TOHONO O'ODHAM REPORTS

VOLUME 2, Edition 3: 1995 to 2004

Third Publication, January 1, 2014

PREFACE TO THIRD EDITION

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

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

January 1, 2014

Violet Lui-Frank
Chief Judge

PREFACE TO SECOND EDITION

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

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

January 1, 2013

Teresa Donahue
Chief Judge

PREFACE

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

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

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

November 1, 2011

Teresa Donahue
Chief Judge

TOHONO O'ODHAM REPORTS

VOLUME 2, Edition 3: 1995 to 2004

Third Publication, January 1, 2014

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APPELLATE DECISIONS

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided August 27, 1996.

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

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

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

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

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

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

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

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

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

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

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

Judgment entered on April 28, 1993 is vacated.

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided July 7, 1997.

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

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

OPINION OF THE APPEALS COURT

AUTHOR: Johnson, Rose Chief Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

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

Before Judge Violet Lui-Frank.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 6, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 7, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 8, 2003.

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

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

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

Decided Aug. 11, 2003

Faithe C. Seota for Appellant

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

Judge Betsy Norris

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

TOHONO O'ODHAM COURT OF APPEALS

In Re the Custody and Support of Raenna HARVEY.

Case No. CTA-0067
(Ref. Case No: 89-CS-4704)

Decided Aug. 11, 2003

Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

John B. NARCHO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0069
(Ref. Case No. CR11-2595/2597-97)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

Brandon HAVIER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0070
(Ref. Case No. CR07-3809/3810-97)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

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

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
Glen ESCALANTE, Appellee.[1]

Case No. CTA-0071
(Ref. Case No. CR03-640-642-98)

Decided Aug. 11, 2003.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Vernon MENDEZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0076
(Ref. Case No. CR-08-3632-3634-99)

Decided Oct. 6, 2003.

Before Judge Betsy Norris.

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

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

TOHONO O'ODHAM COURT OF APPEALS

Conrad GILMORE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0045
(Ref. Case No. CR04-660/661-93)

Decided Aug. 18, 2004.

Before Judge Teresa Donahue.

WHEREAS, the defendant filed a Notice to Appeal on October 21, 1994, and the above-entitled proceeding was referred to the Chief Judge for assignment on appeal in the year 1999; and

WHEREAS, the criminal appeal does not survive the death of the appellant because the appellant is now deceased;

IT IS HEREBY ORDERED that this appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Laticia AYALA, Appellant,
v.
Vincent AYALA, Appellee.

Case No. CTA-0035
(Ref. Case No. 4002-85)

Decided Aug. 23, 2004.

Before Judge Rose Johnson Antone.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0021
(Ref. Case No. 89-M-4592)

Decided Oct. 5, 2004.

Before Judge Violet Lui-Frank.

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

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0058
(Ref. Case No. CR05-937-942-97; CR05-935/936-97;
CR05-723-93; CR04-609-97; CR05-805-93;
CR05-933/934-97)

Decided Oct. 5, 2004.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

Samuel JONES aka Melvin JONES, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0060
(Ref. Case No. CR06-1225/1226-97)

Decided Oct. 6, 2004.

Tohono O'odham Advocate Program by Fred Brahms for Appellant.
Tohono O'odham Prosecutor's Office by Dmitri Downing for Appellee.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ronald PABLO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0037
(Ref. Case No. TR03-220-93; CR07-1054/1059-93)

Decided Oct. 19, 2004.

Tohono O'odham Advocate Program for Appellant

Before Judge Rose Johnson Antone.

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

TOHONO O'ODHAM COURT OF APPEALS

Leonardine J. ROMERO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0062
(Ref. Case No. CR07-1671-1673-97)

Decided Oct. 20, 2004.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Gregory TASHQUINTH, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0061
(Ref. Case No. CR07-3721-3724-96; CR08-3725-3728-96;
CR01-340-370-97; CR02-371-374-97; CR12-3660-96;
CR12-3744-96)

Decided Oct. 29, 2004.

Before Judges Violet Lui-Frank, Roy Mendoza, and Linda Carlos.

The Tohono O'odham Court of Appeals, sitting en banc, reviewed the Trial Court record and remands this case to the Trial Court to complete the sentencing order. For the reasons stated herein, we find that this case does not come within the jurisdiction of the Court of Appeals because the amount of restitution was not finalized. In other words the judgment is not final and ripe for appeal.

The Proceedings in the Trial Court

The trial began on August 7, 1997 with 43 charges. On August 14, 1997 the jury returned verdicts of guilty on 42 charges, and not guilty on CR07-3723-96, Criminal Fraud. The defendant was sentenced on September 8, 1997. The court imposed the recommended sentence, with certain changes noted in the Order of Commitment: 4,320 days, no probation, eligibility for parole after three-fourths of the sentence was served, and restitution, without specifying an amount. After several attempts a restitution hearing was held on January 5, 1998 at which time the court took the matter of the amount of restitution under advisement, but an Order was not issued, or is not in the file.

The appellant filed the Notice of Appeal on January 22, 1998, appealing "the judgment of guilt imposed in this jury trial of August 7, 1997." On that same date the appellant also designated the record on appeal as "the following hearings and matters as the record on appeal: jury trial, August 7, 1997, together with all motions and trial record entries filed therewith."

Discussion

The Tohono O'odham Court Rules of Appellate Procedure, Rule 3(c)(2) provides, in pertinent part, that:

> The appellate court may review any: …Criminal matter after a judgment of guilt and sentencing, …

We find that the trial court did not complete its final order regarding restitution, and, therefore, the case was not ready for appeal.

IT IS ORDERED THAT the case is remanded to the trial court for conclusion of the sentencing order. The appellant will still have the right to file an appeal within thirty days of the entry of judgment by the trial court.

TRIAL COURT DECISIONS

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

TOHONO O'ODHAM NATION, Petitioner,
v.
L. H., Respondent Child.

Case No. 94-UPM-786
(appeal dism'd *Tohono O'odham Nation v. L. H.*, 2 TOR3d 9 (Aug. 11, 2003))

Decided February 16, 1995.

Before Judge Malcolm Escalante.

The Court, having heard oral arguments on the issue of the testing of marijuana for identification purposes, RULES THAT:

1. The results of the Duquenois-Levine Test, the test currently in use by the police officers of the Tohono O'odham Nation, are admissible in court with the testimony of the officer who conducted the test that he is qualified by training to perform such test.
2. Once evidence of a positive test result is presented to the Court, the burden of proof shifts to the Defendant to produce evidence that the substance is not in fact marijuana.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Melvin JOSE, Defendant.

Case No. TR04-413/414-95; CR04-671/672-95

Decided August 14, 1995.

Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Plaintiff.
Tohono O'odham Advocate Program by Chris Shank, Counsel for Defendant.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary for a hearing on Defendant's MOTION TO DISMISS FOR WANT OF PROBABLE CAUSE. Parties present: George Traviolia, Nation's Chief Prosecutor; Chris Shank, Defense Counsel, Advocate Program; Officer E. Loza, Nation's witness. Defendant, Melvin Jose is not present, was not served. Defense Counsel waives Defendant's presence.

Testimony given by Officer Loza was that he observed Defendant's vehicle approaching with the headlights indicating that Defendant was weaving in his traffic lane on Highway 86, a public highway. Officer Loza then followed the vehicle, initiated a traffic stop, and subsequently charged Defendant with DUI and other charges. Although the vehicle was weaving in its lane, given the time of night, the Officer had an obligation to make contact with the driver to see if there was any impairment to the driver which could affect public safety. Thus, the Court finds that the Officer had probable cause to initiate a traffic stop on the Defendant.

THEREFORE, the Court denies Defendant's Motion to Dismiss for Want of Probable Cause.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
John PABLO and Anthony YAZZIE, Defendants.

Case No. (1) TR08-492-494-94; CR08-1525-1527-94
(2) TR01-005/006-95; CR01-053-057-95

Decided November 29, 1995.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary on Defendants' Motion for Clarification of the Court's Order dated October 10, 1995.

The cases at bar are cases of first impression. This Court has heretofore allowed, with no objection from either side, the admission of the Duquenois-Levine (NIK) test results as conclusive evidence of the presence of certain substances resulting in the conviction of defendants.

In its Order dated June 01, 1995, this Court allowed the Defendant to provide proof to the Court that the NIK test has not gained general acceptance in the scientific community as reliably sufficient to positively identify certain drug substances.

Subsequent to a hearing the Court did find the NIK test was unreliable when used alone to identify certain drug substances.

The Court declined to hold that the NIK test results are not admissible as evidence in Court, as was requested by the Defendant.

The Court instead determined that the results of the NIK test may be admitted as evidence as being administered by the Officer, but that said test could not be presented to the trier of fact to be conclusive in identifying the drugs as alleged.

By its order, the Court placed the burden on the Prosecution to show whether the NIK test combined with any other circumstantial evidence obtained by the Officer would be sufficient to prove the identity of the substance beyond a reasonable doubt.

The Officer, of course, will not be allowed to testify as to the conclusiveness of the testing technique or that the test results prove the substance to be the drugs as alleged.

The Prosecution must now move forward to show what evidence, if any, it has to present in addition to the NIK test. If the Nation does not feel they can meet their burden, it is the Nation's choice to act in accordance with that belief.

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

Dorothy ENOS, Plaintiff,
v.
TOHONO O'ODHAM HOUSING AUTHORITY, Defendant.

Case No. 97-TRO-6004
(appeal dism'd *Tohono O'odham Housing Authority v. Enos*, 3 TOR3d 19 (Sep. 4, 2008))

Decided January 10, 1996.

Before Judge Lucilda J. Norris.

I. Facts

A. In Chronological Order

1. Dorothy and Justin were married at the time they applied for the lot and homesite property on which the HUD home was eventually built.
2. Dorothy and Justine were married at the time they applied for the HUD home and in March of 1981 when they signed the Mutual Help and Occupancy Agreement (hereinafter "MHOA").
3. During the time that Dorothy and Justin occupied the home, there were numerous delinquencies in payment of the amounts due and owing the HUD under the agreement.

4. Tohono O'odham Housing Authority (hereinafter "TOHA") has at least one meeting with Dorothy to discuss the fact that the Enos' were behind in their payments.
5. During one meeting Dorothy Enos met with Wayne Chico, Director of TOHA, who testified that at the meeting he informed Dorothy that if she relinquished the home, this action would break the MHOA and Dorothy would relinquish all rights to the property. This discussion did not take place in the Tohono O'odham language.
6. TOHA sent several relinquishment forms to Dorothy.
7. On March 31, 1989, Dorothy finally signed one of the relinquishment forms at home and took to TOHA. The relinquishment form stated that Dorothy "forfeited all the interest, rights, duties, and obligations in the Mutual Help Home…"
8. Soon thereafter Dorothy moved into one of the adobe structures that already existed on the homesite property prior to building of the HUD home. Dorothy testified that she believed that by her relinquishment she forfeited only the HUD house and not the adobe structures and land on which these structures were located.
9. Other people were and are currently living in another adobe structure which was existing on the homesite property. The Enos' rent this structure for residence by others.
10. In March of 1994, Bertram Norris executed a MHOA with TOHA and moved into the HUD home Dorothy formerly occupied.
11. On November 10, 1995, Dorothy was notified by a hand delivered notice that TOHA intended to demolish the two adobe structures on November 15, 1995.

The issue before the court is whether and what Dorothy relinquished by signing the relinquishment form and whether Dorothy relinquished by signing the relinquishment form and whether Dorothy can remain in the adobe structure.

II. DISCUSSION

A. Description of Agreement

On March 6, 1981, Dorothy and Justin Enos executed the MHOA. The agreement is a 40 page document containing 12 articles and one attachment. Apparently, it was developed and drafted by the United States Department of Housing and Urban Development. It is complex and written in language usually used in legal contracts and documents, making it difficult for any person other than an attorney to fully understand the material.

B. A Strict Reading of the MHOA Support TOHA.

Article I, Part 1.2, includes a definition of the "home" which is:

> "The dwelling unit covered by this MHO agreement includes the homesite, as identified in Exhibit A of this Agreement or any other dwelling unit and homesite in the Project (as indicated by the context).

Further, Article II, part 2.1 states:

> (a) Certain land as identified in Exhibit A of this agreement has been leased or conveyed to the will be, as a contribution for the home, this land is valued at $1,500.00, which amount shall be pooled with the values attributed to other contributed homesite in the Project."

If Dorothy could read and understand the above two portions of the agreement, she would have been aware that a relinquishment of the "home"meant she relinquished all rights to the entire homesite, including the 2 adobe structures.

