakotha would live primarily with Ms. Sam, that Mr. Sam would exercise reasonable parenting time consistent with Nakotha's wishes, and that Mr. Sam would pay temporary child support by agreement of the parties, that he would pay the monthly amount of $207 per month directly to Ms. Sam, without prejudice to either party—i.e., the amount would be adjusted to conform with what the O'odham Child Support Guidelines require. (See p. 1, line 13 through p. 2, line 9 of this Court's 12/17/2020 Order.)
3. The parties separated as of March 7, 2020. They incurred debts and obligations after separating. (See p. 2, lines 10 through 11 of this Court's 3/26/2021 Order). Mr. Sam contributed to Ms. Sam's living

expenses until June 2020 (per testimony given by Mr. Sam on 2/17/2021).

4. The marital community ended on September 30, 2020. (See p. 2, lines 12 through 18 of this Court's 3/26/2021 Order.)
5. The marriage of the parties was dissolved on March 26, 2021, and the parties were restored to the status of single persons. (See p. 3, lines 19 through 21 of this Court's 3/26/2021 Order).
6. The Court found that Ms. Sam was eligible to seek spousal maintenance. (See p. 2, lines 7 through 8 of this Court's 3/26/2021 Order).
7. The parties were directed to disclose the status of all creditor accounts as of the date that they separated (March 7, 2020) up through the date of disclosing the records (to present), as Ms. Sam's needs with respect to spousal maintenance required consideration. (See p. 2, lines 19 through 22, and p. 3, line 21 through p. 4, line 2 of this Court's 3/26/2021 Order.) The Court also needed to consider the ability of Mr. Sam to pay spousal maintenance.
8. Mr. Sam was directed to pay $207 per month in combined child support and spousal maintenance until the Court could correctly calculate child support. (See p. 2, line 23 through p. 3, line 17 of this Court's 3/26/2021 Order.)
9. All agreements made by the parties were found to be voluntary and were approved by the Court.

The following issues were reserved for the final trial: final property and debt allocation, spousal maintenance and child support. The following witnesses

testified at the trial: Lisa Michaels, Mr. Sam and Ms. Sam. Counsel for the parties made opening and closing remarks. The Court advised that it took detailed notes when testimony was given at the temporary orders hearings, and that the Court would review its notes and consider the prior testimony.

During the trial, the following exhibits were admitted: letter from Lisa Michael (Ex. 1); check and tax information from Symetra (Ex. 2); records of amounts paid toward water bill (Ex. 3); Arizona vehicle registration paperwork related to the 2016 Chevrolet Malibu (Ex. A); Casa Grande Judgment Account Repayment Plan (Ex. B); APS electricity bill (Ex. C). Unmarked and not admitted as an exhibit, but provided to the Court by stipulation was a debt summary sheet that was prepared by Ms. Laursen.

The parties advised the Court that they reached specific agreements and stated them on the record. Mr. and Ms. Sam were questioned about the terms of their agreements, the voluntary nature of their agreements, and they were advised that any agreements would become binding if approved. The parties acknowledged that the below agreements were entered knowingly and voluntarily, and they understood the binding nature of the agreements, and asked that they be accepted. The Court therefore approved and accepted the following agreements, and ordered the parties to comply with the terms specified below:

Real property and associated debt:

1. The real property located at 62 North Vista Ave., Casa Grande, Arizona 85122 is community property, it is titled and financed in the name of Mr. and Ms. Sam, and it has equity (the property is worth more than what is owed on the mortgage). The property and all equity is awarded to Trina A. Sam. There is a balance due on the mortgage

that Mr. and Ms. Sam are contractually obligated to pay. The mortgage debt is awarded to Ms. Sam, and Ms. Sam will hold Mr. Sam harmless and indemnify Mr. Sam with respect to the mortgage debt, any and all property taxes and any other expenses that may be due now or that may become due that are property-related. Ms. Sam will seek to refinance the residence out of the name of Mr. Sam within a year. Mr. Sam will sign all paperwork required to facilitate a refinance of the real property out of his name. Should there be an issue with refinancing, Mr. Sam will need to resolve the issue by seeking enforcement of the terms of this agreement in the Pinal County Superior Court through a partition action because this Court lacks jurisdiction to enforce this term of the agreement.

2. Later in Chambers: Any refinance costs that are incurred are the responsibility of Ms. Sam.

Personal Property:

3. All personal property in the marital community is awarded to Ms. Sam. Mr. Sam is awarded any personal property in his possession and control.

Vehicles:

4. Ms. Sam is awarded the 2016 Chevrolet Malibu (VIN # 1G11C5SAXGF161213). Ms. Sam is awarded any and all debt associated with the 2016 Chevrolet Malibu. Ms. Sam will hold Mr. Sam harmless and indemnify Mr. Sam with respect to the debt as well as any and all registration and insurance obligations that are now due or that may become due with respect to this vehicle. Ms. Sam will try to

refinance the vehicle out of Mr. Sam's name if possible. Mr. Sam will sign off on any paperwork that will facilitate having the vehicle removed from his name.

5. Mr. Sam purchased a 2013 Chevrolet Malibu after the parties separated (March 7, 2020) and after Ms. Sam was served with the Petition for Dissolution (September 30, 2020). This vehicle is therefore the separate property of Mr. Sam and is reaffirmed as such.

Child Support:

6. The parties agreed that the Court could adopt the Child Support Worksheet filed by Ms. Laursen on July 9, 2021. The Worksheet did not include medical, dental or vision insurance premiums, it includes an adjustment for a child over 12, and establishes that the monthly amount of child support is $146.00. Ms. Sam has the child covered by AHCCCS. The parties did not agree on the allocation of the tax dependency exemption and reserved this as a contested issue for trial.
7. The parties agreed that Mr. Sam has paid all temporary child support payments directly to Ms. Sam, and Mr. Sam gave Ms. Sam the monthly support payment for July in the amount of $207 in open Court.
8. Moving forward, Mr. Sam must pay $146.00 per month in child support through the Clerk of this Court, as follows:

Payable to: Trina Sam, Case Number AV2020-0062
62 N. Vista Ave.
Casa Grande, AZ 85122

The check must be mailed or forwarded to:

Clerk of the Tohono O'odham Justice Center
P.O. Box 761
Sells, Arizona 85634

9. Any uncovered medical, dental or vision expenses incurred that are not covered by insurance or AHCCCS are to be paid as follows: 45% by Mr. Sam; 55% by Ms. Sam. The party incurring an uncovered expense must send a copy of the invoice and receipt showing that the expense was incurred on behalf of the minor child, and make a demand for reimbursement within 6 months of incurring such expense. The other party must pay their percentage owed within 45 days of the demand.

Community Debt:

10. The parties stipulated that the community debt that needs to be divided totals $6,603.37, and that each party is responsible for paying $3,301.68. The parties agreed that Mr. Sam has already paid $200 toward his portion of the community debt, thus leaving a balance due of $3,101.68. The parties agreed that Mr. Sam would pay the balance due to Ms. Sam directly per month, in the monthly sum of no less than $40 per month. The Court directs Mr. Sam to pay his portion of the community debt directly to Ms. Sam, and orders both parties to keep a record of the amounts paid, and the balance due after each payment is made.

Contested issues:

The parties' agreements narrow the issues in dispute to 1) who claims the minor child tax benefits and 2) spousal maintenance.

Minor Child Tax Benefits:

1. The Respondent claimed the minor dependency exemption for Nakotha K. Sam for the 2020 tax year. This results in the Child Tax Credit going to Ms. Sam for the 2020 year. Ms. Sam asks this Court to award

her the tax dependency exemption every year, as well as the Child Tax Credit. The Petitioner asks this Court to award him the right to claim Nakotha K. Sam as a dependent and to claim the Child Tax Credit on an equitable basis as long as he is current on child support. The Court finds and orders as follows:

a. The right to claim the federal and state tax exemptions and credits applicable to minor children is not addressed by the O'odham Code.

b. There is no O'odham custom or tradition that governs who gets to claim minor child tax benefits.

c. The law of the Nation specifically authorizes the Court to order one of the parties in a divorce to pay child support for the "present comfort and future well-being" of the minor children. 9 T.O.C. § 13.

d. When neither the code or Tohono O'odham custom address a specific issue regarding child support, the Court has the discretion to look to Arizona law for guidance. 4 T.O.C. § 1-102; *Garcia v. Garcia*, 1 TOR3d 108, 110 (Trial Ct., Jan. 24, 1994) *app. dism'd* 3 TOR3d 10 (Ct.App., Aug. 17, 2006); *C.V.K. a.k.a. C.O. v. N.K., Sr.,* 2 TOR3d 71 (Trial Ct., May 19, 2003) *aff'd* 3 TOR3d 1 (Ct.App., Apr. 2, 2005).

e. Support payments are for the support and maintenance of the minor child. *Bahyesva v. Miguel*, 3 TOR 3d 151, 152 (Trial Ct., March 7, 2012), citing *Cole v. Cole*, 101 Ariz. 382, 420 P.2d 167 (1966).

f. The purpose of child support is not to raise the standard of living of the custodial parent. *Bahyesva v. Miguel*, 3TOR 3d 151, 152 (Trial Ct., March 7, 2012), citing *Edgar v. Johnson*, 152 Ariz. 236, 237, 731 P.2d 131, 133 (App. 1986).

g. In the absence of an agreement, Arizona's Child Support Guidelines require that a court allocate applicable federal and state tax exemptions applicable to minor children in a manner that allows each parent to claim allowable federal dependency exemptions proportionate to the combined adjusted gross income of the parties in a reasonable pattern that can be repeated.

h. Mr. and Ms. Sam agreed that the Child Support Worksheet filed with the Court on July 9, 2021 would be used to establish child support. That Child Support Worksheet has Mr. Sam's proportionate share of adjusted gross income at 45%, and Ms. Sam's proportionate share of adjusted gross income at 55%.

i. The Court finds and orders that Mr. Sam is awarded the tax benefits for the minor child for 2021 and every odd year thereafter. Ms. Sam is awarded the minor child tax benefits every even year. Ms. Sam must sign and provide to Mr. Sam a Tax Dependency Release Form, Form 8332, to allow him to claim the minor child as a dependent and to release the Minor Child Tax Credit to Mr. Sam for 2021 and every odd year.

j. The Court's goal is to provide a fair and equitable allocation of tax benefits related to the minor child considering that Arizona's

Child Support Guidelines are changing effective January 1, 2022, and the changes support Mr. Sam's position.

k. Consistent with Arizona's 2022 Guidelines, should Ms. Sam claim the tax dependency exemption or the Child Tax Credit for any year that Mr. Sam is entitled to claim the benefits, Ms. Sam will need to make Mr. Sam whole for such benefits, and any benefits will need to be accounted for and will serve as a basis to offset Mr. Sam's portion of community debt owed. If the community debt is satisfied and Ms. Sam takes the benefits, Mr. Sam can petition this Court for relief in the form of a civil judgment.

l. Mr. Sam's right to claim the minor child tax benefits is contingent upon him paying and being current on child support for the year allocated to him. If Ms. Sam believes that Mr. Sam did not pay child support for the year allocated to him, and that Mr. Sam should therefore lose his right to claim the tax benefits, Ms. Sam must file a request to the Court to have the tax benefits instead of the unpaid child support. This is consistent with the new Arizona Child Support Guidelines going into effect on January 1, 2022. If such a request is filed, the Court will set a hearing.

Credit for overpayments of child support:

2. Mr. Sam has paid child support on a temporary basis as of December 2020 in the sum of $207 per month. Mr. Sam has paid this amount up through the end of July, 2021. The actual amount of support that

should have been paid is $146.00. As such, Mr. Sam has overpaid child support.

3. Judge Clifford Wolfblack's October 19, 2020 Order, lines 17 through 19 directed the Petitioner's counsel to determine the temporary amount of child support based off of the parties' income and to have Mr. Sam make the payments directly to Ms. Sam, and for Mr. Sam to keep track of the payments.
4. The Court directs Mr. Sam to advise the Court what amounts he paid in child support in total, in order for the Court to correctly acknowledge what Mr. Sam has paid as the Court recalls hearing that $300 may have been paid prior to the amount being set at $207 per month.
5. The overpayments will have the effect of reducing the community debt awarded to Mr. Sam that he is required to pay back directly to Ms. Sam.

Spousal Maintenance:

1. 9 T.O.C. § 13 authorizes the Court to award spousal maintenance in its discretion.
2. The Nation does not have guidelines or specific rules to guide a judge's exercise of discretion in considering an award of spousal maintenance.
3. There is no O'odham law or custom that guides a judge's exercise of discretion when considering an award of spousal maintenance.
4. 4 T.O.C. § 1-102 authorizes this Court to look to Arizona law for guidance when there is no O'odham law or custom that governs a specific issue.

5. Arizona has A.R.S § 25-319, which offers guidance to judges in considering an award of spousal maintenance. The statute reads:

> "A. In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse for any of the following reasons if it finds that the spouse seeking maintenance:
>
> 1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse's reasonable needs.
> 2. Is unable to be self-sufficient through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to be self-sufficient.
> 3. Has made a significant financial or other contribution to the education, training, vocational skills, career or earning ability of the other spouse.
> 4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.
> 5. Has significantly reduced that spouse's income or career opportunities for the benefit of the other spouse."

6. The trail court has to find that one of the above-five listed reasons applies. If it does, then the Court looks at the next set of factors in computing the amount of spousal maintenance and the duration of the maintenance obligation.

7. As to the first five set of factors, the Court finds as follows:

   a. This Court approved the agreement of the parties to award Ms. Sam the marital residence, which has a value that exceeds the current mortgage. Ms. Sam was also awarded all of the personal property in the marital residence. Mr. Sam cashed out his retirement account and used that money to pay down the mortgage. The Court finds

that Ms. Sam does not meet factor (A)(1) because she was awarded the marital home and all equity therein, and the personal property in the home.

b. Ms. Sam graduated from high school. She is healthy, and is able to work full-time and support herself through appropriate employment. During the marriage, Mr. Sam supported Ms. Sam while she received training to become a certified caregiver. Ms. Sam earned $12.50 per hour and work full-time at the Archie Hendrick's Adult Care Home as a certified caregiver before she chose to leave her full-time job to help care for her mother. Ms. Sam is able to generate part-time earnings while caring for her mother. This has resulted in Ms. Sam not generating full-time earnings. The parties' minor child is 16 years of age. As such, Ms. Sam does not meet factor (A)(2).

c. Ms. Sam did not make significant financial or other contributions to the education, training, vocational skills, career or earning ability of Mr. Sam. Ms. Sam does not meet factor (A)(3).

d. Mr. and Ms. Sam were married for 20 years. The marriage is considered long in duration. Ms. Sam is not, however, of an age that precludes the possibility of gaining employment adequate to be self-sufficient. Ms. Sam is able to work full-time and make at least $12.50 per hour if she chose to. Ms. Sam does not meet factor (A)(4).

e. Ms. Sam did not reduce her income or career opportunities for the benefit of Mr. Sam and does not meet factor (A)(5).

8. The Court makes the following additional findings of fact that are relevant to the issue of spousal maintenance:
   a. Mr. Sam has an 8th grade education. Mr. Sam worked at Gila River Farms, and although he worked as a supervisor at one point, he was demoted and required to resign due to medial reasons acknowledged by the Human Resource Administrative Assistant, Lisa Michael.
   b. Mr. Sam is receiving short term disability pay and is unable to return to work until he is medically cleared by his primary care doctor.
   c. During the marriage, Mr. Sam did not obtain any specialized training or additional education that increased his earning ability in the workforce.
   d. Ms. Sam wants spousal maintenance to be awarded until she decides to go back to work full-time.
   e. Ms. Sam wants spousal maintenance because the parties' minor child lives primarily with her. Ms. Sam acknowledges that child support is being paid per the O'odham Guidelines, but she does not feel this is sufficient to provide for the parties' minor child. Ms. Sam testified that she is on AHCCCS and that she receives food stamps monthly (now known as nutrition assistance) and that she was receiving $800 per month, but is now receiving $500 per month.
9. Although Ms. Sam does not meet any of the five factors listed in A.R.S. § 25-319(A)(1) through (5), this is an O'odham Court, and

looks to subsection (B) to see if in this case, spousal maintenance is still appropriate. The relevant subsection reads:

> "B. The maintenance order shall be in an amount and for a period of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors, including:
> 1. The standard of living established during the marriage.
> 2. The duration of the marriage.
> 3. The age, employment history, earning ability and physical and emotional condition of the spouse seeking maintenance.
> 4. The ability of the spouse from whom maintenance is sought to meet that spouse's needs while meeting those of the spouse seeking maintenance.
> 5. The comparative financial resources of the spouses, including their comparative earning abilities in the labor market.
> 6. The contribution of the spouse seeking maintenance to the earning ability of the other spouse.
> 7. The extent to which the spouse seeking maintenance has reduced that spouse's income or career opportunities for the benefit of the other spouse.
> 8. The ability of both parties after the dissolution to contribute to the future educational costs of their mutual children.
> 9. The financial resources of the party seeking maintenance, including marital property apportioned to that spouse, and that spouse's ability to meet that spouse's own needs independently.
> 10. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and whether such education or training is readily available.
> 11. Excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common.
> 12. The cost for the spouse who is seeking maintenance to obtain health insurance and the reduction in the cost of health insurance for the spouse from whom maintenance is sought if the spouse from whom maintenance is sought is able to convert family health insurance to employee health insurance after the marriage is dissolved.
> 13. All actual damages and judgments from conduct that resulted in criminal conviction of either spouse in which the other spouse or a child was the victim."

10. The parties, during their 20-year marriage, lived modestly. Mr. Sam worked for Gila River Farms, whereas Ms. Sam worked as a caregiver. Ms. Sam worked full-time but chose to switch to part-time to help care for her mother. At closing, Ms. Sam's counsel asked for spousal maintenance to be awarded up until Ms. Sam decides to improve her financial situation. Ms. Francisco's statement made in closing argument includes an admission that her client is choosing to refrain from full-time employment. The Court respects Ms. Sam's choice to help care for her mother, but the choice comes at her own expense. Mr. Sam cannot be forced to supplement Ms. Sam's or her mother's care post separation.
11. Mr. Sam is receiving short-term disability and is suffering from medical issues (post COVID exposure and post hernia surgery), and he cannot work at this time. Mr. Sam is living with a friend. The Court, considering the findings made in paragraph 8(a) through (e) above, and the equities involved in this case (that Ms. Sam was awarded the marital home and all equity), finds that awarding spousal maintenance in favor of Ms. Sam is not appropriate. Specifically, if Ms. Sam chooses to work part-time in order to care for her mother, she must do so and budget accordingly, without relying on Mr. Sam.
12. Ms. Sam stated that she wanted spousal maintenance because their child was diagnosed as a type 2 diabetic, and that medication expenses are being incurred by her, and special foods need to be purchased. This is not a justification to award spousal maintenance because the child is covered by Mr. Sam's medical insurance and by AHCCCS. Also, any

uncovered medical expenses are to be shared in proportion to the parties' adjusted gross income, as specified above, on page 5, paragraph 8. Moreover, Ms. Sam can avail herself of taking the child to an Indian Health Services provider. Lastly, Ms. Sam receives nutrition assistance, formerly known as food stamp assistance.

13. Ms. Sam also stated that she wants spousal maintenance because she needs help with the past due bills. The stipulation of the parties, page 6, paragraph 9 of this Order, requires Mr. Sam to contribute to the community debt. Ms. Sam agreed to $40 per month. Mr. Sam committed to paying this as the minimum, but plans on paying off his portion sooner. The Court cannot therefore award spousal maintenance to Ms. Sam due to her concern over community debt.

14. Ms. Sam asked for spousal maintenance on the basis that the child support received is insufficient. The Court looked at Arizona's Child Support Guidelines in determining who gets to claim the child tax benefits, and in doing so, confirmed that Ms. Laursen's closing arguments related to the self-support reserve test were correct. If this were an Arizona Child Support Calculation, the support would be zero. Ms. Sam's request for spousal maintenance on the basis that the child support ordered by the Court is insufficient is therefore denied.

15. This is a final, appealable order.

Dated July 29, 2021.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2021 DEC 30 A 9:56
JUDICIARY SERVICE CLERK

In the Matter of the Estate of: Willard Henry Anita, DOB: 7/2/1954, DOD: 8/18/2020, Decedent.	Case No.: AV2021-0033 ORDER

An Evidentiary Hearing to address the probate of the HUD home identified as N-026-0028-01, owned by Willard Henry Anita was held on December 8, 2021. Queena Lopez, the Personal Representative, appeared. Queena was represented by Suzanne Laursen. Melva Antia Lopez, the surviving spouse of the Decedent, also appeared. Melva was assisted by Nora Cañez, serving as an interpreter. Other interested individuals attended the hearing.

Queena Lopez, Evelyn Ortiz and Melva Anita Lopez were sworn in and testified. No one elicited testimony regarding custom and tradition. The Court listened to the audio recordings for the hearings held on April 28, 2021, July 28, 2021 and October 20, 2021.

The purpose of the December 8th Evidentiary Hearing was to allow interested individuals to elicit testimony on custom and tradition and inheritance rights and inheritance preferences with respect to the subject HUD home. Ms. Laursen filed a memorandum of law and advised the Court as to her client's position. Melva Antia Lopez, as the surviving spouse, is asking for the HUD home to be awarded to her, and to have Rose Martin serve as the custodian and

caretaker of the home until her application for enrollment with the Tohono O'odham Nation is processed and approved.

Nora Cañez is a member of the Tohono O'odham Nation. She shared her personal experience with the Court and explained how she became an enrolled member of the Tohono O'odham Nation despite being born in Mexico. Ms. Cañez explained what she is doing to help O'odham in Mexico seek and obtain enrollment with the Tohono O'odham Nation. Melva Anita Lopez is like Nora Cañez in that she was born in Mexico and is of O'odham descent. Melva has a pending application for enrollment.

The Court, having considered the testimony and legal arguments related to the HUD home, finds and orders as follows:

1. The HUD home identified as N-026-0028-01 was acquired by Willard Henry Anita sometime in 1978.
2. The subject HUD home is personal property—not a land assignment nor allotted land as defined in *In the Matter of the Estate of Ned Leo Norris*, 1 TOR3d 63, 65-68, case no. 87-P-4304 (December 6, 1988).
3. Willard's first wife and son lived in the HUD home with him.
4. After Willard's first wife passed away, he married Melva Anita Lopez. Melva and Willard Henry Antia lived in the home for some time. Willard also adopted Melva's children.
5. Melva eventually moved to Mexico and resides there now. She wants to live in the HUD home again, and asked the Court to allow her to stay in the bedroom that was hers and Willard's.
6. Willard had a son that also passed away. Willard's son did not have children of his own.

7. Willard filed a petition for dissolution of marriage but it was abandoned. Willard remained married to Melva Anita Lopez. Melva is the surviving spouse of Willard Henry Anita.
8. The Decedent also owned personal property, some of which is located inside and around the HUD home. An Inventory and Appraisement was never prepared nor filed by the Personal Representative. Ms. Laursen relied on the description of personal property stated in her client's Petition as an Inventory and Appraisement. The Court allowed this for purposes of giving creditors notice as the Decedent had debt when he passed away.
9. Applicable homestead allowances were considered and applied with respect to personal property exemptions in order to preserve assets for the benefit of the surviving spouse.
10. Creditors did not make any claims against the Estate. As such, the creditors are forever barred from bringing claims against the Estate.
11. The Decedent died without a will.
12. When there is no O'odham law or custom and tradition on point, the Court may in its discretion look to Arizona Law for guidance. 4 TOC § 1-102.
13. Under Arizona's intestacy statutes, A.R.S. § 14-2102(1), the surviving spouse is entitled to inherit the entire estate when the decedent passes away without a will and any surviving issue are also the issue of the surviving spouse.
14. *In the Matter of the Estate of Ned Leo Norris*, *supra*, at p. 67, and *In the Matter of the Estate of Harry Francisco*, 1 TOR3d 55, 56, case no.

87-P-4290 (June 3, 1988), make clear that the law of the Nation is that the surviving spouse inherits all personal property when the children of the decedent are also the children of the surviving spouse.

15. During the Decedent's lifetime, Willard did not add anyone as a co-owner to the HUD home. Willard allowed various family members to stay with him when they fell on hard times and needed a place to live. The family members that lived in the HUD home did so with Willard's consent. The benevolent actions of the Decedent did not operate to divest Willard of his ownership interest in the HUD home.
16. The record contains no facts or evidence that the HUD home was ever "ancestral property", "communal property" or that the HUD home is "familial in character", as those terms are defined by O'odham case law. *See In the Matter of the Estate of Harry Francisco*, supra, p. 55-58.
17. Under intestacy law, Melva Anita Lopez is entitled to inherit all of the personal property owned by the Decedent.
18. The only issue with the HUD home is that it cannot be owned by someone that is not a member of the Tohono O'odham Nation.
19. Melva Anita Lopez testified that she applied for enrollment with the Tohono O'odham Nation, as she is of O'odham descent but from Mexico.
20. The interpreter, Nora Cañez, shared with the Court that she is working on a census project that should result in Melva being recognized and enrolled with the Tohono O'odham Nation, and she shared her personal experience as she is O'odham and from Mexico, and she applied and

was enrolled as a member of the Tohono O'odham Nation. Ms. Cañez explained that it took close to ten years before her enrollment application was approved, and that Melva's situation is similar to hers. Ms. Cañez expects a faster response to Melva's application for enrollment.

21. Melva initially requested that the HUD home be awarded to Rose Martin (the Decedent's oldest sibling) back on July 28, 2021. She is now asking the Court to award the home to her as the surviving spouse, and for the Court to appoint Rose Martin as the custodian and caretaker of the HUD home pending her enrollment application, so that Rose can preserve the home for Melva's benefit.

22. Queena Lopez requests that the Court ignore and disregard Melva and her wishes regarding the HUD home because she is not an enrolled member.

23. Prior to the Evidentiary Hearing, the Court encouraged the parties to reach an agreement and even suggested that a life estate in favor of Melva could be worked out.

24. Ms. Laursen acknowledged the custom and practice of this Court to award a life estate in a HUD home to a non-member when everyone agrees to this. The record reflects that Queena Lopez will not agree to grant Melva a life estate in the HUD home. Ms. Laursen believes that the Court cannot grant a life estate to a non-member absent the consent of interested heirs. Here, the legal heir is Melva Anita Lopez.

25. As Judge Hilda A. Manuel succinctly put it:

> "To facilitate expedient probate, the Court has encouraged parties to arrive at a workable agreement distributing estates

> without court direction. If the parties chose to distribute estates in accordance with their respective knowledge of tribal custom the court will ratify such agreements without delving into evidentiary analysis."

Norris, supra, at p. 65. Those interested in the Estate of Willard could not reach any agreement regarding the HUD home. As such, the Court had to delve into evidentiary analysis, and finds that equity and fairness require the Court to award Melva Anita Lopez a life estate in the HUD home N-026-0028-01. The award is made pursuant to the Court's authority under Article VIII, section 2 of the Constitution of the Tohono O'odham Nation, and 4 TOC § 1-101(a), and subsection (b)(8).

26. Should Melva's application for Enrollment be approved, Melva is awarded the HUD home as her personal property.
27. If Melva cannot become enrolled as a member of the Tohono O'odham Nation, the HUD home is awarded to Rose Martin upon Melva's death.
28. If Rose Martin predeceases Melva, Rose Martin's heirs are entitled to inherit once Melva passes away.
29. Anyone living in the home at present are directed to surrender possession of the home to Rose Martin and Melva Anita Lopez immediately.

The Court further finds and orders as follows:

30. The non-gaming per capita payment of the Decedent is awarded to Melva Anita Lopez. Queena Lopez, as the Personal Representative, is directed to contact the Nation's Enrollment Office and request a check be made payable to Melva Anita Lopez and for it to be mailed to Melva's mailing address:

Melva Anita Lopez
Calle Industrial #4
Colonia Ejido Hombres Blancos
General Plutarco Elias
Calles, Sonoyta, Sonora Mexico 83570

31. The Court was also made aware of issues regarding personal property that remain unresolved. The Court therefore orders that an Inventory and Appraisement be filed by the Personal Representative with the Court within the next 30 days.

32. Rose Martin, who is also familiar with the items in the home, and who has been suggested as a substitute Personal Representative, is encouraged to prepare and file an Inventory and Appraisement with the Court. A special form need not be used. The Inventory can be hand written, but it must be dated, identify the personal property items, the estimated value of the items, and must be dated and signed.

33. An Evidentiary Hearing is scheduled for March 2, 2022 at 1:30 p.m. for one hour so that any remaining issues and disputes related to personal property can be addressed at that time.

34. The Court further orders Queena Lopez, as the Personal Representative, to have any checks that expired re-issued as the money is part of the Estate and subject to probate.

35. The Court will consider discharging Queena Lopez at the March 2, 2022 Hearing.

Dated December 28, 2021.

Judge Rene Alcoverde, Jr.

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 JAN 20 A 10: 25
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Estate of: Willard Henry Anita, DOB: 7/2/1954, DOD: 8/18/2020, Decedent.	Case No.: AV2021-0033 ORDER

The court has reviewed Queena Lopez's Request for Permission to file an Interlocutory Appeal. A Notice of Appeal was also filed. The trial court cannot address the Notice of Appeal as it is a general notice of appeal and is therefore referred to Chief Judge Donald Harvey.

For the reasons stated below, the Court grants Queena Lopez's Request for Permission to File Interlocutory Appeal, as well as her Motion for Stay of Judgment. If Chief Judge Donald Harvey grants the general Notice of Appeal, the Request for Permissive Interlocutory Appeal is moot, and any part of this order that addresses the request for permission to file an interlocutory appeal is moot.

REQUEST FOR PERMISSIVE INTERLOCUTORY APPEAL

1. Section 11 of the Tohono O'odham Rules of Court includes Rule 3(c)(3) and Rule 14(a), Rules of Appellate Procedure, which authorize a party to seek permission to appeal an order from a lower court which is not a final judgment within 15 days of the Record Entry giving rise to the appeal. The Petitioner's request is timely.

2. Although the December 30, 2021 order was not final as there are unresolved issues with respect to other items of personal property, the order in dispute addresses who is awarded the HUD home, and paragraph 29 includes language directing anyone living in the HUD home to surrender possession of it to Rose Martin and Melva Anita Lopez.
3. The time for an adverse party to respond to Queena's request for an interlocutory appeal has not expired. Notwithstanding, the trial court finds good cause to grant Queena Lopez permission to appeal the subject order now, as the issues with respect to the HUD home are important and nuanced given the facts of this case.
4. Should the Chief Judge find that the Notice of Appeal is appropriate, this section of the order has no legal effect.

MOTION FOR STAY

5. The Petitioner, Queena Lopez, seeks a stay of judgment pending appeal. She is asking this court to hold off on requiring anyone living in the subject HUD home to surrender possession of it to Rose or Melva.
6. Rule 20 of the Rules of Appellate Procedure authorizes Queena to request a stay from a judgment or order, and for this court to grant or deny a request for a stay, and to order a bond if the court finds that one is appropriate.
7. The subject order, although it requires surrendering possession of the home to Rose Martin or Melva Anita Lopez, does not require anyone living in the home to vacate. The order does not contain

eviction language. Notwithstanding, the court finds that a stay is justified given the concern that the trial court is awarding a property interest to someone other than a registered member of the Tohono O'odham Nation. A bond is not being required, as occupancy of the HUD home by those family members in possession of the subject HUD home predates the death of Willard Henry Anita.

8. It is therefore ordered that anyone that was living in the home on the date that Willard Henry Anita passed away can remain in the home until further orders of the court.
9. Queena Lopez previously requested that the court preclude Melva from going to the residence. The court granted the request by ordering everyone to maintain the status quo, as Melva was living in Mexico. At the December 8th evidentiary hearing, Melva requested permission to live in the HUD home and to stay in the room that was hers and Willard Henry Anita's. Pending the resolution of Queena's interlocutory appeal, Melva is not precluded from going to the HUD home or from staying in the room that was hers and the Decedent's.
10. Melva has an interest in securing and preserving personal property she is entitled to inherit that is both in and around the subject home. Allowing Melva to go to the home, and to live there, helps her preserve her interest in all such personal property.

CORRECTION OF CLERICAL MISTAKES AND OMISSIONS.

11. Rule 19(a) of Section 2 of the Tohono O'odham Rules of Court require a court to correct a clerical mistake or a mistake arising

from oversight or omission if one is found in a judgment, order or other part of the record.

12. A court may make a correction on its own with notice to parties, but such a mistake can only be corrected with the appellate court's permission after an appeal has been filed and while it is pending.

13. Should the Chief Judge deny the Notice of Appeal, and the appeal proceed through this order, the court gives notice to the parties that the following mistakes were made, and corrects them as outlined below. If the Notice of Appeal filed on January 13, 2022 is accepted by Chief Judge Donald Harvey, the undersigned requests that the court of appeals allow the trial court to make the following clarifications and corrections.

    i. A clerical mistake exists as the trial court used the term "life estate" in paragraphs 23 through 26 and on the record when the trial court intended to award "lifetime occupancy" to Melva Anita Lopez in the HUD home N-026-0028-01. Lifetime occupancy is term that should have been used. The December 30, 2021 order, and the record, is amended to reflect "lifetime occupancy" any time the term "life estate" is used.

    ii. There is a disconnect between paragraphs 21 through 28 of the findings and orders, where paragraph 21 acknowledges that Melva Anita Lopez's wish and desire was for Rose to be awarded the HUD home, and the order awarding the HUD

home to Rose upon Melva's death if Melva is unable to enroll as a member of the Tohono O'odham Nation.

iii. Specifically, the trial court intended to but omitted to include language in the findings and orders explaining why Rose Martin and her heirs are awarded the HUD home if Melva Anita Lopez is ineligible for enrollment.

iv. First, no legal authority was presented or found that precludes Melva, as the surviving spouse, from selecting a relative of the Decedent, to inherit the HUD home.

v. Prior to the Evidentiary Hearing, Melva's position was that the home should be awarded to Rose Martin, who is a member of the Tohono O'odham Nation and the oldest sibling of the Decedent. Melva selected Rose in her stead.

vi. If Melva is unable to enroll as a member of the Tohono O'dham Nation, her wishes as to who should inherit the HUD home should be given special weight because she is the surviving spouse. Melva has applied for enrollment with the Tohono O'odham Nation, but she is not yet enrolled. Melva has ties to the Tohono O'odham Nation and is the surviving spouse of an enrolled member.

vii. The Court also considered that Rose Martin was willing to allow Melva and others to stay in the home, and since Rose has lived in the home for quite some time, the Court felt that Melva's original request was reasonable.

viii. The Petitioner's position, on the other hand, was that Melva's wishes should be disregarded entirely, and that Melva should not be allowed to go to the HUD home or live there.

ix. Queena and the other interested individuals could have agreed to cohabitate with Melva, and they were given an opportunity to consider a lifetime occupancy in favor of Melva. They refused to agree to such. Regardless of the reasons or motivations for such refusal, it has the effect of leaving Melva without the benefit of residing in the home that was her husband's. The choice to refuse a lifetime occupancy in favor of Melva is that of the Petitioner and the interested individuals. The potential agreement was in their hands, and the effect of their choice is unduly harsh.

x. The record included information that Rose Martin resided in the home for a substantial period of time and that Rose, along with others, provided upkeep to the HUD home. Although Rose was not sworn in, she made statements to the court and expressed her willingness to honor Melva as the surviving spouse of the Decedent.

14. With the permission of the Court of Appeals, the correction and omitted findings specified above should be made a part of the record on appeal.

15. In conclusion, the Court grant's Queena Lopez's request to file an interlocutory appeal unless it is rendered moot by Chief Judge

Donald Harvey. The Court also stays enforcement of paragraph 29 of the order that requires anyone living in the residence to surrender possession of the residence to Rose Martin and Melva Anita Lopez. The prior order that Melva Anita Lopez cannot go to the residence is set aside, and all interested individuals are to allow her access to the home, and to let her stay in the room that was Willard's if she chooses to live there pending the resolution of the appeal.

16. Counsel for Petitioner is directed to provide a copy of this order, and the order filed on December 30, 2021, to the Gu Achi District Council and the Palo Verde community.

17. A copy of this Order is being provided to Chief Judge Donald Harvey, along with the Notice of Appeal filed by the Petitioner.

Dated January 19, 2022.

Judge Rene Alcoverde, Jr.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

IN THE MATTER OF THE ESTATE OF:	Case No: AV2021-0033
Willard Henry Anita, DOB: 07/2/1954, DOD: 8/18/2020, Decedent.	ORDER

FILED
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TOHONO O'ODHAM JUDICIARY
2023 MAR 20 A 7:44
Tiffany Mease
JUDICIARY SERVICE CLERK

At the Status Hearing held March 15, 2023, Queena Lopez, the appointed personal representative for Willard Henry Anita's Estate ("the Estate"), appeared with her counsel of record, attorney Suzanne Laursen of the Tohono O'odham Advocate Program. The Court reviewed the direction from the Appellate Court on remand in case AP2022-0001, directing this Court to award the HUD home, identified as N-026-0028-01 ("the HUD Home"), to Willard Henry Anita's heirs who are members of the Tohono O'odham Nation ("the Nation"). The parties and record agree that the heirs who survived Willard Henry Anita and who are members of the Nation are his siblings Evelyn Ortiz, and Rose Martin, and his nieces Drucilla Miguel and Priscilla Ambrose through his sister Darlene Miguel, and grandniece Yesenia Anita, through his sister Marlene Baptisto ("the Nation-member heirs").

THEREFORE, IT IS ORDERED, based on the direction of the Appellate Court and the information in the record, the Court Orders distribution of the HUD Home as follows:

1. A 1/4 share in the HUD Home, identified as N-026-0028-01, each to Evelyn Ortiz, Rose Martin, and Yesenia Anita, and

2. A 1/8 share in the HUD Home, identified as N-026-0028-01, each to Drucilla Miguel and Priscilla Ambrose.

IT IS FURTHER ORDERED, the closing hearing scheduled on July 12, 2023, at 11:00 a.m. is reaffirmed, unless the Personal Representative requests the Court vacate it through satisfaction from this Order. Should the parties want the Court to change its distribution, they should file notice and a recommended alternative distribution through some stated form of agreement of the Nation-member heirs to the Estate that follows the direction from the Appellate Court made in its Opinion filed February 28, 2023, in AP2022-0001.

Signed March 20, 2023.

Judge David M. Osterfeld

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TOHONO O'ODHAM JUDICIARY
2023 JAN 19 P 2:46
Tiffany Mesa
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Estate of	) Case No. AV2021-0104
	)
Lucinda Anita Hughes-Juan	) ORDER
(DOB: 2/26/1965)	)
(DOD: 10/4/2020)	)
	)
	)
Decedent	)

A status hearing was held on January 11, 2023 (the "Hearing"). The Personal Representative, Emma L. Hughes-Juan, and her legal counsel, Suzanne Laursen from the Tohono O'odham Advocate Program, appeared.

Before the Hearing, Ms. Laursen for the Personal Representative submitted a Motion for Court Ruling on Applicability of A.R.S. §§ 14-2402-2405 (the "Motion").

The Court found the Motion convincing, and granted it from the bench at the Hearing. The Court ruled that none of those statutes, which provide for mandatory surviving spouse allowances and exemptions under Arizona law, applied in this case. This Order provides more detail, and affirms findings and other orders made at the Hearing.

I. FACTUAL & PROCEDURAL BACKGROUND

Lucinda Anita Hughes-Juan (the "Decedent" or "Lucinda") passed on October 4, 2020. A petition to appoint a personal representative and probate the Estate was filed September 2, 2021 (the "Petition"). The Petition included a copy of the Last Will and Testament of Lucinda Hughes-Juan (the "Will").

At the Hearing, Ms. Laursen produced the original Will. The Court examined it, confirmed that the copy in the Petition is a complete and accurate copy, and returned the original to Ms. Laursen. Pursuant to 9 T.O.C. ch. 1, § 17, the Court determined the Will to be validly executed.

The Will (p. 1) recites that:

(a) the Decedent was then (January 8, 2020) married to Tyrone Juan;

(b) she intended to dissolve that marriage before her death;

(c) they had been married for 28 years, but separated for the past eight;

(d) Tyrone had not contributed to the accumulation of any of the assets mentioned in the Will;

(e) if the marriage was not terminated by the time of her death, it was Lucinda's strongest intention that Tyrone not receive any of her property—by the will, intestacy, or any other means; and

(f) Lucinda expressly excluded Tyrone from inheriting any property under the Will.

In addition to including a copy of the Will, the Petition expressly states (Part IV) that Tyrone is excluded from the Will, and asks the Court to find that the people named in the Will (and not Tyrone) are the lawful devisees of the Decedent.

Tyrone signed an Affidavit of Acceptance of Service of Process, & Waiver of Time for Response, on October 18, 2021. Paragraph 2 of that document states that Tyrone "has no objection to the matter proceeding and the court granting the relief requested in the petition."

Nobody filed an objection or response to the Petition.

As stated in the Summons, an initial hearing on the Petition was held on November 1, 2021. Tyrone did not appear. Nobody who did appear raised any objection. The Court appointed the Personal Representative at that hearing.

A status hearing was held on November 9, 2022. Tyrone did not appear. At that hearing, and included in the related Order that was served on Tyrone and all other interested parties, the Court stated that it was not aware whether Tohono O'odham law contained any mandatory surviving spouse allowances or exemptions, like those of Arizona contained in A.R.S. §§ 14-2402-2405. And if not, whether the Court should look to Arizona's allowances and exemptions in a case like this. The Court further invited Ms. Laursen to brief the Court, and Tyrone, on that issue.

Ms. Laursen did that with her Motion, arguing that Tohono O'odham law did not have any such allowances or exemptions, and that the Court should not apply Arizona's allowances or exemptions in this case. That was also served on Tyrone. He did not file a response. He did not attend the Hearing.

II. ANALYSIS

A. Applicable Law

Under Title 4 of the Tohono O'odham Code, Chapter 1, Section 1-102, Tohono O'odham courts must apply the following laws in the following order of precedence for civil actions:

1. The Tohono O'odham Constitution;
2. The Nation's laws and ordinances;
3. The customs of the Nation.

If the Court finds no Tohono O'odham law or custom on point, it *may in its discretion* look to Arizona laws for *guidance*. Id.

1. Tohono O'odham Constitution

The Tohono O'odham Constitution contains no surviving spouse exemptions or allowances. Accordingly, the Court must then look to Tohono O'odham laws and ordinances.

2. Tohono O'odham Laws & Ordinances

The Nation's laws and ordinances contain no surviving spouse exemptions or allowances. Section 17 of the Nation's Domestic Relations Code (Tohono O'odham Code, Title 9), simply directs the Court to distribute property as provided in a valid 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 the proved Tribal custom which restricts the privilege of the Tribal members to distribute property by Will.*

Because Tohono O'odham laws and ordinances do not address surviving spouse exemptions and allowances, the Court will next look to the customs of the Nation.

3. Tohono O'odham Customs

> *O'odham custom may be proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation.*
>
> 4 T.O.C. ch. 1, § 1-102.

No such testimony was provided in this case. However, there is case law from this Court[1] stating that it is Tohono O'odham custom to follow and honor the wishes of a decedent. See In the Matter of the Estate of Elizabeth P. Norris, 2021 TOR Supp. 142, 143 (Tr. Ct. 2018); Moreno v. Moreno, 3 TOR3d 76, 77 (Tr. Ct. 2009); In the Matter of Miguel, 2 TOR3d 75, 76 (Tr. Ct. 2004).

[1] Prior Trial Court decisions are not conclusive, but are persuasive. T.O. R. Ct., Section 1, Rule 8.2(d).

By contrast, there is no Tohono O'odham case law providing that a surviving spouse is entitled to part of a decedent's estate when the decedent expressly wishes otherwise, and the spouses had long been separated, with the intent to divorce.

B. No Mandatory Spousal Exemptions or Allowances

The above analysis shows that Tohono O'odham law—Code and custom—is to follow a decedent's will, as an expression of her wishes. There is nothing in the Tohono O'odham Constitution, Code or case law providing for an allowance or exemption to that if the decedent expressly stated her wishes to exclude her spouse. And no party provided testimony of custom to contradict that here.

It is conceivable that Tohono O'odham custom, or equity, could compel a different result under different facts. Here, however, the undisputed facts show that there is no community property, Tyrone was not dependent on Lucinda and is not participating in the Estate's administration, they had been separated for over eight years, and Lucinda intended to dissolve the marriage.[2]

Accordingly, the Court finds that Tohono O'odham law covers this situation and sees no reason to exercise its discretion under 4 T.O.C. ch. 1, § 1-102 to look to Arizona law. Instead, the Court will end its inquiry after following the Tohono O'odham Code, as supplemented by Tohono O'odham case law on the Nation's custom, and honor Lucinda's wishes by ordering that her property be distributed as she provided in her Will.

III. CONCLUSION

For the reasons above, the Personal Representative's Motion is GRANTED. Arizona's surviving spouse allowances and exemptions do not apply in this case.

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[2] While the Court does not rule on the issue now under Tohono O'odham law, it is noted that some jurisdictions may treat this situation as a "quasi-divorced" state, barring Tyrone from a statutory elective share. See, e.g., Matter of Estate of Hersh, 195 N.J. Super. 74, 77, 79 (1984).

Pursuant to 9 T.O.C. ch. 1, § 17, the Court DETERMINES the Will to be validly executed. Accordingly, pursuant to 9 T.O.C. ch. 1, § 16, the Court DETERMINES that the Decedent's lawful heirs / devisees[3] are those named in the Will: Eric Hughes, Emma Hughes-Juan, Azazalee Hughes, Sidally Hughes and Lillian Hughes. And pursuant to 9 T.O.C. ch. 1, § 17, the Court ORDERS that the property specifically described in the Will be given to the persons named in the Will. That portion of the Estate comprised of property passing from the estate of Lillian Hughes (AV2021-0032) may not be distributed until further order of the Court pending family discussions and administration of Lillian's estate.

A status hearing is set for April 12, 2023, at 9:30 a.m., to coincide with a status hearing for AV2021-0032 (Estate of Lillian Hughes) and an initial hearing for AV2022-0022 (Estate of Marlene Hughes).

SO ORDERED this 19th day of January, 2023.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

[3] The Code uses only the term "heir", not other terms such as beneficiary, devisee, legatee, etc.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Proceedings between: Wesley Valentine, Petitioner, vs. Shaunee Kyla Quasula, Respondent. Regarding Baby Quasula, DOB: 9/16/2021.	Case No.: AV2021-0123; AV2021-0127 ORDER

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY 2021 DEC 16 A 10:46 Lauriha Lopez JUDICIARY SECRETARY

The Initial Hearing in AV2021-0123 took place on December 15, 2021. Salvatore Nuccio appeared for the Respondent. Mr. Nuccio waived his client's appearance. The Petitioner was not present and did not contact the Court regarding his non-appearance. Mr. Nuccio asked for permission to file a Certificate of Service in open Court that is relevant to his client's Petition to Recognize Foreign Judgment in AV2021-0127 (regarding the Coconino County Superior Court Order filed on November 5, 2021 in SV 2021-00045).

In the interest of justice, the Court consolidates, for hearing purposes, AV2021-0123 and AV2021-0127. The Court accepted the Certificate of Service for filing.

As the Court and Mr. Nuccio discussed the case resulting in the termination of his client's parental rights being filed in Coconino County, the filing deadline for Wesley Valetine to object to the Petition for Recognition and Enforcement of Foreign Judgment in case number AV2021-0127, and the deadline for Mr. Valentine to respond to the Motion to Dismiss filed in AV2021-0123, Wesley Valentine appeared for the Initial Hearing.

Mr. Valentine stated that he traveled from Tucson and was delayed because of traffic. Mr. Valentine was brought up to speed with what was stated on the record, which includes a conversation over whether the Indian Child Welfare Act, 25 U.S.C.A. § 1901 et. seq., required notice and service upon the Tohono O'odham Nation Attorney General's Office of the Coconino County Superior Court case that resulted in an order terminating the parental rights of Shaunee Kyla Quasula and the alleged fathers.

There is a circuit split on whether service on the tribe of an Indian child must be accomplished before a court can server the parental rights to an Indian Child. Here, Shaunee Kyla Quasula is a member of the Tohono O'odham Nation. She is the birth mother of the subject child. Under 25 U.S.C.A. § 1903(4), Not Named Quasula, also known as Alyus Michael Valentine, also known as Baby Boy Quasula, is eligible for membership with the Tohono O'odham Nation. As such, the Tohono O'odham Nation falls within the definition of "Indian child's tribe" under 25 U.S.C.A. § 1903(5).

Wesley Valentine stated that he wishes to withdraw his Petition to Establish Paternity with prejudice in AV2021-0123. Mr. Valentine was sworn in testified.

Regarding AV2021-0123, the Court finds and orders as follows:

1. Wesley Valentine is knowingly and willingly abandoning his Petition to Establish Paternity;
2. Mr. Valentine understands that in asking this Court to dismiss his Petition, that the adoption of the subject child can proceed in another jurisdiction;

3. No one forced Mr. Valentine to abandon his Petition to Establish Paternity;
4. Mr. Valentine understands that he cannot change his mind.
5. Salvatore Nuccio, on behalf of his client, is in agreement.
6. The Petition to Establish Paternity is therefore dismissed with prejudice.
7. The Motion to Dismiss filed on behalf of Shaunee Kyla Quasula in AV2021-0123 is therefore moot.

Regarding AV2021-0127, the Court finds and orders as follows:

1. Mr. Nuccio provided a form of order for the Court to sign off on that recognizes and allows enforcement of the Order filed on November 5, 2021 with the Coconino County Superior Court.
2. The form of Order does not comply with Rule 3.3(e)(2) of Section 9 of the Tohono O'odham Rules of Court, which provides that a judgment will not be recognized or enforced if the Indian Child Welfare Act, if applicable, was not properly followed.
3. Separate and apart from the parental rights of Wesley Valentine and Shaunee Kyla Quasula, the Court is concerned, given the circuit split, that service may have been required on the Tohono O'odham Nation before the parental rights were terminated by the Coconino County Superior Court in SV 2021-00045.
4. The Court recognizes the Order filed with the Coconino County Superior Court on November 5, 2021, and gives it full legal effect. The Order is attached hereto as **Exhibit 1**.

5. A copy of this Order and **Exhibit 1** will be mailed to Howard M. Shanker, Attorney General of the Tohono O'odham Nation, P.O. Box 830, Sells, Arizona 85634.
6. Mr. Shanker can seek timely relief with the Coconino County Superior Court if he feels relief is warranted on behalf of the Tohono O'odham Nation.
7. Mr. Shanker can seek timely relief from this Order pursuant to the Nation's applicable Rules of Court should he feel that it is warranted.
8. A copy of this Order will be mailed to the Honorable Elaine Fridlund-Horne, Coconino County Superior Court, 200 N. San Francisco St., Flagstaff, Arizona 86001, regarding SV 2021-00045.
9. This is a final, appealable order.

Dated December 16, 2021.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM NATION JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Proceedings between:	)	Case No.: AV2021-0123; AV2021-0127
Wesley Valentine, Petitioner,	)	ORDER
vs.	)	
Shaunee Kyla Quasula, Respondent.	)	
Regarding Baby Quasula, DOB: 9/16/2021.	)	

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2022 JAN -6 P 2:01
Jessica Cuntone
JUDICIARY SERVICE CLERK

The Court is in receipt of the Motion to Intervene and Request for Disclosure filed by Howard Shanker and Taylor Burdick, Office of Attorney General, Tohono O'odham Nation, as well as their Motion to Stay Enforcement of Foreign Order. The Court finds and orders as follows:

1. The Tohono O'odham Nation Attorney General's Office seeks appropriate relief in the form of a stay on the basis that the Indian Child Welfare Act was not followed by the Coconino County Superior Court.
2. Rule 3.3(e)(2) of Section 9 of the Tohono O'odham Rules of Court provides that a judgment will not be recognized or enforced if the Indian Child Welfare Act, if applicable, was not properly followed.
3. Given that Wesley Valentine decided to withdraw his Petition to Establish Custody, the Court proceeded with recognizing the foreign order.
4. The Court directs Salvatore Nuccio and Welsey Valentine to respond to the Nation's Motions.

6. Pending a ruling on the Nation's motions, the Court finds good cause to stay enforcement of the foreign order attached as **Exhibit 1** to the Order entered on December 16, 2021 regarding AV2021-0127.
7. A copy of this Order will be mailed to Howard M. Shanker, Attorney General of the Tohono O'odham Nation, P.O. Box 830, Sells, Arizona 85634.
8. A copy of this Order will be mailed to the Honorable Elaine Fridlund-Horne, Coconino County Superior Court, 200 N. San Francisco St., Flagstaff, Arizona 86001, regarding SV 2021-00045.

Dated January 6, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

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TOHONO O'ODHAM COURT
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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Proceedings between: Wesley Valentine, Petitioner, vs. Shaunee Kyla Quasula, Respondent. Shaunee Kyla Quasula, Petitioner, vs. Attorney General, Tohono O'odham Nation, Respondent. Regarding Baby Quasula, DOB: 9/16/2021.	Case No.: AV2021-0123 / AV2021-0127 ORDER

The Court is in receipt of the Notice to the Court/Position Statement filed by Salvatore Nuccio, on behalf of Shaunee Kyla Quasula. Based on the filing, the Court finds and orders as follows:

Page 3 of the order filed on December 16, 2021 includes the following:

"Regarding AV2021-0127, the Court finds and orders as follows:

1. Mr. Nuccio provided a form of order for the Court to sign off on that recognizes and allows enforcement of the Order filed on November 5, 2021 with the Coconino County Superior Court.
2. The form of Order does not comply with Rule 3.3(e)(2) of Section 9 of the Tohono O'odham Rules of Court, which provides that a judgment will not be recognized or enforced if the Indian Child Welfare Act, if applicable, was not properly followed.
3. Separate and apart from the parental rights of Wesley Valentine and Shaunee Kyla Quasula, the Court is concerned, given the circuit split, that service may have been required on the Tohono O'odham

Nation before the parental rights were terminated by the Coconino County Superior Court in SV 2021-00045.

4. The Court recognizes the Order filed with the Coconino County Superior Court on November 5, 2021, and gives it full legal effect. The Order is attached hereto as Exhibit 1."

Given that *Tohono O'odham Nation v. Fridlund-Horne in & for Cnty. of Coconino*, No. 1 CA-SA 22-0076, 2022 WL 4243926, ¶14 (Ariz. Ct. App. Sept. 15, 2022), vacated the parental termination order issued by the Coconino County Superior Court in SV 2021-00045, this Court sets aside all portions of the December 16, 2021 order that recognized the termination order issued by the Coconino County Superior Court. A copy of this order will be forwarded to the Coconino County Superior Court. AV2021-0127 is dismissed. The orders issued on December 16, 2021 regarding AV2021-0123 are reaffirmed.

Dated October 6, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

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DATE/TIME
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In the Proceedings between: Shaunee Kyla Quasula, Petitioner, vs. Attorney General, Tohono O'odham Nation, Respondent. Regarding Baby Quasula, DOB: 9/16/2021.	Case No.: AV2021-0127 ORDER

The Court is in receipt of the Attorney General's Notice to the Court, which provides:

1. The legal citation to the appellate opinion that vacated the parental termination order issued by the Coconino County Superior Court in SV 2021-00045.
2. The Notice requests that this Court set aside its December 16, 2021 order.

The Court, having reviewed the opinion in *Tohono O'odham Nation v. Fridlund-Horne in & for Cnty. of Coconino*, No. 1 CA-SA 22-0076, 2022 WL 4243926, ¶14 (Ariz. Ct. App. Sept. 15, 2022), FINDS AND ORDERS AS FOLLOWS:

3. Because the parental termination order issued by the Coconino County Superior Court was vacated by Division 1 of the Arizona Court of Appeals, the Court finds good cause to vacate its order of

December 16, 2021. The Court first wants to hear from Salvatore Nuccio.

4. While it is possible that a Petition for Review may be filed with respect to the Opinion issued by Division 1, this possibility does not justify keeping this case open.

5. As such, the Court finds good cause to accelerate deadline imposed for Salvatore Nuccio to advise the Court regarding his respective positions. Salvatore Nuccio has until October 5, 2022. The matter will be taken under advisement on October 6, 2022.

6. For the parties' edification, the Court is inclined to dismiss the Petition for Recognition and Enforcement of Foreign Judgment without prejudice. This would allow Mr. Nuccio to re-file for recognition and enforcement, or motion the Court to reinstate its prior order, if the parental termination order is reinstated by Arizona's Supreme Court.

Dated September 20, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

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Frances Rios
COURT CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

TOHONO O'ODHAM GAMING ENTERPRISE, an enterprise of the Tohono O'odham Nation, Petitioner v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, JERRY DERRICK, Executive Director, in his official capacity, CATALINA PATRONSKI, Licensing Manager, in her official capacity; and JOHN DOES AND JANE DOES 1-40, Respondents	Case No.: AV2022-0056 ORDER

This is before the Court on Petitioner Tohono O'odham Gaming Enterprise's ("TOGE") Motion for Immediate Stay of March 30, 2022 Final Decision of the Tohono O'odham Gaming Office (the "Motion").

Respondent Tohono O'odham Gaming Office ("TOGO") filed its Response in Opposition to TOGE's Motion to Stay (the "Response").

As noted by Petitioner TOGE, the Court may, pursuant to Section 8, Rule 10(a)(1) of the Tohono O'odham Rules of Court, stay TOGO's March 30, 2022 decision pending final disposition of this case.

Respondent TOGO argues that TOGE's Motion is procedurally deficient because it was filed before TOGE's complaint was filed or served.

The Court does not find a requirement that a motion for stay in an administrative appeal must be filed after the complaint is filed or served. Only that notice has been provided to the agency. T.O. R. Ct. § 8, Rule 10(a)(1).

That notice has been provided here. Accordingly, the Court will substantively consider TOGE's Motion, and TOGO's Response.

As TOGE noted, (i) it must show "good cause" to grant a stay, and (ii) Tohono O'odham law does not provide a definition for that in this context. The Court did find, however, a comparable Arizona case: *P&P Mehta LLC v. Jones*, 211 Ariz. 505 (Ct. App. 2005). And in the absence of Tohono O'odham law on point, the Court may look to Arizona law for guidance in its discretion. 4 T.O.C. Chapt. 1 § 1-102.

The Court exercises that discretion here. The test for good cause announced in the *Mehta* case is on point here, and well-researched and reasoned. Accordingly, this Court will apply a similar standard: to establish good cause for a stay, TOGE must show (A) a colorable claim ("a seemingly valid, genuine, or plausible claim under the circumstances") and (B) the balance of harm favors granting the stay. *Mehta*, 211 Ariz. at 510.

Upon review of TOGE's Motion, and the cited authorities, the Court **FINDS** that TOGE has shown at least a seemingly plausible, and therefore "colorable", claim that TOGO may not consider TOGE's compliance with the employment preference mandate contained in its charter when making licensing decisions. Therefore, TOGE has met this first requirement for a stay.[1]

---

[1] The Court is NOT, however, ruling on this issue at this stage, as TOGO has also shown a colorable claim that it MAY consider the employment preference mandate in licensing decisions, and this appears to be the main legal issue in the case, including in the Complaint recently filed by TOGE.

The Court is presently unable, however, to balance the harms. TOGE laid out its harms in its Motion. TOGO did not specify its harms if the Court were to grant the stay.

As the Court had not previously ruled that it would use the good cause test announced in *Mehta*, the Court **ORDERS** TOGO to supplement its Response, to identify the harms it would suffer if the Court granted a stay and, if it wishes, to show how balancing the harms would favor denying a stay.

TOGO's Response supplement is due within ten days of service of this Order. TOGE will then have five days to file a reply on the issue of balancing harms, if it wishes.

The Court does not set oral argument at this time. But it will reconsider that upon review of TOGO's Response supplement and TOGE's reply (if any). TOGE may also notify the Court if it decides not to file a reply before the deadline, if it wants the Court to rule before waiting for that time to run (including the five extra calendar days provided when served by mail, *see* T.O. R. Ct. Section 1, Rule 4(b)).

SO ORDERED this 15th day of July, 2022.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 AUG 23 P 3:17
Tiffany Mease
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

TOHONO O'ODHAM GAMING ENTERPRISE, an enterprise of the Tohono O'odham Nation, Petitioner v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, JERRY DERRICK, Executive Director, in his official capacity, CATALINA PATRONSKI, Licensing Manager, in her official capacity; and JOHN DOES AND JANE DOES 1-40, Respondents	Case No.: AV2022-0056 ORDER PARTIALLY STAYING FINAL DECISION

This is before the Court on Petitioner Tohono O'odham Gaming Enterprise's Motion for Immediate Stay of March 30, 2022 Final Decision of the Tohono O'odham Gaming Office (the "Motion to Stay"), responses and replies, and oral argument held August 17, 2022. It also considers TOGO's later-filed Motion to Dismiss – Sovereign Immunity.[1] And it considers TOGE's later-filed Notice Requesting Consideration of Admissions in TOGO's Answer in Ruling on Enterprise's Motion to Stay ("Consideration of Admissions Request").

For the reasons below, and within the parameters below, the memorandum issued by TOGO dated March 30, 2022 with the subject "Final Decision: 'In re: TOGE WVR

[1] Relating to the case-in-chief, but partly relevant to the Motion to Stay, without needing response from Petitioner for this Order.

Food & Beverage Director Hiring Matter' " (the "Final Decision") is **PARTIALLY STAYED**.

I. FINAL DECISION

Respondent Tohono O'odham Gaming Office (TOGO) argues that its decision at issue here is not a final agency action, and therefore not reviewable at this time. The Court disagrees.

A. The Final Decision Standing Alone is a Final Action.

At oral argument, TOGO acknowledged that the Final Decision, standing alone, would be a final action. As such, it would be subject to judicial review under 16 T.O.C. ch. 1 § 1204(b). (See Motion to Dismiss at 2.)

B. TOGO's Temporary Self-Suspension of its Final Decision Doesn't Change its Nature.

TOGO later issued, on May 25, 2022, a letter with the subject line of "Re: Amended Final Order, 05/25/2022" (the "Amended Final Order"). The Amended Final Order "temporarily withdr[ew] the Final Order for a period of 120 days . . . .". The Amended Final Order also stated that TOGO may further amend that Final Order as it sees fit.

In its Supplemental Response in Opposition to TOGE's Motion to Stay, at 3:4-6, TOGO asserted that, in light of the Amended Final Order, "there does not even appear to be an appealable 'final action of the Gaming Office' at issue in this case." TOGO further asserted that claim at the August 17 oral argument. And TOGO asserted it again in its Motion to Dismiss, at 2 ("There is no final action of the Gaming Office that is subject to review.")

TOGO suggested at oral argument that (if the Court dismissed) TOGE could re-file when the Final Decision became live again. But this would mean that TOGO could at that

time withdraw the Final Decision again and have the case dismissed again. At which time TOGO could again reinstate the Final Decision. This could repeat indefinitely, with the Final Decision never facing judicial review.

And since TOGO continues to assert the authority and intention to consider hiring preference compliance in licensing matters, and to deny licenses on that basis without even providing or considering an actual application for license, combined with the Amended Final Order's built-in expiration date and manual override, it is not only likely, but highly probable if not inevitable that the Final Decision will be repeated.

In other words, the Final Decision would be "capable of repetition yet evading review". Or more accurately here, highly likely to be repeated yet evading review. In such cases, the action may be reviewed without waiting for that repetition. See, e.g., Manuel v. Tohono O'odham Leg. Counsel, 2021 TOR Supp. 121, 124 (Tr. Ct. 2016); KPNX Broadcasting Co. v. Super. Ct., 678 P.2d 431, 435 (Ariz. 1984); Phoenix v. Phoenix Employment Relations Board, ex. rel. Am. Federation of State, County and Mun. Employees Ass'n, Local 2384, et. al., 699 P.2d 1323, 1329 (Ariz. Ct. App. 1985); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 170 (2000); Porter v. Jones, 319 F.3d 483, 489-90 (9th Cir. 2003).[2] Accordingly, the Court holds that the Final Decision may be reviewed now.

II. SOVEREIGN IMMUNITY

In its Motion to Dismiss, TOGO makes a compelling argument that much of TOGE's requested relief is outside the scope of 16 T.O.C. ch. 1 § 1204(b) (judicial review of

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[2] The "capable of repetition yet evading review" doctrine is usually applied to mootness arguments. While TOGO only mentioned that term once, at oral argument, that is the basis of TOGO's argument. See, e.g., Flagstaff Med. Center, Inc. v. Sullivan, 962 F.2d 879, 884 (9th Cir. 1992) ("The mootness doctrine asks the basic question whether decision of a once living dispute [the Final Decision] continues to be justified by a sufficient prospect that the decision will have an impact on the parties.") (internal quotation marks omitted).

Gaming Office final action) and Section 8 (Administrative Appeals) of the Tohono O'odham Rules of Court, and therefore barred by TOGO's sovereign immunity. However, TOGO also acknowledges that the Final Decision (if a final action) is at least subject to judicial review within the parameters of 16 T.O.C. ch. 1 § 1204(b) and Section 8 of the Tohono O'odham Rules of Court. (Oral Argument; Motion to Dismiss at 2; Answer ¶¶ 3 & 5).

As the Court has held that the Final Decision is a final agency action, it will proceed now with that judicial review within those parameters, including determining whether to stay the Final Decision pending disposition of the case-in-chief pursuant to Tohono O'odham Rules of Court Section 8, Rule 10(1). It will defer ruling on all other issues of sovereign immunity pending TOGE's response to the Motion to Dismiss.

III. STAY ANALYSIS

A. Consideration of Admissions Request

The Court finds nothing in TOGO's Answer Admissions cited in TOGE's Consideration of Admissions Request to change the analysis for the Motion to Stay.

TOGO has indeed been clear that it claims authority to consider hiring preferences in licensing matters. And it has provided a colorable argument that it does have that authority. Just as TOGE has presented a colorable argument that it does not. That is a principal legal question to be further developed and decided in the case-in-chief.

Despite that claimed authority, and evidence that TOGO continued to act on that authority for a time after issuing the Final Decision, the Court finds nothing in TOGE's admissions to indicate that it has continued to exercise that claimed authority in practice *after* issuing the Amended Final Order.

As described below, the Court already agrees that the Final Decision goes beyond just denying Jeffrey George a gaming license. Reliance on an Answer admission is not necessary.

B. Standard for a Stay

In its July 15, 2022 Order ("July 15 Order"), this Court adopted the "good cause" standard set out in P&P Mehta LLC v. Jones, 123 P.3d 1142 (Ariz. Ct. App. 2005), for determining whether to stay an agency's final decision under the Nation's Administrative Appeals Rules. Under the Mehta standard, TOGE must show:

(i) a colorable claim ("a seemingly valid, genuine, or plausible claim under the circumstances"); and

(ii) the balance of harm favors granting the stay. (July 15 Order at 2:13-16); Mehta, 123 P.3d at 1147.

C. Colorable Claim

The Court previously found that Petitioner satisfied the first part (colorable claim) with regard to its argument that TOGO lacks the authority to consider hiring preferences in licensing matters, as TOGO asserts in the Final Decision. (July 15 Order at 2:17-21.)

After additional pleadings and oral argument, the Court further finds that TOGE has made a colorable claim that TOGO lacks the authority to formally and finally deny a license without even providing a license application to a new hire when requested by TOGE and/or going through the prescribed statutory process for accepting or denying an application, also as described in the Final Decision at p. 2 and n.1. (not just for Mr. George, but for "any person connected to any hiring matter when TOGE does not follow Preference as determined by the Gaming Office . . . .") (internal footnote omitted).

TOGO's counsel described this as a "pre-decision" at oral argument. Upon review of the Administrative Record, it appears to be linked to what both parties call a "pre-screen"

process (see, e.g., Admin. R. Tab 4 p.1 (e-mail from TOGO's Catalina Patronski attaching the Final Decision, describing it as "the Final Decision in regards to the *prescreen* for TOGE applicant") (emphasis added) (internal quotation marks omitted). Both parties appear to acknowledge the existence and use of a pre-screen process, but there does not appear to be agreement on TOGO's basing final licensing denials on the pre-screen process without even receiving and reviewing a licensing application.

To be clear, the Court is not ruling on either of those issues now. They are both legal questions to be decided in the case-in-chief. This is a finding only that TOGE has presented a colorable claim ("seemingly valid, genuine, or plausible claim under the circumstances") for each, next to be developed by both sides and then conclusively decided.

D. Balance of Harms

1. Petitioner TOGE's Harms

Petitioner has alleged the following harms it suffers under the Final Decision:

1. TOGO is exercising authority it does not have. As described above, this is a legal question to be decided in the case-in-chief. It will therefore not be considered here. Though the Court agrees that this claimed ongoing authority is in the Final Decision, and therefore subject to judicial review even under the narrow sovereign immunity exception acknowledged in TOGO's Motion to Dismiss.
2. Inability to fill a key management role with its selected person. TOGE's counsel stated at oral argument, after conferring with her client, that TOGE would hold open the West Valley F&B Director position. Accordingly, the Court will not consider this element either for the Motion to Stay.

3. Slow-walking licensing applications. TOGE provided only "information and belief" to support this. (See Motion to Stay 13:8-10). By contrast, TOGO presented specific affidavit evidence in rebuttal. (See Catalina Patronski Aff. ¶¶ 13-16, attached as Ex. A to Resp't Supplemental Resp. Opp'n Motion to Stay). In addition, the Court does not find this alleged harm based in the Final Decision. Accordingly, the Court does not consider it here.
4. Inhibiting TOGE's routine hiring with the uncertainty of TOGO second-guessing TOGE's preference compliance. (See Motion to Stay 11:10-13, 12:25; Argelia Medina Aff. ¶¶ 34 & 37, attached as Ex. 2 to Motion to Stay.)
5. Hurting TOGE's reputation and ability to recruit competitively since word gets out that getting licensed is a long, difficult and uncertain process due to TOGO second-guessing TOGE's preference compliance. (See, e.g., Motion to Stay 14-15; Medina Aff. ¶¶ 39-40.)

For claimed harms 4 & 5, Respondent TOGO asserts, correctly, that TOGE has not identified specific numbers to these harms. Nevertheless, TOGO does not dispute that routine hiring and effective recruiting are by themselves key components to any successful enterprise.

Accordingly, the Court finds claimed harms 4 and 5 above to be cognizable harms to TOGE for purposes of a stay, where two of TOGE's four specific purposes are:

(a) To establish an independent, financially self-sustaining and successful enterprise;

* * *

(d) To produce the maximum economic return to the Nation . . . .

16 T.O.C. ch. 2 ("TOGE Charter") §4.[3]

2. Respondent TOGO's Harms.

TOGO has alleged the following harms it would suffer if a stay was granted:

1. Upending the status quo. TOGO does not say how this would harm it. And the cited cases further note that this policy (optional to begin with) is to protect from, or balance harms.[4] Accordingly, the Court does not find this to be a harm for TOGO for purposes of the Motion to Stay.
2. Granting a stay would be a partial ruling on the merits. (See Resp't Supplemental Resp. Motion to Stay 2-3.) As TOGO bases this on the possibility that it could clear the way for TOGE's installation of Mr. George as West Valley F&B Director, and since TOGE has since stated that it will hold that position open, the Court does not find this to be a harm for TOGO for purposes of a stay either.
3. TOGO's ability to protect the Nation's interests would be compromised. (See Resp't. Supplemental Resp. Motion to Stay 5:24-26.) If it is determined that

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[3] The Court does not downplay the importance of the other two purposes, especially for this matter, subpart (c) ("To promote economic development through training and employment opportunities for members of the Nation"). The Court understands that policy supports TOGO's position on the primary legal question of whether TOGO may consider preference in licensing matters. However, again, that is a legal question to be decided in the case-in-chief. This analysis is focused on balancing current harms for granting or denying a stay.

[4] See Wells Fargo Bank N.A. v. Rogers, 366 P.3d 583, 585, 587 (Ariz. Ct. App. 2016); 1st HC v. Talamante, 2017 WL 1180268, *2 (Ariz. Ct. App. 2017) ("This rule *allows* the court . . . to take appropriate action to preserve the status quo, that is, the situation that exists by virtue of the judgment rendered against the appellant [by the court, not by the appellee] to ensure that the appellee will not lose the benefits of its judgment *and thereby suffer real, not hypothetical or speculative, harm*.") (emphasis added) (internal quotation marks to Rogers omitted); see also Talamante, 2017 WL 1180268 at *3 ("The superior court should consider, however, whether and how to impose protective conditions *to balance the hardships* . . . .") (emphasis added) (internal quotation marks omitted).

TOGO does have the authority to consider hiring preferences in licensing matters, then this will indeed become an important issue. However, since this is a legal question to be decided in the case-in-chief, it will not be considered as a demonstrated harm for purposes of the Motion to Stay.[5]

Tallying the score, the Court finds two legitimate harms for TOGE if the Final Decision is not stayed, and no harms for TOGO if the Final Decision is stayed.

Furthermore, as acknowledged at oral argument, the Amended Final Order is effectively a self-imposed stay. Thus, even if the Court found any harms TOGO would suffer by staying the Final Decision, TOGO already self-inflicted and waived them.

Accordingly, the Court holds that the balance of harms tips in favor of granting a stay.

IV. SCOPE OF STAY

The Final Decision has three components that may be stayed:

1. Refusal to license Jeffrey George. This will not be stayed since TOGE is now holding that position open.
2. Ongoing refusal to license any person when TOGO determines that TOGE did not comply with TOGE's hiring preference mandate (see IIIC above); and
3. Basing final licensing refusals on "pre-screen" determinations without providing or reviewing an actual license application or going through the license application procedure provided in the Gaming Ordinance. (see id.)

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[5] The Court also notes that, if this was found to be a harm at this stage, it would be mitigated by the fact that the Nation's Tribal Employment Rights Commission is already committed to enforcing hiring preferences; at least with respect to "Indians" and "Local Indians". See 13 T.O.C. §§ 1102(G) & (I), 1104, 1107, 1108, 1115.

Petitioner TOGE has made a colorable claim that TOGO does not have the authority to conduct the second and third components above; and shown that such actions cause ongoing harm to TOGE (while staying those actions will not cause harm to TOGO). Therefore, pursuant to 16 T.O.C. Ch. 1 § 1204(b) and Tohono O'odham Rules of Court Section 8, Rule 10(1), the Court **ORDERS** that the second and third components of the Final Decision listed above are **STAYED** pending final disposition of the case-in-chief.

Both of those are legal questions and can be decided on briefings. However, determining whether the Gaming Regulations submitted by TOGE were effective at the time of the Final Decision issuance is primarily a factual issue. And the Court will need to know that *before* deciding the legal questions.

Accordingly, the parties may conduct their own research and/or discovery on the issue of whether the Gaming Regulations were effective when the Final Decision was issued. The Court sets an **Evidentiary Hearing on that issue for October 26, 2022 at 1:30 p.m.** Two hours will be reserved.

The Parties may stipulate any time before then as to effectiveness or non-effectiveness, or that they have both completed their discovery and jointly move for an earlier hearing.

SO ORDERED this 23rd day of August, 2022.

Judge Joseph Hardy Jr.

JUDICIARY

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 OCT 26 A 8:27
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

TOHONO O'ODHAM GAMING ENTERPRISE, an enterprise of the Tohono O'odham Nation, Petitioner v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, JERRY DERRICK, Executive Director, in his official capacity, CATALINA PATRONSKI, Licensing Manager, in her official capacity; and JOHN DOES AND JANE DOES 1-40, Respondents	Case No.: AV2022-0056 ORDER GRANTING TOGE'S OBJECTION TO AFFIDAVIT, AND TOGO'S MOTION TO DISMISS

This is before the Court on:

(a) Respondent's Motion to Dismiss – Sovereign Immunity, of August 18, 2022 ("Motion to Dismiss"); and

(b) Petitioner's Objection to TOGO's Filing of Affidavit of Catalina Patronski with Reply Brief on Motion to Dismiss, filed October 3, 2022 ("Objection to Affidavit").

For the reasons below, the Objection to Affidavit is GRANTED, the Motion to Dismiss is GRANTED, and this case is DISMISSED.

I. FACTUAL & PROCEDURAL BACKGROUND

A. The Gaming Office's Final Decision

In September 2021, the Petitioner, Tohono O'odham Gaming Enterprise ("Enterprise") or ("TOGE") advertised for a Food and Beverage Director position for its West Valley casino. (Compl. ¶ 31.)

The Enterprise selected Jeffrey George for the position and, on or about January 17, 2022, submitted his name to Respondent Tohono O'odham Gaming Office ("Gaming Office" or "TOGO"). (Compl. ¶¶ 36-37.)

On March 30, 2022, the Gaming Office issued a memorandum with the subject "Final Decision: 'In re: TOGE WVR Food & Beverage Director Hiring Matter' " (the "Final Decision") (Admin. R. Tab IV). The Final Decision included the following:

> *The Gaming Office hereby has determined by this final decision the Tohono O'odham Gaming Enterprise ("TOGE") did not comply with the Preference mandate as set forth in the TOGE Charter.*
>
> * * *
>
> *Accordingly, the Gaming Office deems the Preference matter to be in crisis . . . . Therefore, the Gaming Office will not license any person[1] connected to any hiring matter when TOGE does not follow Preference as determined by the Gaming Office . . . .*
>
> * * *
>
> *[1] . . . this determination is not and should not be construed to be a gaming license eligibility determination on the merits with respect to Mr. George. . . .*

B. The Amended Final Decision

On May 25, 2022, The Gaming Office issued a letter with the subject line of "Re: Amended Final Order, 05/25/2022" (the "Amended Final Decision") (Admin. R. Tab VII). The Amended Final Decision included the following:

> *The Gaming Office hereby temporarily withdraws the Final Order for a period of 120 days to allow TOGO and TOGE to discuss settlement.*
>
> * * *

The Gaming Office may further amend this order as it sees fits [sic] as facts and circumstances unfold going forward.

C. TOGE's Challenge

The Enterprise initiated this action with its Notice of Appeal and Request for Record, filed May 27, 2022. It was initially brought as a judicial review / administrative appeal of the Final Decision, under Section 1204 of the Nation's Gaming Ordinance[1] (judicial review of a final Gaming Office decision) and Section 8 (Administrative Appeals) of the Tohono O'odham Rules of Court. (See Notice of Appeal at 1:17-19, 23-26.)

With its subsequent Complaint, however, the Enterprise included claims and requested relief not appearing in Section 1204 of the Gaming Ordinance or Section 8 of the Court Rules. Those are discussed below.

The Gaming Office then filed its Motion to Dismiss on August 18, 2022.

D. Stay of Final Decision in Favor of the Enterprise

After briefings and oral argument on TOGE's Motion to Stay the Final Decision, the Court granted TOGE's motion and issued an order on August 23, 2022 ("Stay Order") partially staying the Final Decision pursuant to Section 1204(b) of the Gaming Ordinance and the Tohono O'odham Rules of Court Section 8, Rule 10(1).

E. Final Decision Rescission

On September 1, 2022, TOGO issued another letter, stating "the March 30, 2022 and May 20, 2022 decisions [Final Decision and Amended Final Decision] are hereby rescinded and the Gaming Office will be closing this file." (Amended Admin. R. Tab VIII, 8.4) (the "Final Decision Rescission").

F. Subsequent Filings on the Motion to Dismiss

[1] 16 T.O.C. ch. 1.

TOGE filed its response to the Motion to Dismiss on September 9, 2022 (TOGE's Opp'n to TOGO's Mot. Dismiss).

TOGO filed its reply on September 22, 2022. (TOGO's Reply in Supp. of Mot. Dismiss – Sovereign Immunity ("TOGO's Reply").)

TOGE filed its Objection to Affidavit on October 3, 2022.

The Court held oral argument on the Motion to Dismiss and the Objection to Affidavit on October 25, 2022.

II. ANALYSIS

A. Objection to Affidavit

Rule 7.1(a)(4) of the Tohono O'odham Rules of Civil Procedure (T.O. R. Ct. § 2) requires affidavits in support of a motion to be filed with the motion, unless the Court orders otherwise. Rule 7.1(f)(3)(C) allows a party to object to evidence offered for the first time in a reply memorandum.

Those rules apply to Ms. Patronski's affidavit filed with TOGO's Reply. As stated above, the Court has discretion to order otherwise. But it does not do that here.

The Court agrees with TOGE's arguments regarding the inability to challenge new evidence in a reply brief, and the affidavit being irrelevant to the Motion to Dismiss (the Motion to Dismiss being based on sovereign immunity).

TOGO asserted that it included Ms. Patronski's affidavit with its Reply to counter previous TOGE statements about the prescreening process. (Oral Arg. on Mot. Dismiss at 28:54). The Court finds that insufficient to override TOGE's objection. TOGO also admitted that the affidavit is irrelevant as to sovereign immunity. (Id. at 29:53.)

Accordingly, the Court GRANTS the Enterprise's request in its Objection to Affidavit, and will disregard entirely the affidavit of Catalina Patronski filed with TOGO's Reply (and the corresponding references in TOGO's Reply) when ruling on the Motion to Dismiss.

B. Count II (Core Administrative Appeal): No More Final Decision Subject to Appeal

Sovereign Immunity is an essential element of tribal sovereignty and self-determination. The shield of immunity protects the autonomous political existence of the tribe.

Escalante v. Sells Dist. Council, 2021 TOR Supp. 36, 39 (Ct. App. 2017) (citation omitted).

The Gaming Office, as a department within the Executive Branch of the Nation,[2] and its employees, are covered by the Nation's sovereign immunity. See 1 T.O.C. ch. 2, § 2101(B). Any waiver of that sovereign immunity, including for appealing its final decisions, must be expressly made by the Legislative Council. 1 T.O.C. ch. 2, § 2101(C); 1 T.O.C. ch. 2, § 2102(B). Further, any such waiver is limited to its terms. 1 T.O.C. ch. 2, § 2101(C).

The Legislative Council provided such an express waiver in Section 1204 of the Gaming Ordinance, for judicial review of a final Gaming Office decision. And under Section 2101(C) of the Nation's sovereign / legislative immunity statute (1 T.O.C. ch. 2), the waiver is limited to the terms of Section 1204 of the Gaming Ordinance.

As admitted by TOGO (e.g., Oral Arg. on Mot. Stay at 55:27), and found by the Court (Stay Order at 2), the Final Decision when first issued was a final agency action, reviewable under Section 1204 of the Gaming Office.[3]

Count II of the Complaint asks the Court to overturn the Final Decision on the grounds that it is not justified by law and it exceeds TOGO's authority. This claim and requested relief fit within the judicial review permitted by Section 1204(e) of the Gaming Ordinance.

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[2] See 16 T.O.C. ch. 1, § 401.

[3] Accordingly, the Court dismisses TOGO's argument brought up for the first time at oral argument on its Motion to Dismiss that even the initial Final Decision was not a final decision reviewable under § 1204 (see Oral Arg. on Mot. Dismiss at 20:20, 51:07).

However, the Gaming Office rescinded its Final Decision. See Final Decision Rescission. Unlike the Amended Final Order, which only temporarily withdrew the Final Decision, and allowed for any other modification at any time, this rescission was complete and unconditional.

Accordingly, there is no longer a final agency decision subject to being overturned under Section 1204 of the Gaming Ordinance. Therefore, Count II must be dismissed.[4]

To the extent that the Gaming Office continues to consider hiring preference mandates in licensing-related activities, and/or refuses even to accept and process licensing applications (both of which were components of the Final Decision, see Final Decision; Stay Order at IV), those actions and inactions are no longer part of a final agency decision. And 2101(C) limits the sovereign immunity exception of Section 1204 of the Gaming Ordinance to its terms. Therefore, Section 1204 no longer provides an avenue around sovereign immunity. Those actions/inactions must be addressed, if at all, under other legal theories.[5]

The Enterprise asserts several such theories. They are discussed below.

C. Count I: Separation of Powers

Count I of the Complaint requests a declaratory judgment that TOGO exceeds its authority in taking any action or inaction based on the Indian or Tohono O'odham hiring preference mandates contained in the Enterprise's Charter (16 T.O.C. ch. 2) or the Nation's Employment Rights Ordinance (13 T.O.C. ch. 1).

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[4] As TOGE now asserts that the Final Decision was "a regulation of the Nation" and therefore overrides sovereign immunity in certain circumstances under 1 T.O.C. § 2102(A) (TOGE's Opp. to TOGO's Mot. Dismiss at 15:16-19), the complete rescission of this alleged regulation also eliminates this argument, and the Court does not reach its merits.

[5] This includes the "capable of repetition yet evading review" doctrine the Court previously applied to the Final Decision itself. (See Stay Order at I.B.) Now without a final action or decision within the meaning of Section 1204 of the Gaming Ordinance, the Enterprise must first establish another theory allowing its claims to bypass sovereign immunity at all before that doctrine could become viable again. The Enterprise attempts this, but the Court finds no such route. Accordingly, the "capable of repetition yet evading review" doctrine is also no longer applicable to this action.

The Enterprise argues that this claim is not barred by sovereign immunity because the Gaming Office violates the constitutional separation of powers by considering hiring preference mandates. (See TOGE's Opp'n to TOGO's Mot. Dismiss at 5.)

The Court agrees with TOGE that the Legislative Council has the constitutional authority to regulate the Gaming Office under Article VI, Section 1, Clauses (b) and (e) of the Nation's Constitution. However, the Court finds nothing in those provisions (or in any of the other materials cited by TOGE) establishing that such authority is exclusive. TOGE itself acknowledges that it is regulated by a number of Nation agencies, including TOGO. (Oral Arg. on Mot. Dismiss at 37:38.)

Indeed, the Constitution also gives to the Executive Branch the power to "oversee the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham Council." T.O. CONST. Art. VII, § (2)(C).

The Indian and Tohono O'odham employment preference mandates are laws of the Tohono O'odham Council. See 13 T.O.C. ch. 1, § 1104; 16 T.O.C. ch. 2, § 6(m). Accordingly, the Executive Branch has the constitutional authority to oversee the implementation of them.

Further, the Legislative Council expressly empowered the Executive Branch (through the Gaming Office) with "overall civil regulatory authority over Gaming Activities within the Nation *and the Gaming Facility Operator [TOGE]* as specifically provided in [the Gaming] Ordinance." 16 T.O.C. ch. 1, § 401 (emphasis added). That is consistent with Article VII, Section 2, Clause (d) of the Constitution (Executive Branch shall exercise all powers delegated by the Tohono O'odham Council).

The parties hotly contest whether that authority specified in the Gaming Ordinance includes the power to consider preference in licensing decisions or non-decisions. In its earlier analyses for TOGE's Motion to Stay the Final Decision, the Court took an initial look at that.

Without deciding the issue, the Court did find that both parties have a "colorable" (seemingly plausible) claim about whether the Gaming Office may consider preference in its licensing activities. (See Order, July 15, 2022 at 2.) But that is a question of statutory authority, not constitutional authority.

The Court also agrees with TOGE that the Legislative Council has the ultimate authority on that and other matters involving the Enterprise. (See Oral Arg. on Mot. Dismiss at 13:30-15:45.) The Court disagrees, however, that TOGO is attempting to exercise untethered authority. (See Id. at 15:50.) Instead, TOGO has a colorable claim based on the Gaming Ordinance and the Enterprise's Charter themselves for considering preference. And that is a statutory question. It is therefore a question that the Legislative Council could resolve, if it wished, by expressing it one way or the other in its own laws, without resorting to challenging TOGO's sovereign immunity.

In sum, TOGO does not overstep its *constitutional* authority by considering employment preference mandates in its licensing-related activities.[6] While such consideration may or may not exceed its authority under the Gaming Ordinance, that is a *statutory* question, not a constitutional question. The Legislative Council could cure any perceived encroachment on its territory by clarifying its own laws. Accordingly, the constitutional separation of powers doctrine does not allow TOGE an avenue around TOGO's sovereign immunity here.

D. Count III: TOGO's refusal to accept and process licensing applications

Count III of the Complaint requests a writ of mandamus to compel TOGO to comply with its statutory duty to process licensing applications for acceptance or denial on their merits.

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[6] As such, further analysis, such as under Francisco v. Toro, 1 TOR3d 68 (Trial Ct. 1989), appeal dism'd, Francisco v. Toro, 3 TOR3d 17 (2008), is not necessary. Though its factors also support no constitutional overreach; e.g., blend of powers vs. exclusive to one branch, see id. at 72 (as just analyzed); cooperative venture vs. coercive influence, see id. (Legislature passing preference laws, Executive enforcing them); one branch aiding the other vs. declaring superiority, see id. (TOGO attempting to advance the Legislature's preference laws, not override them). While acknowledging the difficulties alleged by TOGE under TOGO's preference enforcement, the Court also acknowledges TOGE's assertion that this is a new practice, making it too early to apply the "practical effect" of blending powers as shown over time (see id.) for all parties.

