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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