C. <u>Dorothy's Level of Sophistication and Language Skills Prevented her from Understanding the Terms of the Contract.</u>

It is true that Dorothy signed the Contract; however, it is apparent the she knows little of the terms contained within it. Dorothy is an elderly Tohono O'odham. It is also clear that English is not Dorothy's first language and that Dorothy speaks most fluently in her native language. There was no testimony regarding the content of any actual discussions between the staff at TOHA during which Dorothy could have been educated and informed regarding the MHOA at the time of execution. The complicated process of turning the homesite over to TOHA for later reconveyance back to Dorothy after successful completion of the terms of the Agreement and the unusual definition of "home" would not be clear to many others, much less to Dorothy.

D. <u>TOHA has a higher Duty and Responsibility to Correctly and Timely Inform Dorothy of her Rights and Responsibilities in a way Dorothy can Understand.</u>

Due to the following:

1. The Agreement is written in English.
2. Dorothy speaks English, but has limited understanding of it.
3. All notices to Dorothy are written in English
4. The MHOA is complicated and full of legal terms.

5. Dorothy is not familiar with this type of complicated contract. Without assistance she could not know how the terms in the contract apply to all future actions relating to the Mutual Help Home.

Dorothy must rely on TOHA to inform her of her rights and responsibilities under the Agreement. Therefore, it is the duty of TOHA to fully inform Dorothy in her own language of the nature and content of the agreement.

Fully informing Dorothy is especially important prior to acceptance of Dorothy's relinquishment because, without a full explanation to Dorothy, Dorothy's relinquishment is less than voluntary. The duty of full and proper notice by TOHA to Dorothy was not met.

The fact that TOHA allowed Dorothy to live in the adobe structure for five and one-half years, failing to enforce Dorothy's relinquishment for this period, compounded the problem by reinforcing Dorothy's interpretation of the relinquishment.

E. The Actions and Non Actions of TOHA have Created a Situation Where There are Several Victims.

We now have a situation where presumably the new tenant has signed a MHOA to purchase the home and obtain a homesite lease on the parcel, including the land on which the 2 adobe structures have been built. This new homebuyer has had an assignment granted by the Sells District and has complied with all of the terms and conditions of his agreement but he and his two sons have never been provided with what was promised…the home and land parcel.

Dorothy believing she has a right to return to her former home, is now threatened with loss and demolition of her home.

Further, Dorothy is living in one adobe structure, and another family is living in another adobe structure and Mr. Norris is living in the HUD home-all located on the parcel that, according to Sells District Policy, is only appropriate for one family.

HUD not only allowed Dorothy to stay after her relinquishment, but complicated the situation even further by leasing the home and land to Mr. Norris and left Mr. Norris and Dorothy there to "fight it out" themselves. It is no wonder there is trouble between Dorothy and Mr. Norris. It is no wonder Mr. Norris doesn't want to negotiate for division of what he thought was his parcel.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Prior to execution of all future MHO Agreements, Tohono O'odham Housing Authority staff meet with the new home buyer to explain and review each and every

paragraph in the homebuyer's native language…even if this takes several meetings between Tohono O'odham Housing Authority staff and the home buyer.

2. Prior to acceptance by Tohono O'odham Housing Authority of any relinquishment, a thorough explanation of the consequences of the relinquishment should be made. These explanations should be made in the person's Native language. Tohono O'odham Housing Authority should note in the file the name of the staff member who provided the explanation, the date, what paragraphs of the Agreement or other document were discussed, and whether the homebuyer appeared to understand.
3. Tohono O'odham Housing Authority shall provide to the Court at the end of Thirty (30) days **a proposal as to how they will accommodate the victim Ms. Dorothy Enos at no cost provided by Tohono O'odham Housing Authority.**
    A. Proposal plan to be submitted to the Court by **FEBRUARY 28, 1996 @ 11:00 A. M.** for further order.

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

TOHONO O'ODHAM NATION, Petitioner,
v.
L. T., Respondent Child.

Case No. 97-DC-034; 97-TH-035
(appeal dism'd *Tohono O'odham Nation v. L. T.*, 2 TOR3d 6 (Aug. 6, 2003))

Decided February 14, 1997.

Before Judge Rosalie M. Lopez.

The above-named minor child, the age of 15 years having been advised of her constitutional rights and present with her parent at the Juvenile Arraignment on the offenses of DISORDERLY CONDUCT – 3.6A5; THEATENING – 7.3A1 as to the Petition/Citation filed 01-29-97:

THE COURT FINDS: Dismissing due to it has passed the 10 days from date of filing, with prejudice, in accordance with Tohono O'odham Children's Code, Chapter I, Section 09(B)(2).

IT IS FURTHER ORDERED: Dismissing 97-DC-034 & 97-TH-035 (with prejudice).

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Carmen DELORES, Defendant.

Case No. CR-07-2569-96; CR09-2783-96

Decided September 15, 1997.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Robert Bushkin for Plaintiff.
Faithe Seota, Counsel for Defendant.

Before Judge Rose Johnson.

The above captioned matter comes before the Judiciary on Defendant's Motions to Dismiss and for Appointment of Defense Counsel. The Nation has filed a written response. The Court has ruled to deny Defendant's motion for appointment of counsel pursuant to the Indian Civil Rights Act (hereinafter ICRA), 25 U.S.C., Chapter 15, Section 1302, and set the matter for oral arguments regarding the motion to dismiss.

Parties present: Tohono O'odham Nation's Assistant Prosecutor (hereinafter Nation), Robert Bushkin; Defendant, Carmen Delores; with Defense Counsel, appearing pro bono, Faithe Seota.

FACTS

On July 28, 1996 and September 14, 1996, the Defendant's minor son was arrested while being away from home between the hours of 9:00 P.M. and 6:00 A.M. Subsequently, Defendant was charged with violations of the Juvenile Curfew Ordinance.

Defendant was issued citations on the Arizona Traffic Ticket and Complaint form alleging Curfew Violation; however the citations do not indicate the juvenile in question or which penalty would be applicable if the Defendant were found in violation as alleged. The Ordinance provides a different penalty for each violation.

Trial date was set for November 19, 1996 for case number CR07-2569-96 and December 3, 1996 for case number CR09-2783-96.

At the December 3, 1996 trial Defendant filed the motion now at bar. Although the matter was not filed in accordance with Rule 16, Arizona Rules of Criminal Procedure, the Court set the matter for oral arguments due to the constitutionality question being raised by the Defendant. The Nation filed a response and moved the Court for leave to file an amendment to their original

response. The Court has granted the Nation's motion; however, an amended response has not been filed with the Court as of the date of signing of this Order.

ISSUES BEFORE THE COURT

Defendant's motion moves the Court to declare the Juvenile Curfew Ordinance 96-001 (hereinafter Ordinance) as unconstitutional pursuant to the Nation's Constitution and the ICRA.

Defendant argues the Ordinance denies the right to equal protection guaranteed to the Defendant and all similarly situated single mothers on the reservation by the Nation's Constitution and ICRA. Defendant additionally complains the Ordinance authorizes prosecution of a juvenile's mother while simultaneously authorizing non-prosecution of that juvenile's father.

Defendant further argues the Ordinance violates a juvenile's freedom of speech, and assembly, and that the Ordinance lists no exceptions to these freedoms.

Finally, Defendant argues that certain terms with the Ordinance are "impermissably vague." Specifically, "usual place of abode of the juvenile" and "most direct route."

The Nation contends Defendant's reading of the Ordinance is too limited and the Ordinance does provide parameters around the freedom of religion, speech, and assembly while the juvenile is accompanied by parent/guardian or other adult person. The Nation also contends the Nation has a right to regulate a juvenile's behavior by requiring the supervision of his/her custodial parent, legal guardian, or other adult between the hours of 9:00 P.M. and 6:00 A.M.

The Nation does not share in the vagueness assertion made by Defendant and argues that the meaning of these terms could be established at trial based upon testimony presented by the parties and other witnesses. The Nation opposes the Defendant's motion in all respects.

COURT'S FINDINGS AND ORDER

On October 14, 1955, the Tohono O'odham Legislative Council (hereinafter Legislature), formerly known as the Papago Council, passed Resolution No. 848 making it unlawful for any child under 18 years of age to be absent from home, or the ground immediately surrounding his home, (between the hours of nine o'clock at night and five o'clock in the morning) unless in the company of a parent or guardian or other responsible adult.

On March 28, 1996, the Legislature enacted Ordinance 96-001, Juvenile Curfew Ordinance. This Ordinance provides that a person commits the offense of curfew violation if while he or she is the custodial parent, legal guardian or other adult person having the care, custody, or supervision of a juvenile under the age of eighteen (18) years, the juvenile is on or remains on or loiters in, about or upon any place private or public within the Tohono O'odham Nation away

from the dwelling house or usual place of abode of the juvenile, between the hours of 9:00 o'clock P.M. and 6:00 o'clock A.M. the following day.

The Court finds Ordinance 96-001 prescribes a process to be followed by the police officers who find a juvenile in violation of the curfew. Black's Law Dictionary, revised 6th edition, explains the differences between a resolution and an ordinance as follows:

Resolution. A formal expression of the opinion or will of an official body or a public assembly, adopted by vote; as a legislative resolution.

The term is usually employed to denote the adoption of a motion, the subject-matter of which would not properly constitute a statute; such as a mere expression of opinion; an alteration of the rules.

Ordinance. An ordinance is a rule established by authority; a permanent rule of action; a law or statute.

The chief distinction between a "resolution" and a "law" is that the former is used whenever the legislative body passing it wishes merely to express an opinion to some given matter or thing and is only to have a temporary effect on such particular thing, while a "law" is intended to permanently direct and control matters applying to persons or things in general. An ordinance is a law.

Clearly, in this matter Ordinance 96-001 supersedes Resolution No. 848 and this Court shall so hold that it does. Where two statutory provisions conflict, the more recent one controls. Pima County v. Heinfeld, 134 Ariz. 133, 654 P.2d 281.

An ordinance is unconstitutionally vague if it contains language so imprecise that it fails to give persons of ordinary intelligence fair notice of what it forbids and fails to provide explicit standards for those who enforce the ordinance. State v. Tocco, 156 Ariz. 166, 118, 750 P.2d 784, 876 (1988); State v. Cook, 13 Ariz. 406, 678 P.2d 987 (1984).

In construing an ordinance, words are given their usual and commonly understood meaning unless the legislative body intended otherwise. Carrow Co. v. Lusby, 167 Ariz. 18, 20, 804 P.2d 747, 749 (1990). Even if the ordinance's language was unclear, courts strive to give it a sensible construction and, if possible, uphold the ordinance. State v. Wagstaff, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990).

"Away from the dwelling house or usual place of abode" reasonably presumes the home with whom the minor usually resides. If the dwelling house or usual place of abode of the minor is that where the mother resides, then she is the person legally responsible for the minor who is the

subject of the curfew violation. Likewise, if the dwelling house or usual place of abode of the minor is that where the father resides, then he is the person legally responsible for the minor who is the subject of the curfew violation. The fact that this may affect single mothers more so than fathers is not proved merely by Defendant's naked allegations. But even assuming arguendo that it does, the Ordinance does not recite that it only affects single mothers and the wording of the Ordinance in Section A does not imply that the intent is to affect single mothers adversely. In fact, the Ordinance is written in gender-neutral form and clearly, by its language, does not target single mothers.

In the enactment of the Ordinance the Nation has not removed parental responsibility. The Ordinance defines that a parent, legal guardian or other responsible adult person of a minor must be aware of the minor's activities between the hours of 9:00 P.M. and 6:00 A.M. or face the following consequences:

> I. A custodial parent, legal guardian, or other adult person having the care, custody or supervision of the juvenile found guilty of a curfew violation shall be sentenced to the following:
>
> 1. For a first time offense, a $50.00 fine and counseling for the custodial parent, legal guardian, or other adult person having care, custody or supervision of the juvenile and the juvenile involved as directed by the Court in its discretion.
>
> 2. For a second offense, a $200.00 fine and counseling for the custodial parent, legal guardian, or other adult person having care, custody or supervision of the juvenile and the juvenile involved as directed by the Court in its discretion;
>
> 3. For a third offense, a $500.00 fine or imprisonment in jail for a period not to exceed ninety (90) days or both;
>
> 4. For a fourth or subsequent offense, a $500 fine or imprisonment in jail for a period not to exceed one hundred eighty (180) days or both;
>
> 5. The above fines are mandatory and may not be suspended nor converted to community service; and
>
> 6. The custodial parent, legal guardian, or other adult person having the care, custody, or supervision of the juvenile shall be ordered to make restitution for any and all damage done to public or private property by the juvenile during the time he or she was in violation of this ordinance.