This inaction by TOGO—acknowledged by TOGO as a "prescreen" procedure,[7]—is also no longer linked to a final agency action reviewable under Section 1204 of the Gaming Ordinance. Accordingly, Count III is also barred by sovereign immunity.

E. "Ex Parte Norris" does not save Counts I or III

As explained by TOGE in its Opposition to TOGO's Motion to Dismiss, at IV, the Nation's courts have adopted a version of Ex Parte Young, 209 U.S. 123 (1908). We sometimes now call it "*Ex Parte Norris*". See, e.g., In Re. Pet. of the Jud. Branch, 3 TOR3d 105, 117 (Trial Ct. 2010).

Under this doctrine, our courts allow suits "against government officials for prospective relief when the court deemed such officials to be acting outside the bounds of their constitutional authority." Jose v. Toro, 3 TOR3d 31, 33 (Ct. App. 2011). See also In Re. Pet. of the Jud. Branch, 3 TOR3d at 117 ("plaintiffs are free to bring suit against groups of governmental officials, including entire branches of government, for injunctive or declaratory relief if they are acting outside the scope of their constitutional authority and within their official capacities.").

As noted in the above quotes, *Ex Parte Norris* applies to government officials or branches exceeding their *constitutional* authority.[8] As explained in II.C, *supra*, TOGO's consideration of employment preference in licensing activities (Count I) is not barred by the Constitution, but is instead a question of *statutory* authority.

The same applies to TOGO's refusal to accept and process licensing applications (Count III). Doing so is not outside the Executive Branch's broad constitutional authority to "oversee the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham

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[7] See, e.g., Admin. R. Tab 4 p.1 (e-mail from TOGO's Catalina Patronski attaching the Final Decision, describing it as "the Final Decision in regards to the *prescreen* for TOGE applicant") (emphasis added) (internal quotation marks omitted).

[8] See also Tohono O'odham Advocate Program v. Norris, 3 TOR3d 60, 61-62 (Trial Ct. 2005), appeal dism'd, 3 TOR3d 21 (Ct. App. 2008) (sovereign immunity does not bar a declaratory action involving a *constitutional* issue).

Council" T.O. CONST. Art. VII, § (2)(C). Though it is arguable whether it is within the "overall civil regulatory authority over . . . the [Enterprise] *as specifically provided in [the Gaming] Ordinance*" 16 T.O.C. ch. 1, § 401 (emphasis added), that too is a statutory question, not a constitutional question. And that too is a question that the Legislative Council can resolve, if it wishes, by amending its laws without the need to override TOGO's sovereign immunity.

Therefore, *Ex Parte Norris* does not apply here. Whether or not the Gaming Office is acting within its statutory authority, it is not overstepping its constitutional authority.[9]

Accordingly, Count I and Count III remain barred by sovereign immunity and must also be dismissed.

F. Count IV: Violation of the Enterprise's Right to Procedural Due Process

Count IV of the Complaint asserts that the Gaming Office never issued a notice that the Enterprise violated the Gaming Ordinance, the Compact[10] or the Act[11]; that it was required to issue such a notice; and that failure to do so was a violation of the Enterprise's procedural due process rights.

The Complaint does not specify, and the Court does not see, how any of the Gaming Office's actions or inactions here could constitute a violation of the Gaming Ordinance, the Compact or the Act. TOGO did allege a violation of TOGE's Charter,[12] but TOGE's Charter is not included in any of the Gaming Ordinance, the Compact or the Act.

Further, this allegation is solely "a separate ground for the Court to strike down the Final and Amended Final Decisions." (Compl. at 17, ¶ 104.) Because the Final Decision and Amended

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[9] Cf. U.S. v. Yakima Tribal Ct. of Yakima Indian Nation, 794 F.2d 1402, 1406-07 (9th Cir.), superseded sub nom. U.S. v. Yakima Tribal Ct., 806 F.2d 853 (9th Cir. 1986), as discussed in TOGO's Reply, at 14-15, for the 9th Circuit view of State sovereign immunity under U.S. law where a mistake of law by State officers acting in their official capacities is not enough to override sovereign immunity.

[10] Tohono O'odham – Arizona gaming compact, see 16 T.O.C. ch. 1, § 201(f).

[11] Indian Gaming Regulatory Act, see 16 T.O.C. ch. 1, § 201(a).

[12] See Final Decision ("The Gaming Office hereby has determined by this final decision [TOGE] did not comply with the Preference mandate as set forth in the TOGE Charter").

Final Decision have been fully rescinded and are therefore incapable of being struck down, Count IV must also be dismissed.

III. CONCLUSION

The Enterprise's objection to the filing of Catalina Patronski's affidavit in TOGO's Reply is justified. Accordingly, the Court GRANTS the Enterprise's request in the Objection to Affidavit to disregard entirely the affidavit in ruling on the Motion to Dismiss.

The Gaming Office's Final Decision was fully and unconditionally rescinded. Accordingly, Counts II and IV of the Complaint cannot be sustained.

Further, Counts I and III, no longer tethered to a final agency action reviewable by the Court under Section 1204 of the Gaming Ordinance, are barred by sovereign immunity.

Accordingly, the Court ORDERS that Counts I through IV of the Complaint, and this case, are DISMISSED.

This is a final, appealable order.

SO ORDERED this 26th day of October 2022.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

FILED
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TOHONO O'ODHAM JUDICIARY
2022 DEC 20 P 1:15
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

JASON FRANCISCO, Plaintiff v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, Respondent.	Case No.: AV2022-0092 ORDER of DISMISSAL WITH PREJUDICE

On December 14, 2022, the Court held the Status and Pretrial Hearing ordered October 27, 2022. Respondent Tohono O'odham Gaming Office (TOGO) appeared through Tohono O'odham Nation Assistant Attorney General Hue Le and Mr. Reynaldo Saraficio, Director of the TOGO. Plaintiff Jason Francisco did not appear. Plaintiff provided no good cause for his failure to appear.

Of record and under the Court's consideration were Respondent's Motion to Dismiss for Failure to State a Claim, filed November 3, 2022, Respondent's Rule 7 Motion for Judgment on the Pleadings, filed December 12, 2022, and Respondent's Pretrial Statement, filed December 14, 2022. Plaintiff's only filing is his initial complaint filed on August 15, 2022.

PROCEDURAL HISTORY

Mr. Francisco claimed Respondent denied his gaming license without due process. Respondent's Answer, filed October 10, 2022, largely denied Plaintiff's claim and reserved the defense of Plaintiff's failure to state a claim on which relief could be granted.

On November 3, 2022, Respondent moved this Court to dismiss the case because Jason Francisco stated no claim entitling him to relief. Respondent argued the Court could not grant Mr. Francisco relief under any well-pled facts susceptible of proof. Respondent moved for

Judgment on the Pleadings on December 12, 2022, after the time had run for Plaintiff to file any responsive pleading to the motion to dismiss. *See* Tohono O'odham Rules of Court, Section 2, Rules of Civil Procedure (T.O.R. Civ. Pro.). Under T.O.R. Civ. Pro. Rule 7.1(b)(2), the Court grants Respondent's motions, dismissing this matter with prejudice based on the pleadings before the Court.

STANDARD OF REVIEW

This Court must review and decide final administrative decisions with convenient speed. *See* Tohono O'odham Rules of Court, Section 8, Judicial Review of Administrative Decisions (T.O.R. Jud. Rev. Admin. Dec.), Rule 9. As allowed under T.O.R. Civ. Pro., Rule 11(b)(6), this Court may dismiss an action if the Complaint fails to state a claim on which relief can be granted.[1]

This Court will examine the pleadings and the record, to include the administrative proceeding (T.O.R. Jud. Rev. Admin. Dec., Rule 9(d)) and "will assume the truth of all well-pled factual allegations, resolving all reasonable inferences in favor of the Plaintiff in this case".[2] It will not accept as true "allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts . . . or legal conclusions alleged as facts."[3] If an opposing party does not file a responsive memorandum to a properly filed motion, the Court may summarily grant that motion under T.O.R. Civ. Pro., Rule 7(b)(2).

FACTS

This dispute began when the Tohono O'odham Gaming Office revoked Jason Francisco's gaming license and denied renewal of that license on June 14, 2022. *See* Plaintiff's Complaint,

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[1] This Court may apply the Nation's Rules of Civil Procedure and Rules of Appellate Procedure where applicable. *See* T.O.R. Jud. Rev. Admin. Dec., Rule 12.

[2] *See Chadwick Smith v. Tohono O'odham Nation, et al.*, 2021 TORSupp. 75, 77 (T.O. Ct. App., Sept. 10, 2020), citing *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1259 (Ariz. Ct. App. 2005).

[3] *Id.*

filed August 15, 2022, at pages 1-3. Respondent revoked the license and denied renewal finding Plaintiff violated the Standards of Suitability described in the Tohono O'odham Nation ("Nation")'s Gaming Ordinance, Chapter 1, Section 403(n), Section 802, and the Nation's Gaming Office Regulations (TOGOR), Part 1, Section 1.8, Continuing Disclosure. *See* Plaintiff's Complaint at 1, and attached Notice from Gaming Director Brent Garcia, dated June 14, 2022.

Respondent can revoke or deny a gaming license if it finds an applicant fails to meet standards of suitability to hold such a license, which can include a licensee's failure to reveal, in writing, any citation, charge, or arrest within 48 hours of receipt. TOGR, Part 1, Section 1.8. Plaintiff and Respondent both agree that Phoenix Police stopped Plaintiff on December 31, 2021, and cited, charged, and arrested him for exceeding the speed limit by over 20 miles per hour in a business district, one count of driving under the influence of alcohol to the slightest degree, and one count of driving under the influence of alcohol with a blood alcohol concentration of .08 or more. *See* Plaintiff's Complaint at 1-2, Respondent's Answer at 2. Plaintiff and Respondent also agree that Plaintiff did not provide notice of the citation, charge, and arrest for driving under the influence of alcohol (DUI) within 48 hours of receipt. *See* Plaintiff's Complaint at 1-2, Respondent's Answer at 2, Administrative Record at sections 3, 5 and 18.

Plaintiff infers that he had no duty to report the "possible" DUIs until sentencing. *See* Plaintiff's Complaint at 1-2. Respondent argues the regulations require notice of *any* citation, charge, and arrest, which included Respondent's two charged counts of DUI. *See* Respondent's Answer at 3.

Despite Plaintiff's receipt of an Arizona Traffic Ticket and Complaint from the Phoenix Police Department charging him with two counts of DUI and one count of exceeding the speed limit, and his arrest and booking on those charges, he did not report the two criminal charges of DUI to Respondent within 48 hours of receipt, as required. *See* Plaintiff's Complaint at 1-2,

Respondent's Answer at 2-3, Administrative Record at sections 3, 5, and 18. Even after the license renewal investigator, George Traviolia III, specifically asked for the citation, Plaintiff did not provide it, under his own interpretation he did not have to do so until the Court sentenced him for the DUI. *See* Administrative Record at sections 3, 5.2, and 18. Plaintiff recognized that he did not provide the citation or notice of the two DUI charges to License Renewal Investigator George Traviolia III requested until he entered a plea of guilty over six months after police cited, arrested, and charged him. *See* Administrative Record at 5.2.

ANALYSIS

Failure to State a Claim

Respondent moves to dismiss Plaintiff's Complaint arguing it states no claim on which this Court can grant relief. The Court must assume the truth of all well-pled factual allegations and resolve all reasonable inferences in Plaintiff's favor. Doing so, it remains clear that Plaintiff did not provide TGO notice of the Phoenix Police Department's citation, charge, and arrest for driving under the influence of alcohol (DUI) within the 48 hours of receipt required under the regulations governing his gaming license. *See* Plaintiff's Complaint at 1-2, Respondent's Answer at 2, Administrative Record at sections 3, 5, and 18. Plaintiff admits that he did not provide the required information within 48 hours despite Respondent's specific requests. *See* Plaintiff's Complaint at 2-3; Administrative Record at Section 5.

Plaintiff's claim that his arrest, charge, and citation for "possible" DUI did not require notice within the 48 hours of receipt under TOGOR Part 1, Section 1.8, Continuing Disclosure, is an unreasonable conclusion and an inference that this Court will not construe in Plaintiff's favor. The TOGO provided Plaintiff with the process required for renewal of his gaming license but he did not timely give TOGO information necessary to process the renewal. That failure and the TOGO's independent discovery of his DUI, violated standards of suitability required for Plaintiff's licensure.

Despite having a process available to him to properly investigate his background and clear him for license renewal, Plaintiff did not fully participate in that process and by his own actions prevented the renewal of his gaming license. Respondent's discovery of the DUI citations, charges, and arrest long after Plaintiff's required disclosure period for the DUIs, created good cause for the TOGO to find Plaintiff violated standards of suitability required for licensure. Plaintiff has not stated a claim on which this Court can grant his requested relief for renewal of his gaming license and reinstatement of employment.

Judgment on the Pleadings

Plaintiff has not pursued his action and did not engage in the proceedings past the initial hearing held October 26, 2022. Specifically, he has not responded to TOGO's Motion to Dismiss and failed, without good cause, to appear at the Status Hearing scheduled December 14, 2022. The Court issues judgment on the pleadings before it for Plaintiff's failure to state a claim the Court can grant and for judgment on the pleadings under Rule 7.1(b)(2) of the Tohono O'odham Rules of Court, Rules of Civil Procedure, made effective through T.O.R. Jud. Rev. Admin. Dec., Rule 12.

RULING

THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Complaint is dismissed with prejudice. This is a final and appealable Order under Tohono O'odham Rules of Court, Rules of Civil Procedure, Rule 17(c), for purposes of Tohono O'odham Rules of Court, Section 8, Judicial Review of Administrative Decisions, Rule 11.

Dated this December 20, 2022.

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of:	Case No.: AV2022-0116
Susie Siquieros	
DOB: 04/02/1912,	ORDER
DOD: 02/13/1981,	
Decedent	

FILED
2023 JUL 19 A 7:58
Tiffany Mace
JUDICIARY SUPERIOR COURT

On June 28, 2023, the Tohono O'odham Advocate Program civil attorney Suzanne Laursen, appearing for Respondent Jennifer Celaya, filed a Request for Permission to File an Interlocutory Appeal of the Court's June 26, 2023, Request for Clarification. That June 26, 2023, Request asked counsel to clarify two recent filings pending the Court's review.

The first filing, a "Stipulation and Notice of Substitution of Counsel" filed June 14, 2023, had the signature of Tohono O'odham Advocate Program civil attorneys Belinda BreMiller and Suzanne Laursen, and noted Ms. BreMiller was stipulating with Ms. Laursen to substitute as counsel. The second filing, a "Notice of Substitution of Counsel within the Same Office" had Ms. BreMiller's signature alone and noted that she was substituting ". . . within the same office, in the place and stead of Suzanne Laursen, and on behalf of Respondent, Jennifer Celaya pursuant to 16 A.R.S. Rules of Civil Procedure, Rule 5.3(D). . .."

The Court must follow the Nation's laws and its own Rules before looking to Arizona law (*see* Tohono O'odham Rules of Court (T.O.R.), General Rules of Practice, Rule 1). The Nation's Rules of Civil Procedure (T.O.R. Civ. P.), Rule 6, effective May 8, 2023, allows withdrawal and substitution of counsel in T.O.R. Civ. P., Rules 6(a) and (b). Rule 6(d) allows

for Notice of Settlement, like Arizona's Rule 5.3(D), which is the rule Ms. Celaya cited in her second filing. Given the wide difference between substitution of counsel and notice of a settlement, the Court issued its "Request for Clarification" on June 26, 2023, asking that Ms. Celaya explain the relief she wanted in the form directed in T.O.R. Civ. P., Rule 6 that addresses both requests.

For substitution of counsel, T.O.R. Civ. P., Rule 6 requires a formal Order granting substitution or withdrawal of any counsel in civil proceedings provided (1) a written "motion" invokes that Order and sets forth the reasons for the request, identifies the "client's" contact information, and (2) either has the "client's" signature and a proposed order (Rule 6(b)(1)), or, without the client's signature, explains the next hearing dates and times and has the contact information for the client and notice that the client knows of the next hearings or cannot be found to be told the information (Rule 6(b)(2)). In contrast, a Notice of Settlement (Rule 6(d)), requires just a notice to the Court without many of these same formalities.

The Court can, and has, under T.O.R., Rule 1(d) of its General Rules of Practice, interpreted the "Notice" filings as motions, and can also "construe, administer, and employ the rules to secure the just, speedy, and inexpensive determination of every action and proceeding, given Tohono O'odham laws, traditions, customs, and culture." In doing so, the existing filings can help lead the Court toward a point of decision on substitution of counsel, which seemed to be the intended relief in this matter. This was what this Court did at the June 28, 2023, hearing, when it clarified with Ms. BreMiller that settlement was not an intended concern but instead substitution of counsel was wanted. The Court then asked Jennifer Celaya if she agreed with the substitution of counsel and was aware of the hearings. After hearing Jennifer Celaya's answers,

the Court entered its June 29, 2023, Order allowing substitution of counsel under Nation's Rule 6.

Ms. BreMiller asked that the substitution remain flexible to allow the Tohono O'odham Advocate Program to make internal staffing decisions. The Court granted that request under Rule 1(d) of the Nation's General Rules, noting the substitution could apply to future hearings if needed. *See* the Adult Civil Division Order filed in this case on June 29, 2023.

The Nation's Rule 6 requirements for substitution of counsel serves several purposes. First, it serves the interests of judicial economy and efficiency in having all parties present and ready to move forward and contribute at hearings. Second, it lets counsel generally affirm communication with the client that may be critical for case preparation and ethical obligations. Finally, and perhaps most important, this client knowledge and involvement helps with the Tohono O'odham Himdag in encouraging participation and consensus in the important decisions and matters before the Court.

The Tohono O'odham Rules of Court, Rules of Appellate Procedure, direct the Trial Court's ministerial review of a request for interlocutory appeal under Rule 14. Having conducted that review, the Court finds the form of the Request for Permission to File an Interlocutory Appeal is proper and will therefore grant permission for the appeal to move forward.

Jennifer Celaya also filed a "Motion for Stay of Proceedings," in the late afternoon of June 27, 2023, asking to stay the Status Hearing on June 28, 2023. At the time of that hearing, the Court was not aware of that motion because it was being processed with the clerk of court. The June 28, 2023, hearing cannot be stayed, but that hearing ultimately resulted in the requested relief—substitution of counsel—based on the Court's compliance with the T.O.R., Rule 1 and a

few questions that quickly resolved the confusion from the filings. Having received no objection to the request to file a permissive interlocutory appeal and to stay further trial court hearing until the appellate process ends, the Court now enters its decision.

IT IS ORDERED, Ms. Jennifer Celaya's Request for Permission to File an Interlocutory Appeal is **GRANTED**.

IT IS FURTHER ORDERED, the Status Hearing scheduled September 6, 2023, at 10:00 a.m., is **VACATED** and further activity on this case is stayed pending completion of the appellate process and further Order.

Signed July 18, 2023.

Judge David M. Osterfeld

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of:	Case No.: AV2022-0116
Susie Siquieros	
DOB: 04/02/1912,	ORDER
DOD: 02/13/1981,	
Decedent	

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2023 OCT -3 A 7:54
JUDICIARY SERVICE CLERK

On August 22, 2023, the Appellate Court of the Tohono O'odham Nation found there was no appealable issue for it to review, denied Jennifer Celaya's Interlocutory Appeal and the accompanying stay, and remanded the matter to this Court with direction to lift the stay and schedule further proceedings. The Court having allowed ample time for any party to exercise their right to seek reconsideration of that decision under Rule 22 of the Tohono O'odham Rules of Appellate Procedure, and no party filing such request, the Court sets a Status Hearing.

IT IS ORDERED, setting this matter for **Status Hearing, October 20, 2023, 2:00 p.m.**

Signed October 2, 2023.

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2023 APR 14 P 3:20
JUDICIARY SERVICE CLERK

MARY LUCY ZAZUETA, BARNABE CASTRO, DELISA CASTRO, SAYBURA CASTRO, SETH CASTRO, SULAMAE CASTRO, SEBASTIAN CASTRO, SAMONE CASTRO, SOLIGHE CASTRO, SAUL CASTRO, SUDAI CASTRO, SARAYU CASTRO, SABRINA CASTRO, DRACO FRANCISCO, ALONZO MONTESUMA

Plaintiffs

v.

TOHONO O'ODHAM NATION, SELLS DISTRICT COUNCIL, JUAN C. BUENDIA, CHAIRMAN SELLS DISTRICT COUNCIL, BRUCE G. GARCIA, VICE-CHAIRMAN, SELLS DISTRICT COUNCIL, LORI'ELL REYES, MEMBER OF SELLS DISTRICT COUNCIL, SADIE CARMEN, MEMBER SELLS DISTRICT COUNCIL, DOES 1-50 INDIVIDUALS, DOES 51-100 UNKNOWN ENTITIES,

Defendants

Case No.: AV2022-0122

ORDER

The Tohono O'odham Nation ("Nation") and the Sells District Council and its named Members ("Sells District Defendants") filed Motions to Dismiss this action. After considering those motions and all arguments and filed briefs, the Court now grants the Defendants' pending Motions to Dismiss.

ISSUES

Mary Lucy Zazueta, Barnabe Castro, Delisa Castro, Saybura Castro, Seth Castro, Sulamae Castro, Sebastian Castro, Sabrina Castro[1], Samone Castro, Solighe Castro, Saul Castro, Sudai Castro, Sarayu Castro, Sabrina Castro, Draco Francisco, and Alonzo Montesuma sued the Tohono O'odham Nation and the Sells District Defendants on October 7, 2022, asking the Court to

> "[d]eclare that the Nation's banishment law, process, methods, and Sells District and the Sells District Community Council's resolution of banishment violates the Plaintiffs' constitutional rights of due process and equal protection under the Indian Civil Rights Act . . . and the Tohono O'odham Nation's Constitution and statutes. . . Permanently enjoin the Defendants and their officers, agents, servants, employees, attorneys, police officers, and those persons in active concert or participation with them from executing the banishment resolution until the Court Orders otherwise. Award Plaintiff's [sic] their reasonable attorneys' fees, cost, expert fees and costs, witness costs in this action according to proof . . .[2]

The Nation and the Sells District Defendants ask the Court to dismiss Plaintiffs' lawsuit.

The Nation argues that its sovereign immunity bars this Court's jurisdiction and that Plaintiffs have not stated a claim on which the Court can grant relief. The Sells District Defendants argue this Court has no personal and subject-matter jurisdiction over them, they have not been properly served, they are immune from suit, multiple Plaintiffs lack standing to sue them, and the Plaintiffs have not stated a claim on which this Court can grant relief. Plaintiffs ask this Court to exercise its jurisdiction over all Defendants and decide the dispute.

To perfect jurisdiction, Plaintiffs must sue the Defendants in the right court and must serve them with the Complaint and summons within 120 days. Plaintiffs must also have standing to sue and must bring a claim that would grant relief.

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[1] There were two Sabrina Castro's that Plaintiffs initially named in this action. On the Court's questioning at the January 18, 2023, argument, representative Plaintiff Mary Lucy Zazueta told the Court it was error when she named two Sabrina Castro's in the Complaint, intending to name only one. The Court issued an Order noting that clarification on January 25, 2023.

[2] *See* Complaint for Declaratory Relief and Injunction [sic] Relief, filed October 7, 2022.

Plaintiffs have filed no proof of service on any of the Defendants, even over 180 days after filing on October 7, 2022. Service of the Complaint and summons is the essential first step to framing the case and perfecting the filing. *See* Tohono O'odham Code ("T.O.C."), Title 1, Chapter ("Ch.") 2, Section 2102(A). Failure to serve the Complaint and summons requires dismissal without prejudice when requested, as the Sells Defendants have asked here, or when the Court finds it appropriate. *See* T.O.C., Title 6, Ch. 3, Section 2 ("T.O. R. Civ. Pro."), Rule 3(a)(3).

And because Defendants have claimed sovereign immunity from suit, Plaintiffs must show why this Court has jurisdiction. The Nation's courts have treated sovereign immunity as a defense of personal and subject-matter jurisdiction, *see Escalante v. Sells District Council*, 2021 TOR Supp. 36 (T.O. Ct. App., Jan 27, 2017), *Juan v. Juan*, 2 TOR3d 62 (T.O. Tr. Ct., Jan. 27, 2000).

In any lawsuit, when a defendant moves to dismiss for lack of personal and subject-matter jurisdiction, including when a waiver of sovereign immunity is at issue, the plaintiff has the burden to show why the Court should exercise jurisdiction. *See Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994); *United Linings, Inc. v. Vi-Ikam Industries*, 2 TOR3d 39, 43 (T.O. Tr. Ct., Dec. 20, 1998); *Juan v. Juan*, 2 TOR3d 62, 63 (T.O. Tr. Ct., Jan. 27, 2000); *Parraz v. Desert Diamond Casino*, 2 TOR3d 61, 61-62 (T.O. Tr. Crt., Jun. 30, 1999) (dismissing because Plaintiff did not prove the defendant tribe waived sovereign immunity).

Here, Plaintiffs have not successfully pierced the Nation's sovereign immunity and have not shown the Nation waived its immunity from suit. Plaintiffs also have not properly framed their complaint and have failed to allege a claim on which this Court can grant them relief.

FINDINGS OF FACT

On October 7, 2022, Mary Lucy Zazueta, Barnabe Castro, Delisa Castro, Saybura Castro, Seth Castro, Sulamae Castro, Sebastian Castro, Sabrina Castro, Samone Castro, Solighe Castro,

Saul Castro, Sudai Castro, Sarayu Castro, Sabrina Castro, Draco Francisco, and Alonzo Montesuma filed their "Complaint for Declaratory Relief and Injunction [sic] Relief" ("Complaint") in this Court. That filing "commenced" this civil action.[3] *See* T.O. R. Civ. Pro., Rule 2.

Mary Lucy Zazueta verified the Complaint on her behalf and on behalf of all other named Plaintiffs.[4] The Complaint named the Tohono O'odham Nation, Sells District Council, and its officers Juan C. Buendia (Chairman of the Sells District Council), Bruce G. Garcia (Vice-Chairman), and Lori'ell Reyes and Sadie Carmen (Members of the Sells District Council), Does 1-50 Individuals, and Does 51-100 Unknown Entities, as defendants ("Defendants").

Also, on October 7, 2022, the Civil Division Clerk issued Mary Lucy Zazueta a summons for each named Defendant. Mary Lucy Zazueta's duty to serve the summons and a conformed copy of the pleading on each named Defendant ran for the next 120 days. *See* T.O. R. Civ. Pro.,

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[3] At the outset of this action, Plaintiffs named attorney John Harris as their counsel and he appeared at the November 17, 2022, initial hearing requesting to sit at counsel's table and advocate for Plaintiffs. But John Harris is not admitted to practice law in this Court. On November 17, 2022, the Court told Mr. Harris he was not admitted to practice before the Court and asked him to sit in the audience of the courtroom. Although Mr. Harris then asked to act as "advisory counsel" for Mary Lucy Zazueta and remain at counsel's table, he still had no authority to practice law before the Court and the Court asked him to remove himself to the gallery of the courtroom. The Court is aware that Mr. Harris has been helping Plaintiffs in this case and that most filings since November 17, 2022, have named him as "Advisory Counsel." The Court has never restricted Plaintiffs from working with their counsel of choice, has never rejected any filing based on Mr. Harris's identification as advisory counsel, and would of course welcome admitted counsel at any hearing. But when counsel appears in this Court, interrupts court hearings, and refuses to stop the interruption, as Mr. Harris did on November 17, 2022, the Court must maintain order and will remove such counsel from the courtroom for a brief period. *See* Court Order filed November 22, 2022. The Court has not told Plaintiffs or Mr. Harris that he cannot act as Plaintiffs' counsel, contrary to claims in Plaintiffs' objection filed January 13, 2023. (*See* Notice of Submission of Plaintiffs' Responses and Opposition to Motions to Dismiss on the Pleadings Only and Objection to Violations of Plaintiffs' Right to Counsel, filed January 13, 2023, "c/o Advisory Counsel, John Harris.) The Court clearly, however, has the power and responsibility to oversee the practice of law before it, to admit and deny admission to practice in the Court, and to maintain order in its Court. *See* TOHONO O'ODHAM NATION CONSTITUTION, Article VIII, Section 10(d) and Tohono O'odham Rules of Court, Section 13, Rules Governing Admission to Practice in the Tohono O'odham Courts, Rule 611 of the Arizona Rules of Evidence which this Court follows by default, *see* T.O.C., Title 6, Chapter 3, Section 1, Rule 1(c). Nothing prevents Plaintiffs, either themselves or through Mr. Harris, from hiring admitted counsel to help them. The Court even instructed Plaintiffs and Mr. Harris of this option at the November 17, 2022, hearing and Plaintiffs, through Mary Zazueta, stated they understood. Attorney Sonia Martinez, admitted to practice law in this Court, filed her notice of appearance for Plaintiffs on March 13, 2023.

[4] The parties agreed at the January 18, 2023, argument that Samone Castro, Solighe Castro, Saul Castro, Sudai Castro, Sarayu Castro, and Draco Francisco were never banished from Sells District.

Rule 3(a)(3). The Rules authorize various forms of service—to include personal service, service by mail, and publication—but the Plaintiff must complete their chosen method within 120 days from filing. *See* T.O. R. Civ. Pro., Rule 3(d).

There are specific methods required for serving the Nation and Sells District. *See* T.O. R. Civ. Pro., Rules 3.1(e)(1) and (2). These include delivering a copy of the pleading and summons to the Nation's Attorney General as required for suits against the Nation (*see* Rule 3.1(e)(1)) and delivering a copy of the summons and pleading to legal counsel for a District, such as the Sells District Council, (*see* Rule 3.1(e)(2)). When Plaintiffs question the constitutionality of Tohono O'odham law, rule, regulation, resolution, or ordinance, as they claim here, *see* Complaint at 15-18, they must not only serve the Nation's Attorney General, but must also serve the Legislative Attorney, *see* T.O. R. Civ. Pro., Rule 4(d). Plaintiffs have filed no notice of service on the Nation's Attorney General and Legislative Attorney.

On November 30, 2022, the Sells District Defendants filed their Motion to Dismiss arguing this Court has no personal and subject-matter jurisdiction over them, they have not been properly served, they are immune from suit, multiple Plaintiffs[5] lack standing to sue them, and the Plaintiffs have not stated a claim on which the Court can grant relief. The Sells District Defendants have repeated these defenses and arguments in all of their subsequent filings and at each hearing held in this case. Over 180 days after Plaintiffs filed their Complaint, they have not served Defendants and have not overcome the Defendants' immunity from lawsuit.

The Court even prompted argument on Plaintiffs' lack of service of process on Defendants at the January 18, 2023, hearing to learn whether Plaintiff planned to cure the issue or whether the parties would agree to a cure. The Plaintiffs offered no cure. And despite having

[5] Samone Castro, Solighe Castro, Saul Castro, Sudai Castro, Sarayu Castro, and Draco Francisco were never banished from Sells District.

at least 18 more days after that hearing to serve Defendants, Plaintiffs served no notice and did not ask for more time to serve.

Although the Nation, unlike the Sells District Defendants, has not specifically asked for dismissal for lack of service, it has made a special appearance at all hearings, has objected to the Court's jurisdiction, has preserved all jurisdictional defenses, and has not filed an Answer to Plaintiffs' Complaint. The Nation has asked for dismissal based on its sovereign immunity and on Plaintiffs' failure to state a claim on which the Court can grant relief. (*See* Tohono O'odham Nation Motion to Dismiss for Failure to State a Claim and Sovereign Immunity, generally, filed October 21, 2022.)

The Nation argues that because it had no part in drafting, passing, or enforcing the Sells District banishment process, or the resulting resolution banishing several Plaintiffs from Sells District, it did nothing to deprive Plaintiffs of any protected liberty or property interest. The Nation claims absolute sovereign immunity from "suit, court process, or liability" under T.O.C. Title 1, Ch. 2, § 2101(A). (*See* Nation's Motion to Dismiss for Failure to State a Claim and Sovereign Immunity, at 3, filed October 21, 2022.)

The record also shows Plaintiffs have alleged no official act of the Tohono O'odham Legislative Council, the Nation's Government, or the Tohono O'odham Nation that waived or authorized waiver of the Nation's or the Sells District's sovereign immunity. Plaintiffs identify no law, rule, or regulation of the Nation or its Government that resulted in the Sells District's decision to banish them. Plaintiffs point to the 1997 Removal and Exclusion of Non-members Code ("1997 Code") as the Nation's law they challenge. But that law applies only to the banishment of non-members of the Nation—not District member banishments.

The facts show that the Sells District Council acted under its own authority, independent from the Legislative Council and Nation. The Nation's Constitution, at Article IX § 5, states "each District shall govern itself in matters of local concern," and the *Escalante* Court affirmed

the Sells District's sole authority to banish Nation Members, authority that pre-exists the Nation's Constitution, *see Escalante* at 45.

ANALYSIS

I. *Service of Process*

The Constitution of the Tohono O'odham Nation grants this Court the jurisdictional authority to hear all cases and matters in law and equity arising under the Nation's Constitution, under the laws and ordinances of, or applicable to, the Nation, and under the Nation's customs. *See* TOHONO O'ODHAM NATION CONSTITUTION (Nation's Constitution), Article VIII, Section 2; and T.O.C., Title 6, Ch. 1, § 1104. That jurisdiction reaches into all lands described within Article I of the Nation's Constitution and extends to all people and activities carried on within the Nation's boundaries, as consistent with federal law. *See* Nation's Constitution, Article I.

The people and activities involved here are entirely within the Nation's boundaries. Plaintiffs must serve the Defendants notice of the claim showing why they are subject to this Court's jurisdiction. Under the Nation's law, the Plaintiffs must serve their Complaint and summons on the Defendants within 120 days of filing their Complaint. *See* T.O. R. Civ. Pro., Rules 3(a)(3) and (e). Failure to serve the Defendants can result in dismissal on motion or by the Court if the Plaintiffs fail to correct the problem. *Id.*

The Rules authorize various forms of service, to include personal service, service by mail, and service by publication. Whichever method is used, the plaintiff must complete service within 120 days from filing. *See* T.O. R. Civ. Pro., Rules 3(d) and (e). And when a plaintiff questions the constitutionality of a Tohono O'odham law, rule, regulation, resolution, or ordinance, as here, *see* Complaint at 15-18, they must not only serve the Nation's Attorney General, but also the Legislative Attorney, *see* T.O. R. Civ. Pro., Rule 4(d). Plaintiffs have not shown they have served any notice on the Nation's Legislative Attorney, and while that failure

does not forfeit their claim, *id.*, it is not a properly framed lawsuit that would be an exception to the Nation's absolute sovereign immunity from suit, *see* 1 T.O.C. Ch. 2, § 2102(A).

Because Plaintiffs did not serve the Defendants, have requested no extension of time to do so, and have shown no cause that survives the Sells District Defendants' Motion to Dismiss for lack of service of process under Rule 3(e), the Court grants dismissal, without prejudice, as to the Defendants. And because the Nation did not specifically demand dismissal for lack of service under Rule 3(e), this Court also examines the Nation's Motion to Dismiss based on its sovereign immunity from suit.

II. ***Sovereign Immunity***

a. General overview

The defense of sovereign immunity can challenge both personal and subject-matter jurisdiction. As a sovereign power, the Nation inherently has common law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1987). Tohono O'odham case law has long recognized the Nation's sovereign immunity. *See, e.g., Joaquin v. Goodnight*, 1 TOR3d 29 (T.O. Ct. App. 1991); *Evans v. Nation*, 2 TOR3d 35 (T.O. Tr. Crt. 1998). This immunity "is an essential element of tribal sovereignty and self-determination." *Escalante* at 4.

The Nation's laws declare the scope of its sovereign immunity and the fact it protects its officers, employees, and agents. *See* 1 T.O.C. Ch. 2, Section 2101(A). That shield is separately given, without diminishment, to the Nation's Districts, enterprises, entities, officials, employees, and agents of those entities. *See* 1 T.O.C. Ch. 2, Section 2101(B). Section 2101(C) describes how that shield may be lifted for all matters covered under Sections 2101(A) and (B). Waivers can cover virtually anything two parties negotiate, provided they follow Section 2101(C)'s guidance, as discussed below.

There are three ways to pierce this broad immunity from a lawsuit. First, if against the Nation, the waiver must come through an official act of the Nation's Legislative Council that

expressly waives or allows a waiver limited to its terms. *Id.* at Section 2101(C). Second, if against a Nation's District, enterprise, or entity, the waiver must come through a resolution or other official act of the Tohono O'odham Legislative Council that expressly waives or allows a waiver limited to its terms *and* is expressly granted in a "separate written contract or other duly approved writing." *Id.* Third, sovereign immunity does not prevent "properly framed lawsuits brought against the Nation exclusively in the Tohono O'odham Judicial Court and solely for injunctive and declaratory relief to determine the validity of a law, rule, or regulation of the Nation." *See* 1 T.O.C. Ch. 2, at Section 2102 (A) ("Section 2102(A)").

Here, and first, Plaintiffs have not alleged or shown a resolution or official act of the Nation's Legislative Council expressly waiving the Nation's or any of the government branches' sovereign immunity. No such waiver is found in any part of this record and the Court will not imply one.

Second, Plaintiffs have shown no express waiver of the Sells District Council's immunity or that of its officials, employees, and agents. Such an express waiver would come through an act of the Nation's Legislative Council expressly granting such waiver *and* a separate writing recognizing that waiver. *See* Section 2101(B) -(C). Plaintiffs have shown no such waiver and this Court will not imply one under this exception.

Third, Plaintiffs have not filed a "properly framed lawsuit" against the Nation for injunctive and declaratory relief to determine the validity of a law, rule, or regulation of the Nation. *Id.* Plaintiffs' complaint is not properly framed, asks for more than injunctive and declaratory relief, and the challenged Sells District banishment is not a law of the Nation.

b. The Escalante decision does not waive the Nation's immunity here.

But first, perhaps in recognition that there are no express waivers of the Nation's or Sells District's immunity from suit to be found, Plaintiffs imply there is a caselaw waiver of sovereign immunity. Plaintiffs point to *Escalante* and argue, without support, that decision somehow

declared the Tohono O'odham "government" must oversee the "archaic" (as they call it) custom of District banishments and that District banishment resolutions "fall within the exception to sovereign immunity recognized in Section 2102(A)." (*See* Opposition to Motion to Dismiss of Tohono O'odham Nation ("Opposition to Nation's MTD") at 4, 6, 7, 9, filed December 16, 2022.) Plaintiffs cite Section 1.9 of the Nation's Removal and Exclusion of Nonmembers Code, enacted in 1997 ("1997 Code"), that reads "[n]othing in this ordinance shall be construed to prohibit actions to banish tribal Members residing within any district of the Tohono O'odham Nation based on the custom and tradition of the district." They argue that sentence somehow made each District's banishment process a law of the Nation. *Id.* at 7. Plaintiffs even state their "complaint is a constitutional challenge to the statutory Banishment Code itself" because many of its provisions are not repeated or followed in the Sells District's customary and traditional banishment process. (*See* Complaint at 9, 16 and 18; Opposition to Motion to Dismiss of Sells Community District at 7-8, filed December 16, 2022; Opposition to Motion to Dismiss of Tohono O'odham Nation, at 7-8, filed December 16, 2022.).

Plaintiffs quixotically argue that the Nation's Legislative Council incorporated District Council banishments into the Nation's law when it expressly excluded them under Section 1.9 of the 1997 Code. *See* Complaint at 9. This tortured argument is their reasoning that the Sells District banishment violated the Nation's Constitution, the Indian Civil Rights Act, and waived both the Nation's and Sells District Defendants' immunity from suit.[6]

But Plaintiffs' arguments are a wide misreading of *Escalante*. Plaintiffs alleged no reasonable inference that the 1997 Code applies to the Sells District's banishment process, leaving unanswered the reason they sued the Nation and why they believe the 1997 Code was an express waiver of the Nation's immunity under the facts.

[6] Presumably under Section 2102(A).

Escalante was strictly cabined to the "circumstances of [that] case." *See Escalante* at 41. The Nation was not even a named party there. *Escalante* addressed only the Sells District's banishment under the specific facts of that case—it involved no exercise of the Nation's non-member banishment power and would have no application here to explain why the Nation would be responsible for the Sells District's exercise of its customary and traditional power to banish Nation Members.

Specifically, the *Escalante* Court held "the only issue in **this appeal** is whether sovereign immunity bars the courts of the Tohono O'odham Nation from reviewing the **permanent** banishment orders against Appellants to determine **whether Appellants** received due process of law." *Id.* at 39 (emphasis added). The *Escalante* Court reviewed the Nation's 2010 codification of the doctrine of sovereign immunity and concluded that the Nation and each of the 11 Districts are immune from lawsuit without an **express and specific** waiver of that immunity. *Id.* at 39-40, citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (emphasis added). *Escalante* also held that under the facts of **that** case, "the Sells District Council had not *expressly* waived sovereign immunity from suit arising out of the banishment proceedings." *See Escalante* at 40 (emphasis added).

Ultimately, the *Escalante* Court looked at the applicable existing law then in place—which has not changed—and under the circumstances of that case, read into Section 2102(A)'s language of "law, rule, or regulation" of the Nation an implicit "codification of the established principle that an injunctive lawsuit challenging the constitutionality of tribal government action is not barred by sovereign immunity." *Escalante* at 41-42. The *Escalante* Court unfortunately left undefined its generalized term "tribal government action," but other applicable law makes it clear.

Tribal government action is the action of one or all of the three branches of the Nation's Government, not the action of a District. *See* T.O. Const., Art. IV. The Legislative Council's

1997 Removal and Exclusion of Non-members Code, an act of the Nation's Government to banish non-members, states one should not construe or apply that law to each District's customary and traditional power to banish members. *See* 4 T.O.C. Ch. 2, § 1.9. This recognition respects that the Legislative Council's non-member banishment power differs completely from each District's member banishment power, and one does not interfere with the other. *See* Nation's Constitution, and compare a District's Article IX, Section 5 power to banish members with the Legislative Council's Article VI, Section 1(c)(7) power to banish non-Members.

But Plaintiffs want this Court to conflate these two powers and characterize the Sells District's customary and traditional power of banishment as a law of the Nation, requiring the Nation's involvement in a District's pure exercise of its custom and tradition. This, again, is a wide misreading of *Escalante*. *See Escalante* at 43.

The *Escalante* Court wrote that in the facts and circumstances of the case before it, "the Sells District was exercising the banishment power recognized in Section 1.9 [of the 1997 Code], indisputably a 'law' of the Nation." The focus was on the banishment power generally, looking to the most available example, the 1997 Code, as the law of the Nation, **not** that the Sells District actions were the law of the Nation. Naturally, *Escalante* later focused on other precedential authority[7] to decide *Escalante*, *not* the 1997 Code.

Regardless, were any court to consider that reference a holding, it would be limited to the unique facts of *Escalante* as that Court said several times. *See Escalante* at 41-45. When interpreting statutes, the Court must presume that the legislature says in a statute what it means and means what it says. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). And when the words are unambiguous, the inquiry ends. *Id.* Moreover, the Court must avoid interpretations of statutes that would render them unconstitutional. *See Public Citizen v. United*

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[7] *Ex Parte Norris*. *See Escalante* at 7; *Ex Parte Young*, 209 U.S. 123, 154 (1908); *Jose v. Toro* 3 TOR3d 31 (T.O. Ct. App., Feb. 6, 1992); *Tohono O'odham Advoc. Program v. Norris*, 3 TOR3d 60 (T.O. Tr. Ct., Apr. 25, 2005); *Throssell v. Throssell*, 1 TOR 3d 34, 39-40 (T.O. Ct. App., 1992).

States Dep't of Justice, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

As applied here, the 1997 Code is intended to govern only non-member banishments, leaving member banishments to District Councils to process under their customs and tradition. The 1997 Code makes clear that Districts can only banish Nation Members—the Legislative Council may banish non-members. If this Court were to improperly hold otherwise and confuse these issues for the District Council as Plaintffs request (*see* Complaint at 16-17), it would invent conflict between two sovereign entities and render their duties unconstitutional. *See* Nation's Constitution, and compare the District's Article IX, Section 5 power to banish Members with the Legislative Council's Article VI, Section 1(c)(7) power to banish non-members. Those separate duties should remain separate, and this Court should not, and will not, create a conflict between them regardless of Plaintiffs' request.

c. The Nation's Constitution clarifies Escalante's limited effect.

The Nation's supreme law is expressed through its Constitution. *See* T.O. Const. Art. VIII, Section 10(b) (empowering the Nation's courts to declare the Nation's laws void if they are not in agreement with the Constitution). There, the Nation's "Government" is defined as the three independent branches—the Legislative, Executive, and Judicial. *See* T.O. Const., Art. IV. Districts and their councils are identified separately from the Nation's Government and, likewise, are separately empowered. *See* T.O. Const., Art. IX. Districts govern themselves in matters of local concern. *Id.* at Section 5. The central part of local concern is the power to banish Members from the District. *See Escalante* at 45. This power of banishment predates the Constitution and is part of the unique and distinctive cultural traditions that must be followed unless otherwise declared through express words. *See Id.*; T.O. Const. Preamble and at Art. XIX, Section 2; *see also Escalante* at 45.

While Districts give activity reports to the Legislative Council, they do so to provide a "responsive form of government." *See* T.O. Const., Preamble. The Nation's Constitution takes great care to distinguish the Nation's Government from the Nation[8] and debunks Plaintiffs' argument that the Legislative Council, clearly a part of the Nation's Government, must answer for the actions and decisions of Sells District and its Council. (*See* Complaint, generally, *see also* Opposition to Motion to Dismiss of Sells Community District, at 3, filed December 16, 2022.) It is natural that many will confuse the distinction between the Nation's Government and the Nation and generally refer to all as the "government," but the distinction in the Nation's Constitution is clear.

The *Escalante* decision does not contain any analysis or apply existing law in support of Plaintiffs' argument that the Nation must answer for the Sells District's Member banishment decisions. Instead, the Nation's Constitution draws a clear distinction on the Legislative Council's right to banish non-members, *see* Article VI, § 1(c)(7), and the Districts' separate and independent right to govern themselves in matters of local concern, *see* Article IX, § 5, expressly including District member banishments through longstanding custom and tradition that predates the Nation's Constitution. *See Escalante* at 45.

The true focus for *Escalante* here is that the Nation's Due Process Clause applies to "the actions of District Councils" and "judicial review must be available to ensure that Member banishment proceedings afford Members due process of law guaranteed under the Tohono O'odham Constitution." *See Escalante* at 44; *see also* T.O. Const., Art. III, § 1. This is based on the fundamental guarantees that any deprivation of liberty or property can be weighed in the

[8] The Nation's Constitution states "the Nation and its government" in each of the first Sections of Article 1, making clear the people's intent to treat them differently. The Constitution continues to prove this distinction in Article IV, where it describes the Government as three branches-executive, legislative, and judicial—and describes the Nation as consisting of 11 Districts, in Article IX, Sec. 1.

Nation's Judicial branch, part of its Government as defined in its Constitution. T.O. Const., Art. III, § 1; Art. VIII, § 1, §§ 10(a) & (b).

In reaching that decision, the *Escalante* Court relied on the common law doctrine of *Ex Parte Norris*. *See Escalante* at 7; *Ex Parte Young*, 209 U.S. 123, 154 (1908); *Jose v. Toro* 3 TOR3d 31 (T.O. Ct. App., Feb. 6, 1992); *Tohono O'odham Advoc. Program v. Norris*, 3 TOR3d 60 (T.O. Tr. Ct., Apr. 25, 2005). The *Ex Parte Norris* doctrine recognizes the Nation's common law practice of allowing suits for injunctive relief against officers of the Nation or a District, either individually or as a group, when they have acted outside of their constitutional authority. *See In Re Petition of the Judicial Branch*, 3 TOR3d 105, 115 (T.O. Ct. App., Oct. 22, 2010).

This Court can decide complaints directed at officials in another branch of the Nation's Government (Executive, Legislative, or District), including District officials when necessary, to prevent a violation of due process and restore rights to a Nation's Member those official actions unjustly affected. *See Throssell v. Throssell*, 1 TOR3d 34, 39-40 (T.O. Ct. App., 1992); *In re Petition of the Judicial Branch*, 3 TOR3d at 116-18. This authority exists when a proper waiver of sovereign immunity is found either through an express grant in a "separate written contract or other duly approved writing" under Section 2101(C), or a properly framed lawsuit brought against the Nation seeking "injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation" under Section 2102(A). *See Escalante* at 44-45. The *Escalante* Court felt compelled to allow an implicit waiver of District immunity to examine District banishments that could (1) result in incarceration as punishment for a violation, (2) run permanent or long-term, and (3) inflict significant harm on the banished Member. *Id.* at 44.

III. Plaintiffs' failure to state a claim

Yet, even when Plaintiffs are trying to follow this line of precedent and argue the Nation must answer for the Sells District Defendants' banishment decisions, if the Court construes their pleadings and argument in Plaintiffs' favor, they still fail to show the Nation had any

involvement in the Sells District's banishment decisions. Plaintiffs' Complaint emphasizes this when it declares it is a "single Cause [sic] of action for Declaratory Relief" that is a "constitutional challenge to the statutory Banishment Code itself" and the Sells Community's "use" of that Code when it banished the Plaintiffs. *See* Opposition to Nation's MTD, at 7, 8, 9.

Plaintiffs do not allege the Nation did anything that violated their rights but only that it passed a non-member banishment law, the 1997 Code, that expressly exempts that law's application to District Member banishments. Yet Plaintiffs ask this Court to "declare the Nation's banishment law, process, methods" violate "each and all of their Constitutional rights of due process and equal protection guaranteed" under the Nation's Constitution, the Indian Civil Rights Act, and statutes included in their Complaint. *See* Complaint at 18. It bears repeating that the Plaintiffs are Nation's Members, and the 1997 Code does not apply to them. Plaintiffs also fail to show how the Nation had any involvement in their banishment, let alone how the 1997 Code violated their rights.

Even when the Court "assumes the truth of all well-plead factual allegations and resolves all reasonable inferences in favor of the non-moving party," *see Chadwick Smith v. Tohono O'odham Nation et al.*, 2021 TOR Supp. 165, 167 (March 29, 2019), the Court will not find a valid claim in conclusory statements, conclusions of law, inferences, or deductions not necessarily implied by well-pled facts. *Id.* The Court also will not assume or imply a waiver of the Nation's immunity.

Considering the facts set forth above, and even assuming the truth of all well-pled factual allegations with reasonable inferences resolved in Plaintiffs' favor, there is no basis to show why the Nation is responsible, at all, for Plaintiffs' alleged claims. The Court cannot construe Plaintiffs' claims to substantiate jurisdiction against the Nation and will not imply a basis to sustain jurisdiction against the Nation.

Instead, the facts are simple. The Nation's Districts have independent power to banish Nation Members and that power was not diminished under the 1997 Code. Even *Escalante* did not diminish that power, but only gave the right of judicial review for its exercise in limited circumstances. By no means did *Escalante* speak to any implicit or outright responsibility the Nation would have for District banishments. Instead, the *Escalante* Court *was careful to limit that exception exclusive to the narrowly tailored issue of District banishment of Nation Members and largely the specific facts of the banishment affecting the parties in that case*. Plaintiffs simply have failed to state any claim against the Nation that would grant them relief.

IV. Plaintiffs' failure to properly frame their lawsuit

But even if one could credibly argue the Nation had some responsibility for a District's banishment of a Nation's Member, to invoke the waiver of sovereign immunity under Section 2102(A), Plaintiffs must properly frame their claim to support a waiver of sovereign immunity under Section 2102(A). *See* 1 T.O.C. § 2102(A). That law allows a waiver of the Nation's sovereign immunity only when the plaintiff requests injunctive or declaratory relief in a properly framed claim. *Id.*

Plaintiffs did not properly frame their claim. Plaintiffs have sued in the name of five individuals they know were not banished and would have no standing as Plaintiffs.[9] And although Plaintiffs have sued the Nation and have argued the 1997 Code violates the Nation's Constitution, laws and the Indian Civil Rights Act, *see* Complaint at 16-18, Plaintiffs have not served notice on the Legislative Council's attorney as required when questioning the constitutionality of a Tohono O'odham law, rule, regulation, resolution, or ordinance, as here, *see* Complaint at 15-18. They must not only serve the Nation's Attorney General, but also the Legislative Attorney, *see* T.O. R. Civ. Pro., Rule 4(d), and they have failed to do either.

[9] Again, Plaintiffs agreed on January 18, 2023, that Samone Castro, Solighe Castro, Saul Castro, Sudai Castro, Sarayu Castro, and Draco Francisco were never banished from Sells District.

Finally, Plaintiffs have asked for attorneys' fees, costs, expert fees and costs, and witness costs. *See* Plaintiffs' Complaint filed October 7, 2022, on page 18. A properly framed complaint should only include claims for declaratory and injunctive relief, not damages or costs.[10] *See* 1 T.O.C. § 2102(A); *Escalante* at 41.

THEREFORE, because the Plaintiffs have not served notice on any Defendant, they have shown no reason the Court can exercise personal or subject-matter jurisdiction over the Nation, they have not properly framed their lawsuit, and there is no claim alleged on which this Court can grant their requested relief against the Nation, this Court declines to exercise jurisdiction over the Defendants and dismisses the action without prejudice. Plaintiffs may seek to refile their action under the Nation's laws and this Court's procedure. No further matters remain pending, this judgment is final and entered under T.O. R. Civ. Pro., Rule 17(c).

Signed April 14, 2023.

Judge David M. Osterfeld

[10] In *Escalante*, the Court recognized that even though Appellant had initially made a claim for damages, the later amended complaints removed that claim and only sought declaratory and injunctive relief. Here, Plaintiffs have not filed such an amended claim or sought to modify their claims to purely seek injunctive and declaratory relief.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In Re: TOHONO O'ODHAM NATION HEALTH CARE, a program of the Tohono O'odham Nation, as recipient of an Administrative Subpoena served upon it by the Arizona State Board of Nursing In the Matter of the Investigation Action Against Registered Nurse Shannon-Elizabeth Ibrahim	No. AV2022-0162 Ref: AZ Board Case No. 2021060006 ORDER (by Stipulation)

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2022 DEC 22 A 8:49
JUDICIARY SERVICE CLERK

The Tohono O'odham Nation Health Care ("TONHC"), through Assistant Attorney General Lauren Berdow of the Tohono O'odham Nation Office of the Attorney General, and the Arizona State Board of Nursing (the "Board"), through its Executive Director Joey Ridenour, ask this Court to order TONHC to produce and provide the Board with medical records for three specific TONHC patients. The purpose of the stipulation and production is to further the Board's investigation of Registered Nurse Shannon-Elizabeth Ibrahim ("Nurse"). The Board issued its own subpoena deuces tecum trying to direct TONHC to produce the records.

The Tohono O'odham Nation ("Nation") and its programs are not subject to the jurisdiction of the State of Arizona or its regulatory boards. Too, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is specifically designed to limit disclosure of medical records. However, the HIPAA expressly allows disclosure of medical records to a health oversight agency for investigations such as the one underway for Nurse. *See* 45 C.F.R. §164.512(d)(1). Further, the high priority and high risk investigation affects and serves the interests of public health and public safety. The parties stipulate to the Board's subpoena for production of the requested records for the three specific patients in the interests of public health and public safety to further what they label a "high priority/high risk investigation". This Court has the authority to order production of the requested records.

THEREFORE, IT IS HEREBY ORDERED,

1. This Court has the inherent authority to review requests from foreign jurisdictions for the production of documents and recognition of subpoenas.

See Constitution of the Tohono O'odham Nation, Article VIII, Section 10. The Nation has further described that power under Title 6, Article, Chapter 1, Section 1104, and the Court has put rules into practice for subpoenas in its Rules of Civil Procedure, Rule 15.

2. Recognizing the stipulated request of the parties and the Board's submission to this Court's authority, this Court domesticates the Board's three subpoenas under its inherent power.

3. The TONHC is ordered to produce the medical records for three patients, M.M., L.W., and F.E., but TONHC must redact the names, dates of birth, and social security numbers from the records for these patients before providing them to the Board.

4. The Board will contact none of the three patients without first telling TONHC.

5. The Board will limit its disclosure of any records provided under this Order to only licensing and review issues within its authority under Arizona licensing laws applicable to Nurse within the Board's investigation.

6. Except for Nurse, the Board will not distribute, make copies, or reveal any TONHC medical records to any third party without TONHC's advance written agreement.

7. The Board specifically affirms and agrees that all documents TONHC provides shall be treated as confidential and are not open for public inspection within the meaning of Arizona Revised Statute §§ 32-1664(M) and (N) and in compliance with HIPAA and the Nation's laws.

8. Nothing within this Order or the TONHC's agreement and stipulation for its issuance waives the sovereign immunity of the Nation, the TONHC, this Court and the protection their employees, agents, executives, and assigns have when acting within their authority.

Dated December 21, 2022.

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Verna Ann Miguel DOB: 11/22/1956, DOD: 03/23/2020, Decedent	Case No.: AV2022-0165 ORDER

Tiffany Mase JUDICIARY SERVICE CENTER
FILED TOHONO O'ODHAM NATION 2023 JUL 19 A 7:58

On June 28, 2023, the Tohono O'odham Advocate Program civil attorney Suzanne Laursen, appearing for Petitioner Leatrice Escalante, filed a Request for Permission to File an Interlocutory Appeal of the Court's June 26, 2023, Request for Clarification. That June 26, 2023, Request asked counsel to clarify two recent filings pending the Court's review.

The first filing, a "Stipulation and Notice of Substitution of Counsel" filed June 14, 2023, had the signature of Tohono O'odham Advocate Program civil attorneys Belinda BreMiller and Suzanne Laursen, and noted Ms. BreMiller was stipulating with Ms. Laursen to substitute as counsel. The second filing, a "Notice of Substitution of Counsel within the Same Office" had Ms. BreMiller's signature alone and noted that she was substituting ". . . within the same office in the place and stead of Suzanne Laursen, also of Tohono O'odham Advocate Program on behalf of Petitioner, Leatrice Escalante pursuant to 16 A.R.S. Rules of Civil Procedure, Rule 5.3(D)."

The Court must follow the Nation's laws and its own Rules before looking to Arizona law (*see* Tohono O'odham Rules of Court (T.O.R.), General Rules of Practice, Rule 1). The Nation's Rules of Civil Procedure (T.O.R. Civ. P.) Rule 6, effective May 8, 2023, allows

withdrawal and substitution of counsel in T.O.R. Civ. P., Rules 6(a) and (b). Rule 6(d) allows for Notice of Settlement, like Arizona's Rule 5.3(D), which is the rule Ms. Escalante cited in her second filing. Given the wide difference between substitution of counsel and notice of a settlement, the Court issued its "Request for Clarification" on June 26, 2023, asking that Ms. Escalante explain the relief she wanted in the form directed in T.O.R. Civ. P., Rule 6 that addresses both requests.

For substitution of counsel, T.O.R. Civ. P., Rule 6 requires a formal Order granting substitution or withdrawal of any counsel in civil proceedings provided (1) a written "motion" invokes that Order and sets forth the reasons for the request, identifies the "client's" contact information, and (2) either has the "client's" signature and a proposed order (Rule 6(b)(1)), or, without the client's signature, explains the next hearing dates and times and has the contact information for the client and notice that the client knows of the next hearings or cannot be found to be told the information (Rule 6(b)(2)). In contrast, a Notice of Settlement (Rule 6(d)), requires a notice to the Court without many of these same formalities.

The Court can, and has, under T.O.R., Rule 1(d) of its General Rules of Practice, interpreted the "Notice" filings as motions, and can also "construe, administer, and employ the rules to secure the just, speedy, and inexpensive determination of every action and proceeding, given Tohono O'odham laws, traditions, customs, and culture." In doing so, the existing filings can help lead the Court toward a point of decision on substitution of counsel, which seemed to be the intended relief in this matter.

The T.O.R. Civ. P., Rule 6 requirements for substitution of counsel serves several purposes. First, it serves the interests of judicial economy and efficiency in having all parties present and ready to move forward and contribute at hearings. Second, it lets counsel generally

affirm communication with the client that may be critical for case preparation and ethical obligations. Finally, and perhaps most important, this client knowledge and involvement helps with the Tohono O'odham Himdag in encouraging participation and consensus in the important decisions and matters before the Court.

The Tohono O'odham Rules of Court, Rules of Appellate Procedure, direct the Trial Court's ministerial review of a request for interlocutory appeal under Rule 14. Having conducted that review, the Court finds the form of the Request for Permission to File an Interlocutory Appeal is proper and will therefore grant permission for the appeal to move forward.

Leatrice Escalante has also filed a "Motion for Stay of Proceedings," asking that the Court stay the trial court proceedings during the appellate process. This would include vacating the hearing scheduled July 19, 2023, at 1:30 p.m., to be reset once the Court of Appeals matters end. The Court granted the stay under separate order on July 18, 2023, but also now vacates the scheduled hearing on July 19, 2023.

IT IS THEREFORE ORDERED, Ms. Leatrice Escalante's Request for Permission to File an Interlocutory Appeal is **GRANTED**.

IT IS FURTHER ORDERED, the Status Hearing scheduled July 19, 2023, at 1:30 p.m. is **VACATED** and may be rescheduled once the appellate process ends.

Signed July 18, 2023.

Judge David M. Osterfeld

JUDICIARY

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 OCT -3 A 7:54
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of:	Case No.: AV2022-0165
Verna Ann Miguel	
DOB: 11/22/1956,	ORDER
DOD: 03/23/2020,	
Decedent	

On August 31, 2023, the Appellate Court of the Tohono O'odham Nation found there was no appealable issue for it to review, denied Leatrice Escalante's Interlocutory Appeal and the accompanying stay, and remanded the matter to this Court with direction to lift the stay and schedule further proceedings. The Court having allowed ample time for any party to exercise their right to seek reconsideration of that decision under Rule 22 of the Tohono O'odham Rules of Appellate Procedure, and no party filing such request, the Court sets a Status Hearing.

IT IS ORDERED, setting this matter for **Status Hearing on October 20, 2023, at 1:00 p.m.**

Signed October 2, 2023.

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of:	Case Number: AV2022-0165
Verna Ann Miguel	
DOB: 04/02/1912	**ORDER**

On November 29, 2023, Leatrice Escalante, Temporary Personal Representative, and Belinda BreMiller, Ms. Escalante's attorney, appeared. Ms. Escalante gave an update to the Court. In short, Ms. Escalante is unable to complete the responsibilities of serving as a personal representative. Ms. Escalante talked with Danette Johnson about serving as a personal representative, but Ms. Johnson was not present at the hearing. And Ms. Johnson did not contact the Court.

Ms. Escalante asked the Court to dismiss the case without prejudice. The estate has one asset, non-gaming per capita including the interest thereon. Ms. Escalante described how she has been unable to complete anything because: (1) she has a very busy work schedule, and (2) the other heirs are not wanting to co-operate.

The Court dismiss the case without prejudice.

Dated: November 30, 2023

Judge Kyle Fields

TOHONO O'ODHAM JUDICIARY

FILED IN THE
TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Elliott Hector Bustamante, Petitioner v. Anika Nerisse Joaquin, Respondent In re. Aracelli Elise Bustamante, DOB 03/07/2017, a minor child	Case Number: AV2023-0120 **ORDER REGARDING LEGAL DECISION-MAKING, PARENTING TIME AND CHILD SUPPORT**

A bench trial was held on March 20, 2024 on the issues of legal decision-making, parenting time, and child support. The Court previously established jurisdiction and paternity.

Elliott Hector Bustamante, Petitioner, and Belinda BreMiller, Petitioner's Attorney, appeared. Anika Nerisse Joaquin, Respondent, and Kristin Fitzharris, Respondent's Attorney, also appeared.

To the extent any rulings in this Order conflict with any rulings made from the bench, this Order controls.

I. WITNESSES

A. Petitioner called the following witnesses:

- Anika Nerisse Joaquin
- Elliott Hector Bustamante

After hearing argument on Respondent's motion to exclude testimony from Petitioner's mother (Francine Toro), the Court first decided to apply Arizona Rules of Evidence, Rule 403, pursuant to Tohono O'odham Rules of Court, Section 1, Rule 1, finding no applicable or conflicting Tohono O'odham laws or rules, and that Rule 403 would be "applicable to the facts and circumstances of [this] case". Id.

Arizona Rules of Evidence, Rule 403 provides:

> *The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.*

Petitioner stated that Ms. Toro would testify as to the relationships between Petitioner and Respondent, and between Petitioner and their child. The Court found both relevant.

However, the Court also found that the probative value was weakened due to the witness's relationship to the Petitioner (mother). The Court further found that the probative value would be substantially outweighed by (i) unfair prejudice if the trial went forward now, since Respondent had only been made aware of this witness five days before the trial, on March 15, insufficient time to contact the witness and/or anticipate and prepare potential cross examination, and (ii) undue delay if the trial were to be continued for Respondent to make such preparation.

Supporting both reasons were the facts that (i) Petitioner acknowledged knowing about the witness earlier but inadvertently omitted her name in the Pretrial Statement and in the Amended Pretrial Statement; (ii) Petitioner did not disclose the witness until nine days after the (extended) final disclosure deadline, five days before the trial, and (iii) Petitioner had several chances to cure that, such as when the final disclosure date was extended from January 19, 2024 to March 6, 2024, and especially when Petitioner filed an

amended Pretrial Statement on February 7, 2024, which was a modified reprint of the original Pretrial Statement that included Petitioner's witness list.

Accordingly, the Court ruled that the trial would go forward without Ms. Toro's testimony. However, the Court set a thirty-minute evidentiary hearing for April 3, 2024, at 11:30 a.m. to allow Ms. Toro to testify (after sufficient time for Respondent to contact her and/or prepare cross-examination) ***IF*** the Court had not issued this Order by then.

The Court has issued its Order before that date and therefore **vacates the April 3, 2024, 11:30 a.m. hearing**.

Later in chambers, the Court found further support for its decision with Tohono O'odham Rules of Civil Procedure, Rule 14.4(a)(1) ("Unless a party shows good cause, the Court—on motion or on its own—must enter such orders as are just if a party or counsel: (1) fails to obey an initial or pretrial order or fails to meet the deadlines set in the order").

B. Respondent called the following witnesses:

- Kirkland Pedro
- Malika Hogan
- Alma Johnson Juan
- Anika Nerisse Joaquin

II. EXHIBITS

A. The Court admitted the following exhibits from Petitioner:

1. Plea Agreement
2. Anger Management Certificate
3. Trial Record Entry
4. Minor's School Records of Attendance
6. Messages ref. Visits (overruling Respondent's objection based on irrelevance)

7. Child Support Worksheet

8. Petitioner's Paystubs

9. Gender Neutral Power Wheel

12. Update to School Records

13. Information re. Payments (overruling Respondent's objection based on irrelevance & Tohono O'odham Family Law & Will Procedures Rule 2.9 "child support *award* is to be paid in money. Gifts of clothing, etc. in lieu of money are not to be offset against the support *except by court order*," (emphasis added), finding that there has not yet been any award or court order, and past support, in whatever form, relevant to determine such an award and court order here)

14. Auto purchase and accident info (overruling Respondent's objection on the same bases, for the same reasons, as for Petitioner's Exhibit 13)

15. Photos of child's room at dad's

B. After argument, the Court excluded the following Petitioner exhibits on the following bases:

5. Letter re. housing: hearsay

10. Trauma caused by separation of children from parents: Respondent objected on relevance, withdrawn by Petitioner

11. PSA flyer re domestic violence: Respondent objected on relevance, withdrawn by Petitioner

C. The Court admitted the following exhibits from Respondent:

A. Copy of Child's Birth Certificate

B. Copy of Anika Joaquin's Tribal ID card

C. Copy of Application for Enrollment in the Tribe for child 7/17/17

D. Copy of child's social security card, which the Court orders sealed-both the copy submitted at trial, and the copy submitted as Exhibit D to Respondent's Pretrial Statement filed 1/19/2024.

E. Tohono O'odham Nation Police Department Report 220213029 dated 2/13/23

F. Anika Joaquin pay stubs for August 25-September 21, 2023

G. Arizona State Worksheet for Child Support Amount 1/19/2024

H. Tohono O'odham Worksheet for Child Support Amount 01/19/2024

I. Background check for Elliot Bustamante (overruling Petitioner's objections based on not best evidence and not providing context)

J. Plea Agreement CR2022-0107-1-2

K. Trial Record Entry CR2022-0107-1-2

L. Trial Record Entry CR2021-0364-2/4

The Court also overruled Petitioner's group objections to Respondent's Exhibits I-L on the grounds of cumulativeness and inconsistency, finding (i) no inconsistencies among them, and (ii) enough differences among them to provide helpful presentation of information, without "needlessly presenting cumulative evidence" that would substantially outweigh their probative value. See Arizona Rules of Evidence, Rule 403.

III. LIMITED USE OF ARIZONA LAW

In civil cases, this Court must apply the following sources of law, in the following order of precedence: The Tohono O'odham Constitution, the Nation's laws and ordinances, and the Nation's customs. 4 T.O.C. ch. 1, § 1-102.

If there is no such law or custom on point, the Court *may, in its discretion*, look to Arizona law for *guidance*. Id.

As announced at trial, the Court agrees with the suggestion in Petitioner's pretrial statement, supported by this Court's precedent, that it look to A.R.S. § 25-403 and consider

factors listed there (and all other relevant factors) to determine the best interests of the child when deciding legal decision-making and parenting time.

Both parties also heavily argued A.R.S. § 25.403.03 in their pretrial statements, but did not explain why the Court should look to it. At trial, Respondent persuasively argued that, like A.R.S. § 25-403, there is no comparable Tohono O'odham law, or custom (known to the parties or the Court), and that it ties in helpfully with A.R.S. § 25-403's best interest of the child standards where there has been domestic violence, as there has been here. Accordingly, the Court agreed it would look to A.R.S. § 25.403.03 for guidance as well.

However, the Court admonished it likely would not fully adopt A.R.S. § 25-403.03, seeing issues with its rebuttable presumption against decision-making in one section based on domestic violence limited to certain instances that seem quite significant (sexual assault, serious physical injury, placing in apprehension of imminent serious physical injury), yet almost forcing such categories to be labeled "insignificant" because they are separate from the more drastic full preclusion in another section based on "significant domestic violence" or a "significant history of domestic violence", both of which are undefined, but specifically include crimes as seemingly minor as disorderly conduct by "unreasonable noise". See A.R.S. §§ 25-403.03(A) & (D)1-2, 13-3601, & 13-2904.A.2. Even more confusing, sexual assault and aggravated assault (serious physical injury) are included in *both* the "significant" and "insignificant" sections of A.R.S. § 25-403.03.

After researching Arizona case law on that statute, this Court confirms its conclusion. See, e.g., Deluna v. Petitto, 247 Ariz. 420, 422 (Ct. App. 2019) ("At times, [A.R.S. § 25-403.03] and amendments have been imprecise or lack definitions of critical terms, leading to confusion and unintended errors by the superior court in applying the law to the facts of the particular case, sometimes resulting in inconsistent rulings that do not fulfill the statutory mandate."). Further, while a number of unpublished decisions addressed

the term "significant history of domestic violence," none provided much guidance on what that means; only that the trial court has wide discretion to decide.

Accordingly, pursuant to 4 T.O.C. ch. 1, § 1-102, this Court, in exercising its discretion and looking to A.R.S. § 25-403.03 for *guidance* (only), will consider factors listed there in deciding legal decision-making and parenting time, such as considering domestic violence to be contrary to the best interests of a child (but not necessarily completely precluding legal decision-making or parenting time), considering all relevant factors, including those listed in subsection C, to determine if a person has committed an act of domestic violence, the increased seriousness of committing domestic violence against the other parent (but not necessarily resulting in a rebuttable presumption against legal decision-making if only one but not both parents have committed domestic violence), considering the effect of both parents having committed acts of domestic violence, considering actions a person can take to show mitigation of past domestic violence acts, and possible conditions on parenting time to protect a child and the other parent.

This Court will not, however, attempt to make findings of the undefined and inconsistently applied terms "significant domestic violence" or a "significant history of domestic violence", and will not attempt to apply the full preclusion of subsection A, or the rebuttable presumption of subsection D, and risk falling into the traps that seem to plague the Arizona trial courts noted by the Arizona Court of Appeals. Instead, this Court will attempt to balance all facts and circumstances of this case, in light of all of the factors in A.R.S. §§ 25-403 & 403.03 to decide the best interests of Aracelli in legal decision-making and parenting time.

IV. FINDINGS OF FACT

After weighing the credibility and probative value of the testimony and evidence presented at trial, the Court makes the following findings of fact:

A. Findings that weigh against Petitioner:

1. Sometime in the last six months or so, Petitioner started an aggressive confrontation with Respondent's boyfriend, Kirkland Pedro, when exchanging Aracelli, which upset the child.
2. Petitioner has committed several acts of domestic violence
    a. In June 2021, Petitioner yelled at Respondent, threw a flashlight at her, grabbed and shook her, all in Aracelli's presence. That resulted in a conviction of disturbing the peace / domestic violence and threatening / domestic violence, with fines for each, which were paid, and jail terms for each that were suspended for 1 year of probation and an anger management class, both of which were successfully completed.
    b. In February 2022, Petitioner yelled at Respondent, and threw a phone at her knee, or hit a phone from her hand by her knee, hurting her. He also grabbed her hand and hit his own head with it in apparent apology, which scared her. This resulted in a conviction for disorderly conduct / domestic violence and threatening / domestic violence. Jail terms for both were suspended for 1 year of probation, which was successfully completed.
    c. In October of 2022, Petitioner forcefully pushed Respondent into the back seat of a car against her will, where Aracelli was, and forcefully closed the door on Respondent's foot as she was trying to leave, hurting and injuring Respondent's foot. This was during Petitioner's probation for the 2022 conviction, and would likely have resulted in revocation of that probation if Respondent had reported it, resulting in the imposition of the suspended jail terms (20 days and 100 days).

Further, while the Court is not making any criminal findings, for purposes of A.R.S. § 25-403.03 consideration only, the Court does find that such actions constituted kidnapping and assault domestic violence acts under 7 T.O.C. ch. 1, §§ 7.1A.4, 7.4A, & 8.9A.

3. Petitioner took Aracelli from Respondent's custody at Bashas' some time around June of 2022. The parties dispute whether he did so in Respondent's sight. Even if she did see that, however, her lack of affirmatively agreeing to him taking her does not amount to her consent as Petitioner asserts. Although this could arguably constitute custodial interference under Tohono O'odham law, the Court does not make that finding, even for purposes of A.R.S. § 25-403.03 consideration only, as the Tohono O'odham statute (7 T.O.C. ch. 1, § 7.5) does not have the same presumption that the Arizona statue has: that until paternity is established (which had not been done at the time of this incident), the mother is presumed to be the custodian. Thus, in the absence of a court order, and given that Petitioner is on Aracelli's birth certificate and paternity was never questioned, it is not as clear whether Petitioner had the right to take Aracelli without Respondent's consent. It does, however, have some negative weight under A.R.S. § 25-403.A.1.6 (which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent).

B. Findings that weigh for Petitioner:

1. The past, present, and potential future relationship between Petitioner and Aracelli is good, though not as strong or as positive as that between Respondent and Aracelli, in light of the more time Respondent has spent with her, both at home and addressing her education and medical care, and in light of domestic violence incidents that Petitioner has committed against Respondent, and the aggression against

Respondent's boyfriend, in Aracelli's presence. See A.R.S. §§ 25-403.A.1, 25-403.A.2, 25-403.03.B.

2. Petitioner has cared fully for Aracelli in the past, including after his acts of domestic violence against Respondent, with Respondent's consent. However, the longest he has done so is for about four days at a time.
3. Petitioner has a stable home (with his girlfriend, Amber Ramon), with a room for Aracelli. That room may be shared sometimes with Ms. Ramon's daughter. But that does not appear to be an issue. Respondent expressed some concern about Ms. Ramon's son being present, but seemed okay if steps were taken to make sure Aracelli is protected. The Court shares that concern and will make appropriate orders in the parenting time directives below.

C. Findings that weigh against Respondent:

1. Respondent also committed several acts of domestic violence.
    a. Assault, on or about January 1, 2024, more recently than Petitioner's latest act. See A.R.S. §§ 25-403.A.8, 25-403.03.B. Factors mitigating this include: (i) the victim was not Petitioner or their child; (ii) the child was not present; (iii) the no contact order in connection with that case was quickly dropped; (iv) Respondent has been attending an ongoing women's class with therapy, see A.R.S. § 25-403.03.E.3; and
    (v) Respondent has committed no further acts of domestic violence, see A.R.S. § 25-403.03.E.6.
    b. In November, 2023, after a temporary court order was issued regarding parenting time, Respondent refused to go forward with Aracelli visiting Respondent when she learned that people other than Respondent would be

there. While the Court is not making any criminal findings, it does find for purposes of A.R.S. § 25-403.03 consideration only, that such action constituted custodial interference domestic violence under 7 T.O.C. ch. 1, §§ 7.5 & 8.9A, and a negative consideration under A.R.S. § 25-403.A.1.6 (which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent).

c. Respondent threw a tool at Petitioner sometime around October 2022, injuring his hand. Again, while not making any criminal findings, for purposes of A.R.S. § 25-403.03 consideration only, the Court does find that such action constituted disorderly conduct domestic violence (if not assault domestic violence) under 7 T.O.C. ch. 1, §§ 3.6A.5 & 8.9A (& possibly 7.1A.4).

2. In addition to the November visit described above, there are other incidents of Respondent limiting the "frequent, meaningful and continuing contact" with Petitioner contemplated by A.R.S. § 25-403.A.1.6:

a. For the visits Aracelli has had with Petitioner since the filing of this suit, Respondent has limited the time for those to a few hours, though Petitioner has requested longer hours; e.g., Petitioner requested 12:00 p.m. to 9:00 p.m. on Thanksgiving, and Respondent replied with "some time in the afternoon" (after 12:00 p.m.) and expected her back by 7:00 p.m. (Pet. Ex. 6.) See A.R.S. § 25-403.A.1.6.

b. When Respondent totaled the car Petitioner bought for her and Aracelli's use in a rollover accident (see IV.C.1.b above), both she and Aracelli were taken to the hospital. Although Aracelli was not hurt, Respondent did not even tell Petitioner that Aracelli had been in an accident, or gone to the hospital, or

that the car was totaled, until about two days after the fact, and then only when Petitioner called asking about it when he saw the wrecked car in her driveway.

3. Respondent lives 45-50 minutes from Aracelli's school, and Aracelli has a significant history of being late to school. Respondent did lay out a reasonable plan for improving that. But she did not credibly explain why she has not yet implemented it in light of the long period of those late days. While Petitioner did not have a specific plan on improving the tardiness, he is not privy to the situation at Aracelli's home to be able to formulate a plan. And no evidence was presented of tardiness while he was living with Aracelli.
4. Although not this year, last year Respondent did, and next year she likely will, do a lot of traveling for work. While Respondent did and can bring Aracelli with her and care for her, no other children go, the hours vary and can be very early and/or late and, of course, Respondent is working.

D. Findings that weigh for Respondent:

1. The past, present, and potential future relationship between Respondent and Aracelli is very good, stronger and more positive than that between Petitioner and Aracelli, given the more time Respondent has spent with her, both at home and addressing her education and medical needs, and in light of domestic violence incidents that Petitioner has committed against Respondent, and the aggression against Respondent's boyfriend, in Aracelli's presence. See A.R.S. §§ 25-403.A.1, 25-403.A.2, 25-403.03.B.
2. Aracelli has a positive relationship with Respondent's boyfriend, who Respondent lives with and Aracelli spends time with. See A.R.S. § 25-403.A.2 (interaction and

interrelationship of the child with any other person who may significantly affect the child's best interest).

E. Neutral Findings:

1. As both parties agree, Aracelli is not yet of suitable age and maturity. Therefore, the Court has not sought her wishes as to legal decision-making and parenting time. See A.R.S. § 25-403.A.4.
2. Petitioner's monthly gross income for child support purposes is $3,338. (See Pet'r Ex. 8, Pet'r Paystubs.)
3. Respondent's monthly gross income for child support purposes is $3,156. (See Resp't Ex. F, Anika Joaquin pay stubs for August 25-September 21, 2023.)
4. With 2. and 3. above, pursuant to the child support worksheet incorporated into this Order (discussed below), Petitioner's proportionate share of adjusted combined income is 51%, and Respondent's proportionate share is 49%.
5. With the parenting time schedule adopted in Section VI below, Petitioner will have 81 days per year with Aracelli.
6. Aracelli is in 1st grade now.
7. Aracelli's date of birth is March 7, 2017.
8. Petitioner has historically placed Aracelli on his employment-provided insurance.

F. Summary

Both parties have a strong and positive relationship with Aracelli, Respondent's being somewhat stronger and more positive. See A.R.S. § 25-403.A.1.

Aracelli has a positive relationship with other people she would be around in both parent's households; namely Kirkland Pedro in Respondent's home, and Amber Ramon's daughter in Petitioner's home. See A.R.S. § 25-403.A.2.

Aracelli has a school tardiness issue living with Respondent. See A.R.S. § 25-403.A.3.

The Court found no facts applicable to A.R.S. §§ 25-403.A.4-5.

Respondent has a demonstrated history of restricting Petitioner's visitation with Aracelli, without justification. Petitioner has a much lesser history of denying Respondent's access to Aracelli. See A.R.S. § 25-403.A.6.

The Court found no facts applicable to A.R.S. § 25-403.A.7.

Both parties have a history of domestic violence. See A.R.S. § 25-403.A.8. However, Petitioner's is more extensive and violent, always committed against Respondent, and in the presence of their child. Respondent's domestic violence has continued to the more recent past, but is not as extensive or as violent as Petitioners, has not always been committed against Respondent, and never in Petitioner's presence. See A.R.S. § 25-403.03.A & D (but as noted above, for weighing more heavily the more extensive, violent, and against the other parent acts of domestic violence, and counteracting some when both parents have committed domestic violence, but not applying a preclusion or rebuttable presumption).[1]

Both parties have taken remedial steps to address their history of domestic violence. Respondent's remedial actions, however, have been stronger than Petitioner's, for a lesser history of domestic violence. Further, while Respondent is currently taking ongoing classes with therapy after her last incident, Petitioner has not taken any remedial action after his latest, and arguably most violent, act of domestic violence. See A.R.S. § 25-403.03.E.1 (not used here to rebut a presumption, but to balance against past domestic violence).

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[1] While the child's presence is not listed in A.R.S. §§ 25-403 or 403.03, this Court is only looking to them for guidance and is not bound by either. And A.R.S. § 25-403 says that [an Arizona court] shall consider *all* relevant factors *including* those listed. This Court will therefore also consider Aracelli's presence during the domestic violence, which this Court finds to be a relevant factor.

The Court found no facts applicable to A.R.S. §§ 25-403.A.9-11.

After the several acts of domestic violence, Petitioner continued to care for Aracelli, alone, overnight, for several days at a time, with Respondent's consent.

Petitioner has no demonstrated history of any legal decision-making for Aracelli. Respondent appears to have done most, if not all, of that to date. Petitioner has not even attended Aracelli's parent-teacher meetings, despite having the full right to do so, and the unfettered ability to check the online school calendar and join any notice lists.

V. LEGAL DECISION-MAKING

Balancing the factors above, the Court finds that due to the Petitioner's more violent and extensive domestic violence history compared to Respondent's, and non-domestic violence aggression, committed in the presence of Aracelli (unlike Respondent's domestic violence acts), together with Respondent's history of making most if not all of the legal decisions for Aracelli in the past, it is in the best interests of Aracelli to award Respondent sole legal decision-making for Aracelli Elise Bustamante, and the Court so orders, subject to one condition: Respondent may not transfer Aracelli from a school on the main Tohono O'odham Nation reservation without either Petitioner's advance written consent, or an order of this Court.

Respondent must also, however, consult Petitioner on all significant decisions regarding Aracelli's medical, dental, educational and religious/spiritual activities, as she said at trial she would be willing to do.

Petitioner will continue to have unrestricted access to Aracelli's records (including without limitation medical, dental, educational and religious records). He will also continue to have the right to attend any of Aracelli's medical, dental, school, religious or similar meetings, ceremonies, or other events, whether scheduled or unscheduled.

Respondent must notify Petitioner of any of the above events that she schedules for Aracelli, within 24 hours of scheduling it, and within 24 hours of her becoming aware of any unscheduled medical or dental events.

Petitioner may check the calendars and/or enroll himself on any notice lists of schools or religious or spiritual centers. Therefore, Respondent does not need to notify him of regular events of schools or religious or spiritual centers (such as parent-teacher conferences), only those events that Respondent herself schedules as described above.

VI. PARENTING TIME

Balancing (i) the strong, positive relationship between Aracelli and both of her parents, though stronger with Respondent, (ii) the positive environments for Aracelli in both parents' homes, (iii) Petitioner's more violent and extensive domestic violence history compared to Respondent's, committed in the presence of Aracelli (unlike Respondent's domestic violence acts), (iv) Petitioner's demonstrated history of capably caring for Aracelli, with Respondent's consent even after Petitioner's domestic violence acts, but only for about four days at a time, (iv) Respondent's history and potential future of extensive work travel, and (v) Aracelli's excessive school tardiness living with Respondent, the Court finds it is in the best interests of Aracelli to award joint parenting time, the majority with Respondent, as follows:

1. During school: Starting the second weekend after this Order is filed, Aracelli will stay with Petitioner every other weekend. Petitioner will pick her up from school on Friday afternoon and drop her off at school on Monday morning. Aracelli will stay with Respondent the rest of the time during school.

2. Summer break: Aracelli will stay with Respondent for two weeks at a time, then Petitioner for one week, from Friday to Friday. If they cannot decide who goes first, Respondent gets final say. Exchanges will be at Bashas' in Sells, by 5:00 p.m. on Fridays.

3. Spring break: Aracelli will stay with Petitioner during odd numbered years, and with Respondent on even years.

4. Fall break: Aracelli will stay with Respondent during odd numbered years, and with Petitioner on even years.

5. Winter break, including Christmas Eve and Christmas Day:

(i) In odd numbered years, Aracelli will stay with Respondent for the first half of the break, and with Petitioner for the second half.

(ii) In even numbered years, Aracelli will stay with Petitioner for the first half of the break, and with Respondent for the second half.

6. Holidays: Holiday parenting time supersedes school and regular school break parenting time.

(a) The Parents will have Aracelli on their respective birthdays.

(b) Respondent will have Aracelli on Mother's Day.

(c) Petitioner will have Aracelli on Father's Day.

(d) Aracelli's birthday: Respondent will have Aracelli on all odd numbered years, Petitioner on all even years.

(e) Easter: Respondent will have Aracelli on all odd numbered years, Petitioner on all even years.

(f) Thanksgiving Break, including Thanksgiving day: Aracelli will stay with Petitioner on all odd numbered years, Respondent on all even years.

(g) If either parent is scheduled to travel for work during their regular parenting time with Aracelli, that parent must notify the other as soon as becoming aware of it; the other parent may then choose to take Aracelli during that travel time, without changing the other parenting time schedules of either party, and without changing child support obligations.

7. Exchanges:

(a) The parent with parenting time for a pending school break will pick up Aracelli from school at the start of the break.

(b) If the parenting time lasts for the full break (Spring, Fall and Thanksgiving), that parent will drop off Aracelli at school at the end of the break.

(c) If the other parent gets Aracelli during the break (Summer and Winter), the parent starting the break will pick up Aracelli at the start of the break, they will exchange at Bashas' in Sells on the half-way point, by 5:00 p.m., and the second parent will drop off Aracelli at school at the end of the break.

(d) On birthdays, Mother's Day, Father's Day, Easter, and any work-travel days, if exchanges are needed to honor the parenting time schedule above, then they will be made at Bashas' in Sells, by 9:00 a.m. for the start, and no later than 7:00 p.m. to end.

8. General

The parents may alter those schedules temporarily if they agree in advance in writing (by e-mail, text or otherwise).

Either parent may have someone else pick up or drop off Aracelli for him or her, subject to each parent's obligation to protect Aracelli. The other parent may not object to that, unless that parent has a reasonable, verifiable reason to suspect that Aracelli may be in danger.

If either parent relocates out of the greater Tohono O'odham Nation / Tucson / Casa Grande / Ajo area without the other parent's advance written agreement or Court approval, that parent will remain obligated to pick up and drop off Aracelli at school (on the Nation, see above re. Respondent's restriction against transferring Aracelli from a Nation school

without Petitioner's agreement or Court order) and at Bashas' as outlined above, and bear his or her own cost for doing so.

The parents will not question Aracelli about the other parent's personal life.

Each parent must provide the other with a general idea of where Aracelli will be during their respective parenting times and one or more contact phone numbers in case of emergency, but is not required to provide specific details of location, activities, or timelines, and is not required to disclose what other people will or will not be present, other than as required by law, unless the other parent has reasonable and verifiable grounds to suspect that Aracelli may be in danger, and always subject to each parent's obligation to protect Aracelli.

Neither parent will disparage the other parent to Aracelli, or allow others to do so in her presence.

VII. CLASSES FOR PETITIONER

This Court again looks to A.R.S. § 25-403.03 for guidance; specifically, subsection F, opening paragraph ("the court shall place conditions on parenting time that best protect the child and the other parent from further harm"), and F.3 ("Order the parent who committed the act of domestic violence to attend and complete, to the court's satisfaction . . . any other counseling the court orders"). In light of Petitioner's more violent and repetitive history of domestic violence than Respondent's, committed in Aracelli's presence, with some of that committed after a one-time anger management class; and given Respondent's ongoing therapeutic classes, the Court orders Petitioner to also take therapeutic classes.

Such classes will be a condition to Petitioner's parenting time ordered in Section VI above.

Petitioner's classes must also be ongoing, and geared toward intervention for perpetrators of domestic violence. He must attend the classes for at least as long as Respondent has attended hers, and continues to attend hers. Respondent must provide Petitioner evidence of her attendance (redacted to protect her privacy), if she wishes to enforce this.

Petitioner must provide Respondent evidence of enrolling in such classes within thirty days, and monthly updates on his progress.

If Respondent has reasonable grounds to believe that Petitioner is not complying with these obligations, she may file a motion to enforce for sanctions, which could include restricting Petitioner's parenting time, and/or a finding of contempt of court.

VIII. CHILD SUPPORT

A. Applicable Law

Section 5 of the Tohono O'odham Rules of Court (Family Law and Will Procedures) call for the guidelines in that section and the Tohono O'odham child support worksheet to be used for child support actions, with the Court stating reasons for any deviations. See Family Law and Will Procedures Rule 2.3.

Accordingly, the Tohono O'odham child support guidelines and worksheet are controlling here, and the Court will follow them. See also In the Matter of J.A., 2021 TOR Supp. 54, 58-59 (Ct. App. 2017). However, as discussed below, the Court will exercise its discretion under 4 T.O.C. ch. 1, § 1-102 and look to Arizona law for guidance for certain areas not covered by Tohono O'odham law or custom.

B. Child Support Worksheet

As the parties have not stipulated to a child support worksheet, the Court has completed one based on its findings in Section IV.E above, attached as Exhibit A (the Court's Child Support Worksheet), and incorporates it into this Order as allowed by Family

Law and Will Procedures Rule 2.12. The monthly gross income amounts are taken from the Court's findings in Section IV.E above.

C. Past Child Support

Respondent did not request a retroactive award of child support, only that "[t]he Court should enter child support orders including medical insurance responsibility and tax exemptions pursuant to the parties' incomes and the parenting time orders." (Resp. ¶ 17.) As past child support was not raised or litigated, the Court does not address it either.

Accordingly, while the Court initially ruled for purposes of admitting Petitioner's Exhibits 13 and 14 that Petitioner's car loan payoff and cash payments were relevant (see Section II.A above), that relevance would have been for past child support. As the Court is not addressing past child support, it will not further consider those past payments.

D. Child Support Going Forward

Except for differing parenting time adjustments based on different requested parenting times, neither party provided other adjustments. Therefore, because Respondent has the majority of parenting time, Petitioner's basic child support obligation is $507.10 per month, as shown in the Court's Child Support Worksheet.

E. Parenting Time Adjustment

While the Tohono O'odham guidelines do not provide specific parenting time adjustments like the Arizona guidelines do, the Tohono O'odham guidelines do provide that "[i]f the parents have shared custody, the Court may deviate from the child support guidelines based on the specific expenses related to the shared custody." Family Law and Will Procedures Rule 2.6. Further, "The Court may consider the costs of visitation or parenting time and may allocate such costs between the parents in proportion to their ability to pay." Family Law and Will Procedures Rule 2.7.

The Court finds that it would be fair to credit Petitioner for his significant parenting time here, and that it would be fair to allocate costs between the parents in proportion to their ability to pay, keeping in mind that one of the purposes of the Tohono O'odham guidelines is to provide a child support award that approximates a standard of living for the children as close as possible to what they would have if the family remained together, see Family Law and Will Procedure Rule 2.2(b).

However, Tohono O'odham law does not provide further guidance for implementing those rules. And the Court knows of no Nation customs on point either. Accordingly, the Court finds it helpful to once again exercise its discretion under 4 T.O.C. ch. 1, § 1-102, and look to Arizona law for guidance.

Under A.R.S. § 25-320 Child Support Guidelines, Section V, the table in part D provides an "Adjustment Percentage" of .10 for Petitioner's 81 days of parenting time per year found by the Court above. That .10 is applied to the combined Basic Child Support Obligation of $988 (resulting in $98.80), which is then subtracted from Petitioner's basic monthly obligation of $507.10

The result is that Petitioner Elliott Hector Bustamante owes child support to Respondent Anika Nerisse Joaquin **in the total amount of $408.30 per month**, also as reflected in the Court's Child Support Worksheet. That obligation begins for the full month of April, 2024.

Petitioner must pay that amount in **two equal payments per month, of $204.15 each**, no later than the 1st and 16th day of each month, except for April, 2024. The first payment for that month is due no later than April 10, 2024, and the second payment no later than April 19, 2024.

F. Termination Date

This Court typically orders that child support payments end on the later of a child's 18th birthday or high school graduation (but not later than his or her 19th birthday). With the factual findings above, it appears that Aracelli will probably still be in 12th grade when she turns 18. Therefore, the termination date of Petitioner's child support payments is May 31, 2035, if Aracelli graduates high school in May 2035. If circumstances. If Aracelli graduates before then, the termination date will be the last day of the month of her 18th birthday. If she is still in high school after May 31, 2035, the termination date will be the earlier of (i) the last day of the month of her 19th birthday or (ii) the last day of the month of her high school graduation. None of those will require a further Court order. If any other circumstances arise, either party must request a Court order for a different termination date (or advance written consent from the other party).

G. Payments to Clerk of Court

Unless the parties agree otherwise, Petitioner Elliot Hector Bustamante must make all child support payments going forward payable to Respondent Anika Nerisse Joaquin, and delivered to:

Clerk of the Tohono O'odham Court
P.O. Box 761
Sells, AZ 85634
Re: AV2023-0120, Bustamante v. Joaquin

H. Child Tax Credits

The parties did not direct the Court to any Tohono O'odham law or custom on this point, and the Court knows of none either. Instead, the Court often exercises its discretion under 4 T.O.C. ch. 1, § 1-102, and looks to Arizona law for guidance for this subject. The Court will do that here.

This Court also generally provides that a party awarded child tax deductions may only claim them if they are current in his or her child support obligations. The Court also does that here.

A.R.S. § 25-320 Child Support Guidelines, Section XI.B.1.a provides the general rule of allocating child tax credit benefits between the parents in proportion to their combined child support income.

Applying that here, with only a two percent difference between the parties' proportionate shares of combined income, the Court finds it appropriate to, and therefore orders, that the parties may claim Aracelli for the child tax credits on alternating years. If they have not already decided and filed 2023 tax returns, then Respondent may claim Aracelli for 2023.

Petitioner's right to claim the child tax credits is subject to him being current with his child support obligations.

I. Medical Insurance

Petitioner will keep Aracelli (or add as necessary) on his medical, dental, and vision insurance. Both parties will split any additional cost for such insurance in proportion to their adjusted combined income (52% for Petitioner, 49% for Respondent).

Likewise, the parties will be responsible for paying any uninsured medical, dental or vision expenses for Aracelli in proportion to their adjusted combined income (52% for Petitioner, 49% for Respondent).

J. Annual Exchange of Information

Every twelve months, the parties must exchange financial information such as tax returns, spousal affidavits, and earnings statements.

IX. COURT ORDER

Violating this Order may be considered contempt of court and result in fines and/or imprisonment.

Dated: April 1, 2024

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

Erick Brown, Petitioner v. Tohono O'odham Gaming Office, a department within the Executive Branch of the Tohono O'odham Nation, Respondent	Case No. AV2023-0138 **ORDER**

At the motion hearing held January 17, 2024, Erick Brown, Petitioner, appeared, as did the Tohono O'odham Gaming Office (TOGO), through its counsel, Hue T. Le. The TOGO presented its argument supporting its Motion to Dismiss, and Erick Brown argued against dismissal.

FINDINGS OF FACT

Erick Brown and TOGO both agree that TOGO issued its final administrative decision at the heart of this challenge on June 15, 2023. In TOGO's Notice of Filing Proof of Service Pursuant to the Court's January 25, 2024, Request, TOGO proved it sent that final administrative decision to Mr. Brown on June 15, 2023, and that same filing proves Mr. Brown received that notice on June 22, 2023, when he signed his receipt for the certified mailing.[1]

On October 16, 2023, Erick Brown filed his Notice of Appeal and Request for Record, along with his Complaint for De Novo Judicial Review of Administrative

[1] The TOGO appears to have in error stated Erick Brown signed the return receipt on January 30, 2024. The attached Exhibit A shows Mr. Brown's signature and handwritten date of June 22, 2023, which matches the postmark on the return receipt.

Decision. The TOGO filed its Answer to Mr. Brown's Complaint and its Motion to Dismiss on November 14, 2023.

The Tohono O'odham Rules of Court for Judicial Review of Administrative Decisions (TORCJRAD), Rule 3(a), states this action begins when a party files a Notice of Appeal and Request for Record with this Court and with the Administrative Agency, here the TOGO. That filing must happen within 30 days of the Administrative Agency's service of its final administrative decision on the challenging party. That service occurs at the instant it is personally delivered or within 5 days if mailed to the receiving party's last known address.

But Rule 2(b) of the TORCJRAD also states that if an administrative agency adopts a different period for a party to challenge its final administrative decisions, that period will control. The TOGO, an administrative agency, finds it guidance under Title 16 of the Nation's Code. In Chapter 12 of Title 16, the Nation set out its process of judicial review for TOGO decisions. Section 1204 of Chapter 12 clarifies that any person wanting to appeal a final decision from TOGO "must file an application for judicial review within 60 days after receiving notice" of TOGO's final decision.

Measuring 60 days from June 22, 2023, when Erik Brown signed his certified mail receipt for TOGO's final administrative decision denying his claim, Mr. Brown's deadline to appeal that decision ran on August 20, 2023. Rule 2(b) of the TORCJRAD states that "[u]nless review is sought of an administrative decision within the time and in the way provided in this article, the parties to the proceeding before the administrative agency will be barred from obtaining judicial review of the decision."

ANALYSIS

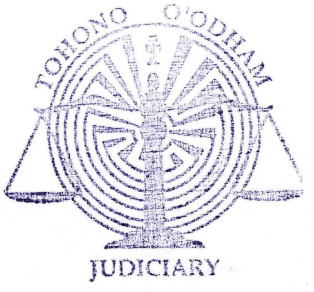
Rule 2(b) of the TORCJRAD sets a hard jurisdictional bar on any challenge to administrative decisions. This Court's jurisdiction is only present if the notice of appeal is filed within the specific period allowed. Here, that period is 60 days. Erik Brown did not file his challenge by August 20, 2023, the allowed 60-day period from June 22, 2023. Instead, he filed his challenge another 57 days later, on October 16, 2023. Because this Court has no jurisdiction to review any challenge filed after that 60-day deadline, the Court must dismiss this action for want of jurisdiction.

THEREFORE, IT IS ORDERED, dismissing this matter with prejudice.

Signed March 11, 2024



Judge David M. Osterfeld



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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Dorinda Miguel and Francisco J. Enriquez, Petitioners v. Emmerson Luther Miguel, Respondent, In re: Eva Lily Miguel DOB: 03/01/2009 A minor child	Case Number: AV2024-0082 **ORDER**

Pursuant to the Court's Order filed July 24, 2024, the parties filed a Stipulation & Order Allocation of Holidays (Stipulation & Proposed Order) with a proposed order regarding paternity, legal decision-making authority, and parenting time.

The Court finds and orders that:

General

1. The Petitioners are the aunt and uncle of the minor child, Eva Lily Miguel.
2. The natural mother of Eva Lily Miguel is deceased.

Legal Decision Making (Legal Custody) and Parenting Time (Physical Custody)

3. Neither the Tohono O'odham Constitution nor Tohono O'odham law addresses third party (non-parental) rights with children (nor does O'odham custom or tradition that the Court is aware of). Therefore, under 4 T.O.C. Ch. 1, § 1-102, the Court may in its discretion look to Arizona law for guidance. The Court does so here.

4. Under such Arizona law, a court may grant legal decision-making authority and placement of a child with someone other than a legal parent if it finds that:
    a. The petitioners stand *in loco parentis* to the child;
    b. It would be significantly detrimental to the child to remain or be placed in the care of the legal parent who wishes to keep or acquire legal decision-making; AND
    c. A court of competent jurisdiction has not entered or approved an order concerning legal decision-making or parenting time within one year before the petition was filed, unless there is reason to believe the child's present environment may seriously endanger the child's health.

    A.R.S. § 25-409 A.1-3.
5. Further, the Court must find one of several other factors, which includes one of the legal parents being deceased. Id. at A.4.
6. Here, in the Stipulation & Proposed Order, the parties agree to joint legal decision-making, with primary parenting time to the Petitioners.
7. As noted above, the Court has already found that the child's legal mother is deceased.
8. The Court further finds, pursuant to the Petition, the previous testimony of the Petitioners, and the Stipulation & Proposed Order, that the Petitioners stand *in loco parentis* to the child, and that no court of competent jurisdiction has entered or approved an order concerning legal decision-making or parenting time within one year before the Petition here was filed.
9. In addition, Respondent father is not seeking to keep sole legal decision-making, so the required finding that it would be significantly detrimental to the child to remain

or be placed in the care of the legal parent who *wishes to keep or acquire* legal decision-making does not apply.

10. Therefore, pursuant to the above Arizona law, the Petitioners here would be eligible for joint legal decision-making with Respondent, and primary parenting time, as set forth in the Stipulation & Proposed Order.

11. While that Arizona law is not binding in this Court, and serves only as guidance, the Court does find it persuasive here in the absence of Tohono O'odham law on point, and also consistent with O'odham custom (in this judge's understanding at least) of both honoring a parent's wishes for the care of his child, and appreciation for aunts and uncles caring for the child and making that task easier for them.

12. Accordingly, the Court approves the Stipulation & Proposed Order, and will sign and issue it as an order of this Court.

Dated: September 5, 2024

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Jacqueline Marie Lopez, Petitioner v. Jermaine Charles Lopez, Respondent In re: Judum Kek Joel Lopez, DOB: 09/11/2019, a minor child.	Case Number: AV2024-0088 **ORDER**

At the Hearing on September 26, 2024 for the name change of the above minor child, and child support, Petitioner, now Jacqueline Marie Josay (Mother), and Lorraine Ventura of the Tohono O'odham Advocate Program, Petitioner's Advocate, appeared. Jermaine Charles Lopez, Respondent (Father) did not appear.

A. Child Support

Ms. Ventura reported that she received enough information to prepare a Tohono O'odham child support worksheet. The Court directed her to file one with the Court when ready, with a request that the Court prepare a child support order from that worksheet. The Court will give Respondent Father a chance to respond before finalizing that order.

B. Name Change

1. <u>Mother's case</u>

Petitioner Mother presented her case for why she wants to change the name of her and Father's son from Judum Kek Joel Lopez (with Father's surname) to Judum Kek Joel Josay (with Mother's surname). Mother grew up in a blended family, but everyone was treated as a member of the same family. However, one brother had a different last name than

everyone else—the only sibling with that last name. Mother saw how that caused him to feel isolated, disconnected, and unloved. And how it led to him drinking and using drugs as an adult. It was scary for Mother to see.

Mother now has three other children in addition to Judum. One has her last name, and two have another, shared last name. Like Mother's brother described above, Judum here would be the only child in this home with the last name of Lopez, if not changed to Josay. She does not want to see him go through the same suffering that she saw her brother go through.

Mother said she may feel differently if Father took a more active role in Judum's life. But since Father left at the beginning of the year, she said he has only reached out to contact him about ten times, none since the initial hearing in this case, not even on Judum's birthday a couple of weeks ago on September 11.

2. Tohono O'odham Law

Father was provided notice that Mother had motioned to change their son's last name, and an opportunity to object if he wanted to. He declined. He neither filed a response nor appeared at the hearing. Therefore, the Court may summarily grant Mother's request. *See* T.O. R. Ct. Section 1, Rule 5(c) ("If a party fails to respond to a motion within 10 days without good cause, the Court will accept the motion as uncontested."); T.O. R. Ct. Section 2, Rule 7.1(b) ("The Court may summarily grant or deny a motion if: . . . (2) the opposing party does not file a responsive memorandum"). Nevertheless, the Court wanted to make findings for the avoidance of doubt.

The Court found no Tohono O'odham law directly on point about changing a minor child's name when both parents are alive and on the birth certificate. However, one case, *In re E.F.J.*, 1 TOR3d 79 (T.O. Tr. Ct. 1989), provides some guidance. There, the Court

changed a minor's name after establishing paternity for a child whose father had recently passed away. *Id.* at 80-81.

That case is dissimilar to the current one because the mother was E.F.J.'s only living parent, and she sought to change her child's last name from hers to the deceased father's name, and the primary issue was paternity. However, the Court noted that the paternal grandparents wished for their son to be "legally recognized as the father of the child so that she may share in what he may have." *Id.* at 81. Thus, it shows the Court's concern for the best interests of the child.

3. Arizona Law

The above Tohono O'odham law, though not directly on point, is consistent with Arizona law. Arizona law is not controlling in our Courts, but we may look to it for guidance, in our discretion, in the absence of Tohono O'odham law or custom on point. 4 T.O.C. Ch. 1, § 1-102. The Court does that here.

Arizona law provides that a parent may apply to change a minor's name so long as the court finds that the change is in the minor's best interests. A.R.S. § 12-601(B). The test for a child's best interests in the context of a name change developed through caselaw.

Arizona's best interest factors for purposes of a child's name change include: (1) the child's preference; (2) the effect of the change on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne his or her given name; (4) any difficulties, harassment, or embarrassment that the child may experience from bearing his or her present or proposed name; and (5) the motive of the child's parents and the possibility that the use of a different name will cause the child insecurity or lack of identity. *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1008 (Ariz. Ct. App. 1993). Arizona's factors are, for the most, part consistent with factors used in other state jurisdictions. 57 Am. Jur. 2d *Name* § 48.

Applying those factors here, the Court makes the following findings:

(1) The child's preference. The Court did not consider this factor, as the child is only five years old.

(2) The effect of the change on the preservation and development of the child's relationship with each parent. The change could have some negative effect on the preservation of Judum's relationship with his Father. However, that is largely due to Father's actions in not reaching out to maintain contact. On the other hand, not changing the name could hamper the relationship with Mother, as shown by her experience above. Weighing these, the Court finds this factor favors changing Judum's surname to his Mother's.

(3) The length of time the child has borne his or her given name. Five years, with little school or other social settings. The Court finds that to be a short enough time to where a name change would not be very drastic, thus allowing a name change if the other factors support it.

(4) Any difficulties, harassment, or embarrassment that the child may experience from bearing his or her present or proposed name. The Court sees no harassment or embarrassment likely from either name. However, it does see likely difficulties in *not* changing Judum's surname, as detailed in Mother's case above. Therefore, this factor also supports changing Judum's surname to his Mother's.

(5) The motive of the child's parents and the possibility that the use of a different name will cause the child insecurity or lack of identity. Mother's motive in changing Judum's surname is detailed above, and the Court finds it persuasive. Father did not respond or object to Mother's motion to change Judum's name, so the Court finds no motive on his part. Therefore, this factor also weighs in favor of changing Judum's name.

Weighing all of the above factors, the clear result is that it is in Judum's best interests to change his surname from his Father's (Lopez) to his Mother's (Josay) under Arizona law. Though such law is not binding here, the Court does find it persuasive, and consistent with Tohono O'odham law.

4. Name Change Order

Therefore, because Father did not respond to Mother's motion to change their son's surname, or appear at this hearing, after notice and an opportunity to be heard, and because the Court finds it is in the best interests of Judum to change his surname from Lopez to Josay, the Court grants Mother's motion.

The Court ORDERS that Judum Kek Joel Lopez's name is changed to **Judum Kek Joel Josay** as his true and legal name, and his birth certificate may be amended to state his name as **Judum Kek Joel Josay**.

Dated: September 26, 2024

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

JOSEPH L. DELGADO, Petitioner, v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, and MARY ANN RAMIREZ, in her official capacity as Executive Director, Respondents	Case No.: AV2024-0100 ORDER DENYING PETITIONER'S MOTION TO STAY THE GAMING OFFICE'S FINAL DECISION

This is before the Court on Petitioner's Motion for a Stay of the Gaming Office's Administrative Decision Pending This Appeal (Motion) filed July 16, 2024, The Court's Order regarding the Motion filed August 5, 2024 (Aug. 5 Order), Respondent's Response to Petitioner's Motion for a Stay of the Gaming Office's Administrative Decision Pending Appeal filed August 5, 2024 (Response), Delgado's Notice Pursuant to the Court's August 5, 2024 Order filed August 7, 2024, and Delgado's Reply in Support of Motion for a Stay of the Gaming Office's Administrative Decision Pending this Appeal filed August 7, 2024 (Reply).

For the reasons below, the Court denies Petitioner's Motion.

I. Controlling Law

The Court reminds both parties that, with few exceptions noted below, only Tohono O'odham law (Constitution, Code, and appellate case law), and Tohono O'odham Court

Rules, are controlling on this Court. What the Court referenced in its Aug. 5 Order, it will spell out here:

> In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation. . . . If a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which addresses the claims asserted, the court ***may in its discretion*** look to the laws of the State of Arizona ***for guidance***.
>
> 4 T.O.C. Ch. 1, § 1-102 (emphasis added).

As an example, the Court in this case did as it did in a previous case and, finding no definition of "good cause" in the context of granting a stay in an administrative appeal under Tohono O'odham law, exercised its *discretion* under 4 T.O.C. Ch. 1, § 1-102 and looked to Arizona law for *guidance*. There it found a well-researched and well-reasoned case on point (P&P Mehta LLC v. Jones, 211 Ariz. 505 (Ct. App. 2005)), and because of its analogous applicability, thorough research, and solid reasoning, the Court *chose* to apply the good cause standard from Mehta to this case, not because Mehta, or any other Arizona law, is controlling—it is not.

In the absence of Tohono O'odham law on point, this Court like many others—especially while young and developing their own jurisprudence, may also consider authority from other jurisdictions besides Arizona (again if provided with an explanation of why the Court should consider it). This may include other states, federal, or even secondary sources such as Corpus Juris Secundum or American Jurisprudence 2d, as those sources can sometimes provide useful, broad perspectives. However, to cite cases from other states, and federal cases (except a few as noted below) as if they are controlling in this Court, ignores the Nation's law and its sovereignty.

The Court also reminds both parties that The U.S. Constitution, including its amendments, the 5th and 14th among them, do not apply to Indian tribes. The Indian Civil

Rights Act of 1968, as amended, 25 U.S.C. § 1301 *et. seq.*, (ICRA) does impose some requirements similar to U.S. constitutional provisions. See Emerson v. Nation, 2021 TOR Supp. 19, 21 (Ct. App. 2015); Frank v. Nation, 2021 TOR Supp. 13, 15 (Ct. App. 2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896). And the Tohono O'odham Constitution expressly recognizes the rights guaranteed by ICRA. T.O. Const. Art. III, § 4.

One of those is the right to due process. "No Indian tribe in exercising powers of self-government shall-- . . . deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8). The Tohono O'odham Constitution also includes a due process right. "[The Tohono O'odham Nation government] shall not . . . deprive any member of liberty or property without due process of law." T.O. Const. Art. III, § 1.

However, although our Courts often use federal or state case law as persuasive authority when interpreting ICRA's or our own Constitutional guarantees, including due process rights, see, e.g., Smith v. Nation, 2021 TOR Supp. 75, 84-85 (Ct. App. 2020); Escalante v. Sells Dist. Council, 2021 TOR Supp. 36, 44 (Ct. App. 2017), there is no requirement to do so, and indeed, given the distinct historical, governmental, and cultural values of Indian tribes, ICRA provisions are not always applied identically to their U.S. Constitution counterparts. See, e.g., Howlett v. The Salish and Kootenai Tribes, 482 F.2d 1140 (9th Cir. 1973); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (9th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971). Further, while basic core concepts may be applied the same, such as reasonable notice and a meaningful opportunity to be heard for due process, see Escalante, 2021 TOR Supp., the interests to which they apply—including what constitutes a protected property interest—may be drastically different. See Chavez v. Sells Community Land Committee, -- TOR – (Ct. App. 2022, AP2021-0002) (pending publication) (available at https://tojc-

nsn.gov/wp-content/uploads/2023/02/Chavez-Opinion.pdf) (homesite assignments on the Nation's unallotted lands do not create a protected property interest in the assignee, while the same person may own a home outright on that homesite (fully protected property interest in the home)).

Given the vital importance of the Nation's gaming activities to the Nation and its members (both as employees and non-employees), and the critical importance of the Nation's sovereignty in being able to operate and regulate its gaming activities (within the parameters of the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701 et seq.) and the Tribal-State Compact between the Nation and the State of Arizona), this could be one of those distinct historical, governmental, and/or cultural situations where due process—or at least what is a protectable property interest—under the Nation's Constitution and ICRA would not be applied the same as it would be under the 14th Amendment to the U.S. Constitution. The Court does not reach that question in this Order, only reminding the parties that (a) the U.S. Constitution does not apply to Indian tribes, and (b) ICRA and Tohono O'odham Constitutional provisions similar to U.S. Constitutional provisions are not always interpreted in the same way.

Here again, the Court may consider such cases if there is no Tohono O'odham law on point, if presented in that context and with some explanation of why the Court should adopt the suggested viewpoint. But to cite U.S. Constitution provisions and their corresponding case law as if they are binding here, also ignores Tohono O'odham law, Tohono O'odham sovereignty, and federal Indian law.

Some federal statutes and case law are of course binding on this Court, if they expressly address and exercise the U.S. government's authority over Indian tribes. E.g., IGRA, ICRA, & Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978). But those are the exceptions, not the rule.

II. Standard for Stay is Good Cause

The standard for seeking a stay here is, as Petitioner (or Delgado) asserts, good cause. And pursuant to the Court's Aug. 5 Order, the Court adopted the "Mehta" standard to show good cause: the petitioner must show (A) a colorable claim ("a seemingly valid, genuine, or plausible claim under the circumstances") and (B) the balance of harm favors granting the stay. Mehta, 211 Ariz. at 510.

As noted in Delgado's Reply (p. 1-2), the Gaming Ordinance itself expressly states that, in an administrative appeal (more precisely for this matter, a judicial review of a Gaming Office final action with respect to a license applicant, see 16 T.O.C. Ch. 1, § 1204(b) & (e)), the reviewing court may reverse if the Gaming Office's action was "Contrary to *constitutional* right, power, privilege, or immunity" "or otherwise not in accordance with law". 16 T.O.C. Ch. 1, § 1204(e)(1) & (2) (emphasis added).

Petitioner asserts that the Gaming Office's final action (Denial of Gaming License Renewal on June 6, 2024 (Non-Renewal)) was contrary to Petitioner's constitutional rights and not in accordance with law *because* of the unconstitutionality and other unlawfulness of the regulations and Ordinance. (See Motion at 4 "The Regulations *relied upon* violate the Tohono O'odham Constitution" (emphasis added); Motion at 6-10 ("the Gaming Office cannot *rely on* Section 602(5) of the Gaming Ordinance" (emphasis added) for several claimed reasons based on violations of constitutional rights and not being in accordance with law.) That fits squarely within the scope of § 1204(e)'s review. The entire basis of Delgado's appeal is the Non-Renewal—the Gaming Office's final action, which relied on those provisions that Delgado claims are unconstitutional and otherwise not in accordance with the law.

Respondent's focus solely on the Petitioner's argument against the constitutionality of the Gaming Office's regulations and Ordinance (Response at 3) while ignoring their role

in the Non-Renewal, the Non-Renewal in which they appeared, and Petitioner's express linking of them to the Gaming Office's Non-Renewal, is perplexing. In any event, Petitioner's express and consistent claim—appealing a final Gaming Office action that he claims was contrary to his constitutional rights and otherwise not in accordance with the law, clearly falls within the scope of review of 16 T.O.C. Ch. 1, § 1204(e). The Mehta good cause standard is therefore the correct one to use for Petitioner's Motion.

Under the Mehta standard for good cause, the Court finds that A. the balance of harms favors granting a stay, but B. the Petitioner has not presented a colorable claim.

A. Balance of Harms

1. Petitioner Delgado's Harms

Delgado asserts that if a stay is not granted, his appeal will become less meaningful (Motion at 1.) That is elevated to "essentially meaningless" at pages 3 and 4 of the Motion. However, this greater harm appears to be based on misstatements by Delgado's counsel where he attributes to Delgado's Declaration (attached to the Motion) that "the Gaming Enterprise *will* reinstate his employment if the Court timely issues a stay" and that "if a stay is not timely issued, the Gaming Enterprise *will have no choice* but to hire someone else to fulfill the general manager role", citing paragraphs 12 and 13 of Delgado's Declaration (emphasis added). If those statements were true and correct, the balance of harms would indeed increase in Delgado's favor.

However, in those paragraphs of Delgado's Declaration, Delgado actually states that he "strongly believes" his employment will be reinstated if a stay is timely issued, and he simply "believes" that the Enterprise will have to hire a replacement if a stay is not timely issued.

Furthermore, Delgado does not state who those "Officers" of the Gaming Enterprise with whom he had discussions to form his beliefs are, or what positions they hold.

Thus, the definitive statements in the Motion that the Gaming Enterprise *will* reinstate Delgado's employment if the Court timely issues a stay, and that it *will have no choice* but to hire a replacement if the Court does not timely issue a stay, are inaccurate and concerning to the Court.

2. Respondent TOGO's Harms.

Respondent (or the Gaming Office, or TOGO) did not assert any harms it would suffer if the Court granted a stay. TOGO did claim that Delgado's harm would be mitigated, wiped out in fact, if successful on appeal, through back pay and renewal of his license. (Response at 4.). However, the Court does not see anywhere in the lists of available remedies in Section 1204 of the Gaming Ordinance, or in Rule 10 of Section 9 of the Tohono O'odham Rules of Court (Administrative Appeals) the authority of this Court to award back pay in an administrative appeal. Moreover, TOGO's argument does not address Delgado's assertion, weak as it is, that the Gaming Enterprise will / may hire a replacement.

Weighing the above—Petitioner's weak but existent assertion of harm if a stay is not granted, against Respondent's lack of any harm if a stay is granted and virtually nonexistent refutation of Petitioner's claimed harm, the Court finds that the balance of harms favors Petitioner, for granting a stay.

B. Colorable Claim

Delgado makes several claims as to why the Non-Renewal was improper. The Court does not find any of them colorable

1. Sections 1.6.1 and 1.6.3 of the Regulations

Delgado's claim that the regulations relied upon in the Non-Renewal—Sections 1.6.1 (excessive debt) and 1.6.3 (federal tax lien)—are "additional standards of unsuitability not contained within the Gaming Ordinance", and therefore unconstitutional or otherwise not in accordance with law (Motion at 6) is not colorable.

Delgado first points to 25 C.F.R. § 556.5 and 16 T.O.C. Ch. 1, § 602(a). (Motion at 3.) 25 C.F.R. § 556.5 includes, in its standards of unsuitability for licensing, a person whose habits a tribal official determines, in applying the standards adopted in a tribal ordinance, "pose a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming".

16 T.O.C. Ch. 1, § 602(a)(5) includes in its standards of unsuitability "a Person whose prior activities, . . . habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto."

Each of those are minimal, "must not issue if" standards, not "must issue unless" standards. Nothing in either says the Nation's Council may not (if within its delegated powers) set other standards of unsuitability. Indeed, contrary to Delgado's confusing mischaracterization that TOGO is arguing that the Council is implicitly delegating to the Gaming Office the responsibility to create new standards of unsuitability (Delgado's Reply at 5), TOGO demonstrates (Response at 5) that the Council has expressly delegated to the Gaming Office other broad powers for its licensing responsibility and other responsibilities under the Ordinance, including the discretion to deny a license renewal if a background investigation reveals information sufficient to disqualify the applicant from holding a license, 16 T.O.C. Ch. 1, § 903(b), the authority to approve or deny license applications, or revoke or suspend licenses, id. at § 403(n), and the very broad power to "do all other things reasonably necessary to protect the integrity of Gaming Activities, financial accounting and money handling and for the proper and efficient fulfillment of the powers

and responsibilities of the Gaming Office under this Ordinance, the Compact, or the Act." 16 T.O.C. Ch. 1, § 403(r).

Delgado then argues, however, that the regulations relied upon in the Non-Renewal—Sections 1.6.1 (excessive debt) and 1.6.3 (federal tax lien)—are "additional standards of unsuitability not contained within the Gaming Ordinance" (Motion at 6) and therefore exceed the powers delegated by the Tohono O'odham Council to the Gaming Office through the Gaming Ordinance and are therefore unconstitutional. (Motion at 5-6.) The Court does not find this colorable.

The Court agrees with Delgado (Motion at 5-6) that, under Article VI of the Tohono O'odham Constitution, the Gaming Office may only exercise powers expressly delegated by the Tohono O'odham Council, and that the Council did delegate powers to the Gaming Office through the Gaming Ordinance, including the power to issue regulations (Motion at 6).

The Court agrees with TOGO, however, that a more complete picture of that section of the Gaming Ordinance delegating the power to the Gaming Office to issue regulations is helpful:

> The Gaming Office shall from time to time promulgate and issue regulations governing any aspect of its responsibilities under this Ordinance, which, so long as they are in furtherance of and not in conflict with any provision of this Ordinance, shall have the force of law.
>
> 16 T.O.C. Ch. 1, § 404(a).

That is a very broad delegation, but it is an express delegation. And there is nothing wrong with that. There is no requirement in the Constitution that an express delegation of powers by the Council must include every detail of what the agency must or must not do. That would defeat the purpose of delegating.

As noted above, the Council has expressly tasked the Gaming Office with multiple responsibilities in the Ordinance, including licensing and "to do all other things reasonably necessary to protect the integrity of Gaming Activities, financial accounting and money handling and for the proper and efficient fulfillment of the powers and responsibilities of the Gaming Office under this Ordinance, the Compact, or the Act." 16 T.O.C. Ch. 1, § 403(r).

The Council has also expressly delegated to the Gaming Office the power—and the duty—to issue regulations governing those responsibilities as long as they are furtherance of and not in conflict with the Ordinance.

Delgado has not offered any argument about how Regulations Sections 1.6.1 (excessive debt) and 1.6.3 (federal tax lien) could *not* be considered in furtherance of the Gaming Office's licensing responsibilities under 16 T.O.C. Ch. 1, § 602(a) (denying a license renewal to a manager with access to the Enterprise's money whose prior activities or habits of excessive debt and / or a federal tax lien the Gaming Office has determined pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable activities in the carrying on of the business and financial arrangements incidental to gaming) or could be considered in conflict with any provision of the Ordinance. The Court doesn't see how any plausible claim to that effect could be made.

Even harder to envision is how one could argue that Regulations Sections 1.6.1 and 1.6.3 could be considered not in furtherance of the Gaming Office's responsibility under 16 T.O.C. Ch. 1, § 403(r) "to do all other things reasonably necessary to protect the integrity of . . . financial accounting and money handling and for the proper and efficient fulfillment of the powers and responsibilities of the Gaming Office under this Ordinance . . . ."

The Court therefore finds that Delgado's claim that Regulations Sections 1.6.1 and 1.6.3, upon which the Non-Renewal rely, are unconstitutional, is not colorable.

2. Section 602(5) of the Gaming Ordinance

a. Gaming Ordinance § 1203(b)(1)-lack of notice

Delgado points to Section 1204(e) of the Gaming Ordinance (Motion at 7), which states that the reviewing court will uphold the Gaming Office's final action unless, among other reasons, the Office's action was "Without observance of procedure required by law". 16 T.O.C. Ch. 1, § 1204(e)(4).

Delgado next points to Section 1203(b)(1) of the Ordinance (Motion at 7), which states that a "notice of violation" will contain a "citation to the Ordinance, regulation . . . that has been or is being violated." 16 T.O.C. Ch. 1, § 1203(b)(1). Because the Gaming Office did not cite Section 602(a)(5) in the preliminary notice, Delgado argues, it did not observe the procedure required by Section 1203(b)(1) and therefore the Non-Renewal must be reversed. (Motion at 7.)

However, TOGO correctly asserts that 1203(b)(1) does not apply here. (Response at 8.) It applies to "notices of violation" which stem from *facility inspections* (Section 1201), and *investigations from reports of violations* (Section 1202(a)), *not* licensing decisions.

The Court acknowledges this can be confusing, as Sections 1201 through 1203 deal only with notices of violations stemming from facility investigations and reported violations, while Section 1204 address judicial review of those *and* all other final agency actions (including licensing decisions). This is made clear by the distinct provisions of Subsections (i) 1204(a) ("Any Person who has been issued a notice of violation . . . and has submitted a written response to the Gaming Office in compliance with the provisions of Section 1203(c) may apply to the Judicial Court of the Tohono O'odham Nation for review

of the Gaming Office's written decision regarding the alleged violation"), and (ii) 1204(b) ("Any applicant for a license under this Ordinance, any Person licensed pursuant to this Ordinance, and any patron of a Gaming Operation aggrieved by a final action of the Gaming Office may apply to the Judicial Court of the Tohono O'odham Nation for review of the final action of the Gaming Office"). Subsections 1204(c) and (e) then address all such judicial reviews together.

Accordingly, the Court understands Delgado initially getting this mixed up in his Motion and thinking that Section 1203(b)(1) of the Gaming Ordinance could apply here. However, after Respondent addressed this in its Response, and Petitioner took another look, he should have reviewed the full Chapter 12 of the Ordinance more carefully and corrected it in his Reply.

Despite this double miss, the Court admonishes TOGO's counsel to avoid accusations of lack of candor without evidence. Delgado's quotation of Section 1203(b)(1) ("the Gaming Ordinance requires that the Gaming Office's preliminary notice contain 'a citation to the Ordinance' at issue" (Motion at 7 (quoting 16 T.O.C. Ch. 1, § 1203(b)(1)), is an accurate quote, and it accurately furthers his argument (inapplicable as it is). His focus is on not citing the Ordinance at issue (Section 602(a)(5) of the Gaming Ordinance).

Much of Delgado's Motion is based on the argument that the regulations at issue are separate from, and in conflict with, the Ordinance at issue. By contrast, TOGO argues, and the Court agrees, that the regulations are a valid delegation, in furtherance of, and not in conflict with, the Gaming Ordinance generally, and Section 602(a)(5) specifically.

While the Court does not find Delgado's claim colorable,[1] it does believe it is made in good faith. Thus, quoting the rest of Section 1203(b)(1), the lack of which TOGO seems

[1] See Section II.B.1., *supra*.

to take as lack of candor (Response at 8) would serve no purpose except to take up space and make Delgado's argument less clear.

b. Due process-property interest in gaming license

Delgado next argues that he has a protected property interest in his gaming license, and the Gaming Office's failure to give notice that it was relying on Section 602(a)(5) violated Delgado's due process rights. (Motion at 7.)

Delgado is correct (Motion at 7) that the Tohono O'odham Constitution guarantees its members due process. See T.O. Const. Art. III, § 1. In addition, ICRA provides a due process right for all Indian tribal members, as described in Section I, *supra*.

However, Delgado cites no Tohono O'odham law establishing a protected property interest in a gaming license. More concerning, Delgado's cited law (to inapplicable state and federal 14th Amendment analysis) are cases involving the revocation or suspension of *existing* licenses, not the non-renewal of expiring or expired licenses. Delgado's inaccurate references to the Gaming Office's action as a revocation or suspension instead of a non-renewal (Motion p. 3, lines 7 & 8, p. 7, lines 19, 20 & 27), do not change this reality.[2] Accordingly, the Court does not find this claim colorable.

In that regard, if in his complaint Delgado wishes to raise this argument again, trying to persuade the Court why it should apply certain 14th Amendment property interest analysis to ICRA and/or Tohono O'odham Constitution due process rights, Delgado should be prepared to address TOGO's counterargument (if TOGO does not propose that this is

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[2] The Court's first exposure to the Gaming Office's final decision here was through the Motion, on page 3, where Delgado referred to it twice, inaccurately, as a revocation instead of a non-renewal. This gave me a false impression and perspective, exacerbated when reviewing the cited case law applicable to license revocations instead of non-renewals. Not until seeing other references to non-renewal, and reviewing the actual Non-Renewal itself—after these earlier references to revocation—was I able to see the situation more accurately. The Court admonishes Delgado's counsel to review his materials, and/or choose his words, more carefully, to avoid misleading the Court and opposing counsel.

one of those distinct historical, governmental, and/or cultural situations where due process under the Nation's Constitution and/or ICRA would not be applied the same as it would be under the 14th Amendment) better than he did in his Reply.

In the Response, TOGO cited case law stating that a property interest protected by due process can only result from a legitimate claim of entitlement arising from an independent source, such as state or federal law (or tribal law, though the cited case did not mention tribal law since it did not involve any Indian tribe). (Response at 6.) TOGO then correctly pointed out that the Gaming Ordinance expressly states that no licensee has a vested right to renewal. (Id. at 6-7).

TOGO cited additional case law providing that where state law gives the licensing authority broad discretion to deny license applications in a closely regulated field, there is no property interest protected by the 14th Amendment. (Id. at 7.) Delgado claims these do not meaningfully rebut his cited cases. (Reply at 5.) To the contrary, if they were controlling, they would not only effectively rebut Delgado's cases, but they would also be applicable (license renewals) while Delgado's cases are not applicable (license revocations).

The Court is aware of similar (non-controlling) 14th Amendment case law that Delgado should be also prepared to address if he raises this argument again and wishes to use 14th Amendment case law as persuasive suggestions, in his complaint—with respect to gaming license *non-renewals*. E.g., Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz., 24 F.3d 56, 62 (9th Cir. 1994) (" 'A reasonable expectation of entitlement is determined largely by the language of the statute . . . .' ") (internal citation omitted); Alpha, LLC v. Dartt, 232 Ariz. 303, 305–06, 304 P.3d 1126, 1128–29 (Ct. App. 2013) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have

a legitimate claim of entitlement to it." *Bd. of Regents of State Coll. v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972); *see also Shelby Sch.,* 192 Ariz. at 168, ¶ 55, 962 P.2d at 242 ("Property rights do not arise from simple wants and desires; they must be based on legitimate claims of entitlement.")).

c. Due process-notice and opportunity to be heard

Here, Delgado does cite to controlling Tohono O'odham law regarding a person's right to reasonable notice and a meaningful opportunity to respond under the Tohono O'odham Constitution's due process clause. (Motion at 8 (citing Escalante v. Sells Dist. Council, 2021 TOR Supp. 36 (Ct. App. 2017).) However, as it is linked to the claimed property interest in the desire for a gaming license renewal, which the Court does not find colorable, the Court cannot find this claim colorable either.

Here again, if Delgado wishes to raise this claim in his complaint, and use 14th Amendment case law as persuasive suggestions, he should address TOGO's more persuasive 14th Amendment argument that Delgado was in fact provided notice and a meaningful opportunity to respond. (See Response at 7 (explaining that the Gaming Office (i) provided Delgado a preliminary notice of its intent to deny his license renewal and provided Delgado an opportunity to challenge that, and (ii) provided Delgado a final decision of non-renewal, which included a notice of his ability to appeal it in court. As explained in Section II.B.1. *supra*, the Gaming Office's lack of reference to Section 602(a)(5) of the Gaming Ordinance in the preliminary notice is of no importance since the cited regulations are the relevant ones on which the decision(s) were based, and stemmed from, and are in furtherance of, Section 602(a)(5) and the Gaming Ordinance generally.

Moreover, even if the Court were to (i) adopt 14th Amendment analysis, and (ii) apply it here the same as it is in federal and state case law instead of differently due to the "distinct historical, governmental, and cultural values" of the Tohono O'odham Nation,

and (iii) find in Delgado's favor that (a) the Gaming Office's action was the taking of a protected property interest instead of the denial of a non-protected hope of renewing a license, and (b) the preliminary notice did not provide reasonable notice and a meaningful opportunity to respond to the taking of that protected property interest because it referenced the regulations only, and not Section 602(5) of the Gaming Ordinance, the Court would like to know why the Non-Renewal, with its explicit reference to Section 602(a)(5), together with this administrative appeal, would not be such a reasonable "post-deprivation" notice and opportunity to respond under 14th Amendment jurisprudence. See, e.g., Miranda v. City of Casa Grande, 15 F. 4th 1219, 1226 (post-deprivation remedies can satisfy due process in revoking licenses).

d. Void for vagueness

Delgado next claims that Section 602(a)(5) of the Gaming Ordinance is void for vagueness. (Motion at 8-10.) Once again, Delgado bases this claim on non-controlling law, with no attempt to show why this Court should adopt its analysis. The Court therefore does not find this claim colorable either.

But also for the sake of expediting next steps, if Delgado intends to raise this claim in his complaint, the Court finds TOGO's counterargument (Response at 8-10) far more convincing. Just to summarize here for convenience: Vagueness challenges outside First Amendment questions are strongly disfavored and must be examined in light of the facts of the particular case. In this case, Section 602(a)(5) provides in part that the Gaming Office shall not issue a license if it determines that a person's past actions may "pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto." 16 T.O.C. Ch. 1, § 602(a)(5). The Gaming Office here determined that Delgado's carrying

a debt of approximately $250,000 (plus, not mentioned in this part of the Response, but in the preliminary notice and in the Non-Renewal, a federal tax lien) posed such a threat to the public interest or created or enhanced the dangers of unsuitable, unfair or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto. (Response at 8-9.)

Delgado argues that 602(a)(5)'s language is so vague that it requires a person of ordinary intelligence to guess at its meaning and is so standardless that it invites discriminatory enforcement. (Motion at 8.)

As TOGO points out (Response at 10), because Delgado correctly notes that 602(a)(5) (mostly) restates 25 C.F.R. § 556(a)-(b), and argues that 602(a)(5) is void for vagueness, then the logical conclusion of Delgado's argument is that 25 C.F.R. § 556(a)-(b) is also void for vagueness. The Court sees nothing vague in either one; broad, perhaps, but not vague.

Delgado argues that 25 C.F.R. § 556(b)'s language "in applying the standards adopted in a tribal ordinance," with respect to determining whether licensing a person poses the threats described in Section 602(a)(5) quoted above, envisions that the Nation would create more specific, separate standards. (Motion at 9-10.) As support, Delgado references a letter from the Chairman of the National Gaming Commission stating that he felt "compelled to note that certain provisions [in the 2021 amendments to the Gaming Ordinance] relating to background and licensing procedures and notifications of results are broadly stated and lack specificity as to the requirements of 25 C.F.R. Parts 556 and 558." (Motion at 10, quoting Sept. 20, 2021 letter from E. Sequoyah Simermeyer, Chairman of the National Indian Gaming Commission, to Ned Norris, Jr., Chairman of the Tohono O'odham Nation, Ex. D to Decl. of Joseph Delgado, attached to Motion ("Simermeyer Letter".)

The Court found this support to be potentially persuasive at first read, perhaps indicating a violation of IGRA, which likely would be controlling in this Court—until reviewing the referenced letter, and what was not cited. First, the Gaming Commission Chairman does not state which provisions of the 2021 amendments are broadly stated and lack specificity. There are many other provisions besides Section 602(a)(5).

Second, he does not state which section(s) of Part 556 he is referencing-there are seven sections in that Part besides § 556. Third, while he says "broadly" and "lack specificity", he certainly does not say "void for vagueness" or that they in any way violate Parts 556 or 558, or IGRA generally. In fact, he states twice that the *Gaming Ordinance is approved*: "[T]he amended gaming ordinance is therefore approved." "These amendments are approved as they are *consistent with the requirements of the Indian Gaming Regulatory Act and NIGC regulations*." (Simermeyer Letter (emphasis added).)

The "NIGC regulations" include, of course, all of 25 C.F.R. Parts 556 and 558. See 25 C.F.R. § 501.1 ("This chapter implements the Indian Gaming Regulatory Act (Pub. L. 100-497, 102 Stat. 2467).") the "chapter" referenced there is chapter III of Title 25 of the Code of Federal Regulations. Chapter III includes Parts 556 and 558, including 25 C.F.R. § 556(b) and its language "in applying the standards adopted in a tribal ordinance".

Thus, despite feeling compelled to "note" that some unidentified provisions in the Gaming Ordinance are broadly stated and lack specificity, the Chairman Simermeyer still concluded, *expressly*, that the Gaming Ordinance (including Section 602(a)(5)) complies with IGRA and the NIGC regulations (including 25 C.F.R. § 556(b)). This express conclusion, together with the other express conclusion that "the amended gaming ordinance is therefore approved" (Simermeyer Letter) undermines Delgado's argument much more than the cited passage supports it. The Court hopes the failure to cite these very relevant and clear passages and address them was not intentional.

3. Delgado's prior habits, activities and reputation

Finally, Delgado argues that, even if Section 602(a)(5) of the Gaming Ordinance withstands his legal challenges (which so far it has) the Court in this administrative appeal will have to consider whether Delgado's "prior habits, activities and reputation are a threat to the public or the regulation of gaming or create a danger of illegal practices." (Motion at 10.) Delgado further argues that he has demonstrated his past activities and reputation are clearly not a threat, by his doing nothing but protecting the public and Nation from threats and illegal activities by serving the Nation's police department for over twenty years and the Gaming Enterprise as Director of Security and General Manager. (Motion at 10.)

First, for the avoidance of doubt, Section 602(a)(5) is a bit broader, as quoted in Section II.B.2.d. *supra.* Second, and more importantly, the actual standard under 16 T.O.C. § 1204(e) is for the Court to uphold the Gaming Office's final decision unless it determines that the decision was arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, unsupported by substantial evidence, without observance of procedure required by law, etc.- the closest there probably being arbitrary, capricious, abuse of discretion, and/or unsupported by substantial evidence.

All of those standards are notably different than this Court substituting its own factual findings for those of the Gaming Office's primary findings, as Delgado posits in his Motion. Under 16 T.O.C. § 1204(e), the Court could not and would not do that—here or at any stage in this appeal. Accordingly, the Court does not find this claim colorable.

Delgado, however, changed his argument to an "arbitrary and capricious" standard in his Reply, *after* TOGO pointed out this correct standard in its Response. (Response at 10-11; Reply at 7-8.) As this does not give TOGO a chance to respond, the Court will not address it here.

Even if it did, however, the Court would still not find it colorable, as it tasks the Gaming Office to base its Non-Renewal decision solely on Delgado's history of service to the Nation (which the Court has no reason to doubt has been beneficial and honorable) but to ignore his significant accrual of debt and federal tax lien. And as the Court noted in Section II.B.2.d. *supra*, the Court found TOGO determined that Delgado's carrying of approximately $250,000 debt (and a tax lien) did in fact pose a threat to the public interest or created or enhanced the dangers of unsuitable, unfair or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto under Section 602(a)(5) of the Gaming Ordinance. To ignore that for prior service, however commendable, would seem the arbitrary and capricious decision, at least at this stage. Delgado may try to prove the reverse as his appeal proceeds.

III. Conclusion

Petitioner Delgado has shown that the balance of harms favors granting a stay of the Gaming Office's final decision (the Non-Renewal of his gaming license).

However, Delgado has not shown that he has a colorable claim. Therefore, the Court DENIES his Motion for a Stay of the Gaming Office's Administrative Decision Pending this Appeal.

As noted above, however, Delgado may raise these or other claims in his complaint, subject to the admonishments in this Order.

Signed August 20, 2024

Judge Joseph Hardy Jr.

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TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

JOSEPH L. DELGADO, Petitioner, v. TOHONO O'ODHAM GAMING OFFICE, a department within the Executive Branch of the Tohono O'odham Nation, and MARY ANN RAMIREZ, in her official capacity as Executive Director, Respondents	Case No.: AV2024-0100 NOTICE OF ERRATA

The Court hereby notifies the parties that the ORDER DENYING PETITIONER'S MOTION TO STAY THE GAMING OFFICE'S FINAL DECISION, filed August 21, 2024 (Order), contained one error and two omissions that the Court now corrects.

1. On page 3, lines 18-19, the citation for Howlett v. The Salish and Kootenai Tribes is corrected to "529 F.2d 233 (9th Cir. 1976)" (instead of "482 F.2d 1140 (9th Cir. 1973)" as cited in the Order).
2. On page 10, line 12, the Court adds subclause (5) to the citation to 16 T.O.C. Ch. 1, § 602(a).
3. On page 15, the Court adds two closing parentheses at the end of the sentence in line 18.

Signed August 22, 2024

Judge Joseph Hardy Jr.

JUDICIARY

FILED IN THE TOHONO O'ODHAM COURT
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The Judicial Court of the Tohono O'odham Nation
In the State Of Arizona
Children's Civil Division

In the Matter of:
J.
[redacted]
DOB: [redacted]

Case No.: CCV2009-0070

COURT ORDER

At the hearing held April 30, 2024, the Tohono O'odham Department of Health and Human Services Child Welfare Services Division ("the Division") appeared through Nancy Ibarra, Program Supervisor, and legal counsel Rebecca Cohen, Assistant Attorney General for the Tohono O'odham Nation. The Division presented their *Notice to Court RE: Additional Research and Description of Requested Records,* dated April 12, 2024.

Upon review of the *Notice,* the Court accepts the foundation presented in the *Notice*, especially citing to 3 T.O.C. Ch.1 §11203(B), where the Court may for good cause, "open [the record] to inspection and copying by the child…or such other person as the Court may, for good cause, permit." (emphasis added.)

The child, who is now an adult, is under the care of the Pima County Public Fiduciary (PCPF), in Case No.: GC2023-0484. The PCPF is in need of information from the child's record when the child was under the care of the Nation, in order to continue caring for the child. The Nation is requesting that certain information be made available to the Pima County Public Fiduciary from the Nation.

The Nation petitions to have the records released to the PCPF to include the following documents:

(a) J[redacted]'s medical records; J[redacted]'s social file for the last three (3) years;

(b) J[redacted]'s legal file for the last three (3) years;

(c) J[redacted]'s financial records for the last three (3) years including, but not limited to all bank records from any financial institution and including from the Tohono O'odham Nation;

(d) any and all accounting summaries for the last three (3) years; and

(e) any and all trust documents for the past three (3) years.

Pursuant to 3 T.O.C. Ch.1 §11203(B), and under 4 T.O.C. Ch. 1, §1101(B)(1), *Purpose,* which states, "to ensure the health and welfare of all children and families within the jurisdiction of the Tohono O'odham Nation." The Court also relies on 4 T.O.C. Ch 1. §1305, *Comity*, which states: "Notwithstanding any other provision of law, the Children's Court shall give comity or full faith and credit to the public acts, records and judicial decrees applicable to child custody proceedings of any court of competent jurisdiction..." In working to ensure the health and welfare of the Nations' members, this Court recognizes that working with adjacent counties and their Courts and public fiduciaries is important, especially under the circumstances at hand.

IT IS ORDERED:

The Court orders the release of records, as stated above, under the following conditions:

(a) Any records provided must be kept Confidential and be marked as such;

(b) That if in open Court when the records are being discussed or shown to anyone, that the Court go into closed session, so that only proper and necessary people are in the Court to discuss and review the documents; and

(c) That the records and documents be placed under seal.

Signed this 1st day of May, 2024.

Debra S. Doll
Judge
Children's Court of the
Tohono O'odham Nation's Judicial
Branch

TOHONO O'ODHAM
JUDICIARY

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CHILDREN'S COURT DIVISION

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2022 OCT 10 P 2:43
JUDICIARY SERVICE CLERK

In the Matter of: N[redacted] V. S[redacted] DOB: [redacted]; M[redacted] R[redacted] S[redacted] DOB: [redacted]; A[redacted] E. C[redacted] DOB: [redacted], H[redacted] D. C[redacted] DOB: [redacted], Minor Children.	Case Number(s): CCV2021-0020 CCV2021-0021 CCV2021-0022 CCV2021-0023 ORDER

A consolidated hearing to establish child support in favor of Shirley A. Harvey, the Guardian and Conservator of the above-named children, and to consider past care and support in her favor, was held on September 21, 2022. Shirley A. Harvey appeared. Trina Norris, Paul V. Sanchez, Regis Conde, and Sanchez Conde were directed to appear but were absent. Shirley Harvey was sworn in and testified. The Court finds and orders as follows:

1. Shirley A. Harvey is the Legal Guardian and Conservator of the legal and financial affairs of: N[redacted] V. S[redacted] (DOB: [redacted]); M[redacted] R[redacted] S[redacted] (DOB: [redacted]); A[redacted] E. [redacted] (DOB: [redacted]); and H[redacted] D. C[redacted] (DOB: [redacted]).

2. On June 15, 2022, Ms. Harvey asked for a child support order to help her with providing for the children. She also asked if the child support order can cover the time that the children were placed in her care by the Tohono O'odham Department of Health & Human Services, Child Welfare Division. N[redacted] and M[redacted] were placed in the physical care of Ms. Harvey in July of 2019. A[redacted] and H[redacted] were placed in the physical custody of Ms. Harvey in February of 2020.

3. This Court's June 16, 2022 order put the parents on notice that child support, including past care and support, was being sought, and the Court directed Trina Norris, Paul V. Sanchez, Regis Conde, and Sanchez Conde to appear on September 21, 2022. They did not appear. Neither did they file an objection to Ms. Harvey's request.

4. Trina Norris (DOB: 6/17/1985) and Paul V. Sanchez (DOB: 3/5/1985) are the natural parents of N[redacted] V. S[redacted] (DOB: [redacted]) and M[redacted] R[redacted] S[redacted] (DOB: [redacted]). They owe a duty of support to N[redacted] and M[redacted] pursuant to 9 T.O.C. § 15.

5. Trina Norris (DOB: 6/17/1985) and Regis Conde (DOB: 9/23/1983) are the natural parents of A[redacted] E. C[redacted] (DOB: [redacted]). They owe a duty of support to A[redacted] pursuant to 9 T.O.C. § 15.

6. Trina Norris (DOB: 6/17/1985) and Sanchez Conde (DOB: 9/29/1978) are the natural parents of H[redacted] D. C[redacted] (DOB: [redacted]). They owe a duty of support to H[redacted] pursuant to 9 T.O.C. § 15.

7. 3 T.O.C. § 1511 recognizes that a child has a right to child support. The Court also has the discretion to attribute income to a parent when establishing child support. *In the Matter of J.A.*, 2021 TOR Supp. 54, 56 (T.O. Ct. App. 2017).

8. The Nation's Division of Child Welfare Services placed N[redacted] and M[redacted] in the care of Shirley on July 16, 2019. The Division then placed A[redacted] and H[redacted] in the care of Shirley on February 28, 2020. The Court did not exercise its discretion to order support for the children in the Child in Need of Care cases pursuant to 3 T.O.C. § 1512(E)(2).

9. *Bahyesva v. Miguel*, 3 TOR3d 151, 152-153 (T.O. Trial Ct. Mar. 7, 2012) states:

> "When neither the code or Tohono O'odham custom address a specific issue regarding child support, the Court has the discretion to look to Arizona law for guidance."

Page 153 of the *Bahyesva* order recognizes that "the person or persons who had custody of the children" are entitled to collect child support arrears. The Court finds the same reasoning justifies entering a child support order in favor of Shirley Harvey, as N[redacted]

and M[redacted] have been in Shirley's physical custody since July 16, 2019. Likewise, A[redacted] and H[redacted] have been living with Shirley since February 28, 2020.

10. In *Garcia v. Garcia*, 1 TOR3d 108, 110 (T.O. Trial Ct. Jan 24 1994), appeal dism'd *Garcia v. Garcia*, 3 TOR3d 10 (Aug. 17, 2006), Judge Mary A. Juan announced that "it is the policy of this Nation that [O'odham children] be sufficiently supported during their minority."

11. Shirley's Petition for Permanent Legal Guardianship resulted in the dismissal of the Child In Need of Care (CINC) case. But for Shirley stepping up to care for the children, the CINC cases would still be open. As such, Shirley has standing as the current Guardian and Conservator to seek child support from the natural parents. This is consistent with Arizona law, which allows for anyone having custody of a child to initiate a child support action in the appropriate superior court. *See* A.R.S. §§ 25-501 through 503.

12. Regarding the issue of past care and support, this Court routinely considers and issues judgments for past care and support to parents asking for it by applying Arizona's child support law. *See Bahyesva v. Miguel*, 3 TOR3d at 152 (when neither the code or Tohono O'odham custom address a specific issue regarding child support, the Court has the discretion to look to Arizona law for guidance); 4 T.O.C. § 1-102 (if the court finds that there is no O'odham law or custom which addresses the claims asserted, the court may look to the laws of Arizona for guidance). Arizona law provides that child support may be ordered retroactively, but not more than three years before the date of the filing for child support. *See* A.R.S. § 25-320(A) through (C). As such, the Court, in its discretion, finds that it is appropriate to award Shirley a judgment for past care and support for the time that the children have been in her physical custody, but not more than 3 years from the date that she first requested support, which is June 15, 2022.

13. Ms. Harvey testified that she is familiar with the work history of her daughter, Trina Norris, as well as the earning history of Paul V. Sanchez, Regis Conde, and Sanchez Conde. Trina lives in Tucson. She works at Amazon. In 2019, she worked at an assembly company in Tucson. Paul Sanchez lives in Tucson and he works at Sam Levitz. Regis Conde lives in Tucson and works in Tucson. Sanchez Conde is disabled and is believed to receive Social Security Disability benefits. All but Sanchez are able bodied and capable of full-time, gainful employment.

14. Arizona's minimum wage is currently $12.80 per hour. The minimum wage paid to those working within Tucson's city limits is $13.00 per hour. Pursuant to Rule 2.4(a)(5) of Section 6 of the Tohono O'odham Rules of Court, the Court finds that it is appropriate to attribute Arizona's minimum wage to Trina, Paul, and Regis. No income is attributed to Sanchez Conde given his disability situation.

15. The Child Support Worksheet with case no. CCV2021-0020 and 0021 is attached and incorporated by reference. Trina Norris owes $475.20 per month in child support for N[redacted] and M[redacted]. Paul Sanchez owes $475.20 per month in child support for N[redacted] and M[redacted].

16. The Child Support Worksheet with case no. CCV2021-0022 is attached and incorporated by reference. Trina Norris owes $306.35 per month in child support for A[redacted]. Regis Conde owes $306.35 per month in child support for A[redacted].

17. The Child Support Worksheet with case no. CCV2021-0023 is attached and incorporated by reference. Trina Norris owes $155.65 per month in child support for H[redacted]. Sanchez Conde owes $155.65 per month in child support for H[redacted]. If Sanchez Conde's receipt of disability benefits or eligibility for such benefits results in a derivative benefit in favor of H[redacted], this benefit is payable to Shirley A. Harvey as child support, and this will satisfy the obligation of Sanchez Conde. If there is no derivative benefit available to Sanchez Conde, the Court will waive the obligation of Sanchez Conde.

18. Given that Trina Norris has three support worksheets with different support obligations, the Court exercises its discretion to utilize the worksheet in CCV2021-0023 to establish her support obligation. The Court multiplies $155.65, which is the support amount for H[redacted], by 4, since there are 4 children. This totals $622.40. This is what Trina Norris will pay per month in child support to Shirley A. Harvey.

19. Paul Sanchez will pay $475.20 per month in child support for N[redacted] and M[redacted].

20. Regis Conde will pay $306.35 per month in child support for A[redacted].

21. As specified in paragraph 17, above, if Sanchez Conde's receipt of disability benefits or eligibility for such benefits results in a derivative benefit in favor of H[redacted], this

benefit is payable to Shirley A. Harvey as child support. If there is no derivative benefit available to Sanchez Conde, the Court will waive the obligation of Sanchez Conde.

22. As to past care and support owed by Trina Norris:

a. The Tohono O'odham Nation Department of Health and Human Services, Child Welfare Division placed N[redacted] and M[redacted] in Shirley Harvey's physical custody on July 16, 2019. As such, starting August 1, 2019, Trina Norris owes Shirley Harvey child support in the monthly amount of $311.20 for N[redacted] and M[redacted]. There are 38 months from August 1, 2019 up through the end of this month. Multiplying $311.20 by 38 totals $11,825.60. A judgment for past care and support against Trina Norris and in favor of Shirley Harvey is entered for $11,825.60 for N[redacted] and M[redacted].
b. The Division then placed A[redacted] and H[redacted] in Shirley's physical custody on February 28, 2020. As such, starting March 1, 2020, Trina Norris Owes Shirley Harvey child support in the monthly amount of $311.20 for A[redacted] and H[redacted]. There are 31 months from April 1, 2020 up through the end of this month. Multiplying $311.20 by 31 months totals $9,647.20. A second judgment for past care and support against Trina Norris and in favor of Shirley Harvey is entered for $9,647.20 for A[redacted] and H[redacted].

23. As to past care and support owed by Paul V. Sanchez:

a. He owes $475.20 per month in child support for N[redacted] and M[redacted], for 38 months. This totals $18,057.60. A judgment for past care and support against Paul Sanchez and in favor of Shirley Harvey is entered for $18,057.60 for N[redacted] and M[redacted].

24. As to past care and support owed by Regis Conde:

a. He owes $306.35 per month in child support for A[redacted], for 31 months. This totals $9,496.85. A judgment for past care and support against Regis Conde and in favor of Shirley Harvey is entered for $9,496.85 for A[redacted].

25. As to past care and support owed by Sanchez Conde:

a. Sanchez Conde owes $155.65 per month in child support.

b. Sanchez Conde is disabled, and he is believed to be a recipient of Social Security disability insurance benefits, or eligible for such benefits.
c. If H[redacted], as a child of Sanchez Conde, is entitled to a retroactive application of derivative benefits, the Court enters a judgment for past care and support in favor of Shirley Harvey, for the benefit of H[redacted], in the amount of $4,825.15.
d. If such a benefit is available, then this benefit is payable to Shirley A. Harvey as child support for H[redacted]. If there is no derivative benefit available to Sanchez Conde, the Court waives the past care and support obligation of Sanchez Conde.

26. The duty to pay recurring monthly child support for all children begins on November 1, 2022. The child support obligation is due on the first day of the month, and it becomes delinquent at the end of the month. The child support must be paid as follows:

    i. Payable to Shirley Harvey and include the respective case number;
    ii. Mailed to P.O. Box 761, Sells, AZ 85634.

27. Shirley Harvey will need to visit the Social Security office nearest her and present them with a certified copy of this order, so they can help her determine if H[redacted] is entitled to derivative benefits as a result of the disability of his father, Sanchez Conde.

28. Neither parent works for the Tohono O'odham Nation. As such, this order will need to be registered and domesticated in the State of Arizona. Ms. Harvey can contact the Arizona Department of Economic Security Division of Child Support Services to help her. They have a location in Tucson off of 1455 S Alvernon Way Tucson AZ 85711. The customer service telephone number is 1-800-882-4151. They also have a website: https://des.az.gov/dcss.

29. Ms. Harvey will be provided with 4 certified copies of this order, to help her register the order with the State of Arizona, to help her with collecting child support.

30. It is expected that the State of Arizona may modify the support orders issued by this Court when the order is registered in the State of Arizona. The Court sets a Review Hearing on April 12, 2023 at 9 a.m. so that it can determine the status of the domestication, and to enter an amount that needs to be paid toward the arrears if necessary.

31. Pending further order of the Court, any tax benefits related to the minor children are awarded to Shirley Harvey.

32. This is a final, appealable order.

Dated October 10, 2022.

Judge Rene Alcoverde, Jr.

TOHONO O'ODHAM JUDICIARY

Case: CCV2021-0020 & 0021 # _____ Date: 10/7/2022

NOTES: Guidelines are set up on a monthly basis. Convert all figures to monthly amounts. This is an information sheet only. Calculations to be done on the Worksheets.

I. MONTHLY GROSS INCOME: What is the Gross Income of each parent? (Rule 2.4(a))

		FATHER	MOTHER
a.	Salary, Wages	2,218.67	2,218.67
b.	Commissions		
c.	Spousal Maintenance Received		
d.	Bonuses, Gifts, Prizes, Lottery Winnings		
e.	Dividends		
f.	Capital Gains		
g.	Severance Pay		
h.	Pensions, Retirement Plans, IRA Withdrawals, etc.		
i.	Annuities		
j.	Interest		
k.	Rents Received		
l.	Trust Income		
m.	Social Security		
n.	Workmen's Compensation Benefits		
o.	Disability Benefits		
p.	Unemployment Benefits		
q.	Self-Employment Income (Gross receipts minus ordinary & necessary expenses required to produce Income, excluding any item which is phantom, unfair or "on paper" only)		
r.	Malingering Parent: attribute what they should be earning		
s.	Residence with a third party, remarriage or expense-sharing benefits derived.		
t.	OTHER: _____		
	_____		
TOTAL MONTHLY GROSS INCOME		2,218.67	2,218.67

II. **ADJUSTMENTS TO MONTHLY GROSS INCOME.** What Deductions Should Be Made From Monthly Gross Income? (Rule 2.4(b))

2. ***Spousal Maintenance:*** actually paid by a party. _____ _____

3. ***Child Support:*** actually paid by a party. _____ _____

4. ***Medical Insurance:*** on child actually paid by a party. _____ _____

5. ***Non-Voluntary Deductions:*** which in fairness should be deducted from income: mandatory retirement, union dues, etc. _____ _____

6. ***Supplemental Considerations:*** _____ _____

NECESSARY EXPENSES. These may be added to the Amount of Child Support.

7. ***Child Care:*** costs actually paid by a party, such as babysitting, nursery, etc. _____ _____

8. ***Extraordinary Education Expenses:*** private/ special school, etc., but only if both parties agreed or court ordered. _____ _____

9. ***Child Over 12:*** Court may adjust upward to 10%

MORE SUPPORT NEEDED FOR CHILD M[redacted] and N[redacted] are over 12 years of age.

AGE _____ BECAUSE: _____

_____

(Prorate if several children, some over, some under 12).

10. ***OTHER:*** _____

_____

MISCELLANEOUS

11. ***Shared or Joint Custody:*** Should any adjustment be made?

12. ***Visitation Expenses:*** Judge may make an allowance for these.

ADJUSTMENT NEEDED AS FOLLOWS: _____

_____

MONTLY GROSS INCOME		FATHER	MOTHER	COMBINED
1.	**TOTAL MONTHLY GROSS INCOME:**	2,218.67	2,218.67	4,437.33
	ADJUSTMENTS			
2.	Spousal Maintenance Paid			
3.	Child Support Paid			
4.	Medical Insurance Paid			
5.	Non-voluntary Deductions			
6.	Supplemental Considerations			
	ADJUSTED MONTHLY GROSS INCOME			
7.	Line 1 Minus Lines 2, 3, 4, 5, and 6.	2,218.67	2,218.67	4,437.33

8.	**BASIC CHILD SUPPORT OBLIGATION (From Schedule tables)**	864.00
	ADDITIONS TO BASIC OBLIGATION	
9.	Child Care Costs	
10.	Extraordinary Education Expenses	
11.	Child Over Twelve	86.40
	TOTAL CHILD SUPPORT OBLIGATION	
12.	Add Lines 8, 9, 10 and 11.	950.40

PROPORTIONATE SHARES OF ADJUSTED COMBINED INCOME

13. Father's Adj. Gross Income divided by Combined Adj. Gross Income = .50
14. Mother's Adj. Gross Income divided by Combined Adj. Gross Income = .50

PARENTAL CHILD SUPPORT OBLIGATION

15. Father's Share of Combined Adj. Gross Income X Total C.S. Obligation. $ 475.20
16. Mother's Share of Combined Adj. Gross Income X Total C.S. Obligation. $ 475.20

CHILD SUPPORT AWARD: $ 475.20 per month to be paid by: X FATHER X MOTHER

NOTES: *Child support award must be based on above. Deviations must be supported by written findings by judge. Court must order medical insurance and specify each parent's share of costs unpaid by insurance. Visitation costs may be provided for, specifying each parent's share. No deviation from standard for joint custody unless extra expenses are imposed on one parent.*

SCHEDULE OF BASIC CHILD SUPPORT OBLGATIONS

This schedule is only part of the overall guidelines and must be used together with the accompanying information.

COMIBINED MONTHY ADJ. GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN
500	69	116	141	180
600	83	136	171	212
700	96	158	198	224
800	108	178	225	272
900	121	198	222	304
1000	134	218	276	332
1100	147	238	303	364
1200	159	258	320	392
1300	172	278	357	420
1400	184	298	381	448
1500	197	316	408	480
1600	209	336	432	508
1700	222	356	459	536
1800	234	374	483	564
1900	246	394	507	588
2000	258	412	534	616
2100	271	432	558	644
2200	283	450	582	672
2300	295	468	606	700
2400	307	488	633	724
2500	319	506	657	752
2600	331	524	681	780
2700	343	542	705	804
2800	355	562	729	832
2900	367	580	756	860
3000	379	598	780	884
3100	391	618	804	912
3200	403	634	828	936
3300	415	652	852	964
3400	427	670	876	985
3500	439	690	900	1016
3600	451	708	924	1040
3700	463	726	948	1064
3800	475	744	972	1092
3900	487	762	996	1116
4000	498	798	1020	1140
4250	522	814	1068	1192
4500	557	864	1126	1269

(Continued)

COMIBINED MONTHY ADJ. GROSS INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
4750	581	904	1164	1312	
5000	616	958	1201	1354	
5250	640	989	1239	1396	
5500	660	1020	1277	1440	
5750	680	1050	1315	1482	
6000	700	1080	1352	1525	
6250	715	1104	1390	1567	
6500	730	1128	1428	1610	
6750	735	1152	1466	1652	
7000	750	1176	1504	1695	
7250	760	1200	1542	1737	
7500	770	1224	1580	1780	1887
7750	780	1240	1599	1802	1910
8000	790	1256	1620	1826	1936

This schedule is only part of the overall guidelines and must be used together with the accompanying information.

Case: CCV2021-0022 # _____ Date: 10/7/2022

NOTES: Guidelines are set up on a monthly basis. Convert all figures to monthly amounts. This is an information sheet only. Calculations to be done on the Worksheets.

I. MONTHLY GROSS INCOME: What is the Gross Income of each parent? (Rule 2.4(a))

		FATHER	MOTHER
a.	Salary, Wages	2,218.67	2,218.67
b.	Commissions		
c.	Spousal Maintenance Received		
d.	Bonuses, Gifts, Prizes, Lottery Winnings		
e.	Dividends		
f.	Capital Gains		
g.	Severance Pay		
h.	Pensions, Retirement Plans, IRA Withdrawals, etc.		
i.	Annuities		
j.	Interest		
k.	Rents Received		
l.	Trust Income		
m.	Social Security		
n.	Workmen's Compensation Benefits		
o.	Disability Benefits		
p.	Unemployment Benefits		
q.	Self-Employment Income (Gross receipts minus ordinary & necessary expenses required to produce Income, excluding any item which is phantom, unfair or "on paper" only)		
r.	Malingering Parent: attribute what they should be earning		
s.	Residence with a third party, remarriage or expense-sharing benefits derived.		
t.	OTHER:_____		
	_____		
TOTAL MONTHLY GROSS INCOME		2,218.67	2,218.67

II. **ADJUSTMENTS TO MONTHLY GROSS INCOME.** What Deductions Should Be Made From Monthly Gross Income? (Rule 2.4(b))

2. ***Spousal Maintenance:*** actually paid by a party. _____ _____

3. ***Child Support:*** actually paid by a party. _____ _____

4. ***Medical Insurance:*** on child actually paid by a party. _____ _____

5. ***Non-Voluntary Deductions:*** which in fairness should be deducted from income: mandatory retirement, union dues, etc. _____ _____

6. ***Supplemental Considerations:*** _____ _____

NECESSARY EXPENSES. These may be added to the Amount of Child Support.

7. ***Child Care:*** costs actually paid by a party, such as babysitting, nursery, etc. _____ _____

8. ***Extraordinary Education Expenses:*** private/ special school, etc., but only if both parties agreed or court ordered. _____ _____

9. ***Child Over 12:*** Court may adjust upward to 10%

MORE SUPPORT NEEDED FOR CHILD A[redacted] C[redacted] _____

AGE _____ BECAUSE: _____

_____

(Prorate if several children, some over, some under 12).

10. ***OTHER:*** _____

_____

MISCELLANEOUS

11. ***Shared or Joint Custody:*** Should any adjustment be made?

12. ***Visitation Expenses:*** Judge may make an allowance for these.

ADJUSTMENT NEEDED AS FOLLOWS: _____

_____

MONTLY GROSS INCOME		FATHER	MOTHER	COMBINED
1.	**TOTAL MONTHLY GROSS INCOME:**	2,218.67	2,218.67	4,437.33
	ADJUSTMENTS			
2.	Spousal Maintenance Paid			
3.	Child Support Paid			
4.	Medical Insurance Paid			
5.	Non-voluntary Deductions			
6.	Supplemental Considerations			
	ADJUSTED MONTHLY GROSS INCOME			
7.	Line 1 Minus Lines 2, 3, 4, 5, and 6.	2,218.67	2,218.67	4,437.33

8.	**BASIC CHILD SUPPORT OBLIGATION (From Schedule tables)**	557.00
	ADDITIONS TO BASIC OBLIGATION	
9.	Child Care Costs	
10.	Extraordinary Education Expenses	
11.	Child Over Twelve	55.70
	TOTAL CHILD SUPPORT OBLIGATION	
12.	Add Lines 8, 9, 10 and 11.	612.70

PROPORTIONATE SHARES OF ADJUSTED COMBINED INCOME

13. Father's Adj. Gross Income divided by Combined Adj. Gross Income = .50
14. Mother's Adj. Gross Income divided by Combined Adj. Gross Income = .50

PARENTAL CHILD SUPPORT OBLIGATION

15. Father's Share of Combined Adj. Gross Income X Total C.S. Obligation. $ 306.35
16. Mother's Share of Combined Adj. Gross Income X Total C.S. Obligation. $ 306.35

CHILD SUPPORT AWARD: $ 306.35 per month to be paid by: X FATHER X MOTHER

NOTES: *Child support award must be based on above. Deviations must be supported by written findings by judge. Court must order medical insurance and specify each parent's share of costs unpaid by insurance. Visitation costs may be provided for, specifying each parent's share. No deviation from standard for joint custody unless extra expenses are imposed on one parent.*

Case: CCV2021-0023 # _____ Date: 10/7/2022

NOTES: Guidelines are set up on a monthly basis. Convert all figures to monthly amounts. This is an information sheet only. Calculations to be done on the Worksheets.

I. **MONTHLY GROSS INCOME:** What is the Gross Income of each parent? (Rule 2.4(a))

		FATHER	MOTHER
a.	Salary, Wages	0	2,218.67
b.	Commissions		
c.	Spousal Maintenance Received		
d.	Bonuses, Gifts, Prizes, Lottery Winnings		
e.	Dividends		
f.	Capital Gains		
g.	Severance Pay		
h.	Pensions, Retirement Plans, IRA Withdrawals, etc.		
i.	Annuities		
j.	Interest		
k.	Rents Received		
l.	Trust Income		
m.	Social Security		
n.	Workmen's Compensation Benefits		
o.	Disability Benefits		
p.	Unemployment Benefits		
q.	Self-Employment Income (Gross receipts minus ordinary & necessary expenses required to produce Income, excluding any item which is phantom, unfair or "on paper" only)		
r.	Malingering Parent: attribute what they should be earning		
s.	Residence with a third party, remarriage or expense-sharing benefits derived.		
t.	OTHER: _____		
	_____		
TOTAL MONTHLY GROSS INCOME		0	2,218.67

II. **ADJUSTMENTS TO MONTHLY GROSS INCOME.** What Deductions Should Be Made From Monthly Gross Income? (Rule 2.4(b))

2. ***Spousal Maintenance:*** actually paid by a party. _____ _____

3. ***Child Support:*** actually paid by a party. _____ _____

4. ***Medical Insurance:*** on child actually paid by a party. _____ _____

5. ***Non-Voluntary Deductions:*** which in fairness should be deducted from income: mandatory retirement, union dues, etc. _____ _____

6. ***Supplemental Considerations:*** _____ _____

NECESSARY EXPENSES. These may be added to the Amount of Child Support.

7. ***Child Care:*** costs actually paid by a party, such as babysitting, nursery, etc. _____ _____

8. ***Extraordinary Education Expenses:*** private/ special school, etc., but only if both parties agreed or court ordered. _____ _____

9. ***Child Over 12:*** Court may adjust upward to 10%

MORE SUPPORT NEEDED FOR CHILD H[redacted] O[redacted]. _____

AGE _____ BECAUSE: _____

_____

(Prorate if several children, some over, some under 12).

10. ***OTHER:*** _____

_____

MISCELLANEOUS

11. ***Shared or Joint Custody:*** Should any adjustment be made?

12. ***Visitation Expenses:*** Judge may make an allowance for these.

ADJUSTMENT NEEDED AS FOLLOWS: _____

_____

MONTLY GROSS INCOME		FATHER	MOTHER	COMBINED
1.	**TOTAL MONTHLY GROSS INCOME:**	0	2,218.67	2,218.67
	ADJUSTMENTS			
2.	Spousal Maintenance Paid			
3.	Child Support Paid			
4.	Medical Insurance Paid			
5.	Non-voluntary Deductions			
6.	Supplemental Considerations			
	ADJUSTED MONTHLY GROSS INCOME			
7.	Line 1 Minus Lines 2, 3, 4, 5, and 6.	0	2,218.67	2,218.67

8.	**BASIC CHILD SUPPORT OBLIGATION (From Schedule tables)**	283.00
	ADDITIONS TO BASIC OBLIGATION	
9.	Child Care Costs	
10.	Extraordinary Education Expenses	
11.	Child Over Twelve	28.30
	TOTAL CHILD SUPPORT OBLIGATION	
12.	Add Lines 8, 9, 10 and 11.	311.30

PROPORTIONATE SHARES OF ADJUSTED COMBINED INCOME

13.	Father's Adj. Gross Income divided by Combined Adj. Gross Income =	.50
14.	Mother's Adj. Gross Income divided by Combined Adj. Gross Income =	.50

PARENTAL CHILD SUPPORT OBLIGATION

15.	Father's Share of Combined Adj. Gross Income X Total C.S. Obligation.	$ 155.65
16.	Mother's Share of Combined Adj. Gross Income X Total C.S. Obligation.	$ 155.65

CHILD SUPPORT AWARD: $ 155.65 per month to be paid by: X FATHER X MOTHER

NOTES: *Child support award must be based on above. Deviations must be supported by written findings by judge. Court must order medical insurance and specify each parent's share of costs unpaid by insurance. Visitation costs may be provided for, specifying each parent's share. No deviation from standard for joint custody unless extra expenses are imposed on one parent.*

FILED IN THE
TOHONO O'ODHAM COURT
2024 7 03 AM10:15
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CHILDREN'S COURT DIVISION

In the Matter of:

Y[redacted] L[redacted] Z[redacted]
DOB: 1/28/2009

A Minor Child.

Case No.: CCV2023-0057

ORDER

The Court held an initial hearing in this case where Juan Zazueta, natural father to minor Y[redacted] L[redacted] Z[redacted], DOB: 01/28/2009 challenged the previously ordered guardianship. Juan Zazueta, natural father and Tonya Joaquin, sister of [redacted] was present. The proper service for today's hearing was completed by Mr. Zazueta.

On December 26, 2023, the Court granted guardianship of Y[redacted] L[redacted] Z[redacted] to Tonya Joaquin. The Court noted in its order that Juan Rudolph Zazueta, natural father, was in federal prison serving a sentence. At that time the Court found jurisdiction in this case and, based on testimony provided by Tonya Joaquin, found that granting the petition was in the best interest of Y[redacted] L[redacted] Z[redacted]. The petition was granted.

The Court reviewed case AV2018-0164 *In re: Y[redacted] L[redacted] Z[redacted], Karen Joaquin vs. Juan R. Zazueta.* In that case on February 22, 2019, the Court awarded joint legal custody and decision-making for Y[redacted] L[redacted] Z[redacted] DOB: 01/28/2009, to Karen Joaquin, natural mother and Juan Zazueta, natural father. On March 2, 2023, the mother passed away. On May 25, 2023, the Court awarded Juan Zazueta sole legal decision-making and parenting time of Y[redacted]. The Court vacated the prior child support order

effective March 2, 2023. The Court also addressed arrearages of approximately $6,000.00 which the estate is now entitled to in AV2023-0085 *In the Matter of the Estate of Karen L. Joaquin* DOB: 09/13/1964 – DOD: 03/02/2023.

The Court finds the following:

1. During the December 20, 2023, hearing it was presented that Juan Zazueta, natural father would be incarcerated for 2 years. This information was not enough for the Court to void or dismiss the proper service on Mr. Zazueta or the two power of attorney parties who Mr. Zazueta has named in his absence, in accordance with Rules of Civil Procedure, Rule 3. Summonses and Process, 3.2: Service. "A party must serve a summons with a conformed copy of the pleading. Service must be completed as required by this rule." Or Section 1603 Notice of Hearing of the Tohono O'odham Nation Children's Code that says "Once the Court schedules a hearing, the petitioning party must provide notice of the hearing to any person having the care of the child and to such other relatives of the child as the Court may deem proper."
2. Juan Zazueta, natural father, left power of attorney of Y[redacted] L[redacted] Z[redacted] to Gloria Zazueta and Travis Zazueta prior to his incarceration. During the December 20, 2023, hearing the Court did not question whether service had been provided to Gloria Zazueta or Travis Zazueta.
3. Tonya Joaquin testified that from March 2, 2023, until August 2023 Y[redacted] L[redacted] Z[redacted] was in the care and custody of Ms. Joaquin. Ms. Joaquin did not testify about the extent of Mr. Zazueta's involvement

with Y[redacted] prior to his July 2023 incarceration. Nor did the Court question the extent of involvement.

4. The granting of the guardianship of Y[redacted] L[redacted] Z[redacted] was done in violation of Juan Zazueta, natural father's, due process rights and the Court hereby recognizes the error.
5. Article 6 – Guardianship of the Tohono O'odham Nation Children's Code states in Section 1602 Commencement of Appointment Proceedings; Petition (B) "Upon Petition by the proposed guardian requesting guardianship of a child within the jurisdiction of the Children's Court, the Court may appoint a guardian for a child who is without either parent or whose parents are unavailable or otherwise unable to care for the child." The Court finds that minor Y[redacted] L[redacted] Z[redacted] was not without a parent or care since the natural father had two parties in place to care for her via Power of Attorney.
6. The Court finds Y[redacted] Z[redacted] is not a child in need of care and there is not sufficient evidence that supports the need of a continued guardianship of Ye[redacted] Z[redacted] via this Court's venue.

The Court orders the following:

Based on the Courts findings the Court now dismisses CCV2023-0057 and vacates the order dated December 26, 2023, that granted the guardianship of Y[redacted] L[redacted] Z[redacted] to Tonya Joaquin.

Should there still be a concern of the control, care, and custody of Y[redacted] L[redacted] Z[redacted], any party should report those concerns to the proper authorities. The parties should not use this venue as a means to intimidate, threaten, or restrict the proper care of Y[redacted] L[redacted] Z[redacted].

In probate case AV2023-0085 the forgoing should now reflect Y[redacted] Z[redacted] c/o Juan Zazueta P.O Box 429 Sells, AZ 85634. The Court now vacates the annual review hearing in CCV2023-0057 on December 18, 2024, at 9:00 a.m.

Signed July 3, 2024.

Judge Deola Juan

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff, v. ADRIAN JOSEPH VALDEZ, Defendant.	Case No.: 2010-1926CR ORDER

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 JUN 17 P 1:12
Venice Garcia
JUDICIARY SERVICE CLERK

This is before the Court on a Petition to Revoke Probation. The Defendant and the Nation contend that Adrian Valdez's original jail sentences violated the Indian Civil Rights Act and Tohono O'odham law. The Court disagrees.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Original Sentences

On October 17, 2007, in case 2007-07-1541-1545CR (the "Poola Case"), Defendant Adrian Valdez admitted to stabbing Rhonda Poola in her stomach twice. Consolidated Plea Agreement (October 17, 2007) ("Plea Agreement"); Complaint (July 9, 2007).

The Court accepted the Plea Agreement and sentenced him the same day. The sentencing included two consecutive 360-day jail terms for two separate offenses. *See* Plea Agreement; Trial Record Entry (October 17, 2007) ("Sentencing Order").