Section B. of the Ordinance provides allowance for defenses:

> B. The provisions of this ordinance shall not apply under the following circumstances:
>
> 1. When the juvenile is accompanied by his or her custodial parent, legal guardian or other adult person having the care, custody, or supervision of the juvenile; or
>
> 2. Where the juvenile is on an emergency errand where the health or safety of an individual is endangered; or
>
> 3. Where the juvenile is in transit from a public or private school event or function which began prior to 9:00 o'clock P.M. of the same day and he or she is using the most direct route from the event or function to his or her dwelling house or usual place of abode; or
>
> 4. Where the juvenile is lawfully employed and is enroute to or from the employment or is engaged in lawful activities related to the employment.

According to the legislative action, the purpose of the Ordinance is to curb escalation of juvenile illegal activity that is occurring primarily in the Sells village. "The traditional right of the State" to impose time, place and manner restrictions on minors' rights, while citing juvenile crime statistics in support of the curfew has been upheld. Chambers, 4 Ill.Dec. at 310-12, 360 N.E.2d at 57-59.

The Arizona Traffic Ticket and Complaint form on which Defendant was charged with the offense does not indicate whether this is the Defendant's initial offense or a subsequent offense; therefore, Defendant has not been given notice as to which penalty would be applied.

THEREFORE, IT IS ORDERED BY THE COURT:

1. The Juvenile Curfew Ordinance does not imply any adversity toward single mothers nor does it exclude fathers from being prosecuted for violation of the Ordinance; thusly, the Ordinance is not in violation of the Tohono O'odham Nation's Constitution or the Indian Civil Rights Act.

2. Defendant's motion to dismiss is GRANTED on the basis that Defendant has not been given sufficient notice for the applicable penalty which the Defendant may be subject to.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
John B. NARCHO, Defendant.

Case No. CR11-2595/2597-97
(appeal dism'd, *Narcho v. Tohono O'odham Nation*, 2 TOR3d 11 (Aug. 11, 2003))

Decided April 16, 1998.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Patricia Pogo Overmeyer, Attorney for Defendant.

Before Judge Lucilda J. Norris.

PROCEDURE

This matter having come to be heard on March 6, 1998 in the Adult Criminal Court Division on a Motion To Dismiss filed by Patricia Pogo Overmeyer, Attorney for Defendant, John B. Narcho, with a Response filed by Michael Ehlerman, Assistant Prosecutor for the Tohono O'odham Nation. Further, the Court is in receipt from the parties a Stipulation Of Facts For Limited Purpose Of Motion To Dismiss Hearing. The parties summoned and present were: Michael Ehlerman, Assistant Prosecutor for the Tohono O'odham Nation, Patricia Overmeyer, Counsel for the Defendant, John B. Narcho and the Defendant. The Nation's witnesses properly noticed were: Austin Nunez, San Xavier District Chairman, Dave Pablo, San Xavier District Office, Marsha Davis San Xavier District Office. The Nation moved the Court that the testimony of Marsha Davis would not be needed and requested that she be excused. The Court granted request and allowed Ms. Davis to leave the courtroom. The parties addressed the stipulated motion and stated its purpose to the Court to provide the Court with a factual background for oral arguments on the Defendant's Motion To Dismiss. Further the parties stipulated to the admission into evidence of a letter dated November 7, 1997 from San Xavier District Chairman, Austin Nunez to the Defendant.

SUMMARY OF FACTS

On November 7, 1997, Defendant, John B. Narcho went to the San Xavier District of the Tohono O'odham Nation to collect signatures for a petition to recall the Nation's Chairman, Edward Manuel.

The Defendant had previously informed San Xavier District Chairman Austin Nunez that he would be gathering signatures by the mission church and plaza area. Mr. Narcho was aware that District Chairman Nunez had determined that Mr. Narcho needed to "come before our people at our District/Community meeting to obtain approval" before collecting signatures in the San Xavier Plaza area.

On November 7, 1997 at approximately 12:40 p.m., the Defendant set up a truck with a large sign approximately 20-25 yards to the east of the plaza wall and approximately ten feet to the west of Little Nogales road. At that time, District Chairman Nunez approached the Defendant and repeated that under District customs the Defendant needed to obtain community approval before collecting signatures. The Defendant declined to leave the area and the Tohono O'odham Nation Police were called. The Defendant was ultimately arrested by Tohono O'odham Police Officer, Kevin Ruder for Criminal Trespass.

DISCUSSION

Defendant argues that this Court must follow the First Amendment Jurisprudence of the United States Supreme Court because the Indian Civil Rights Act guarantees freedom of speech to members of Indian Nations by tracking the precise language of the First Amendment to the U.S. Constitution and thereby imposes First Amendment jurisprudence on the Courts of the Nation. He also asserts that the Tohono O'odham Constitution by its Article III, Section 4 adopts the U.S. Supreme Court's First Amendment jurisprudence. Defendant's arguments are therefore based upon United States Supreme Court analysis of the United States Constitution.

Defendant argues that the area where the Defendant was attempting to gather signatures is a traditional public forum. He argues that such traditional public forums, the right of the government to limit expressive activity such as those attempted by Mr. Narcho is sharply circumscribed and that the government may not place unreasonable restrictions on the Defendant's ability to exercise his free speech rights. Defendant further argues that the requirement that Defendant obtain permission from the District/Community prior to soliciting signatures is unreasonable. Defendant cites U.S. Supreme Court case law in support of his position that the District's requirement that Defendant attend a District/Community meeting to obtain permission to solicit signatures is a prior restraint which is impermissible. Defendant asserts that it is constitutionally impermissible because it presents a danger that government officials may unduly suppress expression protected by the First Amendment and that the District

procedure lacks safeguards designed to prevent the dangers of political suppression of projected speech.

Although this may be an accurate analysis of the law in the United States, it is difficult to use the same analysis when addressing this case because the U.S. Constitution is not the same as the Tohono O'odham Constitution. It is felt by this Court that provisions of the Tohono O'odham Constitution are in conflict with the analysis of prior restraints presented by Defendant and that use of the prior restraint analysis would violate certain portions of the Tohono O'odham Constitution. Therefore, although U.S. Federal case law is helpful in analysis of this matter, it is inappropriate to wholly apply the U.S. Supreme Court interpretations of the First Amendment to the U.S. Constitution.

The Tohono O'odham Constitution itself directly guarantees the freedom of speech to its members. Section 2 of Article III entitled Rights of Members states in applicable part, **"All members of the Tohono O'odham Nation shall have the freedom of worship, speech, press and assembly".** Because the foregoing rights were specifically and directly provided for by the drafters of the Tohono O'odham Constitution, it is necessary that these rights be interpreted in harmony with other applicable sections of the Constitution so that the document is a consistent workable whole. One such applicable section is Section 3 of Article XVI/Land Policy which states:

> Inasmuch as the lands of the Tohono O'odham Nation are held in common, district boundaries shall not prevent any member of the Nation from going into any district to Live or beneficially use the lands in accordance with the Customary procedure of the district. (Emphasis added).

One can only surmise that the basic rights of the Tohono O'odham people to free speech and assembly as described in Article III, Section 2 of the Constitution and the rights of the Nation's members to use district lands in accordance with the customary procedures of the district (wherein the land is located) are separate and distinct rights belonging to the people of the Nation. These rights must be read in harmony and therefore necessarily in a manner unique and different from the those of the United States Constitution.

In the case, we may not determine that use of district customary procedures in managing land use are unconstitutional when the Preamble of the Tohono O'odham Constitution states that one purpose of the Constitution is to preserve, protect and build upon our unique and distinctive

culture and traditions; and Article XVI, Section 3 of the Tohono O'odham Constitution provides that use of the land are to occur in accordance with customary procedure. (emphasis added).

Although in other jurisdictions it may be necessary to have written guidelines for obtaining permits or other grants of right to use federal land, we are a unique people. Historically here on the Nation the customary procedures are not written in books or treaties, as the framers of the Tohono O'odham Constitution were certainly aware. In fact, the customary procedures vary from district to district and usually involve the whole community. The ability of the Districts/Communities to govern their own lands is deeply rooted both in the Constitution and in the fabric of Tohono O'odham society.

In accordance with the customary procedure of the San Xavier District the Defendant was informed he should approach the District/Community for approval of his intended activity. According to the testimony of District Chairman Nunez, these meetings are held to hear presentations from outside persons and organizations; to provide a forum for the Nation's Legislative Council members and San Xavier District Council members to report to the community; and to provide a forum by which members of the community may bring matters for discussion before the community. Approaching the District/Community, therefore, is not equivalent to approaching a governmental body or official. It is equivalent to approaching the residents of the community and is keeping with the cultural courtesy and respect that Tohono O'odham people show for their fellow members. We therefore cannot ignore the validity of these customary procedures until is shown that such procedures directly infringe on other rights provided for by the Tohono O'odham Constitution. In this particular instance, the Defendant was provided with the information about how to obtain community approval for his activities. The Defendant knew what he had to do, but declined to do it.

The Court therefore holds:

1) It is in keeping with the Constitution that district customary procedures be used to manage the beneficial use of district land.
2) The customary procedure of going to the District/Community to request permission to use certain lands is a prior restraint that is not unreasonable as it is rooted in the custom and tradition of the Tohono O'odham people and recognized by the Constitution.
3) Defendant's rights to free speech were sufficiently safeguarded in this matter, in the fact that District/Community membership, when applying its customary procedures,

is less likely than governmental bodies or public officials to impermissibly prevent the free speech of its fellow Tohono O'odham members.

4) It is up to each District to develop safeguards to ensure that the District/Community's application of customary procedures is not an effort to suppress expression merely because public officials oppose the speaker's view.
5) Defendant's Motion to Dismiss is hereby **DENIED.**

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

Wayne EVANS, Petitioner,
v.
TOHONO O'ODHAM NATION and Edward D. MANUEL, Respondent.

Case No. 96-C-6751
(appeal dism'd, *Evans v. Tohono O'odham Nation*, 3 TOR3d 20 (Sep. 4, 2008))

Decided July 17, 1998.

Before Judge Malcolm Escalante.

This matter came on to be heard on the 27th day of May, 1998 pursuant to Defendants' Motion to Dismiss. The Court having heard the arguments of counsel and having reviewed the Complaint, Defendants' Motion to Dismiss, Plaintiff's Opposition to Defendants' Motion to Dismiss, and Defendants' Reply to Opposition to Defendant's Motion to Dismiss and for good cause shown, the Court makes the following Findings of Fact and Conclusions of Law.

FINDING OF FACT

1. This Court has jurisdiction over the subject matter and parties pursuant to the Constitution of the Tohono O'odham Nation and Title III of the Law and Order Code, Civil Actions, Chapter 2, Section 1.
2. The Tohono O'odham Farming Authority, hereinafter TOFA, was established by the Tohono O'odham Legislative Council pursuant to a Plan of Operation for the purposes of utilizing, developing, and generating profits from the agricultural resources of the Tohono O'odham Nation for the benefit of the Nation.
3. From August 22, 1995 to early November 1996, Plaintiff served as the General Manager of TOFA.

4. The terms and conditions of Plaintiff's employment as well as the conditions for Plaintiff's termination are set forth in the Management Contract
5. Pursuant to the Management Contract, Plaintiff's employment was subject to termination for misfeasance, malfeasance, and non-feasance at any time without prior notice.
6. On September 9, 1996 in Resolution 96-387, the Tohono O'odham Legislative Council suspended TOFA's Plan of Operation for a period of 180 days and authorized the Defendant Edward Manuel, Chairman of the Tohono O'odham Nation, hereinafter Chairman Manuel, to secure and take control of the assets of TOFA and take any and all necessary steps to insure that the day to day farming operations continued without interruption.
7. On September 9, 1995 Chairman Manuel suspended Plaintiff without pay as the General Manager of TOFA.
8. On November 5, 1996, in Resolution 96-511, the Tohono O'odham Legislative Council directed Chairman Manuel to terminate Plaintiff as General Manager of TOFA.
9. On or about November 5, 1996, Chairman Manuel terminated Plaintiff as General Manager of TOFA.

CONCLUSIONS OF LAW

10. By its enactment of the Indian Civil Rights Act, hereinafter ICRA, Congress did not grant jurisdiction to Federal Courts over Indian nations or their officials with respect to claims of Indian Civil Rights Act violations nor did Congress waive the immunity of such Indian nations or officials from ICRA suits in federal Court.
11. By its enactment of the ICRA, Congress did not waive the immunity of Indian nations or official from ICRA suits in tribal court.
12. In accordance with well settled law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.
13. The people of the Tohono O'odham Nation did not waive the tribe's sovereign immunity by adopting the Tohono O'odham Constitution.
14. Congress has not abrogated the sovereign immunity of the Tohono O'odham Nation or its officials, nor has Defendant Tohono O'odham Nation waived said sovereign immunity. The Tohono O'odham Nation, therefore, is immune from suit.