In case 2007-07-1649-1653CR (the "Thomas Case"), Mr. Valdez also admitted to stabbing Tasheena Thomas in her side. Plea Agreement; Complaint (July 16, 2007).

He was also sentenced on October 17, 2007, for the Thomas case. That sentencing included four 360-day jail terms and one 60-day jail term for five separate offenses; all consecutive but all suspended for five years of probation. *See* Plea Agreement; Sentencing Order.

Mr. Valdez was not represented by counsel at any time through sentencing. Also, the Nation and Defendant stipulate, and the Court takes judicial notice, that the sentencing judge was not a state-licensed attorney.

B. Probation Revocation

Mr. Valdez served his 720 days in jail for the Poola Case (see Trial Record Entry for Release). Upon release, he signed probation orders on July 1, 2009.

The record shows no further contact between Mr. Valdez and the Court from the time he signed his probation orders in 2009 until his recent arrest, despite multiple attempts by the Nation's Probation department. *See* Petition to Revoke Probation; Memorandum from Adult Community Service Supervisor to Deputy Probation Officer (Oct. 19, 2009).

On July 7, 2010, the Nation filed a Petition to Revoke Probation. It recommended that Mr. Valdez serve the previously suspended 1,500 days in jail for the Thomas Case. That is the present case, 2010-1926CR ("Probation Revocation Proceeding").

A bench warrant for Mr. Valdez's arrest was issued on July 10, 2010. The warrant was executed February 24, 2022. He is in custody now pending this and other proceedings.

C. Current Posture

Mr. Valdez has counsel in this Probation Revocation Proceeding. Through counsel, Mr. Valdez filed "Defendant's Position on Sentencing", with a supporting Memorandum of Points and Authorities (together, "Defendant's Position").

Defense argues that the sentences imposed in the Poola Case and the Thomas Case violated the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et. seq.*, (ICRA), as amended by the Tribal Law and Order Act of 2010 (TLOA). The stated grounds are that the presiding judge at the plea agreement hearing and sentencing was not qualified for sentences exceeding one year for a proceeding, and that Mr. Valdez was not represented by counsel.

The Nation then filed "Nation's Brief Regarding Defendant's Original Sentence" (the "Nation's Brief"). It largely agrees with the Defendant's Position. But it added the assertion that Mr. Valdez's sentences violated the Tohono O'odham Code as well, also on the grounds that the sentencing judge was not qualified.

A hearing on the matter was held on June 13, 2022. Mr. Valdez, his counsel, and counsel for the Nation were present.

The Defendant's Position, as supplemented in open court during the June 13 hearing, asks the Court to vacate Mr. Valdez's 1,500-day jail sentence for the Thomas Case. The Nation's Brief requests the same.

II. ISSUE & BRIEF ANSWER

The issue before the Court is whether the sentences imposed on Adrian Valdez in the Poola Case and the Thomas Case violated the Indian Civil Rights Act and the Tohono O'odham Code, on the grounds that they imposed over one year in jail for each proceeding, and therefore Mr. Valdez should have been represented by counsel, and the sentencing judge should have been law-licensed.

The Court concludes that the sentences did not violate either law on these grounds because these requirements were enacted *after* Mr. Valdez's sentencing, and therefore do not apply. Instead, ICRA and Tohono O'odham law as in effect at the time of sentencing apply, and both laws permitted these sentences as imposed.

III. ANALYSIS

A. ICRA and Tohono O'odham Law Before TLOA

TLOA became law almost three years after Mr. Valdez's plea agreement and sentencing, on July 29, 2010. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

The Nation made some conforming changes to its laws in 2013. Tohono O'odham Legis. Council Res. 13-390 (Oct. 3, 2013) [hereinafter *2013 T.O. Resolution*].

Before TLOA, courts of the Tohono O'odham Nation and the U.S. Ninth Circuit allowed tribal court judges, whether law-licensed or not, and without providing counsel to defendants, to sentence defendants under ICRA for up to one year for *each offense*, with multiple year-long sentences to run consecutively. *See Nation v. Antone*, 3 TOR3d 67 (Tr. Ct. 2007); *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2012); *Bustamante v. Valenzuela*, 715 F. Supp. 2d 960 (D. Ariz. 2010); *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967, 970 (D. Nev. 1985); *see* 25 U.S.C. § 1302(7) (pre-TLOA version).

Similarly, before TLOA and the 2013 T.O. Resolution, the Tohono O'odham Code did not prevent this "stacking", nor require that a defendant be provided counsel or that a presiding judge be law-licensed. *See* Tohono O'odham Code, 1st Ed. (2006), Tit. 6 (Courts) & Tit. 7 (Crimes), Chapt. 1 (Criminal Code).

Accordingly, under both ICRA and Tohono O'odham law, Mr. Valdez's sentences were lawful when imposed.

B. *ICRA and Tohono O'odham Law After TLOA*

1. Stacking Separate Offenses Still Allowed

TLOA and the 2013 T.O. Resolution changed things. Stacking separate offenses is now expressly allowed in ICRA itself, though now with a maximum of 9 years for a

proceeding. *See* 25 U.S.C. § 1302; *Nation v. Frank*, 2021 TOR Supp. 238, 242 (Tr. Ct. 2016) [hereinafter *Trial Ct. Frank*].

Stacking is also now expressly allowed under the amended Tohono O'odham Code, though also with a maximum of 9 years for a proceeding. *See* 7 T.O.C. Chapt. 1, §§ 1.11(A)-(B).

2. New Defense Counsel and Judge Requirements for Proceedings Where Over 1 year in Jail is Imposed

However, TLOA added that for any *proceeding* in which a tribe imposes a *total* jail term of over 1 year, the tribe must

> (1) provide a defendant with the right to effective assistance of counsel;
> (2) at the tribe's expense, provide an indigent defendant a licensed defense attorney; and
> (3) require the presiding judge to have sufficient legal training and be licensed to practice law.
>
> 25 U.S.C. § 1302(c).

As described in *Trial Ct. Frank*, 2021 TOR Supp. at 242-43, "proceeding" for these requirements addresses "a prosecution of a crime(s) that arose from a single transaction or incident" and is functionally equivalent to an incident (noting the Court of Appeals' implicit addressing of the definition in *Frank v. Nation*, 2021 TOR Supp. 13, 16 (Ct. App. 2014) [hereinafter *Appeals Ct. Frank*].

Similarly, the 2013 T.O. Resolution amended the Tohono O'odham Code, largely conforming to the TLOA provision on judge qualifications:

> "A judge presiding over a criminal proceeding in which a total term of imprisonment of more than one year is imposed shall be a state-licensed attorney with sufficient legal training to preside over the criminal proceedings."
>
> 6 T.O.C. Chapt. 1, § 1103(D); *see 2013 T.O. Resolution.*

The Court agrees that the Poola Case and the Thomas Case would each constitute a "proceeding" under post-TLOA ICRA and under the amended Tohono O'odham Code, *if* either applied. And because a total sentence of over one year in jail was imposed for each case, the new requirements would apply. However, for the reasons below, the Court finds that the laws applicable to Mr. Valdez's sentences are the laws that were in effect at the time of his sentencing: ICRA *before* TLOA, and Tohono O'odham law *before* the 2013 T.O. Resolution. And under both laws, his sentences were lawful.[1]

C. Prospective v. Retroactive Application

1. Tohono O'odham Law

Reviewing the language of the 2013 T.O. Resolution, our Court of Appeals stated that the 2013 changes to the Tohono O'odham Code were prospective, to be applied to "new cases or any pending criminal proceeding in which a trial is scheduled within 30 days of the effective date of the resolution, October 3, 2013." *Appeals Ct. Frank*, 2021 TOR Supp. at 16; *see 2013 T.O. Resolution.*

Mr. Valdez's sentencing occurred almost six years before that effective date. On that 2013 effective date, neither the Poola Case nor the Thomas Case was a "new case" or a "pending criminal proceeding in which a trial is scheduled within 30 days". Accordingly, the 2013 changes do not apply, and his sentences remain legal under Tohono O'odham law. *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)

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[1] Though similar to the TLOA changes, the parties did not raise, and the Court does not address, the 2013 addition to the Tohono O'odham Code regarding a defendant's right to counsel in certain cases, 6 T.O.C. Chapt. 1, § 1108.

Also, as laid out above, TLOA does not flatly require that a defendant be represented in over 1-year in jail proceedings. Rather, a tribe must provide to an *indigent* defendant a licensed defense attorney at the tribe's expense, but the tribe must provide to any other defendant only the *right* to effective assistance of counsel. 25 U.S.C. § 1302(c)(1)-(2). Mr. Valdez would have to show that he was either indigent or that he was not indigent and the Nation denied his right to retain his own counsel to prevail on this claim if TLOA did apply. But since the Court finds TLOA does not apply here, it does not make any factual finding on why he was not represented.

(when the legislature has expressly stated whether a statute is to apply prospectively or retroactively, "of course, there is no need to resort to judicial default rules.").

2. TLOA

(a) TLOA also applies to pending pre-trial and new proceedings only.

TLOA, however, did not expressly state its reach. When that happens with a federal statute, there is a strong presumption that it applies only to future actions. The key test is whether applying it retroactively would impose new legal consequences to events completed before enactment. *Vartelas v. Holder*, 566 U.S. 257, 273 (2012); *Landgraf*, 511 U.S. at 269-70, 280; *see generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 261-65 (2012) (Presumption Against Retroactivity).

Here, applying the TLOA requirements which became effective in 2010, to Mr. Valdez's sentencing in 2007, would clearly attach new legal consequences to events completed before enactment: It would transform sentences that had been legal for almost three years into illegal sentences.

Because Congress did not include clear direction that was the intent, under *Vartelas* and *Landgraf* (and the many cases cited therein and relied upon afterwards), TLOA does not apply to Mr. Valdez's sentences here. They remain legal under pre-TLOA ICRA.

(b) Defendant's cited cases do not change that result.

Defendant's Position relies on two cases: *Appeals Ct. Frank,* 2021 TOR Supp. 13, and *Johnson v. Tracy*, 2012 WL 4478801 (D. Ariz. 2012). The Court also finds relevant to that argument *Trial Ct. Frank,* 2021 TOR Supp. 238.

This Court agrees with all three of those cases. However, the Court finds them inapplicable here. The issue in those cases was whether to apply TLOA[2] to plea agreements, trials, and sentencing occurring *after* TLOA became effective.

By contrast, the issue here is whether to apply TLOA to a plea agreement and sentencing that occurred *before* TLOA became effective. That is a crucial difference, and the Court concludes TLOA does not apply in such a case.

Because these TLOA provisions address the proceedings themselves and not the underlying crimes, applying TLOA to pre-sentence proceedings like those in *Johnson* and the *Frank* cases fits with *Vartelas* and *Landgraf*. It does not attach new legal consequences to events completed before enactment. It only changes the procedural requirements going forward to address those completed events. *See Johnson*, 2012 WL 4478801 at *3 ("a procedural change to a statute 'would ordinarily govern in trials conducted *after* its effective date' ") (emphasis added) (quoting *Landgraf*, 511 U.S. at 280). *See also Trial Ct. Frank*, 2021 TOR Supp. at 241 ("This Court agrees with the reasoning in *Johnson* in so much as the rights listed in 25 U.S.C. § 1302(c) apply to criminal proceedings conducted *after* TLOA was enacted[.]") (emphasis added), and *Appeals Ct. Frank*, 2021 TOR Supp. at 15 ("The ICRA as amended by the TLOA has been held applicable in cases tried *after* it became a law, even if a defendant was charged before law took effect.") (emphasis added). *See generally* Scalia & Garner, *supra*, at 266-67 (Pending-Action Canon: "When statutory law is altered during the pendency of a lawsuit, the courts at every level must apply the new law unless doing so would violate the presumption against retroactivity.").

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[2] Specifically, the newly imposed requirements at issue here for proceedings imposing more than one year total in jail: (i) right to counsel (*Appeals Ct. Frank*, 2021 TOR Supp. at 14; *Trial Ct. Frank*, 2021 TOR Supp. at 244), and (ii) a state-licensed judge (*Johnson*, 2012 WL at *2, *3). The Court does not express an opinion on any other ICRA provisions.

The *Johnson* court further explained, "as a general matter, 'a court is to apply the law in effect at the time it renders its decision[.]' "). *Johnson*, 2012 WL 4478801 at *3 (quoting *Landgraf*, 511 U.S. at 264).

In *Johnson* and in both *Frank* decisions, the courts were to apply the law in effect at the time they rendered their decisions: TLOA. Here, the Court was to, and did, apply the law in effect at the time it rendered its decisions in the Poola and Thomas Cases: pre-TLOA ICRA.

(c) Miranda v. Anchondo is more analogous.

In *Miranda v. Anchondo*, 684 F. 3d 844 (9th Cir. 2012), the defendant Beatrice Miranda was charged, tried, and convicted of eight separate offenses arising from one criminal transaction. In one proceeding, the tribal court sentenced her to multiple consecutive jail terms, for a total term of more than one year: 910 days. Like Mr. Valdez here, Ms. Miranda had no counsel through sentencing. And as with Mr. Valdez, Ms. Miranda was sentenced *before* TLOA was enacted. *Id.* at 846-47.

After TLOA was enacted, the Ninth Circuit Court of Appeals reviewed the legality of Ms. Miranda's sentences. The court acknowledged that TLOA was in effect at the time of its review, but that Ms. Miranda's sentencing, like Mr. Valdez's sentencing here and unlike the sentencing in the *Frank* cases and the *Johnson* case, occurred *before* TLOA's enactment. *Id.* at 846, n.1 and 849, n.4.

Though the court did not analyze the issue, it did apply only pre-TLOA ICRA to Ms. Miranda's case, "the version that was in effect when Petitioner was sentenced"). *Id.* at 846 n.1. The court held that Ms. Miranda's sentences, which like Mr. Valdez's sentences included a total jail term of more than one year for one proceeding, while she was unrepresented, was legal under ICRA. *Id.* at 852.

Likewise, this Court applies the version of ICRA that was in effect when Mr. Valdez was sentenced: pre-TLOA. Under that version, Mr. Valdez's sentences are also legal, regardless of his being unrepresented and the sentencing judge not being law-licensed.

IV. CONCLUSION

The TLOA requirements regarding defense counsel and a licensed judge for proceedings in which over 1 year total jail time is imposed, and the similar Tohono O'odham Code change regarding a licensed judge, apply to plea agreements, trials and sentences conducted *after* their enactment. Mr. Valdez was sentenced *before* their enactment. ICRA and Tohono O'odham law as in effect at the time of his sentencing apply, and both laws allowed his sentences as imposed.

Accordingly, the Defendant's and the Nation's requests to vacate Mr. Valdez's sentences for the Thomas Case are **DENIED** and this Probation Revocation Proceeding may proceed.

A probation revocation hearing is set for July 1, 2022, at 8:15 a.m., to coincide with Mr. Valdez's pretrial hearing in case 2012-2205-2209CR.

SO ORDERED this 16th day of June, 2022.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

Fwd: Def, Det, Pros, T.Norton, Prob
061722 DG

FILED IN THE
TOHONO O'ODHAM COURT
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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Johnny Garcia Defendant	Case No.: CR2017-0951-1-2 Opinion on Reconsideration Re: Case Notes for Probation Revocation Hearing

The Court issued an opinion on March 14, 2023 that in this probation revocation proceeding, the Adult Probation Department was not required to disclose its probation officer's notes. The Nation filed a Motion to Reconsider. The Court granted the Motion. Upon reconsideration, the Court issues this Opinion.

The Court affirms its opinion that probation revocation hearings in the Nation's courts, like parole revocation hearings, are not full criminal proceedings. Instead, they are more in the nature of civil, or "quasi-criminal," proceedings. These proceedings do not carry the full panoply of disclosure and other requirements and rights found in the Tohono O'odham Rules of Criminal and Traffic Procedure. See Nation v. Lopez, 2 TOR3d 54, 55 (Tr. Ct. 1999).

The Court agrees that Arizona Rules of Criminal Procedure governing probation revocation hearings apply to such hearings on the Nation. See T.O. R. Ct. § 1, Rule 1; Nation v. Vincent, 2021 TOR Supp. 208, 209 (Tr. Ct. 2001). But they apply only to the extent they do not directly conflict with a written Tohono O'odham law or rule *and* are applicable to the facts and circumstances of a particular case. T.O. R. Ct. § 1, Rule 1(c).

Accordingly, to the extent the Vincent Court looked to *pretrial* Arizona Rules of Criminal Procedure for a probation revocation proceeding, this Court disagrees as it is inconsistent with T.O. R. Ct. § 1, Rule 1, and the persuasive consensus of other jurisdictions discussed below, and instead agrees with the Lopez court that civil or administrative rules would apply to fill any gaps.

The Court also agrees that a defendant retains due process / basic fairness rights in a probation revocation proceeding, despite its civil / quasi-criminal nature. However, due process there is a much lower level than in a full criminal proceeding, as the defendant has already been convicted and sentenced under the heightened due process procedures of a criminal adjudication. A probation revocation proceeding is not imposing a new sentence; rather, it is deciding whether to effect a previously imposed sentence. As other courts discussed below describe it, a person on parole or probation enjoys a conditional liberty, with "minimum" due process rights.

I. ANALYSIS

A. Arizona Probation Revocation Rules

Probation revocation procedures are contained in Rules 27.6 through 27.10. of the Arizona Rules of Criminal Procedure. The Court finds nothing in those rules requiring disclosure of probation officer notes. Only:

> A violation must be established by a preponderance of the evidence. Each party may present evidence and has the right to cross-examine any witness who testifies. The court may receive any reliable evidence, including hearsay, that is not legally privileged.

Ariz. R. Crim. P. R. 27.8(b)(3). Accord Nation v. Vincent, 2021 TOR Supp. at 209; Nation v. Lopez, 2 TOR3d at 55.

In the Tonono O'odham Nation, as in other jurisdictions (see I.B. *infra*), a violation can be and often is established solely by testimony. The defendant is provided

the opportunity to cross-examine and, if desired, present his or her own testimony or other evidence. That fits within the Arizona Rules and Tohono O'odham case law on probation revocation and does not (absent special circumstances discussed below) require disclosure of probation's notes.

Finding nothing in the Tohono O'odham or Arizona court rules requiring disclosure of probation notes, the Court turns to due process under the Nation's Constitution and the Indian Civil Rights Act.[1]

B. Due Process

1. Tohono O'odham Constitution and ICRA

The United States Constitution does not apply to Indian tribes. However, the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 *et. seq.*, (ICRA) imposes some requirements similar to U.S. constitutional provisions. See Emerson v. Nation, 2021 TOR Supp. 19, 21 (Ct. App. 2015); Frank v. Nation, 2021 TOR Supp. 13, 15 (Ct. App. 2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The Tohono O'odham Constitution expressly recognizes the rights guaranteed by ICRA. T.O. CONST. ART. III, § 4.

One of those is the right to due process. This is ICRA's version of the due process guarantee of the fifth amendment to the U.S. Constitution. "No Indian tribe in exercising powers of self-government shall-- . . . deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(a)(8).

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[1] Beyond following Arizona court rules when applicable to a case and when not conflicting with a Tohono O'odham rule or law, Tohono O'odham courts are never bound by any Arizona constitutional, statutory, or case law. In civil cases, the Court *may*, in its *discretion*, look to Arizona law for *guidance*; and then only if there is no Tohono O'odham law or custom addressing the claims. 4 T.O.C. ch. 1, § 1-102.

Given the distinct historical, governmental, and cultural values of Indian tribes, ICRA provisions are not always applied identically to their U.S. Constitution counterparts. See Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); O'Neal V. Cheyenne River Sioux Tribe, 482 F.2d 1140 (9th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

The Nation's courts, however, have often borrowed due process concepts from U.S. constitutional analyses to both the Nation's and ICRA's due process guarantees. See, e.g., Smith v. Nation, 2021 TOR Supp. 75, 84-85 (Ct. App. 2020); Escalante v. Sells Dist. Council, 2021 TOR Supp. 36, 44 (Ct. App. 2017); Nation v. Francisco, 3 TOR3d 155, 156-57 (Tr. Ct. 2012); Nation v. Lopez, 3 TOR3d 159 (Tr. Ct. 2012).

The Court finds no reason to do otherwise for this issue. Accordingly, the following analysis applies to Mr. Garcia's due process rights under both the Tohono O'odham Constitution and ICRA.

2. Tohono O'odham case law

Our Court of Appeals has described it this way: "At its core, the due process guarantee requires reasonable notice and a meaningful opportunity to respond." Escalante v. Sells Dist. Council, 2021 TOR Supp. 36, 44 (Ct. App. 2017) (citing Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985) and Zinermon v. Burch, 494 U.S. 113 (1990)).

While the Nation's courts have not yet applied that to probation officers' notes, due process appears to be satisfied on its face without their disclosure. Mr. Garcia had notice: the petition to revoke probation listed specific provisions and facts for the basis to revoke. It identified his probation officer as making those allegations, and who can testify at a revocation hearing to those facts. Mr. Garcia also has an opportunity to be heard: the Court held an arraignment where Mr. Garcia denied the allegations. The Court set a

hearing where Mr. Garcia will have a further opportunity to be heard, including presenting his own case (if he chooses) and cross-examining the probation officer (and any other witnesses).

This is supported by federal case law more on point.

3. Federal case law

In Morrissey v. Brewer, 408 U.S. 471, 480 (1972), the United States Supreme Court started and ended with the proposition that a parole revocation proceeding is not part of a criminal prosecution and therefore not subject to the full panoply of rights of a criminal proceeding. See id. at 481, 489. While revocation may deprive a person of liberty, the sentence was already imposed so it is a "conditional liberty;" thus, the parolee is entitled to due process, but not the extensive due process owed pre-adjudication. See id. at 481-89.

The U.S. Supreme Court later applied Morrissey to probation revocation hearings, finding no difference for due process determinations. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). Under those two cases, probationers and parolees in the federal and state systems are entitled to the following due process rights under the U.S. constitution:

> At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:
>
> "(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good

> cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole."

Gagnon v. Scarpelli, 411 U.S. at 786 (quoting Morrissey v. Brewer, 408 U.S. at 489, internal citation omitted).

Following Morrissey / Gagnon, the United States Ninth Circuit[2] has held that non-disclosure of probation notes does not violate a parolee's or probationer's due process rights if the notes are not used in evidence. Probation officers can even refer to their notes during testimony without changing that. A detailed petition to revoke, with testimony at a hearing, allowing the probationer to cross-examine, provides sufficient notice and opportunity to be heard. See U.S. v. Tham, 884 F.2d 1262 (9th Cir. 1989); U.S. v. Donaghe, 924 F.2d 940 (9th Cir. 1991); U.S. v. Ritter, 45 Fed.Appx 609 (9th Cir. 2002) (unpublished).

A Ninth Circuit district court in U.S. v. Houston, 2009 WL 2488176 (E.D. Cal. 2009) (unpublished) denied a disclosure request for probation notes. The probation office there had a policy:

> It is the policy of the United States Probation Office for the Eastern District of California to maintain probation files and their contents, including notes, as confidential. The documents contained in a probation file are not released unless they constitute direct evidence of a violation or are ordered released by a court of competent jurisdiction.

Id. at *2.

The probation officer acknowledged reliance on the notes to prepare his revocation petition. Id. at *1. However, the officer testified at the revocation hearing

---

[2] The likely venue for a federal ICRA-based habeas corpus proceeding brought by an inmate in the Tohono O'odham jail in Sells. See Miranda v. Anchondo, 684 F.3d 844 (9th Cir. 2012).

without the notes being submitted into evidence. The court therefore held, under Donaghe and Tham, that the probationer was not entitled to the notes, id. at *3, without showing a compelling reason, which she did not. Id. at *4.

Although federal courts applying Morrissey / Gagnon and the Ninth Circuit cases cited above strongly disfavor any disclosure of probation notes, citing their confidential nature and potential harm to third parties, they may *permit* such disclosure. But only upon a defendant's request, and only when narrowly tailored, redacted to include just the notes related to alleged violations and notes that may exculpate the probationer, and when redacted to protect third parties or any information that may compromise the safety of any individual. See U.S. v. Rivera-Rodriguez, 321 F. Supp. 3d 278, 282 (D. P.R. 2018) (rejecting defendant's disclosure request for all of probation's notes).

The court in U.S. v. Rivera Guio, 2019 WL 11637272 *52 (D. P.R. 2019) (unpublished) held the same, adding that probation officers' notes are undisputedly confidential records prepared for use in their duties as members of the judiciary, not as an arm of the prosecution.

Similarly, the court in U.S. v. Rockot, 2013 WL 5536224 *2 (W.D. Penn. 2013) (unpublished) denied a defense disclosure request for all of probation's case notes as overbroad. That court followed Third Circuit precedent that there is no automatic production of a probation officer's entire file, even when the officer testifies.

In U.S. v. Joline, 2009 WL 4795607 (M.D. Penn. 2009) (unpublished), the court denied a similar request on the same grounds, further noting that "neither party has briefed whether the probation officer's notes should be disclosed," and "there is no indication that the government plans to use the probation officer's notes as evidence." Id. at *2.

This Court finds all the above cases persuasive and applicable to due process under the Nation's and ICRA's due process guarantees as well.

II. CONCLUSION

The Court finds there is no applicable Tohono O'odham or Arizona rule of procedure requiring disclosure of probation officer notes in a probation or parole revocation proceeding.

The Court further finds that under the due process guarantees of the Tohono O'odham Constitution and ICRA:

(a) a probationer's / parolee's due process rights are not violated by nondisclosure of probation notes in a revocation proceeding if the notes are not used as direct evidence (even if a probation officer relies on the notes to prepare a revocation petition and/or references them during testimony);

(b) due to their confidential and sensitive nature, any disclosure of probation notes is strongly disfavored; and, that

(c) the Court may, on a case-by-case basis, grant a specific request by a probationer / parolee—or by the Nation—to see parts of Probation's notes if either (i) those notes must be submitted as direct evidence, or (ii) the probationer / parolee specifically requests the notes; *provided*, *however*, that in either case, the party files a narrowly tailored request, the notes are redacted to include only notes related to alleged violations, notes that may exculpate the probationer / parolee, and to protect third parties and any information that may compromise the safety of any individual.

Dated April 3, 2023.

Fwd: Pros, Def, Prob, Deten.
041023 TL

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Tohono O'odham Nation, Plaintiff v. Johnny Garcia, Defendant	Case Number: CR2017-0951-1/2 **ORDER**

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 NOV -1 P 1:58
JUDICIARY SERVICE CLERK

The Nation filed a notice with the Court. In short, the Nation is seeking to have a Petition for Special Action decided by a three-judge panel in the Court of Appeals. Unfortunately, the Court cannot accommodate the Nation's request because: (1) the Court of Appeals held that it does not have the authority to review extraordinary writs, which include Petitions for Special Actions, under its original jurisdiction; and (2) Rule 2 of Procedure for Extraordinary Writs provides a specific process, and the Nation's Petition for Special Action does not comply with those rules.

A. Special Actions Generally.

Special Actions are creatures of Arizona law. *See* 17B A.R.S. Special Actions, Rules of Proc., Rule 1, State Bar Comm. Note. Special actions did not exist at common law. *Id.* Special Actions were created to simplify the process of seeking an extraordinary writ. *Id.* In Arizona, a special action does not change the substance of extraordinary writs; instead, it "merely establishes the procedure for obtaining their remedies." *Id.* Finally, the Arizona Supreme Court created the special action process under its rulemaking authority. *Id.*; *see* 17B A.R.S. Special Actions, Rules of Proc., Rule 1, History.

B. Pre-2013. Extraordinary Writs were heard in the Nation's Court of Appeals under the Appellate Court's Original Jurisdiction.

In 2003, the Court created rules about extraordinary writs. *See* Administrative Order 04-03 dated April 28, 2003. Those rules codified the existing process to handle extraordinary writs. In 2011, the Court combined various Administrative Orders into the Tohono O'odham Rules of Court. *See* 2011 Tohono O'odham Rules of Court.

The Court listed the rules for extraordinary writs in Rule 23 and Rule 24 of the Rules of Appellate Procedure. The Rules stated that extraordinary writs were assigned to the Court of Appeals under its original jurisdiction. *Original jurisdiction* is the "court's power to hear and decide a matter before any other court can review the matter." Black's Law Dictionary (11th ed. 2019). As a result, when a party filed an extraordinary writ it was immediately assigned to a panel of three appellate judges, and the Court of Appeals would resolve the writ.

Over the years, and before the Court established the Rules of Court, parties would file a Petition for Special Action. The Court of Appeals noted that Petitions for Special Action were like extraordinary writs, and the Court of Appeals addressed the issues asserting its original jurisdiction. *See*, *e.g.*, *Joaquin v. Goodnight*, 1 TOR3d 29, 29-30 (Ct. App. Mar. 22, 1991); *Corty v. Judicial Court*, 2 TOR3d 2 (Ct. App. Jul. 7, 1997).

C. 2013. The Court of Appeals held that Exercising Original Jurisdiction over Extraordinary Writs was Unconstitutional.

In late 2013, the Court of Appeals repeatedly held that having the Court of Appeals review extraordinary writs under original jurisdiction was unconstitutional. *See Frank v. Tohono O'odham Nation*, 3 TOR3d 55, 55-56 (Ct. App., Nov. 8, 2013) (holding that a writ of habeas corpus is not an appeal and that the Court of Appeals' jurisdiction is limited to hearing appeals); *Wichapa v. Tohono O'odham Nation*, 3 TOR3d 56 (Ct. App., Nov. 14, 2013) (holding that the Court of Appeals is limited to appellate jurisdiction and that the Court of Appeals does not have the authority to

exercise original jurisdiction over extraordinary writs). The Court responded to these cases by amending the Rules of Court.

D. 2014. The Court Revised the Rules of Appellate Procedure and Issued the Rules of Procedure for Extraordinary Writs.

In 2014, the Court amended the Tohono O'odham Rules of Appellate Procedure to remove extraordinary writs from the Court of Appeal's original jurisdiction. *See* 2014 Tohono O'odham Rules of Court. And the Court created the Tohono O'odham Rules of Procedure for Extraordinary Writs. *Id.* The current 2023 Tohono O'odham Rules follows the same process. *See* Rules 23 and 24 of the Tohono O'odham Rules of Appellate Procedure; Rules 1 and 2 of the Tohono O'odham Rules of Procedure for Extraordinary Writs.

E. The Court is Unable to Process Nation's Request.

The Nation relies on pre-2014 cases to support its request to have a special action decided by a three-judge appellate panel under the Court of Appeal's original jurisdiction. *See, e.g.*, *Joaquin v. Goodnight*, 1 TOR3d 29 (Ct. App. Mar. 22, 1991); *Corty v. Judicial Court*, 2 TOR3d 2 (Ct. App. Jul. 7, 1997); *Miranda v. Nation*, 2 TOR3d 5 (Ct. App. Jan. 6, 2003).

Under this Court's precedent, special actions are like extraordinary writs. *Id.* But the Court of Appeals does not have the authority to hear extraordinary writs under its original jurisdiction. *Frank*, 3 TOR3d at 55-56 and *Wichapa*, 3 TOR3d at 56-57.

Rule 2 of the Rules of Procedure for Extraordinary Writs provides the process to file an extraordinary writ. In the Nation's October 30, 2023 Notice, it states that it is not seeking an interlocutory appeal because the trial court's orders/opinions are already post-conviction. As a result, the Court must treat this Petition for Special Action as an extraordinary writ. Unfortunately, the petition does not meet the requirements under Rule 2(a). For example, the petition does not have a summons. As a result, the Court cannot process the petition. The Nation may refile a petition under Rule 2 of the Rules of Procedure for Extraordinary Writs.

Dated: November 1, 2023

Judge Kyle Fields

Fwd: Pros
11012023
YR

TOHONO O'ODHAM JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Laurinda Smith
DOB: 12/03/1983
Defendant

TRIAL RECORD ENTRY

Case No. CR2019-1400-1-3; CR2022-0439-1-4

FILED IN THE TOHONO O'ODHAM COURT
2023-2-21 AM11:51
JUDICIAL COURT CLERK II

OFFENSE(S) CR2019-1400 Ct 1: 3.6A5/8.9B8, Ct 2: 3.6A1/8.9B8, Ct 3: 12.2A/8.9B8; CR2022-0439 Ct 1: 3.6A1/8.9B8, Ct 2: 3.6A1/8.9B8, Ct 3: 3.6A1, Ct 4: 12.4A

COURT DATE: _____ TIME: _____ BOND POSTED: _____

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☐ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Petition to Convert Work Hours to Credit for Detention Days served.
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☐ Present	_____	☐ Not Present
DEFENSE COUNSEL:	☐ Present	_____	☐ Not Present ☐ Pro Se
PROSECUTORS:	☐ Present	_____	☐ Not Present
PROBATION OFFICER:	☐ Present	_____	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Laurinda Smith, DOB: 12/03/1983
CASE NO. CR2019-1400-1-3; CR2022-0439-1-4

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Ms. Smith submitted a Petition to Convert Work Hours to Credit for Detention Days served. The Nation filed a Response. As further explained in the attached Continuation Order, the Court grants Ms. Smith's Petition for 188 hours of work credit, with the exact number of converted days in jail to be calculated by Corrections.

February 21, 2023
DATE

JUDGE, Joseph Hardy Jr.

DISTRIBUTION: ☐ COURT ☐ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☐ DEFENSE ATTORNEY ☑ DETENTION

022123 GB

TOHONO O'ODHAM JUDICIARY

Rev. 11/2022

Continuation Order

CR2019-1400-1-3
CR2022-0439-1-4

TOHONO O'ODHAM NATION, Plaintiff

vs.

LAURINDA SMITH, Defendant

The Nation and its courts have a strong history of crediting jail sentences for community service work performed, other than for those few exceptions listed in Rule 16.1 of the Tohono O'odham Rules of Criminal and Traffic Procedure. Unlike parole or early release simply for good behavior, community service is normally seen as an active way to work off a person's debt, as well as positively helping the community.

The Court does have discretion under 7 T.O.C. ch. 1, § 1.13 to deny credit for work performed even if it is eligible under Rule 16.1. That is normally reserved for more egregious cases.

This is not one of those cases. While Ms. Smith chose longer jail terms instead of probation, that does not by itself preclude crediting community service work against those longer jail terms. Probation, especially with programs, can benefit a person, and the community in which that person lives. But community service work can also benefit the community. And to Ms. Smith's credit, she recognized that she would likely not be successful with programs that were court-ordered, erasing those personal and community benefits, and also resulting in the longer jail terms. Accordingly, the Court will not further penalize her for accepting longer jail terms at the start, and crediting community service hours against those terms.

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED
2022 DEC 16 P 12:21
JUDICIARY SERVICE CLERK
WITHIN THE
TOHONO O'ODHAM JUDICIARY

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Timothy Lorentine Ortega
DOB: 09/23/76
Defendant

TRIAL RECORD ENTRY

Case No. **CR2021-0234-1-6**

OFFENSE(S) Ct. 1: 3.6A4/8.9B1, Ct. 2: 3.6A5/8.9B1, Ct. 3: 7.1A1/8.9B1, Ct. 4: 7.1A2/8.9B1, Ct. 5: 7.2A/8.9B1, Ct. 6: 7.3A1/8.9B1

COURT DATE: December 16, 2022 TIME: 8:15am BOND POSTED:

CALENDER EVENT: ☐ Arraignment ☒ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☐ Other _____
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☒ Present	In Custody	☐ Not Present
DEFENSE COUNSEL:	☒ Present	Wolfblack	☐ Not Present ☐ Pro Se
PROSECUTORS:	☒ Present	Allen	☐ Not Present
PROBATION OFFICER:	☐ Present		☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☒ The following charges are dismissed: CR2021-0234-1-6

(☐)with prejudice (☒)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATIC. . . . Timothy Lorentine Ortega, DOB: 09/23/76
CASE NO. CR2021-0234-1-6

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $ _____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Please see the attached order.

December 16, 2022
DATE

JUDGE, Kyle Fields

DISTRIBUTION: ☐ COURT ☐ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☐ DEFENSE ATTORNEY ☑ DETENTION

12162202

TOHONO O'ODHAM JUDICIARY

Rev. 12/2020

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 DEC 16 P 12:21
JUDICIARY SERVICE CLERK

Continuation Order

Nation v. Timothy Lorentine Ortega

CR2021-0234-1-6

At the hearing, Mr. Ortega asked the Court to dismiss the case because the Nation has not provided a police report. The Nation stated that it no longer has access to the database where the police report was stored. And the Nation could not give a timeline when, if ever, the report would be available. Instead of the police report, the Nation provided Mr. Ortega a letter from the Tohono O'odham Police Department stating that the Department cannot get the report.

Under Rule 7.2(a)(3) of the of the Tohono O'odham Rules of Criminal and Traffic Procedure, the Nation must disclose "All then existing original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged[.]"

If the Nation doesn't provide the report(s), Rule 7.3(d) provides: "Upon motion of a party and for good cause shown, the Court shall dismiss cases without prejudice when the primary police report or the investigative report was not made available to the defendant at the time of the pre-trial conference."

In the past, the Court has previously let the Nation disclose substitute documents (police officer notes, 911 call records, affidavit(s) from the police officer, or a substitute a police report) so long as it had the same information that would be in an investigative report. Disclosing the substitute documents would satisfy the disclosure requirements of Rule 7.2(a)(3).

Here, the Nation has disclosed a letter stating that the police report is not available. The letter contains none of the information that would typically be in a police report (who, what, when, where, and why). Therefore, the Court dismisses the case without prejudice. *See* T.O. R. Crim. Pro. 7.3(d).

Mr. Ortega also asked to change his release conditions. The request is moot because the Court dismissed the case without prejudice.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Dalton Saraficio DOB: 10/27/1988 Defendant	Case No.: CR2021-0261-1-4 ORDER

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 JAN 26 A 9:50
JUDICIARY SERVICE CLERK

This is before the Court on Defendant's Brief Re: Motion to Dismiss ("Motion to Dismiss"). The Nation filed a Response. Defendant did not file a Reply. For the reasons below, the Court denies the Motion to Dismiss.

I. ANALYSIS

A. Probable Cause

Tohono O'odham law has its own jurisprudence on probable cause. See Nation v. Alvarez, 2021 TOR Supp. 255 (2018), and cases cited therein. Under that jurisprudence, probable cause "is a common sense determination under the totality of the circumstances that would lead a reasonable person to believe that a crime has been committed and that the defendant committed it. Id. at 3. When presented in a motion to dismiss for lack of probable cause, the Court focuses on the complaint and the affidavit of probable cause. Id. at 4.

Following that here, the Court finds that the Law Enforcement Statement of Probable Cause in this case more than satisfies that burden. Accordingly, the Court denies Defendant's Motion to Dismiss for lack of probable cause.

B. *Rule 7.3*

Under Rule 7.3(d) of the Nation's Rules of Criminal and Traffic Procedure:

> *Upon motion of a party and for good cause shown, the Court shall dismiss cases without prejudice when the primary police report or the investigative report was not made available to the defendant at the time of the pre-trial conference.*

The Nation acknowledges that the police report in this case is indefinitely unavailable. (Nation's Response at 3.) It was therefore not made available to the Defendant at the time of the pre-trial conference.

However, the Nation also correctly points out that this Court has accepted substitutes, so long as they have the same information that would be in an investigative report or police report (who, what, when, where, and why). See Nation v. Ortega, __ TOR__ (Case No. CR2021-0234-1-6) (Tr. Ct. Dec. 16, 2021).

In this case, the Court finds that acceptable substitutes were provided: Detailed and thorough Statement of Probable Cause, together with photos of items seized by police, photos of preliminary drug testing results, copy of waiver of rights, consent to search, and Mr. Saraficio's recorded interview. Accordingly, the Motion to Dismiss under Rule 7.3 is denied.

C. Narcotics Analysis Reports

Under Rules 7.2(a)(4) & 7.2(b) of the Nation's Rules of Criminal and Traffic Procedure, the Nation must disclose, no later than the initial pre-trial conference date, "the results of physical examinations and of scientific tests, experiments or comparisons *that have been completed*" (emphasis added). The Nation timely provided field test

results. There is no requirement that final lab test results also *be completed* and disclosed by that time. Instead, if the Nation wishes to use later-run conclusive lab test results at trial, it will need to follow the schedules set out under Rule 9.2. Because those times have not yet been triggered, the Nation is in compliance with its disclosure requirements and Defendant's Motion to Dismiss on this ground is denied.

II. CONCLUSION

For the above reasons, Defendant's Motion to Dismiss is DENIED.

SO ORDERED this 26th day of January, 2023

Judge Joseph Hardy Jr.

Frvd: Def., PROS, Adv. WolfBlack
01262023 ja

TOHONO O'ODHAM
JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 APR 11 P 3:03
JUDICIARY SERVICE CLERK

Tohono O'odham Nation Plaintiff v. Michael James Miguel Defendant	Case No.: CR2021-0346-1-3 ORDER

Michael Brown, attorney for Defendant Michael Miguel, filed a motion to withdraw. The Court set a hearing. Mr. Brown moved to expedite the hearing.

The Court reschedules the Motion to Withdraw Hearing for April 24, 2023 at 1:00 p.m.

Mr. Brown may resubmit his motion to withdraw, basing it on Tohono O'odham rules. His original motion was based on Arizona State Bar Ethical Rules. The Nation does not follow those, but has its own Code of Ethics for Attorneys and Advocates Practicing in the Courts of the Tohono O'odham Nation (Section 14 of the Tohono O'odham Rules of Court).

Further, this Court understands Arizona takes the position that attorneys who comply with tribal ethics rules when representing clients in tribal court are not subject to Arizona disciplinary action, even when the permissible tribal conduct would not be allowed under Arizona's rules. See Arizona Ethical Opinions 90-19 and 99-13; Arizona Ethical Rule 8.5.

If Mr. Brown shows termination is justified under Rule 10 of the Tohono O'odham Code of Ethics, the Court will grant the motion and vacate the hearing set above.

SO ORDERED this 11th day of April, 2023.

Judge Joseph Hardy Jr.

Faxto: Def, Det, Pros, DC
04112023

TOHONO O'ODHAM
JUDICIARY

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

TOHONO O'ODHAM NATION, Plaintiff v. CHRISTOPHER MORENO, Defendant.	Case No.: CR2022-0077-3 ORDER

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 MAY 21 P 1:30
Gabrielle Escarsega
JUDICIARY SERVICE CLERK

The Court has received and reviewed Defendant Christopher Moreno's Motion to Amend to Clarify Plea Agreement, filed May 20, 2022, at 3:35 p.m[1]. This Motion comes after expedited hearing and argument made the morning of May 20, 2022, based on the Court's setting of that hearing to address Mr. Moreno's Second Stipulated Motion to Clarify Plea Agreement Sentence, filed May 17, 2022, and his Motion to Clarify Plea Agreement, filed May 12, 2022.

At the expedited hearing and argument on May 20, 2022, the Court told the parties that from its review of the entire record—including the plea agreement filed April 22, 2022, and the audio record of that plea proceeding—there was no record of any party asking for credit for time

[1] In Mr. Moreno's Second Stipulated Motion to Clarify Plea Agreement Sentence, filed May 17, 2022, he argues that the Court "appears to have denied Mr. Moreno's Motion on the basis that [counsel] . . . had been allowed withdrawal after all matters had been resolved, and the Court was unwilling to consider said Motion unless a new Notice of Appearance was filed." This argument was repeated in the Motion to Amend to Clarify Plea Agreement. Counsel David Oliver's motion to withdraw as Mr. Moreno's counsel, filed May 9, 2022, had been granted on May 10, 2022. There was no new Notice of Appearance filed before May 16, 2022. The Court had never stated it was unwilling to consider Mr. Moreno's motions and had not denied his initial motion but rather asked him to clarify whether he intended to have counsel reappear in his case after counsel had withdrawn. Counsel's notice of appearance is required under the Rules of Criminal and Traffic Procedure, Rule 3(b), and is essential to put all parties and the Court on notice that an individual authorizes counsel to represent them and that the rules governing communication with such counsel must be observed. *See also* General Rules of Practice, Rule 5. This clarity is essential in every case in which counsel appears and is easily addressed through filing the required Notice of Appearance. Once Mr. Oliver filed that Notice of Appearance in this case, the Court could, and did, proceed as expeditiously as possible.

served which would have credited Mr. Moreno with any time before the date of sentencing on May 2, 2022. The Nation's Prosecutor, Ms. Christina Rinnert, and Defense counsel, Mr. David Oliver, both recognized they had not made a record of any request for credit for time served before the May 20, 2022, hearing, but they avowed that was their internal intent.

Prosecutor Rinnert, and Defense Counsel Oliver attached their signed declaration to their Motion to Amend to Clarify Plea Agreement, and avowed they intended to ask the Court to award Defendant credit for time served, starting February 15, 2022, against the probation revocation sentence issued in CR2018-0461-1. This declaration provides a basis for the Court to revisit the plea agreement and correct any injustice. The parties reference 70 days as sentence in CR2018-0461-1, but the Court record reflects 90 days, broken into two distinct periods.

CR2018-0461-1

In CR2018-0461-1, the Court originally imposed a 30-day jail sentence on May 4, 2018, as straight time under a plea agreement filed April 17, 2018. That agreement also required a 60-day jail sentence only if Mr. Moreno failed to successfully complete one year of supervised probation. The Court ordered Mr. Moreno to self-surrender to the Nation's jail by noon on June 8, 2018, to serve his 30-day jail sentence. On June 12, 2018, Nation's Probation filed a Motion to Revoke Probation claiming in part that Mr. Moreno failed to self-surrender as ordered. Probation asked the Court to impose the suspended 60-day sentence for the violation. On June 13, 2018, the Court issued a warrant for Mr. Moreno's arrest.

On February 15, 2022, police arrested Mr. Moreno on the outstanding warrant. At his initial appearance on the motion to revoke probation on February 16, 2022, the Court ordered Mr. Moreno to serve the original 30-day jail sentence, granted credit for time served up to that point, and set arraignment. At the arraignment on February 25, 2022, Defendant admitted violating probation and was ordered to serve the remaining 60-day sentence consecutive to the original 30-

day sentence. This meant that Defendant would be released on this probation violation charge on May 16, 2022.

The Court does not grant added credit against a probation violation sentence. But given the 30-day sentence was not part of a probation sentence, the parties could seek credit for time served against that time. While this may have been the parties' *intent* for presentation at the plea agreement hearing in CR2022-0077-3, it was never presented to the Court.

CR2022-0077-3

On May 2, 2022, the Court processed Defendant's guilty plea in CR2022-0077-3. Under that plea, the Court sentenced Defendant to 30 days in jail, *to run concurrent with any other sentence*, with 150 days of jail suspended provided he completed supervised probation for one year. Mr. Moreno's counsel of record reviewed the plea on the record, stated Mr. Moreno had been advised of its terms and accepted them, and clearly advised the sentence should *run concurrent* with any other sentence. Again, the parties made no request that the sentence would receive any credit for time already served.

Based on the terms and requests before the Court at the time of sentencing, the Court sentenced Mr. Moreno to serve those 30 days in jail on May 2, 2022, and ordered them to run concurrent with any other sentence. Having no reason to give some preexisting credit on sentence, the Court did not include one in its entry and Order. Thus, the 30-day sentence in CR2022-0077-3, properly ran from sentencing, May 2, 2022, concurrently with the balance of sentence in CR2018-0461-1, until May 16, 2022, and has continued running independently until it would naturally expire on June 1, 2022.

The Cure

A sentencing judge need not rule on issues the parties have not raised, cannot divine what is not presented, and a judge does not have the jurisdictional authority to, *ab initio*, change an otherwise lawful sentence of record. *See* Rule 24.3, Arizona Rules of Criminal Procedure; *State*

v. Thomas, 142 Ariz. 201, 688 P.2d 1093 (App.1984); *State v. Falkner,* 112 Ariz. 372, 542 P.2d 404 (1975).

However, now that Ms. Rinnert and Mr. Oliver have clarified that a credit for time served provision was part of their internal negotiations and part of the Defendant's calculus in electing to accept the plea agreement, the Court, having reopened the plea proceeding to prevent manifest injustice, will award that credit as cure. This credit is awarded against Mr. Moreno's remaining sentence in CR2022-0077-3, meaning he may be immediately released, in this case only.

IT IS THEREFORE ORDERED:

Based on Nation's Prosecutor Christina Rinnert's and Defense Counsel David Oliver's declarations and avowals to the Court they had discussed and intended to ask for credit for time served in this case as against any other sentence, and given the initial 30-day jail sentence in CR2018-0461-1 is one possible sentence against which that time could run, the Court, to prevent manifest injustice, awards Mr. Moreno credit for time served up to 30 days in CR2022-0077-3, to begin February 15, 2022, and to end March 17, 2022, in this case only.

Mr. Moreno may be immediately released from jail in this case only. The Court also urges counsel, going forward, to present their intentions on sentencing at the time of sentencing, as the time and resource needed to cure these problems after the fact can delay a defendant's freedom.

Dated this May 21, 2022.

Judge David M. Osterfeld

JUDICIARY

FWD: Pros, Det, Def, D. Oliver, Prob.

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 JUL -5 A 11:09
JUDICIARY SERVICE CLERK

TOHONO O'ODHAM NATION, Plaintiff v. ALYUS AMURY ENCINAS, DOB: 03/19/2002 Defendant.	Case No.: CR2022-0175-1-8 ORDER

At the Pre-Trial Hearing held on July 1, 2022, the Court asked Alyus Amury Encinas whether he had completed his financial affidavit and request to appoint counsel that the Court had twice provided him. This request had been provided Mr. Encinas because the Nation said it would seek more than one year in jail as sentence, giving Mr. Encinas the right to have the assistance of counsel without charge. Mr. Encinas responded that he did not want to complete the form because he wanted to represent himself.

The Court asked several questions of Mr. Encinas to understand whether he is familiar with the Nation's Rules of Criminal Procedure, Rules of Evidence, and whether he had adequate skill and experience to (1) question witnesses (both direct and cross examination), (2) challenge and present evidence in Court, (3) present any defenses to which he would be entitled, and (4) appropriately object to preserve his rights and interests. After that questioning, the Court finds that while Mr. Encinas has voluntarily and intelligently elected to represent himself and has expressed his interest in waiving his right to counsel, he does not have adequate experience or familiarity with the rules and procedures governing this case, much less the skill necessary to

independently preserve his right to due process afforded under Article III, Section 1, of the Constitution of the Tohono O'odham Nation. The Court does not find that Mr. Encinas has knowingly waived his right to counsel.

Clearly, the Court cannot force Mr. Encinas to defer his constitutional right and interest in representing himself to the decisions of appointed counsel. But equally clear is that the Nation's Constitution affords him due process of law which counsel could help preserve in Mr. Encinas's absence of training and experience in the law, even when counsel serves in a standby capacity. Such standby counsel would be a ready resource for Mr. Encinas during trial and its preparation to help him make sure his decisions can have the benefit of advice from someone with legal training and experience.

The Court finds that the interests of justice are served in appointing Alyus Amury Encinas a state-licensed attorney to serve as standby counsel, in compliance with the appointment process outlined in Rule 3 of this Court's Rules of Criminal and Traffic Procedure.

IT IS ORDERED: appointing Alyus Amury Encinas standby counsel, in the interests of justice, in compliance with Rule 3 of this Court's Rules of Criminal and Traffic Procedure. The next scheduled hearing is a Status Hearing on August 1, 2022, at 1:00 p.m., with a Bench Trial thereafter, scheduled to begin August 24, 2022, at 9:00 a.m. Should appointed counsel require additional time to prepare for trial, the Court will quickly set a hearing to determine each party's position on such a continuance.

Dated this July 1, 2022.

Fwd: Pros., Def., Deten., Advocate
w/ waiver of State licensed Attorney
070522 TL

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 OCT -2 P 1:53
JUDICIARY SERVICE CLERK

Tohono O'odham Nation Plaintiff v. Sonny DeAngelo Patricio Defendant	Case No.: CR2022-0277-1-4 ORDER

This is before the Court on the Nation's Motion to Continue Trial (Motion), and the Defendant's Objection to Motion to Continue Trial (Objection). The Nation did not file a reply. Neither party requested oral argument. The Court therefore rules on those filings.

I. BACKGROUND

On August 18, 2023, a bench trial was set for October 19, 2023. (See Trial Record Entry Aug. 18, 2023.) The Nation filed its Motion September 12, 2023, saying it "just learned on September 06, 2023 that the responsible police officer for this case, Officer D. Lopez-Saum, is scheduled for out of country military deployment from September 18, 2023, through August 2024." (Motion 1.)

The Nation did not say when Officer Lopez-Saum received his deployment orders. The Nation stated Officer Lopez-Saum would be unavailable for the October 19 trial date (Motion 1), but did not explain if alternatives had been discussed; e.g., appearing by telephone or moving to accelerate the trial date.

The Nation further asserted that Officer Lopez-Saum is a "necessary and key witness" for the Nation (Motion 1) and that "the Nation cannot proceed to trial without him" (Motion 2).

The Nation did not state whether the alleged victim had a preference on exercising her right to a speedy disposition, see 7 T.O.C. § 4102(L), or waiting for Officer Lopez-Saum's return. Nor did the Nation address how the requested continuance would affect the Defendant's right to a speedy trial.

The Defendant points out that the Nation did not object to the initial setting of the trial date, did not appear to communicate with Officer Lopez-Saum about availability until almost a month later, and then asked for a trial continuance of 11 to 12 months. (Objection 1.) Defendant further asserts that he is prepared for trial and a delay of such length would thwart his rights. (Objection 2.)

II. ANALYSIS

A. Standard for Continuing a Trial.

> *A continuance of any trial date will be granted [if] it is shown that extraordinary circumstances exist and that the delay is indispensable to the interests of justice. In ruling on a motion for continuance, the Court must consider the rights of the defendant and any victim to a speedy disposition.*

T.O. R. Crim. Pro. R. 5(c)(2) (Rule 5(c)(2)).

B. Extraordinary Circumstances and Indispensable to Interests of Justice.

Neither side cited any Tohono O'odham law on what constitutes "extraordinary circumstances" or "indispensable to the interests of justice." The Court is not aware of any either. The Nation did cite some Arizona case law on extraordinary circumstances. While not controlling here, the Court does find it useful for guidance.

The Nation cites Arizona v. Lukezic, 143 Ariz. 60, 70 (1984), for the proposition that unavailability of a key prosecution witness would constitute an extraordinary circumstance. (Motion 2.) However, Lukezic found that the delay there (other than delays caused by or consented to by the defendant) was caused by the unforeseen illness of the

trial judge. Lukezic, 143 Ariz. at 69-70. Indeed, the Lukezic court distinguished Arizona v. Heise, 117 Ariz. 524, 526, 573 (Ct. App. 1977), where "the delay was caused by a scheduling conflict which the prosecutor's office could have easily foreseen." Lukezic, 143 Ariz. at 70 (key witness gave advance notice of vacation to prosecution); accord, Ariz. v. Vasko, 193 Ariz. 142, 144-45 (Ct. App. 1998) (prosecution knew of arresting officer's Army Reserve training and requested trial before it, but unforeseen and unavoidable case transfer status into that period justified continuance).

As shown in Vasko, military leave may be foreseeable when scheduling a trial. And as further noted in Vasko, extraordinary circumstances require "more than just a mere allegation of a witness's unavailability." Id. at 145. Here, the Nation did not show or even allege that Officer Lopez-Saum's "scheduled" (Motion 1) deployment was not foreseeable. See also Heise, 117 Ariz. 524 at 526 ("when the sole reason the trial court is placed in this dilemma is the failure of the prosecutor to keep track of witnesses, we must reluctantly conclude that the trial court abused its discretion in finding the existence of extraordinary circumstances").

Furthermore, the unavailable witness in Heise was "apparently the only witness qualified to testify as to the cause of death of the victim." Heise, 117 Ariz. at 524. There is no demonstration by the Nation that Officer Lopez-Saum is similarly critical to establish any element of the charges here, or even why his testimony is needed at all, other than the bare assertion that he is a "necessary and key witness." (See Motion 1.)

All of the charges in the Complaint are domestic violence counts involving solely the alleged victim, Aldeena Oliver. Neither the Complaint nor the Law Enforcement Statement of Probable Cause indicate that Officer Lopez-Saum witnessed any of the alleged acts. In fact, the Statement of Probable Cause suggests that Officer Lopez-Saum was not present, and that Ms. Oliver is the only direct witness. The Nation did not explain

how Officer Lopez-Saum would therefore be a key witness, or why "the Nation cannot proceed to trial without him." (Motion 2.)

In addition, even if the Nation had shown that Officer Lopez-Saum is a necessary and key witness, it did not show, or even allege, that his absence was not foreseeable. While the Heise court acknowledged that delay to obtain the testimony of a witness that *was* shown to be critical for the prosecution would be "in the interest of justice," and not continuing the trial would therefore likely result in dismissal, it nevertheless held that "extraordinary circumstances" did not exist when that critical unavailability resulted from the prosecution's failure to keep track of its trial schedule and witness availability. See Heise, 117 Ariz. at 526.

C. Right of the Victim to a Speedy Disposition.

Neither side addressed this element of Rule 5(c)(2). As both the moving party and the party with standing to assert a victim's right (on the victim's request, see 7 T.O.C. ch. 4, § 4103(B)), the Nation should at least advise whether Ms. Oliver has taken a position on postponing the trial for a year waiting for Officer Lopez-Saum's return, especially where the Nation has not shown how Officer Lopez-Saum is necessary for the trial.

D. Right of the Defendant to a Speedy Disposition.

Rule 5(a) of the Tohono O'odham Rules of Criminal Procedure generally requires a trial within 120 days from a defendant's arraignment. However, continuances toll that period. See T.O. R. Crim. Pro. R. 5(a), (b)(5).

In addition, there are no bright-line tests for a defendant's speedy trial right under the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 et. seq., (ICRA); specifically, 25 U.S.C. § 1302(a)(6) ("No Indian tribe in exercising powers of self-government shall-- . . . deny to any person in a criminal proceeding the right to a speedy and public trial . . . .").

Rather, this Court has applied a four-factor balancing test adopted by the U.S. Supreme Court for speedy trial cases under the U.S. Constitution. Those factors are: (1) length of the delay, (2) reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice against the defendant. See Nation v. Salcido, CR2022-0423-1-4 (Tr. Ct. Apr. 3, 2023) (unpublished); Nation v. Valencia, CR2022-0400-1-5 (Tr. Ct. April 3, 2023) (unpublished).

Each of those factors depends on the facts and circumstances of a particular case. Id. In this case, neither party addressed those factors, except for the Defendant's assertion of his right. Although Defendant did not elaborate, he did at least assert his right to a speedy trial by objecting to the continuance, confirming he is ready, and claiming the requested continuance would thwart his rights. (Objection 2.)

Further, while the Nation did not address the length of the requested continuance here, at least 317 days (see Motion 1), the Court notes that the case the Nation cited for support involved a delay of only 15 days. See Lukezic, 143 Ariz. at 70. The delay in Vasko was 36 days. See Vasko, 193 Ariz. at 144. The delay in Heise was 28 days (and did not justify a continuance since it was foreseeable). See Heise, 117 Ariz. at 524-26.

Accordingly, to the extent the Court can consider this element, it must weigh in favor of the Defendant.

III. CONCLUSION

The Nation has not shown that Officer Lopez-Saum is a critical (or even necessary) witness, that his scheduled deployment was unforeseeable, and that there are no alternatives to his appearing while deployed. The Nation has also not provided the alleged victim's stance on her right to a speedy disposition, nor addressed the Defendant's right to a speedy trial, both required considerations for a continuance under Rule 5(c)(2). While the Defendant has asserted his right to a speedy trial.

Accordingly, the Court does not find that continuing the trial for 317 days, or more, is based on extraordinary circumstances or would be indispensable to the interests of justice. Therefore, the Court DENIES the Nation's Motion, without prejudice. The Nation may make a motion for reconsideration if it has further facts and argument supporting its Motion consistent with the above.

SO ORDERED this 2nd day of October 2023.

Judge Joseph Hardy Jr.

Fwd: Def, Det, Pros, D.C.
10022023 (T. Norton)

TOHONO O'ODHAM JUDICIARY

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED WITHIN THE TOHONO O'ODHAM JUDICIARY
2022 OCT 20 P 1:27
JUDICIARY SERVICE CLERK

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Jalen Justin Juan
DOB: 02/09/1991
Defendant

TRIAL RECORD ENTRY

Case No. **CR2022-0292-1-16**

OFFENSE(S) Ct. 1 - 2.9A, Ct. 2 - 2.1A, Ct. 3 - 3.4A/8.9B8, Ct. 4 - 3.6A1/8.9B8, Ct. 5 - 3.6A1/8.9B8, Ct. 6 - 3.6A1/8.9B8, Ct. 7 - 5.2A1/8.9B8, Ct. 8 - 5.2A1/8.9B8, Ct. 9 - 7.1A4, Ct. 10 - 7.1A4/8.9B8, Ct. 11 - 7.3A5/8.9B8, Ct. 12 - 7.3A5/8.9B8, Ct. 13 - 7.4A/8.9B8, Ct. 14 - 7.4A/8.9B8, Ct. 15 - 7.4A/8.9B8, Ct. 16 - 14.1A3

COURT DATE: October 14, 2022 TIME: 8:15 AM BOND POSTED: ___

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Status of appointment of Cansel.
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☒ Present	Jalen Justin Juan	☐ Not Present	
DEFENSE COUNSEL:	☐ Present		☐ Not Present	☐ Pro Se
PROSECUTORS:	☒ Present	Kelly Davanyi	☐ Not Present	
PROBATION OFFICER:	☐ Present		☐ Not Present	

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☒ Set for: Continued Status Hearing on October 24, 2022, at 1:00 p.m., at which the Court will obtain additional information necessary for the Court's decision on appointment of counsel, under Rule 3(a)(4)(B) of its Rules of Criminal Traffic Procedure

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATI(Jalen Justin Juan DOB: 02/09/1991
CASE NO. CR2022-0292-1-16

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $ _____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: See Attached Continuation Order. Mr. Juan is advised that should he want the Court to reconsider his existing Conditions of release, he may file such a request with the Court in advance of the scheduled Status hearing on October 24 2022 at 1:00 p.m and the Court will expedite transmittal of that request to the Tribe and request its expedited response to ensure his interests pending further decision on representation.

October 14, 2022
DATE

JUDGE, David Osterfeld

DISTRIBUTION: ~~☐ COURT~~ TM ☐ PROBATION ☒ DEFENDANT ☒ PROSECUTOR ☐ DEFENSE ATTORNEY ☒ DETENTION

Advocate Program - Cheryl Lopez
Attorney General – Howard Shanker
Executive Legal Counsel – Christine Van Pyle

102022 TM

JUDICIARY

Rev. 12/2020

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2022 OCT 20 P 1:27
Tiffany Mease
JUDICIARY SERVICE CLERK

CONTINUATION ORDER for Trial Record Entry of Status Hearing DATED October 14, 2022, re:
TOHONO O'ODHAM NATION VS. JALEN JUSTIN JUAN: DOB: 02/09/1991
CR2022-0292-1-16

The Court held a status and pretrial hearing on October 14, 2022. The Court, Prosecutor Kelly Daranyi, Defendant Jalen Justin Juan, and Tohono O'odham Advocate Program attorney Tom Norton—whom the Court specially recognized for discussion only and not as appearing in any representative capacity in this case—discussed the process to appoint counsel for indigent criminal defendants described in Title 6, Chapter 1, Article 1, Section 1108(B)(3)(c) of the Nation's Code ("Code").

Historical Context

At the initial appearance held July 7, 2022, the Nation told the Court, under Section 1108(C) of the Code, it wanted a jail sentence of more than one year as allowed under the 2010 Tribal Law and Order Act (TLOA), an amendment to the Indian Civil Rights Act ("ICRA")'s, limit of a one-year sentence ("TLOA Notice"). Immediately after the Nation's TLOA Notice, the Court gave Mr. Juan a financial affidavit to certify whether he was indigent. *See* Title 6, Chapter 1, Article 1, Section 1108(B)(2) of the Code and Tohono O'odham Rules of Court, Section 3, Rules of Criminal and Traffic Procedure (here "Rule"), Rule 3(a)(1)(A). The Court also gave Mr. Juan additional copies of the affidavit on July 8, 2022, and August 5, 2022.

On August 8, 2022, Mr. Juan filed his completed financial affidavit showing he was indigent. Just a few hours later, the Court appointed the Tohono O'odham Advocate Program to represent Mr. Juan, under Section 1108(B)(3)(a), and Rule 3(a)(1)(D). On August 22, 2022, Mr. Juan filed a Request to Speak with the Court, stating he wanted the help of an attorney to consider the Nation's plea offer. The ensuing pre-trial hearings were continued on August 26, 2022, and September 16, 2022,

expressly because Mr. Juan did not have appointed counsel and was asking to speak with an attorney.

On October 7, 2022, as permitted under Rule 3(a)(1)(C), the Nation's Advocate Program ("Program") filed its Notice of Conflict Letter ("Conflict Letter"), and attached a copy of that letter, dated September 8, 2022. The Program "declined representation based upon the existence of an ethical conflict of interest" and also told Mr. Juan "the conflict attorney did not accept your case."

At the October 14, 2022, hearing, Mr. Norton confirmed that the Program could not represent Mr. Juan per conflict, and the Nation's Prosecutor confirmed it sought a sentence of more than one year in jail. The Court looked to Section 1108(B)(3)(c), directing the Court shall appoint "on a rotating basis, any attorney authorized to practice law in the Tohono O'odham Judicial Court and who is not employed by the Nation" if no other counsel is available.

The Court asked those present to share their thoughts on available, competent, and effective state-licensed counsel authorized to practice law in the Court and able to help an indigent criminal defendant. The Nation properly deferred, the Advocate Program stated it had a conflict and believed it had no further duty, and the Court advised it believed there is a ministerial duty for the Nation, which would likely fall to the Advocate Program, to recommend counsel for the Court's use when it appoints an indigent criminal defendant counsel under Section 1108(B)(3)(c). Mr. Norton objected to the Court ordering the Advocate Program to appear at future hearings in this case. The Court clarified that it would be *inviting* the Program and other potentially responsive arms of the Nation to appear at the next status hearing for discussion and resolution of this concern.

Analysis

The Nation's Code, at Section 1108's Right to Counsel, describes much of the process surrounding appointment of counsel for persons charged with crimes in this Court. That Section sets two paths to counsel.

First, any person can pay for their own advocate or lawyer, regardless of the jail time they are facing. (*See* Section 1108(A)). Second, when the Nation tells the Court it will seek more than one year in jail as sentence for charges in a criminal proceeding, the Court "shall" appoint a state-licensed attorney to represent indigent defendants, provided "more than one year is actually imposed". (*See* Section 1108(B)). If a defendant is not indigent then they should pay for their own attorney even if the sentence would require more than one year in jail, but if they are indigent, then the Code requires the Court to appoint a state-licensed attorney at the Nation's expense.

Counsel at the Nation's Expense

The Nation incorporated ICRA into its Constitution, under Article III, Section 4. The 2010 TLOA amendments to ICRA activate the appointment of a state-licensed attorney for indigent criminal defendants in jeopardy of a sentence for more than one year in the Nation's jail.

On October 1, 2013, the Nation adopted Resolution 13-390, amending Title 6, Section 1, Article 1 of its Code, adding the additional protections and guarantees of state-licensed counsel and state-licensed judges required to implement TLOA. Shortly thereafter, the Nation's Court of Appeals issued its first decision interpreting this new process to appoint state-licensed counsel for indigent criminal defendants facing more than one year in jail.

In *Frank v. Nation*, 2021 T.O.R.Supp. 13, 16 (T.O. Ct. App., Aug. 11, 2014), Glen Frank challenged a four and one-half year jail sentence because his requests for time to hire counsel were denied and the Court did not then determine whether he was indigent and appoint him a state-licensed counsel under Title 6, Chapter 1, Article 1, Section

1108. *Id.* at 14. Finding in Mr. Frank's favor, the Court observed that while tribal governments are not subject to the Bill of Rights or the 14th Amendment to the United States Constitution, Congress granted similar protections to Glen Frank and others like him when it enacted ICRA and the later TLOA amendment to ICRA. *Id.* at 15. Again, those federal laws are incorporated in the Nation's Constitution and become guaranteed rights for the Nation's members and those charged in its criminal courts.

The Court explained that when the "total sentences for all the crimes charged for the criminal proceeding or incident exceed one year, then the requirement for effective assistance of counsel at the expense of the Nation applies" and the sentence of each individual charge is not considered. *Id.* at 16. This "total view" gives an indigent criminal defendant a greater chance of qualifying for assistance of counsel over the "individual view" that each charge with a maximum sentence under 365 days in jail would not qualify for counsel.

Also, this important ruling, when viewed against the backdrop of Section 1108(C)'s specific timing requirement for the Nation to advise whether it wants jail over one year, clarifies the Court's existing practice of appointing counsel immediately on notice from the Nation. It also clarifies the need for the Nation to provide its notice early in the case, the need for the Advocate Program's immediate response to a notice of appointment and timely notice of conflict, and the Nation's establishment of a recommendation process for competent, effective counsel whom the Nation can pay if the Court must appoint under Section 1108(B)(3)(c).

After *Frank*, the Nation's Appellate Court then decided *Jonathan Emerson v. Tohono O'odham Nation*, 2021 T.O.R.Supp. 19 (T.O. Ct. App., Apr. 6, 2015), again interpreting appointment of counsel in a TLOA case. Sometime before October 21, 2013, the Nation charged Mr. Emerson with two crimes that could together total a sentence of 540 days in jail, but each had a maximum sentence under one year in jail. On October 21, 2013, the Nation asked for a jail sentence exceeding one year.

Immediately after that notice, the Court appointed the Nation's Advocate Program to represent Mr. Emerson. (*Id.* at 20.)[1]

Between October 21, 2013, and December 9, 2013, the Advocate Program did not contact Mr. Emerson, the record did not show that a state-licensed attorney ever contacted Mr. Emerson, and no state-licensed attorney ever appeared to represent Mr. Emerson. (*Id.*) On December 9, 2013, the Nation's Prosecutor changed position and told the Court it no longer wanted Mr. Emerson to serve more than one year in jail. This notice came over 30 days before trial as required under Title 6, Section 1108(C) of the Nation's Code.

But, the Nation's jail did not allow Mr. Emerson to use its phone to call and hire his own counsel, he was not given access to legal materials, police reports, other official documents, and had no assistance in issuing subpoenas to compel his witnesses to appear. After the ensuing bench trial, the Court found Mr. Emerson guilty of two criminal charges and sentenced him to jail.

Mr. Emerson appealed the conviction, arguing the Nation deprived him of due process when it denied him reasonable opportunity and means to retain counsel of his choice and to access legal materials and process—effectively denying him access to the Court. The Nation's Court of Appeals agreed and found the denials of material, access, and assistance deprived Mr. Emerson of liberty without due process. (*Id.* at 23-24.) Article III, Section 1 of the Nation's Constitution declares that the Nation "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law."

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[1] This practice of immediate appointment continues to today, as seen in the instant case when, at the initial appearance on July 7, 2022, the Nation fulfilled its duty of notice under Section 1108(C) of the Code and the Court immediately gave Defendant his affidavit to show indigence. When Defendant filed his affidavit, the Court immediately appointed the Advocate Program as counsel under Section 1108(B)(3).

The *Emerson* decision shows that regardless of indigence or the sentence the Nation wants in a criminal proceeding, a defendant still has important rights to gather evidence, prepare his defense, and evaluate the Nation's evidence and plea offers with counsel as the case moves toward sentencing, regardless of who pays for that counsel. In *Tohono O'odham Nation v. Glen Frank*, 2021 T.O.R.Supp 238, 244 (Tr. Ct., Oct 3, 2016), this Court held that it commits reversible error if a defendant enters "a plea agreement without the assistance of counsel when he is entitled to counsel." (*Id.* at 245.)

In construing the law, this Court must give words their usual and commonly understood meaning and give them sensible construction. *Tohono O'odham Nation v. Carmen Delores*, 2 TOR3d 26, 28 (Tr. Crt., September 15, 1997). For appointed counsel to have any benefit, the Court, given this precedent and Section 1108, has consistently appointed counsel immediately after the Nation states it will seek more than one year, and the Nation is largely consistent in its practice of providing its notice seeking more than one year at sentencing at initial appearance or arraignment. This practice assures that the Court and the Nation are giving proper effect to the intent and language of the law and precedent requiring that indigent criminal defendants receive counsel at the Nation's expense.

Section 1108(B)(3)(c)

What remains unclear and without direction in the Nation's Constitution, its Code, or the Rules, is how the Court would comply with Section 1108(B)(3)(c), selecting effective, competent counsel "on a rotating basis" from "any attorney authorized to practice law in the Tohono O'odham Judicial Court and who is not employed by the Nation" and how that counsel would be paid "at the Nation's expense." *See* Title 6, Section 1108(B)(1) and (C).

Looking to its own guidance, the Canons of Conduct for Judges, Canon 2, directs a judge to recognize a separation between the Judicial Branch and other branches of government and avoid any conduct or action that violates such separation, or raises an

appearance of impropriety. Balanced with that responsibility, is Article III, Section 1 of the Nation's Constitution's guarantee that the Nation's government "is established to protect and maintain [the people's] individual rights" and the Nation's government "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law."

Applied here, Section 1108(B)(3)'s "catchall" appointment states the "Court shall appoint attorneys to indigent criminal defendants . . . on a rotating basis, any attorney authorized to practice law in the Tohono O'odham Judicial Court . . . who is not employed by the Nation" and the Nation pays that expense if the Court "actually imposes" a total term of more than one year in prison. *See* Section 1108(B)(1), –B(3) and –(C). This rotating appointment process presents several problems.

First, while this Court is charged to appoint an attorney for Mr. Juan, it cannot stipulate who that attorney is and cannot negotiate the terms of any contract between the Defendant and the Nation's office that would oversee/supervise/negotiate the services that attorney provides Mr. Juan. Were the Nation's judges to assume that role, it would give the appearance of impropriety in direct violation of Canon 2, of the Canons of Judicial Conduct. Canon 2 states:

> An independent and honorable tribal judiciary is essential to justice in the tribal community. A judge shall help create and maintain such a judiciary and shall observe high standards of conduct toward achieving this goal.
>
> **(a) Separation of Branches.** A judge shall recognize a separation between the trial court and the Court of Appeals of the Judicial Branch, *between the Judicial Branch and other branches of the tribal government*, and *shall avoid any conduct or action that violates such separation, or raises an appearance of impropriety.*
>
> **(b) Decision-Making.** A judge shall not participate in legislative or executive decision making except where such

> participation is in accordance with the custom and tradition of the Nation.
>
> (emphasis added)

No existing list tells this Court who among its admitted state-licensed attorneys can effectively assist each criminal defendant and the list does not discriminate those state-licensed attorneys with trial experience and those who practice criminal law. That is an administrative skill best housed in the department authorized to provide that specialized assistance to the Nation's members, the Tohono O'odham Advocate Program.

While the Court could not find precedent in its record addressing the rotational appointment of counsel process set out in Section 1108(B)(3)(c), it did find Arizona precedent reviewing a similar process. Under Title 4, Section 1-102 of the Nation's Code, the Court may, absent its own precedent, look to Arizona law as persuasive authority and the Court believes that is proper here, when analyzing this mainly administrative and ministerial process of identifying competent, effective state-licensed counsel able to help an indigent criminal defendant and how the Nation would pay the expense of that lawyer.

In *Zarabia v. Bradshaw*, 912 P.2d 5 (Ariz. 1996), the Arizona Supreme Court, sitting en banc, reviewed a rotational appointment process that the Yuma Superior Court had developed to appoint counsel for indigent criminal defendants, absent a Yuma County Public Defender's office. That process was a rotational appointment from a list of licensed attorneys who practiced in the Yuma Superior Court and the appointments did not discriminate whether the attorney had any trial experience, any criminal law experience, or any experience representing indigent criminal defendants—it was a pure rotational appointment process despite real impact on the indigent defendant. *Id.* at 6. The appointed lawyers were also paid a flat rate of $375.00 for up to 20 hours of work on a case and $50 dollars an hour for each hour thereafter, rates far below the market and the overhead for most private practitioners.

The system failed. Civil lawyers who practiced in estate planning and transactional work were appointed to represent defendants charged with serious felonies. *Id.* These lawyers objected to their appointments, arguing their clients would have ineffective assistance of counsel. The Yuma County Superior Court presiding judge rejected the objections, and counsel filed a petition for special action. *Id.* at 6-7.

In its decision, the Arizona Supreme Court opined that the Yuma County Superior Court's rotational appointment process violated a defendant's right to the competent, effective assistance of counsel and violated the statutory and rule driven process established for payment of such counsel. *Id.* at 7. Besides the damage that inadequate representation takes on an indigent criminal defendant's rights, it also "violates the public interest in—and right to—establishing a fair justice system and achieving prompt, final disposition of charges." *Id.*

Here, the Court does not want to repeat the errors of the Yuma Superior Court. The existing rotational process set out in Section 1108(B)(3)(c), does not guarantee or guide the process to competent and effective counsel for an indigent criminal defendant and leaves unanswered the source of funding to pay that counsel. No existing list tells this Court who among its admitted state-licensed attorneys can effectively assist each criminal defendant and the list does not discriminate those state-licensed attorneys with trial experience and those who practice criminal law who are also not employed by the Nation.

Instead, the Court would rely on the Nation's Advocate Program or its Executive Branch for this expertise. The Court would also rely on the Nation for funding, independent of the Court, to pay that competent, effective counsel under a contract drafted and negotiated independent of the Court. Until the contract, the associated funding, and the identification of competent, effective counsel are available to the Court, it cannot activate Section 1108(B)(3)(c) as a source of counsel for an indigent criminal defendant.

Absent clarity in the appointment process under Section 1108(B)(3)(c), the Court must instead follow the direction of this Nation's Court of Appeals, and "determine that since a Defendant was not provided effective assistance of counsel at the expense of the Nation, the judge could not sentence the Defendant to more than one year in jail on all the charges." *See Frank*, 2021 T.O.R.Supp. at 16.

The Court will hold a hearing as allowed under Rule 3(a)(1)(B) of the Nation's Rules of Criminal and Traffic Procedure to obtain additional information and input during its process appointing Mr. Juan counsel. **The Court invites the Nation's Advocate Program Director or her designee, the Nation's Attorney General or his designee, and Executive Legal Counsel or her designee, to this Status Hearing scheduled October 24, 2022, at 1:00 p.m., where they can, as a friend of the Court and not appearing as a party, offer input on the administrative and ministerial processes of naming competent and effective counsel and the funding source for such counsel inherent within the appointment of counsel process outlined in Section 1108(B)(3)(c).**

While this hearing addresses Mr. Juan's specific needs, the Court can also offer the Nation's Advocate Program Director or her designee, the Nation's Attorney General or his designee, and the Executive Legal Counsel or her designee an opportunity to have additional discussion in chambers and divorced from any specific case or person, at a mutually convenient time, which the Court and these invited parties can set. These discussions will develop an agreed process for giving effect to Section 1108(B)(3)(c), for cases moving forward.

October 14, 2022

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA

FILED
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TOHONO O'ODHAM JUDICIARY
2023 FEB -6 P 2:42
JUDICIARY SERVICE CLERK

Tohono O'odham Nation Plaintiff	Case No.: CR2022-0362-1-4
v.	ORDER
Camillus Nunez DOB: 09/17/1984 Defendant	

Camillus Nunez has been in custody since September 8, 2022. At the arraignment, the Nation stated it was seeking more than one year of imprisonment. The Court gave Mr. Nunez an attorney request form, which Mr. Nunez filled out and filed. Sometime later, the Advocate Program filed a notice stating that it had a conflict of interest. The Advocate Program then referred the case to a conflict attorney, but the conflict attorney also had a conflict of interest.

Right to Counsel

The Tohono O'odham Code provides a defendant the right to counsel at his or her expense. 6 T.O.C. § 1108(A). The Code also provides a right to counsel for indigent criminal defendants at the expense of the Nation. 6 T.O.C. § 1108(B). In short, the Code requires:

1. The defendant be indigent, so he or she is financially unable to retain private counsel; and
2. The Court actually imposes more than one year of imprisonment.

6 T.O.C. § 1108(B)(1)-(2). When a defendant meets those two conditions, the defendant is entitled to a state-licensed attorney at the expense of the Nation. 6 T.O.C. § 1108(B)(1). As a practical matter, the Court will not know the second requirement until after sentencing. Waiting until the end of a case to appoint counsel defeats the purpose of having a right to counsel, as the defendant

wouldn't have the help of counsel until after the Court convicted and sentenced the defendant. *See generally* 22A C.J.S. Criminal Procedure and Rights of Accused §§ 680-82 (discussing the right to counsel). The Code addresses this temporal issue by requiring the Nation to notify the Court, at the initial appearance, whether the Nation will seek to impose more than one year of imprisonment. 6 T.O.C. § 1108(C).

Appointment of Counsel

When a defendant is entitled to counsel, the Code provides a process to appoint counsel. 6 T.O.C. § 1108(B)(3). The Code states:

> The Court shall appoint attorneys to indigent criminal defendants in the following order:
> (a) Advocate Program or another Nation's program designated to provide criminal defense services;
> (b) conflict attorneys contracted by the Nation to provide criminal defense services; then
> (c) on a rotating basis, any attorney authorized to practice law in the Tohono O'odham Judicial Court and who is not employed by the Nation.

Id.

In this case, both the Advocate Program and the conflict attorney have a conflict. As such, Section 1108(B)(3)(c) would apply. The Court, however, cannot implement Section 1108(B)(3)(c).

The Tohono O'odham Constitution provides a separation of powers. T.O. Const. Art. IV, V § 1, VII § 1, VIII § 1. The Constitution also limits each Branch's power. *Id.*; *see In Re: Petition of the Judicial Branch*, 3 TOR3d 128 (Tr. Ct. 2011). The Court cannot carry out Section 1108(B)(3)(c) on its own because doing so would infringe both the Legislative and Executive Branch's designated powers.

The Court does not have the authority to contract with legal counsel for indigent defendants. *See* T.O. Const. Art. VI § 2(a) (providing that the Legislative Branch has the power to contract for legal counsel).

The Court has not been allocated any funding for indigent defense counsel. *See* T.O. Const. Art. VI § 1(d)(2)-(3) (providing that the Legislative Branch has the power to authorize spending under approved budgets). The Code requires that attorneys be provided at the expense of the Nation. *See* 6 T.O.C. § 1108.

The Court is not equipped to evaluate potential attorneys who could serve as effective conflict counsel. *See* T.O. Const. Art. VII § 2(c) (stating that the Executive Branch has the power to implement all laws, ordinances, and resolutions).

The Court does not have the authority to create a bar association, which would include mandating legal practitioners, as a condition of admission, to represent indigent defendants pro bono (free of charge). *See Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Tr. Ct. 2005) (discussing that the Judicial Branch's authority is limited by the Constitution and other Branch's authority).

While the Court cannot implement Section 1108(B)(3)(c), the Code provides the remedy. If the Nation cannot provide a state-licensed attorney at the expense of the Nation to an indigent criminal defendant, the Court cannot sentence the defendant to more than one year. *See* § 1108(B)(1).

Conclusion

The Nation cannot provide Mr. Nunez with a state-licensed attorney at the expense of the Nation. Therefore, the Court finds and orders that it cannot sentence Mr. Nunez to more than one year of incarceration. As a result, the Court also orders the Nation to complete disclosure to Mr. Nunez and to treat Mr. Nunez as a self-represented litigant. The Court sets a pretrial hearing on March 24, 2023 at 8:15a.m.

Dated February 6, 2023.

Judge Kyle Fields

Fwd: Pros., Defen., Def.
020623TL

IN THE JUCICIAL COURT OF THE TOHONO O'ODHAM NATION
COUNTY OF PIMA, STATE OF ARIZONA

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 FEB 17 A 10:38
JUDICIARY SERVICE CLERK

TOHONO O'ODHAM NATION, **Plaintiff,**	)	**No.** CR2022-0360-2
V.	)	**ORDER**
Lamuel Emilio Luz, **Defendant.**	)	**PETITION TO CONVERT WORK HOURS TO CREDIT FOR DETENTION DAYS SERVED**

ORDER

This petition to convert, having come before the Tohono O'odham Judiciary Court and the Court acknowledging jurisdiction over this matter, sustains the same.

THEREFORE, the motion is hereby:

____**Granted** ✓ **Denied** See the attached Continuation Order.

DATED this 15th **day of** February, **20**23.

Judge, Tohono O'odham Judiciary Court

Fwd to: Def, Det, Pros, Prob
02 Mar 2023
17
JR

Continuation Order

CR2022-0380-2

TOHONO O'ODHAM NATION, Plaintiff

vs.

LAMUEL LUZ, Defendant

The Nation and its courts have a strong history of crediting jail sentences for community service work performed, other than for those few exceptions listed in Rule 16.1 of the Tohono O'odham Rules of Criminal and Traffic Procedure.

However, the Court will at times exercise its discretion under 7 T.O.C. ch. 1, § 1.13 to deny credit for work performed even if it is eligible under Rule 16.1.

This is one of those cases. In light of the offense to which the Defendant admitted—knocking Ms. Enos down from behind, pinning her with a metal pole while repeatedly punching her face for several minutes, then threatening to beat her more if she ever talked to another man; and considering that he was already granted credit for some work hours, the Court denies this request to credit more work hours for jail time.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 JAN 25 P 12:45
JUDICIARY SERVICE CLERK

Tohono O'odham Nation Plaintiff v. Jaime R. Hendricks DOB: 10/27/1988 Defendant	Case No.: CR2022-0389-1; CR2022-0376-1 ORDER

This is before the Court on Defendant's Motion in Limine to Preclude Any / All Documentation of Any Priors of Defendant ("Motion in Limine"). The Court has not received a response filed by the Nation at this time, but does not find one necessary, and wishes to rule before the bench trial scheduled two days from now.

I. ANALYSIS

The Court will follow the Arizona Rules of Evidence cited in this Order for this issue, as they apply to the facts and circumstances of this case, and they do not directly conflict with a written Tohono O'odham law or rule. See T.O. R. Ct. Section 1, Rule 1(c).

At the January 9, 2023 Status Hearing, the Nation notified the Court and Defendant that it intended to ask the Court to take judicial notice (under Az. R. Evid. Rule 201) of materials in another proceeding with Mr. Hendricks (Case no. CR2020-0825-1-4). The Nation stated the purpose would be to show that Mr. Hendricks had notice of a banishment that underlies the charges here. The Court previously ruled that

because the Nation intended to use the material for notice, and not to show action in conformity therewith, that the Court would allow it.

The Court affirms that ruling now. Mr. Hendricks is charged with two separate counts of criminal trespass, 7 T.O.C. ch. 3, § 3.4B. An essential element of that crime is that the defendant received notice of the district banishment of which he is accused of violating.

Rule 404(b)(1) of the Arizona Rules of Evidence provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, Rule 404(b)(2) provides that such evidence may be admissible for other purposes, specifically including knowledge.

Accordingly, the Nation may use such materials here to show that Mr. Hendricks had knowledge of a banishment order against him. The evidence will be limited to that purpose, unless the Nation can show good cause and admissibility for another purpose as well. [1]

Although Defendant refers to Rule 2 (B) (2) of the Arizona Rules of Evidence, the Court understands from the cited rule language and argument based on prejudice, that the intended reference is Rule 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time or other Reasons.

The Court does not find that such evidence in this case would be substantially outweighed by unfair prejudice, confusing the issues, undue delay, wasting time, or

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[1] *If* Mr. Hendricks is found guilty, the Nation may also use evidence of a prior conviction of the same offense, to show a repeat offense for sentencing. See 7 T.O.C. ch. 3, § 3.4E.2. The Defense does not appear to argue that point. (See Motion in Limine p. 4, 2-3.)

needlessly presenting cumulative evidence. Accordingly, Rule 403 does not prevent its admission here.[2]

II. CONCLUSION

For the above reasons, Defendant's Motion in Limine is DENIED.

SO ORDERED this 24th day of January, 2023

Judge Joseph Hardy Jr.

[2] Defendant states that the Nation could use less prejudicial evidence, such as obtaining banishment documentation separately. (See Motion in Limine p. 3, 10-13.) It is not the Nation's burden to seek less prejudicial evidence-especially if it does not show notice in addition to the existence of a banishment itself. However, if Defendant is more concerned about the prejudicial effect of prior acts than about Mr. Hendricks' knowledge of an underlying banishment, the Court may be willing to accept a stipulation to that element.