15. In suspending and terminating Plaintiff as General Manager of TOFA, Chairman Manuel acted in his official capacity and pursuant to authority delegated to him by the Legislative Council.
16. Plaintiff fails to state a claim against Defendant Edward Manuel, the Chairman of the Tohono O'odham Nation for acting in excess of his authority.

IT IS THEREFORE ORDERED:

The Plaintiff's complaint against the Defendants Tohono O'odham Nation and Chairman Manuel is hereby dismissed with prejudice.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Glen ESCALANTE, Defendant.

Case No. CR03-640-342-98
(appeal dism'd, *Tohono O'odham Nation v. Escalante*, 2 TOR3d 12 (Aug. 11, 2003))

Decided July 31, 1998.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Tohono O'odham Advocate Program by Jim White and Laurie Bowman, Counsel for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary Court (hereinafter Court) for oral argument hearing on Defendant's MOTION FOR DISCOVERY SANCTIONS, filed by and through his Defense Counsel. The Tohono O'odham Nation by and through the Prosecutor's Office has filed a response.

Parties present: Tohono O'odham Nation Assistant Prosecutor (hereinafter Nation), Michael Ehlerman; Defense Co-Counsels, Jim White and Laurie Bowman; Defendant, Glen Escalante.

ISSUES

Defendant, by and through his Counsel, moves the Court to sanction the Nation for failure to provide the written statement/incident report authored by Officer J. Garcia, #242, whom the Nation will call as a witness in the case-in-chief. Disclosure of such statement is required within the time frame set out by Rule 15.1 (1), Ariz.R.Crim.P.

Defendant argues that on April 7, 1998, he received the Nation's Rule 15.1 (a) disclosure at his pretrial conference, disclosing Officer J. Garcia as a witness in its case-in-chief and failed to disclose Officer Garcia's incident report.

Defendant further argues the Nation should be sanctioned by precluding Officer J. Garcia as a witness, as provided for by Rule 15.7 (4), Ariz.R.Crim.P.

The Nation in their response argues that the Defendant's motion should be denied as (1) the Nation cannot be sanctioned for failing to disclose a witness statement that does not exist, (2) The Nation has no duty to generate written reports, witness statements or to otherwise assist the defendant in the presentation of his case, and (3) the doctrine of separation of powers prevents the Judicial Branch from mandating report writing policies for an Executive Branch Department.

FINDINGS AND ORDER

The court has adopted the Arizona Rules of Criminal Procedure, as applicable, to be the rules of court in adult criminal matters, pursuant to Administrative Order III and the Constitution of the Tohono O'odham Nation, Article VIII, Section 10 (d).

Rule 15.1(a) states in relevant part, no later than the pretrial conference or 20 days after arraignment, whichever is earlier, or at such time as the court may direct, the prosecutor shall make available to the defendant for examination and reproduction the following material and information except as provided by Rule 39(b) within the prosecutor's possession or control:

> (1) The names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements;

The court has not otherwise directed for discovery to be provided to the defendant.

The investigating officer, Officer J. Garcia, in accordance to his authority as a police officer of the Tohono O'odham Department, arrested and filed complaints against the defendant that defendant did on or about March 8, 1998 committed the following violations of the Tohono O'odham Criminal Code: Assault/Domestic Violence, CR03-640-98; Threatening/Domestic Violence, CR03-641-98; Disorderly Conduct/Domestic Violence, CR03-642-98.

Defendant was arraigned on March 23, 1998, entered not guilty pleas to all charges and requested a trial by the jury. A pretrial conference was ordered for April 7, 1998.

Defendant filed his MOTION FOR DISCOVERY SANCTIONS on May 7, 1998 requesting the court to preclude Officer J. Garcia from testifying for the reason that the Prosecution has not disclosed Officer Garcia's report as required under Rule 15.

Rule 15 specifically defines the process to be followed in obtaining discoverable material in a criminal action and also describes the Nation's obligation to make disclosures, in this case the Officer's report, within a particular timeframe.

The Nation raises the issue the court does not have authority to mandate report writing policies for an Executive Branch Department, Police Department. The court recognizes the separation of powers doctrine and does not view its role to mandate any policies for departments of the Executive Branch.

The police department, a law enforcement agency and in this case has initiated an investigation in the alleged criminal actions of the defendant, is an arm of the Nation. In this relationship the Nation has control of the agency and is required to produce the police officer's report within the timeframe of Rule 17.

The court promulgated the discovery rules to provide both the Nation and defendants with adequate means to discoverable materials to aid in the preparation of each side's case to avoid any delays or surprises at trial.

Defendant has not waived any of the applicable timeframes. (The Nation reported during oral arguments that the defendant did receive the police officer report on the day of the hearing.) Whether the Nation has now provided the police officer report is not relevant. The Court finds the Nation's has failed to provide the discoverable material within the timeframe of Rule 17.

NOW THEREFORE IT IS ORDERED BY THE COURT Defendant's MOTION FOR DISCOVERY SANCTIONS is **GRANTED**, Officer J. Garcia is precluded from testifying in this case matter.

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

UNITED LININGS, INC, a corporation, Plaintiff,
v.
VI-IKAM DOAG INDUSTRIES, INC., a tribally chartered corporation of the Tohono O'odham Nation

Case No. 98-C-7354

Decided December 20, 1998.

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

This case arises out of a contract dispute and collection of an alleged debt between plaintiff, United Linings, Inc. (United Linings), a non-Indian corporation licensed to do business in the state of Arizona, and defendant, Vi-Ikam Doag Industries (VDI), a tribally chartered corporation of the Tohono O'odham Nation (the Nation). United Linings claims that VDI owes it $28,571.72 for materials VDI purchased as part of a project for a containment basin in the San Lucy District of the Nation. United Linings also asks for any interest which has accrued on the debt, alleged as due and owing since May 1, 1996. Attorney's fees are also requested as part of the claim.

According to United Linings, this case is about whether VDI "honors the agreements it makes." [Plaintiff's Response to Motion to Dismiss, p. 2]. VDI, however, views the case differently. It asks this court to dismiss United Linings' claim, arguing that as a wholly-owned tribal corporation, it enjoys the benefit of what it asserts is the Nation's sovereign immunity from suit in the Nation's own courts. According to its theory of the case, since VDI has neither consented to this lawsuit, nor agreed to waive its immunity by express, written provision, United Linings' contract claim cannot be heard by this court. As VDI's counsel acknowledged to the court during oral argument on its motion, whether in fact VDI owes the claimed debt on the materials provided under contract by United Linings is of no consequence, for *no* court, it argues, may hear the claim under the theory of tribal sovereign immunity which VDI asserts in this case.

VDI's motion to dismiss came before this court for oral argument on October 21, 1998. The court, having considered the arguments and evidence presented before it, hereby denies VDI's motion to dismiss. Accepting for argument's sake that VDI indeed does possess sovereign immunity as a tribally chartered corporation of the Nation, the arguments and evidence, at least so far as presented to the court, are sufficient to establish a waiver of VDI's immunity with respect to the transactions at issue in this case.

I.

This action arises out of a contract dispute and collection of an alleged debt between plaintiff, United Linings, and defendant, VDI. United Linings alleges that it contracted with VDI to deliver a lining for a containment basin project in the San Lucy District of the Nation. By 1996, United Linings alleges that it had completed delivery of materials worth $132,359 for the project, and that thereafter, VDI made payments of $50,000 and $53,787.28, leaving an unpaid balance for the materials of $28,571.72.

United Linings further alleges that when VDI refused to pay for the balance of materials as it had agreed, it asked for their return. VDI has neither returned nor paid for these materials, at least according to United Linings.

On January 7, 1998, United Linings filed a complaint against VDI in the Superior Court for the State of Arizona, County of Pima. In addition, United Linings filed an Application for Provisional Remedies. In an ex parte proceeding at which VDI was not present, the Arizona Superior Court ordered the issuance of a writ of garnishment permitting United Linings to remove funds from VDI's bank account at Bank One, Arizona, based on United Linings' statements that VDI did not have sufficient funds to pay its creditors, was disposing of its assets, had refused to secure its debt to United Linings, and intended to defraud its creditors.

As permitted under Arizona law, VDI immediately requested an expedited hearing to protest the garnishment and to ask for the refund of its property in state court. A hearing was held on January 30, 1998, after which the Arizona Superior Court judge concluded that United Linings had not met its burden and VDI's funds were returned.

VDI then filed a Motion to Dismiss and Motion to Change Venue with the Arizona Superior Court on February 13, 1998. The Motion to Change Venue was later withdrawn by VDI. The Motion to Dismiss was based upon the asserted lack of an Arizona court's jurisdiction over matters that arise on the reservation, the sovereign immunity of VDI as a tribally chartered corporation, and failure to state a claim.

The Superior Court granted VDI's Motion to Dismiss for lack of subject matter jurisdiction, finding as following:

> . . . there are insufficient contacts with this state outside the boundaries of the Tohono O'odham Nation to permit the exercise of subject matter jurisdiction over the defendant, a tribally chartered corporation wholly owned by the Nation and created for the benefit of its members. *R.J. Williams Co. v. Ft. Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983). Tribal Courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir. 1982).
>
> The assertion of jurisdiction in this case would violate tribal Indian law and the policy of preempting State court jurisdiction over Indian Tribes and their subordinate economic organizations in the absence of waiver or consent. *Tohono O'odham Nation v. Schwartz*, 837 F. supp 1024 (D. Ariz. 1993).

Minute Entry, April 6, 1998. The Superior Court did not address the issues of sovereign immunity or failure to state a claim raised by VDI in its motion to dismiss.

Having failed to collect on its alleged debt in state court, United Linings filed this action in tribal court on May 7, 1998. VDI responded to this action by filing its motion to dismiss and a request for oral argument, which was held on October 21, 1988.

II.

That part of VDI's motion to dismiss upon United Linings failure to state a claim upon which relief may be granted is easily disposed of by this court. It is well-established that a motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *See Triad Assocs. V. Chicago Housing Authority*, 892 F.2d 583, 586 (7th Cir. 1989). A motion to dismiss can only be granted if it appears beyond doubt that the plaintiff could prove no set of facts entitling him or her to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Taking all well-pleaded facts in the plaintiffs' complaint as true for the purposes of ruling on defendant's motion to dismiss, *see Ed Miniat, Inc. v. Globe Life Insurance Group., Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987), this court finds that United Linings has met its burden on the sufficiency of its complaint. United Linings alleges that VDI purchased material and/or services, agreeing to pay the sum of $28,571.72, that demand was made upon VDI, and that said obligation remains due and owing. In its supplemental memorandum, requested by the court at the October 26 hearing, and timely filed and responded to by VDI's Controverting Statement of Facts and Supplemental Memorandum, United Linings attached as an exhibit a purported copy of its agreement with VDI, signed by VDI's then-General Manager, contemplating United Linings' supplying and installing wastewater lagoon linings at a site within the San Lucy District of the Nation. VDI does raise several issues with respect to the authority of its then-General Manager to sign such an agreement and whether the agreement contains a waiver of sovereign immunity. These issues do not have to be decided on at this time for purposes of VDI's motion to dismiss for failure to state a claim. The agreement as alleged, along with the statements asserted by United Linings in its complaint, provide this court with adequate evidence regarding the sufficiency of the underlying contract claim. That part of VDI's motion to dismiss for failure to state a claim is therefore denied.

III.

That part of VDI's complaint seeking dismissal on the grounds that it is immune from suit presents a more difficult burden for United Linings to meet. Generally, courts treat sovereign immunity defenses as grounds for dismissal and consider it when testing for the existence of subject matter jurisdiction. *See, e.g., Wetlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 673 (9th cir. 1993); *McCarthy v. U.S.*, 850 F.2d 558, 560 (9th circ. 1988), *cert. denied*, 489 U.S. 1052 (1989). On a motion to dismiss for lack of subject matter jurisdiction, generally plaintiff bears the burden of establishing subject matter jurisdiction because it is plaintiff who is seeking to invoke the court's jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994); *Sopcak v. Northern Mountain Helicopter Service*, 52 F.3d 817, 818 (9th Cir. 1995). The burden of demonstrating that VDI either does not enjoy the Nation's sovereign immunity from suit, or that VDI does enjoy sovereign immunity but it has been waived, thus rests with United Linings. See *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746 (Fed. Cir. 1988) (1975). An inability to make such a showing creates a fundamental jurisdictional defect which warrants dismissal. See 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3654, at 186-99 (1985); C. Wright, The Law of Federal Courts 115 (4th ed. 1983). See also *Hahn v. United States*, 757 F.2d 581, 586 (3d Cir. 1985).