TOHONO O'ODHAM JUDICIARY

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TOHONO O'ODHAM COURT
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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff	Case No.: CR2022-0400-1-5
v.	OPINION
Elijah Valencia Defendant	

This is before the Court on the Nation's Brief Re: Speedy Trial Time Limits and Delays in Appointment of Counsel. Mr. Valencia did not file a response. But the matter was discussed at the March 13, 2023, Status Hearing. The Court ruled from the bench that Mr. Valencia's right to a speedy trial had not been violated. This Opinion provides the analysis after further research. To the extent the analysis here differs from the March 13 hearing, this Opinion controls.

I. BACKGROUND

Elijah Valencia was arraigned on October 10, 2022. The charges were disorderly conduct/domestic violence, disturbing the peace/domestic violence, two counts of misuse of a weapon and/or dangerous instrument, and unlawful possession of liquor. The maximum jail time for these counts combined is 860 days.

The Nation advised it was seeking over one year in jail on November 18, 2022. Mr. Valencia demonstrated he is indigent. Therefore, Mr. Valencia was entitled to a court-appointed licensed attorney at the Nation's expense. See 6 T.O.C. ch. 1, § 1108(B); 25 U.S.C. § 1302(c)(2).

The Court ordered an attorney appointment through the Nation's Advocate Program on November 30, 2022. On January 9, 2023, Mr. Valencia advised that the Advocate Program declined representation. The Court advised on January 12 that it had no other attorneys to appoint.

On January 23, the Court also modified Mr. Valencia's pretrial release conditions, from held without bond to release on one third-party signer. He was released under those conditions on or about January 24.

Also on January 23, the Court noted that Mr. Valencia had been in pretrial custody for approximately 105 days since his arraignment. The Court invited the Nation to brief on whether the time Mr. Valencia waited for counsel should count against the speedy trial time stated in Rule 5 of the Tohono O'odham Rules of Criminal and Traffic Procedure (hereinafter, the **T.O. Speedy Trial Rule**). The Court also agreed that the time from that point until the Court ruled on the issue would not count toward his speedy trial time.

The Nation provided a brief on February 24, 2023. At the March 13 hearing, Mr. Valencia said he had not received a copy. The Nation provided him a copy in open court. Mr. Valencia did not file a response.

Also on March 13, the Court found that it could not sentence Mr. Valencia to more than one year in jail because no licensed attorneys were available through the Advocate Program or the Court to represent him at the Nation's expense, and ordered that his case proceed with Mr. Valencia as a self-represented litigant.

From the Nation's notice of seeking over one year in jail on November 18, 2022, through the March 13, 2023, order for his case to proceed, Mr. Valencia's case was essentially on hold.

II. BRIEF ANSWER

Two speedy trial provisions apply. First, the procedural bright-line T.O. Speedy Trial Rule with few exceptions. It does not confer a right on defendants. It allows, but does not mandate, dismissal if not met.

Second, the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 *et. seq.*, (ICRA) confers on defendants a substantive right to a speedy trial. It mandates dismissal if violated. It is based on a four-factor test, applied on a case-by-case basis.

For the reasons below, the Court (A) makes no finding whether the time spent awaiting an attorney tolled the time under the T.O. Speedy Trial Rule, but holds that even if it did, and even if the time period has run as a result, the Court would not choose the remedy of dismissal in this case; and (B) under the four-factor test for ICRA's speedy trial right, Mr. Valencia's right has not been violated.

III. ANALYSIS

A. Tohono O'odham Speedy Trial Rule

The T.O. Speedy Trial Rule states, in subsection (a): "Speedy Trial. Every person against whom a complaint is filed shall be tried within 120 days from the person's arraignment, except for those excluded periods set forth in Subsection (b) of this Rule."

Subsection (b) excludes delays caused "by or on behalf of" the defendant. That phrase is not defined.

1. "On behalf of" the defendant

In Marvin v. Rine, 590 F.3d 1215, 1224-25 (11th Cir. 2009), the court said "Because the phrase 'on behalf of' is not defined in the DPPA, we again look to its ordinary meaning. 'On behalf of' means 'as the agent of' or 'as representative of.' " (quoting Bryan A. Garner, A Dictionary of Modern Legal Usage 83 (1987)) (internal citation omitted). By contrast, "in behalf of" means to "independently promote that person's interest, praise, or defense—or to act on one's own for that person's benefit . . . ." Bryan A. Garner, LawProse Lesson #173: "On behalf of" and "in behalf of" (July 29, 2014).

The Court finds that persuasive and adopts the meaning "as the agent of, or as representative of" for the phrase "on behalf of" in the T.O. Speedy Trial Rule; e.g., actions taken by a defendant's lawyer. Thus, delays resulting from the actions or inactions of the Advocate Program, the Court, the Nation, or other parties in waiting for the appointment of an attorney are not "on behalf" of Mr. Valencia, even if another party may see the delay as beneficial to him.

2. "By" the defendant

Of course, any direct action a defendant takes to delay trial is "by" the defendant. Likewise, a delay that a defendant supports or agrees to could also be said to be "by" the defendant. After reviewing the record, the Court is not clear whether Mr. Valencia supported or agreed to any of his continuances or standstill- either while in custody or out of custody. However, as explained below, this does not change the outcome here.

Moreover, while Mr. Valencia did not waive his right to an attorney, which could have ended the delay earlier, the Court will not interpret holding onto a valuable right as a delay caused "by or on behalf of" a defendant. The Court agrees that the Prosecution is not at fault for the delay. But there is no exclusion for such no-fault delays in the T.O. Speedy Trial Rule.

3. The Nature of the T.O. Speedy Trial Rule and consequences for noncompliance

The T.O. Speedy Trial Rule gives an express 120-day period post-arraignment to try a defendant. It is a court procedural rule, originally a Court administrative order. See T.O. Speedy Trial Rule, legislative history. The rule does not mandate dismissal, or even mention dismissal, if time runs over.

Other Tohono O'odham rules specifically mention dismissal. For example, Rule 7.3(d) of the Tohono O'odham Rules of Criminal and Traffic Procedure requires dismissal if certain conditions are met. Rule 9.3(a) gives an illustrative list of available sanctions, including dismissal.

In contrast to the T.O. Speedy Trial Rule, other jurisdictions have speedy trial rules or statutes that specifically require dismissal if not satisfied. See, e.g., Ariz. R. Crim. P. Rule 8.6. Other jurisdictions allow, but do not require, dismissal if not met. See, e.g., U.S. v. Saavedra, 684 F.2d 1293, 1297 (9th Cir. 1982).

In accordance with the foregoing, this Court agrees with the Vermont Supreme Court that a speedy trial rule that does not mandate dismissal "is part of the internal operating procedures of trial courts and does not provide any rights to defendants." Vermont v. Reynolds, 95 A.3d 973, 978 (Vt. 2014). Further, it "cannot be invoked by defendant as a matter of right" and, while the Vermont order included "may dismiss" language, the Court continued "it is for the trial court to determine, in each case, whether dismissal shall result." Id. (internal quotations and citations omitted).

This Court further agrees with the Vermont court, other state courts and federal courts that defendants do have a substantive speedy trial right, apart from procedural rules. That right is provided in the federal and state systems by the U.S. Constitution (6th Amendment), see id. at 979-82; U.S. v. Saavedra, 684 F.2d 1293, 1297 (9th Cir. 1982) (dismissal based on speedy trial procedural rule is not mandatory unless the defendant's constitutional speedy trial rights have been violated) and in tribal systems by the Indian Civil Rights Act, see III.B., *infra*.

The T.O. Speedy Trial Rule's silence on dismissal gives even less reason to read mandatory dismissal into it than those like the Vermont and federal rules which provide for permissive dismissal. The Court does believe, considering these permissive dismissal rules, plus the mandatory dismissal nature of a constitutional / ICRA speedy trial violation (discussed below), that the Court could dismiss a case for not meeting the T.O. Speedy Trial Rule as well. But that too would be a case-by-case determination.

Because the Court finds below that Mr. Valencia's ICRA speedy trial right was not violated, it would not dismiss his case for not meeting the T.O. Speedy Trial Rule timeline—if it made that finding. Instead, the Court is satisfied that modifying his release conditions, and ordering his case to proceed upon learning that there were no attorneys available to represent him at the Nation's expense, with the Nation requesting and setting a specific trial date, were appropriate and sufficient actions.

B. *ICRA Speedy Trial Right*

The U.S. Constitution does not apply to Indian tribes. However, the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 *et. seq.*, (ICRA) imposes some requirements similar to U.S. constitutional provisions. See Emerson v. Nation, 2021 TOR Supp. 19, 21 (Ct. App. 2015); Frank v. Nation, 2021 TOR Supp. 13, 15 (Ct. App. 2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The Tohono O'odham Constitution expressly recognizes the rights guaranteed by ICRA. T.O. CONST. ART. III, § 4.

One of those is the right to a speedy trial. This is ICRA's version of the speedy trial guarantee of the sixth amendment to the U.S. Constitution. "No Indian tribe in exercising powers of self-government shall-- . . . deny to any person in a criminal proceeding the right to a speedy and public trial . . . ." 25 U.S.C. § 1302(a)(6).

Given the distinct historical, governmental, and cultural values of Indian tribes, ICRA provisions are not always applied identically to their U.S. Constitution counterparts. See Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); O'Neal V. Cheyenne River Sioux Tribe, 482 F.2d 1140 (9th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

But this Court found no precedent applying ICRA's speedy trial right differently than the Sixth Amendment right. It did find case law applying the Sixth Amendment version that is on point and persuasive as-is. This Court therefore follows it for application to ICRA's speedy trial right.

1. Fundamental right, mandating dismissal if violated

The United State Supreme Court has held the U.S. constitutional right to a speedy trial to be "fundamental," and therefore requires dismissal if it is violated. See Strunk v. U.S., 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972).

2. Four-factor balancing test under Barker v. Wingo

In Barker v. Wingo, the U.S. Supreme Court expressly rejected any specific timeframe for testing a constitutional speedy trial violation. Id. at 529. Instead, it established a four-factor balancing test:

> Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530. The court explained, "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis." Id.

(a) Length of Delay

This will depend on the particular case; e.g., "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Id. But the delay should be "presumptively prejudicial" before further analysis of the other three factors. Id.

Here, the Court sees the charges against Mr. Valencia closer in complexity to an ordinary street. Thus, the Tohono O'odham Speedy Trial Rule, being universally applicable, seems a fair starting point- 120 days from arraignment.

However, as the Nation was seeking over one year in jail, the charges are serious and can require more preparation time on both sides. Further, the process of appointing a licensed attorney adds time. And the prosecution may have only limited contact with a defendant in that stage, necessarily adding more delay.

Finally, a defendant is—not always but usually—less prejudiced while out of custody. See id. at 526-27. Mr. Valencia was placed on conditional release before 120 days had run from his arraignment. And shortly after that, progress resumed on his case and a trial date set.

Weighing those factors, the Court finds that the length of delay here is not presumptively prejudicial. That could end the inquiry. However, while the Barker court did say that, see id. at

530, it also said that none of the four factors are either a necessary or sufficient condition. Id. at 533. Therefore, this Court will examine the other factors.

(b) Reason for delay

Delays by the prosecution or the defendant to deliberately hamper the other party are, of course, counted against the responsible party. Id. at 531; Vermont v. Brillon, 556 U.S. 81 (2009). For more "neutral factors" such as overcrowded courts, neither party may have control or culpability.

But the government, rather than the defendant, bears the ultimate responsibility for those neutral factors in the system. Therefore, while weighing less heavily, they should be weighed against the government. Barker, 407 U.S. at 531.

Courts have applied this to breakdowns in the public defender system. In Vermont v. Brillon, the U.S. Supreme Court found that the defendant caused the delays. But it noted that "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State." 556 U.S. at 94 (internal quotation and citation omitted).

A federal district court did exactly that in Russell v. Denmark, 528 F. Supp.3d 482 (S.D. Miss. 2021). The court there found that the delays were "entirely due to institutional breakdown"–the public defender not communicating with the defendant for 14 months, and the court doing nothing after the defendant alerted the court to his limbo status. See id. at 498-99.

The Georgia Supreme Court has also applied Vermont v. Brillon to possible breakdowns in its public defender system. Mr. Phan's prosecution was delayed over four years, mostly due to public defender actions and inactions. However, the court held that if there are still attorneys within that system available to represent a defendant, there is no systemic breakdown under Brillon. See Phan v. Georgia, 290 Ga. 588, 594-95 (2012) (citing Weis v. Ga., 287 Ga. 46 (2010)).

This Court disagrees with the Georgia court and agrees with the Russell court. In Russell, attorneys were available to represent defendants. The defendant actually had an attorney from that system representing him. But he was ignored for over a year. That should be considered a systemic breakdown weighing against the state. Further, Barker does not require a complete systemic breakdown for such a "neutral factor" to weigh against the government (its example of overcrowded courts implies a hurdle, not a complete failure).

Nevertheless, while Mr. Valencia's case was delayed, it did not rise to the level of that in Russell. Here, the Nation and the Court actively monitored the status; the Advocate Program notified Mr. Valencia that it could not represent him; the Court placed Mr. Valencia on conditional release, and ordered resumption of the case where a sentence of more than a year in jail off the table due to the unavailability of an attorney to represent him at the Nation's expense; and the Nation promptly resumed prosecution and set a trial.

Accordingly, while the "neutral factor" of delay while waiting for appointment of counsel here may be weighed against the Nation, the Court gives it less weight to start, under Barker, and even less weight under Brillon, given the actions taken by the Nation, the Court, and the Advocate Program.

(c) Defendant's assertion of the right

As the Nation has explained, time can actually advantage a defendant over the prosecution. The prosecution must prove a criminal case beyond a reasonable doubt. And memories fade. Witnesses may lose contact and/or cooperation.

The Barker court agreed. See Barker, 407 U.S. at 521, 531. Additionally, they posited that the more serious the deprivation, the more likely a defendant is to complain. Id. Thus, Barker heavily weights a defendant asserting the speedy trial right. Id. at 531-32. Conversely, they said it would be hard for a defendant to prove denial of the right without asserting the right. Id. at 532.

Here, the Court cannot recall Mr. Valencia ever asserting his speedy trial right. He expressed frustration at being held in custody. But he did not ask to push his case to trial. The Court initially raised the issue. The Nation briefed it. Mr. Valencia did not file a response. And he did not argue either way at the hearing. Accordingly, this factor counts heavily against Mr. Valencia.

(d) Prejudice to the defendant

The U.S. Supreme Court has identified three interests *of defendants* that the speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. See Barker, 407 U.S. at 532, and cases cited there.

Mr. Valencia was released from custody before the 120-day period of the Tohono O'odham Speedy Trial Rule ran. Thus, the first interest was no longer an issue. And the third interest also tilted toward not violating his speedy trial right. While he still may face the anxiety and concern of a prosecution, it is no longer indefinite "dead time," as his case is proceeding to trial. Accordingly, the Court finds little weight in this fourth factor counting against Mr. Valencia's speedy trial right.

(e) Balancing the Barker Factors

a. *Length of delay*. Not presumptively prejudicial. Therefore, this weighs strongly against violation, if not ending the inquiry.

b. *Reason for delay*. A "neutral factor" not caused by either party, but ultimately chargeable to the government instead of the defendant. Thus, weighing toward a violation, but with less weight than an intentional delay. Also, a delay that lasted approximately two months before Mr. Valencia's conditional release, further lessening its weight.

c. *Defendant's assertion of the right*. Not asserted, which weighs very strongly against violation.

d. *Prejudice against defendant*. The two stronger interests are no longer in play. The weaker one remains. That weighs toward a violation, but not strongly.

Balancing these together, two factors somewhat weigh toward a violation, while two factors strongly, if not definitively, weigh against violation. The Court therefore finds that Mr. Valencia's right to a speedy trial under ICRA has not been violated.

IV. CONCLUSION

The T.O. Speedy Trial Rule is procedural and does not give defendants any rights. If a defendant is not tried within its 120-day post-arraignment timeline, dismissal is permitted, but not required. The Court makes no finding whether that period has run here. But even if it has, the Court would not dismiss the case because of it, instead finding the actions taken in response sufficient.

ICRA confers to defendants a fundamental right to a speedy trial. Violation requires dismissal. Courts apply a four-factor test on a case-by-case basis. Applying that test here, the Court finds Mr. Valencia's speedy trial right has not been violated

Dated April 3, 2023.

Judge Joseph Hardy Jr.

Fwd'. Pros, Def.
040323TL

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Francisco Salcido Defendant	Case No.: CR2022-0423-1-4 ORDER

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 APR 10 A 8:12
JUDICIARY SERVICE CLERK

This is before the Court on Francisco Salcido's Motion to Dismiss. The Nation filed a response. Mr. Salcido filed a reply. At the March 31, 2023 pretrial hearing, the Court ruled from the bench, denying the Motion. This Order provides the analysis. To the extent this analysis differs from that explained at the March 31 hearing, this Order controls.

I. BACKGROUND

Mr. Salcido was arraigned on October 31, 2022. The charges were aggravated assault/domestic violence, assault/domestic violence, threatening/domestic violence, and disorderly conduct/domestic violence. The maximum jail time for these counts combined is 960 days.

On November 17, 2022, the Nation advised it was seeking over one year in jail. Mr. Salcido demonstrated he is indigent. Therefore, he was entitled to a court-appointed licensed attorney at the Nation's expense. See 6 T.O.C. ch. 1, § 1108(B); 25 U.S.C. § 1302(c)(2).

The Court ordered an attorney appointment through the Nation's Advocate Program on November 30, 2022. On December 16, Mr. Salcido said he met with a representative from the Advocate Program, who said the Program would provide him representation.

At hearings after that, however, Mr. Salcido said he had heard nothing more from the Program. Nobody from the Program, or conflict counsel, filed a notice of appearance with, or otherwise notified the Court of the status of the appointment of counsel.

At a March 3 hearing, Mr. Salcido asserted his speedy trial right. He made an oral motion to dismiss based on denial of that right. He said he would follow with a written motion. Accordingly, the Court reserved judgment pending that motion, with a chance for the Nation to respond and Mr. Salcido to reply.

Mr. Salcido filed his written motion on March 10. The Nation filed its response March 20. Mr. Salcido filed a reply on March 27. The hearing / denial was March 31.

Also on March 31, after the hearing, the Advocate Program filed a notice that neither it nor conflict counsel was able to represent Mr. Salcido.

With that information, the Court ordered (also on March 31) that it would be unable to sentence Mr. Salcido to over one year in jail for this proceeding, and that his case will proceed with him as a self-represented litigant. At the next hearing, the Court will hear from the parties to set a trial date (if that is still how they wish to proceed).

From the Nation's notice of seeking over one year on November 17, 2022, through the Court's March 31, 2023, order to proceed, while waiting for the appointment of an attorney for approximately 117 days, Mr. Salcido's prosecution was essentially on hold, other than his Motion process from March 3 through March 31.

II. BRIEF ANSWER

Mr. Salcido's Motion asserts two grounds: (1) speedy trial and (2) due process.

For due process, the Court agrees with the Nation that Mr. Salcido did not provide facts or legal bases sufficient to make a ruling—or even a counterargument by the Nation. Accordingly, the Court denies that claim.

Two speedy trial provisions apply. First, the bright-line period with few exceptions in Rule 5 of the Tohono O'odham Rules of Criminal and Traffic Procedure (hereinafter, the **T.O. Speedy Trial Rule**). That is a procedural rule. It does not confer a right on defendants. It allows but does not mandate dismissal if not met.

Second, the Indian Civil Rights Act confers on defendants a substantive right to a speedy trial. It mandates dismissal if violated. It is based on a four-factor test, applied on a case-by-case basis.

For the reasons below, the Court (A) finds that the T.O. Speedy Trial Rule has not been met here, but further finds that circumstances do not warrant dismissal as a result; and (B) under the four-factor test for ICRA's speedy trial right, Mr. Salcido's right has not been violated.

III. ANALYSIS

A. Tohono O'odham Speedy Trial Rule

The T.O. Speedy Trial Rule states, in subsection (a): "Speedy Trial. Every person against whom a complaint is filed shall be tried within 120 days from the person's arraignment, except for those excluded periods set forth in Subsection (b) of this Rule."

Subsection (b) excludes delays caused "by or on behalf of" the defendant. That phrase is not defined.

1. "On behalf of" the defendant

In Marvin v. Rine, 590 F.3d 1215, 1224-25 (11th Cir. 2009), the court said "Because the phrase 'on behalf of' is not defined in the DPPA, we again look to its ordinary meaning. 'On behalf of' means 'as the agent of' or 'as representative of.' " (quoting Bryan A. Garner, A Dictionary of Modern Legal Usage 83 (1987)) (internal citation omitted).

By contrast, "in behalf of" means to "independently promote that person's interest, praise, or defense—or to act on one's own for that person's benefit . . . ." Bryan A. Garner, LawProse Lesson #173: "On behalf of" and "in behalf of" (July 29, 2014).

The Court finds that persuasive and adopts the meaning "as the agent of, or as representative of" for the phrase "on behalf of" in the T.O. Speedy Trial Rule; e.g., actions taken by a defendant's lawyer. Thus, delays resulting from the actions or inactions of the Advocate Program, the Court, the Nation, or other parties in waiting for the appointment of an attorney are not "on behalf" of Mr. Salcido, even if another party may see the delay as beneficial to him.

2. "By" the defendant

Of course, any direct action a defendant takes to delay trial is "by" the defendant. Likewise, a delay that a defendant supports or agrees to could also be said to be "by" the defendant. In this case, Mr. Salcido did not request any continuances. Plus, he affirmatively asserted his speedy trial right on March 3.

Moreover, while Mr. Salcido did not waive his right to an attorney, which could have ended the delay earlier, the Court will not interpret holding onto a valuable right as a delay caused "by or on behalf of" a defendant. The Court agrees that the Prosecution is not at fault for the delay. But there is no exclusion for such no-fault delays in the T.O. Speedy Trial Rule.

Therefore, the Court finds that the T.O. Speedy Trial Rule time expired on or about February 28, 2023. Mr. Salcido was not tried by then.

3. The Nature of the T.O. Speedy Trial Rule and consequences for noncompliance

The T.O. Speedy Trial Rule gives an express 120-day period post-arraignment to try a defendant. It is a court procedural rule, originally a Court administrative order. See T.O. Speedy Trial Rule, legislative history. The rule does not mandate dismissal, or even mention dismissal, if time runs over.

Other Tohono O'odham rules specifically mention dismissal. For example, Rule 7.3(d) of the Tohono O'odham Rules of Criminal and Traffic Procedure requires dismissal if certain

conditions are met. Rule 9.3(a) gives an illustrative list of available sanctions, including dismissal.

In contrast to the T.O. Speedy Trial Rule, other jurisdictions have speedy trial rules or statutes that specifically require dismissal if not satisfied. See, e.g., Ariz. R. Crim. P. Rule 8.6. Other jurisdictions allow, but do not require, dismissal if not met. See, e.g., U.S. v. Saavedra, 684 F.2d 1293, 1297 (9th Cir. 1982).

In accordance with the foregoing, this Court agrees with the Vermont Supreme Court that a speedy trial rule that does not mandate dismissal "is part of the internal operating procedures of trial courts and does not provide any rights to defendants." Vermont v. Reynolds, 95 A.3d 973, 978 (Vt. 2014). Further, it "cannot be invoked by defendant as a matter of right" and, while the Vermont order included "may dismiss" language, the Court continued "it is for the trial court to determine, in each case, whether dismissal shall result." Id. (internal quotations and citations omitted).

This Court further agrees with the Vermont court, other state courts and federal courts that defendants do have a substantive speedy trial right, apart from procedural rules. That right is provided in the federal and state systems by the U.S. Constitution (6th Amendment), see id. at 979-82; U.S. v. Saavedra, 684 F.2d 1293, 1297 (9th Cir. 1982) (dismissal based on speedy trial procedural rule is not mandatory unless the defendant's constitutional speedy trial rights have been violated) and in tribal systems by the Indian Civil Rights Act, see III.B., *infra*.

The T.O. Speedy Trial Rule's silence on dismissal gives even less reason to read mandatory dismissal into it than those like the Vermont and federal rules which provide for permissive dismissal. The Court does believe, considering these permissive dismissal rules, plus the mandatory dismissal nature of a constitutional / ICRA speedy trial violation (discussed below), that the Court could dismiss a case for not meeting the T.O. Speedy Trial Rule as well. But that too would be a case-by-case determination.

For the same reasons explained in Part III.B. *infra*, showing that Mr. Salcido's ICRA speedy trial right has not been violated, the Court declines to dismiss his case at this point for running over the T.O. Speedy Trial Rule time.

B. *ICRA Speedy Trial Right*

The U.S. Constitution does not apply to Indian tribes. However, the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 *et. seq.*, (ICRA) imposes some requirements similar to U.S. constitutional provisions. See Emerson v. Nation, 2021 TOR Supp. 19, 21 (Ct. App. 2015); Frank v. Nation, 2021 TOR Supp. 13, 15 (Ct. App. 2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The Tohono O'odham Constitution expressly recognizes the rights guaranteed by ICRA. T.O. CONST. ART. III, § 4.

One of those is the right to a speedy trial. This is ICRA's version of the speedy trial guarantee of the sixth amendment to the U.S. Constitution. "No Indian tribe in exercising powers of self-government shall-- . . . deny to any person in a criminal proceeding the right to a speedy and public trial . . . ." 25 U.S.C. § 1302(a)(6).

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But this Court found no precedent applying ICRA's speedy trial right differently than the Sixth Amendment right. It did find case law applying the Sixth Amendment version that is on point and persuasive as-is. This Court therefore follows it for application to ICRA's speedy trial right.

1. Fundamental right, mandating dismissal if violated

The United State Supreme Court has held the U.S. constitutional right to a speedy trial to be "fundamental," and therefore requires dismissal if it is violated. See Strunk v. U.S., 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514, 522 (1972).

2. Four-factor balancing test under Barker v. Wingo

In Barker v. Wingo, the U.S. Supreme Court expressly rejected any specific timeframe for testing a constitutional speedy trial violation. Id. at 529. Instead, it established a four-factor balancing test:

> Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Id. at 530. The court explained, "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis." Id.

(a) Length of Delay

This will depend on the particular case; e.g., "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Id. But the delay should be "presumptively prejudicial" before further analysis of the other three factors. Id.

The Court would not equate the charges against Mr. Salcido to an ordinary street crime. However, they are also far from a complex conspiracy charge.

However, as the Nation was seeking over one year in jail, the charges are serious, and can require more preparation time on both sides. Further, the process of appointing a licensed attorney adds time. And the prosecution may have only limited contact with a defendant in that stage, necessarily adding more delay.

Moreover, the delay has ended. Mr. Salcido's case is back on track.

Weighing those factors, the Court finds that a 117-day delay while facing up to 960 days in jail is not presumptively prejudicial. That could end the inquiry. However, while the Barker court did say that, see id. at 530, it also said that none of the four factors are either a necessary or sufficient condition. Id. at 533. Therefore, this Court will examine the other factors.

(b) Reason for delay

Delays by the prosecution or the defendant to deliberately hamper the other party are, of course, counted against the responsible party. Id. at 531; Vermont v. Brillon, 556 U.S. 81 (2009). For more "neutral factors" such as overcrowded courts, neither party may have control or culpability.

But the government, rather than the defendant, bears the ultimate responsibility for those neutral factors in the system. Therefore, while weighing less heavily, they should be weighed against the government. Barker, 407 U.S. at 531.

Courts have applied this to breakdowns in the public defender system. In Vermont v. Brillon, the U.S. Supreme Court found that the defendant caused the delays. But it noted that "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State." 556 U.S. at 94 (internal quotation and citation omitted).

A federal district court did exactly that in Russell v. Denmark, 528 F. Supp.3d 482 (S.D. Miss. 2021). The court there found that the delays were "entirely due to institutional breakdown"–the public defender not communicating with the defendant for 14 months, and the court doing nothing after the defendant alerted the court to his limbo status. See id. at 498-99.

The Georgia Supreme Court has also applied Vermont v. Brillon to possible breakdowns in its public defender system. Mr. Phan's prosecution was delayed over four years, mostly due to public defender actions and inactions. However, the court held that if there are still attorneys within that system available to represent a defendant, there is no systemic breakdown under

Brillon. See Phan v. Georgia, 290 Ga. 588, 594-95 (2012) (citing Weis v. Ga., 287 Ga. 46 (2010)).

This Court disagrees with the Georgia court and agrees with the Russell court. In Russell, attorneys were available to represent defendants. The defendant actually had an attorney from that system representing him. But he was ignored for over a year. That should be considered a systemic breakdown weighing against the state. Further, Barker does not require a complete systemic breakdown for such a "neutral factor" to weigh against the government (its example of overcrowded courts implies a hurdle, not a complete failure).

Nevertheless, while Mr. Salcido's case was delayed, it did not rise to the level of that in Russell. Here, the Nation and the Court actively monitored the status; the Advocate Program eventually determined and notified Mr. Salcido and the Court that it could not provide an attorney; and the Court therefore ordered resumption of the case with a sentence of more than a year in jail unavailable.

Accordingly, while the "neutral factor" of delay while waiting for appointment of counsel here may be weighed against the Nation, the Court gives it less weight to start, under Barker, and even less weight under Brillon, given the actions taken by the Nation, the Court, and the Advocate Program.

(c) Defendant's assertion of the right

As the Nation has explained, time can actually advantage a defendant over the prosecution. The prosecution must prove a criminal case beyond a reasonable doubt. And memories fade. Witnesses may lose contact and/or cooperation.

The Barker court agreed. See Barker, 407 U.S. at 521, 531. Additionally, they posited that the more serious the deprivation, the more likely a defendant is to complain. Id. Thus, Barker heavily weights a defendant asserting the speedy trial right. Id. at 531-32. Conversely,

they said it would be hard for a defendant to prove denial of the right without asserting the right. Id. at 532.

Here, Mr. Salcido did assert his right. He did not do so until his case had been at a standstill for about two and a half months. But when he did, he did it clearly and consistently. First with an oral motion. Then a written motion. Then a written reply to the Nation's response. Accordingly, under Barker this factor weighs heavily in favor Mr. Salcido.

(d) Prejudice to the defendant

The U.S. Supreme Court has identified three interests *of defendants* that the speedy trial right was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. See Barker, 407 U.S. at 532, and cases cited there.

Mr. Salcido has been serving jail sentences in other matters since before his arraignment in this case. His final release date for those sentences is February 15, 2024. (See Memorandum Re: TRE for Release from Tohono O'odham Corrections, filed 11/15/2022 in case nos. CR2021-0470-1 and CR2021-0580-1, and Trial Record Entry filed 11/22/2022 for the same cases.)

This completely negates the first two interests of this Barker factor. And Mr. Salcido has not shown how the delay here, which has ended, would impair his defense in his current situation. Accordingly, the Court finds this fourth factor weighs very heavily against Mr. Salcido.

(e) Balancing the Barker Factors

a. *Length of delay*. Not presumptively prejudicial. Therefore, this weighs strongly against violation, if not ending the inquiry.

b. *Reason for delay*. A "neutral factor" not caused by either party, but ultimately chargeable to the government instead of the defendant. Thus, weighing toward a violation, but with less weight than an intentional delay.

c. *Defendant's assertion of the right*. Mr. Salcido asserted, which weighs strongly toward violation.

d. *Prejudice against defendant*. Mr. Salcido has been incarcerated on other matters since before his arraignment here and will remain so for almost another year. This weighs very heavily against violation.

Balancing these together, one factor weighing strongly to violation and one factor somewhat toward a violation, with two factors strongly, if not definitively, weighing against violation.

The Court therefore finds that Mr. Salcido's right to a speedy trial under ICRA has not been violated.

IV. CONCLUSION

The T.O. Speedy Trial Rule is procedural and does not give defendants any rights. If a defendant is not tried within its 120-day post-arraignment timeline, dismissal is permitted, but not required. That period has run here, and Mr. Salcido has not yet been tried. However, because his case is back on track and his ICRA speedy trial right was not violated, the Court does not dismiss his case.

ICRA confers to defendants a fundamental right to a speedy trial. Violation requires dismissal. Courts apply a four-factor test on a case-by-case basis. Applying that test here, the Court finds Mr. Salcido's speedy trial right has not been violated.

For the foregoing reasons, Mr. Salcido's Motion to Dismiss is DENIED.

SO ORDERED this 3rd day of April, 2023.

Judge Joseph Hardy Jr.

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Francisco Salcido Defendant	Case No.: CR2022-0423-1-4 ORDER

FILED
WITHIN THE
TOHONO O'ODHAM NATION
2023 APR 27 P 12:36
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This is before the Court on the Nation's Motion to Appoint a State-Licensed Attorney, filed April 21, 2023.

I. BACKGROUND & ANALYSIS

On November 17, 2022, the Nation advised it was seeking over one year in jail for Mr. Salcido. (Nation's Notice of Intent to Seek More than One Year Incarceration, Nov. 17, 2022.)

The Court provided Mr. Salcido a Financial Affidavit and Request for Court-Appointed Attorney and Order (Financial Affidavit & Order), with instructions to complete it and submit it to the Court, to determine whether he is indigent, and therefore entitled to a court-appointed licensed attorney at the Nation's expense under 6 T.O.C. ch. 1, § 1108(B). (See Trial Record Entry, Nov. 22, 2022.)

Mr. Salcido submitted his Financial Affidavit on November 28, 2022. The Court found he is indigent, and therefore ordered an attorney appointment through the Nation's Advocate Program on November 30, 2022. The Nation may not have received a copy of the completed Financial Affidavit and Order appointing counsel. A copy is attached here as Exhibit A.

On March 31, 2023, the Advocate Program filed a notice that neither it nor conflict counsel was able to represent Mr. Salcido. (Tohono O'odham Advocate Program Notice of Filing, March 31, 2023.)

When neither the Advocate Program nor conflict counsel can represent a defendant entitled to a licensed attorney at the Nation's expense, 6 T.O.C. ch. 1, § 1108(B)(3)(c)[1] calls for the Court to appoint "on a rotating basis, any attorney authorized to practice law in the Tohono O'odham Judicial Court who is not employed by the Nation, and who is able to be paid by the Nation."

However, as the Court explained in Nation v. Nunez, Case No. CR2022-0362-1-4 (Tr. Ct. Feb. 6, 2023) (scheduled for publication; copy attached here as Exhibit B), the Court is unable to implement 6 T.O.C. § 1108(B)(3)(c), practically or legally. Instead, if both the Advocate Program and conflict counsel are unable to represent an indigent defendant, unless the defendant waives the right, the case must proceed without an appointed attorney, with the Court unable to impose more than one year in jail. See id. at 3.

In accordance with that, after the Advocate Program's filing here, the Court ordered the case to proceed with Mr. Salcido representing himself (or retaining his own counsel) with the Court unable to sentence him to over a year in jail because neither the Program nor conflict counsel could represent Mr. Salcido, and the Court had no attorney it could appoint. (Trial Record Entry, March 31, 2023.)

II. CONCLUSION

The Court already appointed an attorney for Mr. Salcido under 6 T.O.C. ch. 1, § 1108(B)(3)(a)-(b). The Advocate Program and conflict counsel were unable to accept the

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[1] Rule 3(a)(1)(D) of the Tohono O'odham Rules of Criminal and Traffic Procedure has identical language.

appointment. The Court is unable to separately appoint an attorney under 6 T.O.C. ch. 1, § 1108(B)(3)(c). Therefore, the case is proceeding without an appointed attorney at the Nation's expense, with the Court unable to impose more than one year in jail.

Because the Court already did what the Nation requests, it takes no further action.

Dated April 26, 2023.

Judge Joseph Hardy Jr.

Fwd to: Def, Det, Pros,.
04272023

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Francisco Salcido Defendant	Case No.: CR2022-0423-1-4 ORDER DENYING MOTION TO APPOINT NEW CONFLICT ATTORNEY

FILED WITHIN THE TOHONO O'ODHAM NATION
2023 MAY 26 P 1:34
JUDICIARY SERVICE CLERK

This is before the Court on the Nation's Motion to Appoint New Conflict Attorney (Motion). Mr. Salcido did not file a response.

The Court granted a similar motion in Nation v. Valencia (CR2022-0400-1-5, Tr. Ct. May 4, 2023) (unpublished). The Court did not consider there what it considers here. Accordingly, the Court finds no precedential or persuasive value in that order.

Instead, the Court finds that Mr. Salcido was not represented during a "critical stage" of his criminal proceeding. As a result, the Court may not sentence Mr. Salcido to over one year in jail regardless of whether he has an attorney for the remainder of the proceeding. The Court therefore denies the Motion.

I. BACKGROUND

On November 17, 2022, the Nation advised it was seeking over one year in jail for Mr. Salcido. (Nation's Notice of Intent to Seek More than One Year Incarceration, Nov. 17, 2022.)

The Court provided Mr. Salcido a Financial Affidavit and Request for Court-Appointed Attorney and Order (Financial Affidavit & Order), with instructions to complete it and submit it to the Court, to determine whether he is indigent. (See Trial

Record Entry, Nov. 22, 2022.) If so, Mr. Salcido would have to be represented by a court-appointed licensed attorney at the Nation's expense in order for the Court to impose a total term of imprisonment of more than one year in this proceeding under 6 T.O.C. ch. 1, § 1108(B) and 25 U.S.C. § 1302(c)(2).

Mr. Salcido submitted his Financial Affidavit on November 28, 2022. The Court found him indigent.

The Nation's Code and Rules of Court call for the appointment of a licensed attorney at the Nation's expense in such case in the following order:

(1) the Nation's Advocate Program (Advocate Program);

(2) conflict attorneys contracted by the Nation; and

(3) on a rotating basis, any attorney authorized to practice law in the Tohono O'odham Judicial Court who is not employed by the Nation, and who is able to be paid by the Nation.

See 6 T.O.C. ch. 1, § 1108(B)(3); Tohono O'odham Rules of Criminal and Traffic Procedure, Rule 3(a)(1)(D).[1]

(1) Advocate Program

The Court appointed the Advocate Program on November 30, 2022. (Financial Affidavit and Request for Court-Appointed Attorney and Order, refiled as the Appointment Order on Dec. 1, 2022.)

(2) Conflict Attorney

The Advocate Program is the Nation's agent for contracting with conflict attorneys for purposes of step (2) of the above attorney appointment statute and rule. Rather than the Court issuing a separate order, if the Advocate Program cannot accept the

[1] As in effect at that time. New Rules of Court became effective on May 8, 2023, without substantive changes to this Rule.

representation, it determines, first, whether any conflict attorneys are available and, if so, refers directly to such attorney(s). The conflict attorneys then determine whether they can take the representation.

That happened in this case. The Advocate Program could not take the representation due to a conflict, and determined no conflict attorney was available. (Advocate Program Notice of Filing, March 31, 2023.)

(3) Any authorized attorney able to be paid by the Nation

As the Court explained in Nation v. Nunez, Case No. CR2022-0362-1-4 (Tr. Ct. Feb. 6, 2023) (scheduled for publication; copy attached here as Exhibit A), the Court is unable to implement 6 T.O.C. § 1108(B)(3)(c), practically or legally. Instead, if both the Advocate Program and conflict attorney are unable to represent an indigent defendant, unless the defendant waives the right, the case must proceed without an appointed attorney, with the Court unable to impose more than one year in jail. See id. at 3.

In accordance with that, after the Advocate Program's filing here, the Court ordered the case to proceed with Mr. Salcido representing himself (or retaining his own counsel) and the Court unable to sentence him to over one year. (See Trial Record Entry, March 31, 2023.)

Importantly, a pretrial hearing was held after that, where a bench trial was set at the parties' request. (See Trial Record Entry, Apr. 20, 2023.)

Sometime after that, the Advocate Program contracted with a new conflict attorney. The Nation then filed the Motion seeking appointment of that attorney.

II. ANALYSIS

The U.S. Constitution does not apply to Indian tribes. However, the Indian Civil Rights Act of 1968, as amended, 25 U.S.C. § 1301 et. seq., (ICRA) imposes some requirements similar to U.S. constitutional provisions. See Emerson v. Nation, 2021 TOR

Supp. 19, 21 (Ct. App. 2015); Frank v. Nation, 2021 TOR Supp. 13, 15 (Ct. App. 2014); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896). The Tohono O'odham Constitution expressly recognizes the rights guaranteed by ICRA. T.O. CONST. ART. III, § 4.

ICRA requires that, for a tribal court to sentence an indigent defendant to over one year in jail in a criminal proceeding, the tribe must provide a licensed attorney at the tribe's expense. 25 U.S.C. § 1302(c)(2). The Tohono O'odham Code has a similar requirement. See 6 T.O.C. ch. 1, § 1108(B).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to assistance of counsel. This has evolved into an extensive right to a court-appointed attorney at the government's expense in the federal and state systems—much more extensive than the right under ICRA and Tohono O'odham law.

Accordingly, interpretations of right to counsel under the U.S. Constitution do not necessarily apply to ICRA's or the Nation's right to counsel laws. See Howlett v. The Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976); O'Neal V. Cheyenne River Sioux Tribe, 482 F.2d 1140 (9th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

However, as the Tohono O'odham system shares the underlying commitment to basic fairness, the Court agrees with the doctrine developed under the federal and many state systems that, when a defendant is entitled to such an attorney, the defendant's rights are violated if the defendant faces a "critical stage" of the pretrial process without an attorney. See, e.g., Rothgery v. Gillespie County, Tex., 554 U.S. 191, 211-12 (2008); Coleman v. Alabama, 399 U.S. 1, 7-10 (1970); see generally, 39 C.J.S. Habeas Corpus § 124 (surveying various state and federal cases requiring counsel at critical stages).

What constitutes a "critical stage" may differ among the federal, state, and tribal systems. However, the Court finds persuasive the underlying principles stated in one of the seminal U.S. Supreme Court cases here, Coleman v. Alabama, 399 U.S. 1, 7-10 (1970). First, "[w]hether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Id. at 7 (internal quotes and citation omitted). Second, "'critical stages' include the type of arraignment where certain rights may be sacrificed or lost." Id.

The Tohono O'odham Rules of Criminal Procedure are clear that once a defendant requests a bench trial or jury trial, that request is considered final. T.O. R. Crim. Pro. Rule 6(c). Thus, choosing one necessarily sacrifices the right to the other. Equally clear is that an attorney can greatly assist with that decision, to help avoid the prejudice of making the wrong choice for the case—which prejudice, under our rules, cannot be undone.

Accordingly, under the principles of Coleman v. Alabama, the hearing where Mr. Salcido elected a bench trial was a critical stage of his proceeding. He was not represented. Therefore, even if a licensed attorney took his representation now at the Nation's expense, the Court could not sentence Mr. Salcido to more than one year in jail without violating his right to an attorney under ICRA and Tohono O'odham law.

III. CONCLUSION

The Court finds the principles in Coleman v. Alabama applicable to both ICRA's and the Tohono O'odham Code's requirement that an indigent defendant have a court-appointed licensed attorney at the Nation's expense to allow the Court to impose a total term of imprisonment over one year in a proceeding.

The Court further finds that, first, having an attorney when setting a trial could have helped Mr. Salcido avoid potential substantial prejudice in regards to facing a

sentence of over one year in jail and, second, the hearing where his trial was set was the type where certain rights may be sacrificed or lost. Thus, that hearing was a "critical stage" of his pretrial proceeding.

As such, because Mr. Salcido was not represented by a licensed attorney when making that decision, the Court may not sentence him to more than one year in jail, whether or not a licensed attorney begins representation after that decision.

Mr. Salcido remains entitled to seek counsel at his own expense, or pro bono. The Court would welcome that. However, the Court may not sentence him to over one year in this proceeding, and he is not entitled to a Court-appointed attorney at the Nation's expense. The Nation's Motion is therefore DENIED.

SO ORDERED this 26th day of May, 2023.

Judge Joseph Hardy Jr.

Fwd to: Def, Det, Pros
05262023

JUDICIARY

TOHONO O'ODHAM NATION JUDICIARY
2023 AUG 31 A 10:59
JUDICIARY SERVICE CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Clement Soto Defendant	Case No.: CR2022-0426-1 ORDER

This is before the Court on Defendant Clement Soto's Petition to Convert Work Hours to Credit for Detention Days Served filed July 28, 2023 (Petition), and the Nation's Response to Petition to Convert Work Hours filed August 8, 2023 (Response).

I. ISSUE & BRIEF ANSWER

Defendant is currently serving a jail sentence for this matter. He filed the Petition to request the Court shorten his sentence by crediting him time for 459 hours worked while in custody.

The Nation asserts that the victim objects to the Petition (Resp. 3:13-14), but that Rule 16.1, 3 T.O.R. Crim. Pro. R. (Rule 16.1) does not allow her objection to be considered (e.g., Resp. 3:14-15).

The Nation therefore asks this Court to amend Rule 16.1 to allow for discretionary denial of a petition to convert work hours to credit for time served after consideration of all relevant factors and input, to include without limitation: victim input, to add victim objection as a basis for discretionary denial, and to conform with Criminal Code statutes

that require mandatory sentences and/or prohibit early release. (Resp. 6.) The Nation also requests the Court deny the Petition. Id.

The Court denies the Nation's requests to amend Rule 16.1 because (i) The Chief Judge, not the Trial Court, issues and changes court rules; and (ii) even if the Trial Court did have the authority to amend Rule 16.1, it finds the rule already does what the Nation asks.

The Court defers on the Nation's request to deny the Petition, and sets a Review Hearing on September 11, 2023, at 1:00 p.m. to consider the Petition, including input from the victim.

II. ANALYSIS

A. Court rules are implemented by the Chief Judge administratively, not by the Trial Court deciding specific cases.

Tohono O'odham Code Title 6, Chapter 1, Section 1106 provides:

> *(A) The chief judge, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all divisions of the Tohono O'odham Judicial Court to promote speedy determination of cases.*

Issuing (and amending) court rules is an administrative function of the Chief Judge, not an adjudicatory function of Trial Court judges. Accordingly, this Court denies the Nation's requests to amend Rule 16.1.

The Court has, however, submitted the Nation's comments to the Chief Judge for potential future revisions. The Nation, and anyone else, may at any time submit additional comments to the Court's Special Counsel at Christina.Rinnert@tonation-nsn.gov.

B. Rule 16.1 Already Allows Consideration of All Relevant Factors, Including Victim Input.

Section 1.13 of the Tohono O'odham Criminal Code[1] provides:

Section 1.13. Work Credit

The Court may, in its discretion, give any confined inmate work credit on a jail sentence for each day of satisfactory work performed. The Court shall determine how may days credit to give for work credit.

Rule 16.1 supplements that statute and provides:

Rule 16.1. Purpose; Conversion; Restrictions.

The intention of the work credit conversion is to shorten an imposed sentence of incarceration. The conversion of supervised, certified hours worked to benefit the corrections facility or community, and not otherwise credited as payment for any fines or restitution, or as community service hours required as part of any sentence. If granted, the defendant will receive two hours of detention time credit for every one hour worked. The Court may deny a defendant's request for work credit if he or she:

(a) is convicted of any offense with a penalty that requires mandatory detention or prevents work credit, parole, probation, or early release;

(b) is completing a sentence on a violation of probation;

(c) is completing a sentence on a violation of parole;

(d) is convicted of any offense requiring registration as a sex offender or any offense against elders or children, including Contributing to the Delinquency of a Minor;

(e) is ineligible for credit because the sentencing order specifically states that the defendant may not accumulate work credit or credit for community service;

(f) has disciplinary incidents or write-ups while in custody; or

[1] 7 T.O.C. ch. 1.

(g) does not meet the Corrections classification level allowing eligibility to participate in community service.

The Nation asserts that "Rule 16.1 plainly states that only the enumerated options in the exhaustive list in the Rule allow for a discretionary denial." (Resp. 3:1-2.) It is not clear how the Nation arrives at this conclusion, and the Court disagrees for several reasons.

First, Rule 16.1 does not say "only" or have any other limiting words for the list of discretionary denial grounds. The Court will not read in extra words without a compelling reason. It finds no compelling reason here.

Second, even if Rule 16.1 could be interpreted as limiting the Court's discretionary denial to the listed examples only, as the Nation asserts, statutes (and rules) addressing the same subject should be read together-*in pari materia*-and harmonized if possible. See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252-255 (2012) (Related-Statutes Canon); 82 C.J.S. Statutes § 458 (Construction of statutes relating to the same subject matter).

Criminal Code Section 1.13 provides broad discretion regarding work credit. Reading Rule 16.1 to take away that discretion in all but seven cases would create stark disharmony. In contrast, reading clauses (a)-(g) of Rule 16.1 as illustrative rather than limiting, is harmonious with the statute.

Third, again assuming that clauses (a)-(g) of Rule 16.1 could be read as either limiting or illustrative, an interpretation that validates the rule outweighs an interpretation that invalidates it. See Scalia & Garner, *supra*, at 66-28 (Presumption of Validity); 82 C.J.S. Statutes § 95 (Presumptions of validity of statutes and regularity of enactment, generally).

The Nation argues that Rule 16.1, interpreted to allow discretionary denial only in those seven cases, would violate the Nation's Victims' Rights Code by not allowing victim input to be considered. (Resp. 3:6-10.) In contrast, interpreting Rule 16.1 to allow the Court

to consider a victim's input, and any other relevant factors, is not only harmonious with Criminal Code Section 1.13, but supports its validity with respect to the Victims' Rights Code.

Perhaps the provisions for mandatory sentences and restrictive sentencing orders should not be included in a list of discretionary denial grounds, as the Nation also argues. However, those are not at issue in this case. Accordingly, the Court takes no position on them, but again refers to the above canon of reading statutes and rules *in pari materia*, noting that the Court has always read Criminal Code Section 1.13's unqualified language of the Court's discretion to grant work credit to *any* inmate, as necessarily limited by other statutes prohibiting work credit. If *in pari materia* was disregarded, and every statute had to list every other statute that affected it from time to time as laws changed, it is hard to imagine how much denser laws would be and it would be nearly impossible to keep up with changing cross-references.

In sum, this Court finds clauses (a) through (g) of Rule 16.1 as illustrative, not limiting. Before amended Rule 16.1 took effect on May 8, 2023, those factors required denial. Accordingly, while perhaps not critical to include them now as specific examples of when the Court may exercise its broad discretion, their inclusion serves to remind those accustomed to the old rule that those grounds no longer require denial (at least pursuant to the Rule itself, without limiting statutes that do prohibit work credit).

III. CONCLUSION

The authority and responsibility to amend Court Rules lies with the Chief Judge through an administrative process, not with the Trial Court deciding individual cases. Therefore, the Court denies the Nation's motion to amend Rule 16.1.

Rule 16.1, like Criminal Code Section 1.13, already allows consideration of all relevant factors, including victim input, when deciding whether to grant a petition to

convert work hours to credit for detention days served. The Nation raised several grounds for denying Mr. Soto's Petition in its Response, including the victim's objection. Accordingly, the Court sets a Review Hearing on September 11, 2023, at 1:00 p.m. to address Mr. Soto's Petition. The victim may be heard there. A second petition filed by Mr. Soto on August 22, 2023, will also be addressed at that hearing.

SO ORDERED this 31st day of August, 2023.

Judge Joseph Hardy Jr.

Fwd: Def, Def, Pros
08312023

TOHONO O'ODHAM
JUDICIARY

FILED IN THE
TOHONO O'ODHAM COURT
2023 9 13 AM 10:32
JUDICIAL COURT CLERK II

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Clement Miguel Soto
DOB: 12/29/1965
Defendant

TRIAL RECORD ENTRY

Case No. CR2022-0426-1

OFFENSE(S) Ct. 1: 7.2A

COURT DATE: September 11, 2023 TIME: 1:00p.m BOND POSTED: _

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Review
☐ Sentencing ☒ Parole Hearing

DEFENDANT:	☒ Present	In custody	☐ Not Present
DEFENSE COUNSEL:	☐ Present	_____	☐ Not Present ☒ Pro Se
PROSECUTORS:	☒ Present	Michael Colmenero	☐ Not Present
PROBATION OFFICER:	☐ Present	_____	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Clement Miguel Soto, DOB: 12/29/1965
CASE NO. CR2022-0426-1

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by:_____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ ____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $ _____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Victim Jessica Chico was provided the opportunity to be heard, but did not attend. After considering Defendant Soto's Petition for Parole, and Petitions to Convert Work Hours to Credit for Detention Days Served filed July 28, 2023 and August 22, 2023 (Petitions to Convert Work Hours), and the Nation's Responses, and hearing from the parties, the Court denied Mr. Soto's Petition for Parole in open court, and took the Petitions to Convert Work Hours under advisement. The Court now grants Mr. Soto's Petitions to Convert Work Hours for the reasons stated in the attached Continuation Order.

September 13, 2023
DATE

JUDGE, Joseph Hardy Jr.

DISTRIBUTION: ☐ COURT ☐ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☐ DEFENSE ATTORNEY ☑ DETENTION

09/13/23 JH

JUDICIARY

Rev. 12/2020

FILED IN THE
TOHONO O'ODHAM COURT
2023 9 13 AM 10:32
JUDICIAL COURT CLERK II

Continuation Order

CR2022-0426-1

TOHONO O'ODHAM NATION, Plaintiff

vs.

CLEMENT MIGUEL SOTO, Defendant

After the hearing, the Court further reviewed and considered Mr. Soto's Petitions to Convert Work Hours and the Nation's Responses, including (a) the Prosecution's objections based on the victim's input that she is fearful of Defendant, Defendant's criminal history, and the nature and circumstances of this case (Nation's Resp. to Pet. to Convert Work Hours, Aug. 8, 2023, 5), (b) the Prosecution's policy argument that "[a] defendant should not be able to serve a lesser sentence simply because work credit is available to them" (Nation's Resp. to Pet. to Convert Work Hours, Aug. 8, 2023, 5:16-17), (c) Mr. Soto's understanding (stated in open court) when accepting a plea agreement that credit for work hours would be available, (d) the granting of a previous petition to convert work hours in this case to which the Prosecution did not object, and on which Mr. Soto stated he relied in continuing to work and submit the present Petitions, (e) the permanent No Contact Order in favor of Ms. Chico and her residence that is part of both the plea agreement and the sentence, which Mr. Soto raised on his own at the hearing, (f) the strong history and practice of this Court granting credit for work hours in recognition of its demonstration of good behavior and discipline in custody, and to "benefit the corrections facility or community", T.O. R. Crim. Pro. R. 16.1, and (g) the fact that work credit is only available in the first place to those inmates who earn the opportunity as a privilege (which may be lost).

Further, though not controlling here, the Court notes the strong policies favoring work credit in other jurisdictions as well. See, e.g., Beaty v. Shute, 54 Ariz. 339, 341-42 (1939), construing the purpose of a similar "two for one" work credit law "to encourage prisoners to observe the rules of the prison and to work faithfully"; see generally 72 C.J.S. Prisons § 141 (Reduction of prison term by good-time, work, and other similar credits, generally) ("Legislative purposes behind statutes providing credits or deductions from sentences of inmates include the encouragement of orderly conduct, discipline, or good behavior, encouraging prisoners to observe the rules of the prison, to improve of morale, and to further education.") (internal citations to Massachusetts, U.S., Illinois, Mississippi, Alaska, California, Wisconsin, and Indiana cases omitted).

The Court has discretion to grant or deny petitions to convert work hours. 7 T.O.C. ch. 1, § 1.13. Considering the various case-specific–and general–factors above, the Court in its discretion grants Mr. Soto's Petitions to Convert Work Hours in the amounts documented: 459 hours of work credit for the July 28, 2023 Petition, and 126 hours of work credit for the August 22, 2023 Petition.

The Court notes that Mr. Soto filed another petition to convert work hours on September 8, 2023, and said he had another petition to file at the hearing (which the Court directed Mr. Soto file through Corrections with the Court). Neither of those petitions are included in this order, and the Prosecution may file responses to either or both of those in the normal time frame if they wish.

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED IN THE
TOHONO O'ODHAM COURT
2024 2 20 PM03:26
Denise Garcia
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Lorna Cipriano
DOB: 07/24/1996
Defendant

TRIAL RECORD ENTRY

Case No. CR2022-0440-1; CR2023-0197-1

OFFENSE(S) CR2022-0440 Ct.1: 5.4A1; CR2023-0197 Ct 1: 3.7A

COURT DATE: February 15, 2024 TIME: 9:00 AM BOND POSTED:

CALENDER EVENT: ☐ Arraignment ☒ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☐ Other _____
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☐ Present	Presence waived	☒ Not Present
DEFENSE COUNSEL:	☐ Present	_____	☐ Not Present ☐ Pro Se
PROSECUTORS:	☒ Present	Amy Ruskin	☐ Not Present
PROBATION OFFICER:	☒ Present	Joseph Tenario	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Lorna Cipriano, DOB: 07/24/1996
CASE NO. CR2022-0440-1; CR2023-0197-1

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: On remand from AP2023-0006, with orders to hold a hearing on the issue of whether probation terms were to run concurrently or consecutively.

Lorna Cipriano had transportation problems. She was in contact with Probation and advised she would accept a ruling of concurrent or consecutive probation terms. Probation Officer Tenario reported her compliance and progress has been very good. Christina Rinnert appeared representing Probation. Both plea agreements and sentencing orders were silent on whether the probation terms were consecutive or concurrent. This judge (who presided over the plea / sentencing hearings) does not remember the issue being addressed in open court. The parties agreed that probation is not a sentence, but rather a suspension of a sentence. SEE THE ATTACHED CONTINUATION ORDER

February 15, 2024
DATE

JUDGE, Joseph Hardy Jr.

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☐ DEFENSE ATTORNEY ☐ DETENTION

022024 DG

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
02202403:26PM
DATE/TIME
DeniceGarcia
COURT CLERK

Continuation Order

CR2023-0197-1
CR2022-0440-1

TOHONO O'ODHAM NATION, Plaintiff

vs.

LORNA CIPRIANO, Defendant

Ms. Rinnert argued for concurrent probation terms, as there is no presumption of consecutive probation terms (as there is for jail terms), Ms. Cipriano serving consecutive instead of concurrent probation terms would serve no rehabilitative purpose in this case, the Court has historically granted concurrent probation terms, it is in the Court's discretion, and probation is under the Court's purview.

Officer Tenario did not feel that having Ms. Cipriano serving concurrent or consecutive probation terms under her current circumstances would affect her much one way or the other.

Ms. Ruskin argued that the Nation had an expectation that probation terms would run consecutively, and to order them to run concurrently could jeopardize their plea agreements. However, if the Court were to recognize that each probation term retained its separate start date and ran concurrently only for the periods of actual chronological overlap, and given Ms. Cipriano's good progress here, in the interests of justice, the Nation would not be opposed to such a ruling of concurrent probation terms.

The Court agreed with that view of concurrency.

Based on the above reasons, the Court in its discretion ordered that Ms. Cipriano's probation terms (each 12 months) are to run concurrently as follows:

CR2022-0440-1: Started 3/15/23, stayed 6/1/23-9/15/23, scheduled to end 6/30/24.

CR2023-0197-1: Started 9/15/23, scheduled to end 9/15/24.

The concurrent period is from 9/15/23 to 6/30/24 only.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CRIMINAL DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 AUG 31 P 3:36
JUDICIARY SERVICE CLERK

Tohono O'odham Nation Plaintiff v. Dale Joaquin Defendant	Case No.: CR2022-0483-1/2/5-9 ORDER DENYING DEFENDANT'S MOTION TO DROP CHARGES

This is before the Court on Defendant Dale Joaquin's Request to Speak with the Court filed 8/14/2023 (Motion) and the Nation's Response to Request to Speak with the Court filed 8/30/2023 (Response).

Mr. Joaquin moves to dismiss the charges against him on the grounds that he was sentenced to more than one year in jail, without representation, in violation of the Nation's Code and the U.S. Tribal Law & Order Act. The Nation disagrees.

The Court agrees with the Nation, other than its assertion that an indigent defendant's right to a court-appointed attorney is triggered by the Nation's notice of intent to seek more than one year of imprisonment (Resp. 2:9-11).

Rule 3 of the Nation's Rules of Criminal Procedure defers to the statutes to determine *when* the right is triggered. "Upon notification that the Nation will seek more than one year of imprisonment in a criminal proceeding, a defendant may file a sworn financial affidavit." T.O. R. Crim. P. Rule 3(a)(1(A). "***If*** a defendant is entitled to a state-licensed attorney, the Court must appoint attorneys in the following order . . . ." Id. at 3(a)(1)(D) (emphasis added).

Thus, under Rule 3, the Nation's notice triggers only the right of the defendant to *request* a court-appointed attorney. Nothing in Rule 3 says when a defendant is entitled to a state-licensed attorney, and certainly does not link it to the Nation's notice alone.

The Nation's Code and the Tribal Law & Order / Indian Civil Rights Act (ICRA) are both clear that an indigent defendant's right to a court-appointed attorney at the Nation's expense is triggered by the actual imposition of more than one year of imprisonment, not by mere notice of intent to seek it. See 6 T.O.C. ch. 1, § 1108 ("An indigent defendant shall have the right to a state-licensed attorney at the expense of the Tohono O'odham Nation in a criminal proceeding in which a total term of imprisonment of more than one year ***is actually imposed***.") (emphasis added); 25 U.S.C. § 1302(c)(prelude & clause (2)) ("In a criminal proceeding in which an Indian tribe . . . ***imposes*** a total term of imprisonment of more than 1 year . . . the tribe must provide an indigent defendant the assistance of a defense attorney licensed to practice law . . . .") (emphasis added).

The Court recognizes this is a "backward-looking" test. That does not change its importance. Though not controlling here, this Court finds persuasive a very similar backward-looking test imposed by the U.S. Supreme Court for an indigent defendant's right to appointed counsel for jail sentences vs. non-jail sentences under the U.S. Constitution. See Scott v. Illinois, 440 U.S. 367, 373-74 (1979): ("[A]ctual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. . . . We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

This Court notes that the Scott Court made that backward-looking rule in the absence of constitutional language specifying "actual imposition" vs. "mere threat of imposition," while here we have two statutes containing actual imposition language. This Court further notes that both statutes were implemented after the Scott decision, suggesting the drafters knew what they were doing when choosing that language.

Compare, for contrast, the U.S. Supreme Court's note in Nichols v. U.S., 511 U.S. 738, 749 n.12 (1994) (affirming Scott v. Illinois), that "States may decide based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors. Indeed, many, if not a majority, of States guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed." The court cited Arizona, Ariz. R. Crim. Pro. 6.1(b) ("any criminal proceeding that *may result* in punishment involving a loss of liberty") (emphasis added), as one such state that went that route. The Nation, and ICRA, go the other route, requiring appointed counsel only when more than one year of imprisonment is actually imposed, not merely threatened or authorized.

The Court agrees with the Nation that other sentences, such as fines, community service, and restitution, are not included in the Nation's or ICRA's limitation that the Court may not sentence an unrepresented indigent defendant to a total term of imprisonment of more than 1 year. That restriction applies only to jail time.

The statutory language itself makes this clear. The Nation's Code and ICRA refer specifically and only to prison terms of over one year, not overall sentences that include over one year of imprisonment. See 6 T.O.C. ch. 1, § 1108 ("An indigent defendant shall have the right to a state-licensed attorney at the expense of the Tohono O'odham Nation in a criminal proceeding in which ***a total term of imprisonment of more than one year*** is actually imposed.") (emphasis added); 25 U.S.C. § 1302(c)(prelude & clause (2)) ("In a

criminal proceeding in which an Indian tribe . . . imposes ***a total term of imprisonment of more than 1 year*** . . . .") (emphasis added). They do not say, as Mr. Joaquin suggests, that representation is required for a court to sentence a defendant to a total term of imprisonment of more than one year . . . PLUS fines, community service, restitution, etc.

This is buttressed by the separate treatment and limitations on fines versus jail time in ICRA: 25 U.S.C. §§ 1302(a)(7)(B) (each offense generally limited to imprisonment no more than 1 year ***or a fine of $5,000, or both***); 1302(a)(7)(C) no more than 3 years of imprisonment ***or a fine of $15,000, or both*** under certain conditions); 1302(b) (offenses subject to imprisonment between 1 and 3 years, ***or fines between $5,000 and $15,000, or both***); 1302(c) (providing an indigent defendant the right to a court-appointed attorney for imposing a total term of imprisonment of more than 1 year, no mention of fines).

None of those ICRA provisions require *any* legal representation for the various ranges of fines.[1] The requirement for counsel—court appointed or otherwise—applies only to sentences actually imposing a total term of imprisonment of over 1 year.

The Nation's Code does not address the different ranges of jail and/or fines cited above in ICRA. Instead, it includes only the final ICRA limitation cited above (§ 1302(c)) that the Court may not sentence an unrepresented indigent defendant to ***a total term of imprisonment of more than 1 year***. See 6 T.O.C. ch. 1, § 1108. Like ICRA § 1302(c), the Nation's Code adds no representation requirements for separate fines, community service, or restitution.

Here, Mr. Joaquin did not have representation and the Court did not sentence him to a total term of imprisonment of more than one year. The community service (and restitution, if imposed) are separate, and not subject to the Nation's or ICRA's requirements

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[1] The Court notes that the fines, converted to community service, imposed on Mr. Joaquin fall well below the ICRA maximums.

that the Nation provide an indigent defendant with a licensed attorney at the Nation's expense. Therefore, his sentences are lawful under both the Nation's Code and ICRA.

For the above reasons, Mr. Joaquin's motion is denied. For Mr. Joaquin's reference, the Court is including copies of the statutes cited above with his copy of this Order.

SO ORDERED this 31st day of August, 2023.

Judge Joseph Hardy Jr.



FILED IN THE
TOHONO O'ODHAM COURT
2023 AUG 30 PM 12:21
JUDICIAL COURT CLERK II

In the Jud l Court of the Tohono C odham Nation
In the State of Arizona
Criminal Division

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Tyrone Matthew Miles
DOB: 09/22/1996
Defendant

TRIAL RECORD ENTRY

Case No. CR2023-0037-1-8

OFFENSE(S) Ct. 1: 7.2A, Ct. 2: 8.4A2, Ct. 3: 8.4A3, Ct. 4: 3.4A, Ct. 5: 3.6A1, Ct. 6: 3.6A4, Ct. 7: 3.6A5, Ct. 8: 12.4A

COURT DATE: August 30, 2023 TIME: 9:00 AM BOND POSTED: _____

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☒ Hearing
☐ Jury Trial ☒ Bench Trial ☐ Other _____
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☒ Present	In Custody	☐ Not Present	
DEFENSE COUNSEL:	☒ Present	Francis	☐ Not Present	☐ Pro Se
PROSECUTORS:	☒ Present	Allen	☐ Not Present	
PROBATION OFFICER:	☐ Present	_____	☐ Not Present	

IT IS ORDERED:

☒ The Defendant is found Guilty of: CR2023-0037-1(lesser included offense of assault)/2/4/5/6/8

☒ The Defendant is found Not Guilty of: CR2023-0037-3/7

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☒ Set for: Sentencing Hearing Sep. 25, 2023 at 1:00pm.

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☒ Presentence Report Requested.

TOHONO O'ODHAM NATI(. Tyrone Matthew Miles, DOB: 09/2
CASE NO. CR2023-0037-1-8

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Nicollette Francisco testified. Officer K. Manuel testified. Exhibits 7-16 were admitted.
The Nation amended Count 1 to Attempted Aggravated Assault.
The Court finds that Mr. Miles is guilty of CR2023-0037-1(lesser included offense of assault)/2/4/5/6/8. The Court finds Mr. Miles not guilty to CR2023-0037-3/7. The Court sets a sentencing hearing and requests a presentence report.
Mr. Miles asked to amend his release conditions. After reviewing the record, the Court denies the request.

August 30, 2023
DATE

JUDGE, Kyle Fields

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☑ DETENTION

083023 JH

T. Francis

JUDICIARY

Rev. 11/2022

FILED IN THE
TOHONO O'ODHAM COURT
2023 9 25 PM2:10
JUDICIAL COURT CLERK II

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Tyrone Matthew Miles
DOB: 09/22/1996
Defendant

TRIAL RECORD ENTRY

Case No. CR2023-0037-1-8

OFFENSE(S) Ct. 1: 7.2A, Ct. 2: 8.4A2, Ct. 3: 8.4A3, Ct. 4: 3.4A, Ct. 5: 3.6A1, Ct. 6: 3.6A4, Ct. 7: 3.6A5, Ct. 8: 12.4A

COURT DATE: September 25, 2023 TIME: 1:00 PM BOND POSTED:

CALENDER EVENT: ☐Arraignment ☐Pre-Trial ☒Hearing
☐ Jury Trial ☐Bench Trial ☐Other _____
☒Sentencing ☐Parole Hearing

DEFENDANT:	☒ Present	In Custody	☐Not Present
DEFENSE COUNSEL:	☒ Present	Francis	☐ Not Present ☐ Pro Se
PROSECUTORS:	☒ Present	Allen	☐ Not Present
PROBATION OFFICER:	☒ Present	Hobbs	☐Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATIC . . Tyrone Matthew Miles, DOB: 09/22
CASE NO. CR2023-0037-1-8

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by:_____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: At the hearing, the parties made recommendations on sentencing. The Court orders:

Ct 1-90 days, credit for time served, concurrent.

Ct 2-360 days, credit for time served, consecutive. $1000 fine converted to 138 hours of community service due 03-29-24.

Ct 4-60 days, consecutive. Ct 5-10 days, consecutive.

Ct 6-10 days, consecutive. Ct 8-10 days, consecutive.

No contact with Nicolette Francisco and her residence.

September 25, 2023

DATE

JUDGE, Kyle Fields

DISTRIBUTION: ☑ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☑ DETENTION

TOHONO O'ODHAM JUDICIARY

D. Tyler Francis

092523 jg

Rev. 11/2022

FILED IN THE
TOHONO O'ODHAM COURT
2023 6 13 PM03:36
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Tohono O'odham Nation Plaintiff v. Mario Robert Figueroa Jr. Defendant	Case No.: CR2023-0074-1/6/8 ORDER DENYING MOTION TO REVOKE PROBATION

The Nation filed a Motion to Revoke Probation (Motion). The Court issued a Trial Record Entry setting the matter for a hearing on June 20, 2023 at 9:00 a.m. After further review of the record, the Court denies the Nation's Motion and vacates the June 20 hearing.

The Court agrees with the Prosecution that in the absence of contradictory laws of the Nation, the Court will look to Arizona Rule of Criminal Procedure 27.6, which allows a probation officer or a prosecuting attorney to file a motion to revoke probation.

However, in this proceeding, the Court previously ordered probation stayed at the request of Adult Probation, pending adjudication of new charges in Case CR2023-0136-1-3. (Trial Record Entry, May 22, 2023.) The Nation's sole basis for its Motion is that it has probable cause to believe that Mr. Figueroa did in fact commit the offenses charged in CR2023-0136-1-3, in violation of Section 1 of his Conditions and Regulations of Probation ("Obey all tribal, city, county, state and federal laws."). (See Motion at 2-3.)

The Court finds it premature to start a revocation proceeding based solely on Mr. Figueroa's alleged guilt of new crimes that have not yet been adjudicated. Further, while

either the Prosecution or Probation may move for revocation, in the event of an express disagreement like here, the Court will generally give more deference to Probation, as an arm of the judiciary charged with the sole authority and responsibility for supervising probationers, and in a closer ongoing relationship with, and better position to evaluate, probationers. Cf., generally, U.S. v. Mejia-Sanchez, 172 F.3d 1172, 1174-75 (9th Cir. 1999); U.S. v. Davis, 151 F.3d 1304, 1306 (10th Cir. 1998); U.S. v Sczubelek, 402 F.3d 175, 188 (3rd Cir. 2005); U.S. v. Bermudez-Plaza, 221 F.3d 231, 234 (1st Cir. 2000).[1]

Accordingly, the Court denies the Nation's Motion to Revoke Probation, vacates the status hearing previously set for June 20, 2023 at 9:00 a.m., and affirms the stay on probation.

SO ORDERED this 13th day of June, 2023.

Judge Joseph Hardy Jr.

[1] This would not be the case for a new criminal proceeding brought under 7 T.O.C. ch. 1, § 2.15 (Probation Violation), which would be entirely in the Prosecution's discretion.

Filed to: Pros, Def. Def, Prob., DG.
06:32:23 EB

FILED
WITHIN THE
TOHONO O'ODHAM JUDICIARY
2023 SEP 13 P 3:24
JUDICIARY SERVICE CLERK

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Hilarion Enos Jr.
DOB: 10/28/1992
Defendant

TRIAL RECORD ENTRY

Case No. CR2023-0284-2-4

OFFENSE(S) Ct 2: 3.6A2/8.9B9, Ct 3: 7.2A/8.9B9, Ct 4: 8.4A2

COURT DATE: _____ TIME: _____ BOND POSTED: _____

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☐ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Nation's Notice of Intent to Seek more than one year Incarceration.
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☐ Present	_____	☐ Not Present
DEFENSE COUNSEL:	☐ Present	_____	☐ Not Present ☐ Pro Se
PROSECUTORS:	☐ Present	_____	☐ Not Present
PROBATION OFFICER:	☐ Present	_____	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Hilarion Enos Jr., DOB: 10/28/1992
CASE NO. CR2023-0284-2-4

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: The Nation filed a Notice of Intent to Seek More than One Year of Incarceration. The Court orders the attached Finacial Affidavit: Request for Court-Appointed Attorney be delivered to Mr. Enos in Corrections, for him to complete and file with the Court as soon as possible to determine if he qualifies for a Court-appointed attorney at the Nation's expense. The Court notes that Mr. Enos is not entitled to a Court-appointed attorney solely from the Nation's Notice of Intent to Seek More than One Year Incarceration as stated in its Notice. Rather, that right is triggered, if he is indigent, by the actual imposition of more than one year of imprisonment. See 6 T.O.C. ch. 1, § 1108; 25 U.S.C. § 1302(c); 3 T.O.R. Crim. Pro. R. 3, Nation v. Camillus Nunez, Case No. CR2022-0362-1-4, at 1 (Tr. Ct. Feb. 6, 2023) (scheduled for publication); Nation v. Dale Joaquin, Case No. CR2022-0483-1/2/5-9, at 2 (Tr. Ct. Aug. 31, 2023); Christina Rinnert, The Trouble With the Tribal Law and Order Act, ARIZ. ATT'Y, July/Aug. 2023, at 38-39.

September 12, 2023

DATE

JUDGE, Joseph Hardy Jr.

DISTRIBUTION: ☐ COURT ☐ PROBATION ☐ DEFENDANT ☐ PROSECUTOR ☐ DEFENSE ATTORNEY ☐ DETENTION

FILED IN THE
TOHONO O'ODHAM COURT
2023 3 06 AM 11:02
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CRIMINAL DIVISION

Glen Frank Petitioner v. Tohono O'odham Nation, Respondent	Case No.: HC2022-001 (Ref: 2010-0506/0507CR; CR2017-1498-1; CR2018-1140-1-10) ORDER

Petitioner Glen Frank filed a Petition for a Writ of Habeas Corpus. Respondent Tohono O'odham Nation filed a Pre-Answer Motion to Dismiss. Mr. Frank filed a Response.

A hearing was held on March 2, 2023. Mr. Frank appeared, representing himself. Hue Le appeared for the Nation.

I. ISSUES & BRIEF ANSWERS

Mr. Frank based his petition on three claims:

A. The Nation violated his right against double jeopardy[1] when it handed Mr. Frank to the U.S. government, who then prosecuted Mr. Frank for the same conduct to which he had pled guilty in the Nation's Case CR2018-1140.

B. The Nation violated Mr. Frank's right, as an indigent defendant, to a court-appointed licensed attorney at the Nation's expense[2] when he was facing

[1] 25 U.S.C. § 1302(a)(3) (tribal government may not put someone twice in jeopardy for the same offense).

[2] 25 U.S.C. § 1302(c)(2) ("In a criminal proceeding in which an Indian tribe . . . imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--. . . (2) at

more than one year in jail for the various proceedings underlying this action.

C. The Nation violated Mr. Frank's right to due process[3] by (i) not telling him that the U.S. would prosecute him for the same conduct underlying Case CR2018-1140, and (ii) handing him over to U.S. federal authorities without prior notice or an opportunity to be heard.

For the reasons below, the Court finds that the Nation (A) did not place Mr. Frank twice in jeopardy for the same offense; and (B) did not violate Mr. Frank's right to a court-appointed attorney.

The Court further finds that the Nation did not violate Mr. Frank's due process rights by not telling him, when he was pleading guilty to CR2018-1140-1-10, that the U.S. government would be prosecuting him for the same offense (which neither the Prosecution nor the Court had any way of knowing at the time).

The Court did not, however, rule on (i) whether Mr. Frank was entitled to notice and an opportunity to be heard (due process) before the Nation turned him over to U.S. authorities pursuant to its writ of habeas corpus ad prosequendum (request to hand over for federal prosecution); (ii) if so, whether the Nation denied that right; and, if yes to those two, (iii) whether that harmed Mr. Frank.

Accordingly, the Court grants the Nation's Motion to Dismiss in part on the double jeopardy and right to counsel grounds, requests further briefing on the remaining issues of due process for transferring Mr. Frank to federal custody, and continues the hearing on the Motion to Dismiss to address that issue on oral argument.

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the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law . . . .")

[3] T.O. CONST. Art. III, § 1 (the government of the Tohono O'odham Nation will not "deprive any member of liberty or property without due process of law.")

II. ANALYSIS

A. Double Jeopardy

The Tohono O'odham Nation and the U.S. government are separate sovereigns. Each has its own inherent sovereign powers. Each decides separately who it will prosecute and for what.

Therefore, if both sovereigns prosecute and/or imprison the same person for the same underlying conduct, it is not a violation of the person's right against double jeopardy. See, e.g., U.S. v. Lara, 541 U.S. 193, 208-210 (2004).

That is what happened here. The Nation prosecuted Mr. Frank, he pled guilty, and the Nation sentenced him. Later, the U.S. government separately prosecuted Mr. Frank and sentenced him for the same underlying conduct. This was not a violation of Mr. Frank's right against double jeopardy. Accordingly, this claim is dismissed.

B. *Right to Court-appointed Attorney at the Nation's Expense*

25 U.S.C. § 1302(c)(2) requires a tribe to provide an indigent defendant, at the tribe's expense, a licensed attorney for any *proceeding* that imposes over one year in jail.

A "proceeding" for this requirement is "a prosecution of a crime(s) that arose from a single transaction or incident" and is functionally equivalent to an incident. Nation v. Frank, 2021 TOR Supp. 238, 242-43 (Tr. Ct. 2016) (noting the Court of Appeals' implicit addressing of the definition in Frank v. Nation, 2021 TOR Supp. 13, 16 (Ct. App. 2014).

Here, Mr. Frank was facing over one year in jail total. However, that total was from several different proceedings, with different underlying acts, from different prosecutions over different times. None of the separate proceedings underlying this habeas action imposed over one year in jail. Accordingly, Mr. Frank was not entitled to a court-appointed attorney at the Nation's expense.

Mr. Frank further argued that he should be provided counsel at the Nation's expense on general grounds of fairness. However, while the right to government-appointed and funded counsel is more extensive in the U.S. and state systems, in tribal systems that right is limited to proceedings imposing over one year in jail, see generally, 25 U.S.C. § 1302, and specifically in the Tohono O'odham system, see 6 T.O.C. chapt. 1, § 1108.[4]

Because none of Mr. Frank's proceedings imposed more than one year in jail, he was not entitled to a court-appointed licensed attorney at the Nation's expense. Therefore, this claim is dismissed.

C. Due Process

1. Due process at the time Mr. Frank pled guilty to CR2018-1140-1-10.

Mr. Frank first argued that the Nation should have told him that it would be handing him over to the U.S. government for "further prosecution" for the acts underlying CR2018-1140-1-10. He argued that, had he known, he would not have pled guilty in the Nation's case, as the U.S. used that guilty plea against him in its prosecution. That, he claimed, was unfair—violating his right to notice and an opportunity to be heard (due process). The Court denies this claim for several reasons.

First, the Nation could not have known the U.S. would prosecute when Mr. Frank pled guilty to the Nation's case. As noted above, the Nation and the U.S. are separate sovereigns. They independently decide who, when, and if they will prosecute. And the U.S.'s writ of habeas corpus, which stated it was pursuing prosecution of Mr. Frank, was not issued until after Mr. Frank had pled guilty and started his sentence for the Nation.

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[4] Mr. Frank is, however, always entitled to counsel either at his own expense, or if he can find counsel able and willing to represent him *pro bono*. See id.

Mr. Frank argues that the Nation should have notified him of federal interest, since the U.S. was involved in the initial investigation. First, Mr. Frank acknowledged that the F.B.I. had interviewed him. Thus, he had as much knowledge as the Nation did of federal interest.

Second, while the Nation must ensure that a defendant is informed of the potential penalties that *the Nation* may impose for a guilty plea, it is not responsible for anticipating and informing a defendant of all other possible consequences of a guilty plea that are outside its control, including the possibility that the U.S. government may separately decide to prosecute or how they might go about that prosecution. That would be impossible.

For these reasons, the Nation did not violate Mr. Frank's due process rights by not telling him that the U.S. would, or could, separately prosecute him.

2. Due Process when the Nation turned Mr. Frank over to the U.S.

Mr. Frank argues that he should have been provided notice and an opportunity to be heard before the Nation turned him over to the U.S. pursuant to the U.S.'s writ of habeas corpus ad prosequendum.

The Court was initially inclined to deny this claim because (i) due process applies when the Nation is attempting to deprive a person of liberty,[5] (ii) the Nation had already done that pursuant to the underlying proceedings, and had provided due process for those; (iii) unlike the State of Arizona in an extradition proceeding, the U.S. already had jurisdiction over Mr. Frank;[6] (iv) writs of habeas corpus act upon the jailer, not the

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[5] See T.O. CONST. Art. III, § 1.

[6] Compare Tohono O'odham Rules of Criminal and Traffic Procedure, Rule 12 (extradition, requiring hearing or waiver), with Rule 13 (federal habeas corpus, no hearing or waiver required).

prisoner;[7] (v) denying the U.S.'s writ would only change the timing of Mr. Frank's transfer–the U.S. could have simply picked him up in the jail's parking lot upon his release, without any cooperation from the Nation; and, (vi) if the U.S. had done that instead, it may not have credited him with time served in the Nation's jail for the same offense, as the Nation did for the time Mr. Frank spent in federal custody.

However, this issue has not been fully developed. Accordingly, the Court asks for further briefing (see details below).

III. CONCLUSION

For the above reasons, Mr. Frank's claims based on double jeopardy and denial of court-appointed counsel are dismissed. His claim based on denial of due process when he pled guilty to CR2018-1140-1-10 is also dismissed.

Mr. Frank's claim based on denial of due process when he was turned over to U.S. custody on its writ of habeas corpus is preserved pending further briefing and oral argument.

The Court requests the Nation to further brief the Court and Mr. Frank on:

(i) whether Mr. Frank had any due process rights to notice and an opportunity to be heard on the U.S.'s writ of habeas corpus;

(ii) if so, whether the Nation denied him those rights and, if yes to both (i) and (ii), then

(iii) whether Mr. Frank was harmed by being transferred to federal custody before he had served his full sentence for the Nation rather than if the U.S. had picked him up after his release from the Nation's jail without a writ.

That is due by March 31, 2023.

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[7] See Braden v. 30th Jud. Cir. Ct of KY, 410 U.S. 484, 494-95 (1973).

Mr. Frank may file a response within 10 business days of receiving the Nation's brief. The Court understands that Mr. Frank is seeking materials to help with his case. If that causes him to need more time, he can file a Request to Speak with the Court to request an extension before his 10-day response time runs.

Oral argument on these remaining issues is set for April 18, 2023, at 10:00 a.m.

SO ORDERED this 6th day of March 2023.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

FILED IN THE
TOHONO O'ODHAM COURT
2024 6 05 PM12:36
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
TRAFFIC DIVISION

Tohono O'odham Nation Plaintiff v. NATASHA L. MATTHEWS DOB: 02/16/1994 Defendant	Case No.: TR2022-0007-1-2 ORDER

The Court is in receipt of a Supplemental Motion to Vacate the Court's Order to Show Cause from Chief Prosecutor Nicol Green. On May 29, 2024, the Court received a Motion to hold a defendant that was filed at 8:40 a.m. The Court granted the Motion in the case of *Tohono O'odham Nation vs. Natasha Lupe Matthews*, DOB: 02/16/1994 incident report: 240524089. That Motion was granted and signed by Judge Osterfeld, not Judge Juan as cited in the Motion. On May 29, 2024, at 8:31 a.m. the Court received a booking from Tohono O'odham Department of Corrections for Natasha L. Matthews DOB: 02/16/1994 in reference to a warrant for TR2022-0007-1-2. The Court noticed the warrant case number was not cited on the Motion to hold that was filed for incident report: 240524089. Therefore, the normal processes of the Court proceeded which included an initial appearance for the case.

As cited above, the booking for the warrant case, TR2022-0007-1-2, was filed with the Court by Tohono O'odham Department of Corrections ten minutes prior to the Motion to hold. Any communication between the Nation and the Tohono O'odham Department of Corrections is unknown to the Court.

However, the absence of the Nation before this Court in multiple recent proceedings has occurred. This Court has granted motions in those instances to vacate the Order to Show Cause hearings where the Nation was on notice to Show Cause for their absence. As cited by the Nation in their Motion, they were not provided an email from the Tohono O'odham Nation Department of Corrections nor the Court. Neither the Court or the Judges received an email that gave notice to the Court or Judges that warrant case TR2022-0007-1-2 was going to be on the initial schedule. The notification that the Nation refers to is an email that is sometimes, not always, sent as a courtesy from Tohono O'odham Department of Corrections. The policies and procedures of the Tohono O'odham Nation Prosecutors Office is not in the control of the Court or Tohono O'odham Department of Corrections.

The Court recognizes the plea of the Nation's inadequate notice. However, the responsibility of how adequate notice is received by the Nation for court proceedings is not the burden of either the Tohono O'odham Nation Department of Corrections nor Tohono O'odham Nation Judicial Branch. On May 29, 2024, the initial appearances were scheduled to start at 11:00 a.m. That day the Branch Court Officer did not commence the proceedings until sometime after 11:00 a.m. This was done in an effort to allow additional time for the Nation to appear. The absence of the Nation in Court proceedings is a concern. The Court will continue to issue order to Show Cause Orders in cases where the Nation fails to appear.

The Court finds that the Nation's claim that their absence was not done with any malicious intent or to delay proceedings. The Court now vacates the Order to Show Cause hearing scheduled for June 17, 2024, at 1:30 p.m.

SO ORDERED this 5 day of June, 2024

Deola Juan

Judge Deola Juan

Fwd: Pros., Def., Det.
060524 JH

TOHONO O'ODHAM JUDICIARY

FILED IN THE
TOHONO O'ODHAM COURT
2024 6 28 PM12:09
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

In Re: PROSECUTOR'S PETITION FOR ADMINISTRATIVE ORDER DATED APRIL 18, 2024

ORDER

The Court reviewed the Petition for Administrative Order from the Nation's Prosecutor's Office, which requests permission to e-file Complaints, to schedule initial appearances and allow the filing of criminal complaints 72 hours after booking, or, in the alternative, for permission to appear telephonically for weekend and holiday initial appearances.

In addressing the Nation's Petition, the Court took into consideration the following: the Preamble to the Nation's Constitution states that "[w]e, the members of the Tohono O'odham Nation, formerly known as the Papago Tribe, do ordain and establish this constitution for the people of this nation, in order to affirm our sovereign powers of self-government, to preserve, protect and build upon our unique and distinctive culture and traditions, to conserve our common resources, [and] to establish a responsive form of government." Article III, Section 1 of the Tohono O'odham Constitution emphasizes that "[a]ll political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights. It shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or

property without due process of law." Article VIII, Section 10(d), vests the Judiciary with the power to "[e]stablish court procedures for the Tohono O'odham Judiciary."

a. ***Prosecutor's Petition to e-File Complaints.***

The Court does not address the Prosecutor's request to e-file complaints, as that is covered in the Rules of Court, T.O. R. Civ. P. 4.2(d), which states, in part: "any pleading, document, or other paper filed with the Court may be filed by electronic mail (email) under this section." Additionally, the Rules of Court, T.O. R. Civ. P. 4.2(e) states, "[a] party filing a document by fax or e-filing *does not* have to file an original signature document" (emphasis added). Allowing electronic filing of documents was established during the pandemic, updated in 2022, and put into the 2023 Rules of Court to allow easier access to the Court and ease the burdens on all filing parties. The Court does note that Rule 1(a)(4), Rules of Criminal Procedure, requires an original probable cause statement to be filed with Complaints.

b. Prosecutor's Petition requested this Court issue an administrative order allowing for the scheduling of initial appearances and the filing of criminal complaints 72 hours after booking.

Tohono O'odham Criminal Code 7 T.O.C. Ch. 1, § 1.15, states that "[n]o person shall be detained, jailed or imprisoned for a period longer than thirty-six (36) hours including Saturdays, Sundays, and legal holidays without a detention order bearing the signature of a duly qualified judge of the Tohono O'odham Courts." In addition, the current Rules of Court were developed based on the Nation's Constitution, Code, and

practices relied upon since the development of the Criminal Code. The Rules are designed to support and strengthen the best practices for members and victims, with the rights of members and the Nation's laws foremost.

A 72-hour hold is a stop-gap exception, not the rule, for detaining a member of the Nation in Corrections. A blanket 72-hour hold would be irresponsive to individual members arrested over a weekend or on a holiday and who are otherwise eligible for immediate release based on a signature promising to appear. The Court finds that, had there been an intention to allow arrested individuals to be detained over weekends and holidays, the Legislative Council would have written the Code differently. The Council would have made it clear that the 36-hour requirement would only apply during the Court's business hours, Monday through Friday, as opposed to the way it is written, which specifically includes weekends and holidays in the 36-hour calculation. The Code requires detained individuals to be brought before a judge without delay. An open-ended authorization for automatic 72-hour holds over weekends and holidays, as requested by the Prosecutor's Office, is contrary to the plain language of the Criminal Code, and does not harmonize with the customs and traditions (Himdag) of the O'odham people.

Furthermore, a 72-hour hold requires an individualized request, specifically addressing the facts of a particular matter. For example, that the Probable Cause Statement is missing the officer's signature. 7 T.O.C. § 1.15(B) states that "[i]f no complaint has been filed with the Court against the person who has been arrested, and that person is brought before the Court, and the Court has probable cause to believe the person has committed an offense and that a complaint will be filed, the Court *may order* the temporary detention of

a person pending the filing of the complaint" (emphasis added). These requests are not a mere formality that should be presumed to have automatic approval. Each request must be reviewed by a judge, and the judge must make a decision based on the particular facts of that case and any reasons the Prosecutor's Office provides to explain why a hold is necessary. Given the Council's multiple use of "and" within that section of the Criminal Code, it is apparent to this Court that each component must be met before a judge signs an order to hold a member of the Nation in Corrections. The use of "may" establishes that the decision is at the judge's discretion, and approval is neither required nor automatic. The Court will not abuse its rule-making authority to change or manipulate the law as it is written simply for the sake of convenience.

The Prosecutor's Office cites to other nations' and states' rules and codes, which are not applicable here. As stated before, the Council, in writing the Code, was clear in its intent: a member of the Nation must be brought before the Court within 36 hours unless good cause is shown and a judge approves the member being held.

c. Prosecutor's Petition requested this Court allow the Prosecutor's Office to appear telephonically for weekend and holiday initial appearances.

The Rules of Court require that any motion be "filed at least 3 days before any hearing." General Rules of Practice, Rule 5(a). Additionally, Rule of Civil Procedure 7.1(a)(1) requires that a motion "must be in writing, **state the specific grounds** for granting the motion, and set forth the relief or order sought" (emphasis added). Rule 7.1(a)(2) also requires a supporting memorandum be provided.

More importantly, it is customary for the O'odham people to meet face-to-face to reach an understanding and come up with solutions. This is part of O'odham Himdag. *In re: Petition of the Judicial Branch*, Case No. 2008-0283AV, 3 TOR3d 81, 89, (Trial Ct., Mar. 11, 2010, Appeal dism'd *In Re: Petition of the Judicial Branch*, 3 TOR3d 50 (Ct.App., Jul 19, 2012) makes this clear:

> Intergovernmental cooperation and interrelation strongly resonate with Tohono O'odham culture and tradition, which stress the importance of harmonious interactions and fosters a spirit of inclusiveness. *See, In Re: Petition of the Judicial Branch*, 3 TOR3d 81, 89 (Trial Ct., Mar. 11, 2010, appeal dism'd *In Re: Petition of the Judicial Branch*, 3 TOR3d 50 (Ct.App., Jul. 19, 2012) (discussing the Himdag philosophy of living—passed down to the O'odham from Íitoi—which recognizes the reality that power cannot be centralized and no matter what one does, other entities can effect one's existence). An important aspect of this O'odham ethos is the patient deliberation of all factors.

Employees of the Nation should have a vested interest in and a strong sense of obligation to the Nation, its Himdag, and its members. By meeting face-to-face, we honor the past, the defendant, and any alleged victims. This is especially important when a member's liberty is at stake. For decades, the Nation's Prosecutors have appeared in Court for all initial appearances, including when there was a pandemic lockdown or there were only two prosecutors in the office to cover every criminal court proceeding. Even during the pandemic, when many criminal hearings during the week (arraignments, review hearings, pre-trial hearings, etc.) were held telephonically due to the Chairman's Executive Order related to the State of Emergency, initial appearances continued to be held in person every day of the week, and a Prosecutor was present in the courtroom.

In *Tohono O'odham Nation v. Natasha L. Matthews*, TR2022-0007-1-2 (Trial Court Order filed on June 5, 2024), the Court observed: "the absence of the Nation before this Court in multiple recent proceedings has occurred. . . . The absence of the Nation in Court proceedings is a concern." Allowing telephonic appearances by the Nation on weekends and holidays intensifies the Court's concerns, as the Nation's failures to appear for Initial Appearances have taken place during regular, Monday through Friday, business hours.

In another instance, for the June 23, 2024, Initial Appearances, Chief Prosecutor Nicol R. Green was permitted to appear by telephone. When asked why the Nation sought to appear by telephone, other than driving to and from the Courthouse, there were no compelling reasons given to the Court to allow a telephonic appearance. Also, during the same Initial Appearances, the Nation repeatedly deferred to the Court to make appropriate release conditions for the defendants. The record suggests that the Nation was not prepared to make meaningful recommendations for release. The Court finds that continuing the practice of in-person appearances by the Nation better maintains a defendant's right to have meaningful release conditions put in place. Proper arguments allow the Court to consider nuanced concerns for the safety of alleged victims and the Nation's communities. Lastly, in-person appearances maintain the "spirit of inclusiveness."

Conclusion

Employees, no matter the distance traveled, are required to be in Sells to serve in our respective capacities, handle the Court's business, and tend to the members of the Nation consistent with O'odham Himdag. All departments participating in Initial Appearances come together in person to ensure that the Nation's communities are safe, that

defendants' rights to reasonable bail and release conditions are honored, and that victims rights are protected. We must work with each other to carry out the business of the Nation. Therefore, for the above-stated reasons, the Court denies the Petition for Administrative Order.

Dated and entered: 6/27/2024

Rene Alcoverde, Jr.
Chief Judge

JUDICIARY

FWD: Pros.
VJ 6/28/2024

TOHONO O'ODHAM REPORTS



VOLUME 5, Edition 1:
October 1, 2024-December 31, 2025

Fifth Publication, December 2025

PREFACE TO FIFTH VOLUME

The December 31, 2025, Fifth Volume of the Tohono O'odham Reports includes an appellate case from 2015 that has been cited in other cases but remained unpublished. It also contains trial court cases in which the lower court resolved significant issues or issues of first impression.

December 30, 2025

/s/

Rene Alcoverde, Jr.
Chief Judge

Volume 5 TOR3d

Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	Case Number	Document Date	Type of Document	Judge	Citation Number
APPELLATE CASES					
Elvira Aguilla v Tohono O'odham Nation	CTA-0127	4/22/2015	Order re Reasonable Suspicion standard	Judges Atwood, Courson, Brown	5 TOR3d 1 (Ct.App., Apr. 22, 2015)
Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	**Case Number**	**Document Date**	**Type of Document**	**Judge**	**Citation Number**
TRIAL COURT CASES					
Sara Magdalena Salazar v. Manalito Andre Jose	AV2022-0086	11/7/2025	Order Re Child Support Modification	Alcoverde	5 TOR3d 6 (Tr. Ct., Nov. 07, 2025)
In the Matter of the Estate of Susie Siquieros	AV2022-0116	5/19/2025	Opinion & Order Re Property Distribution declining use of custom & tradition as not proven, with Notice of Errata	Hardy	5 TOR3d 11 (Tr. Ct., May 19, 2025)
In the Matter of the Estate of Karen L. Joaquin	AV2023-0085	1/3/2025	Order Re Child Support Arrearages & Conditional Judgment	Hardy	5 TOR3d 34 (Tr. Ct., Jan. 3, 2025)
In the Matter of the Estate of Karen L. Joaquin	AV2023-0085	11/4/2025	Order Re Distribution of Property (using custom and tradition)	Hardy	5 TOR3d 43 (Tr. Ct., Nov. 04, 2025)
Raven Jade Johnson v. Bryce Juan Antone	AV2023-0110	1/30/2025	Order Re Parenting Time, Legal Decision making, and Child Support (using custom and tradition)	Hardy	5 TOR3d 50 (Tr. Ct., Jan. 30, 2025)
In the Matter of the Estate of Elizabeth Siquieros	AV2023-0113	4/22/2025	Order Re Distribution of Property (using custom and tradition)	Hardy	5 TOR3d 60 (Tr. Ct., Apr. 22, 2025)
Rentzel John Lopez v. Chalena Mae Mendoza	AV2024-0119	12/12/2024	Order Re Service by Community Posting, Paternity, Legal Decision Making, Parenting Time, & Name Change	Hardy	5 TOR3d 76 (Tr. Ct., Dec. 12, 2024)
In the Matter of S. K. F.	AV2024-0170	1/10/2025	Order Re Name Change Analysis	Hardy	5 TOR3d 84 (Tr. Ct., Jan. 10, 2024)

Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	Case Number	Document Date	Type of Document	Judge	Citation Number
In the Matter of the Estate of Anthony George Lopez	AV2024-0172	5/22/2025	Order Re service of process outside the Nation, Errata	Hardy	5 TOR3d 87 (Tr. Ct., May 22, 2025)
In the Matter of the Estate of Diane Narcho	AV2024-0173	5/22/2025	Order Re Appointing Personal Representative & Distributing Property	Hardy	5 TOR3d 90 (Tr. Ct., May 22, 2024)
In the Matter of the Estate of Charlotte T. Conde	AV2025-0030	4/23/2025	Order Re Appointing Personal Representative & Distributing Property (using custom and tradition)	Hardy	5 TOR3d 93 (Tr. Ct., Apr. 23, 2025)
In the Matter of the Guardianship & Conservatorship of Tyrin A. Moreno	AV2025-0041	5/15/2025	Order Requiring Service on Alleged Incapacitated Person	Hardy	5 TOR3d 98 (Tr. Ct., May 15, 2024)
In the Matter of the Estate of Patricia J. Sanchez	AV2025-0083	11/13/2025 (Amended 01/05/2026)	Amended Order Appointing Personal Representative and Distributing Estate Assets (using custom and tradition)	Alcoverde	5 TOR3d 102 (Tr. Ct., Nov. 13, 2025)
LaPorte v. Tohono O'odham Nation dba Desert Diamond Casinos	AV2025-0089	9/19/2025	Order Denying Defendant's Motion to Dismiss (personal injury statute-of-limitations issue)	Alcoverde	5 TOR3d 106 (Tr. Ct., Sep. 19, 2025)
In the Matter of D.H. f/k/a Y.	CCV2015-0010	3/21/2025	Order Re whether Court has authority to order the Nation's Child Welfare Division to investigate if a child is in need of care and appear and report its investigation to the Court; Separation of Powers issue	Osterfeld	5 TOR3d 110 (Tr. Ct., Mar. 21, 2025)
In the Matter of M.R.	CCV2024-0038	3/17/2025	Order Re Access to Confidential Juvenile Court Records by the US DOJ	Osterfeld	5 TOR3d 123 (Tr. Ct., Mar. 17, 2025)
In the Matter of D. P.	COP2022-0003-1-9; COP2022-0009-1-4	3/31/2025	Order Re Respondent's Motion to Dismiss federal habeas corpus writ	Alcoverde	5 TOR3d 128 (Tr. Ct., Mar. 31, 2025)
In the Matter of J.A.J.	COP2024-0020-1-3	3/5/2025	Disposition Order Re restitution against a juvenile whose criminal activity caused severe injury to others present within the Nation	Osterfeld	5 TOR3d 133 (Tr. Ct., Mar. 5, 2025)

Case Name Cases in BLUE contain juvenile names/DOBs and have been redacted.	Case Number	Document Date	Type of Document	Judge	Citation Number
Tohono O'odham Nation v. Dustin Cody Herrera	CR2023-0423-1-7	3/3/2025	Order Re Prosecutor Disclosure Violations (Second Amended)	Alcoverde	5 TOR3d 151 (Tr. Ct., Mar. 3, 2025)
Tohono O'odham Nation v. Frank Jaimez	CR2024-0171-1-5	9/23/2025	Order Vacating Sentence & Plea Agreement (lack of jurisdiction)	Alcoverde	5 TOR3d 163 (Tr. Ct., Sep. 23, 2025)
Tohono O'odham Nation v. Jacquelynn Reyes aka Smith	CR2025-0213-1-8	9/8/2025	Order Re Motion for a Probable Cause Hearing (Denied)	Alcoverde	5 TOR3d 165 (Tr. Ct., Sep. 8, 2025)
Tohono O'odham Nation v. Katrina Stevens	CR2025-0248-1-6	9/8/2025	Order Re Motion for a Probable Cause Hearing (Denied)	Alcoverde	5 TOR3d 167 (Tr. Ct., Sep. 8, 2025)
Tohono O'odham Nation v. Leon Michael Lopez	TC2021-0053-1-3	7/6/2023	Order Re Probable Cause Hearing, Officer's reasonable suspicion to stop a vehicle	Fields	5 TOR3d 169 (Tr. Ct., July 6, 2023)
Tohono O'odham Nation v. Derek Ira Pablo, Jr.	TC2023-0019-1-15	3/31/2025	Order Re Respondent's Motion to Dismiss re federal habeas corpus writ (Notice to defendant is not required for transfer to U.S./Federal custody)	Alcoverde	5 TOR3d 173 (Tr. Ct., Mar. 31, 2025)
Tohono O'odham Nation v. Julio Velasco aka Hank Velasco	TC2025-0016-1-8	9/2/2025	Order re Probable Cause Hearing (admonition to parties re: treating PC Hearing as mini-trial)	Hardy	5 TOR3d 178 (Tr. Ct., Sep. 02, 2025)
In the Matter of the Estate of John Miles Gil	AV2025-0092	11/14/2025	Order applying ARS 14-2114 for disinheritance	Alcoverde	5 TOR3d 185 (Tr. Ct., Nov. 14, 2025)

APPELLATE DECISIONS

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
04/22/15 7:30am
DATE/TIME
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IN THE COURT OF APPEALS
OF THE TOHONO O'ODHAM NATION

Elvira Ester AGUILLA,	)	
	)	
Appellant	)	
	)	
v.	)	**Case No. CTA-0127**
	)	**(Ref. Case No. : 2011-0966CR)**
TOHONO O'ODHAM NATION,	)	
Appellee	)	**ORDER REMANDING TO TRIAL COURT**
	)	

Before Judges Barbara Atwood, Amy Courson, and Michael Brown.

Appellant Elvira Ester Aguilla, through her legal counsel, appeals the judgment and sentence of the Judicial Court of the Tohono O'odham Nation, rendered on or about August 25, 2014. Appellant argues that the officer lacked reasonable suspicion to stop her vehicle.

I.
BACKGROUND

On July 5, 2010, Tohono O'odham Police Officer Ray Shaulis observed a vehicle traveling westbound on Arizona State Highway 86 at road marker 117. The vehicle was travelling below the posted 65 MPH zone. Officer Shaulis observed the vehicle drift toward and touch, but not cross, the white line on the right side of the west bound traffic lane more than once over the course of the next half-mile. Based upon his observations, Officer Shaulis initiated a stop of the Appellant's vehicle.

The lower court held a Probable Cause Hearing on April 8, 2013. Officer Shaulis was the only witness at the Probable Cause Hearing. The lower court found that (1) the Appellant was traveling below the posted speed limit and (2) the Appellant's vehicle "drifted over or touched the white line on the right side of the road several times." The lower court applied a "totality of the circumstances" test, which also took into account public safety and the public interest, and found that there was sufficient reasonable suspicion to initiate the traffic stop of the Appellant.

On May 20, 2013, during the course of the lower court proceedings, Appellant submitted an interlocutory appeal raising the same issues as are raised in this appeal. The Court of Appeals determined that, since Appellant had failed to get permission to raise such an appeal prior to judgment and sentence, the Court of Appeals did not have jurisdiction at that time. Sentence has now been given in the lower court proceeding pursuant to a Plea Agreement, which preserved Appellant's right to appeal on the issue of reasonable suspicion to stop.

Appellant argues that traveling less than ten miles per hour under the posted speed limit and touching, but not crossing, the white line do not amount to reasonable suspicion that justifies an investigatory traffic stop.

The Nation (hereinafter "Appellee") makes three arguments in response. Appellee first argues that a "totality of the circumstances test" should be applied and that, because the officer could articulate two particularized reasons for initiating the stop, the stop was based upon reasonable suspicion and should be upheld. Second, Appellee argues that the public interest must be balanced against an individual's right to personal security. Third, Appellee argues that the appeal should be rejected on procedural grounds because Appellant failed to meet the burden of proof required during the Probable Cause Hearing.

The Court of Appeals, sitting en banc, finds it has jurisdiction over this matter and accepts this Appeal pursuant to Rule 13(a) of the Tohono O'odham Court Rules of Appellate Procedure.

II.
ANALYSIS

The requirements of the Fourth Amendment apply to the Tohono O'odham Nation as a result of the Indian Civil Rights Act, 25 U.S.C. § 1302(a)(2) (prohibiting unreasonable searches and seizures). In determining whether Appellant's traffic stop was unreasonable, our standard of review is de novo, but in exercising de novo review, we must take into account the "totality of the circumstances" and give due weight to inferences drawn from facts by the court below and the enforcing officer. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). In *Ornelas*, the Court held that "as a general matter determinations of reasonable suspicion . . . should be reviewed de novo on appeal." *Id.* The Court acknowledged, however, that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* Accord, *U.S. v. Arvizu*, 534 U.S. 266, 275 (2002).

The issue in this case is whether, under the totality of circumstances, the lower court clearly erred in finding that Officer Shaulis had reasonable suspicion to justify the stop of Appellant's vehicle. This Court reviewed the audio recording of the Probable Cause Hearing held on April 8, 2013. During this hearing, Officer Shaulis was questioned by counsel for both the Appellant and the Appellee. Officer Shaulis testified that the Appellant touched, but did not cross, the white line on the right-hand side of the roadway three times within the course of a half-mile. Though the touching was repeated over a short distance, this Court finds it significant that the Appellant did not cross the white line.

The Officer testified that he also took into consideration the fact that Appellant was driving under the posted speed limit. There is conflict in the facts with regard to Appellant's actual speed. The Trial Court's decision noted that while Officer Shaulis testified that Appellant's speed was 56 MPH, his report stated 58 MPH. Court Findings and Order 1, 3 (April 30, 2013). Appellee's Response Brief states that Officer Shaulis observed Appellant's vehicle travelling 58 MPH.

Nation's Appellate Response Brief at 8. In light of the ambiguity in the lower court's findings and the representation in Appellee's own brief, we accept that Appellant's speed was in fact 58 MPH. While the difference between 56 MPH (9 miles under the speed limit) and 58 MPH (7 miles under the speed limit) is small, that difference is significant in a totality of the circumstances analysis.

Importantly, in this case Officer Shaulis did not observe a violation of the traffic laws by Appellant. If the officer's articulated basis for the investigatory stop were based upon a violation of the Traffic Code, Title 23, Section 665-163h, we would be compelled to find that the stop was not justified. Appellant cites to compelling case law interpreting substantially similar provisions of traffic laws from the State of Arizona and other states. In the cited cases, the courts held that it was not enough for a driver to touch the white line. Instead, the driver must actually *cross* the white line before the court can make a finding of a violation of a traffic law that requires that a vehicle shall be driven as nearly as is practicable within a single lane.

Officer Shaulis testified that he received training to identify the signs of impaired drivers. Part of that training taught him that impaired drivers may drive under the posted speed limit. Appellee argues that Officer Shaulis applied a "totality of the circumstances" test and concluded that Appellant's reduced speed and touching the white line created reasonable suspicion to initiate the stop. Appellee relies on *U.S. v. Padilla* as a case in which similar facts were deemed to fulfill the totality of the circumstances test required to uphold an investigatory stop. *U.S. v. Padilla*, 2010 WL 185998 (D. Ariz. 2010) (unpublished decision), *aff'd sub nom. United States v. Thomas*, 468 Fed. Appx. 714 (9th Cir. 2012). We find that the facts of *Padillla* are distinguishable from the facts in this case.

In *Padilla*, the District Court ultimately found that the officer who initiated the stop had articulated reasonable suspicion that four separate *traffic violations* had occurred. *Id.*, at *3. As was discussed above, violation of traffic laws is not at issue in this case. The *Padilla* court noted that "[t]here was also reasonable suspicion to believe the driver to be drinking or fatigued because he was driving slower than normal and on and along the fog line." Significantly, that finding was in addition to the finding based on multiple possible traffic violations. Moreover, in *Padilla*, the driver was travelling eleven miles below the speed limit. In this case, Appellant was driving only seven miles below the posted speed limit. Thus, the circumstances in *Padilla* are clearly distinguishable from the circumstances presented in this case.

Appellant's brief cites to the National Highway Traffic Safety Administration's publication, "The Visual Detection of DWI Motorists" ("DWI Detection Guide"), which provides officers with a tool that can be used for determining the probability that a driver is impaired. The DWI Detection Guide guides officers to consider at least one "cue" *in addition* to weaving when making an assessment of whether or not a driver may be impaired. Slow speed is one possible impairment cue listed under the heading "Speeding and Breaking," but slow speed is described as *ten or more* MPH under the posted speed limit.

We acknowledge that the DWI Detection Guide is just that – a guide. Additionally, we have no information that suggests that Officer Shaulis used the DWI Detection Guide or similar guidance when determining whether reasonable suspicion existed to stop the Appellant. Further, we recognize that case law requires us to give deference to the observations of experienced

officers, such as Officer Shaulis. Nonetheless, we interpret the DWI Detection Guide's guidance to suggest that a driver's observed speed should be significantly less than the posted speed limit, presumptively 10 or more MPH below the posted limit, before an officer is justified in finding reasonable suspicion to initiate a stop.

As explained above, based upon the facts recited in Appellee's brief, Appellant was traveling 58 MPH, only seven miles below the posted speed limit. We are left with a very slender justification for the stop: Appellant's speed was not significantly below the posted limit, and Appellant's vehicle touched but did not cross the white line. Because Appellant did not violate a traffic law and the officer did not assert any other particularized or objective bases for the stop, we conclude that the totality of the circumstances in this case do not support a finding of reasonable suspicion that justifies the stop.

Appellee's second argument is that the stop should be upheld because the public interest outweighs the Appellant's right to privacy and her freedom from unreasonable searches. The court below placed considerable weight on the public interest in maintaining highway safety within the Nation. See Court Findings and Order, April 30, 2013. The public interest in law enforcement, however, is embedded within the Supreme Court's Fourth Amendment standards. In *Michigan v. Summers*, 452 U.S. 692, 699 (1981), the Supreme Court recognized that in light of the strong public interest in law enforcement, certain limited intrusions can be justified by less than probable cause. The Court did *not* hold that a traffic stop based on less than reasonable suspicion could be upheld because of the public interest. This Court is very mindful of the harm that drunken drivers pose to the members of the Nation or any other persons encountered on the roadway. We must comply with the Indian Civil Rights Act, however, which shields individuals from unreasonable searches and seizures. In particular, stops such as that involved in this case must be based upon reasonable suspicion. A stop that violates an individual's right to privacy cannot be upheld solely on the basis that the search resulted in evidence of a crime.

Finally, Appellee argues that Appellant failed to meet the burden of proof required during the Probable Cause Hearing. Appellee cites to *Rakas v. Illinois* and argues that Appellant failed to show that her Fourth Amendment rights were violated by the challenged search or seizure. 439 U.S. 128 (1978). The *Rakas* opinion, which concerned a defendant's standing to challenge a search, framed the question courts should ask when presented with motions for suppression of evidence: "[T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Id.* at 140. On a motion to suppress, if the evidence relied on by the Government fails to meet constitutional standards, a criminal defendant need not introduce any evidence to the contrary. In this case, because the facts showed that there was no reasonable suspicion, the search violated Appellant's right to privacy, and, thus, suppression is proper.

Therefore, based upon the foregoing, this Court concludes that the combination of traveling at a speed not significantly below the posted speed limit and weaving within a single lane but not committing a violation of traffic laws, without more, does not meet the totality of the

circumstances test required for a finding of reasonable suspicion. The case is remanded to the trial court for disposition of all remaining matters consistent with this Decision.

Ordered and issued this 21st day of April 2015.

Signing for the Court:

Barbara A. Atwood

Barbara Atwood, Judge Pro Tem
Presiding Appellate Judge

TOHONO O'ODHAM NATION
JUSTICE CENTER

TRIAL COURT DECISIONS

FILED
IN THE
JUDICIAL COURT
OF THE
TOHONO O'ODHAM
NATION
11/25/12:00
DATE/TIME
Frances Rios
COURT CLERK

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
ADULT CIVIL DIVISION

Sara Magdalena Salazar,
Petitioner,
vs.
Manalito Andre Jose,
Respondent.

Case No.: AV2022-0086

ORDER

A Trial on the Respondent's Petition to Modify Parenting time took place on October 22, 2025. Manalito Jose appeared, and was represented by Robert J. Curigliano. Sara Salazar appeared, and was represented by Jeffrey P. Judge. The parties were sworn in and testified. Stipulations were made on the record, and those issues that were not agreed upon were testified to. Proposed worksheets were provided to the Court. Closing arguments were made, and the matter was taken under advisement.

Note: Although Mr. Jose filed a petition to modify parenting time, seeking equal parenting time, and although equal parenting time could have an impact on child support, the Court takes no action on the petition to modify parenting time at this time, as this is outside the scope of the scheduled hearing. The Court notes, however, that service of the Petition was provided in open Court.

The Petition to Modify Parenting Time is set for a Trial on January 8, 2026, from 9 a.m. to noon. The Court will interview the minor child on

Friday, November 21, 2025, at 2 p.m. Neither party is to coach the child. If they do, the Court will impose sanctions.

The Court finds and orders as follows:

1. The Court has personal and subject matter jurisdiction.
2. The Petitioner/Mother's monthly gross income is $3,501.23. She pays $12 per month for medical, dental and vision insurance premiums. She has no other children.
3. The Respondent/Father's monthly gross income is $4,826.48. He has one other child that lives with him.
4. Neither parent incurs regular monthly day care expenses.
5. When school is in session, Respondent/Father exercises parenting time from noon on Fridays through Sundays, at 5 p.m. The Court believes that Father should be credited with one full day for Friday parenting time, since the child is not with his mother. Regarding Saturday, it is a full 24-hour period. For Sunday, the child wakes up with father, eats lunch, and possibly dinner, and stays with father for a total of 17 hours. The Court gives father a credit of 3 days of parenting time every school week.
6. For the summer break, Respondent/Father exercises equal parenting time. The summer break is approximately 12 weeks. This results in approximately 42 days of parenting time during the summer.
7. The parents divide up the Christmas, Fall and Spring Breaks. This results in approximately 14 more days of parenting time.
8. There are 52 weeks in a calendar year. Taking away 12 weeks for the summer, 2 weeks for Christmas Break, and 2 weeks for Fall and Spring

Break, the net is 36 weeks. 36 weeks multiplied by 3 parenting time days per week totals 108.

9. Adding 108, 14 and 42 from above totals 164 days of parenting time. This is close to equal parenting time, but no exactly equal.
10. The Court prepared and adopts the attached Tohono O'odham Child Support Worksheet.
11. The Court recognizes that the Nation's Guidelines give no credit for parenting time days exercised. The Nation's Worksheet would result in the Respondent/Father paying $650.05 in child support per month, even though Father has the child for a substantial amount of parenting time. The Court finds that it is unfair and unequitable to disregard the substantial parenting time exercised by the Respondent/Father in this case, especially in light of the Tohono O'odham Nation's Family Law and Will Procedures, Rules 2.6, 2.7 and 2.8, which allow the Court to deviate from the Guidelines based on the specific expenses related to shared custody, the costs of parenting time, and to reduce the amount of support paid to a custodial parent when the noncustodial parent is directly providing for a child's needs for an extended period, such as on a long visit.
12. Rule 2.6 of the Family Law and Will Procedures says that the Nation's "guidelines seek to remove financial incentives associated with custody and visitation arrangements." However, no other guidance is given. Neither party pointed the Court to an O'odham custom or tradition on point.
13. Pursuant to 4 T.O.C. ch. 1, § 1-102, the Court finds and determines that no O'odham law or custom gives guidance on adjusting child support when a

parent exercises substantial parenting time. The Court therefore exercises its discretion to look to Arizona law for guidance.

14. Arizona's Child Support Guidelines do give parenting time day credit. The Court will use Arizona's Child Support Guidelines and Arizona's Child Support Calculation. Based on the identical values, but providing for 164 days of parenting time credit, Respondent/Father would owe $39 a month in child support to the Petitioner/Mother. The Court ran an Arizona Support Calculation for equal time, and the amount also results in $39 per month in child support. The Court adopts both Arizona Child Support Worksheets.

15. The Court rejects adopting the Child Support Worksheets provided by the parties.

16. The Court notes that there is a gap in the O'odham Support Guidelines regarding parenting time day credit. The parties are free to ask their legislative representatives to seek legislation on this very important issue if they wish.

17. Although there was no Proof of Service filed, the Petitioner filed a Response to the Petition to Modify Child Support in August of this year.

18. The Court therefore orders as follows: effective September 1, 2025, the Respondent/Father, Manalito Andre Jose, will pay $39 per month in Child Support to the Petitioner/Mother, Sara Magdalena Salazar, for the support of their child, S[redacted] J[redacted].

19. The Court adopts and approves the separately filed Wage Assignment.

20. The Court directs the Clerk of Court to serve a copy of this Order to the Court's Accounting Department, so that a Child Support Ledger can be generated.

21. The Court will review the Ledger in Chambers as soon as it is completed and see whether the Wage Assignment needs to be amended to address arrearages, if any are owed.
22. The Court further orders: any uncovered medical, dental or vision expenses incurred by the parties on behalf of their daughter will be shared as follows: 47% to be paid by the Petitioner/Mother; 53% to be paid by the Respondent/Father.
23. The parties will alternate claiming the minor child tax credits, based on the current allocation.
24. This is a final, appealable order.

Dated November 6, 2025.

Judge Rene Alcoverde Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Susie Siquieros DOB: 04/02/1912 DOD: 02/13/1981 Decedent	Case Number: AV2023-0116 **OPINION AND ORDER AND RE. PROPERTY DISTRIBUTION**

SUMMARY: Opinion and order declining to apply O'odham custom as not proven, and instead applying equity and best interests of the estate and heirs to distribute estate property.

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of:	Case Number: AV2022-0116
Susie Siquieros	
DOB: 04/02/1912	**NOTICE OF ERRATA**
DOD: 02/13/1981	
Decedent	

FILED IN THE TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

The Court hereby notifies the parties that the OPINION AND ORDER AND RE. PROPERTY DISTRIBUTION filed May 19, 2025, contained two typographical errors that the Court now corrects.

1. Both were in the first page, in the caption at the top of the page.
2. The Case Number at the top right is corrected from "AV2023-0116" to "AV2022-0116".
3. The title of the document is corrected from "OPINION AND ORDER AND RE. PROPERTY DISTRIBUTION" to "OPINION AND ORDER RE. PROPERTY DISTRIBUTION".
4. These errors are typographical only and do not affect the substance of the Order.

Signed June 25, 2025

Judge Joseph Hardy Jr.

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Susie Siquieros DOB: 04/02/1912 DOD: 02/13/1981 Decedent	Case Number: AV2023-0116 **OPINION AND ORDER AND RE. PROPERTY DISTRIBUTION**

I. Background

Susie Siquieros (Decedent) passed on February 13, 1981. She died without a written will. Her estate was partially probated in 1990-91 (case no. 90-P-4886 in this Court). The only property included in that case was a brand and cattle. Pursuant to agreement among Susie's six adult children living then, the brand and then-living cattle went to Susie's daughter Elizabeth Siquieros, with future calves of those cattle going to five of the children in a specified order. The sixth surviving child, Nina M. Innis (now Nina M. Siquieros, the Personal Representative in this case), chose not to participate in the livestock assignment. There was no mention in that prior probate of the adobe home at issue here, or of any other property besides the cattle and the brand. The Court here was not made aware of that prior probate until very late in this case.

Nina M. Siquieros (Personal Representative) then filed a Petition to Appoint Personal Representative and Petition to Probate Estate (Petition) for the Estate of Susie Siquieros on September 29, 2022. She was later appointed as Personal Representative (Order May 23, 2024).

The Petition listed as Estate property: a traditional adobe home in the Sells District (the Adobe Home or the Home), household furniture, and personal effects. An Inventory

of Estate's Property filed January 18, 2023, clarified that all personal effects were previously shared among Susie's adult children around the time of her passing. The Inventory also stated that there were several fixtures and bedframes in the Adobe Home, estimated at the time at around $3,000. However, The Personal Representative later had an appraisal that concluded those fixtures were not worth anything.

II. Issue

In the Petition, the Personal Representative asked that she be named the sole heir of Susie Siquieros. However, after lengthy searches and attempts at service through various methods, the Personal Representative and one of the Decedent's great grandchildren, Jennifer Celaya (Respondent), agreed on a list of heirs. (Order filed July 8, 2024.)[1] That list includes 27 surviving descendants of Susie Siquieros, excluding those that renounced their interests and those found to be excluded by prior wills of other family members.

Shortly before that determination of heirs, when the Court found all interested parties had been provided notice, and again when the Court approved the Parties' agreement on heirs, the Personal Representative reiterated her original position that she should be the sole recipient of the Adobe Home. She did this despite agreeing to multiple heirs. Also while agreeing to multiple heirs, Jennifer Celaya said that the Adobe Home should go only to her. (See Order May 23, 2024, p. 2, 5-7; Order July 8, 2024, ¶¶ 2-3.)

Both the Personal Representative and the Respondent said they would prove their positions with the Nation's customs. (Order July 8, 2024, ¶¶ 2-3.) The Court notified all heirs that they would be doing this, as was their right under controlling Tohono O'odham law, and explained how the other heirs could assert their own claims on where the Adobe Home should go, if not just to the Personal Representative or just to the Respondent, or if

[1] Because the Personal Representative and the Respondent are the only two heirs that chose to participate in these proceedings, they are referenced in this Order as the Parties.

any other heirs objected to the process generally. (Order July 8, 2024, ¶¶ 6-7.) No other heir did either.

The Court must now decide who gets the Adobe Home.

III. Applicable Laws

A. Customs of the Nation

> *In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation.* ***If*** *a Tohono O'odham Court finds that there is* ***no Tohono O'odham law or custom*** *which address the claims asserted, the court* ***may in its discretion*** *look to the laws of the State of Arizona for* ***guidance****.*
>
> 4 T.O.C. ch. 1, § 1-102 (emphasis added).

The Tohono O'odham Constitution, and the Nation's laws and ordinances, do not address intestate succession, or how property passes without a written will. Under 4 T.O.C. ch. 1, § 1-102, the next law this Court is required to apply is the Nation's customs.

> *O'odham custom may be proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation.*
>
> Id.

The Personal Representative elected to prove under 4 T.O.C. ch. 1, § 1-102, "by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation", see id., that the Adobe Home should go solely to her under the custom that the only surviving child inherits a parent's property. (See Response to Respondent Jennifer Celaya's Motion to Disqualify Nina Siquieros as a Personal Representative 1, Oct. 23, 2024.) In contrast, but also under 4 T.O.C. ch. 1, § 1-102, Jennifer Celaya appeared to choose to prove that the Adobe Home should go to her by looking to the intentions of Pete Siquieros (Susie Siquieros' husband)—charging their daughter Elizabeth Siquieros with the duties of the eldest child, then following Elizabeth

Siquieros' intentions, which were to grant the Adobe Home (erroneously thought to belong to Elizabeth) to Jennifer Celaya. (See Resp. Pretrial Stmt. (Amended) Sept. 25, 2024.)

B. Burden of Proof

"As a matter of law, it is axiomatic that . . . the proponent for application of tribal custom has the burden to offer proof to satisfy the evidentiary requirements implicit with this kind of fact." In re Norris, 1 TOR3d 63, 64 (Tr. Ct. 1988). Though prior Trial Court decisions are not conclusive, they are persuasive. T.O. R. Ct., § 1, R. 8.2(d). The Court finds this rule persuasive and applies it here.

Both Parties followed this rule during two trials on customs of the Nation. The Personal Representative, representing herself, and Jennifer Celaya, represented by Belinda BreMiller of the Tohono O'odham Advocate Program, called Tohono O'odham elders as witnesses, and presented evidence, to support their cases. The following witnesses testified:

Called by the Nina Siquieros / Personal Representative:
Diane Garcia
Joseph Enos

Called by Jennifer Celaya / Respondent:
Ned Norris Jr.

The Court is not aware, however, of any Tohono O'odham law or custom on the burden of proof *level* required to establish customs of the Nation. Therefore, pursuant to 4 T.O.C., ch. 1, § 1-102, the Court exercises its discretion and looks to Arizona law for guidance.

Under Arizona law, the basic standard for proving facts in a civil matter is "preponderance of the evidence" or over a 50% likelihood. See Aileen H. Char Life Interest v. Maricopa County, 208 Ariz. 286, 291 (2004) ("We perceive no reason to depart from the usual rule that a plaintiff must establish each element of a civil action by a preponderance of the evidence, and we hold that standard applies.").

That is in accordance with other jurisdictions. The Court further FINDS that the Nation's customs are factual matters, see the quote from In re Norris above in this subsection, and this is a civil case. Therefore, the Court here HOLDS that the preponderance of evidence standard applies to the Parties' proving the Nation's customs under 4 T.O.C. ch. 1, § 1-102.

IV. Motion to Disqualify Personal Representative

Respondent filed a Motion to Disqualify Nina Siquieros as a Personal Representative dated October 14, 2024 (Motion to Disqualify). Upon review of the written and audio record, the Court does not find that it ruled on it. It does so now.

The Motion to Disqualify heavily cites Arizona fiduciary law, correctly noting that the Tohono O'odham Code does not provide a definition of fiduciary. (See Motion to Disqualify 4-5.) The Court agrees that looking to Arizona law for guidance may be an appropriate exercise of the Court's discretion in such a case under 4 T.O.C. ch. 1, § 1-102.

However, more appropriate would be to look to Arizona law for guidance on removal of personal representatives directly. That also is lacking in Tohono O'odham law, and Arizona law speaks specifically to that in A.R.S. § 14-3611. Accordingly, the Court would likely exercise its discretion under 4 T.O.C. ch. 1, § 1-102 and look to that law.

A.R.S. § 14-3611 lays out several specific circumstances for removal of a personal representative. Respondent did not cite or argue any of those in her Motion to Disqualify. It is possible that one of Respondent's arguments could be adapted to one of the circumstances listed in A.R.S. § 14-3611. But they are not apparent on their faces, and the Court will not make the Respondent's arguments for her.

Neither does the Court find any of Respondent's arguments applicable here. First, the fiduciary arguments contain only allegations, without factual support. Even if they were

proven, however, the Court does not see how they would constitute grounds for removal; perhaps civil liability, but not removal.

Respondent also claims that the Personal Representative was trying to disinherit the named heirs of their "entitlements". (Motion to Disqualify 3.) Even if such intent was proven (which it was not-the Court sees nothing more than a good-faith assertion of an inheritance theory under a Nation's custom), that assumes Arizona law applied, which had never been determined.

Under 4 T.O.C. ch. 1, § 1-102, the Court only looks to Arizona law, for *guidance*, in its *discretion*, if there is nothing on point in the Nation's Constitution, laws, or *customs*. Despite Respondent's apparent belief that it is virtually "settled law" that Arizona probate law governs intestate cases in this Court (see Motion to Disqualify 3), it is not. Practice cannot override the Code. It is very often—maybe almost always—used, but that is because there is nothing in the Nation's Constitution or laws on point, and parties seldom assert the Nation's customs. Therefore, under 4 T.O.C. ch. 1, § 1-102, it can be useful and efficient (and aid in predictability) for the Court to exercise its discretion and look to Arizona law for guidance. But even there it is not mandatory. And occasionally parties *do* assert, and prove, the Nation's customs. In such cases, the Court *must* use that as controlling law and may not even consider Arizona law. Likewise, when the Parties here assert custom, the Court may not even consider Arizona law with respect to distribution of the Adobe Home unless and until neither Party proves custom.[2]

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[2] The Court does find it somewhat problematic that the Personal Representative agreed to 26 "heirs" besides herself. Though the term "heir" is not defined under Tohono O'odham law, it typically implies entitlement to at least *some* part of a decedent's estate, determined by the applicable intestacy laws of a jurisdiction. See, e.g., *Black's Law Dictionary* (7th ed.) ("1. A person who, under the laws of intestacy, is entitled to receive an intestate decedent's property, esp. real property"). Thus, it could be argued that all heirs here are entitled to at least some portion of the Estate, though not necessarily the full portion that Arizona intestacy law would mandate, as Respondent seems to argue. On the other hand, the Personal Representative maintained her position that, pursuant to Tohono O'odham custom, she is the sole heir entitled to the Adobe Home despite agreeing to naming other heirs. See Section II *supra*. Further, there is Court precedent in

Moreover, even if the other heirs were previously entitled to a portion of the Adobe Home, they were notified that the Parties here were each seeking the Adobe Home exclusively to themselves, and given the chance to object and/or assert their own claim(s) under the Nation's customs. See Section II *supra*; (Order July 8, 2024, ¶¶ 6-7.) They were also notified of the proceedings following that, including the Parties' position statements, witness lists and summaries, and Court orders summarizing the trials.

"At its core, the due process guarantee requires reasonable notice and a meaningful opportunity to respond." Escalante v. Sells Dist. Council, 2021 TOR Supp. 36, 44 (Ct. App. 2017). The named heirs here were provided both. And of course, the Personal Representative and the Respondent fully participated. Thus, even if any heir had an entitlement in the Adobe Home before this decision, due process would have been satisfied before "disinheriting" them *if* they were left with no interest in the Adobe Home.

There is also no bill of attainder here. The Parties are asserting, and the Court is following, the Nation's customs as the controlling law. That is what is required under 4 T.O.C. ch. 1, § 1-102.

In short, the Court does not find grounds for removing Nina Siquieros as Personal Representative. Though neither party raised the Arizona statute that addresses removal (and

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naming heirs first, and then determining what their respective intestate shares are. See In re. Anita, 4 TOR3d 10, 12 (Ct. App. 2023) ("In a probate case, the Court will determine heirs or identify people named in a will at the beginning of the case. When distributing the estate's assets, the Court must distribute the assets in accordance with the Constitution.") (internal citations omitted); In re. Norris, 1 TOR3d 63, 63 (Tr. Ct. 1988). Here, the "applicable intestacy laws" would be the proved custom—that the Adobe Home goes either only to the Personal Representative or only to the Respondent. As the Adobe Home may be the only Estate property, leaving the other heirs with nothing, perhaps the definition of "heir" under Tohono O'odham law would not follow the typical definition. See 9 T.O.C. ch. 1, § 16 ("In the determination of the heirs the Court shall apply the custom of the Tribe as to inheritance."). But the Court need not answer this question definitively here, given the ultimate holding below. However, it notes for future reference that the better practice for all parties and the Court may be to wait to determine heirs until after all interested parties have announced whether they intend to prove distribution and/or heirs by the Nation's customs, and have had the chance to do so, and make those determinations together.

as discussed above, it is not controlling here but the Court would likely find it useful for guidance) the grounds for removal there appear to focus on the personal representative's duty to the estate. Respondent's arguments focus on the claimed wrongs against her, and to some degree the other heirs. While those could justify some other remedy, if proven (which the Court does not see here), they do not seem to justify removal. The Personal Representative has consistently shown good-faith and diligent efforts to preserve the Estate and distribute the Estate property how she believes it should be distributed—despite Respondent's consistent and strong disagreement with that belief. Therefore, the Motion to Disqualify is DENIED.

V. Findings of Fact & Conclusions of Law

After considering the weight and credibility of the witnesses and other evidence, and applying the law, the Court FINDS and ORDERS as follows:

A. Customs not set in stone

1. Witnesses called by both parties agreed that customs of the Nation can differ from District to District, from village to village, and can change over time. Therefore, the holdings in this case with respect to customs are specific to the facts and circumstances of this case.

B. Personal Representative-eldest surviving child inherits

2. Only one witness said that it is always the custom that the eldest child (male or female) inherits property (if there was no oral will) if that child is able. (Testimony of Diane Garcia.)
3. Even the other witness called by the Personal Representative did not mention this custom. Rather, he focused on the importance of sharing, and how that has been a central O'odham custom throughout the ages. (Testimony of Joseph Enos.)

4. The witness called by the Respondent did mention this custom, but stated that it was the oldest *male* child. (Testimony of Ned Norris Jr.) Moreover, he said that if there was no oral will, it was just as likely that the family would meet to come to a consensus for distributing the property. (Id.)
5. With only one of three witnesses solidly supporting this position of the Personal Representative, the Court FINDS that she has not proven this custom by a preponderance of the evidence.

C. Respondent-Intentions of prior owner and subsequent caretaker

6. Respondent had earlier argued that we should follow the intentions of Pete Siquieros (Susie Siquieros' husband), who had charged their daughter Elizabeth Siquieros with the duties of the eldest child, then follow Elizabeth Siquieros' intentions, which were to grant the Adobe Home (erroneously thought to belong to Elizabeth) to Respondent. (See Resp. Pretrial Stmt. (Amended) Sept. 25, 2024.)
7. Respondent did not, however, provide any witness testimony to support this theory as a custom of the Nation under 4 T.O.C. ch. 1, § 1-102.
8. Respondent did at closing argument seize on testimony of one of the Personal Representative's witnesses (Diane Garcia) that the father is the head of the family.
9. From that, the Respondent says it follows that:
    a. because the original owner of the Adobe Home (Pete Siquieros), the father, willed the home to his wife Susie Siquieros (the Decedent) but charged their daughter Elizabeth Siquieros as caretaker of the home and the whole compound (which the Court does FIND as proven facts) and
    b. because Elizabeth Siquieros, as caretaker, allowed the Adobe Home to be shared by many family members over the years (with consultation of other

family members) and Susie never included the Adobe Home in a will, written or oral (which the Court also FINDS as proven facts), and

c. because Elizabeth Siquieros believed that she owned the Adobe Home and wanted to give it to the Respondent (for which some evidence was provided, but the Court does NOT FIND either of those proved by a preponderance of the evidence), that

d. the Adobe Home should go to the Respondent.

10. As noted above, the Court did not find several of the factual links in this chain proven by a preponderance of the evidence, as required.

11. Further, with just one of three witnesses saying that the father is the head of the family, the Court does NOT FIND this custom proven by a preponderance of the evidence.

12. Nor does the Court FIND the overall custom of following the intentions of the father to a non-owner caretaker to distribute property proven by a preponderance of evidence, whether or not she believed she owned it (no witness testimony was provided to support this theory).

13. Therefore, the Court FINDS that the Respondent has not proven this theory by a preponderance of the evidence.

D. No Customs Proven

14. For the reasons above, the Court FINDS that neither Party has proven a custom of the Nation by a preponderance of the Evidence under 4 T.O.C. ch. 1, § 1-102.

VI. Equity

15. As should be clear by now, even without any custom of the Nation proven, this Court is not bound to apply Arizona intestacy law to decide who gets the Adobe Home. See Sections IIIA & IV *supra*; 4 T.O.C. ch. 1, § 1-102 ("***If*** a Tohono

O'odham Court finds that there is ***no Tohono O'odham law or custom*** which address the claims asserted, the court ***may in its discretion*** look to the laws of the State of Arizona for ***guidance.***) (emphasis added).

16. The Court will, however, *start* there, and *note* that under A.R.S. §§ 14-2103 & 14-2106, the named heirs would share in the Adobe Home, in varying degrees based on their proximity in relation to Susie Siquieros.

17. One witness stated that a judge should try to get an understanding of the family to try to make a decision in the best interests of the family. (Testimony of Ned Norris Jr.) Both parties appeared to support that.

18. This also aligns with the Tohono O'odham Judicial Court being one of equity as well as one of law. See T.O. CONST. art. VIII, § 2 ("The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity[.]"); 4 T.O.C. ch. 1, § 1-101(a) ("The Tohono O'odham Courts . . . are empowered to hear all actions in law and equity arising under the Tohono O'odham Constitution, the laws, ordinances or customs of the Tohono O'odham Nation[.]"); Emerson v. Nation, 2021 TOR Supp. 19, 21 (Ct. App. 2015) ("The judicial power of the Tohono O'odham Nation is vested in the Tohono O'odham Judiciary and extends to all cases and matters in law and equity arising under the Constitution.") (internal citation omitted).

19. Jennifer Celaya presented strong evidence that the Adobe Home was held out for use by extended family members throughout the years. Nina Siquieros acknowledged this.

20. Jennifer Celaya also presented evidence that many family members anticipated that either shared use, or multiple family member interests in the Adobe Home, would continue.

21. Nobody (including the Personal Representative and the Respondent) claimed that any family members—throughout the years since the time Susie Siquieros was alive—expected or wished the Adobe Home to *not* be shared by any other family members.

22. Though not proven as a custom of the Nation in this case, one of the Personal Representative's witnesses focused almost entirely on sharing as a critical part of the O'odham Himdag, especially with family ("famiglia"). (Testimony of Joseph Enos.)

23. Both parties stated several times that they would be okay with—even favor—extended family members sharing the Adobe Home. (Respondent's Pretrial Statement (Amended), 9 Sept. 30, 2024 ("Respondent's Proposed Solution", first, if each of Elizabeth Siquieros' descendants are awarded ¼ interest in her HUD Home, which they were, "then Mrs. Susie Siquieros' home should go equally to all heirs who are entitled [sic] to an interest in the home."); Personal Rep. Response to Jennifer Celaya's Pretrial Statement, Oct. 9, 2024 3-4 ("As to other family members' interest in the homestead, they are welcomed to share in the wealth, which comes with responsibilities, sharing, care of property and respect for what has been left for the elders.") ("Sharing in the inheritance is acceptable and desired, but ownership requires those responsible traits that would ensure protection and furtherance of the valued property, to be shared as appropriate and just in the judgment of the heir or heirs."); Personal Rep. Closing Arg., Nov. 14, 2024; Respondent Closing Arg. Nov. 14, 2024.)

24. As evident in the above quotes from Nina Siquieros, however, she qualified that sharing the Adobe Home should come with sharing respect and responsibility for the property.

25. The Court finds this concern valid, especially with the large number of heirs (27), many of whom have had little or no recent contact with each other.

26. Nina Siquieros said she is willing to be the caretaker of the Adobe Home, and to get it into habitable shape so it can be used by her and extended family. (Personal Rep. Closing Arg., Nov. 14, 2024.)

27. As explained in Section II *supra*, no other heir besides Nina Siquieros and Jennifer Celaya provided any input for this matter after invitation.

VII. Distribution Orders

28. Weighing the foregoing, the Court FINDS it to be in the best interests of the Estate and the heirs, and to be equitable, and so ORDERS, as follows:

A. Adobe Home awarded to all heirs in fractional shares

29. To continue the family tradition of sharing the Adobe Home, which the Parties stated they want to continue, the Adobe Home is awarded to all the previously agreed-upon heirs.

30. Pursuant to 4 T.O.C. ch. 1, § 1-102, the Court exercises its discretion and looks to Arizona law for *guidance* to determine the shares of ownership among the heirs.

31. A.R.S. §§ 14-2103 & 14-2106 provide the method for determining the shares of intestate ownership among multiple generations of descendants.

32. However, in this case, necessary facts for that process were not established; *i.e.*, the number of surviving descendants and predeceased descendants with surviving descendants of their own in each generation with surviving descendants. See A.R.S. 14-2106.

33. Accordingly, the Court, using that statute for guidance only, will start with the information from Susie Siquieros' prior probate (see Section I supra).

34. The Petition in that prior probate stated that Susie Siquieros had six surviving adult children. The Petition stated that those children were all the possible heirs.
35. The Nation's Code stated then, as it does now, that all possible heirs must be notified before a determination of heirs is made. 9 T.O.C. ch. 1, § 16.
36. The final Court Order stated that notice had been provided by law, and named the six surviving children as the heirs.
37. Accordingly, although Susie Siqueiros' prior probate was started almost ten years after her passing, the Court here must presume that at the time of her passing she had six surviving children, and no deceased children that had surviving descendants.
38. However, one of Susie's children, Lyman Siquieros, has since passed, and his sole will beneficiary, Jacqueline Siquieros, renounced her interest in the Adobe Home.
39. Therefore, for purposes of A.R.S. § 14-2106, ownership of the Adobe Home is divided into five equal shares at the level of Susie's children. One of those shares (1/5) goes to Nina Siquieros (Susie's last surviving child today).
40. Wilfred Siquieros, another child of Susie's, willed whatever future interest he may have in the Adobe Home to his son, Enrique Siquieros. Thus, Enrique Siquieros also has a 1/5 interest in the Adobe Home.
41. Pursuant to the list of agreed heirs, there are no other surviving grandchildren.
42. Accordingly, the remaining 3/5 interest in the Adobe Home is combined and passed to the level of the great grandchildren.
43. The Court cannot tell the exact number of surviving great grandchildren and deceased great grandchildren with their own surviving descendants. However, each great great grandchild's address is "c/o" an adult. There are five separate c/o adults for the great great grandchildren. Therefore, again emphasizing that A.R.S. § 14-2106 does not control here and the Court is only looking to it for *guidance*, and that

the heirs declined to assert their own claims after notice and the opportunity to be heard (see Section II *supra*), the Court will presume that there are five deceased great grandchildren with surviving offspring of their own.

44. With 5 deceased great grandchildren, plus the 17 listed surviving grandchildren heirs, A.R.S. § 14-2106 would say that the 17 great grandchildren heirs each get 1/22nd of the 3/5 share of the Adobe Home passed to their level, or a 3/110 share of the Adobe Home for each great grandchild heir. The Court so ORDERS that.

45. The other 5 1/22 shares are combined (5/22 of 3/5=3/22) and passed down to the great great grandchild level, and divided equally among them. There are 8 great great grandchildren. Dividing that 3/22 share among them gives them each a 3/176 share of the Adobe Home. The Court so ORDERS that.

46. See Exhibit A for those specific fractional shares assigned to the heirs.

B. Heirs to share costs in proportion to their use

47. Based on fairness (equity), two earlier cases of this Court imposed a requirement that family members awarded co-ownership of property share in its upkeep. In re Francisco, 1 TOR3d 55, 58 (Tr. Ct. 1988) ("In the interests of fairness, the Court further FINDS that the upkeep and maintenance of the rock house must be shared equally by the family members."); In re Norris, 1 TOR3d 63, 68 (Tr. Ct. 1988) (applying In re Francisco) ("all lawful heirs have a right to the use and enjoyment of the land located within the Chukut Kuk District, provided that . . . upkeep or maintenance must be shared among the users in equal proportion to their use.").

48. Likewise, the Court recently imposed the same requirement in the case related to this one, In re Elizabeth Siquieros, AV2023-0113 (Tr. Ct. Apr. 22, 2025) (Order Re. Property Distribution) (unpublished).

49. Again applying Rule 8.2(d) of Section 1 of the Tohono O'odham Rules of Court, the Court finds those prior cases persuasive. Although the former two were decided under a particular Nation's custom, and the latter was determined under a different Nation's custom, and this case is not being decided under any proved custom of the Nation, they offer useful guidance for splitting maintenance costs for a shared property for this case of equity, or trying to determine the best interests of the family.

50. The Court is particularly persuaded by In re Norris—that maintenance costs should be divided based on proportion of usage. That principle applies here, as the heirs may never use the Adobe Home equally.

51. Accordingly, the Court, in its role as a court of equity as noted above, applies that principle here and ORDERS that the heirs share in the upkeep and maintenance of the Adobe Home in equal proportion to their use, and adds or clarifies that maintenance and upkeep includes utilities.

52. The Court extends that principle and requirement here because, unlike those earlier cases, the Adobe Home is currently uninhabitable. Specifically, the Court ORDERS that the heirs share in the repair and restoration of the Adobe Home in equal proportion to their use.

C. Appointment of Caretaker

53. Because Nina Siquieros (i) has one of the two largest fractional ownerships, (ii) volunteered to be caretaker of the Adobe Home and to make it habitable again for use by extended family, and (iii) has been the caretaker of the Adobe Home for approximately the last two years and eight months as the Estate's Personal Representative, the Court appoints Nina Siquieros as Caretaker of the Adobe Home going forward.

54. The Caretaker must consult with any heir who gives notice for matters involving the Adobe Home; *e.g.*, restoration, use, or maintenance. The Caretaker will have final say on judgment matters, though all heirs will have the right to use, subject to their proportional share of restoration and maintenance as described above.

55. The Caretaker will also have the final determination of those amounts, calculating who owes what, and satisfaction of payment, or payment in kind; *e.g.*, heirs doing restoration, repair or maintenance work directly, or paying for it.

56. Any other heirs may, however, challenge those decisions and overrule the Caretaker if (i) heirs holding over 50% of the ownership interests of the Adobe home—all of whom are current in their restoration and maintenance obligations—vote to do so, (ii) one or more heirs successfully challenge such decision(s) in a court of law or equity or through voluntary mediation or arbitration, or (iii) any other grounds are satisfied that the Caretaker and the heirs may come up with from their own system of managing the Adobe Home.

57. The Caretaker is authorized to repair and restore the Adobe Home to make it habitable for use by her and the other heirs.

58. The Caretaker may advance restoration and repair costs (and/or do her own work) and require proportional use reimbursements (money or in-kind) from heirs if and when they wish to use the Adobe Home.

59. The Caretaker may also advance maintenance costs or work, and require proportional use reimbursements from heirs if and when they wish to use the Home.

D. Any other Estate property awarded in like manner.

60. If any other property is discovered to be property of the Estate, it is ORDERED to be distributed to the heirs in the same proportion as the Adobe Home, as listed in Exhibit A.

VIII. Conclusion

61. The Court did not find that either the Personal Representative (Nina Siquieros) or the Respondent (Jennifer Celaya) proved a custom of the Nation by a preponderance of the evidence, which would be controlling law under 4 T.O.C. ch. 1, § 1-102, or that any other heir objected to these proceedings or asserted their own claims after notice and the opportunity to be heard.

62. Pursuant to (i) the Parties' support for trying to determine the best interests of the family as propounded by one of the trial witnesses, (ii) this Court being a court of equity as well as a court of law, (iii) following what the Parties said they would prefer as alternative outcomes (continuing the long family tradition of sharing the Adobe Home among family, with the Personal Representative's caveat that sharing of use should include sharing respect and responsibility), (iv) another witness' emphasis on sharing as a central component of Tohono O'odham Himdag, especially with family, and (v) looking to Arizona law *for guidance only* pursuant to 4 T.O.C. ch. 1, § 1-102, the Court awards the Adobe Home to all of the previously agreed-upon heirs, in the shares listed in Exhibit A.

63. As further detailed in Section VII above:

    a. All heirs must share in the repair, restoration, and maintenance (including utilities) of the Adobe Home in equal proportion to their use.

    b. Nina Siquieros is appointed as Caretaker for the Adobe Home. Subject to consultation requirements and challenge rights of other heirs, she will have decision authority for matters such as making the Adobe Home habitable, use of the home by the heirs, maintenance, etc.

c. Nina Siquieros may advance costs and/or work for restoration, repair, and maintenance, and require proportional reimbursement from other heirs (in cash and/or in kind) if/when they wish to use the Adobe Home.

IX. Miscellaneous

64. If neither Party files any further documents by June 20, 2025, the Court will discharge the Personal Representative, order Belinda BreMiller and the Tohono O'odham Advocate Program withdrawn as counsel for the Respondent with no further obligations in this case, and administratively close this matter.

65. This is a final, appealable Order.

Dated: May 19, 2025

Judge Joseph Hardy Jr.

Exhibit A

Heirs of Suzie Siquieros and their fractional ownership of the Adobe Home (see Section VII of the Order)

CHILDREN

a. Nina Siquieros PO Box 1161, Sells, AZ 85634: 1/5

ALL REMAINING GRANDCHILDREN

b. Enrique Siquieros address unk: 1/5

ALL REMAINING GREAT GRANDCHILDREN: Each listed great grandchild gets a 3/110 share of the Adobe Home

c. Dallas Hendricks 8808 S. Komckud Wag, Tucson, AZ 85746

d. Danielle Hendricks c/o Bryant Hendricks PO Box 2795 Sells, AZ 85634

e. Crystal Hendricks c/o Bryant Hendricks PO Box 2795 Sells, AZ 85634

f. Preston Juan PO Box 2321 Sells, AZ 85634

g. Alan Juan PO Box 1796 Sells, AZ 85634

h. Joshua Osife c/o Virgil Osife PO Box 843 Sells, AZ 85634

i. Lizette Osife PO Box 843 Sells, AZ 85634

j. Jennifer Celaya PO Box 2273 Sells, AZ 85634

k. Hano Dahe 5201 S. Chihuihu Road lot 20 Casa Grande. AZ 85915

l. Pearl Rovie address unkn

m. Tanea Rovie address unkn

n. Melanie Rovie address unkn

o. Francine Schooling 9712 E. Paseo San Rosendo, Tucson, AZ 85747-5044

p. Deanna Benson PO Box 23 Peach Springs, AZ 85634

q. Naomi Tom 229 West Palm Ct. Coolidge AZ 85128

r. Christopher Tom PO Box 3519 Pagosa Springs, CO 81147

s. Marie Hendricks Lewis PO Box 807 Sacaton, AZ 8514 7

ALL REMAINING GREAT GREAT GRANDCHILDREN: each listed great great grandchild gets a 3/176 share of the Adobe Home

t. Sophia Hendricks c/o Chandra Francisco 2800 S. Mission Rd. Apt 7105 Tucson, AZ 85713

u. Madelyn G. Hendricks c/o Chandra Francisco 2800 S. Mission Rd. Apt 7105 Tucson, AZ 85713

v. Hohokamil Hendricks c/o Gwendolyn Juan PO Box 1492 Sells, AZ 85634

w. Gabrielle Hendricks c/o Gwendolyn Juan PO Box 1492 Sells, AZ 85634

x. Leona L. L. Hendricks c/o Gwendolyn Juan PO Box 1492 Sells, AZ 85634

y. Lyric Hendricks c/o Stephanie Velasco 9643 N. 69th Dr. Peoria, AZ 85345

z. Kevin Hendricks c/o Carimissa Williams

aa. Micah Hendricks address c/o Vanessa Trujillo

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Karen L. Joaquin DOB: 09/13/1964 DOD: 03/02/2023 Decedent.	Case No.: AV2023-0085
AND Karen Joaquin, Petitioner, v. Juan Zazueta, Respondent In re: Y[redacted] Z[redacted] DOB: [redacted]	AND Case No.: AV2018-0164 ORDER RE: CHILD SUPPORT ARREARAGES & CONDITIONAL JUDGEMENT And Conditional Judgment

SUMMARY: Order holding child support arrearages are for the benefit of the child under Tohono O'odham law and do not become part of the estate of a deceased parent obligee, and finding conditional judgments allowable under Tohono O'odham law, with an accompanying conditional judgment.

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Karen L. Joaquin DOB: 09/13/1964 DOD: 03/02/2023 Decedent.	Case No.: AV2023-0085
AND	AND
Karen Joaquin, Petitioner, v. Juan Zazueta, Respondent	Case No.: AV2018-0164 ORDER RE: CHILD SUPPORT ARREARAGES AND CONDITIONAL JUDGEMENT
In re: Y[redacted] [redacted] Z[redacted] DOB: [redacted]	

On December 11, 2024, the Court held a Status Hearing for Case No. AV2023-0085 (Estate of Karen Joaquin). Personal Representative Tonya Joaquin appeared, with her counsel Suzanne Laursen of the Tohono O'odham Nation Advocate Program. Juan Zazueta, father of heir Y[redacted] Z[redacted], also appeared. Ms. Joaquin's fiancé, Christopher Lopez, was also present.

Because the hearing also addressed matters from Case No. AV2018-0164 (Karen Joaquin v. Juan Zazueta), the Court orders that, for this Order only, the two cases are consolidated.

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I. Child Support Arrearages

A. Current Status

The parties acknowledged that Juan Zazueta owed child support arrearages in Case no. AV2018-0164 (Karen Joaquin v. Juan Zazueta). After a hearing on May 24, 2023 acknowledging Ms. Joaquin's passing on March 2, 2023, and that Mr. Zazueta had been caring for Y[redacted] Z[redacted] since then, the Court issued an Order (the May 2023 Order) awarding Mr. Zazueta sole legal decision-making and parenting time for Y[redacted]a [redacted] Z[redacted], and vacating the prior child support order effective March 2, 2023. Id. The Court denied, however, Mr. Zazueta's request to waive or vacate the arrearages up to that point "unless Ms. Joaquin's estate agrees to waive/release those obligations." Id. Following that, the Court recently ordered in Case No. AV2023-0085 (Estate of Karen Joaquin) that the outstanding child support would be added to Karen Joaquin's Estate. (the Sept. 10 2024 Order.)

The Court issued a later Order, on September 11, 2024, announcing that it was reconsidering its May 2023 Order and Sept. 10 2024 Order with respect to the child support arrearages. The December 11 hearing, and this Order, come from that reconsideration with the parties' input.

B. Parties' Agreement

The Personal Representative and Mr. Zazueta agreed that the arrearages are for Y[redacted] Z[redacted] and should ***not*** be part of the Estate.

C. Tohono O'odham Law

The Court found this to be the result under Tohono O'odham law as well. First, 9 T.O.C. § 14 and 3 T.O.C. § 1511 make clear that child support is for the child, not for third

parties.[1]

In addition, the purpose of child support under Tohono O'odham law is to "permit the children a standard of living which approximates as closely as possible the one they would have had if the family remained together[.]"[2] If the child support arrearages were to become Estate property rather than Y[redacted]'s, to be split among multiple heirs, this purpose would be frustrated.

Indeed, third parties receiving child support payments for their own benefit would be inequitable, resulting in unjust enrichment, and not in the child's best interests. See Bahyesva v. Miguel, 3 TOR3d 151, 153 (T.O. Tr. Ct. 2012).

D. Non-binding Arizona Law

Arizona law, though not binding, is in accord. First, the Arizona Supreme Court has found it inequitable to require an obligor parent to pay back child support that accumulated while exercising custody of the child.[3] In Cole, a father was not making court-ordered monetary payments to the mother, but had custody of the child during the period the arrears accumulated.[4] Though the father was not complying with the decree itself, the court in Cole reasoned that his compliance with the spirit of the decree—to support the child—made it inequitable for him to pay the mother for support she did not give.[5]

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[1] See 3 T.O.C. § 1511 ("The Nation also recognizes that a *child has a right to support* and the Division shall assist the parent to establish an order of child support.") (emphasis added); 9 T.O.C. § 14 ("The Court may, from time to time, after the entry of final decree on petition of either party . . . amend, change or alter any provision therein respecting the care, custody or maintenance of the . . . *children* may require.") (emphasis added).

[2] T.O. R. Fam. Law & Will Pro. R. 2.2(b).

[3] Cole v. Cole, 420 P.2d 167, 169 (Ariz. 1966).

[4] Id.

[5] Id.

E. Prior Orders Partially Vacated

For the reasons above, the Court vacates (i) its ruling in the May 2023 Order that the arrearages may not be waived or vacated unless Karen Joaquin's Estate agreed to that, and (ii) its ruling in the Sept. 10 2024 Order that the arrearages would be added to Karen Joaquin's Estate. All other parts of both Orders remain unchanged.

II. Child Support Amount

Although the parties acknowledged that Juan Zazueta owed child support arrearages in Case no. AV2018-0164, there had been no official determination of the outstanding amount. Some Court orders mentioned *approximately* $6,000[6], but did not reference the source of that estimate. This Court noted in its Sept. 10 2024 Order that the exact amount would be determined. The Court has done that now, from a child support ledger from the Court's Accounting Department attached to this Order as Exhibit A. Pursuant to that ledger, **the actual amount of child support owing as of Ms. Joaquin's passing, when future child support stopped accruing, is $13,035.76**. The Court is unclear where the "approximately $6,000" estimate came from. But if Mr. Zazueta disputes the ledger, he may file a motion with the Court (for Case no. AV2018-0164) with his own evidence.

III. What to Do with the Arrearages

A. Tohono O'odham Law Does Not Answer

After finding that arrearages payment to third parties would result in unjust enrichment, Tohono O'odham law does not specify what should be done with arrearages

[6] E.g., Order in CCV2023-0057 filed July 3, 2024 and, referencing that Order, Order in AV2023-0085 filed September 10, 2024.

after the obligee parent passes and the obligor parent assumes full legal decision-making and parenting time. The Court in Bahyesva, while noting the issue was not before the Court, did posit that when an obligee parent is not entitled to arrearages, another person, such as someone who actually provided care, or the children themselves, may be entitled to some or all of the arrearages.[7]

B. Mille Lacs Band of Ojibwe and Texas Law Provide Some Guidance

Some jurisdictions have enacted statutes that specifically address this situation. Though not controlling in this Court, these statutes provide some guidance, as this Court has recognized that divorce and child support proceedings are equitable actions, and the Court must consider the best interests of the child. See Bahyesva, 3 TOR3d at 153.

First, the Mille Lacs Band of Ojibwe's Code authorizes its court to either (i) expunge child support arrears or (ii) allow the Band's Child Support Enforcement Program to collect payments as trustee *to disburse arrears payments to the children*.[8] If the children at issue are legal adults, they may become parties to the matter and ask the court to forgive the arrears.[9] The Code does not, however, speak directly to arrear-owing parents who become a child's sole custodian.

Second, the State of Texas' Family Code allows child support arrears owed to an obligee who has passed away to go directly to the obligor.[10] The provision states that when an obligee dies, child support owed by the obligor must be paid to, among other options,

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[7] Bahyesva, 3 TOR3d at 153-54 (citing Arizona and Indiana case law).
[8] Mille Lacs Band of Ojibwe Code, Tit. 8, § 2019(d).
[9] *Id.* at § 2019(d)(1).
[10] Tex. Family Code § 154.013(c)(2) (Vernon 2023).

"a person, including the obligor, who has assumed actual care, control, and possession of the child, if a managing conservator or guardian of the child has not been appointed[.]"[11] Notably, the statute construes the obligation as a continuing obligation *to the child*, rather than the estate.[12]

C. Application: Trust Account and Conditional Judgment

1. Trust Account

At the hearing, the Court and Personal Representative Tonya Joaquin were both concerned with Y[redacted] receiving the benefit of the arrearages, given Mr. Zazueta's history of non-payment. Mr. Zazueta addressed that concern proactively, proposing that he open a trust account for Y[redacted] that he could not access, and pay the arrearages into that, for Y[redacted].

The Court found Mr. Zazueta's proposal consistent with the above principles of equity, best interests of the child, and the statutes from the Mille Lacs Band of Ojibwe and Texas. Personal Representative Tonya Joaquin was still concerned, however, about enforcing the deposits. The Court also shared that concern, noting that the ideal situation here would be a system like the Mille Lacs Band of Ojibwe's, where a child support enforcement program would collect payments as trustee to distribute to (or perhaps hold until adulthood for) the child. Unfortunately, the Nation does not have such a program. Further, after the hearing, the Court checked with its Accounting Department and learned that they are unable to enforce or even monitor such a situation.

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[11] *Id.*
[12] *Id.* § 154.013(a).

Therefore, the Court ordered its own enforcement mechanism at the hearing, but modifies it here after further consideration. First, the Court **ordered Mr. Zazueta to file with the Court by February 15, 2025 evidence of opening the trust account and making an initial deposit(s),** ***and now further orders that Mr. Zazueta include evidence that he may not access the funds or close the account and that all funds will go solely to Y[redacted] Z[redacted] upon her 18th birthday.***

Second, the Court ordered that all funds in the account belong to Y[redacted] Z[redacted]. She is entitled to withdraw and receive all of funds when she reaches 18 years of age, or earlier if ordered by the Court.

2. Conditional Judgment

In addition, the Court is entering with this Order a conditional judgement in Case No. AV2018-0164 against Mr. Zazueta in favor of Y[redacted] Z[redacted]. To make it final and unconditional,[13] Y[redacted] Z[redacted], within two years after she turns 18, must file with the Court an affidavit that (a) states the amount of the arrearages she received, and how much, if any, remains outstanding, and (b) includes copies of the final statement(s) of the trust account described in Section III.C.1 above, showing the amounts deposited up to [redacted]a reaching 18 years of age and Y[redacted] receiving all of the funds in the account after her 18th birthday. The parties agreed to that conceptually at the hearing, with the Court noting that

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[13] Tohono O'odham law does not speak to such conditional, provisional, or *nisi* judgments. The Court may therefore, and does, look to Arizona law for guidance. See 4 T.O.C. § 1-102. Arizona does honor conditional judgments where, among other situations, (i) the conditions can be determined with certainty, or (ii) the case is one of equity, such as domestic relations. See Gerow v. Covill, 192 Ariz. 9, 13-14 (Ct. App. 1988) (and cases cited therein). This Court finds that Arizona law persuasive and applies it here. Because the conditions of the judgment here can be determined with certainty *and* it is an equitable (domestic relations) case, a conditional judgment is proper.

it would finalize the details in this Order and the corresponding conditional judgment, which it has now done.

IV. Miscellaneous

The Court mentioned at the hearing that, if Accounting was unable to monitor, then it may schedule one or more review hearings. However, noting that Y[redacted] has slightly over two years until she reaches 18, and that she will have a judgment for any shortages received when she does, which she may personally enforce, the Court declines to set review hearings at this time.

Signed January 3, 2025.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Karen L. Joaquin DOB: 09/13/1964 DOD: 03/02/2023 Decedent.	Case No.: AV2023-0085 ORDER RE: DISTRIBUTION OF PROPERTY AND CLOSING CASE

SUMMARY: Order explaining that in a probate matter without a statute governing intestate distribution on the Nation, the Court must apply O'odham custom if a party proves it—by a preponderance of the evidence—through the testimony of those familiar with the Nation's or a community's customary practices; that Arizona law cannot be considered unless no custom is proven; and that, even then, Arizona law provides guidance only at the Court's discretion.

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Karen L. Joaquin DOB: 09/13/1964 DOD: 03/02/2023 Decedent.	Case No.: AV2023-0085 ORDER RE. DISTRIBUTION OF PROPERTY AND CLOSING CASE

The Court held a trial on October 15, 2025, to determine what interest, if any, Respondent Yesenia Zazueta—the Decedent's minor daughter—has in two Estate vehicles: a Chevrolet Tahoe and a Chevrolet Silverado. The Court had previously awarded both vehicles to Petitioner Tonya Joaquin, the Decedent's adult daughter, before Yesenia had a legal representative to act on her behalf. That award was made subject to any interest of Yesenia Zazueta in the vehicles "to be determined at a later time in these proceedings." (Order Appointing Pers. Rep. & Distrib. Order 2:6-11, Sept. 14, 2023.)

Petitioner Tonya Joaquin appeared through counsel, Suzanne Laursen, civil attorney with the Tohono O'odham Advocate Program. Respondent Yesenia Zazueta was represented by her father, Juan Zazueta, appearing pro se on her behalf.

I. Party Positions

A. Petitioner Tonya Joaquin's Position

Petitioner, through her Pretrial Statement filed July 31, 2025, and as confirmed at trial, asserted that (a) under Tohono O'odham Nation custom, older siblings inherit estate property to provide for younger siblings following a parent's death, and (b) that custom

should govern this case. Under that custom, Petitioner Tonya Joaquin would retain sole title to both vehicles.

B. Respondent Yesenia Zazueta's Position

Respondent took the position, at a hearing held June 18, 2025, that Respondent should be awarded *one* of the two vehicles outright, while Petitioner kept the other. Juan Zauzeta offered that Respondent be awarded the vehicle that was not fully operational (the Tahoe), as Mr. Zazueta said he could repair it.

II. Applicable Law

> *In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation.*

4 T.O.C. ch. 1, § 1-102.

A. Tohono O'odham Constitution and the Nation's laws and ordinances

There was no will in this case. The Tohono O'odham Constitution and the Nation's laws and ordinances provide no specific guidance on distributing estate property without a will (intestate succession), except that Title 9 of the Tohono O'odham Code—like Title 4—defers to tribal custom: "In the determination of the heirs the Court shall apply the custom of the Tribe as to inheritance." 9 T.O.C. ch. 1, § 16. Accordingly, under both Title Four and Title Nine of the Code, the customs of the Nation are next in the order of governing authority.

B. Customs of the Nation take precedence; Arizona law used only for guidance, in the Court's discretion, IF no customs apply.

> *If a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which addresses the claims asserted, the court **may** in its **discretion** look to the laws of the State of Arizona for **guidance**.*

4 T.O.C. ch. 1, § 1-102 (emphasis added).

In contrast to the Nation's statutes, Arizona's statutes do provide specific guidance for intestate succession. If applied here, they would say that Petitioner and Respondent share the Estate property equally. See A.R.S. §§ 14-2103 & 2106. That is basically Respondent's request.

However, under 4 T.O.C. ch. 1, § 1-102, this Court may not even consider Arizona law unless and until Petitioner fails to establish her case under the Nation's customs. Even then, the Court is not required to apply Arizona law but "*may* in its *discretion* look to the laws of the State of Arizona for *guidance*." 4 T.O.C. ch. 1, § 1-102 (emphasis added). For example, in In re Susie Siquieros, the Court found that none of the Nation's Constitution, laws, or ordinances addressed the issue, and no party proved a relevant custom—yet the Court still declined to apply Arizona law, instead applying equity and the best interests of the estate and heirs. See In re Susie Siquieros, 5 TOR3d –, 10-17 (Tr. Ct. May 19, 2025) (scheduled for publication).

C. Proving O'odham custom

> *O'odham custom may be proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation.*

4 T.O.C. ch. 1, § 1-102.

It can be difficult and time-consuming to prove customs of the Nation for several reasons. Customs can differ from district to district and from village to village. They can change over time. And they may be subject to overriding customs. See In re Susie Siquieros, 5 TOR3d at 8; In re Conde, 5 TOR3d –, 4 (Tr. Ct. Apr. 23, 2025) (scheduled for

publication); In re Elizabeth Siquieros, 5 TOR3d –, 7 (Tr. Ct. Apr. 22, 2025) (scheduled for publication).[1]

Accordingly, the Court often limits its holdings regarding O'odham custom to the facts and circumstances of the particular case. See In re Susie Siquieros, 5 TOR3 at 8; In re Conde, 5 TOR3d at 4; In re Elizabeth Siquieros, 5 TOR3d at 7, 9, 12. As a result, our body of precedential case law on custom remains sparse.

In addition, the party asserting such a moving target must prove it. See In re Susie Siquieros, 5 TOR3 at 4; In re Conde, 5 TOR3d at 3; In re Elizabeth Siquieros, 5 TOR3d at 3-4; In re Norris, 1 TOR3d 63, 64 (Tr. Ct. 1988). And it can be difficult to find "persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation," see 4 T.O.C. ch. 1, § 1-102, willing and able to testify at trial.

Nevertheless, if the Nation's Constitution, laws, and ordinances do not address an issue, and a party is able to prove a Nation's custom, this Court *must* apply it pursuant to 4 T.O.C. ch. 1, § 1-102 and, in a probate case involving intestate succession, 9 T.O.C. § 16.

D. Burden of proof

The Court likewise found no controlling authority defining the burden of proof for establishing O'odham custom. However, the Trial Court has held several times that, in civil cases such as this, the standard is a preponderance of the evidence. See In re Susie Siquieros, 5 TOR3d at 4; In re Conde, 5 TOR3d at 3; In re Elizabeth Siquieros, 5 TOR3d

[1] The Court acknowledges that published Trial Court decisions are not conclusive, but they are persuasive. T.O. R. Ct. § 1, R. 8.2(d). The Court found no controlling appellate case law on these issues.

at 4-5. Finding those decisions persuasive, though not binding, see T.O. R. Ct. § 1, R. 8.2(d), the Court applies that standard here.

III. Petitioner's Case on O'odham Custom and Respondent's Course Change

Petitioner called Christina Andrews as a person "familiar with the customary practices of the O'odham" *and* "the custom of a particular community within the Nation" under 4 T.O.C. ch. 1, § 1-102 to prove her asserted controlling custom. Ms. Andrews testified that it is the custom of both the Nation and the Gu Achi District (home district of both the Decedent and the Petitioner (Pet. to Appoint Personal Rep. and Pet. to Probate Estate 1, June 7, 2023) that older siblings inherit estate property to care for younger siblings after the death of parents.

Tonya Joaquin and her younger brother, Duran Santos, testified extensively to the point that Petitioner has in fact used both vehicles to care for her younger siblings since the passing of their mother, in accordance with the O'odham custom she asserted.

Christina Andrews provided clear and credible testimony regarding the specific custom of the Nation and the Gu Achi District in support of Petitioner, as described above. However, before Petitioner rested her case, Respondent unconditionally agreed that Petitioner could keep both vehicles as requested, and asked that the trial be concluded and the case closed.

Consequently, the Court does not know what evidence Respondent might have offered in response to Ms. Andrews' testimony and therefore cannot conclusively determine whether Petitioner proved the asserted O'odham custom by a preponderance of the evidence. Consistent with prior cases, the Court limits its holding on O'odham custom to the specific facts and circumstances of this matter. The Court does not reject Petitioner's

asserted custom but simply finds that it was not proven by a preponderance of the evidence, as Respondent changed position and granted Petitioner's request before presenting any evidence in response.

IV. Conclusion

The Court accepts Respondent's change of position, and awards both Estate vehicles, the Chevrolet Tahoe and Chevrolet Silverado, solely and unconditionally, to Tonya Joaquin. The Court makes no ruling on custom of the Nation.

This case may now be closed.

This is a final, appealable Order.

Dated October 30, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of: Raven Jade Johnson, Petitioner, vs. Bryce Juan Antone, Respondent.	Case No.: AV2023-0110 **ORDER RE. PARENTING TIME, LEGAL DECISION-MAKING, AND CHILD SUPPORT**

SUMMARY: Order applying "best interest of the child" standard for parenting time and legal decision-making, emphasizing traditional O'odham practices rather than the factors set forth in Arizona statute.

FILED IN THE
TOHONO O'ODHAM COURT
2025 1 30 AM 11:08
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of:

Raven Jade Johnson,

Petitioner,

vs.

Bryce Juan Antone,

Respondent.

In re: X[redacted] A[redacted] DOB: [redacted],

T[redacted] A[redacted] DOB: [redacted],

Xi[redacted] A[redacted] DOB: [redacted],

Minor Children.

Case No.: AV2023-0110

ORDER RE. PARENTING TIME, LEGAL DECISION-MAKING, AND CHILD SUPPORT

A trial on the issues of parenting time, legal decision-making, and child support was held on November 12, 2024. Petitioner, Raven Jade Johnson (Mother), and her Attorney, Belinda BreMiller of the Tohono O'odham Advocate Program, were present; also present were Respondent, Bryce Juan Antone (Father), and his Advocate, Shirley Santos Molina. Several witnesses for both sides testified. Due to time constraints, the Court offered counsel the choice of providing closing statements, if they wished to provide one, in court or in writing after the trial. Ms. Molina provided one in court; Ms. BreMiller filed one in writing after the trial.

As previously agreed by the parties and ordered by the Court (Order signed Aug. 14, 2024, pp. 3-4), the Court (i) did not apply the Arizona Rules of Evidence or Arizona Rules of Civil Procedure at the trial;[1] (ii) followed the O'odham practice of allowing each party to speak their peace without interruption, so long as the testimony and information was not purposefully insulting and was relevant to the issues; (iii) allowed any elder family member to give the Court any information they had about what is best for their grandchildren; and (iv) admitted all exhibits, and allowed each party through their respective counsel to argue and discuss why the exhibits are relevant and what weight the Court should give them.

The Court may still, however, look to Arizona law for guidance when there is no Tohono O'odham law or proven custom on point. 4 T.O.C. Ch. 1, § 1-102. In that regard, this Court, when determining parenting time and legal decision-making, often applies the "best interest of the child" standard, as does Arizona law. See, e.g., Bustamante v. Joaquin, 4 TOR3d 247, 251-52 (Tr. Ct. 2024) (using A.R.S. § 25-403 for guidance).

However, as much testimony, argument, and party agreement (at trial and pursuant to the above parameters) in this case was placed on traditional O'odham practices—and the children's participation in those practices—and little emphasis was placed on the specific factors listed in A.R.S. § 25-403, the Court here will look for the best interests of the children by following what was presented at trial (including Petitioner's written closing argument) rather than attempting to fit it within A.R.S. § 25-403.

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[1] Also because, pursuant to Tohono O'odham Rules of Court, Section 1, Rule 1(c), the Court found that such rules are not applicable to the facts and circumstances of this case, for the reasons described in Petitioner's Pretrial Statement.

With those parameters, after considering the witness testimony, exhibits, and arguments, the Court finds and orders as follows:

I. Parenting Time & Legal Decision-Making

A. Generally

Different than the parties' original positions, the parties eventually agreed to continue the current arrangement of sharing the children week to week. **The Court agrees and approves, and ORDERS that Raven Jade Johnson and Bryce Juan Antone are awarded parenting time of alternating weeks for all children (X[redacted] A[redacted], T[redacted] A[redacted], and X[redacted] A[redacted]), generally**, subject to specific exceptions listed below.

Both at trial (testimony and closing argument) and in Respondent's Notice of Filing Pre-Trial Statement (Respondent's Pre-Trial Statement), p. 2, lines 19-24, Respondent expressed that he was more focused on spending time with the children in cultural events (as they arise; e.g., dance groups that happen every weekend and ceremonies sometimes annually or at different periods) rather than parties, celebrations, and the like, and did not request any specific dates or events with the children.

While Mother agreed at trial that cultural events are important, she did request some specific holidays and events (trial testimony and written closing argument), and also expressed her focus on other extracurricular activities for the children, especially cheer and tutoring for Xo[redacted] A[redacted], and football for T[redacted] A[redacted] (id.). Both parents gave compelling reasons supporting their wishes.

Mother provided a stronger demonstrated history of making the day-to-day legal and practical decisions and actions for the children, often by necessity when Father was not present, such as medical appointments, schooling, and buying food and clothing.

Therefore, the Court ORDERS that Raven Jade Johnson and Bryce Juan Antone are awarded joint legal decision-making for all children (X[redacted] A[redacted], T[redacted] A[redacted], and X[redacted] A[redacted]), with Raven Jade Johnson having final say if they cannot agree, also subject to exceptions listed below.

Both parents may continue to have full, unrestricted access to all records of all children, including without limitation medical, educational, religious, cultural, and governmental.

Both parents may attend all medical and educational appointments for the children, and all public recreational and cultural events for the children.

Each parent must notify the other at least 48 hours before a scheduled medical or educational appointment (excluding educational events published on public calendars), and within 48 hours after such an unscheduled event or emergency.

Both parents must speak respectfully to each other and about each other in front of the children, and not allow anyone else to say bad things about the other in front of the children.

B. Exceptions

The following are exceptions to the general parenting time and legal decision-making orders listed above:

Mother may choose ONE primary extracurricular recreational activity for each child at a time (e.g., cheer for X[redacted] and football for T[redacted]) that takes precedence over

other activities. Father must cooperate, including transporting the child(ren) to and from that activity while the children are in his custody.

Father may designate any traditional / cultural events for the children that, alone or together, take up as much time as the primary extracurricular recreational activities per child chosen by Mother. Those events will take precedence over other activities (except Mother's selected primary extracurricular recreational activity). Mother must cooperate, including transporting the child(ren) to and from those activities while the children are in her custody.

Each parent must notify the other at least 48 hours in advance of any of the above activities in order for the other parent to accommodate and cooperate as required.

Mother may select other recreational extracurricular activities for the children consistent with her final say of legal decision-making, but Father is not required to accommodate (by transporting or otherwise) if she does.

Father must cooperate with all other legal decisions made by Mother exercising her final say in the event of disagreement, such as medical or educational appointments, including tutoring for X[redacted] if they disagree on that.

The children will be with Mother on Mother's Day and with Father on Father's Day. Regardless of which parent has custody on the following days:

1. As previously agreed by Father (Notice of Filing Pre-Trial Statement of Resp. p. 2, lines 16-19, Nov. 12, 2024), Mother may host birthday parties for all children.
2. The parent who has custody of a child on that child's birthday must allow the other parent some time on that day with the child (in-person).

3. The parent who has custody of a child during the other parent's birthday must allow that other parent some time on that day with the child (in-person).