It is well-established under principles of federal Indian law that Indian tribes enjoy sovereign immunity from suit in *federal* and *state* courts, unless Congress or the tribe consents to waive tribal immunity in such suit. This immunity was first recognized in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), where the Supreme Court held that "Indian Nations are exempt from suit without congressional authorization," 309 U.S. at 512. Commentators and some courts had expressed a degree of doubt as to whether tribes themselves could waive their sovereign immunity, but this issue has been considered as having been resolved by the United States Supreme Court in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). There, the Court found a tribe immune from a *state* court action seeking to enjoin off-reservation fishing claimed to be in violation of state law. The Court, in its discussion on the tribe's sovereign immunity from suit in state court under federal law, assumed a power on the part of a tribe to waive its own immunity: "Absent an effective waiver or consent [by the tribe], it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

Thus, this court accepts the proposition that the Nation would enjoy sovereign immunity from suit in state and federal court, absent a waiver or consent by Congress or the tribe. The court also accepts VDI's assertion that under the rules and principles set out by federal and Arizona courts (which are not binding on this court), VDI would likely be held to possess tribal sovereign immunity as a commercial enterprise that functions as a subordinate economic unit of the tribe. As such a tribal entity, VDI would be immune from suit in federal and Arizona courts, absent an effective waiver or consent by Congress, the Nation, or VDI. See *In re Greene*, 980 F.2d 590 (9th Cir. 1992) (holding that tribal sovereign immunity extended to a commercial enterprise wholly owned by the Yakima Indian Nation); *White Mountain Apache Indian Tribe v Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971) (Fort Apache Timber Co. is a subordinate business organization which enjoys sovereign immunity); *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104, 1110 (1989) (affirming the immunity of subordinate business organizations but concluding the Picopa Construction Co. is *not* a subordinate economic unit enjoying the immunity of the Salt River Pima-Maricopa Indian Community). These cases, however, do not establish definitively whether the Nation or VDI enjoy sovereign immunity in the Nation's *own* courts.

VDI, in urging this court to hold that the Nation and its subordinate economic enterprises enjoy sovereign immunity in the Nation's courts, mischaracterizes the Supreme Court's holding in *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977). According to VDI, *Puyallup* holds that "absent an effective waiver or consent, a tribe may not be sued in *tribal*, state, or federal court." [Defendant's Motion to Dismiss, at 5 (emphasis added by this court)]. *Puyallup* did not mention *tribal* courts anywhere in its text, and for good reason. It would be an invasion of tribal sovereignty contrary to more than a century of Supreme Court Indian law jurisprudence for the Court to declare limits on a tribal court's jurisdiction respecting the issue of tribal sovereign immunity, absent congressional legislation. Since the days of *Ex parte Crow Dog*, 109 U.S. 556 (1883) and *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court consistently has refrained from instructing tribal legal systems and courts on how to interpret their own constitutions, customs and traditions, or how to treat defenses under tribal law, absent express congressional legislation. *Puyallup* simply does not speak to the issue of the degree and extent of tribal sovereign immunity in tribal court.

Further, unlike a number of other tribes, the Tohono O'odham Nation in its Constitution and laws does not specifically affirm or declare the existence of its sovereign immunity in any court. For example, Article XXIV of the Constitution of the Pascua Yaqui Tribe of Arizona States:

> The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, *unless the tribal council enacts an ordinance expressly consenting to suit*. (Emphasis added).

The Hopi Tribal Council, by resolution, has asserted that "sovereign immunity is proper and should continue to be available in suits for damages against tribal governments as such is necessary to preserve limited public funds for public purposes." Hopi Res. H-62-90 (Apr. 2, 1990). Some tribes have specifically restricted their own tribal courts from hearing claims against the tribe, absent specific waiver by tribal legislation. For example, Chapter 33, *Civil Matters*, section 33-02-01 of the Sisseton-Wapeton Sioux Tribe, states that its tribal court

> Shall have no jurisdiction over any suit brought against the Tribe without the consent of the Tribe, unless by specific legislation the Tribe has restricted its sovereign immunity under certain circumstances. Nothing in this Code shall be construed as consent by the Tribe to be sued.

Defendant VDI has cited to no provision of the Tribal Constitution or Tribal Code which declares that the Nation has declared through its laws that it enjoys sovereign immunity from suit in its own courts. The authority contained in Article VI of the Nation's Constitution, vesting the Council with the powers of preventing encumbrance upon the fiscal assets, land and other public property of the Nation, appears to be sufficient support for a power of legislation declaring the Nation's sovereign immunity from suit. These powers, however, are granted by the Constitution to the Council, and, must be, by the terms of Article VI, "exercise[d]." By this language, it is clear that the framers of the Tohono O'odham Constitution intended that the Council possess these powers, but it is also clear that the powers are not self-executing. They must be acted upon, by appropriate legislation. Thus, the Nation's Constitution vests the Council with ample authority to enact legislation similar to that passed by the Hopi Council and the Sisseton-Wapeton Sioux Tribe preventing the Nation's courts from entertaining suits against the tribe.

Thus, in the absence of an express constitutional or legislative declaration that the Nation enjoys, unconditionally, sovereign immunity in its own courts, this court proceeds cautiously on the assertion of the defense in the present action. In fact, because of this court's finding on the issue of waiver, discussed below, it declines to rule specifically on the existence or scope of tribal sovereign immunity in the Nation's courts under the Constitution and laws of the Nation. The court will assume, without expressly so holding, that for the purposes of argument only, VDI

possesses sovereign immunity from suit in the Nation's courts. However, because this court holds that whatever degree of immunity VDI enjoys has been effectively waived by the Nation in VDI's charter, it is unnecessary for this court to speculate any further on the existence or extent of the Nation's or VDI's sovereign immunity in tribal court.

IV.

VDI urges this court to adopt the "general principle" that a waiver of tribal sovereign immunity must be "unambiguous and 'unequivocally expressed,'" *quoting Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). VDI argues that this principle is "simple" and it requires this court to find that VDI's immunity to suit has not been expressly waived by a written provision. Therefore, United Linings' complaint must be dismissed. [Defendant's Motion to Dismiss, at 8]. In a tribal court, however, application of the "general principle" of the United State' Supreme Court's decision in *Santa Clara* that a waiver of sovereign immunity must be "unambiguous and 'unequivocally expressed'" by a written provision is not as "simple" as VDI makes out.

The reasons supporting the *Santa Clara* express written waiver principle's application by a non-Indian court, whether it be the United States Supreme Court or the Superior Court of Arizona sitting in Pima County, simply do not apply to a tribal court. As Judge Posner, reflecting on the reach of *Santa Clara* to contractual debt obligation cases, stated in *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 23 Indian Law Reporter 2125 (7th Cir. 1996):

> Doubt about the efficacy of the tribe's waiver arises only because of statements in a number of judicial opinions that waivers or other overrides of tribal sovereign immunity must be explicit to be effective. These statements are found in two distinct classes of case. In one, illustrated by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the issue is whether Congress has curtailed tribal rights; in these cases the requirement of a clear statement serves to protect tribal prerogatives. In the other class of case, illustrated by contract cases such as the present one, the issue is whether the tribe itself has waived one of its rights. Here the only purpose that a requirement of a clear statement could serve would be the admittedly, perhaps archaically, paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration. We do not find this or any other purpose articulated in the cases, and this leads us to doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit, especially since the harder it is for a tribe to waive its sovereign immunity, the harder it is for it to make advantageous business transactions.

Id. at 2126.

To accept VDI's argument that a tribal court can find a waiver of tribal sovereign immunity only where it is "unambiguous and 'unequivocally expressed'" by written provision would be to accept the proposition that the Nation's courts, established as an independent branch of the Nation's government by Article IV of the Nation's Constitution, cannot be trusted to "protect tribal prerogative." This court rejects that proposition.

It is instructive to examine closely the United State Supreme Court's *Santa Clara* opinion which VDI primarily relies on, for the Court there similarly rejected the notion that tribal courts cannot be trusted to "protect tribal prerogatives." *Santa Clara* dealt with Congress' intent in passing the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303. The question before the Court there was whether *Congress* intended to waive the tribe's sovereign immunity from suit to authorize *federal courts* to review violations of the Acts' provisions except as they might arise on habeas corpus, the only remedial provision *expressly* supplied by Congress in this landmark legislation. See 25 U.S.C. § 1303 (the privilege of writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." *Id.*)

Thus, in *Santa Clara*, the Supreme Court was confronted with the contention that Congress *impliedly* waived tribal sovereign immunity under the ICRA to authorize civil suits for equitable relief against the tribe and its officers in federal courts. The plaintiff in that case argued against the tribe that Congress impliedly waived tribal immunity, in addition to its express waiver of immunity for habeas corpus actions brought in federal court under the ICRA. It was in response to this argument that the Court, in one of its most important decisions protecting tribal sovereignty, announced its "unequivocally expressed" rule for *Congressional* waivers of tribal sovereign immunity.

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are banned by its sovereign immunity from suit.

Id. at 59.

Thus, VDI's reliance on *Santa Clara* for the general principle that in tribal court, waivers of tribal sovereign immunity must be "unequivocally expressed" is misplaced. *Santa Clara*, as the Supreme Court itself recognized, dealt with the weighty issue of Congress' "plenary authority to

limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess." *Id*. 56. In such cases involving the unilateral congressional extinguishment of tribal powers of sovereignty "pre-existing the Constitution," *id*., the Supreme Court has traditionally, and rightly, looked for clear expressions of Congressional intent to extinguish. "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Id*. at 60. The Court in *Santa Clara*, out of respect for the principle of tribal sovereignty in federal Indian law, ruled that the plaintiff's remedies for violations of the ICRA, exclusive of a writ of habeas corpus, were limited to the tribal forum. Under the Constitution of the Nation, as with most other Indian tribes, that forum would be the tribal court. Under *Santa Clara*, tribal courts therefore are presumed by the United States Supreme Court to be perfectly capable institutions for protecting tribal prerogatives under the ICRA. *See also National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

Neither *Santa Clara*, nor any other case cited by VDI, therefore, answers the question of what interpretive principle a tribal court should apply in determining whether or not the tribe has waived its sovereign immunity from suit in tribal court on a contractual debt alleged as owed by a tribal corporation. The waiver of sovereign immunity by the tribe is clearly an act of self-determination in the unilateral exercise of tribal sovereignty. Unlike the congressional exercise of plenary power, as exemplified by the ICRA, the tribe alone decides upon whether it shall waive its immunity. In the absence of a constitutional or legislative directive from the Nation's elected Council, the Nation's courts, as a constitutionally created independent branch of the Nation's government, *see* Constitution of the Tohono O'odham Nation, Art. IV, must decide upon the general principle for deciding whether there has been a waiver of sovereign immunity in a particular case.

V.

Santa Clara, therefore, does not support the rule which VDI urges should be applied by a *tribal* court to determine whether the tribe or VDI waived VDI's sovereign immunity to suit in this case. In federal and state court, the reasons for requiring express waivers relate directly to the institutional respect for tribal sovereignty that is deeply embedded in the principles of federal Indian law. Such reasons do not apply in a tribe's own courts, which are entrusted with a constitutional obligation to protect and exercise the sovereignty of the tribe. In fact, the institutional respect accorded tribal sovereignty by federal and state courts, and by Congress as

well, counsels that tribal courts approach the issue of deciding the rule for finding a waiver of tribal sovereign immunity with great care and sensitivity, fully cognizant of its unique responsibilities under the principles of federal Indian law, as well as under the Nation's constitution and laws. For a tribal court must be ever mindful of the institutional reality that under the principles of federal Indian law, Congress possesses plenary power to diminish or extinguish this important attribute of tribal sovereignty.

The source of tribal immunity from suit in federal and state courts is a subject of considerable current debate and controversy. No congressional statute exists conferring such an immunity on tribes, nor does the doctrine appear in the Constitution of the United States. In the Supreme Court's most recent pronouncement on the doctrine, *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1998), Justice Kennedy, writing for the six person majority, stated "though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident." *Id*. at 1703.

While the majority in *Kiowa* reluctantly upheld tribal sovereign immunity from civil suits in contract, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation, the Court indicated that the doctrine was ripe for congressional scrutiny as to its soundness and need for reform as public policy.

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment. (Citations omitted).

Id. at 1705.

It is worth noting that two Justices joined Justice Stevens' vigorous dissent in *Kiowa*, which argued strongly for limiting the reach of the doctrine judicially to on-reservation conduct only. Further, at the very time that oral argument was presented to the Court in *Kiowa*, Congress had scheduled hearings on tribal immunity, see Transcript of Oral Argument, *Kiowa Tribe*, 118 S.Ct. 1700 (1998) (No. 96-1037), available in 1998 WF 15116, at *15, *27-*28. (Jan. 12, 1998), and several members of Congress, most particularly Senator Slade Gorton of Washington, a long-time ranking majority member of the Senate committee with oversight responsibility for Indian affairs, had recommended legislation to significantly curb tribal immunity in the period of time between when the Court heard oral argument and issued its opinion in *Kiowa*. *See, e.g.*, Jim Camden, "Gordon Rips Taxes, GOP Senator Says We Should Just Start Over With Tax Code," *Spokesman-Review* (Spokane, Wash.) April 17, 1998, at B3.

Criticism of tribal sovereign immunity is not limited to all of the current members of the Supreme Court and prominent members of Congress with oversight responsibility for Indian legislation. A large number of state and federal courts have questioned the wisdom of applying the doctrine, particularly in situations where tribes or their instrumentalities are engaged in commercial activity or have been sued for activities occurring off the reservation. *See* Note, "In Defense of Tribal Sovereign Immunity," 95 Harv.L.Rev. 1058 (1982)(collecting state and federal court cases criticizing the doctrine). The legal literature criticizing the doctrine has similarly burgeoned in recent years. *See, e.g.*, Fogleman, Note, "Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses," 79 Va.L.Rev. 1345, 1364-65 (1993).

The lack of a federal constitutional or legislative foundation for the doctrine of tribal sovereign immunity, the United States Supreme Court's open invitation to Congress to reform this court-created doctrine, and sustained criticism by non-Indian courts and commentators would normally counsel a tribal court to proceed cautiously when confronted by a motion to dismiss a contract claim against a tribal corporation solely on the basis of tribal sovereign immunity not having been expressly waived. Caution is advisable, not necessarily out of any fear of criticism or providing more ammunition to those who would attack or seek to abrogate or extinguish this important attribute of tribal sovereignty, but rather because of the unique responsibility entrusted upon the tribal courts of the Nation in applying this doctrine. Under the present state of federal Indian law, tribes have sovereign immunity in federal and state courts, at least for the time being. This means that the courts of the Tohono O'odham Nation have the sole

responsibility for deciding the scope of the Nation's sovereign immunity in tribal courts, and it is a responsibility that this court takes most seriously.

VI.

A proper respect for protecting tribal prerogatives requires that the Nation's courts adopt a simple principle that waivers of sovereign immunity should never be implied, but, following the soundly reasoned opinion of the Appellate Court of the Hopi Tribe in *Martin v. Hopi Tribe*, 25 Indian Law Reporter 6185 (1996), no "magic words" should be required either for a tribal court to find a waiver of tribal sovereign immunity:

> Although a waiver must be "unequivocally expressed," courts have not required valid waivers to explicitly state, "sovereign immunity is hereby waived," or any other "magic" words for there to be a valid waiver. See *Hopi Tribe*, 46 F.3d at 921; *see also Franchise Tax Bd. Of Cal. V. U.S. Postal Service*, 467 U.S. 512, 521, (1984)….
>
> Therefore, although an effective waiver of sovereign immunity will be strictly construed and not enlarged beyond what the language of the statute requires (*see Ardestani v. I.N.S.*, 502 U.S. 129, 112 S.Ct. 515 (1991)), there is no "ritualistic formula" for such an expression (quoting *Franchise Tax Bd. of Calf.*, 467 U.S. at 521).Also, although we must look at the plain statement made, the Tribal Council's intent to waive immunity must be reviewed to put the scope of the statement in context

Id. At 6188. Following *Martin*, this court adopts the principle that a waiver of tribal sovereign immunity in a suit on a contractual debt alleged as owned by a tribally chartered corporation must be established by looking to the plain statements and the intent of the words asserted as constituting the waiver.

Applying this principle to the present case convinces this court that the Nation has waived whatever degree of sovereign immunity VDI might enjoy from suit in tribal court for the type of contract claim being brought by United Linings. The plain statement of waiver is contained in VDI's corporate charter, *see* Ordinance of the Papago Tribal Council (Charter of the Vi-ikam Doag Industries, Inc.) Ord. No. 1-84 (enacted Feb. 8, 1984). The charter sets out a broad array of powers on behalf of VDI by which the Council intended the corporation "to encourage and promote the development of business and employment opportunities and income in the San Lucy District and cooperate with individuals, families, groups, the District Council, Legislative Council, other governmental agencies, and private and public corporations to achieve VDI's

objectives." Charter, Art. I. In order for VDI to better carry out these important purposes, the Council, by Article II(2) of the charter, declared as follows:

> The Papago Tribe hereby gives its irrevocable consent to allowing the Vi-ikam Doag Industries to sue and be sued in its corporate name upon any contract, claim or obligation arising out of its activities under this Charter, and hereby authorizes the Vi-ikam Doag Industries to agree by express provisions in a contract to waive any immunity from suit it might otherwise have; provided however, that the foregoing consent and authorization shall not be deemed a consent or an authorization by or on behalf of the Vi-ikam Doag Industries of the Papago Tribe to the levy of an judgment, lien, attachment, execution or other judicial process upon the property, assets or receipts pledged or assigned, and further provided that neither the Papago Tribe nor the San Lucy District shall be liable for the debts or obligations of Vi-ikam Doag Industries.

VDI argues that by this language, the Papago Tribal Council (the predecessor to the Tohono O'odham Legislative Council), authorized VDI "'to sue and be sued in its corporate name' and to exercise this authority 'by express provisions on a contract'" [Defendant's Motion to Dismiss, p. 9 (underline supplied by VDI)] The purpose and effect of this provision authorizing the corporation to sue and be sued and agree to express provisions in a contract to waive immunity, VDI argues, is thus to permit VDI to waive its immunity, but until it so acts, it is immune from suit.

The language of the charter, however, does not support VDI's interpretation. The "sue and be sued" clause as set forth in the tribal ordinance quoted above has been recognized as constituting an express waiver of sovereign immunity by a number of non-Indian courts. *See, e.g., Weeks Const. Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986); *American Indian Agricultural Credit, American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux*, 780 F.2d 1374 (8th Cir. 1985) (quoting with approval the "sue or be sued" clause at issue in *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23 (D. Minn. 1974) (Heaney, J., sitting by designation), *aff'd* 517 F.2d 508 (8th Cir. 1975); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918(1966) (tribal corporation validly waived sovereign immunity through use of "sue and be sued" clause, though waiver qualified to bar attachment of property). This court is similarly persuaded that the "sue or be sued" language in VDI's charter represents a plain statement that the Council intended to and in fact did waive VDI's sovereign immunity on

any "contract, claim or obligation" arising out of its activities under the charter. Under the charter, VDI is still possessed of any immunity "it might otherwise" still have with respect to all suits not involving a contract, claim or obligation arising out of its activities under the Charter. According to this language, therefore, it has the power, should its business judgment so dictate, to waive this remaining form of immunity by contract.

This construction is a more reasonable and clear interpretation of VDI's powers under its Charter than that urged by VDI. It is also more consistent with the broad intent spelled out in the Charter by which the Council sought to give VDI whatever authority it might need to successfully carry out its activities, short of consenting to the levy of any judgment, lien, attachment, execution or other judicial process upon the property the assets or receipts pledge or assigned by the Nation and the District."[T]he harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." *Sokaogan*. 23 Indian Law Reporter at 2126.

VII.

In conclusion, this court finds that the Tribal Council of the Nation intended to waive whatever degree of immunity VDI might enjoy under tribal law in tribal court on "any contract, claim, or obligation arising out of its activities" under its charter by allowing VDI "to sue and be sued in its corporate name." The Council's protection from "levy of any judgment, lien, attachment, execution or other judicial process upon the property, assets or receipts pledged or assigned" by the Nation to VDI signals a clear intent to insulate the Nation's property from any debts that might be incurred by VDI, thus further buttressing the interpretation that this subordinate economic entity would stand on its own in carrying out its activities. For these reasons, VDI's motion to dismiss is denied.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Raycita PANCHO, Defendant.

Case No. CR10-3252-3260-98

Decided January 13, 1999.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor C. Peter Delgado for Plaintiff.

Faithe Seota-Norris, Counsel for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary for a Settlement Conference. Parties present: Assistant Prosecutor for the Tohono O'odham nation (Nation), C. Peter Delgado; Defendant Raycita Pancho; Defense Counsel, Faithe Seota-Norris.

The Nation presents the stipulated facts as presented by the Police Officer's Report. The Nation having conferred with the victim, Darren Lopez, moves to dismiss the matters relating to the victim, CR10-3252-98, CR10-3253-98, CR10-3254-98, CR10-3255-98.

The Nation further moves the Court to issue a ruling whether an unborn child is considered a person based on O'odham tradition. Defense Counsel does not object to having the Court issue its ruling, based on Defense Counsel's personal knowledge that the unborn child is deemed a person.

The Nation finally moves the Court if the Court rules an unborn is considered a person they move to dismiss CR10-3257-98 and CR-3260-98.

THEREFORE, IT IS HEREBY ORDERED BY THE COURT:

1. Finds cause to and dismisses CR10-3252/3253/3254/3255/3257/3260-98.
2. Finds based on the oratory history of the O'odham, women who are pregnant are cautioned against being around certain situations (ie the butchering of an animal, family members are not permitted to hunt during the pregnancy) in order to prevent any harm to the child or suffering to the child once the child is born. The Court rules that an unborn child is a person.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Delbert LOPEZ, Defendant.

Case No. CR11-3309-98

Decided May 12, 1999.

Tohono O'odham Prosecutor's Office by Assistant Prosecutor Michael Ehlerman for Plaintiff.
Tohono O'odham Advocate Program by Kenneth Sheffield, Attorney for Defendant.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Judiciary for hearing of oral arguments regarding the amount of jail time to be imposed on Defendant when found in violation of parole.

Parties present: Tohono O'odham Nation (Nation) Assistant Prosecutor Michael Ehlerman; Defendant, Delbert Lopez; Defense Attorney, Kenneth Sheffield, Tohono O'odham Advocate Program.

FACTS

Defendant was granted parole on August 24, 1998 after having served 196 days of the original 360 days detention imposed. Defendant was informed in writing, by the assigned Probation/Officer, of the possible penalty should he be found in violation of his parole. The detention sentence could be 540 days.

Based on the Defendant's arrest on November 1, 1998, by Officer Richard Cantu, the Probation/Parole Officer filed a Petition to Revoke Parole. On February 20, 1999 Defendant was arrested pursuant to three bench warrants for failure to appear for arraignment. He was found by the Court to be in contempt and the Court imposed 10 days detention on each warrant.

At the Parole hearing on March 29, 1999, Defendant admitted to violating his parole. Based on the sentence recommendation and arguments from both Counsels, the Court issued instructions for Counsel to file written briefs on the issue of the appropriate sentence to be imposed.

ISSUE

When a parolee is found in violation of a petition to revoke parole must they serve only "the rest of the sentence" or "the sentence imposed which resulted in parole, plus one half of that sentence."

FINDINGS AND ORDER

Defense Counsel asserts, and the Nation stipulates, a petition to revoke, which is filed by the Probation/Parole Officer, is civil or quasi-criminal in nature. This burden of proof is lower than would be in a criminal case. The parolee does not have the right to many guaranteed protections under the constitution as in criminal procedures. The applicable rules would be those used in administrative or civil hearings.

On the other hand when a parolee is charged with the crime of parole violation, Chapter 2, Section 2.16 Tohono O'odham Nation Criminal Code, the Defendant argues the crime of parole violation entitles the Defendant to all protection otherwise afforded in criminal matters. This

includes a burden of proof beyond a reasonable doubt and the right to a trial by jury on the merits.

The Court concurs that Chapter 2. Section 2.16 applies only to criminal offenses and not to revocations alleged on a Petition to Revoke filed by the Probation/Parole Officer. These matters would proceed as in a civil or administrative hearing where hearsay evidence has limited admissibility.

Definition #52 located in Section 1.16 of the Criminal Code defines parole as “a release from prison before a sentence is up, that depends on the person “keeping clean” and doing what he or she is supposed to do while out. If the person fails to meet the “conditions of parole,” the rest of the sentence must be served.” The court finds Definition #52 as the applicable sentence to be imposed for a parole violation pursuant to a Petition to Revoke Parole filed by the Probation/Parole Officer.

The Nation also argues that the Indian Civil Rights Act (ICRA) imposes a mandate upon the Court limiting detention up to 360 days on any one sentence although multiple charges could exceed the total of 360 days.

Chapter 2, Section 2.16 of the Criminal Code states when a person is found guilty of parole violation 9they0 shall be sentenced to the following: 1. Imprisonment in jail for a period equal to the sentence imposed which resulted in parole, plus one half of that sentence; and 2. If parole violation is based on a new offense the Court shall impose additional jail time to be served consecutively with the parole violation sentence. (Emphasis added). The Court finds the penalty that may be applied when a person is found in violation of this section may be in excess of that allowed under the ICRA since additional time may be imposed. A sentence exceeding the ICRA mandated limit of 360 days is unconstitutional. The Court is constitutionally banned from exceeding 360 days for any one sentence it imposes.