C. Coordination and Communication

While the Court agrees with Respondent that—generally—in-person communication tends to be more effective and efficient, that does not appear to be the case here. Instead, the Court finds Petitioner's compromise offer (Pet. Closing Arg. p. 2, lines 6-11, Jan. 28, 2025) to be the best under the circumstances. The Court therefore ORDERS that the parties schedule a time to communicate by email about the schedules once per month, with both parents focusing on that communication for *at least* thirty continuous, uninterrupted, non-distracted, minutes.

II. Child Support

The parties agreed that neither should pay child support going forward if the Court awarded the alternating week parenting time (trial testimony; Pet. Closing Argument, p. 2, lines 17-18.) **The Court finds this reasonable and therefore orders neither party will owe accruing child support going forward.**

The parties agree that Father should pay back support for the time he was in Glendale (December 2021 through February 2024, or 26 months). (Resp. Closing Argument at Trial, Nov. 12, 2024; Pet. Closing Arg. p. 2, lines 6-11, Jan. 28, 2025; Notice of Filing Pre-Trial Statement of Resp., p. 2, lines 16-19, Nov. 12, 2024). The Court approves.

Petitioner submitted a Child Support Worksheet for this (Pet. Closing Arg., Attachment, Jan. 28, 2025), using Father's paystubs from this period (see Pet. Ex. 1, admitted at trial, Nov. 12, 2024; Pet. Pretrial Statement, Pet. Ex. 1, July 22, 2024).

The Court approves and incorporates that worksheet into this Order. Accordingly, the Court finds a basic back child support amount of $24,986 (26 months x $961).

To that, Mother agreed to credit Father $1,154.15. (Pet. Closing Arg. p. 2, lines 15-17; Pet. Pretrial Statement, p. 4, lines 15-22.) Father agreed to that, and requested an additional $900 credit. (Notice of Filing Pre-Trial Statement of Resp., p. 2, line 27 – p. 3, line 3, & Ex. 3.) Mother did not address that request, but did not contest it. The Court therefore will include it in the credit, for a total credit of $2,054.15.

Accordingly, the Court awards a total back child support award, for the benefit of all three children, payable by Bryce Juan Antone, in the amount of $22,931.85 ($24,986 minus $2,054.15).

Petitioner asked that Respondent pay a "fair monthly amount" towards the arrears. (Pet. Closing Argument, p. 2, lines 19-20.) Respondent did not propose a schedule when agreeing to pay back support. But the Court finds it necessary to establish some schedule.

The Court agrees with Petitioner that a "fair monthly amount" is appropriate. Looking to the Tohono O'odham Child Support Guidelines, the Court finds that a fair monthly amount would be the amount that Father would have to pay *if* he were to pay regular child support going forward, using the parties' current income.

For that purpose, the Court prepared, and attaches as Exhibit A and incorporates into this Order, a Child Support Worksheet using the parties' most recently submitted income as provided in Petitioner's Exhibit 2, admitted at trial, for Mother (pay period ending 2/3/2024, showing an hourly rate of $19.76, and an average tip pool distribution of $1,446 per 2-week pay period), and Respondent's Notice of Filing Child Support Worksheet, Nov. 12, 2024, Exhibit 1, (pay period ending 8/22/24, after switching jobs,

showing an hourly rate of $16.59) for Father. With that, Father's monthly payment would be **$616.59**, and that is the amount the Court ORDERS he pay each month towards the $22,931.85 arrearage.

Father must make all such payments payable to Raven Jade Johnson, and, unless otherwise agreed in writing, delivered to:

Clerk of the Tohono O'odham Court
P.O. Box 761
Sells, AZ 85634
Re: AV2023-0110, Raven Johnson v. Bryce Antone

III. Medical and Educational Expenses

Petitioner asked in her written Closing Argument that expenses for the children's medical care and education be evenly split. (Pet. Closing Argument, p. 2, lines 18-19.) This was the first time this issue was raised, and Respondent did not have a chance to respond. Accordingly, the Court will not rule on it at this time.

Either party may, however, petition the Court to litigate this issue. While not making any conclusions, the Court will note that it may be inclined to (i) do what it often does for medical expenses if it were to award an ongoing child support order (see, e.g., Bustamante, 4 TOR3d at 270) and order that the parents divide any out-of-pocket costs for adding the children to any medical plans, and the costs for any uninsured medical expenses (including dental, vision, mental health, etc.) in proportion to their combined child support income: 69% for Mother and 31% for Father according to the most recent income Child Support Worksheet, and (ii) given Mother's final say for legal decision-making, and the difference in income, make Father responsible for educational expenses only if he agrees for the children to attend a school, tutoring, or the like, that is not free, in whatever amounts the

parties agree to—which would not limit Mother's right of final say in the event of a disagreement over legal decisions, such as enrolling a child in a private school or tutoring, it would just not allow Mother to force Father to pay for those choices.

IV. Miscellaneous

This is a final, appealable, Order.

Signed January 30, 2025.

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Elizabeth Siquieros DOB: 08/13/1950 DOD: 11/21/2021 Decedent	Case Number: AV2023-0113 **ORDER RE. DISTRIBUTION OF PROPERTY**

SUMMARY: Order applying O'odham custom, as proved by individuals familiar with customary practices, to distribute estate property.

FILED IN THE
TOHONO O'ODHAM COURT
2025 4 22 PM01:34
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Elizabeth Siquieros DOB: 08/13/1950 DOD: 11/21/2021 Decedent	Case Number: AV2023-0113 **ORDER RE. DISTRIBUTION OF PROPERTY**

I. Background; Distribution of Personal Property other than HUD Home[1]

Elizabeth Siquieros (Decedent) passed on November 21, 2021. She died without a written will. The Personal Representative, Nina Siquieros, filed a Petition to Appoint Personal Representative and Petition to Probate Estate (Petition) on August 18, 2023.

The Petition listed as Estate property: Hud home no. AZ-026-019-0035-01 in the Sells District (the HUD Home) and various personal property items (later supplemented by a detailed inventory).

In the Petition, the Personal Representative asked that Elizabeth Siquieros's four grandchildren be named her lawful heirs: Jennifer Celaya, Marisela Celaya, Lizette Osife, and Joshua Osife. Without objection, the Court named them as her heirs pursuant to an Order filed on October 31, 2023.

According to the Personal Representative's Report on Sibling's Meeting 10/6/2024 re Personal Property filed December 9, 2024 (the Report), the heirs selected some Estate property pursuant to agreement amongst themselves, with plans for further selection. The Court approves and ratifies that past and any future distribution by agreement.

[1] Homes on Tohono O'odham Nation unallotted land, like the HUD Home here, are personal property. T.O. CONST. art. XVI, § 6; Chavez v. Sells Cmty. Land Comm. et. al., 4 TOR3d 1, 5 (Ct. App. 2021).

The Report asks the Court to award a $3,311.37 Department of Education refund, and all other Estate funds, equally among the heirs. The Court has said that, if no interested party proposed applying the Nation's customs to distribute the Estate's property not divided by mutual agreement (other than the HUD Home), the Court would likely apply Arizona law and divide it equally among the heirs. (See Orders filed May 1, 2024, p.4 & Oct. 7, 2024, p. 2 (discussing the application of 4 T.O.C. ch. 1, § 1-102, and looking to AZ law for guidance, in the Court's discretion, only if the issue is not addressed by the Nation's Constitution, laws, or customs—as further discussed below).) With the Personal Representative's request to divide all funds equally among the heirs, and because no interested party has asked to use the Nation's customs to distribute any property (other than the HUD Home) in any other way, the Court implements that earlier likelihood, looking to Arizona law for guidance and, applying A.R.S. §§ 14-2103 & 14-2106, ORDERS that all Estate funds, and any remaining property not distributed among the heirs by agreement (excluding the HUD Home), are awarded equally to the four heirs.[2]

II. Issue

The Personal Representative and the heirs cannot agree on distribution of the HUD Home, so the Court must decide. The Personal Representative claims that it should be awarded only to Lizette and Joshua Osife under the Nation's custom of oral wills. One heir, Jennifer Celaya, claims that the Nation's custom that the eldest child (which she says applies to grandchildren as well) controls, so the HUD Home should go to her—though she feels it is her duty as the eldest to distribute it among all four grandchildren.

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[2] The Court is unclear about the Report's request to award the vehicle to Lizette Osife. If the reference to "her sibling verbally agreed to have her claim the vehicle" means that all three of Lizette's siblings agreed that she could have the vehicle, then as just stated, the Court approves and ratifies that distribution. If instead only one sibling agreed, then it falls in the "remaining" property category that is awarded equally among the four heirs, who may work out either use arrangements or sell or give their interests to each other.

III. Applicable Laws

A. Customs of the Nation

> *In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation. O'odham custom may be proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation. If a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which address the claims asserted, the court may in its discretion look to the laws of the State of Arizona for guidance.*

4 T.O.C. ch. 1, § 1-102.

The Tohono O'odham Constitution, and the Nation's laws and ordinances, do not address intestate succession, or how property passes without a written will. Under 4 T.O.C. ch. 1, § 1-102, the next law this Court is required to apply is the Nation's customs.

The Personal Representative elected to prove under 4 T.O.C. ch. 1, § 1-102, "by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation", see id., that the HUD Home should go to just Lizette Osife and Joshua Osife because the Decedent made an oral will to that effect, and oral wills are a custom of the Nation. In contrast, but also under 4 T.O.C. ch. 1, § 1-102, Jennifer Celaya chose to prove that the custom applicable to this case is that the eldest child / grandchild (being Jennifer Celaya) inherited the HUD Home; though Ms. Celaya modified that by saying, as the eldest, she felt it was her duty to distribute fairly, which in this case meant to all four grandchildren.

B. Burden of Proof

"As a matter of law, it is axiomatic that the Petitioner, as the proponent for application of tribal custom has the burden to offer proof to satisfy the evidentiary requirements implicit with this kind of fact." In re Norris, 1 TOR3d 63, 64 (Tr. Ct. 1988).

Though prior Trial Court decisions are not conclusive, they are persuasive. T.O. R. Ct., § 1, R. 8.2(d). The Court finds this rule persuasive and applies it here.

The Parties followed this rule during several trials on customs of the Nation. The Personal Representative, representing herself, and Jennifer Celaya, represented by Suzanne Laursen of the Tohono O'odham Advocate Program, called witnesses (most of them elders) and presented evidence to support their cases. The following witnesses testified:

Called by the Personal Representative:

Ida Rose Norris	Nina Siquieros	Ned Norris Jr.
Juanita Parvello	Shirley Molina	

Called by Jennifer Celaya:

Jennifer Celaya	Candace Lee Juan	Clifford Wolf Black Sr.

The Court gave several notices to the other heirs, and opportunities to be heard and present their own evidence on the Nation's customs if they wished, but none did. Accordingly, because the only two that appeared at the trials were the Personal Representative and Jennifer Celaya, they are referred to in this Order as the Parties.

The Court is not aware, however, of any Tohono O'odham law or custom on the burden of proof required to establish customs of the Nation. Therefore, pursuant to 4 T.O.C., ch. 1, § 1-102, the Court exercises its discretion and looks to Arizona law for guidance.

Under Arizona law, the basic standard for proving facts in a civil matter is "preponderance of the evidence" or over a 50% likelihood. See Aileen H. Char Life Interest v. Maricopa County, 208 Ariz. 286, 291 (2004) ("We perceive no reason to depart from the usual rule that a plaintiff must establish each element of a civil action by a preponderance of the evidence, and we hold that standard applies.").

That is in accordance with other jurisdictions. The Court further FINDS that the Nation's customs are factual matters, and this is a civil case. Therefore, the Court here

HOLDS that the preponderance of evidence standard applies to the parties' proving the Nation's customs under 4 T.O.C. ch. 1, § 1-102.

C. Hearsay: Then-existing state of mind exception

Before the customs trials, the Court ruled that (i) it would follow the Arizona Rules of Evidence regarding hearsay for the customs of the Nation trials, and (ii) it would allow statements by Elizabeth Siquieros about what she planned or intended to do with the HUD Home after she passed, under Ariz. R. Evi. Rule 803(3), which allows: "A statement of the declarant's then-existing state of mind (such as motive, intent, or plan)[.]"). (Order filed Oct. 7, 2024, p. 2.)

Ms. Laursen objected for the record on behalf of Jennifer Celaya at one of those pretrial hearings to the Court's second ruling. (Id.) However, at trial, Jennifer Celaya herself testified as to statements by Elizabeth Siquieros about what she intended to do with the HUD Home. Therefore, the Court FINDS that Ms. Celaya waived her objection.

D. "Heir"; Non-applicability of Arizona law

The Court notes that the term "heir" is not defined under Tohono O'odham law. However, it typically implies entitlement to at least some part of a decedent's estate, determined by the applicable intestacy laws of a jurisdiction. See, e.g., A.R.S. § 14-1201.31 (" 'Heirs' . . . [means persons] who are entitled under the statutes of intestate succession to the property of a decedent."); *Black's Law Dictionary* (7th ed.) ("1. A person who, under the laws of intestacy, is entitled to receive an intestate decedent's property, esp. real property"); *Webster's New World Dictionary* (3d college ed.) ("a person who, under the laws of intestacy, inherits or is legally entitled to inherit, through the natural action of the law, another's property or title upon the other's death 2 anyone who receives property of a deceased person either by will or by law.").

As noted above, and unlike Arizona, the Nation has no statutes of intestate succession. But under 4 T.O.C. ch.1, § 1-102, Arizona intestacy law would only apply if no custom of the Nation was proved as to intestate succession, and the Court then chose to exercise its discretion and look to Arizona law for guidance. In practice, that is usually what happens in this Court.

If that were the case here, then each grandchild would be entitled to an equal ¼ share of the HUD Home. See A.R.S. §§ 14-2103 & 14-2106. But that is *NOT* the case here. In this case, both the Personal Representative and Jennifer Celaya chose to prove the Nation's custom with respect to the HUD Home under 4 T.O.C. ch. 1, § 1-102.

Therefore, Arizona intestacy law does not apply now for the HUD Home and may never apply if a Nation's custom is proved for this case. Accordingly, it would be premature to say what right, if any, each heir has to the HUD Home. And if the Court either (i) determined the Personal Representative proved her case and awarded the HUD Home to only Lizette Osife and Joshua Osife, or (ii) determined Jennifer Celaya proved her case (other than her modification to share the HUD Home with the other heirs), and awarded the HUD Home entirely to Jennifer Celaya, it could not be said that any heir was having an entitlement or property interest taken away from them, or that they were being "disinherited", because Arizona law never applied to the HUD Home and they were never vested with a right in the first place.[3]

IV. Findings of Fact & Conclusions of Law

After considering the weight and credibility of the witnesses and other evidence, and applying the law, the Court FINDS and ORDERS as follows:

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[3] At least in this case, where all heirs have already inherited a portion of the Estate. The Court does not address here whether the term "heir" under Tohono O'odham law necessarily requires an award of some estate property in every case.

A. Customs not set in stone

1. Witnesses called by both parties agreed that customs of the Nation can differ from District to District, even from village to village, and can change over time. (Testimony of Clifford Wolf Black Sr. and Ned Norris Jr.)
2. The HUD Home is in the Siquieros compound in the Sells District. Elizabeth Siquieros is enrolled in the Chukut Kuk District.
3. Most witnesses spoke to the customs of only one or two particular communities or Districts- some of them were neither Sells nor Chukut Kuk.
4. Neither party attempted to establish which community or District would be applicable for this case, if not a custom of the O'odham in general.
5. For the above reasons, the holdings in this case with respect to customs are specific to the facts and circumstances of this case.

B. Eldest child / grandchild inherits

6. Only one witness said that it is always the custom that the eldest child inherits property-and that would apply to grandchildren if all the children were deceased. (Testimony of Candace Lee Juan, for Schuk Toak and Chukut Kuk Districts.)
7. Other witnesses acknowledged that as a custom, but that the oral will custom overrode it. (Testimony of Juanita Parvello and Clifford Wolf Black Sr.)
8. The Court notes that, when the Personal Representative questioned witnesses about oral wills overriding the eldest child custom (which she appeared to acknowledge), she framed it as the parents choosing someone else in cases where the eldest child was not responsible enough to care for the property. This does not square with the Personal Representative's repeated assertion that Jennifer Celaya does not need the HUD Home because she is resourceful enough to get her own home. It would seem that under the Personal Representative's logic, Jennifer Celaya is the eldest and

highly responsible, and therefore under this custom she would be the sole recipient, and the Decedent would not choose anyone else to inherit.

9. In any event, that was not developed. But neither did the Court FIND this custom proved by a preponderance of the evidence (as applicable to this case, see Section IV.A.5 above). Therefore, the Court will not apply it to distribute the HUD Home.

C. Oral Wills

1. Oral wills generally

10. Although this term was seldom used (it was mentioned a few times), the Personal Representative's argument is in essence that Elizabeth Siquieros made an oral will that her HUD Home be awarded to only Lizette Osife and Joshua Osife; and that making oral wills is a custom of the Nation (or a particular community within the Nation) and is therefore controlling law under 4 T.O.C. ch. 1, § 1-102.

11. If the Personal Representative could prove that custom and the making of the oral will, this would have some support in 9 T.O.C. ch. 1, § 17 ("A Will shall be deemed to be valid . . . if the Will was made in accordance with proved Tribal custom ***or*** made in writing[.]") (emphasis added). However, that statute was adopted in 1938. So even if making oral wills was a Nation-wide custom at that time, it does not necessarily mean it is now, or at the times applicable to this matter.

12. The Court did find, however, credible testimony from several witnesses that making oral wills remains a strong custom across the Nation, at least through the time periods that would impact the mindset of Elizabeth Siquieros: Clifford Wolf Black Sr. for Chukut Kuk, Ned Norris Jr. for the Nation in general, and Shirley Molina for the community of Schuchuligk in Hickiwan District.

13. Weighing against the argument for oral wills in this case is the fact that many in the Decedent's own family, including her father, the patriarch Pete Siquieros, used

written wills. Pursuant to Pete Siquieros' written will, Elizabeth Siquieros served as caretaker for the Siquieros compound for decades. However, not everyone in the family used a written will.

14. In addition, as discussed below, testimony was provided that the Decedent tried to provide an oral will—but possibly at different times with different dispositions.

15. Seeing evidence of making oral wills in Districts as far apart as Chukut Kuk (where the Decedent is enrolled) and Hickiwan, and the Nation in general from as far back as 1938 through much of the Decedent's lifetime, the Court FINDS that the Personal Representative has proved by a preponderance of evidence that making oral wills is a custom of the Nation applicable to this case (and this case only, see Section IV.A.5 above), despite the presence of several written wills in the Decedent's family.

2. Decedent's final wishes

16. However, the Court also FINDS that under this custom (and also for this case only), a Decedent's wishes may change, and it is the *final* wishes that matter. (Testimony of Clifford Wolf Black Sr. & Ned Norris Jr.)

17. The Personal Representative and Juanita Parvello testified that Elizabeth Siquieros stated several times that she wanted her HUD Home to go to Lizette Osife and Joshua Osife upon her passing.

18. However, they both acknowledged that Elizabeth Siquieros also wanted all her grandchildren to be cared for, and that Jennifer Celaya had her own home when the Decedent made those statements.

19. Ned Norris Jr. (the Personal Representative's witness) testified that it would be reasonable for a homeowner to change her mind to later add a relative in the distribution of her home if she later learned that relative lost her home.

20. During closing arguments, the Personal Representative acknowledged that she did not know whether Elizabeth Siquieros had changed her mind about including Jennifer Celaya in the distribution of the HUD Home.
21. Jennifer Celaya testified that the Decedent told her—after Ms. Celaya no longer had her own home, that the Decedent's home was hers.
22. Jennifer Celaya was certain that the Decedent was referring to the HUD Home. However, there is credible evidence that Elizabeth Siquieros believed she also owned another home on the Siquieros compound (the home actually belonging to Susie Siquieros, in related case no. AV2022-0116[4]) and some evidence that Elizabeth Siquieros at some point may have intended to give that home to Jennifer Celaya (See Ex. A to Order filed Oct. 7, 2024).
23. No other witness testified as to Decedent's intent to give the HUD Home to Jennifer Celaya and, if she did, whether she intended to exclude any other grandchildren.
24. Accordingly, the Court FINDS that Elizabeth Siquieros's exact last words have not been proven by a preponderance of evidence by either Party.

3. Mindset of the Decedent to determine final wishes

1. Although the Decedent's last words are not known, this Court has recognized the Nation's custom of honoring the wishes of a decedent. See In re Hughes-Juan, 4 TOR3d 172, 175 (Tr. Ct. 2023); In re Elizabeth Norris, 2021 TOR Supp. 142, 143 (Tr. Ct. 2018); In re Miguel, 2 TOR3d 75, 76 (Tr. Ct. 2004).
2. One witness opined that it was important to put yourself in the mindset of the now deceased person. (Testimony of Ned Norris Jr.).

[4] The Court has been reviewing the records and testimony of both of these cases, and working on final orders, simultaneously. As there are several other issues to address in Susie Siquieros's case, however, that order is not yet complete. It will issue soon.

3. Compare the Restatement (Third) of Property (Wills & Don. Trans.) § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document [or oral will] is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").
4. The Court agrees with these concepts, and that a decedent's final wishes may be shown by evidence of her mindset / intention, if enough exists.
5. This also aligns with the Tohono O'odham Judicial Court being one of equity as well as one of law. See T.O. CONST. art. VIII, § 2 ("The judicial power of the Tohono O'odham Judiciary shall extend to all cases and matters in law and equity[.]"); 4 T.O.C. ch. 1, § 1-101(a) ("The Tohono O'odham Courts . . . are empowered to hear all actions in law and equity arising under the Tohono O'odham Constitution, the laws, ordinances or customs of the Tohono O'odham Nation[.]").
6. Accordingly, the Court will attempt that here, to see if there is enough extrinsic evidence to determine Elizabeth Siquieros's final wishes for her oral will.

4. Caring for family members

7. This third custom—caring for family members (and looking out for future generations)—became apparent during the trials. Nearly every witness—for all communities and Districts across the Nation, and the Nation generally, agreed on it. (Testimony of Clifford Wolf Black Sr. for Chukut Kuk and the Nation generally, take care of each other; if the eldest inherits, is expected to take care of siblings); Ned Norris Jr., for the Nation in general (O'odham are a caring people; if there is an opportunity to provide—specifically in the context of a home—and we have the ability, we usually will); Ida Rose Norris, for Baboquivari District (sister's children had homes so she wanted to leave house to grandson); Juanita Parvello (from Baboquivari District, but general O'odham custom to share, take care of all, later

generations); (Shirley Molina for the community of Schuchuligk in Hickiwan District (if the Decedent's wishes are not known, see who needs a home next); Jennifer Celaya (saying the HUD Home is all of her siblings' home, and as the eldest, it's her duty to look out for her younger siblings).)

8. With this near unanimous support, the Court finds the custom of caring for all family members (and looking out for future generations) applicable to this matter (and this matter only, see Section IV.A.5 above).

5. Application

9. Both parties presented ample evidence that Elizabeth Siquieros did indeed share the custom of caring for all family members and looking out for future generations.

10. Moreover, the witnesses that knew Elizabeth Siquieros—including the Personal Representative, Jennifer Celaya, and Juanita Parvello—agreed that Ms. Siquieros embraced these values expressly for her *four* grandchildren. (Testimony of Nina Siquieros (Elizabeth Siquieros wanted to share with all four grandkids, equally spreading her wealth); Juanita Parvello (Elizabeth Siquieros wanted all four of her grandchildren to have a home).

11. The Personal Representative also testified that Elizabeth Siquieros was actively helping Jennifer Celaya find another home. But she passed without success.

12. There was also documentary evidence that the Decedent was trying to get Jennifer Celaya a home- the traditional home on the Siquieros compound that Elizabeth may have thought she owned, but which actually belonged to Susie Siquieros. Although that evidence is far from conclusive as to any specific action, as explained by the Personal Representative's valid in-court criticisms, the Court does find in it more intent that the Decedent wanted, and was actively trying to help, Jennifer Celaya get a home. (See Ex. A to Order filed Oct. 7, 2024.)

13. Jennifer Celaya had lost her own home several years ago and had been living with Elizabeth Siquieros since then and through Ms. Siquieros's passing. Lizette Osife and Joshua Osife are younger, living with their father, and not yet on their own. The evidence above, under Ms. Siquieros's living this custom, shows the Court that Elizabeth Siquieros would want at least Jennifer Celaya, Lizette Osife, and Joshua Osife to share her HUD Home.
14. The alternative would be that Elizabeth Siquieros would want Jennifer Celaya ejected upon Ms. Siquieros's passing and again have no home.
15. The Personal Representative argued for this several times, with the reasoning that Jennifer Celaya was at some point in the past "on track" to finding a home and she is quite resourceful and therefore has no need of the HUD Home. That, however, is an opinion, not factual evidence, and the Court therefore may not accept it. The evidence presented was that Jennifer Celaya was not able to maintain the one home she had and, even with the active help of Elizabeth Siquieros, was not able to secure another one-showing a strong need for a home—period.
16. In addition, neither the Personal Representative nor any of the witnesses suggested there was a caveat to this custom of caring for family members in need—that the resourceful ones should be left to fend for themselves.
17. Indeed, the Personal Representative herself said in closing arguments that while Elizabeth Siquieros was very happy to have her own house, she also welcomed family members- *she never turned them away*. She took in Jennifer Celaya to live with her before and after Ms. Celaya had her own home. The Court does not believe that Ms. Siquieros—after a lifetime of welcoming in all family members—would choose to turn away Jennifer Celaya now.

18. Instead, the Court finds this alternative (that Elizabeth Siquieros would want Jennifer Celaya removed from the HUD Home since she is resourceful and was previously searching—unsuccessfully—for another home) exactly opposite to the strong evidence presented about Elizabeth Siquieros's mindset and intention, and her respect for the custom of caring for all family members and looking out for future generations.
19. Marisela Celaya has her own home now. It is therefore less clear whether Elizabeth Siquieros would want her to share in the HUD Home as well. And Marisela did not make her position known in any way or present any evidence as to any need she may have in the HUD Home, despite several invitations from the Court to all interested parties.
20. However, Jennifer Celaya repeated several times that it was her position the HUD Home belonged to all four siblings. One time she stated that, as the eldest, she felt it her duty to distribute fairly, implying if not a current need, perhaps a potential need for the HUD Home by Marisela.
21. Therefore, the Court must defer to what the evidence does show: Elizabeth Siquieros wanted to take care of all four grandchildren (including Marisela), and Jennifer Celaya's testimony suggesting some current or future need of the home by Marisela.

V. Conclusion

22. For the above reasons, the Court FINDS that Elizabeth Siquieros made an oral will under the Nation's custom, and her final wishes—as shown by the strong evidence of her intentions and mindset under the custom of caring for family and looking out for future generations, were to leave her HUD Home to all four of her grandchildren.
23. The Court therefore ORDERS that the HUD Home is awarded in equal shares to Jennifer Celaya, Lizette Osife, Joshua Osife, and Marisela Celaya.

24. There was one caveat suggested to the custom of caring for family members—specifically for taking extended family members in need into one's home. That is the expectation that they help. (Testimony of Ned Norris Jr.)
25. While just one witness said this and it therefore cannot be deemed a rule (for this case at least, see above), the Court finds it consistent with two earlier cases, In re Francisco, 1 TOR3d 55, 58 (Tr. Ct. 1988) ("In the interests of fairness, the Court further FINDS that the upkeep and maintenance of the rock house must be shared equally by the family members."); In re Norris, 1 TOR3d 63, 68 (Tr. Ct. 1988) (applying In re Francisco) ("all lawful heirs have a right to the use and enjoyment of the land located within the Chukut Kuk District, provided that . . . upkeep or maintenance must be shared among the users in equal proportion to their use.").
26. Again, applying Rule 8.2(d) of Section 1 of the Tohono O'odham Rules of Court, the Court finds those prior cases persuasive. Although they were decided under a different Nation's custom, they offer useful guidance for splitting maintenance costs for a shared property. The Court is particularly persuaded by In re Norris—that maintenance costs should be divided based on proportion of usage. That principle applies here, as the heirs do not now, and may never, use the HUD Home equally.
27. Accordingly, the Court, in its role as a court of equity as noted above, applies that principle here and ORDERS that each heir share in the upkeep and maintenance of the HUD Home in equal proportion to their use.
28. This is a final, appealable Order.

Dated: April 22, 2025

Judge Joseph Hardy Jr.

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

Rentzel John Lopez, Petitioner, v. Chalena Mae Mendoza, Respondent, In re: E[redacted] M[redacted] (DOB: [redacted]) A minor child.	Case Number: AV2024-0119 **ORDER RE: SERVICE BY POSTING, PATERNITY, LEGAL DECISION-MAKING, PARENTING TIME, & CHILD'S NAME CHANGE**

SUMMARY: Order ruling on sufficiency of service by posting, analyzing best interests of the child for legal decision-making and parenting time, and Tohono O'odham law for changing a child's name without both parents' consent.

FILED IN THE TOHONO O'ODHAM COURT
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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

Rentzel John Lopez,

Petitioner,

v.

Chalena Mae Mendoza,

Respondent,

In re: E[redacted] M[redacted]
(DOB: [redacted])
A minor child.

Case Number: AV2024-0119

ORDER RE: SERVICE BY POSTING, PATERNITY, LEGAL DECISION-MAKING, PARENTING TIME, & CHILD'S NAME CHANGE

At the continued Initial Hearing on December 11, 2024, Rentzel John Lopez, Petitioner (or "Father") appeared. Chalena Mae Mendoza, Respondent (or "Mother") did not appear. The minor child E[redacted] M[redacted] (or "Child") also appeared. Rentzel John Lopez and E[redacted] M[redacted] testified.

The Court finds and orders that:

General

1. Chalena Mae Mendoza was validly served under the Tohono O'odham Rules of Civil Procedure 3. In that regard, the Court found Mr. Lopez's recent Proof of Service by posting, sufficient except the filing lacked a copy of the document posted (the Summons). To cure that, Mr. Lopez testified in Court, while reviewing a copy of the Summons issued by the Court and included in the record, that it was the document he posted as described in his Proof of Service.

2. This Court has jurisdiction under the Tohono O'odham Constitution.

3. Chalena Mae Mendoza did not file an answer or response. Therefore, the allegations in the petition are admitted.

Paternity

4. Paternity has been established by in-court testimony.

5. Rentzel John Lopez is the legal and biological father of E[redacted] M[redacted] DOB: [redacted].

6. E[redacted] M[redacted]'s birth certificate may be updated to show Rentzel John Lopez as the legal and biological father. A separate, stand-alone order will issue that Mr. Lopez may use for this purpose.

Legal Decision-Making (Legal Custody) and Parenting Time (Physical Custody)

7. As Tohono O'odham law does not directly address how to determine legal decision-making (legal custody) or parenting time (physical custody), nor, to the Court's knowledge or as proved by either party, does O'odham custom or tradition, the Court often exercises its discretion under 4 T.O.C. Ch. 1, § 1-102 and looks to Arizona law for guidance, specifically A.R.S. § 25-403 (factors for determining best interests of the child). See, e.g., Bustamante v. Joaquin, 4 TOR 3d 247, 251-52 (T.O. Tr. Ct. 2024). The Court does so here.

8. Father has established that sole legal decision-making and primary parenting time in his favor would be in the child's best interests here based on the following factors:

a. A.R.S. § 25-403.A.1. (The past, present, and potential future relationship between the parent and the child): past relationships are strong with both parents, stronger *previously* with mother since E[redacted] lived with her full-time. However, she cannot be found now, and E[redacted] has lived full-time with

Father for the last six years or so; therefore the relationship is stronger with Father now.

b. A.R.S. § 25-403.A.2. (The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest): E[redacted] and Rentzel John Lopez both get along well with Chalena Mae Mendoza's extended family.

c. A.R.S. § 25-403.A.3. (The child's adjustment to home, school, and community): E[redacted] lived in North Comelic with his mother and now lives in Santa Rosa with his father. He has done well in both communities and schools.

d. A.R.S. § 25-403.A.4. (If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time): E[redacted] is 16 years old and has no preference.

e. A.R.S. § 25-403.A.5. (The mental and physical health of all individuals involved): No noted issues in this regard, other than concern as to why Mother has been absent for the last six years and allegedly is without a stable residence.

f. A.R.S. § 25-403.A.6. (Which parent is more likely to allow the child frequent, meaningful, and continuing contact with the other parent): both parents seem likely to allow this.

g. A.R.S. § 25-403.A.7. (Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation, or to persuade the court to give a legal decision-making or a parenting time preference to that parent): N/A

h. A.R.S. § 25-403.A.8. (Whether there has been domestic violence or child abuse pursuant to § 25-403.03): None alleged.

i. A.R.S. § 25-403.A.2.9. (The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time): N/A

j. A.R.S. § 25-403.A.2.10. (Whether a parent has complied with chapter 3, article 5 of [Arizona Code Title]): N/A

k. A.R.S. § 25-403.A.2.11. (Whether either parent was convicted of an act of false reporting of child abuse or neglect under A.R.S. § 13-2907.02): Neither.

l. A.R.S. § 25-403.A. (any other relevant factors):

i. Ms. Mendoza did not appear or file a response.

ii. Ms. Mendoza has chosen not to see her child for six years and it would therefore seem impossible for her to make legal decisions for him.

iii. Ms. Mendoza's whereabouts are unknown, even to her own family. Therefore, unrestricted parenting time would seem impracticable and possibly dangerous.

9. Based on these findings, the Court awards sole legal decision-making and primary parenting time for [redacted] to Rentzel John Lopez.

10. Chalena Mae Mendoza retains her full rights to unrestricted access to [redacted]'s records, including without limitation medical, dental, psychological, educational, tribal, governmental, religious, etc.

11. Upon Mother's request, Father will allow reasonable in-person parenting time with Mother, with any safety requirements (e.g., supervision) that Father reasonably determines are necessary.

12. Father will also allow liberal telephone, text, and video talks between E[redacted] and Mother.

13. If conditions change substantially, Mother may petition to amend these parenting time and/or legal decision-making orders.

Child's Name Change

14. There is also no controlling Tohono O'odham law, nor, to the Court's knowledge or as proved by either party, is there O'odham custom or tradition directly addressing changing a minor's name without the consent of both parents. There is, however, some guidance in our own Trial Court decisions[1] also with support by looking, in the Court's discretion under 4 T.O.C. Ch. 1, § 1-102, to Arizona law (A.R.S. § 12-601(B) and interpreting case law) for guidance.

15. Specifically, this Court addressed that question in Lopez v. Lopez, 4 TOR 3d 278 (T.O. Tr. Ct. 2024). There, the Court noted the common interest that this Court and the Arizona courts (and many other U.S. jurisdictions) have in the best interests of the child in considering a minor's name change. Id. 279-80.

16. Arizona, through case law, developed a list of factors for determining the best interests of a child for a name change. Id. at 280 (citing Pizziconi v. Yarbrough, 868 P.2d 1005, 1008 (Ariz. Ct. App. 1993). Though not controlling here, the Court does find those factors useful, and will therefore exercise its discretion under 4 T.O.C. Ch. 1, § 1-102 and look to them again here for guidance:

a. child's preference: E[redacted] is 16 years old and has no preference.

[1] See T.O. R. Ct. Sect. 1, R. 8.2(d) (published trial court decisions used for precedential value are persuasive, but not conclusive).

b. effect of the change on the preservation and development of the child's relationship with each parent: it may develop E[redacted]'s relationship with Father, while weakening it with Mother.

c. length of time the child has borne his or her given name: 16 years, almost his entire minor life.

d. any difficulties, harassment, or embarrassment that the child may experience from bearing his or her present or proposed name: none on either side.

e. motive of the child's parents and the possibility that the use of a different name will cause the child insecurity or lack of identity: Father wants to change the name since he is now raising E[redacted] on his own. The Court does not find changing E[redacted]'s name will cause insecurity or lack of identity.

17. If Ms. Mendoza had objected to the name change, the above findings may suggest neutrality or favor keeping E[redacted]'s current surname [redacted]. However, because Ms. Mendoza did not object, E[redacted] is not objecting, and Mr. Lopez is and has been solely caring for E[redacted] for the past 6 years, the Court finds it in the best interests of E[redacted] M[redacted] to change his name to E[redacted] Lopez.

Name Change Order

18. The Court orders that E[redacted] M[redacted]'s name is **changed to E[redacted] Lopez** as his true and legal name, and the birth certificate may be amended to state his name as E[redacted] Lopez.

19. A separate order will issue that Mr. Lopez may use for this purpose.

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Miscellaneous

20. This is a final, appealable Order.

Dated: December 12, 2024

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of:	Case Number: AV2024-0170
S[redacted] F[redacted]	
DOB: [redacted]	**ORDER**

On January 9, 2025, Toshia Folson, Petitioner on behalf of S[redacted] F[redacted], appeared. S[redacted] F[redacted] did not attend the hearing.

A father is listed on the birth certificate: Marcus Manfred Garcia. He was not present. Toshia Folson advised that he has little contact with her or their daughter S[redacted], and that this Court granted Toshia full custody some years ago, though she lost her evidence of that custody and is trying to replace it.

The Court explained that even with full custody (though quite helpful), this Court engages in a multi-factor analysis when deciding whether to grant a name-change for a minor when one parent has not provided consent. One of those factors is what the child thinks, and since Ms. Folson said that this action was filed at the request of S[redacted], the Court would like to hear from her directly.

Accordingly, the Court continued the hearing to February 5, 2025 at 3:00 p.m. for Toshia Folson to get her evidence of full custody and to arrange S[redacted]'s ability to come along.

Service on Father Also Required

However, upon review of the Court's analysis, it notes that the father must also be provided notice and the opportunity to be heard. That means that Toshia Folson must get a

Summons from the Clerk of the Court for the new hearing, and serve it, with a copy of the Petition, on the father. She must also file proof of service with the Court.

The Court notes that the rules for service for this Court are published on the Tohono O'odham Judicial Branch's website, under Rules and Opinions, Rules of Court, 02 Rules of Civil Procedure. This is a direct link to that section: https://tojc-nsn.gov/wp-content/uploads/2024/07/02-Rules-of-Civil-Procedure-Updated-Rules-3.1-4.1-on-031924-4.1d1-2-on-050824-and-7.1-on-062824-4.2L-added-073024-002.pdf. Rule 3 of the Rules of Civil Procedure lays out the various methods of service of process, *and what must be filed with the Court to prove service is complete*.

Rescheduled Hearing Date and Time

Because our Rules of Court also provide for a response time once a party is served (generally 20 days if personally served, 30 days if served by mail), *the Court must now change the continued hearing date and time to* **March 12, 2025 at 9:00 a.m.**, to give Toshia Folson time to serve Marcus Garcia, and time for Mr. Garcia to respond (if he wishes).

Name Change Analysis

To help the parties prepare for the hearing, this is the analysis the Court conducts when deciding whether to change a minor's name when one parent has not provided consent. See Lopez v. Lopez, 4 TOR 3d 278 (T.O. Tr. Ct. 2024).

1. As noted above, both parents should be provided notice and the *opportunity* to be heard. Whether they accept that opportunity is up to them.
2. The name change must be in the best interests of the child, based on:
   a. The child's preference.
   b. The effect of the change on the preservation and development of the child's relationship with each parent.
   c. The length of time the child has borne his or her given name.

d. Any difficulties, harassment, or embarrassment that the child may experience from bearing his or her present or proposed name.

e. The motive of the child's parents and the possibility that the use of a different name will cause the child insecurity or lack of identity.

Toshia Folson, and Marcus Garcia if he appears and contests the name change, should be prepared at the March 12 hearing to explain if and how each of the above factors applies and is in the best interests of S[redacted] F[redacted].

Dated: January 9, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Anthony George Lopez DOB: 03/22/1933 DOD: 07/14/2020 Decedent	Case Number: AV2024-0172 **NOTICE OF ERRATA**

The Court hereby notifies the parties that the following Orders contained the wrong birthdate for the Decedent, Anthony George Lopez, in the caption on the first page. The Court now corrects each of those from "03/22/1993" to "03/22/1933":

1. Order Preserving Testimony and Continuing Initial Hearing, filed March 14, 2025
2. Order filed May 22, 2025.
3. Order Appointing Personal Representative, filed June 20, 2025.
4. Order Distributing Property and Closing Case, filed July 3, 2025.
5. These errors are typographical only and do not affect the substance of the Orders.

Signed August 22, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Anthony George Lopez DOB: 03/22/1993 DOD: 07/14/2020 Decedent	Case Number: AV2024-0172 **ORDER**

At the continued Initial Hearing on May 21, 2025, Ivina Margaret Hendricks, Petitioner, and Lorraine Ventura of the Tohono O'odham Advocate Program, Petitioner's advocate, appeared. Interested party Ivaleen Hendricks was also present.

Petitioner Ivina Margaret Hendricks provided a new, temporary mailing address of 10500 E. Tanque Verde Road, Tucson, AZ 85749. The Court will mail her copies of documents to that address until she provides a different one.

Ms. Ventura reported continued attempts—though unsuccessful—at getting a renunciation from Raphella (sp?) Lopez. Petitioner still believes that Ms. Lopez wants to renounce her interest in the Estate. After hearing the diligent efforts and hurdles facing the Petitioner, the Court stated that it would not reject a renunciation from Ms. Lopez solely for lacking a notarization.

Petitioner's counsel had not yet determined whether the attempted service on Raphella Lopez, in Phoenix, Arizona, satisfied Rule 3.2 of the Tohono O'odham Rules of Civil Procedure (service made outside the Nation must comply with the rules of that outside jurisdiction), as mentioned in the Court's March 14, 2025 Order. The Court will await counsel's word on that.

The Decedent's two nieces, Ivina Margaret Hendricks and Ivaleen Hendricks, informed the Court that they intended to divide the Estate's traditional house equally between them if Raphella Lopez, the Decedent's sister, renounced her interest. The Court noted that if she did not renounce, but simply did not file a response after being served, the nieces would likely have to prove a custom of the Nation as to why the house should go to them and exclude Ms. Lopez. The Court would be bound to follow that, if proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation. See 4 T.O.C. ch. 1, § 1-102.

Otherwise, the Court would likely, also under 4 T.O.C. ch. 1, § 1-102, in the absence of Tohono O'odham law or custom, exercise its discretion and look to Arizona law for guidance. That law provides that Raphella Lopez would get a 50% share of the house, and the nieces (both daughters of the same predeceased sister of the Decedent) each would get a 25% share. See A.R.S. § 14-2106.

The Court sets a **Status Hearing for June 18, 2025 at 2:00 p.m.**

Dated: May 21, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

ADULT CIVIL DIVISION

In the Matter of the Estate of: Diane Narcho DOB: 10/29/1959 DOD: 07/06/2022 Decedent	Case Number: AV2024-0173 **ORDER APPOINTING PERSONAL REPRESENTATIVE AND DISTRIBUTING PROPERTY**

At the continued Initial Hearing on May 21, 2025, Neal C. Narcho, Petitioner, and Jeffrey Judge of the Tohono O'odham Advocate Program, Petitioner's attorney, appeared. Neal C. Narcho previously testified, and the Court preserved his testimony.

Based on the testimony and evidence presented, the Court finds that:

1. This Court has jurisdiction.
2. The Court accepted for filing in open court a Proof of Service for Michael Harvey in El Cajon, CA. Counsel for Petitioner confirmed that such service satisfied Rule 3.2 of the Tohono O'odham Rules of Civil Procedure (service made outside the Nation must comply with the rules of the outside jurisdiction).
3. Neal C. Narcho has provided notice to all involved parties as required by law.
4. No one has filed an answer, response, or opposition with the Court.
5. Neal C. Narcho is Diane Narcho's brother and is entitled to serve as Diane Narcho's personal representative without bond.
6. Diane Narcho died without a written will on July 6, 2022.
7. Diane Narcho has the following heirs:

a. Daniel Harvey

b. Michael Harvey

8. Diane Narcho's estate consists of her interest in the following:

a. 2020 Chevrolet Silverado 1500, VIN 1GCRYDED4LZ228313

b. Personal belongings

9. Diane Narcho may have had an outstanding debt with Exeter Finance LLC (Exeter) relating to the Silverado.

The Court orders that:

1. The Court amends its Order filed March 14, 2025 by changing the title on page 1 from "ORDER APPOINTING PERSONAL REPRESENTATIVE" to "ORDER PRESERVING TESTIMONY AND CONTINUING INITIAL HEARING".
2. Neal C. Narcho is appointed Personal Representative of Diane Narcho's estate, to serve without bond.
3. An inventory of the Estate is not required.
4. The Court awards all of the Decedent's interests in the 2020 Chevrolet Silverado 1500, VIN 1GCRYDED4LZ228313 (subject to any valid lien against the vehicle), her personal belongings, and any other property found to belong to the Estate, in equal shares to Daniel Harvey and Michael Harvey.
5. The Personal Representative intends to seek a ruling from the Court barring claims from Exeter.

a. Pursuant to 4 T.O.C. ch. 1, § 1-102, the Court will look to Arizona law.

b. Counsel for the Personal Representative will, by June 11, 2025, file with the Court a motion with supporting brief stating whether the notice previously delivered to Exeter satisfied the requirements under A.R.S. § 14-3801.B (Notice to creditors by mail) to start the sixty-day time period running.

c. If it was, Counsel will move for a ruling barring claims by Exeter under A.R.S. § 14-3801.B.

d. If it was not, Counsel plans to send a compliant notice, to be followed by a motion to bar claims by Exeter—if Exeter does not present any claims within 60 days.

6. The Court sets a Status Hearing for **August 20, 2025 at 10:00 a.m.** The Personal Representative does not have to attend if counsel doesn't consider his presence necessary. And if the Exeter notice / claim matter is resolved by then, the Court will vacate the hearing.

Dated: May 21, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Charlotte T. Conde DOB: 07/07/1965 DOD: 08/27/2023 Decedent	Case Number: AV2025-0030 **ORDER APPOINTING PERSONAL REPRESENTATIVE & DISTRIBUTING PROPERTY**

SUMMARY: Order applying O'odham custom, as proved by individuals familiar with customary practices, to determine heirs and distribute estate property.

FILED IN THE
TOHONO O'ODHAM COURT
2025 4 24 AM08:40
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Estate of: Charlotte T. Conde DOB: 07/07/1965 DOD: 08/27/2023 Decedent	Case Number: AV2025-0030 **ORDER APPOINTING PERSONAL REPRESENTATIVE & DISTRIBUTING PROPERTY**

At the Initial Hearing on April 23, 2025, Evelyn Conde, Petitioner, and Susanne Laursen, civil attorney of the Tohono O'odham Advocate Program, Petitioner's attorney, appeared. Melinda (Linda) Preston appeared as a person familiar with the customs of the Sells District. Pearl Conde, a sister of the Decedent, was present, as was a relative of Ms. Preston. Evelyn Conde and Linda Preston testified.

I. General

Based on the testimony and evidence, the Court FINDS and ORDERS as follows:

1. This Court has jurisdiction.
2. Charlotte T. Conde's estate consists of her interest in the following:
    a. Hip home in the Sells District
    b. Bank of America account (which the Petitioner suspects may have little or no funds)
3. Charlotte Conde was unmarried and had no children. Her parents predeceased her. She has three surviving siblings and one predeceased sibling. Her predeceased sibling had three children who also predeceased Charlotte Conde. Each of those predeceased nephews and nieces had three children each, all of whom are alive.
4. Those are all of the *possible* heirs known do the Petitioner and to the Court.

5. Pursuant to 9 T.O.C. ch. 1, § 16, Evelyn Conde has provided notice to all of those possible heirs, and they have been given full opportunity to come before the Court and defend their interests.
6. No one has filed an answer, response, or opposition with the Court. Pearl Conde and Russell Conde, siblings of the Decedent, filed renunciations of the HIP home.
7. Evelyn Conde is Charlotte T. Conde's sister and is entitled to serve as Charlotte T. Conde's personal representative without bond.
8. Charlotte T. Conde died intestate, without a will, on August 27, 2023.
9. Petitioner does not know whether Charlotte T. Conde had any debts, based on her personal effects being removed without permission by other family members. She suspects, however, that she had little or no debt-most likely limited to a Bank of America credit card.
10. Evelyn Conde is appointed Personal Representative of Charlotte T. Conde's Estate, to serve without bond.
11. An inventory of the Estate is not required.

II. Determination of Heirs; Applicable Laws

12. The Petition asked the Court to determine Charlotte Conde's heirs by Tohono O'odham custom.
13. The Nation's Code addresses this:

> *In all civil cases the Tohono O'odham Courts shall apply, in order of precedence, the Tohono O'odham Constitution, the Nation's laws and ordinances, and finally the customs of the Nation.*
>
> 4 T.O.C. ch. 1, § 1-102.

14. The Tohono O'odham Constitution, laws and ordinances do not address determination of heirs without a will, or intestate succession of property, other than

Title 9 of the Tohono O'odham Code which, like Title 4, points to tribal custom. ("In the determination of the heirs the Court shall apply the custom of the Tribe as to inheritance."). 9 T.O.C. ch. 1, § 16.

15. Title 4 of the Code further provides:

> *O'odham custom may be proved by testimony of persons familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation.*
>
> 4 T.O.C. ch. 1, § 1-102.

16. Though not controlling, see T.O. R. Ct., § 1, R. 8.2(d), the Court agrees with previous Trial Court decisions holding that a person asserting tribal custom has the burden of proving it. See In re Norris, 1 TOR3d 63, 64 (Tr. Ct. 1988); In re Elizabeth Siquieros, AV2023-0013 at 3-4 (Tr. Ct. Apr. 22, 2025) (unpublished), and must do so by a preponderance of the evidence. In re Elizabeth Siquieros at 4-5.

III. Application: Determination of Heir & Distribution of Property

17. Petitioner followed all of the above here.
    a. Petitioner called her witness, Linda Preston.
    b. Ms. Preston established herself as a "person[] familiar with the customary practices of the O'odham, or the custom of a particular community within the Nation"- specifically the Sells District.
    c. The Court found by a preponderance of the evidence that it is the custom in the Sells District in this case, where the Decedent had no spouse, no surviving parents, and no children, that the eldest surviving sibling inherits the estate.
    d. Evelyn Conde established that she is the eldest surviving sibling.

18. Therefore, pursuant to the Tohono O'odham custom and statutes cited above,[1] the Court DETERMINES that the sole heir of Charlotte T. Conde is Evelyn Conde.

19. Further pursuant to the custom established for the case here, Evelyn Conde, as the eldest surviving sibling of Charlotte T. Conde, is awarded all of the Estate property.

IV. Holding on Custom Applicable to this Case Only

20. This Court has noted the Nation's customs may differ over time and from place to place, and may be subject to overriding customs. See In re Elizabeth Siquieros at 7.

21. Further, nobody in this case challenged the custom presented by the Petitioner or offered a different or competing custom.

22. Accordingly, the holding with respect to the custom in this case is specific to the facts and circumstances of this case.

V. Miscellaneous

23. The Court will keep this case open until July 25, 2025 in case the Personal Representative needs anything from the Court. If nothing is filed by then, the Court will administratively close this matter.

24. This is a final, appealable Order.

Dated: April 23, 2025

Judge Joseph Hardy Jr.

[1] The Petition asked the Court to find all of the relatives listed in Section I.3 above as heirs under Arizona law, then find that Tohono O'odham custom has priority over Arizona law and award the estate to Evelyn Conde. (Pet. Section VI.) However, the Court only looks to Arizona law, in its discretion, if no Tohono O'odham custom applies. 4 T.O.C. ch. 1, § 1-102 ("***If*** a Tohono O'odham Court finds that there is no Tohono O'odham law or custom which address the claims asserted, the court ***may in its discretion*** look to the laws of the State of Arizona ***for guidance***.") (emphasis added). That is not the case here. Because the Court has found custom to apply, Arizona law never comes into play.

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Guardianship and Conservatorship of: Tyrin Abraham Moreno DOB: 12/27/2005 An alleged incapacitated and protected person	Case Number: AV2025-0041 **ORDER REQUIRING SERVICE ON THE ALLEGED INCAPACITATED PERSON AND CONTINUING INITIAL HEARING**

SUMMARY: Order requiring service on the proposed incapacitated person in an adult guardianship hearing to protect due process rights.

FILED IN THE
TOHONO O'ODHAM COURT
2025 5 15 AM 11:03
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

ADULT CIVIL DIVISION

In the Matter of the Guardianship and Conservatorship of: Tyrin Abraham Moreno DOB: 12/27/2005 An alleged incapacitated and protected person	Case Number: AV2025-0041 **ORDER REQUIRING SERVICE ON THE ALLEGED INCAPACITATED PERSON AND CONTINUING INITIAL HEARING**

At the hearing on May 14, 2025, Bernadette Frances Jose, Petitioner, appeared.

The Court finds and orders that:

1. This Court has both personal and subject matter jurisdiction under the Tohono O'odham Constitution.
2. Bernadette Frances Jose filed a petition for Appointment of Guardian/Conservator.
3. Bernadette Frances Jose is Tyrin Abraham Moreno's mother.
4. Tyrin Abraham Moreno's father was served and did not appear or file a response.
5. Tyrin Abraham Moreno was not served with notice of the hearing.
6. Declaring a person incapacitated and appointing a guardian and conservator for that person strips that person of valuable liberty and property rights, such as the rights to vote, make their own medical decisions and control their own finances. See, e.g., In re Manuel, 4 TOR3d 74, 75-77 (Tr. Ct. 2024).
7. This Court, as a branch of the Tohono O'odham Nation, cannot deprive any member of liberty or property without due process of law. T.O. CONST. art. III, § 1; 25 U.S.C. § 1302(a)(8).

8. "At its core, the due process guarantee requires reasonable notice and a meaningful opportunity to respond." Escalante v. Sells Dist. Council, 2021 TOR Supp. 35, 44 (Ct. App. 2017).
9. In the adult guardianship context, this means that alleged incapacitated persons—like other interested parties—must be served with a summons and copy of the petition for guardianship and conservatorship, and have the *opportunity* to file a response and/or appear at the hearing and speak for themselves, or through counsel (at their expense) if desired.
10. Arizona law is not controlling on this Court, and is not even needed for guidance in this case as the Tohono O'odham Constitution and case law cited above answer the question. See 4 T.O.C. ch. 1, § 1-102.
11. However, the Court notes that Arizona law is in agreement on this point. A.R.S. § 14-5309 requires that, in a proceeding for the appointment of a guardian, notice of a hearing must be given to "[t]he ward or the alleged incapacitated person and that person's spouse, parents and adult children."
12. Further, the Arizona Probate Code Practice Manual, citing A.R.S. § 14-503(C), specifically notes that "[t]he alleged incapacitated person's *rights to due process*—to appear in person, to be represented by counsel, to present evidence, to cross-examine . . . are protected by statute." 1 STATE BAR OF ARIZ., 2022 ARIZ. PROB. PRAC. MANUAL § 11-3-2.3 (6th ed.) (emphasis added).
13. This does not mean that alleged incapacitated persons *must* appear, simply that they be provided notice and the *opportunity* to appear. If they choose not to appear at the guardianship hearing after being lawfully served, due process has been satisfied.
14. Because Tyrin Abraham Moreno was not served, the Court could not proceed with appointing a guardian / conservator without violating his due process rights.

15. Accordingly, the Court **continued the Initial Hearing to June 5, 2025 at 9:30 a.m.**

16. Bernadette Frances Jose must serve Tyrin Abraham Moreno with a summons showing the continued Initial Hearing with that date and time, and a copy of the Petition, so that he has the opportunity to respond-by filing a response and/or by appearing in person- *if* he wishes to do so.

Dated: May 15, 2025

Judge Joseph Hardy Jr.

TOHONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Estate of: Patricia J. Sanchez DOB: 05/30/1945 DOD: 06/19/2024 Decedent	Case Number: AV2025-0083 **AMENDED ORDER** APPOINTING PERSONAL REPRESENTATIVE AND DISTRIBUTING ESTATE ASSETS

NOTE: On November 13, 2025, this Court issued an Order. Paragraph 7 of said Order misquotes 4 T.O.C., ch. 1, §1-102, when the Court used the term "elder" when the Code uses "persons". Pursuant to Rule 19(a) of the Rules of Civil Procedure, this Amended Order is issued to correct the mistake. All other parts of the order are reaffirmed and restated.

An Evidentiary Hearing took place on November 5, 2025. Gail Sanchez, the Petitioner, appeared with her counsel, Suzanne Laursen of the Tohono O'odham Advocate Program. Gilbert Sanchez, interested heir, appeared, representing himself. The Court swore in the parties and those witnesses that were in attendance that expected to testify. Opening arguments were not made.

Ms. Laursen called the following witnesses, who were examined, cross examined, and examined on redirect: Wavalene Saunders; Laura Homewytewa; Linda Hendricks; Cecil Lewis; and Gail Sanchez. Exhibits 1 (police report), 2 (police report), 3 (letter from Wavalene Saunders) and 4 (Wells Fargo release of lien) were admitted. Ms. Laursen rested. Gilbert Sanchez called himself as a party-witness. Closing arguments were made. On the

record, the Court requested the parties to recognize that they are family, and that they should be working together and to honor the memory of Patricia J. Sanchez.

The Court finds and orders as follows:

1. The Court has personal and subject-matter jurisdiction.
2. Patricia J. Sanchez, the Decedent, was a member of the Tohono O'odham Nation, from the Sif Oidak District.
3. Patricia Sanchez was a widow when she passed away. She was survived by her two children, Gail Sanchez and Gilbert Sanchez.
4. Patricia Sanchez did not have a will when she passed away.
5. Title 9, Chapter 3, Section 16 of the Tohono O'odham Nation's Code, provides that any member claiming to be an heir of a decedent may bring a suit to have the Court determine the heirs of the decedent and to divide among the heirs the decedent's property, and further states: "In the determination of heirs, the Court shall apply the custom of the Tribe as to inheritance."
6. The late Hilda Manuel shared the following concerns with applying custom and tradition in probate cases when this would result in interested heirs being disinherited:

> **If tribal custom is applied in this case, the Petitioner/proponent of tribal custom would inherit nothing. The Court would be required to make a distribution to the male heirs found to be responsible. Not only is the Court not ready to carry out this function, the application of tribal custom would work a great injustice and give rise to potential equal protection problems. The application of tribal custom would be indefensible because of its lack of definition and consistent application, but moreover, because the Nation has not codified custom into a uniform law nor required its application. (Emphasis Added).** *In re Norris*, 1 TOR3d 63, 66 (Tr. Ct. 1988).

7. While recognizing the equal protection issue, in cases where a party requests custom and tradition to be applied, the proponent for the application of tribal custom is given the opportunity to show the custom and tradition that applies in a particular district, and in a particular community, by a preponderance of the evidence, by the testimony of persons familiar with the customary practices. *See* Title 4 of the Tohono O'odham Nation Code, Chapter 1, Section 1-102. Here, Linda Hendricks and Laura Homewytewa, elders of the Sif Oidak community, testified that the eldest child, or the child who cared for the deceased relative during their last days, inherits the property of the decedent. Gilbert Sanchez admitted that this is the recognized custom of his community, and that Gail Sanchez meets those requirements.
8. The Court finds that Gail Sanchez and Gilbert Sanchez are the lawful heirs of Patricia Sanchez. Gail is the oldest child. Gail cared for Patricia Sanchez in her last days, over the six months before she passed away. Gail took Patricia to her medical appointments.
9. Given the applicable custom of the Sif Oidak community, Gail Sanchez is recognized as the sole heir of the Estate of Patricia Sanchez. She is awarded all Estate assets, including the vehicles, personal property, and the HIP home.
10. Gail Sanchez submitted herself to the jurisdiction of this Court. She is therefore appointed as the personal representative of the Estate of Patricia J. Sanchez, and she will serve without having to post a bond, and without restrictions.
11. Given that Gail Sanchez is awarded all Estate assets, she is not required to provide an Inventory and Appraisement.
12. Gilbert Sanchez previously changed the locks to the HIP home. He agreed to give a key to Gail Sanchez. Gail agreed to allow Gilbert's children, who are currently residing in the home, some time to move out.

13. This is a final, appealable order.

14. The Court will hold a Probate Review Hearing on February 4, 2026, at 10 a.m.

Dated January 5, 2026.

Judge Rene Alcoverde Jr.

TOHONO O'ODHAM JUDICIARY

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TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

Donna LaPorte and Charles LaPorte, Wife and Husband,

Plaintiffs,

v.

The Tohono O'odham Nation dba Desert Diamond Casinos & Entertainment West Valley; Tohono O'odham Gaming Enterprise; John Does I-X; Jane Does I-X; ABC Corporations I-X; and XYZ Partnerships I-X,

Defendants.

Case Number: AV2025-0089

RULING ON MOTION TO DISMISS

On September 18, 2025, Theodore Julian, counsel for Plaintiffs, appeared, as well as Jonah Rappazzo, counsel for the Defendant Tohono O'odham Gaming Enterprise. Mr. Rappazzo argued his Motion to Dismiss, alleging that the Plaintiffs' claim is time-barred. Mr. Julian argued in response. The Court denies the Motion to Dismiss on the grounds that there is no statute of limitations in the Nation's Civil Code for civil personal injury claims.

ANALYSIS

The Tohono O'odham Nation has not enacted a Code provision that time-bars civil claims for personal injury. The Nation has a two-year statute of limitations for livestock

actions that can be brought by one person against another under 2 T.O.C. ch. 5, § 5404. The Nation also has statutes of limitations for criminal prosecutions in 7 T.O.C. ch. 1, § 1.5. The Tohono O'odham Nation has no binding or persuasive case law that puts injured parties on notice that they have two years to file a civil action.

The Court has discretion to look to Arizona law for guidance when the Tohono O'odham Constitution, laws, or customs and traditions do not apply or address the issues in dispute. 4 T.O.C. ch. 1 § 1-102 states that "the court may in its discretion look to the laws of the State of Arizona for guidance." The Court is not required to apply Arizona law, as this is an O'odham Court. The Court finds that this discretionary possibility does not comport with due process so as to justify summarily denying the Plaintiffs' personal injury claims.

The record demonstrates that Mr. Julian reached out to Jones, Skelton & Hochuli, P.L.C., who used to represent TOGE, and that he also made a claim and requested records on behalf of the Plaintiffs. He asked if there was a statute of limitations and was told there was none. He was then provided the "Claims Procedure" form attached as **Exhibit B** to the Response to Motion to Dismiss, which reads:

> The Tohono O'odham Nation has not established limits within which claims must be presented; however, the laws of the State of Arizona may be looked to for guidance.

Mr. Julian avowed that he relied on that response. He also requested videos, records, and to have evidence preserved, and shared that nothing was provided to him. He explained that the denial of his clients' claim was internal to Tribal First, TOGE's insurance company.

Estoppel is appropriate in the statute of limitations context where a defendant's acts or omissions actually and reasonably induce a plaintiff to refrain from filing a timely suit.

See Doe v. Marten, 49 Cal. App. 5th 1022, 1028, 236 Cal. Rptr. 3d 547 (2020). The existence of estoppel is a question of fact for the trial court. *Id.* Here, there is no statute of limitations contained in the Nation's Civil Code and therefore, there can be no equitable estoppel. The actions taken by Mr. Julian demonstrate that the Plaintiffs did not simply sit on their rights and that, should the Court choose to look to Arizona's statute of limitations, Mr. Julian could establish estoppel as a basis to not apply Arizona's two-year statute of limitations.

Given that the Tohono O'odham Nation's Civil Code does not directly address a statute of limitations while other sections of the Code do (i.e., Criminal and Livestock Buyers Codes), the Court could read the lack of a statute of limitations as a deliberate choice by the Council to leave it out. The Civil Code was published in 1945 and has not been updated since. The Council may believe the common law statute of limitations should be applied and provide guidance for what is not stated in the Code. However, nothing in the Code specifically addresses this legal issue. Presumably, if the Council wanted to impose a statute of limitations, they would have already done so, or at a minimum, they would have included one for personal injury claims in the Gaming Enterprise Code, which was originally published in September of 1993.

The Council clearly codified statutes of limitations in two other sections of the Nation's Code. The Court considered employing the omitted case canon, which asserts that if a statute doesn't say something clearly, the Court must attempt to discern what lawmakers meant by their omission. This is important here because, though other sections of the Code clearly contain a statute of limitations, the Civil Code does not. Simply put, this canon is "the principle that what a text does not provide is unprovided." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 96 (Thomson/West

2012). Defendant argued that since there is no statute of limitations in the Civil Code, this Court must accept that what the Council meant by this omission is that the Court should look to Arizona law for a statute of limitations. The Court disagrees and believes that adopting the Arizona statute of limitations, whole-cloth, would amount to legislating from the bench.

The Court therefore FINDS and ORDERS that it is fair and equitable to allow the Plaintiffs' civil case to proceed on the basis that there is no statute of limitations that requires civil claims for personal injury to be filed within two years of accruing. However, for future cases, through this Order and until the Council enacts a statute of limitations, the Court adopts the common law statute of limitations of two years for personal injury claims.

Furthermore, as the Chief Judge for the Judicial Branch, this Order will be published in the next volume of cases, and will be immediately added to the Court's website, so it can be relied upon as persuasive authority until legislative action is taken.

Dated September 19, 2025.

Judge René S. Alcoverde Jr.

TOHONO O'ODHAM JUDICIARY

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THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CHILDREN'S DIVISION

In the Matter of: D[redacted] H[redacted], f/k/a Y[redacted] Date of Birth: [redacted]	Case No.: CCV2015-0010 ORDER

At the February 4, 2025, Emergency Review Hearing, the Tohono O'odham Nation Department of Health and Human Services, Child Welfare Division ("Division"), appeared through Assistant Attorney General Rebecca Cohen, Child Welfare Investigator Savannah Lopez, and Program Supervisor Nancy Ibarra. The Division stated it appeared as a courtesy to the Court.

The Division provided Ms. Lopez's sworn statement of due diligence and oral statements supporting its investigation into D[redacted] H[redacted]'s well-being. The Division also presented arguments on its Motion for Clarification and to Correct Annual Review Court Order, filed January 8, 2025.

In its motion, the Division claimed the Court's January 8, 2025, Order had "implications for the Nation's separation of powers." The Division asked the Court clarify that its Order was "intended to be a referral to the Division for investigation equivalent to a hotline call" to avoid alleged potential separation of powers violations. This analysis addresses the Division's concerns.

ANALYSIS

Reports of a Child in Need of Care and the Court's Authority

The Children's Code guides this Court's analysis. The Code's primary purpose is "[t]o ensure the health and welfare of all children and families" in the Nation's jurisdiction, "[t]o provide for the care, protection, and mental and physical development" of those children, and to provide judicial and other procedures to execute and enforce the Code's provisions. *See* 3 T.O.C. ch. 1, art. 1, § 1101(B)(1), (3), and (6).

The Children's Code requires that its provisions "be interpreted broadly to exercise the jurisdiction of the Nation and the Children's Court to the maximum extent permitted by law and to facilitate the authority of the Nation and Children's Court to protect the interests of children and families." 3 T.O.C. ch. 1, art. 2, § 1201. This broad interpretation shows the legislature's intent to prioritize the Nation's children's safety and well-being and focuses the Nation's authority, and that of this Court, to protect children and their families to the maximum extent permitted by law.

To fulfill this legislative intent, the Children's Court "shall have the authority to issue all orders necessary to ensure the safety of children within the jurisdiction of the Nation, including the issuance of subpoenas, orders of restriction, warrants for protective custody, and such other orders as may be appropriate." 3 T.O.C. ch. 1, art. 3, § 1302. The Court's judges and employees can also file reports indicating a child may be a "Child in Need of Care." *Id.* at art. 4, § 1402. A Child in Need of Care includes a child with no parent, guardian, or custodian willing and able to provide control of, and care for, the child and can also be a child without adequate food, shelter, clothing, medical care, or education necessary for his or her health and well-being. 3 T.O.C. ch. 1, art. 2, § 1202.

The law's purpose for investigating children in need of care, is to "provide maximum safety and protection" for a child who may be abused, neglected, or abandoned, and "to ensure the safety, protection, and physical and emotional well-being of a child who is at risk of such harm." *Id.* at § 1401. Even "[c]ourt-ordered social and health services may be necessary in order to protect the child's safety and physical and emotional well-being and to prevent additional abuse of the child." *Id.*

Reports alleging a child needs care flow to two Nation entities—either the Nation's Police Department ("TOPD") or the Division. 3 T.O.C. ch. 1, art. 4, § 1402(A). The agency receiving the report "shall notify" the other agency within eight hours and shall file a written preliminary report to that other agency within 24 hours. *Id.* Once the Division receives that report or referral, it "shall investigate the allegations contained in the referral; take immediate and appropriate steps to secure the safety and well-being of the child involved, including, if necessary, taking the child into temporary custody . . . offer and, if accepted, provide appropriate services to the family." *Id.* at § 1402(B).

The Court's Role in Guardianship cases

The Children's Court can appoint guardians for children to ensure they have stable homes where they can thrive. This appointment is formalized in a guardianship order that gives legal recognition of the guardian's duty to manage the child's medical care, education, and financial needs. 3 T.O.C. ch. 1, art. 6, § 1601, *et seq*. The Division typically provides the Court with an affidavit of due diligence about a prospective guardian's fitness to serve in that role. The Court has, in the spirit of cooperation and collaboration, always appreciated and accepted that information under 3 T.O.C. ch.1, art. 6, §§ 1602(C)(8) and (D).

In that same spirit of cooperation and collaboration, over the past two years, this Court has routinely ordered the Division to conduct welfare checks when guardians fail to appear at multiple hearings.[1] These checks provide critical information to the Court—the child's ultimate guardian—enabling it to protect the children under its jurisdiction. Without the Division's investigation, the Court cannot verify a child's safety or well-being. When a guardian misses court and fails to file their report on two or more consecutive hearings, it becomes a great concern whether the child has a willing caretaker or lacks adequate food, shelter, clothing, medical care, or education necessary for his or her health and well-being.

The Court typically allows thirty days for the Division to file a report following a welfare check order. This extended time recognizes the Division's workload while addressing critical safety concerns for the child. The Division has a responsibility to investigate referrals and ensure children's safety. *See* 3 T.O.C. ch. 1, art. 4, § 1402. The Code defines a Child Welfare Worker as "a person employed by the Tohono O'odham Nation Department of Health and Human Services, with the responsibility for investigating Child in Need of Care referrals and providing services to families of a child alleged or adjudicated to be a child in need of care." *See* 3 T.O.C. ch. 1, art. 2, § 1202.

Reading the Nation's laws together and interpreting them to maximize child protection, the Court's orders directing the Division's investigation of a child's care and condition fulfills the law's letter as a referral and its purpose for protection. The Court is not creating any new policy or duty for the Division. Instead, the Court is utilizing the Nation's law to the maximum extent possible and utilizing persons "with the responsibility for investigating Child in Need of Care referrals and providing services to

[1] The Court has, in at least five previous cases, issued an order with language identical to that which the Division objects in this matter. *See* CCV2019-0027, CCV2019-0009, CCV2018-0047, CCV2013-0100, CCV2013-0101.

families of a child alleged or adjudicated to be a child in need of care" to help provide that child maximum safety and protection.

Addressing the Division's Motion

The Division argues the Court exceeds its authority in ordering the investigation, a written report, and attendance at a hearing to consider the report. While acknowledging its commitment to child protection, the Division considers such actions a "courtesy" and objects to the term "order."

However, the Court has authority to "issue all orders necessary to ensure the safety of children within the jurisdiction of the Nation . . ." 3 T.O.C. ch. 1, art. 3, § 1302. Both the Court and Division must interpret the Code broadly to exercise jurisdiction "to the maximum extent permitted by law" and "protect the interests of children and families." *Id.* at art. 2, § 1201. The Division is uniquely qualified, trained, and authorized to investigate whether children receive necessary care. *Id.* at art. 4, § 1402. And, again, the Nation's law defines a Child Welfare Worker as a person with the "responsibility" to investigate a Child in Need of care referral and provide appropriate services to the family. *Id.* at art. 2, § 1202.

The Court is not creating a new policy when ordering an investigation and report for a child with an unresponsive guardian. It is applying existing laws to ensure child safety. Whether termed a "referral" or an "order," the effect is the same: a referral to the Division as directed in Section 1402. And this triggers the Division's duty to investigate and secure D[redacted]'s well-being. The Court trusts the Division will conduct a thorough investigation.

In the spirit of cooperation and collaboration the Court seeks the resulting report to understand what is happening in the ward's life. The Court sets a hearing date, typically thirty days later, for the Division to share its findings. The Court wants to cooperatively work with the Division's workload and responsibilities in holding that hearing, allowing ample time for investigation and for any guardian to recognize their responsibilities and provide their information to the Court.

Despite having this robust report and investigation process made clear in the Nation's law, the difference between the word "order" and the word "referral" appears to be causing concern about separation of powers. While the Court disagrees with this interpretation, it won't let terminology prevent necessary child protection.

But without directions to the Division to appear and provide the results of its investigation, the Court lacks the resources of trained and equipped professionals to conduct the thorough and complete investigation and report the Division can provide. If this were truly a separation of powers issue, the Court could only appoint individuals within its own branch to investigate a ward's status and appear and report on the care and well-being of that ward. While such individuals, like probation officers and court officers, are professionals and competent in their own field, they lack the specialized training of Child Welfare Workers. This leaves the Court without adequate information about wards under its jurisdiction and would fail to give effect to the Nation's law and its purpose.

The Court welcomes the Division's voluntary appearance in many guardianships. The Division typically provides an affidavit stating its position on the requested guardianships. By law, the Division appears to be a party to any guardianship where parental rights remain intact, as parents challenging guardianship must notify the

Division thirty days before a hearing to challenge the guardianship. *See* 3 T.O.C. ch. 1, art. 6, § 1605(D).

The Division's party status in most guardianships, whether by its own appearance or by the operation of a parent's challenge, makes sense. Its staff have the training and experience to ensure children's safety and well-being. This helps the Court protect children and maximize their safety under the Children's Code. *See* 3 T.O.C. ch. 1, art. 1, § 1101(B)(1), (3), and (6); -ch. 1, art. 3, § 1302; -ch.1 art. 2, § 1202; -ch. 1 art. 4, § 1401, 1402.

Violation of Separation of Powers

The Division argues this Court's order to investigate and report on D[redacted]'s well-being has "implications for the Nation's separation of powers." The Division claims such orders lack authority when it's not a party to the case. The Division also argues the Court's orders in this regard are coercive and, therefore, violate separation of powers.

The Division regularly appears in guardianship cases, filing affidavits in cases where a child was found to be in need of care, like D[redacted]. Any parent challenging guardianship must, as noted above, notify the Division, regardless of its party status. This demonstrates the Division's inherent role in guardianships.

The Court's "authority to issue all orders necessary to ensure the safety of children within the jurisdiction of the Nation" under Section 1302, and its responsibility to "protect the best interests of the child," at Section 1301, are broad and fundamental. These powers extend to any case involving a child's welfare.

The Court's Order directing a welfare check on D[redacted] H[redacted] doesn't mandate new policies. It simply requires the Division to fulfill its existing duty to investigate when information suggests a child needs care.

The Division cites the Nation's Constitution, and *Manuel v. Tohono O'odham Legislative Council*, 2021 TOR Supp. 121, 123 (2016), and *Tohono O'odham Nation v. Escalante*, 2 TOR3d 37 (1998), to argue that the Court cannot interfere with executive branch policies.

In *Escalante*, the Court stated it did not view its role "to mandate any policies for departments of the Executive Branch." 2 TOR3d at 39. Here, the Court is not mandating policies for the Division or any other Executive Branch. The Division's duty to investigate a child in need of care is triggered by information it receives indicating, in part, that a child may be without a parent, guardian, or custodian willing to provide control and care for the child. This information is, and should be, actionable regardless of whether it is labeled a referral, report, or order. The Court is not directing the Division to file a formal action in the Court as a result of its investigation, but simply to appear and provide notice of the ward's condition to the guardian, the Children's Court, which is mandated under specific factual circumstances, *see* 3 T.O.C. ch. 1, art. 4, § 1402(C).

In *Manuel v. Tohono O'odham Legislative Council*, 2021 TOR Supp. 121, 123 (2016), the Court held that a Legislative Council resolution directing the approval and appointment process on executive appointments encroached on the Chairman's appointment power. Here, the Court is not interfering with the Division's responsibility to investigate and report on concerns where a child may be in need of care. As well, the Court is not directing the Division on the manner or process by which it investigates and drafts or writes its report. Instead, the Court is activating its responsibility to report its concerns about a child for which it has responsibility to monitor and ensure maximum safety and protection, and it is providing a forum for the Division to report the results of its investigation on the Court's concerns. The manner in which the Division completes its investigation of the subject child's status as required under Section 1402, is at its full

discretion. The Court's concern is that the child is safe and protected, as the Court has oversight responsibility to make sure that is true.

In *In Re: Petition of the Judicial Branch*, 3 TOR3d 81, 93 (2010), the Court emphasized that "[w]hile it is obvious that the Constitution intends to provide a system of checks and balances of authority, the term *separation of powers* is never articulated. . . . the Court will not read into the Constitution that the governing processes must necessarily be *adversarial*." (Emphasis in original.) The Court's intent here is cooperative, not adversarial, and aimed at protecting a child's welfare after a guardian has failed two or more times to provide the Court with a report on the child's care and well-being.

In the 2011 case, *In Re: Petition of the Judicial Branch*, 3 TOR3d 128, 133, the Court discussed how the Judicial Branch has the constitutional power to "[e]stablish court procedures for the Tohono O'odham Judiciary." (Citations omitted.) By ordering information or attendance, the Court is performing a constitutional duty and confirming one the Division may have as well, *see* 3 T.O.C. ch. 1, art. 4, § 1402(C). Additionally, "not only must a branch act in furtherance of constitutionally appropriate objectives, but it must also utilize constitutionally appropriate means." *In Re: Petition of the Judicial Branch*, 3 TOR3d at 135. Here, the Court's "constitutionally appropriate objective" is protecting D[redacted], one of the Nation's children, and the "constitutionally appropriate means" is through a court order issued to determine D[redacted]'s safety and protect his physical and emotional well-being. In exercising that authority, the Court has not violated the three-part test developed in *Francisco*, 1 TOR3d 76, 71-72 (1989), as reviewed below, but acknowledges there is a way to resolve the Division's concern in accord with the Nation's Himdag.

The Francisco Test:

(a) Is there significant interference by one branch with the operations of another branch?

Here, the Court ordered a welfare check on its ward. Under 3 T.O.C. Ch. 1, art. 3 § 1302, the Court "shall have the authority to issue all orders necessary to ensure the safety of children within the jurisdiction of the Nation, including the issuance of subpoenas, orders of restriction, warrants for protective custody, and such other orders as may be appropriate." (Emphasis added). The Code identifies the Division and its Child Welfare Workers as responsible for "investigating Child in Need of Care referrals and providing services to families of a child alleged or adjudicated to be a child in need of care." *See* 3 T.O.C. ch. 1, art. 2, § 1202.

Moreover, under 3 T.O.C. Ch. 1, art. 5 § 1505, "[u]pon request of the petitioner; the child; the child's parent, guardian or custodian; or on the Court's own motion, the Court or the clerk of the Court shall issue subpoenas, to be served by the requesting party, requiring attendance and testimony of witnesses and production of papers at any hearing." (Emphasis added.) Article 6 of the Children's Code, § 1602(B), reiterates that the Court has the responsibility to "protect the best interests of the child."

Together, these provisions make clear that this Court must enter orders to ensure a child's safety within its jurisdiction. And because the Nation has empowered the Division to investigate whether a child needs care, this Court must partner with the Division to ensure children's safety through trained investigators. If the Division prefers terminology like "referral" be used in the Court's resulting order in a guardianship where the guardian has failed to report at least two successive times, the Court can use that language in its order and can invite the Division to appear at the hearing called to review the child's status. If an order inviting the Division's appearance is a concern, the Court

would be left to subpoena any report resulting from its referral. Through this referral-and-report process, the Court could ensure it has adequate information for its duty through a process strictly defined in the Code.

The Court would rather take this last approach to ensure the intergovernmental cooperation and interrelation that "strongly resonate with Tohono O'odham culture and tradition, which stress the importance of harmonious interactions and fosters a spirit of inclusiveness." *See*, *In Re: Petition of the Judicial Branch*, 3 TOR3d 128, 132 (Trial Ct., May. 18, 2011), *In Re: Petition of the Judicial Branch*, 3 TOR3d 81, 89 (Trial Ct., Mar. 11, 2010, appeal dism'd), *In Re: Petition of the Judicial Branch*, 3 TOR3d 50 (Ct.App., Jul. 19, 2012) (reviewing the Himdag philosophy of living—passed down to the O'odham from Íitoi—that makes clear that power cannot be centralized and other entities can always effect one's existence). The patient deliberation of all factors weighs heavily on this important aspect of O'odham ethos. *In Re: Petition of the Judicial Branch*, 3 TOR3d at 89 (quoting Papago activist Peter Blaine). Therefore, these Tohono O'odham values should inform and guide the cooperation, collaboration, and common goals the Division and this Court have when acting to ensure maximum protection and safety for the Nation's children.

(b) Is the power exercised exclusively inherent to one branch or a blend of the two branches?

The power to issue orders belongs exclusively to the Court. But the Court is not mandating policies for the Executive Branch. (Division's *Mtn. for Clarification*, 1:26.) The child remains a ward of the Court even within a guardianship, and the Children's Code requires the Court "to ensure the health and wellbeing of all children and families within the jurisdiction of the Tohono O'odham Nation." 3 TOC Ch. 1, art. 1 § 1101(B)(1).

The order at issue did not dictate how TODHHS should perform its duties. The Court merely ordered a welfare check, which would happen even if termed a "referral" under Section 1402. The Court also ordered the Division to appear at the Emergency Review Hearing on February 4, 2025, and file a report of its findings. (Division's *Mtn. for Clarification*, 1:18-21.)

The Division has the exclusive power to investigate and decide how to manage those investigations. The Court has not told the Division how it should conduct those investigations. *See* 3 T.O.C. ch. 1, art. 4, § 1402.

Instead, the Court's order directing investigation, report, and hearing helps blend the separate powers of the Court and the Division and focus those two important responsibilities and purposes on serving a child's best interests and ensuring a child is safe through information brought forward from an investigation. A court hearing also gives each party an opportunity to be heard. This cooperative approach fulfills the O'odham custom and tradition of harmonious interactions and fosters a spirit of inclusiveness.

(c) Is the action intended to function as a coercive influence or as a mere cooperative adventure? Is it the intent of the action to aid the other branch or to declare superiority of the branch in an area exclusively reserved to the other branch?

The Court's order will provide an avenue for cooperation between the Division and the Court in monitoring the health and welfare of a child within a guardianship. There is no coercive intent. The Court must "ensure the health and welfare of all children and families within the jurisdiction of the Tohono O'odham Nation" and exercise the authority under 3 TOC Ch. 1, art. 6 § 1602(B), to "protect the best interests of the child."

When an appointed guardian fails to report on a child's condition, the Court must get information from the next capable source—the Division and its trained staff. The Court's order is not intended to interfere in the Division's matters or to claim superiority over the Division. Rather, recognizing its limits and the Division's capabilities, the Court seeks the best information from a trained source so it can provide maximum protection for the child as the Nation's law requires. The Court sees this as a cooperative matter because it is providing notice to the Division of a concern about a child's guardianship and care, and the Division can utilize its specialized training and skill to help the Court understand what is happening for that child and if they are safe and protected.

Neither the Division nor the Court can gather this information and hold guardians accountable alone; it must be a cooperative act with each aiding the other. In this spirit, the Court will identify in orders similar to that at issue here, that it is referring the child to the Division as one in need of care, and will set a hearing date and invite the Division to appear and report on its findings as a result of that investigation, all under 3 TOC Ch. 1, art. 3, § 1302, -art. 4 §§ 1401, 1402(B) and (C), -art. 5 § 1505, and -art. 6 §§ 1602(B) and (D). The Court will trust the Division will appear and readily provide its report of investigation to the Court for proper oversight of its ward, implementing a harmonious interaction and fostering a spirit of inclusiveness. If no report is received, the Court may then subpoena such report under 3 TOC Ch. 1, art. 3 § 1302 to fulfill its duties under those laws.

Signed March 21, 2025.

Judge David M. Osterfeld

JUDICIARY

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

IN THE STATE OF ARIZONA

CHILDREN'S DIVISION

FILED
WITHIN THE
TOHONO O'ODHAM NATION JUDICIARY
2025 MAR 17 P 12:04
JUDICIARY SERVICE CLERK

In the Matter of:

M[redacted] R[redacted]
Date of Birth: [redacted]

Case No.: CCV2024-0038

ORDER

The Tohono O'odham Nation Division of Health and Human Services, Child Welfare Division ("Division") has asked the Court to grant Assistant United States Attorney Micah Schmidt access to files in this case for use in federal prosecution of M[redacted] R[redacted]. The Division contends that the Tohono O'odham Nation's law would allow such access under the good cause exception to the general bar against non-party access to juvenile records. They argue good cause exists in the federal prosecution of M[redacted] R[redacted] to hold him accountable for his actions harming his special needs sibling and the associated harm to his community and the Nation. Although M[redacted] R[redacted] initially opposed the release to protect his privacy rights, he filed no written response during the ample time the Court provided.

Title 3, Chapter 1, Article 12, requires protection of confidential records, reports, and proceedings in the Children's Court. The general purpose of this law is "to protect the privacy rights of the child." *See* Section 11201. The law allows release of certain records to parties with specific roles relevant to the protection of

the Nation's children. These parties include the Division, the Nation's Police Department, the Nation's Prosecutor, the child and/or guardian and their counsel, this Court and its staff, and others whom the Court determines should have access for good cause. This request presents a matter of first impression.

The Court understands the importance of accountability shown in the text and spirit of the Juvenile Justice chapter of the Nation's Children's Code. Equally important is "rehabilitation consistent with the protection of the Tohono O'odham Nation" for juveniles subject to the Nation's Juvenile Justice Code. *See* Title 3, Chapter 2, Article 1, Section 2101. Both accountability and rehabilitation weigh heavily in the Court's decision.

The Court must balance these principles to determine whether good cause exists to release M[redacted]R[redacted]'s Children's Court records to parties not specifically named in the Code but who may need access, nonetheless. This may include external criminal and juvenile justice officials, like Assistant United States Attorney Micah Schmidt, who fulfill crucial roles in serving the Nation's needs while upholding both the interests of justice and the best interests of children within the Nation.

Chapter 1, Article 12, Section 11203(C), authorizes the Court to permit in-camera inspection of juvenile court records when necessary to resolve an issue before it. While in-camera inspection typically involves judicial review of documents, it may also entail controlled review by a party under conditions that

prevent public disclosure. The Division has encouraged and requested the Court allow Micah Schmidt to appear at this Court and review this file to understand what is there and what he might specifically request.

The Court had explained that in making its individualized decision on what might constitute good cause, the requesting party should identify specific documents requested. Given neither the Court nor the Division is assisting Mr. Schmidt in preparing his case, he alone must clarify his request, which necessarily requires an initial review of the records.

Therefore, the Court implements its recommended process for Assistant United States Attorney Micah Schmidt's in-camera inspection under Section 11203(C) of the records in this case. Mr. Schmidt must contact the Clerk of Court, arrange to appear in person, and follow the Clerk's direction regarding handling and reviewing the official record.

Upon completing his review, Mr. Schmidt should provide the Clerk of Court with a list of requested documents and give copies of that list to the Division through Assistant Attorney General Marissa Sites and to M[redacted]R[redacted] through his counsel, Mr. Saul Huerta. Ms. Sites and Mr. Huerta would then confer and submit to the Court their positions on each document—whether they stipulate to release, take no position, or have other objections explained in their filing. The parties may file this notice jointly or separately. The Court will then review the specific documents and

the parties' positions before rendering a decision with analysis on what good cause would authorize the copying of specified documents, if any, for United States Attorney Micah Schmidt under Section 11203(B). The Division has not objected to this process and M[redacted] R[redacted] has provided no argument or challenge despite having ample opportunity and time.

THEREFORE, IT IS ORDERED, the Court invites Assistant United States Attorney Micah Schmidt to appear during regular business hours to conduct an in-camera inspection under Section 11203(C) of the official Children's Court Record in this case. Following that inspection, Mr. Schmidt will give a list of documents he wants to copy to the Clerk of Court, to the Division through Assistant Attorney General Marissa Sites, and to M[redacted] R[redacted] through his counsel of record, Mr. Saul Huerta.

Ms. Sites and Mr. Huerta would then meet (in person or by phone/electronic meeting) within two weeks of receiving Mr. Schmidt's request, confer and provide the Court notice of the list and their positions on each document—including whether they stipulate to release, take no position, or maintain objections explained in their filing. The parties may file this notice jointly or separately, but no later than one week after their meeting.

The Court will then consider the notice, review the specific documents and the reasons each party provided, and issue a decision with analysis on what good

cause, if any, would authorize the copying of specified documents for Assistant United States Attorney Schmidt under Section 11203(B).