THEREFORE THE COURT ORDERS the penalty for Petitions to Revoke Parole would be as stated in Definition #52, … the rest of the sentence must be served. Defendant in this case shall serve the balance of the 164 days consecutive to any other sentence imposed by the Court during the time of his incarceration from February 20, 1999. Defendant is not given credit for time served while on parole.

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

Cecil WILLIAMS, Plaintiff,
v.
CHUKUT KUK DISTRICT, Defendant.

Case No. 92-PWM-5445

Decided June 9, 1999.

Before John L. Tully, Judge Pro Tempore.

The Court enters the following findings of fact, conclusions of law, and order.

The facts are largely undisputed. In October, 1990, the Chukut Kuk District council approved a district budget for fiscal year 1991. The budget established a salary for the position of district chairman in the amount of $14,000 per year. The district resolution and the budget were subsequently approved by the Tohono O'odham Legislative Council on October 22, 1990, and were rendered retroactively effective to October 1, 1990.

Plaintiff Cecil Williams was subsequently elected chairperson of the Chukut Kuk District and took office on May 9, 1991. Plaintiff was paid, pursuant to the district budget, from that time through and including August 15, 1991.

Plaintiff failed to attend council meetings and failed to report to council offices. On September 17, 1991, the Chukut Kuk District Council approved Resolution No. 18-91 (the "1991 Resolution"). The 1991 Resolution stated, in material part:

> That the Chukut Kuk Council does stop paying the chairman and hereby pay the vice-chair woman the chairman's salary.

The parties have stipulated that the 1992 fiscal year district budget approved a salary for the position of chairperson of the district in the amount of $14,700. The parties have further stipulated that the 1993 district budget, which was subsequently approved by the Tohono O'odham Legislative Council, established a pay rate of zero for the position of chairperson and approved a salary of $14,700 for the vice-chairperson of the district.

On December 13, 1993, the Tohono O'odham Legislative Council approved a resolution removing Plaintiff Cecil Williams from the position of chairman of the Chukut Kuk District. The parties are apparently in agreement that Mr. Williams remained district chairman until removed from office in December 1993. The parties are also in agreement that the resolution enacted by

the legislative council in December 1993 was valid and did, in fact, effectively remove Mr. Williams from office.

Mr. Williams claims that he is entitled to be paid as district chairman in accordance with the budgets approved by the district for the time period August 15, 1991 through December 13, 1993, when he was removed from the position of chairman. The district concedes that Mr. Williams is entitled to salary for the period August 15, 1991 through September 17, 1991, but argues that the 1991 Resolution effectively eliminated any further entitlement Mr. Williams might have to salary as district chairman. The district also contends that it is entitled to an offset for unauthorized withdrawals of district funds allegedly made by Mr. Williams. The parties have stipulated that the offset issue is to be severed for trial at a later date for reasons of judicial economy and to allow the parties to complete disclosure/discovery on that issue.

The Court finds that Mr. Williams is entitled to be paid salary as chairman for the period August 15, 1991 through September 17, 1991, and that he is entitled to no other pay as district chairman.

This case raises issues of statutory and constitutional interpretation. The first issue is whether the 1991 Resolution effectively eliminated pay for the position of chairman of the district. The second issue is whether the district is constitutionally entitled to reduce the salary of a sitting chairman.

The first issue is essentially one of statutory interpretation. In interpreting statutes, the court is obligated to determine and give effect to the legislative intent behind the statute. Calvert v. Farmers Ins. Co. Of Arizona, 144 Ariz. 291, 697 P.2d 684 (1985). To do so, the court must look at the words, context, subject matter, and effects and consequences of the statute. State ex. rel. Flournoy v. Mangum, 113 Ariz. 151, 548 P.2d1148 (1976). Measured against this standard, this Court has little difficulty in determining the district's intent in enacting the 1991 Resolution. The budget for fiscal year 1991 establishing the chairman's salary at $14,000 per year was based upon the assumption that the chairman would work what was, in essence, a half time job. The 1991 Resolution recites, and Mr. Williams concedes, that he had not fulfilled his duties as chairman and had not performed the anticipated services for the district since July, 1991. Although the language of the 1991 Resolution may be somewhat inartful, the Court has no difficulty in concluding that the district's intent in passing the 1991 Resolution was to modify the 1991 fiscal year budget, and the chairman's salary, by reducing that salary to zero.

The district council's intent in enacting the 1993 fiscal year budget is also clear: by enacting a budget with no salary allocated for the chairman, the district council clearly exercised its desire to pay no wages to Mr. Williams for that fiscal year.

The 1992 fiscal year is somewhat more problematic. The parties have not provided the Court with a copy of the 1992 fiscal year budget, with a copy of the district resolution, or the legislative council resolution approving the budget for the 1992 fiscal year. The parties have stipulated, however, that the budget, as approved by the district and the legislative council, includes a line item for the chairman's salary in the amount of $14,700. An argument could be made that the district council, in approving a budget for the 1992 fiscal year with this line item, intended to reinstate Mr. Williams' salary for the 1992 fiscal year. The Court, however, finds to the contrary.

Legislative intent is to be determined from the language of the documents in issue, along with the historical context in which the district has acted. In construing legislative intent, this Court must take into account not simply the 1992 fiscal year budget but must consider the budgets for 1991 and 1993, the 1991 Resolution, and other historical data.

The budget for the 1991 fiscal year was approved and adopted in October, 1990, and effective October 1, 1990. The budget for the 1992 fiscal year was adopted in the fall of 1991. At that time, as reflected in the 1991 Resolution, the vice-chairwoman was performing the duties and functions of the position of chairman and, according to the 1991 Resolution, it was the intent of the district council to pay her an amount equal to the chairman's salary. The Court finds it probable that the legislative intent in adopting the 1992 fiscal year budget was to continue paying the chairman's salary to the vice-chairwoman.

The issues Mr. Williams raises in this litigation appear to have first surfaced after the adoption of the budget for the 1992 fiscal year. The earliest notice of the issue in the record is a letter dated January 28, 1992, from the Tohono O'odham Attorney General's Office to the district treasurer concerning the issue. Mr. Williams filed this action in October, 1992. When the district council met to adopt the budget for the 1993 fiscal year (presumably in October, 1992), it was aware of the issues in this litigation. The budget subsequently adopted therefore addresses the issue by clearly reflecting the district's intent to continue paying the vice-chairwoman a salary for the 1993 fiscal year and not pay the chairman. Since the district council evidenced its intent in the 1991 Resolution to withdraw all salary from Mr. Williams, and since the council evidenced the same intent in adopting the 1993 budget, it is logical to infer that the 1992 budget simply contained a scrivener's error inconsistent with the intent of the council. In short, the

Court concludes in interpreting legislative intent that the adoption of the budget for the 1992 fiscal year was not intended by the council to supersede the 1991 Resolution and that the 1991 Resolution continued in effect throughout fiscal year 1992.

The second issue presented is whether the district council had the legal authority to reduce the income of a sitting district chairman. The Court concludes that the 1991 resolution is a valid exercise of the district council's governmental authority.

Legislative enactments, such as the 1991 Resolution, are presumed to be constitutional and effective. See, e.g., State v. Ramos, 133 Ariz. 4, 648 P.2d 1189 (1982); State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987). The burden of proof is upon the party asserting that a particular exercise of governmental authority is unconstitutional.

The 1986 Constitution provides for the creation of district councils (Article IX, Sec. 3) and provides for the position of chairman and vice-chairman of each district. (Id.) The Constitution also addresses the issues of compensation, and the reduction of compensation, for certain public officials. Article VII, Sec. 4, provides that the chairman and vice-chairman of the Nation are to receive compensation for their services and that such compensation "shall not be diminished during their continuance in office." Similarly, Article VIII, Sec. 9, provides that judges of the Tohono O'odham courts shall receive compensation "which shall not be diminished during their continuance in office." However, there are no similar provisions for the positions of district chairman and vice-chairman. While the Constitution recognizes the positions of district chairman and vice-chairman, there is no requirement that such positions be compensated, or that any salary for these positions not be reduced during a particular individual's tenure in office.

Compensation and the reduction in compensation for certain public officials was a subject considered and addressed by the framers of the Constitution. By excluding district chairmen and vice-chairmen from the designation of those who are required to be compensated and from the designation of those whose compensation cannot be reduced while in office, the framers expressed their intent that the districts would be unfettered in their authority to address these issues as a matter of local governmental control.

Mr. Williams asserts that the district council is precluded from exercising such authority by Article IX, Sec. 7 of the Constitution. Section 7 provides, in pertinent part, that: "No district council shall expend district funds except to budgets authorized under resolutions of the district council and approved by the Tohono O'odham council." Section 7 evidences a desire on the part of the framers of the Constitution to vest fiscal authority in the local districts subject to the

legislative council's constraint on undue expenditures. Section 7 is not a mandate that all funds identified in a particular district budget must, in fact, be spent. Rather, Section 7 indicates an opposite intent: that districts may not expend funds unless first approved by the legislative council.

Based upon the foregoing, the Court finds that Petitioner is entitled to a salary as district chairman for the period August 15, 1991 through September 17, 1991, computed on the basis of an annualized salary of $14,000 per year, subject to any offset that the District may claim and prove at the remainder of the bifurcated matter.

The Court further orders that a telephonic status conference is scheduled for Monday, June 21, 1999, at 4:00 p.m., for the purpose of scheduling the remainder of this matter for hearing. Defense Counsel is directed to initiate the conference call.

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

Roy PARRAZ, Plaintiff,
v.
DESERT DIAMOND CASINO, the TOHONO O'ODHAM NATION TRIBE, Defendant.

Case No. 96-C-6462

Decided June 30, 1999.

Before Robert Hershey, Judge Pro Tempore.

The above-entitled proceeding came before this Court on May 5, 1999 upon defendants' Motion to Dismiss and Plaintiff's Motion to Amend Complaint. Upon hearing arguments of counsel,

IT IS HEREBY ORDERED granting defendants' Motion to Dismiss and denying Plaintiff's Motion to Amend.

The Tribe has not waived its sovereign immunity from suit and, as such, this Court lacks subject matter jurisdiction to hear the complaint. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 118 S.Ct. 1700 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940). This Court rejects the reasoning of Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 877 F.Supp. 1262 (D. Wisc. 1995). The Court is

mindful of Judge Williams' carefully crafted opinion in United Linings v. VI-IKAM Doag Industries, Inc., 2 TOR3d 39 (Dec. 20, 1998). The facts presented by Mr. Parraz, however, do not rise to the level required by United Linings to overcome The Nation's sovereign immunity.

The Court declines to treat or convert the matter to a Motion for Summary Judgment.

The Court disallows Plaintiff's Motion to Amend. Plaintiff was terminated on March 9, 1995. The Tohono O'odham Gaming Authority did not come into existence until March 31, 1995 by Plaintiff's own admission in court. Furthermore, Plaintiff has not alleged in his complaint that the Gaming Authority has waived its immunity from suit.

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

Codylee Michael JUAN and Charmaine JUAN, a married couple, Plaintiff,
v.
Carlos Francisco JUAN and Jane Doe JUAN, a married couple; the ESTATE OF CARLOS FRANCISCO JUAN; Jane Doe JUAN and/or John DOE, as personal representatives of the estate of Carlos Francisco JUAN; TOHONO O'ODHAM NATION, a governmental entity; SELLS DISTRICT, a district of the Tohono O'odham Nation, John DOES 1-10; and Jane DOES 1-10, Defendants.

Case No. 96-T-6510
(appeal dism'd *Juan v. Juan*, 3 TOR3d 1 (Jan. 4, 2005))

Decided January 27, 2000.

Before Judith M. Dworkin, Judge Pro Tempore.

This case arises out of a traffic accident in which the vehicle of Plaintiff Codylee Juan, a Tohono O'odham police officer collided into the vehicle of Defendant Carlos Francisco Juan. At the time of the collision, Defendant was employed by the Sells District. In addition to Defendant Carlos Juan and fictitious wife Jane Doe Juan, Plaintiff brought suit against personal representatives of the Estate of Carlos Francisco Juan, the Tohono O'odham Nation and the Sells District.

Defendants filed a Motion to Dismiss on the ground that all claims asserted in the Complaint were barred by the doctrine of sovereign immunity. Plaintiffs filed a Memorandum of Points and

Authorities in Opposition to Defendants' Motion to Dismiss. Defendants filed a Reply in Support of Their Motion to Dismiss. The Court having heard oral argument on the matter and considered the arguments presented to it, grants Defendants motion and dismisses the Complaint in its entirety.