Signed: March 17, 2025

Judge David M. Osterfeld

TOHONO O'ODHAM JUDICIARY

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CHILDREN'S COURT DIVISION

In the matter of: D.P. [redacted] DOB: [redacted] Respondent Child.	Case No.: COP2022-0003-1-9; COP2022-0009-1-4. **ORDER**

FILED IN THE TOHONO O'ODHAM COURT
2023 JUDICIAL COURT

For the reasons stated below, the Court denies the Respondent's Motion to Dismiss.

NOTICE IS NOT REQUIRED FOR TRANSFERS TO U.S. CUSTODY.

At 1:49 p.m. on 5/31/2024, Nicol Green, Chief Prosecutor for the Tohono O'odham Nation, filed a Motion to Stay Case and Grant Comity to Federal Habeas Corpus Writ. An identical motion was filed in TC2023-0019, a case in the Adult Criminal/Traffic Division. At 2:32 p.m., this Court granted the motions in all cases, and the Respondent was transferred to federal custody. The attached Application for Writ of Habeas Corpus filed in TC2023-0019 includes paragraph 4, which states that the Respondent's "[a]ppearance is necessary on [. . .] Wednesday, June 5, 2024 at 2:00 pm. . . ." The paragraph above Magistrate Bruce G. Macdonald's signature reads:

> **The Instant Application is granted and the U.S. Marshall for this district, his deputies, and other U.S. Marshalls and their deputies, or other federal law enforcement officer(s) for this district, is and are directed to produce the named detainee, on the date, and at the time, and in the place recited above, and thereafter maintain the said detainee within the jurisdiction of this Court pending the satisfaction of this writ or further orders of the Court, thereupon to be returned to the facility listed above** unless otherwise ordered by the Court. (Emphasis added.)

The facility listed above is the Tohono O'odham Detention Center.

The Respondent argues that his due process rights were violated because he was not provided notice or given an opportunity to object to any defects in the application for federal writ of habeas corpus before it was granted by the Court. Mr. Brown complains that the Nation, although certifying that they gave him notice of their Motion, did not. He argues that the writ only required the Defendant to appear for one Initial Appearance. The Respondent ignores the last paragraph, which includes "to maintain the said detainee within the jurisdiction of this Court pending the satisfaction of this writ or further orders of the Court. . . ." Mr. Brown also ignores that at the federal initial appearance, he and his client submitted to detention in federal custody until the federal matters were resolved.

The Court finds that the Respondents claims that due process was violated, and that this Court is guilty of engaging in *ex parte* communications, is disingenuous and not supported by legal authority. 7 T.O.C. ch. 2, art. V, §§ 5.1 through 5.2, which govern federal extraditions, do not require notice. § 5.1 does not apply to D.P. [redacted] because he is now an adult. Even if D.P. [redacted] were still a minor, notice is not required. Section 5.2(A) provides that upon receipt of (1) a writ of habeas corpus and a certified arrest warrant issued by the United States of America, and (2) a motion to grant comity filed by a Nation's Prosecutor, the Judicial Court may grant comity to such a writ and order the person held in custody until transferred to an agent of the United States within five days. Subsection (B) prohibits the Court from granting comity when criminal proceedings are pending unless:

> "(1) **the federal writ requires the person to be returned to the Nation's custody immediately upon the completion of the federal prosecution**. . . . If the Court grants comity to the federal writ, the Nation's proceedings shall be stayed pending a hearing in the Judicial Court after the person's return." (Emphasis added.)

There is nothing in the Extradition Code that gives a respondent or defendant the right to notice of, or the right to object to, a motion seeking comity that seeks a transfer order to the United States for federal prosecution.

Rule 11 through 11.7 of Children's Court Juvenile Justice outline the procedures that must be followed when a motion to grant comity is filed. These Rules align with the Extradition Code, and neither provide a respondent or defendant with the right to notice or an opportunity to be heard.

The Respondent complains that the Nation engaged in gamesmanship and was motivated to push this case to go federal when his competency became an issue after discovery of an old brain injury was shared. As convincing as the Respondent's gamesmanship arguments were, which included claims of baiting, this Court finds and holds that the Prosecutor's intentions are irrelevant. In the words of our former Chief Judge Hilda Manuel: "[t]he motives of the parties are not for this Court to scrutinize provided that the purposes are not expressed or sought to be enforced through means that offend the Constitution. *Francisco v. Toro*, 1 TOR3d 68, at 69 (Trial Ct., Jan. 12, 1989) appeal dism'd 3 TOR3d 17 (Ct. App., Sep. 4, 2008).

Likewise, Rules 13.1 through 13.7 of the Rules of Criminal Procedure do not give rise to notice in federal extradition settings. The Court therefore finds and orders that it is the Court's sole purview and responsibility to ensure that the Extradition Code and all applicable Rules of Court are complied with, and announces that respondents lack all standing to contest temporary exchanges between the Tohono O'odham Nation and federal district courts. *See Allen v. Hunter*, 65 F. Supp. 365, 367-68 (D. Kan. 1946), a case where a defendant argued that the federal government lost all jurisdiction over him when he was permitted to return to the Indiana State Prison. The court found that the question of jurisdiction and custody is purely one of comity

between the two sovereigns, not a personal right of the prisoner which can be asserted. *See also Young v. Harris*, 229 F.Supp. 922, 924 (W.D. Mo. 1964), *Derengowski v. U.S. Marshal, Minneapolis Off., Minn. Div.*, 377 F.2d 223, 223 (8th Cir. 1967), and *Chunn v. Clark*, 451 F.2d 1005, 1006 (5th Cir. 1971), which make clear that prisoners have no standing to contest the temporary exchange of two prisoners between two sovereigns. This Court's refusal to entertain Mr. Brown's claim that the Nation actively moved this case to go federal because it wanted to avoid competency challenges is further justified by the fact that the federal government's decision to seek prosecution is solely in that sovereign's hands. Once in the other sovereign's hands, the issues of competency are not defeated.

Mr. Brown asked the Court whether Rule 5 of the General Rules of Practice applies to federal extraditions. The Court finds and orders that it does not, and admonishes Mr. Brown for unfairly attacking the Court by claiming that it engaged in ex parte communications with the Prosecutor's Office. Mr. Brown explained why he believes that not providing notice was a due process violation. The Court is convinced that Mr. Brown was making a good-faith argument to have Rule 5 apply in federal extraditions. After this Order, future attacks will result in orders to show cause.

RIGHTS TO SPEEDY TRIAL ARE STAYED

Rule 11.7 of the Children's Court Juvenile Justice requires this Court to stay the Nation's proceedings upon granting comity to a federal writ, provided that the Defendant's return to the Tohono O'odham Nation is provided for. This is identical to Rule 13.4(b) of the Rules of Criminal Procedure, and both set of rules mirror the Extradition Code.

Although the Respondent argues that 3 T.O.C. ch. 2, art. 13, § 21302 is violated when comity is granted and an adjudicatory hearing is not held within 30 days of receipt of the juvenile

offender petition, § 21302 includes "unless good cause is shown" language. The Court finds and orders that the Code and Rules of Court must be read harmoniously, and announces that 7 T.O.C. ch. 2, art. V, § 5.2(B) mandates a stay for good cause if this Court grants comity to federal writs of habeas corpus that comply with the Tohono O'odham Nation's Extradition Code.

DISCLOSURE ISSUES

During argument, Mr. Brown raised issues of non-disclosure as a basis for dismissal and relief. This may have been as a result of the Court's concerns with what it perceived to be a lack of disclosure. The Nation responded that the TC case going federal would result in more abundant disclosure. The Court reviewed the files and did not find a motion seeking relief for discovery violations. Nor did the Court find a separate statement of good-faith efforts. The Court therefore denies any relief for non-disclosure without prejudice. The Court does, however, remind the Nation of their duty to disclose, and the possibility of sanctions if a motion for discovery violations is properly filed.

SETTING OF A STATUS HEARING

The Nation's Supplemental Response to Motion to Dismiss (Timeline), on page 6, lines 12 through 13, advises that D. P. [redacted] pled guilty to possession of a firearm by a prohibited person, and that D. P. [redacted] admitted to violating his federal supervised release. The Court sets a Status Hearing to review these pending cases on May 2, 2025, at 9 a.m.

3/31/2025

DATE

JUDGE Rene Sanchez Alcoverde Jr.
Tohono O'odham Justice Court

Fwd: Resp., Pros., Prob.,
DU: M. Brown.
040125 dl

FILED IN THE
TOHONO O'ODHAM COURT
2025 MAR 05 PM 04:02
JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
CHILDREN'S DIVISION

IN THE MATTER OF:	CASE NO. COP2024-0020-1-3
J[redacted] A[redacted] J[redacted]	
DOB: [redacted]	DISPOSITION ORDER
Respondent.	

At the Restitution and Disposition Hearing held February 18, 2025, J[redacted] A[redacted] J[redacted] appeared with his counsel, Margaret Hirchak, his father [redacted], and his grandfather, [redacted]. The Nation appeared through conflict counsel Madelynn Franklin and Malena Acosta of the Pascua Yaqui Tribe Office of the Prosecutor.

Sonia Laventure, victim advocate, and attorney Kara Crosby with the conflict counsel for the Pascua Yaqui Tribe, observed without objection from the parties. Victim Marisa Karla Saxton appeared with her husband Benjamin Saxton, and sons Solomon and Neil Saxton. Victim Calie Marie Krietemeyer appeared by phone.

FINDINGS OF FACT

On December 16, 2024, J[redacted] A[redacted] J[redacted] knowingly, intelligently, and voluntarily admitted to committing aggravated assault with serious physical injury against Mrs. Krietemeyer and Mrs. Saxton on March 21, 2024. He hit them head-on while driving without a license at 85 miles per hour in a 45 mile-per-hour zone. At this restitution and disposition hearing, the Court first heard evidence and argument on restitution and then issued disposition for the two delinquent acts of aggravated assault that J[redacted] J[redacted] admitted against each victim.

Mrs. Krietemeyer and Mrs. Saxton testified about the injuries, medical care, lost work, and associated expenses resulting from when J[redacted] J[redacted] struck their car head-on. Calie Marie Krietemeyer testified her injuries included hemorrhages in her right breast region, lower anterior abdomen wall, left lower neck and clavicular region, and left pneumothorax. She also suffered injuries to her left hip, left forehead, and right shin, with continuing pain in her chest, left hip, left neck, and head.

During Mrs. Krietemeyer's testimony, the Nation moved to admit fourteen exhibits (A1-A14) supporting her restitution claim. J[redacted] J[redacted] did not object to these exhibits but objected to awarding lost wages for Steve Norman, Mrs. Krietemeyer's husband, arguing he is not a victim. The Nation requested the Court order J[redacted] J[redacted] to pay $10,720.92 in restitution to Cali Marie Krietemeyer, comprising her lost wages ($4,772.24), her husband's lost wages ($5,138.96) for time lost helping with her care, mileage ($505.72) for travel to medical treatments and services, and medical treatment payments ($304.00).

J[redacted] J[redacted] cross-examined Mrs. Krietemeyer and established that these costs were not paid through worker's compensation and she could not cash out leave benefits from her employer. Mr. J[redacted] also reviewed Mrs. Krietemeyer's claim for Steve Norman's wages and her personal vehicle insurance and the business associated with that insurance.

As a result of the questioning, the parties stipulated that Mrs. Krietemeyer's counsel had accepted a $25,000.00 settlement from J[redacted] J[redacted]'s Farmers Insurance policy which satisfied her attorney's fees Arizona Worker's Compensation fund claims. Mrs. Krietemeyer testified she did not plan to file additional insurance claims.

Marisa Karla Saxton testified about her injuries requiring emergency medical attention, including a burst fracture in her L5 vertebra with 60% bone height loss, L4 vertebra misalignment causing retropulsion of her lumbar spine, and continuing pain

from both of these injuries. She also has lumbar scoliosis from this damage, nerve pain down her left leg and into her foot, and spinal fusion likely required as a direct result of these injuries.

Mrs. Saxton also suffered a broken pelvis in two areas, a fractured foot, a broken clavicle requiring plates and screws to repair, she had to wear a hard-shell back brace for four months, still has an indention in her forehead, required stitches to reattach the inside of her left cheek and lip, and brain injuries causing severe migraines, vomiting, and vertigo. These injuries prevented her from working for six months and continue to require additional time off for follow-up medical visits and treatment. Mrs. Saxton testified her physician would likely direct additional surgery and medical treatment in the future as a direct result of the injuries J[redacted] J[redacted] caused on March 21, 2024.

Mrs. Saxton testified about her lost wages, therapeutic massages to reduce pain medication dependency, and the costs she incurred for co-pays and expenses for medical treatment. She received $25,000.00 settlements from both Farmers Insurance and GEICO Insurance ($50,000.00 total), which paid her attorney fees and Worker's Compensation claims. She also received a $25,000.00 settlement from her own State Farm insurance. The Nation moved to admit eleven exhibits (B1-B11). J[redacted] J[redacted] did not object to the admission of those exhibits.

The Nation requested $10,364.24[1] in restitution for Mrs. Saxton as economic loss as a direct and proximate result of J[redacted] J[redacted]'s aggravated assault, consisting of her lost wages ($9,154.21) and medical expenses ($1,210.00). J[redacted] J[redacted] cross-examined Mrs. Saxton about her settlement with her own insurance company, State Farm, her lost wages, and established she had not filed any other claims with any other insurance provider.

[1] The Nation's Exhibit B1 contains a scrivener's error in mathematical calculation for the total amount of restitution that Mrs. Saxton claims. The error totals $.03 cents more than the actual costs. The Court enters that corrected amount in this judgment and corrects the record to accurately reflect this amount.

On re-direct, Marisa Karla Saxton testified she did not get paid for the hours of lost work she claimed for restitution. Given there was additional evidence offered on redirect, the Court asked if J[redacted] J[redacted] wished to conduct a final examination of Mrs. Saxton, and Mr. J[redacted] declined.

J[redacted] J[redacted] presented testimony from his father, [redacted], about his own employment and the general ways he would approach helping his son to pay any restitution the Court may order in this case. J[redacted] J[redacted] submitted exhibit XX1, a letter from Mrs. Saxton's attorney noting settlement with J[redacted] J[redacted]'s insurance providers and payment to fully satisfy all claims from the State of Arizona. J[redacted] J[redacted] then rested. The Nation did not present rebuttal evidence.

Each side provided a closing argument. The Nation requested full restitution for both victims claimed in Exhibits A1 and B1. J[redacted] J[redacted] did not dispute that the Nation's Children's Juvenile Justice Code allows restitution but objected to the full amounts requested and asked that J[redacted] be allowed to satisfy restitution through community service.

The Court asked the Nation's Probation Officer Joseph Tenario to summarize the Disposition Report that Probation Officer J'Shon Humeyestewa had filed. Neither party challenged or added to this report. J[redacted] J[redacted] did not provide an alternative disposition report or recommendations that he or his legal counsel prepared.

Each victim then gave a victim impact statement, with Cali Marie Krietemeyer beginning and Marisa Karla Saxton ending. The Nation asked Benjamin Saxton, husband of Marisa Karla Saxton, to provide a brief statement. J[redacted] J[redacted] did not object to the statement, provided it would not allege rumors or unfounded allegations against J[redacted] J[redacted].

ANALYSIS AND CONCLUSIONS OF LAW

Restitution Award

The Tohono O'odham Nation Juvenile Justice Code allows the Court to "order the child [a child found to be a juvenile offender] to pay restitution under such conditions and limitations as the Court may prescribe." *See* 3 T.O.C. ch. 2, art. 15, §21505(C). Restitution is defined as:

> financial or other reimbursement by the child to the victim, and is limited to actual damages for injury to or loss of property, actual expenses incurred for medical, psychiatric and psychological treatment for injury to persons, and lost wages resulting from injury which are a direct and proximate result of the delinquent act. Restitution does not include reimbursement for damages to mental anguish, pain and suffering, or other intangible losses.

See 3 T.O.C. ch. 2, art. 2. A victim is entitled "to receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury." *See* 7 T.O.C. ch. 4, art. 15, §4102(J). The purpose of the Nation's Juvenile Justice Code is to "establish, for children committing juvenile offenses, a program of supervision, care, and rehabilitation consistent with the protection of the Tohono O'odham Nation." *See* 3 T.O.C. ch. 2, art. 1, §2101(B).

In deciding the amount of restitution, the Court evaluates whether the victim has shown, by a preponderance of evidence, the actual damages for injury or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting as a direct and proximate cause of J[redacted] J[redacted]'s delinquent acts of aggravated assault against Cali Marie Krietemeyer and Marisa Karla Saxton. The testimony and exhibits before the Court proved, by a preponderance of evidence, the actual damages of $8,141.96 for Cali Marie Krietemeyer, and the actual damages of $10,364.24 for Marisa Karla Saxton as a direct and proximate cause from J[redacted] J[redacted]'s delinquent acts on March 21, 2024. Those amounts are explained below.

a. Restitution for Cali Marie Krietemeyer

Cali Marie Krietemeyer testified that as a direct and proximate cause of J[redacted] J[redacted]'s aggravated assault against her, she had injuries that required immediate emergency medical attention, including being airlifted to the nearest emergency room. On arrival at the emergency room, she had associated medical expenses and continuing care with ongoing medical attention that kept her from working for several weeks. The injuries included hemorrhages in her right breast region, her lower anterior abdomen wall, her left lower neck and clavicular region, and left pneumothorax. She also had an injury to her left hip, to the left side of her forehead, and her right shin. She has continuing pain in her chest, left hip, left neck, and head.

The proved and undisputed expenses included her lost work of 187.22 hours[2] and associated lost wages of $25.49 per hour, for a total of $4,772.24 lost wages; out-of-pocket expense payments for therapeutic massage and physical therapy that was referred as a result of her medical treatment (4 amounts totaling $304.00); and mileage for her personal transportation to those appointments for necessary medical treatment and referred physical therapy and massage (754.8 miles at $0.67 per mile for total of $505.72); all economic loss that was a direct and proximate results from J[redacted] J[redacted]'s delinquent acts.

Cali Marie Krietemeyer also requested reimbursement for lost wages for her husband, Steve Norman. She claimed Mr. Norman lost 128 hours of work to immediately care for her as a direct result of J[redacted] J[redacted]'s aggravated assault against her on March 21, 2024, and that, but for those delinquent acts, Mr. Norman would not have

[2] The Court notes that Nation's Exhibit A1 contained a scrivener's error for the date of service for "Rubs Massage Studio" on November 20, 2024, with a charge of $69.00. The Nation moved to correct its exhibit A1 to change the date of that service for $69.00 to November 10, 2024, with no objection from J[redacted] J[redacted]. The Court also notes that the same Exhibit A1 also has an error on the number of hours of Mrs. Krietemeyer's lost work which read 172.22 hours, but was actually proved to be 187.22 hours in Exhibit A2.

taken time from work without pay and she would not have required his help. The Nation valued those 128 hours at the actual salary rate that Steve Norman earned in his work at Amazon, resulting in a total claim for Steve Norman's lost wages of $5,138.96.

Mrs. Krietemeyer testified that Mr. Norman immediately took time from work to help her handle daily living tasks because she could not use her arms or hands for a couple weeks from the hemorrhaging and associated pain she had from her injuries. In the absence of being able to use her arms as a direct and proximate cause of J[redacted] J[redacted]'s delinquent acts, Steve Norman helped Cali Krietemeyer bathe, dress, eat, and walk around her house to use the restroom, helped her take care of daily living tasks, and drove her to necessary medical appointments. J[redacted] J[redacted] did not object to the admission of exhibits A3, A4, and A5, showing the actual hours Steve Norman lost work. J[redacted] J[redacted] also made no argument that the amount of time claimed was untrue, excessive, or unreasonable. J[redacted] J[redacted] did, however, object to the Court awarding total wages claimed for those 128 hours because he believed Mr. Norman was not a victim and therefore not entitled to reimbursement for those wages.

The Court agrees that Steve Norman is not a victim as defined under the Nation's law. But the Court finds Cali Marie Krietemeyer, a victim, proved by a preponderance of evidence that she required another person to assist her with her daily tasks of living and transportation to necessary medical treatments and appointments as consequence of J[redacted] J[redacted]'s aggravated assault against her. The unchallenged evidence of the injuries and their impact on Mrs. Krietemeyer proved she could not move her hands sufficiently to take care of her own daily tasks for several weeks after J[redacted] J[redacted]'s delinquent acts and she required assistance to bathe, use the restroom, dress, eat, tend to her own needs, and drive to medical appointments.

The Court finds it reasonable that a victim with a spouse or partner would naturally use that partner or spouse as support for taking care of daily living tasks during

the period immediately after a serious injury. This is because the victim likely feels most comfortable having that loved one provide the intimate support required to use the restroom, to bathe, to eat, to handle daily living tasks, and to drive the family vehicle to medical treatment. This necessary support can displace this spouse or partner's work hours and income from their normal workplace, as it did here, and result in actual direct expense to the victim required to continue important and necessary medical treatment the victim requires to recover from injuries sustained as a direct and proximate cause of the delinquent acts causing the necessary care.

If not met through the spouse or partner, this necessary care would otherwise come through the care of a skilled care provider commanding a high wage or through the even higher costs of a hospital or clinical care facility and may exceed the value of the standard work hours of the spouse/partner. This at-home assistance from a spouse or partner helps reduce the costs required to recover from the injuries, provides a more comfortable situation for the victim, and, overall, may cut cost for any person liable for those costs, like J[redacted] J[redacted].

This supportive care has actual value and is easily determined, as here, by the value of the time lost or displaced to help the victim. The value of that time incurs to the victim because they would either pay it to a care provider or lose its equitable value from the lost wages to their household.

But the Court also recognizes that the value of a spouse or partner providing general assistance for daily tasks and support is not, and should not be, valued the same as a skilled medical provider, nor should its value necessarily be the regular wage that spouse or partner makes in their own line of work that could be far removed from medical care. Instead, the value should be the general market value for the skill required. The Court, therefore, is not bound to grant any rate of pay that a spouse otherwise earns

when they are using that time to provide a general level of care for injuries their spouse sustained as a direct and proximate cause of a delinquent act.

Here the value of Steve Norman's assistance should correlate with the remedial care needed to help Cali Krietemeyer perform her daily living tasks she claimed he performed in the aftermath of a serious injury she sustained as a direct and proximate result of Jordan Jose's aggravated assault. Considering this analysis, the Court reduces the claimed value the Nation placed on Steve Norman's time of 128 hours from his average Amazon wage of $40.148 per hour as reflected in Exhibits A1, A3, A4, and A5, to $20.00 per hour.

The Court therefore accords Cali Krietemeyer the value of $2,560.00 for the undisputed 128 hours of Steve Norman's caregiving required to help her bathe, eat, walk, use the restroom, drive to medical appointments, and receive necessary general care immediately after, and as a direct and proximate cause from, J[redacted] J[redacted]'s aggravated assault on her. This award of restitution for this value is not to recognize Steve Norman as a victim but, rather, to recognize the value of actual time and assistance that Cali Krietemeyer required to help her handle her daily living tasks required as a direct and proximate cause of Jordan Jose's delinquent acts.

The parties stipulated that Cali Krietemeyer's attorney had settled her claim with one of J[redacted] J[redacted]'s insurance providers, Farmers Insurance, for $25,000.00 and there were no other insurance settlements. The undisputed evidence also revealed that the $25,000.00 settlement had been used to pay Mrs. Krietemeyer's attorneys and to resolve worker's compensation claims from the State of Arizona. And, as noted above, the parties stipulated that none of these settlement payments went to Mrs. Krietemeyer to pay the expenses she claimed as economic loss for restitution. Therefore, the Court orders J[redacted] J[redacted]'s payment of Cali Krietemeyer's economic loss of $8,141.96 as restitution for expenses incurred for medical treatment for injury and lost wages resulting from

injury, all a direct and proximate result of J[redacted] J[redacted]'s aggravated assault against Cali Krietemeyer on March 21, 2024.

b. Restitution for Marisa Karla Saxton

Marisa Karla Saxton testified that as a direct and proximate cause of J[redacted] J[redacted]'s aggravated assault against her, she had injuries that required immediate emergency medical attention with associated medical expenses and ongoing medical attention that removed her ability to work for several weeks. The injuries included a burst fracture in her L5 vertebra, with a loss of 60 percent of that vertebra bone height from the impact. This injury also pushed her L4 vertebra out of alignment, causing retropulsion of her lumbar spine and continuing pain. She also has lumbar scoliosis from this damage, nerve pain down her left leg and into her foot, and spinal fusion likely required as a direct result of these injuries.

Mrs. Saxton also had her pelvis broken in two areas, a fractured foot, a broken clavicle requiring plates and screws to repair, she had to wear a hard-shell back brace for four months, still has an indention in her forehead, required stitches to reattach the inside of her left cheek and lip, and suffered brain injuries that cause severe migraines, and made her vomit and suffer from vertigo for months after the initial injuries. The injuries prevented her from working for six months and still require additional time off for follow-up medical visits and treatment. Mrs. Saxton testified her physician would likely direct additional surgery and medical treatment in the future as a direct result of the injuries J[redacted] J[redacted] caused on March 21, 2024.

Marisa Karla Saxton's restitution claim included lost hours of work for a total of 319.63 hours which, at a pay rate of $28.64 per hour, total $9,154.21 for lost wages. *See* Arizona Department of Revenue calculations presented in Exhibits B2 and B3. Adding the out-of-pocket expense payments for the therapeutic massage that her physician recommended at a total of $1,090.00, and co-payments for five medical visits that totaled

$120.00, Marisa Karla Sexton's entire restitution claim totals $10,364.21.[3] The evidence proved these claims and amounts are entirely economic loss and Mrs. Krietemeyer would not have incurred them but for J[redacted] J[redacted]'s aggravated assault.

The evidence also proved that J[redacted] J[redacted]'s two insurance policies from GEICO and Farmers Insurance settled with Mrs. Saxton for $25,000.00 each, for a total of $50,000.00. That $50,000.00 went directly to pay Mrs. Saxton's attorney fees and to resolve all her worker's compensation claims with the State of Arizona. None of the $50,000.00 went directly to Mrs. Saxton for the lost wages and medical treatment she required as a direct and proximate cause of J[redacted] J[redacted]'s delinquent acts.

The evidence also proved that Marisa Saxton filed a claim against her own insurance company, State Farm, and received a $25,000.00 settlement from her underinsured motorist coverage. This money was not taken or settled from J[redacted] J[redacted]'s policies or any of his accounts for his payments or expense. Rather, it came from Marisa Saxton's own policy that she paid for (she testified this claim also caused her rates to increase). J[redacted] J[redacted] did not argue that Marisa Saxton's personal insurance had sought subrogation from him for the amounts it paid Mrs. Saxton. And J[redacted] J[redacted] did not overcome Mrs. Saxton's preponderance of evidence showing that her lost wages and actual expenses for medical care resulted as a direct and proximate cause from his aggravated assault on her.

Restitution for the juvenile delinquent offense of aggravated assault can exist simultaneously with a civil settlement from a victim's and delinquent offender's insurance. Restitution does not eliminate a civil settlement; they are independent matters. Even if a victim settled a claim with the offender's insurance company, that does not prevent this Court from ordering restitution as appropriate and supported in the evidence.

[3] The Nation's Exhibit B1 contains a scrivener's error in mathematical calculation for the total amount of restitution that Mrs. Saxton claims. The error totals $.03 cents more than the actual costs. The Court enters

Concern about double recovery or a windfall to the victim is at times resolved through a civil suit that an insurance company may file seeking subrogation from the juvenile delinquent causing the injury or from the victim where appropriate. But even in the absence of such potential, it is logical that a juvenile may allege his or her restitution should be offset by any insurance settlement or financial award a victim may receive for their injuries or any adjustments with creditors they may negotiate reducing the face value of their bills. J[redacted] J[redacted] made a similar argument at the restitution hearing.

In general, J[redacted] J[redacted] argued this Court should find Mrs. Krietemeyer's and Mrs. Saxton's restitution claims satisfied through the civil settlements they received from J[redacted] J[redacted]'s insurance providers and, for Mrs. Saxton, through her civil settlement with her own insurance company. While the Nation's case law does not have precedent directly on point for this topic, Arizona's courts have decided similar issues. The Nation's Court has, absent its own precedent, looked to Arizona law as persuasive authority. *See* 4 T.O.C. ch. 1, §1-102, *Bahyesva v. Miguel*, 3 TOR3d 151, 152 Trial Ct., Mar. 7, 2012), *Garcia v. Garcia*, 1 TOR3d 108, 110 (Trial Ct., Jan. 24, 1994) app. dism'd 3 TOR3d 10 (Ct.App., Aug. 17, 2006); *C.V.K. a.k.a. C.O. v. N.K.*, Sr., 2 TOR3d 71 (Trial Ct., May 19, 2003) aff'd 3 TOR3d 1 (Ct.App., Apr. 2, 2005).

Arizona, like the Nation, entitles a victim to prompt reimbursement of economic loss from the juvenile offender for the loss that is a direct and proximate result of the delinquent act. *See* 3 T.O.C. ch. 2, art. 2; art. 15, §21505(C); and 7 T.O.C. ch. 4, art. 15, §4102(J). Similarly, this reimbursement of economic loss comes in the form of restitution which has a rehabilitative purpose to help modify a child's behavior, encourage responsibility and recognition of the value of loss a victim will experience from a juvenile's delinquent acts, and to help deter future similar conduct from the juvenile. *See State v. Patton*, 120 Ariz. 386, 586 P.2d 635 (1978).

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that corrected amount in this judgment and corrects the record to accurately reflect this amount.

Restitution is intended to restore the victim to the state before the delinquent act. *See State v. Fancher*, 169 Ariz. 266 (Ct. App. Div. 1, 1991). Restitution is meant to encourage rehabilitation and to deter future criminal conduct. *In re Kory L.*, 194 Ariz. 215 (Ct. App. Div. 1, 1999). It is based on the principle that the juvenile should make reparations to the victim by restoring that victim to their existing condition before the delinquent act occurred. *In re William L.*, 211 Ariz. 236 (Ct. App. Div., 1 2005). Because the Nation's law directs a juvenile to pay restitution to their victim for lost wages and actual costs for medical treatment and care, the Court finds similar principles expressed between Arizona's and the Nation's rehabilitative purpose in allowing restitution for victims of a juvenile's delinquent act.

But any restitution claims for a victim's economic loss that a juvenile offender's insurance has already satisfied should not be duplicated in a resulting restitution order. This would only create a windfall for the victim and would not serve the rehabilitative purposes of restitution.

And a child should not avoid rehabilitative restitution simply because a victim had the foresight to obtain their own insurance coverage and has received a settlement from that coverage. Arizona has named this principle the "collateral source rule" that "prohibits the minor from benefitting from a victim's foresight in obtaining insurance coverage" or relief that comes from a collateral source, not the juvenile offender. *See In re Pima County Juv. Action No. 45363-3*, 151 Ariz., 541, 541 (App. 1986).

When a victim's insurance provider pays the victim under the victim's underinsured policy claim, it is between the victim and that company whether it will seek offset from the victim for any claims it paid under the victim's own policy, not the juvenile offender who is not a party to that contract. The Nation's law does not require the Court to offset a victim's recovery from the victim's own insurance when determining and adjudging restitution for that victim's economic loss that is a direct and

proximate cause from a delinquent act. Instead, the Nation's law makes clear that a victim is entitled to receive prompt restitution from the child for economic loss of actual expenses for medical treatment for the injury and lost wages resulting directly from injury that is a direct and proximate result of the delinquent act. *See* 3 T.O.C. ch. 2, art. 2, and 7 T.O.C. ch. 4, art. 15, §4102(J).

J[redacted] J[redacted] presented no evidence and made no argument that he was subject to any lawsuit or claim for subrogation from Mrs. Saxton's State Farm insurance company for money it paid to her under her underinsured policy claim. He presented no specific challenge to the mileage, massage costs, medical co-pay expenses, or the actual number of hours of lost work that Mrs. Saxton claimed. J[redacted] J[redacted] did not argue that those costs and expenses were indirect or consequential. Rather, J[redacted] J[redacted] generally argued that the Court should not award Mrs. Saxton restitution when she received a civil settlement from her own underinsured motorist coverage.

The burden and consequence of acquiring, paying for, and claiming relief under that underinsured automobile insurance policy was Marisa Saxton's alone. As noted above, the proceeds Mrs. Saxton subsequently received do not credit or offset J[redacted] J[redacted]'s own burden to make her whole and pay restitution found reasonable under a preponderance of evidence and the principles of rehabilitation in the Nation's Juvenile Code. The Court does not decide, in this matter, the resolution of any subrogation claim that Marisa Saxton's personal insurance provider may bring against her or others for monies it paid because of her claim for underinsured coverage.

Were the Court to rule Marisa Saxton could not claim restitution from J[redacted] J[redacted] because she received money from her own underinsured coverage she purchased, this would not only offset J[redacted] J[redacted]'s burden by her own hand and money, it would create a negative inference for any future victim of a delinquent juvenile offender. The victim

would have to pick the best of two undesirable choices, (1) either abandon a claim against their own insurer for fear of increased expense to their own pocket and hope they are awarded restitution and then wait to be made whole through full payment over time, or (2) attempt recovery from their own underinsured insurance coverage and face increased costs of insurance from that company that pays their claim while also being barred from claiming restitution against the juvenile offender.

This impossible choice is not required. The juvenile offender should not benefit from the victim's own insurance. This is the concept of the collateral source rule noted above. A victim receiving compensation from a source collateral to the juvenile offender's sources—such as the victim's insurance, parents, spouse, or personal assets—does not offset the restitution a victim is entitled from the juvenile. Were that not the rule, there would be no rehabilitative purpose to restitution, especially when underinsured insurance coverage is common and may be required by some insurance providers.

This Court has discretion to impose restitution for delinquent acts despite or in addition to civil settlements related to those acts. The victim who receives settlement from their own underinsured coverage and restitution from a delinquent juvenile offender is not "double dipping" without proof of that fact. This is because the juvenile offender is only paying once for their act, which satisfies the principle of rehabilitation through restitution and fulfills the victim's right to restitution from the juvenile offender for their acts that caused the victim loss and injury. Here, J[redacted]J[redacted] did not provide proof of any "double dipping" or economic loss that his own insurance proceeds paid and which he would pay again in restitution.

Thus, a victim's receipt of an insurance settlement from their own insurance provider for underinsured motorist coverage should not offset or reduce the restitution a

juvenile offender must pay that victim under the Nation's law under the facts in this case. This Court will recognize this principle as the collateral source rule in similar analysis as reviewed above.

Similarly, under Arizona precedent, a court imposing restitution for a juvenile should consider the nature of the offense, and the age, physical condition, and earning capacity of the juvenile. *See* A.R.S. §8-344. Here, J[redacted] J[redacted] becomes an adult on [redacted], just [redacted] after his disposition hearing.

J[redacted] J[redacted] presented no evidence why he could not work for income at an age when it is legal for him to become employed and earn such income in effort to satisfy a restitution order in this case. J[redacted] J[redacted]'s father, [redacted], testified generally about his own employment and said he did not have $20,000.00 saved to immediately pay restitution the Court may order J[redacted] J[redacted] to pay in this case. But [redacted] also testified that he understands the issue of restitution in this case, accepts that the Court can order restitution, and would help J[redacted] J[redacted] with financial burdens where able, to include this restitution. It is clear that J[redacted] J[redacted] has a connection to his community and his family and that support may be available from those sources.

Therefore, the Court orders J[redacted] J[redacted]'s payment of Marisa Karla Saxton's economic loss of $10,364.21 as restitution for expenses incurred for medical treatment for injury and lost wages resulting from injury, all a direct and proximate result of J[redacted] J[redacted]'s aggravated assault against Marisa Karla Saxton on March 21, 2024.

DISPOSITION

Having decided the restitution award in this case on February 18, 2025, the Court also entered Disposition for J[redacted] A[redacted] J[redacted] that day as follows:

COP2024-0020-1: AGGRAVATED ASSAULT with serious physical injury to

Cali Marie Krietemeyer:

Detention: 180 days, all suspended pending successful completion of 12 months supervised probation. This period of detention will run concurrent to any other detention period.

Probation: 12 months, supervised. This period of probation runs concurrent to any other term of probation.

Fine: $1,000.00, which is designated to issue to the victim Cali Marie Krietemeyer and which when fully paid shall, in part, satisfy the restitution noted below in equal amount of $1,000.00.

Conditions: (1) J[redacted] A[redacted] J[redacted] shall not drive any motor vehicle without a license; (2) J[redacted] A[redacted] J[redacted] shall not possess or consume any alcohol or illegal drugs, and is subject to drug and alcohol testing at the discretion of his probation officer; (3) J[redacted] A[redacted] J[redacted] must satisfactorily complete a driver's education course before the end of his supervised probation period and provide proof of that completion to the Nation and this Court (only one course needed for both Allegations); (4) J[redacted] A[redacted] J[redacted] shall not contact the victim Cali Marie Krietemeyer; and (5) J[redacted] A[redacted] J[redacted] must pay restitution to Cali Marie Krietemeyer in the amount of $8,141.96, which includes the $1,000.00 fine noted above.

Restitution due date: J[redacted] A[redacted] J[redacted] must pay the entire amount of restitution of $8,141.96 in this Allegation 1—either in one lump sum or completed over time in payment arrangements made with the Clerk of this Court—no later than 3:00 p.m. on February 27, 2026. Payments should be issued in cash, cashier's check, or money order written to the "Tohono O'odham Nation Judicial Court" and should reference this case number in the memo section.

COP2024-0020-2: AGGRAVATED ASSAULT with serious physical injury to Marisa Karla Saxton:

Detention: 180 days, all suspended pending successful completion of 12 months supervised probation. This period of detention will run concurrent to any other detention period.

Probation: 12 months, supervised. This period of probation runs concurrent to any other term of probation.

Fine: $1,000.00, which is designated to issue to the victim Marisa Karla Saxton and which when fully paid shall, in part, satisfy the restitution noted below in equal amount of $1,000.00.

Conditions: (1) J[redacted] A[redacted] J[redacted] shall not drive any motor vehicle without a license; (2) J[redacted] A[redacted] J[redacted] shall not possess or consume any alcohol or illegal drugs, and is subject to drug and alcohol testing at the discretion of his probation officer; (3) J[redacted] A[redacted] J[redacted] must satisfactorily complete a driver's education course before the end of his supervised probation period and provide proof of that completion to the Nation and this Court (only one course needed for both Allegations); (4) J[redacted] A[redacted] J[redacted] shall not

contact the victim Marisa Karla Saxton; and (5) J[redacted] A[redacted] J[redacted] must pay restitution to Marisa Karla Saxton in the amount of $10,364.21, which includes the $1,000.00 fine noted above.

Restitution due date: J[redacted] A[redacted] J[redacted] must pay the entire amount of restitution of $10,364.21 in this Allegation 2—either in one lump sum or completed over time in payment arrangements made with the Clerk of this Court—no later than 3:00 p.m. on February 27, 2026. Payments should be issued in cash, cashier's check, or money order written to the "Tohono O'odham Nation Judicial Court" and should reference this case number in the memo section.

J[redacted] J[redacted] must report to probation no later than 72 hours from his receipt of this Order. This is a final order.

SIGNED THIS 5TH DAY OF MARCH 2025.

Judge David M. Osterfeld

Fwd Resp., Pros., Prob.,
Dr. M Hirchak
03 10 25 JJ

TOHONO O'ODHAM
JUDICIARY

FILED IN THE
TOHONO O'ODHAM COURT
2025 3 14 AM11:35
JUDICIAL COURT CLERK II

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CRIMINAL DIVISION

Tohono O'odham Nation, Plaintiff, vs. Dustin Cody Herrera, Defendant.	Case No.: CR2023-0423-1-7 **SECOND AMENDED ORDER**

SECOND PREFATORY NOTE: The Court found additional typographical errors in the Amended Order (page 11, lines 8 and 22). The Court corrects those errors as well and issues this Second Amended Order.

Summary of Procedural History as Relevant to Defendant's Motion for Sanctions.

A Pre-Trial Hearing was scheduled for 6/7/2024. The morning of the Pre-Trial Hearing, Mike Brown, counsel for Dustin Cody Herrera, advised that he filed a motion to dismiss and sanctions due to alleged disclosure and discovery violations by the Tohono O'odham Nation Prosecutor's Office (Nation). Applicable Rules of Court provided the Nation a meaningful opportunity to respond, and for Mr. Brown to reply. The Nation did not object to the motion for being deficient for not including a statement of good faith efforts, as required by T.O. R. Crim. P. 9.3(b). The matter was continued and set for hearing on 7/29/2024.

The Nation filed an "Objection to Motion for and Hearing Re: Probable Cause, Alternatively, Response to Motion for Probable Cause Hearing" on 6/18/2024. The Objection did not challenge Mr. Brown's motion for sanctions for not including a statement of good faith

efforts. Instead, it challenged the motion on the grounds that there was full compliance with its duty to disclose. On 7/17/2024, Mr. Brown motioned to continue the hearing scheduled for 7/29/2024. The motion noted: "Counsel has contacted the Tohono O'odham Prosecutor's Office who has no objection to the instant motion."

Mr. Brown again filed a "Motion to Continue Hearing on Disclosure Violations" on 8/5/2024, advising that Ms. Ruskin, for the Nation, "has no objection to a brief continuance. . . ." The hearing was reset to 8/12/2024. The Court held the combined Pre-Trial Hearing and Oral Argument, and took the matter under advisement. On 8/14/2024, Mr. Brown filed a "Request for Leave to File Supplemental Pleadings." The Court ordered that Mr. Brown could supplement his motion, stating that the "Nation will have the opportunity to respond" and that Mr. Brown could file a reply if he so desired, and that the Court would then take the matter under advisement.

On 10/3/2024, the Nation motioned for a Status Conference. The matter was set for hearing on 11/4/2024. On 10/30/2024, Mr. Brown motioned to continue the matter, due to issues with the availability of his investigator, and noted: "Counsel has candidly discussed with the assigned prosecutor, Michael Colmenero these issues and the delay that has resulted due to the investigator issues raised above. Mr. Colmenero understood and agreed that a continuance of the Status Conference was necessary." The matter was continued to 12/9/2024.

On 12/9/2024, the parties appeared for the Status Conference, and agreed that Mr. Brown would file a motion regarding concerns with respect to disclosure and prejudice by 1/14/2025, and that the Nation would respond within the required time, and the matter would be argued on 2/10/2025.

Mr. Brown filed his supplemental motion with respect to disclosure and prejudice on 1/22/2025, 8 calendar days past the time ordered by the Court. The Court issued an order

continuing the 2/10/2025 hearing to 2/24/2025, to allow the Nation time to respond to the motion. On 1/28/2025, the parties stipulated to extend the deadlines to file discovery motions, thereby curing the untimely filing by Mr. Brown. The Nation's response was filed on 2/3/2025. Mr. Brown filed a Reply on 2/13/2025. The Court heard argument from counsel on 2/24/2025. Mr. Colmenero appeared for the Nation. Mr. Brown appeared for Mr. Herrera. The Court finds that the Nation has waived any objection to Mr. Brown's non-compliance with T.O. R. Crim. P. 9.3(b). The Court admonishes Mr. Brown to file a separate statement before any future motions for discovery sanctions are filed. Otherwise, they will not be heard.

Mr. Brown is seeking a dismissal of the case with prejudice on the grounds that: 1) the Nation failed to provide the name, contact information, and any statements made by a witness known to the Tohono O'odham Police Department and alleged victim; the Nation failed to provide police investigative reports, radio and call logs, as well as paramedic and medical records of the alleged victim that may contain exculpatory and impeachment information. Mr. Brown points out clear discrepancies and concerns in the filed Probable Cause statement. The Nation contends that the matter should proceed to trial without providing any of the requested disclosure, and that the Defendant has not been prejudiced.

Facts.

Mr. Brown filed his notice of appearance on 11/27/2023. Despite Rule 19 of the Code of Ethics for Legal Practitioners prohibiting direct communication with a party know to be represented, on 11/29/2023, the Nation provided a Case Status Report directly to the Defendant. The Case Status Report states that disclosure "materials taken to Corrections /Jail for signature and release to Defendant."

Mr. Lagattuta filed his notice of appearance on 12/4/2023, and a Demand for Disclosure, which included a demand for "all then existing original and supplemental reports prepared by a law enforcement agency in connection" with Mr. Herrera's charges, and "all then existing material or information which tends to mitigate or negate the defendant's guilt as to the offense charged or which would tend to reduce the defendant's punishment therefore." (*See* Demand for Disclosure, item #s 3 and 8).

On 12/6/2023, Mr. Lagattuta withdrew from the case. Mr. Brown filed his own Demand for Disclosure on 12/20/2023, which requested "[a]ll reports (including hand-written case notes) and supplemental reports generated or otherwise created by any law enforcement agency" involved in this case, regardless of whether the person or party is a potential testifying or non-testifying witness, as well as all written or otherwise recorded statements made by the alleged victim and any other witness or person interviewed and/or with information relevant to the investigation and Defendant's defense, regardless of whether the party is testifying, and "[a]ll material or information which is exculpatory or otherwise tends to mitigate or negate the Defendant's guilt as to the offense(s) charged, or which is relevant to reduce any potential sentence." (*See* First Demand for Disclosure, item #s 1, 4 and 7.)

At the 2/24/2025 hearing, the Nation, through Mr. Colmenero, acknowledged that the Law Enforcement Statement of Probable Cause (P.C. Statement) filed on 11/5/2023 includes discrepancies, and offered that the Defendant can use these discrepancies to defend himself and impeach and attack the credibility of the witnesses. The Nation also denied that they were required to produce the name of the neighbor witness mentioned in the P.C. Statement, or any of the alleged victim's medical records. The Law Enforcement Statement of Probable Cause reads:

> **Teresa advised that she was able to get out of the house with her son and walked to the neighbor's residence to ask for**

> **shelter. During my conversation with Teresa, I did not observe any visible marks, but she did have redness on her neck.** I advised Teresa that I was going to do a follow-up with her later today to see if any bruises showed afterward. Paramedics responded to the scene and evaluated Teresa. **No pictures were taken at the time of the investigation however I conducted a follow-up shortly after and I did observe visible scratches and red marks on her neck.** Pictures were taken and submitted for evidence. (Emphasis added.)

The Nation conceded that Mr. Brown requested all reports from TOPD, as well as information with respect to the neighborhood witness that the alleged victim sought shelter with.

The Court finds that the undisclosed witness is a source of information as to first-hand observations with respect to the alleged witness's condition at the time she sought shelter, and is a source of impeachment, exculpatory and mitigation information, as well as being a source of information regarding excited utterances, present sense impressions, and admissions by the alleged victim that can result in affirmative defenses. Mr. Brown also sought written and recorded statements given by this alleged witness to investigating officers. Nothing was provided.

Instead of seeking a protective order or permission from the Court to disregard their duty to disclose, the Nation responded:

> Defendant still has no authority whatsoever for the proposition that the Prosecutor's Office or law enforcement are required to conduct further investigation or get every conceivable piece of information from independent agencies that may or may not help Defendant's case. . . . There is no authority that requires law enforcement to get the name and information of every possible witness that could help Defendant. (*See* Response to Supplement to Motion for Dismissal or Order for Meaningful Sanction of Preclusion Evidence, page 2, line 18 through page 3, line 2.)

Mr. Brown also sought the alleged victim's medical records, including paramedic records, as the records would have documented any and all injuries of the alleged victim before Officer Jose Infante returned for his follow up and noticed scratches on the neck of the alleged victim. The Nation's response was:

> Nor is there any authority whatsoever that the Prosecutor's Office is specifically required to get medical records of the victim that it does not intend to use at trial. These medical records are not in the Prosecutor's Office possession or control and they are not in law enforcement possession or control. The agencies that provided medical care are independent agencies.
>
> Also, "under the Victim's Bill of Rights, the victim may assert the right and refuse to make available to the defense a victim's medical records. State ex. rel. Romley v. Superior Court in and for the County of Maricopa, 172 Ariz. 232 (1992). (See Response, *Id.*, at p. 3, lines 3 through 12.)

Analysis.

The Code of Ethics for Legal Practitioners is found in Section 18 of the Tohono O'odham Rules of Court, and reads:

> It is a prosecutor's duty to make sure a defendant in a criminal case is given justice under all laws, codes, ordinances, resolutions, and rules of the Tohono O'odham Nation. To carry out this responsibility, a prosecutor must:
> (d) disclose to the defense all exculpatory evidence and information known to the prosecutor that may negate or mitigate the guilt of the accused.

T.O. R. Crim. P. 7.2(a)(8) states that unless otherwise ordered by the Court, or restricted by law or rule, prosecutors must provide each defendant with the following information that is in their possession or control: "all existing material or information which mitigates or negates the defendant's guilt as to the offense charged, or which could reduce the defendant's

punishment[.]" Subsection (b) requires the disclosure of this information by the initial date set for the pretrial conference.

Mr. Lagattuta and Mr. Brown made formal written requests for all exculpatory evidence and information known to the prosecutor that may negate or mitigate the guilt of the accused. The requests included all investigative reports, call logs, medical records and paramedic records.

T.O. R. Crim. P. 7.2(d)(1)(A) and (B) states that "unless otherwise ordered by the Court, the prosecutor must, within 30 days of a written request, provide to the defendant for examination, testing, and reproduction, any specified items contained in the list submitted under subsection (a) of this Rule, and any 911 call records existing at the time of the request that can reasonably be determined by the custodian of the record to be related to the case. Subsection (e)(2) outlines that the prosecutor's duty under this Rule extends to material and information in the possession or control of "any law enforcement agency which has participated in the investigation and that is under the prosecutor's direction and control."

In *Tohono O'odham Nation v. Glen Escalante*, 2 TOR Supp. 3d 37, 38-39 (Trial Ct., Aug. 11, 2003), the Nation argued that it could not be sanctioned for failing to disclose a witness statement that does not exist, that it has no duty to generate written reports, witness statements or to otherwise assist the defendant in the presentation of his case, and asserted that the doctrine of separation of powers prevents the Judicial Branch from mandating report writing policies for an executive branch. The Honorable Judge Rose Johnson Antone recognized the separation of branches, that the Court does not mandate policies for Executive Branch departments, and made clear that:

> The police department, a law enforcement agency and in this case has initiated an investigation in the alleged criminal actions of the defendant, is an arm of the Nation. In this relationship the Nation has control of the agency and is required

> to produce the police officer's report within the timeframe of Rule 17. The Court promulgated the discovery rules to provide both the Nation and defendants with adequate means to discoverable materials to aid in the preparation of each side's case to avoid any delays or surprises at trial.

In *United States v. Alahmedalabdaloklah*, 94 F.4th 782, 844 (9th Cir. 2024), cert. denied, 220 L. Ed. 2d 272 (Dec. 9, 2024), the 9th Circuit explained:

> The prosecutor will be deemed to have "knowledge" not only of information that the prosecutor personally knows, but also of information that the prosecutor "could have learned." *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (quoting *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (en banc)). "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *Bryan*, 868 F.2d at 1036. As to those agencies that are not involved in the investigation, the "prosecutor need not comb the files of every federal agency which might have documents"; rather, the obligation to disclose "turn[s] on the extent to which the prosecutor has knowledge of and access to the documents." *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (quoting *Bryan*, 868 F.2d at 1036).

The Court finds that the Nation's Prosecutor's Office is an arm of the Executive Branch, as is the Tohono O'odham Police Department, and the Prosecutor's Office is therefore under a duty to provide all records in the possession of the Tohono O'odham Police Department once properly requested. The plain language of subsection (d) contemplates that there may be occasions when a rightful objection must be made, and in those instances, the Prosecutor's Office must seek affirmative relief to be excused from their duty to disclose. Otherwise, if no records are disclosed within 30 days, this can result in sanctions for failure to make timely disclosure.

Mr. Brown's Motion and Supplemental Motion for Dismissal cites to *Brady v. Maryland*, 373 U.S. 83, (1963), *United States v. Giglio*, 405 U.S. 150 (1972), Rule 7.2 and Rules 9.1

through 9.3 of the Nation's Rules of Criminal and Traffic Procedure, Rule 15.7 of Arizona Rule of Criminal Procedure, and a number of Arizona and federal cases, as well as, Title 25 U.S.C. §1302(a) of the Indian Civil Rights Act.

Having compared the Nation's Rules of Court with *Brady v. Maryland*, 373 U.S. 83 (1963), and the line of exculpatory and mitigation jurisprudence, the Court finds it is appropriate to formally adopt *Brady*, which requires disclosure by the government, of materials that are potentially exculpatory or impeaching, including that which would impeach a government witness by showing bias or prejudice or otherwise, *United States v. Bagley*, 473 U.S. 150, 154 (1972), or provide grounds to attack the reliability, thoroughness, and good faith of the investigation, *Kyles v. Whitley*, 514 U.S. 419, 445, 446 (1995). The Tohono O'odham Rules of Court further justify adopting *U.S. v. Bundy*, 968 F.3d 1019, 1038 (9th Cir. 2020), which states that the government has an affirmative obligation to learn of potentially favorable evidence and provide it to the defense, including evidence known to those acting on the government's behalf in the case, including the police. *Kyles*, 514 U.S. at 437. To summarize, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194.

At the 2/24/2025 hearing, the Nation admitted that it did not provide the name of the neighbor that the alleged victim sought shelter with, that it did not obtain any police investigative notes or the call logs, and admitted that it reached out to the alleged victim and asked for her medical records. Although the alleged victim responded that she would provide her medical records, the Nation did not follow up on the offer. Instead, they rely on *State ex Rel. Romley v. Maricopa County Superior Court*, supra, to disregard the request.

The Nation's failure to provide the neighbor witness's name and contact information, and the alleged victim's medical records, violated T.O. R. Crim. P. 7.2(a)(8). The Nation's failure to provide police report radio and call logs after being requested violated T.O. R. Crim. P. 7.2(d)(1)(B). The Nation's reliance on the Victims' Rights Law, 7 T.O.C. Ch. 4, and *Romley* is misplaced. Not only does the Victims' Rights Law not protect the Nation from obtaining the alleged victim's medical records, *Romley* itself cites to the United States Supreme Court, which has held that state laws providing for nondisclosure of information to criminal defendants must, in some situations, yield to the constitutional confrontation rights of the accused. *See, e.g., Michigan v. Lucas,* 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991) (state rape shield law; Court remanded for determination of confrontation clause violation); *Davis,* 415 U.S. 308, 94 S.Ct. 1105 (statute requiring confidentiality of juvenile records must yield to cross-examination rights). *Romley* states:

> if the trial court determines that Brady and due process guarantees require disclosure of exculpatory evidence and, further, if the court determines that the medical records are exculpatory and are essential to presentation of the defendant's theory of the case, or necessary for impeachment of the victim relevant to the defense theory, then the defendant's due process right to a fundamentally fair trial and to present the defense of self-defense overcomes the statutory physician patient privilege on the facts as presented here, just as the due process right overcomes the Victim's Bill of Rights on these facts. *See Hospital Corp. of America v. Superior Court*, 157 Ariz. 210, 755 P.2d 1198 (App.1988).

The Court finds that the Defendant's right to due process under the Nation's Constitution, Article III, Section 1, as well as the Indian Civil Rights Act, 25 U.S.C.A. §1302(a)(6), and Rule 15.1(b)(8) of Arizona's Rules of Criminal Procedure require this same type of disclosure. The

Tohono O'odham Nation's Rules of Criminal Procedure, Rule 9.3(a)(2) authorizes the dismissal of a case with prejudice for failure to disclose. The Court is required to consider:

1. the significance of the information not timely disclosed;
2. the impact of the sanction on the party and the victim; and
3. the state of the proceedings at which the disclosure is ultimately made.

Regarding Factor 1, the Court finds that the Probable Cause Statement contains sufficient information to alert the Court that the alleged victim did not have visible scratches on her neck at the first point of contact. No photographs were taken. Then, after the Defendant and the alleged victim were separated, and after being screened by paramedics and medical staff, she had scratches not previously there. The Probable Cause Statement identified a neighbor that provided shelter to the alleged victim. That neighbor would have personal knowledge regarding observations of the alleged victim after she separated from the Defendant, and the neighbor can attest to statements made that are potentially exculpatory. Not providing the medical information or name of the witness obstructs the Defendant's right to defend himself, and to effectively prepare meaningful cross examinations.

Regarding Factor 2, a dismissal with prejudice means that the Nation will be unable to prosecute Mr. Herrera for these alleged offenses. If dismissed, the alleged victim would not be able to see the case result in a conviction and sentence. Regarding sentences, the Court has broad discretion with respect to sentencing. Sentences can include a time-served jail sentence, as Mr. Herrera was book into custody on 11/4/2023, and released on 12/11/2024. The Court can sentence Mr. Herrera to more jail time, or impose a jail sentence but suspend it upon successful completion of supervised probation, or impose monetary fines, or a combination.

Regarding Factor 2 as to the alleged victim, she obtained an order of protection against the Defendant. Protective orders expire after six months after being served. The alleged victim can always seek a new order of protection, which, if violated, can result in criminal charges. Also, the alleged victim is the spouse of the Defendant. The alleged victim can divorce Mr. Herrera if she desires. However, the dismissal can also result in the parties reconciling.

Regarding Factor 3, the requested information has yet to be disclosed. This has severely prejudiced the Defendant by having this case remain on the active docket and not being able to adequately negotiate a plea or to motion to dismiss for legal deficiencies. Mr. Herrera was arrested on 11/4/2023. It has been 496 calendar days since then. The Court finds that the substantial delay in disclosure has prejudiced Mr. Herrera. For the above-stated reasons, all Counts are dismissed with prejudice against Mr. Herrera. The 3rd Party Signers are discharged. This is a final, appealable order.

3/14/2025
DATE

JUDGE Rene Sanchez Alcoverde Jr.
Tohono O'odham Nation Justice Center

TOHONO O'ODHAM
JUDICIARY

Fmo to: Pros, DC-Brown, Def.
031425EB

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED IN THE TOHONO O'ODHAM COURT
25SEP23 AM08:24
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Frank Anthony Jaimez
DOB: 05/24/1997
Defendant

TRIAL RECORD ENTRY

Case No. CR2024-0171-1/4

OFFENSE(S) Ct.1: 7.1A1/8.9B Ct.4: 7.3A1/8.9B

COURT DATE: _ TIME: _ BOND POSTED: ___

CALENDER EVENT: ☐Arraignment ☐Pre-Trial ☐Hearing
☐ Jury Trial ☐Bench Trial ☒Other Motion to Vacate
☐Sentencing ☐Parole Hearing

DEFENDANT:	☐ Present		☐Not Present
DEFENSE COUNSEL:	☐ Present	_____	☐ Not Present ☐ Pro Se
PROSECUTORS:	☐ Present	_____	☐ Not Present
PROBATION OFFICER:	☐ Present	_____	☐Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☒)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Frank Anthony Jaimez, DOB: 05/24/199
CASE NO. CR2024-0171-1/4

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: The Court reviewed the Prosecutor's Response to the Court's 9/19/2025 Order. The Nation advised that the Defendant was prosecuted as a non-Indian under VAWA based on Pascua Yaqui prosecutors. Potentially eligible is not proof beyond a reasonable doubt to give this Court subject-matter jurisdiction. Pursuant to Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212, 98 S. Ct. 1011, 1022–23, 55 L. Ed. 2d 209 (1978), the Court vacates the underlying sentence and Plea Agreement. The Court also vacates any hearings scheduled in this case, including the Motion to Revoke Probation, as Court lacks criminal jurisdiction. The Defendant is to be released immediately.

September 23, 2025

DATE

JUDGE, Rene Alcoverde Jr.

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☐ DEFENSE ATTORNEY ☑ DETENTION

092325 09

TOHONO O'ODHAM JUDICIARY

Rev. 11/2022

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED IN THE TOHONO O'ODHAM COURT
25SEP08 AM09:06
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Jacquelynn Ronnie Reyes aka: Smith
DOB: 05/02/1984
Defendant

TRIAL RECORD ENTRY

Case No. **CR2025-0213-1-8**

OFFENSE(S) Ct.1: 7.3A1/8.9B, Ct.2: 7.3A5/8.9B, Ct.3: 3.6A1/8.9B, Ct.4: 3.6A4/8.9B, Ct.5: 3.6A5/8.9B, Ct.6: 8.4A2, Ct.7: 8.4A2, Ct.8: 12.4A

COURT DATE: _ TIME: _ BOND POSTED: _____

CALENDER EVENT: ☐Arraignment ☐Pre-Trial ☐Hearing
☐ Jury Trial ☐Bench Trial ☒Other Mot. for Probable Cause Hearing
☐Sentencing ☐Parole Hearing

DEFENDANT:	☐ Present	☐Not Present
DEFENSE COUNSEL:	☐ Present	☐ Not Present ☐ Pro Se
PROSECUTORS:	☐ Present	☐ Not Present
PROBATION OFFICER:	☐ Present _____	☐Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Jacquelynn Ronnie Reyes aka: Smith, DOB: 05/02/1984
CASE NO. CR2025-0213-1-8

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: A Motion for Probable Cause Hearing was filed on 8/15/2025. While the Nation has the burden of proof at all stages of the proceedings, the Tohono O'odham Police found probable cause to arrest Ms. Reyes. The Initial Appearance took place on 5/28/2025. At that time, the Court reviewed the complaint and P.C. Statement, and set release conditions, which would not have taken place absent a finding of probable cause. The Nation's has its own common law jurisprudence. There is no specific rule or binding caselaw on point. Persuasive cases require the motion to be filed before a trial is set. Here, the motion was filed the same day the Trial was set. The Court exercises its discretion to deny setting a hearing. Instead, the Court applies Nation v. Saraficio, 4 TOR 3d 357, 357. Here the P.C. Statement identifies multiple witnesses that give similar reports, and the reports align with the Complaint. The motion is therefore denied.

September 5, 2025
DATE

JUDGE, Rene Alcoverde Jr.

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☐ PROSECUTOR ☑ DEFENSE ATTORNEY ☑ DETENTION

090825CR3

Rev. 11/2022

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Criminal Division

FILED IN THE TOHONO O'ODHAM COURT
25SEP08 AM09:05
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Katrina Stevens
DOB: 02/04/1999
Defendant

TRIAL RECORD ENTRY

Case No. CR2025-0248-1-6

OFFENSE(S) Ct.1: 12.4A Ct.2: 7.3A5/8.9B Ct.3: 7.1A2/8.9B Ct.4: 8.4(2) Ct.5: 3.6A1/8.9B, Ct.6: 3.6A5/8.9B

COURT DATE: _ TIME: _ BOND POSTED: _____

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☐ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Mot. for Probable Cause Hearing
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☐ Present _____	☐ Not Present
DEFENSE COUNSEL:	☐ Present	☐ Not Present ☐ Pro Se
PROSECUTORS:	☐ Present	☐ Not Present
PROBATION OFFICER:	☐ Present _____	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☐ Set for: _____

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Katrina Stevens, DOB: 02/04/1999
CASE NO. CR2025-0248-1-6

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Mr. Wolfblack has motioned for a Probable Cause Hearing. The Nation's Probable Cause jurisprudence states that probable cause is a common sense determination under the totality of the circumstances that leads a reasonable person to believe that a crime was committed and that the defendant committed it. See Nation v. Alvarez, 2021 TOR Supp. 255 (2018). Alvarez cites to Aguilla v. Tohono O'odham Nation, CTA-0127 (T.O. Ct. App. 2015), but Aguilla is not in the Tohono O'odham Reports. The Court will have that case added to the Judicial Branch Website. Aguilla states that a probable cause hearing is akin to a motion for preliminary hearing. Regardless of the nature, the Court is guided by a common sense determination. Here, the criminal complaint is based on an affidavit of probable cause, which includes party admissions after an advisement of rights. The Court finds that this satisfies Nation v. Saraficio, 4 TOR 3d 357, 357-358. The motion is therefore denied.

September 5 2025

DATE

JUDGE, Rene Alcoverde Jr.

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☐ DETENTION

WolfBlack

09 08 25 EB

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Traffic Division

FILED IN THE
TOHONO O'ODHAM COURT
2023 7 06 AM07:59
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Leon Michael Lopez
DOB: 01/26/1983
Defendant

TRIAL RECORD ENTRY

Case No. TC2021-0053-2/3

OFFENSE(S) Ct. 2: 13.1A, Ct. 3: 13.7A2

COURT DATE: July 5, 2023 TIME: 9:00 AM BOND POSTED: ___

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Probable Cause
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☒ Present	In Custody	☐ Not Present	
DEFENSE COUNSEL:	☒ Present	Oliver	☐ Not Present	☐ Pro Se
PROSECUTORS:	☒ Present	Allen	☐ Not Present	
PROBATION OFFICER:	☐ Present		☐ Not Present	

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☒ Set for: Status Hearing July 17, 2023 at 1:00pm

_____

☐ The following charges are dismissed: _____

(☐)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Leon Michael Lopez, DOB: 01/26/1983
CASE NO. TC2021-0053-2/3

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____ ___ m to _____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ ___ m and _____ _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $ _____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: Please see the attached document.

July 5, 2023
DATE

JUDGE, Kyle Fields

TOHONO O'ODHAM JUDICIARY

DISTRIBUTION: ☐ COURT ☐ PROBATION ☒ DEFENDANT ☒ PROSECUTOR ☒ DEFENSE ATTORNEY ☒ DETENTION

070623 TL

D. Oliver

Rev. 12/2020

FILED IN THE
TOHONO O'ODHAM COURT
2023 7 06 AM 07:59
JUDICIAL COURT CLERK II

Continuation Order

Nation v. Lopez

TC2021-0053-2/3

At the probable cause hearing, Officer Slawson testified.

Probable cause is a "common sense determination under the totality of the circumstances that would lead a reasonable person to believe that a crime has been committed and that the defendant committed it." *Tohono O'odham Nation v. Alvarez*, 2021 TOR Supp. 253, 255 (Trial Ct., May 23, 2018).

For a police officer to stop a vehicle, the officer needs at least reasonable suspicion. *See Tohono O'odham Nation v. Fasthorse*, 1 TOR3d 81, 86 (Trial Ct., Oct. 23, 1989) (discussing that a police officer has reasonable suspicion for a traffic stop). Reasonable suspicion is a lower standard than probable cause. *See id.* at 86-87 (discussing the differences between reasonable suspicion and probable cause to search a vehicle). Reasonable suspicion for a traffic stop is a particularized and objective basis for suspecting the particular person who was stopped was breaking the law. *See* 22 C.J.S. Criminal Procedure and Rights of Accused § 89. When evaluating reasonable suspicion, the Court uses an objective standard. *See Heien v. North Carolina*, 574 U.S. 54 (2014). As a result, the officer's motivation or subjective beliefs for stopping a vehicle is not controlling in deciding whether reasonable suspicion existed to justify the stop. *See id.; see also* 22 C.J.S. Criminal Procedure and Rights of Accused § 89 (surveying cases).

Under Title 23, Chapter 1, Section 66-179 of the Tohono O'odham Code, "No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield…which obstruct the driver's clear view of the highway or any intersecting highway."

Here, Officer Slawson saw a few items hanging from Mr. Lopez's rearview mirror while approaching from the opposite direction. Officer Slawson turned around and followed Mr. Lopez. Officer Slawson confirmed that he saw the items and conducted a traffic stop.

Mr. Lopez asserts that Officer Slawson's interpretation of Section 66-179 is not legally correct because the items were hanging from the rearview mirror and not attached "upon the front windshield[.]" Even if the Court assumed that Officer Slawson's interpretation of Section 66-179 was wrong, an officer's reasonable mistake of law can still provide the particularized and objective basis to justify a traffic stop. *See Heien*, 574 U.S. at 60-61. Here, Officer Slawson had a particularized and objective basis to stop Mr. Lopez's vehicle. As a result, the Court finds that Officer Slawson had reasonable suspicion for the traffic stop.

The Court sets a status hearing.

FILED IN THE
TOHONO O'ODHAM COURT
2025 4 01 AM 07:56
JUDICIAL COURT CLERK II

IN THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
CRIMINAL DIVISION

Tohono O'odham Nation, Plaintiff, vs. Derek Ira Pablo Jr., Defendant.	)	Case No.: TC2023-0019-1-15 **ORDER**

For the reasons stated below, the Court denies the Defendant's Motion to Dismiss.

NOTICE IS NOT REQUIRED FOR TRANSFERS TO U.S. CUSTODY.

At 1:49 p.m. on 5/31/2024, Nicol Green, Chief Prosecutor for the Tohono O'odham Nation, filed a Motion to Stay Case and Grant Comity to Federal Habeas Corpus Writ. Identical motions were filed in Children's Court matters. At 2:32 p.m., this Court granted the motions in all cases, and the Defendant was transferred to federal custody. The Application for Writ of Habeas Corpus includes paragraph 4, which states that the Defendant's "[a]ppearance is necessary on [. . .] Wednesday, June 5, 2024 at 2:00 pm. . . ." The paragraph above Magistrate Bruce G. Macdonald's signature reads:

> **The Instant Application is granted and the U.S. Marshall for this district, his deputies, and other U.S. Marshalls and their deputies, or other federal law enforcement officer(s) for this district, is and are directed to produce the named detainee, on the date, and at the time, and in the place recited above, and thereafter maintain the said detainee within the jurisdiction of this Court pending the satisfaction of this writ or further orders of the Court, thereupon to be returned to the facility listed above** unless otherwise ordered by the Court. (Emphasis added.)

The reference to the facility listed above is the Tohono O'odham Detention Center.

The Defendant argues that his due process rights were violated because he was not given notice or an opportunity to object to any defects in the application for federal writ of habeas corpus before it was granted. Mr. Brown complains that he was not given a copy, despite the Nation's certification that he was copied to the motion, and argues that the writ only required the Defendant to appear for one Initial Appearance. The Defendant's argument ignores the last paragraph, which includes "to maintain the said detainee within the jurisdiction of this Court pending the satisfaction of this writ or further orders of the Court. . . ." Mr. Brown also ignores that at the federal initial appearance, that his client submitted to being detained in federal custody until that the federal matters were resolved.

The Court finds that the Defendant's claim that due process was violated, and that this Court is guilty of engaging in *ex parte* communications, is disingenuous and unsupported by legal authority. 7 T.O.C. ch. 2, art. V, §§ 5.1 through 5.2, govern federal extraditions. Neither require notice to a defendant. Section 5.2(A) provides that upon receipt of (1) a writ of habeas corpus and a certified arrest warrant issued by the United States of America, and (2) a motion to grant comity filed by a Nation's Prosecutor, the Judicial Court may grant comity to such a writ and order the person held in custody until transferred to an agent of the United States within five days. Subsection (B) prohibits this Court from granting comity when criminal proceedings are pending unless:

> "(1) **the federal writ requires the person to be returned to the Nation's custody immediately upon the completion of the federal prosecution**. . . . If the Court grants comity to the federal writ, the Nation's proceedings shall be stayed pending a hearing in the Judicial Court after the person's return." (Emphasis added.)

There is nothing in the Extradition Code that gives a defendant the right to notice of, or the right to object to, a motion seeking comity that seeks a transfer order to the United States for federal prosecution.

Rules 13.1 through 13.7 of the Rules of Criminal Procedure outline the procedures this Court must follow when faced with a motion to grant comity. These Rules align with the Extradition Code and do not provide a defendant with the right to notice or an opportunity to be heard before the Court grants a motion for comity. The Court announces that it is the Court's sole purview and responsibility to ensure that the Extradition Code and all applicable Rules of Court are complied with.

Mr. Brown asked the Court whether Rule 5 of the General Rules of Practice applies to federal extraditions because if it does, Rule 5 contemplates a response and reply. The Court finds and orders that Rule 5 of the General Rules of Practice does not apply in federal extraditions. All 7 T.O.C. ch. 2, art. V, § 5.2 requires is receipt of a writ of habeas corpus, a certified arrest warrant, and a motion to grant comity filed by a Nation's prosecutor. In *Allen v. Hunter*, 65 F. Supp. 365, 367-68 (D. Kan. 1946), a defendant argued that the federal government lost all jurisdiction over him when he was permitted to return to the Indiana State Prison. The court found that the question of jurisdiction and custody is purely one of comity between the two sovereigns, not a personal right of the prisoner which can be asserted. *See also Young v. Harris*, 229 F.Supp. 922, 924 (W.D. Mo. 1964), *Derengowski v. U.S. Marshal, Minneapolis Off., Minn. Div.*, 377 F.2d 223, 223 (8th Cir. 1967), and *Chunn v. Clark*, 451 F.2d 1005, 1006 (5th Cir. 1971), which make clear that prisoners have no standing to contest the temporary exchange of two prisoners between two sovereigns. The Court therefore orders that defendants lack all

standing to contest temporary exchanges between the Tohono O'odham Nation and federal district courts.

The Defendant complains that the Nation engaged in gamesmanship and was motivated to push this case to go federal when his competency became an issue after discovery of an old brain injury was shared. As convincing as the Defendant's gamesmanship arguments were, which included claims of baiting, this Court finds and orders that the Prosecutor's intentions are irrelevant. In the words of our former Chief Judge Hilda Manuel: "[t]he motives of the parties are not for this Court to scrutinize provided that the purposes are not expressed or sought to be enforced through means that offend the Constitution. *Francisco v. Toro*, 1 TOR3d 68, at 69 (Trial Ct., Jan. 12, 1989) appeal dism'd 3 TOR3d 17 (Ct. App., Sep. 4, 2008).

This Court's refusal to entertain Mr. Brown's claim that the Nation actively moved this case to go federal because it wanted to avoid competency challenges is further justified by the fact that the federal government's decision to seek prosecution is solely in that sovereign's hands. Once in the other sovereign's hands, the issues of competency before this Court are not extinguished. Once the Defendant is returned to the jurisdiction of this Court, the issue will be ripe for adjudication.

The Court admonishes Mr. Brown for attacking the Court's impartiality by claiming that it engaged in ex parte communications with the Prosecutor's Office. The Court is convinced that Mr. Brown was making a good-faith argument to have Rule 5 of the General Rules of Practice apply in federal extraditions. After this order, future attacks will result in an order to show cause.

RIGHTS TO SPEEDY TRIAL ARE STAYED

Although the Defendant argues that his right to a speedy trial was violated when the motion to grant comity was granted, the Court finds and orders that the Code and Rules of Court must be read harmoniously. Both 7 T.O.C. ch. 2, art. V, § 5.2(B) and Rule 13.7 of the Rules of Criminal Procedure mandate a stay if this Court grants comity to federal writs of habeas corpus that comply with the Tohono O'odham Nation's Extradition Code. Here, the Nation complied with both the Code and Rules of Court. As such, the Defendant's Motion to Dismiss on the grounds that his speedy trial rights were violated is denied.

DISCLOSURE ISSUES

During argument, Mr. Brown raised various issues of non-disclosure as a basis for dismissal and relief. This Court is concerned over the lack of disclosure. In reviewing the files, the Court did not find a motion seeking relief for discovery violations, nor was there a separate statement of good-faith efforts. The Court therefore denies any relief for non-disclosure without prejudice.

SETTING OF A STATUS HEARING

The Nation's Supplemental Response to Motion to Dismiss (Timeline), on page 6, lines 12 through 13, advises that Mr. Pablo pled guilty to possession of a firearm by a prohibited person, and that Mr. Pablo admitted to violating his federal supervised release. Today, the Nation motioned to dismiss as Mr. Pablo accepteda plea agreement in federal court to possession of a firearm. The motion does not specify whether dismissal with or without prejudice is sought. Given that the Defendant has a right to be heard on the issue of prejudice, the Court sets a Status Hearing on May 2, 2025, at 9 a.m.

Dated March 31, 2025.

JUDGE Rene Sanchez Alcoverde Jr.
Tohono O'odham Justice Court

Tohono O’odham Nation

vs.

Julio Velasco aka: Hank Velasco

Case No. TC2025-0016-1-8

Trial Record Entry upholding the availability of probable cause hearings in Tohono O’odham practice—distinct from initial appearances because defendants there are rarely represented and the probable cause hearing functions similarly to a limited preliminary hearing in other jurisdictions—and applying that framework to dismiss two counts for lack of probable cause while cautioning parties against turning such hearings into unfocused “mini trials.”

In the Judicial Court of the Tohono O'odham Nation
In the State of Arizona
Traffic Division

FILED IN THE TOHONO O'ODHAM COURT
25SEP02 AM10:53
JUDICIAL COURT CLERK II

TOHONO O'ODHAM NATION,
Plaintiff

vs.

Julio Velasco aka: Hank Velasco
DOB: 03/15/1977
Defendant

TRIAL RECORD ENTRY

Case No. TC2025-0016-1-8

OFFENSE(S) Ct.1: 5.2A5 Ct.2: 3.3A Ct.3: 7.4A/8.9B Ct.4: 7.10A/8.9B Ct.5: 7.3A2/8.9B Ct.6: 3.6A4/8.9B Ct.7: 2.9A Ct.8: 66-286

COURT DATE: August 25, 2025 TIME: 1:30 PM BOND POSTED: _____

CALENDER EVENT: ☐ Arraignment ☐ Pre-Trial ☒ Hearing
☐ Jury Trial ☐ Bench Trial ☒ Other Probable Cause
☐ Sentencing ☐ Parole Hearing

DEFENDANT:	☒ Present	_____	☐ Not Present
DEFENSE COUNSEL:	☒ Present	Carmine Mediate	☐ Not Present ☐ Pro Se
PROSECUTORS:	☒ Present	Wendy McHood	☐ Not Present
PROBATION OFFICER:	☒ Present	Ashley Joaquin	☐ Not Present

IT IS ORDERED:

☐ The Defendant is found Guilty of: _____

☐ The Defendant is found Not Guilty of: _____

☐ The Defendant Pled: (☐)Guilty (☐)Not Guilty (☐) No Contest (☐)Admit (☐)Deny

TO: _____

☒ Set for: Pretrial Hearing September 19, 2025 at 9:00 a.m.

_____

☒ The following charges are dismissed: TC2025-0016-1/2

(☒)with prejudice (☐)without prejudice

☐ Presentence Report Requested.

TOHONO O'ODHAM NATION VS. Julio Velasco aka: Hank Velasco, DOB: 03/15/1977
CASE NO. TC2025-0016-1-8

IT IS FURTHER ORDERED that the Defendant:

☐ Pay a fine of $_____. (☐) Suspended (☐) Fine Agreement allowed

☐ Pay $ _____ Per month beginning _____until fine is paid in full.

☐ Shall complete _____ hours of community service by: _____

☐ Be committed to tribal jail for a period of: _____

☐ Be placed on: (☐) supervised (☐)unsupervised probation (☐)Deferred Sentence (☐)Parole Granted

For: _____

(☐) Shall attend: (☐) Defensive Driving (☐)Alcohol/Drug Evaluation (☐)Alcohol/Drug Education

(☐) Alcohol/Drug Treatment

BY: _____

(☐) Shall enroll in: _____

Counseling by: _____

And shall show proof of completion to Court by _____

(☐) Defendant not eligible for parole/work credit during first _____ days.

(☐) Defendant eligible for work release from _____m to_____ ___ m.

(☐) Defendant may drive a motor vehicle between the hours of _____ m and _____ m.

AND THAT: Bond in the amount of: $_____ is hereby.

(☐) exonerated (☐) converted (☐)forfeited

(☐) Refund BOND in the amount of $_____

(☐) Issue Bench Warrant (☐) Quash Bench Warrant (☐) Conditions:

ADDITIONAL ORDERS: See the attached Continuation Order.

August 29, 2025
DATE

JUDGE, Joseph Hardy Jr.

DISTRIBUTION: ☐ COURT ☑ PROBATION ☑ DEFENDANT ☑ PROSECUTOR ☑ DEFENSE ATTORNEY ☐ DETENTION

Comediate

090225 cr

Rev. 11/2022

Continuation Order

Tohono O'odham Nation

vs.

Julio Velasco

Case No. TC2025-0016-1-8

Probable Cause Hearing held August 25, 2025

Preliminary matters:

1. Defense moved to dismiss on the grounds that the Nation did not file a response to its Motion for a Probable Cause Hearing within the required 10 days after service, and the Court should therefore accept the motion as uncontested. See T.O. R. Ct. Section 1, Rule 5(b) & (c).

The Court denied the motion to dismiss, because in Court Rules, periods of less than 11 days are measured in business days, T.O. R. Ct. Section 1, Rule 4; and 10 business days had not yet run. On further review, the Court also notes that Defense's Motion for a Probable Cause Hearing requested only that—a hearing. It did not request dismissal for lack of probable cause. Thus, accepting the Motion for a Probable Cause Hearing as uncontested would not have resulted in dismissal—only in setting a probable cause hearing—which had already been done.

2. The Nation objected to holding probable cause hearings generally, arguing that probable cause has already been found at the initial appearance. The Court denied that motion, largely for the reasons stated in Defendant's Motion for Probable Cause Hearing, which reflected this Court's own common law jurisprudence. (See Def.'s Mot. for Probable Cause Hr'g, Aug. 14, 2025.)

While Defendant's cited cases are Trial Court decisions and therefore not conclusive, see T.O. R. Ct. Section 1, Rule 8.2(d), they are persuasive. Id. This judge agrees with those cases and with the value of having a probable cause hearing available after a defendant's initial appearance, for two reasons.

First, unlike in state and federal courts, defendants in this Court are rarely, if ever, represented at their initial appearances—even when facing over a year of imprisonment.

Second, as described in Nation v. Alvarez, 2021 TOR Supp. 253, 255 (Tr. Ct. 2018), this Court's probable cause hearings are more like (though not identical to) preliminary hearings in other jurisdictions. Other jurisdictions have both initial appearances and

preliminary hearings. Initial appearances are conducted quickly after arrests and typically require some showing of probable cause. See, e.g., Ariz. R. Crim. P. 4.2(a)(4) (must determine probable cause for purposes of release from custody); Fed. R. Crim. P. 5(b) & 4(a) (for warrantless arrests, a filed complaint or affidavit(s) filed with the complaint must show probable cause). Those are both much like this Court's initial appearances.

In other jurisdictions, separate preliminary hearings may sometimes (not always) be held later, to determine whether there is probable cause to advance the case. See, e.g., Ariz. R. Crim. P. 5.1(a) (preliminary hearing after initial appearance), 5.3(a)(3) (must determine whether State's case establishes probable cause), 5.4(a) (hold defendant to superior court if probable cause found), 5.4(d) (dismiss complaint and discharge defendant if no probable cause found); Fed. R. Crim. P. 5.1(c) (preliminary hearing after initial appearance), (e) (defendant to appear for further proceedings if probable cause found)-(f) (dismiss complaint and discharge defendant if no probable cause found). That is also the purpose of our post-initial appearance probable cause hearings. See Alvarez, 2021 TOR Supp. at 256 ("Simply put, the probable cause hearing is a hearing where the Nation must show that there's enough evidence to charge the defendant and justify a trial.").

The Nation expressed concern that probable cause hearings could devolve into "mini trials." The Court assured the Prosecutor that this long-standing practice has not been abused in the past and trusted it would not be in the future.

In this case, it appeared clear to the Court that probable cause existed for Counts 3 through 8, and Defense ultimately acknowledged probable cause for Counts 3 through 6 and 8. It also appeared clear to the Court that probable cause did not exist (at least at this stage) for Counts 1 and 2. But reaching those straightforward conclusions came only after nearly three hours of direct and cross-examination covering all eight counts.

In hindsight, it seems plausible that Defense was testing the overall strength of the Nation's case and probing for gaps—a "mini trial" of the sort the Nation warned about. Had Defense instead concentrated on establishing the absence of probable cause where it was genuinely in question, the hearing could have been concluded in under an hour—the typical length of probable cause hearings in our Court—with the same results.

The Court therefore cautions all parties to conduct these hearings with sharper focus: to come prepared, to know in advance what issues truly warrant challenge, and to resist turning this important and unique feature of Tohono O'odham procedure into something it was never meant to be.

The Nation called the following witnesses:

- Officer Ryan Bothof, Tohono O'odham Police Department, Badge No. 407
- Renee Ortiz

The Court admitted the following into evidence:

- Nation's Exhibit 1 (overruling Defendant's objection based on excessive hearsay): Law Enforcement Statement of Probable Cause.
- Defendant's Exhibit 3: Vehicle Removal Report.

Findings and Orders:

The Court followed the standard that "[p]robable cause is a common sense determination under the totality of the circumstances that would lead a reasonable person to believe that a crime has been committed and that the defendant committed it." Nation v. Alvarez, 2021 TOR Supp. 253, 255 (Tr. Ct. 2018).

Based on the testimony and evidence, the Court found no probable cause supporting the charges of theft (of Renee Ortiz's car) or joyriding (Counts 1 and 2) and therefore dismissed those counts with prejudice. The totality of the circumstances showed that Ms. Ortiz and Mr. Velasco were together at the times of those alleged crimes, as they had been for 30 years, with seven children together; that she had expressly given him permission to use her car a number of times previously; and that, while it may have been due to her fear, she had never told him that he could not use it, nor reported it stolen. Ms. Ortiz did not tell T.O.P.D. Officer Bothof otherwise (only, perhaps, that she had never told him that he could always keep it).

The Court found probable cause for Count 7 (interfering with a police officer). Mr. Velasco did not stop when Officer Bothof activated his sirens—after confirming that the car Mr. Velasco was driving had an expired registration—or when Officer Bothof told him to pull over on his loudspeaker (Mr. Velasco's window was down). Mr. Velasco initially pulled away when Officer Bothof tried to handcuff him. Mr. Velasco's slow fleeing, compliance after initial resistance, and his reasons for doing so do not remove a reasonable person's belief that a crime had been committed and that the Defendant committed it.

The Court found conclusively—and Defense acknowledged—that there was probable cause as to Counts 3 through 6 and 8. The Court therefore struggles to understand why Defense devoted so much time and energy to examining witnesses on facts directly related to these counts. The Court afforded Defense counsel wide latitude, over the Prosecution's repeated objections, on the expectation that all this effort would culminate in a coherent argument that no probable cause existed for these counts. That argument never came, as it did for Counts 1 and 2.

A probable cause hearing is not meant to serve as a fishing expedition or a test run to see if something unexpected might appear. It is a focused proceeding, designed to challenge probable cause where there is a legitimate basis to believe it is lacking. Such

questioning may have its place in counsel's broader trial preparation or investigative strategy, but it does not belong in this forum.

The Court will not dwell further on this instance, but counsel is admonished that future probable cause hearings must be conducted with greater precision. The Court will be attentive to ensure that its time—and the time of all participants—is directed toward genuine disputes, not exploratory detours.

FILED IN THE
TOHONO O'ODHAM COURT
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JUDICIAL COURT CLERK II

THE JUDICIAL COURT OF THE TOHONO O'ODHAM NATION
IN THE STATE OF ARIZONA
ADULT CIVIL DIVISION

In the Matter of the Estate of: John F. Miles Gil, (DOB: 11/10/2006) (DOD: 11/11/2024) Decedent.	Case No: AV2025-0092 ORDER

The Initial Hearing took place on November 12, 2025. The Petitioner, Maryia Miles, appeared, along with Lorraine Ventura, her Advocate. A proof of service was filed. Service was completed by community posting, with the effective date of August 28, 2025. No response has been filed. The Court swore in Maryia Miles, who testified.

The Court finds and orders as follows:

1. The Court has personal and subject-matter jurisdiction.
2. The Decedent, John F. Miles, was not married when he passed away. He had no will, and he was survived by his parents, Maryia Miles and Arthur Gil.
3. The Decedent passed away without any debt. His estate consists of his Per Capita Payment.
4. Maryia Miles provided all support for John F. Miles. Arthur Gil was ordered to pay child support to Maryia Miles, and did not pay any support.
5. The Tohono O'odham Nation has no probate code to guide the Court when a decedent passes away but was not supported during their lifetime. The

Petitioner did not seek to establish an O'odham custom or tradition that applies in this case. Instead, the Petitioner and her counsel asked that the Court apply Arizona's intestacy laws, including Arizona Revised Statutes Section 14-2114, which provides that inheritance from a deceased child is precluded unless that natural parent openly treated the child as a natural child, and has not refused to support the child. The Court finds that it is appropriate to look to Arizona law in this case for guidance, and finds that the failure to support John F. Miles by Arthur Gil precludes him from inheriting any part of John F. Miles. The Court orders that Maryia Miles is awarded the Per Capita payment that John F. Miles is entitled to.

6. The Court finds that the Petitioner, Maryia Miles, has standing to serve as the Personal Representative, and she consents to the jurisdiction of the Court. The Court therefore appoints Maryia Miles to serve as the Personal Representative of John F. Miles, to serve without having to post a bond and without restrictions.
7. Unless something is filed, this case will be administratively closed on March 4, 2026, and counsel will be withdrawn, and Ms. Miles will be discharged as the Personal Representative.
8. This is a final, appealable order.

Dated November 14, 2025.

Judge Rene Alcoverde Jr.