Courts treat sovereign immunity defenses as a matter of subject matter jurisdiction. *See, e.g. Wetlands Water Dist. V. Firebaugh Canal*, 10 F.3d 667, 673 (9th Cir. 1993). On a motion to dismiss for lack of subject matter jurisdiction, generally, plaintiff bears the burden of establishing subject matter jurisdiction because it is plaintiff who is seeking to invoke the Court's jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994).

Plaintiffs affirmatively allege in their Complaint that the Nation and the District are governmental entities, that Defendant Carlos Francisco Juan was acting within the course and scope of his employment at the time of the accident and that the basis of the claim against the Nation and the District is that of *respondeat superior* as the employer of Carlos Francisco Juan. In their response and opposition to the motion to dismiss, Plaintiffs do not dispute that sovereign immunity bars claims against any but Defendant Sells District. As to this Defendant, Plaintiffs contend that the Sells District of the Tohono O'odham Nation is not immune from suit. Plaintiffs argue that unlike the Tribe which enjoys sovereign immunity, the District is a separate entity much like a City and does not enjoy the immunity of the Tribe. Plaintiffs argue, in the, alternative that if the Sells District enjoys immunity it has waived that immunity by acquiring and/or purchasing liability insurance.

The Districts of the Tohono O'odham Nation are unlike municipal corporations within the State of Arizona. Municipal corporations, such as cities and town, are voluntary organizations organized by the initiative and by the approval of the inhabitants and are independent of general governmental activities of the state. *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 206 P.2d 1041 (Ariz. 1949); ARIZ. CONST. art. XIII.

The Districts of the Tohono O'odham Nation are organizations of fairly limited power and authority which may act only under the supervision of the Tohono O'odham Council. CONST. art. IX. A district may only govern itself in matters of "local concern;" minutes of all district council meetings must be submitted to the secretary of the Council; and a district council may expend district funds only pursuant to a budget approved by the Council. CONST. art. IX §§5, 6 and 7. Finally, the Tohono O'odham Council may even change the number and boundaries of districts. CONST. art. IX § 2. This is all evidence that the districts are merely subordinate

governmental units of the tribal government and as such enjoy the same rights and privileges as the Tohono O'odham Nation, including immunity from suit.

In Defendants' reply in support of their motion to dismiss. Defendants' attach an affidavit of Bob Burrows, Insurance Manager of the Tohono O'odham Nation. Mr. Burrows was familiar with the policies in effect and the specific claims made as a result of the traffic accident in this case. Mr. Burrows attested that (1) the Sells District does not carry its own policy of liability insurance, (2) liability coverage was provided through the Nation, (3) both vehicles were repaired pursuant to claims made under the Nation's automobile insurance policy, and (4) Plaintiffs' complaint was submitted to the Nation's insurance carriers. Thus, Plaintiffs claim that the Sells District has waived any immunity that it may have fails.

In conclusion, this court finds that the Defendants are immune from suit and that, as to the Sells District, the immunity of suit has not been waived.

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

TOHONO O'ODHAM LEGISLATIVE COUNCIL, Dennis RAMON, Chairman, and Mary Ann ANTONE, Sif Oidak District Council Representative, Petitioners,
v.
Edward D. MANUEL, Tohono O'odham Nation Chairman, Respondent.

Case No. 00-TRO-8283

Decided October 18, 2000.

P. Michael Ehlerman, Counsel for Petitioners.
Mary Cowan, Counsel for Respondent.

Before Judge Rose Johnson Antone.

This matter came to be heard before the Court, commencing on the 11th day of October 2000. Parties present: Petitioners, Dennis Ramon and Mary Ann Antone; Counsel for Petitioners, P. Michael Ehlerman; Respondent, Edward Manuel, Counsel for Respondent, Mary Cowan.

The Court makes the following Findings of Fact and Conclusions of Law:

The Court had before it evidence and testimony regarding the preliminary injunction requested by the Petitioners. Several criteria must be met before a preliminary injunction shall be issued by this Court.

An injunction shall not be granted to prevent the lawful exercise of duties by a public officer. Further, the party requesting the preliminary injunction must prove that:

1. There is a strong likelihood that he will succeed on the merits at trial.
2. There is strong possibility that irreparable injury will result to him should an injunction not issue.

Article II, Section 2(h) of the Constitution empowers the Chairman of the Tohono O'odham Nation to call the Legislative Council into special session. Respondent called the Legislative Council into Special Session and scheduled the session to occur on October 9, 2000. Respondent provided appropriate notice of the special session by delivering a written letter to the Chairman of the Legislative Council on October 6, 2000, three days before the scheduled special session.

Although the Legislative Rules of the Tohono O'odham Legislative Council clearly bind the Legislative Council, the Court does not hold that the Respondent is bound by the Legislative Rules of the Tohono O'odham Legislative Council which require a four day notice period. In accordance with Section 2 of the Legislative Rules of the Tohono O'odham Legislative Council, the Office of the Legislature is responsible for providing notice to the members of the Council.

Article V, Section 2 in applicable part states , "A majority of the votes cast shall govern the action of the Tohono O'odham Council." In accordance with this section of the Constitution, the calendar for the legislative sessions was adopted by a majority of the members of Council in a formal resolution. Petitioner Chairman of the Legislative Council, by an October. 6, 2000 memo to Legislative Council members, attempted to cancel the October legislative session and close the Legislative Branch. The Court finds, however, that the calendar had not been amended by a formal action of the Council and the October sessions were not canceled in accordance with the Constitution. Therefore, the Petitioner Chairman of the Legislative Branch had no authority to cancel the session. Such attempted cancellation and closure cannot act to invalidate Respondent's notice of the special session.

The testimony presented at the hearing showed that several members of the Council got actual notice of the special session and chose not to participate. It was not the fault of Respondent that some members may not have received notice because they left the legislative branch office as a result of the Petitioner Legislative Chairman's memo closing the Legislative Branch and "canceling" the October session.

Testimony at the hearing failed to show that Respondent presided over the special session on October 9, 2000 or that Respondent acted in any way so as to usurp the authority of the

Legislative Branch. The affidavit filed and testimony presented showed that the special session was presided over by Councilman Albert Manuel, Jr. and that the acting legislative secretary, Julianna Saraficio, took role at the session and determined that a quorum was present.

The Court therefore holds that Respondent called a special session of the Legislative Council in conformance with the Constitution of the Tohono O'odham Nation and that Respondent gave appropriate and sufficient notice of the session to the Legislative Branch. The Court further finds that Respondent did not usurp powers given to the Legislative Branch. The Court finds that the Petitioners have failed to meet the criteria for issuance of the preliminary injunction.

The Court has held a full hearing on all matters brought to the court by the Pleadings. Both Petitioners and Respondent have had ample opportunity to present any and all evidence in support of their positions. For these reasons and Rule 65(a) (2) of the Rules of Civil Procedure, the Court makes its final findings and orders.

Article V, Section 4 of the Tohono O'odham Constitution states that the Chairman of the Legislative Council shall exercise any authority delegated to him by the Council. Further, this Court has entered into evidence Respondent's Exhibit 4 which is a Legislative Council Resolution entitled Approving Delegation of Authority to Chairman and Vice Chairman of Legislative Council. Nowhere in this document is the Chairman of the Legislative Council delegated to file suit on behalf of the Council. The Court, however, specifically notes Section 5 which states that the Chairman has full authority to, "with the consent of the Tohono O'odham Council, act as representative of the Council." This section merely reiterates the language in the Constitution that when actions are to be taken by the Chairman of the Council on behalf of the Council, the Council must delegate that authority to its Chairman. There has been no showing that the Legislative Council lawfully authorized the Chairman of the Council or the remaining Petitioner Antone to act in its behalf in filing the present suit. Therefore, the Court finds that both Petitioners lack standing to bring this suit.

The Court makes no findings regarding the validity of the actions taken at the October 9, 2000 special session by the Legislative Council, as these matters were not the subject of the present action.

THEREFORE THE COURT HEREBY ORDERS that the Petitioners' motion for injunctive relief is DENIED. This matter is dismissed.

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

Ernest MORISTO on behalf of the Moristo heirs, Plaintiff,
v.
BABOQUIVARI DISTRICT COUNCIL et al., Ronald VENTURA, Chairperson, Defendants.

Case No. 00-TRO-8334

Decided March 14, 2001.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Judiciary Adult Civil Division for a status hearing on Plaintiff's MOTION FOR TEMPORARY RESTRAINING ORDER.

Court having heard the arguments and having received the documentation of the public hearing ordered by the Court finds:

1. A resolution has not been reached by the parties.
2. Article IX, Tohono O'odham Nation Constitution, Section 5, states "Each district shall govern itself in matters of local concern, except that in any matter involving more than one district in which there is a dispute, the Tohono O'odham Council shall decide the matter." (emphasis added)
3. That parties have not presented the matter of I'itoi's cave and its impact as it relates to the cultural significance on the O'odham and its adjacent location to the area in question.
4. The Tohono O'odham Legislative Council does have authority to decide this issue based on the recognized cultural significance and location of I'itoi's cave to the area in question; therefore this issue is prematurely before the Court.

IT IS HEREBY ORDERED that the Motion for Temporary Restraining Order is denied and the matter is dismissed.

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

BIG FIELD COMMUNITY, Plaintiff,
v.
Thomas JOHNSON, Defendant.

Case No. 01-TRO-8734

Decided January 22, 2002.

Nicholas Lewis, Counsel for Plaintiff.
Verlon Jose, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The hearing in this matter was on January 15, 2002. The parties appeared with their legal counsel, Nicholas Lewis for the plaintiff, and Verlon Jose for the defendant.

Based upon the testimony and other evidence presented, the Court finds that the plaintiff's principal concerns were the impact of eventual erosion upon the two crosses which are memorials for two deceased members of the Big Field Community, from future water backup in the roadside ditch which the defendant's road currently obstructs, and the fact that the defendant was not a registered member of the Sells District, and, therefore, not able to hold land or use land. The plaintiff abandoned the issue of the Right of Way. The testimony heard by the Court showed that there is a dispute over the land in question being within the Big Field Community or within the Sells Community. That is not an issue which the Court can decide, and the find of a dispute over the land in question is applicable in this case only to show the Court that Big Field Community has standing to raise questions in this case. The Court finds that the plaintiff presented sufficient evidence to show that damage is likely to the area where the crosses are when the rains come and the water flows build up along the paved road up to the area of the defendant's roadway.

The Court also finds that the defendant established that the current situation has not resulted in damage to the crosses, since there has not been rain for a while, but he indicated that he is mindful of the impact, and is reviewing ways to mitigate the effects of the road by a proper culvert with the help of the Bureau of Indian Affairs. Further, the defendant conceded that he was not a registered member of the Sells District, but was in the process of registering with the District.

For the reasons stated herein, a restraining order shall be issued.

IT IS ORDERED, ADJUDGED AND DECREED THAT the defendant is restrained and enjoined from further work on the roadway until further order of this court, after his membership status in the District of Sells is confirmed and approved, and after the defendant resolves the matter of the roadside ditch for the water runoff near the two crosses, either through a culvert or relocation of the roadway. This order shall remain effective until the court issues an order dissolving the restraining order and injunction.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Kelly R. JOHNSON, Defendant.

Case No. CR07-2240-02

Decided April 8, 2003.

Before Judge Violet Lui-Frank.

This case is based upon a Petition to Revoke Probation filed on July 29, 2002. The defendant presents a novel question for the court: Does a term of probation begin at the time of sentencing, when a defendant is in jail under another sentencing order in another case, and the judge did not specifically allow the sentence to be concurrent to any other term of imprisonment?

The defendant was convicted of assault under a plea agreement in CR05-1974-01 on September 10, 2011. On that date the court approved the plea agreement, accepted the plea, found the defendant guilty of assault, and sentenced him. The sentence was made that day: 120 days, suspended for ten months of supervised probation, evaluation by the Alcohol and Substance Abuse program and compliance with recommendations, completion of the Personal Growth Class through Behavioral Health, and an order prohibiting contact with the victim.

At the time that sentence in CR05-1974-01 was pronounced, the defendant was serving 150 days in CR06-2307-01, on a revoked probation originally granted in CR02-766-00. His release date was October 17, 2001.

Defendant moved to dismiss the Petition to Revoke Probation filed by the Probation Officer on July 29, 2002, alleging violations of the probation conditions ordered in CR05-1974-01. The defendant executed the Conditions and Regulations of Probation on October 17, 2001, the same day he was released from jail in CR06-2307-01. The defendant's motion to dismiss is based upon

his argument that the probation period of ten (10) months in CR05-1974-01 expired on July 10, 2001. Defendant argued that the probation period began at the time that sentence was imposed, September 10, 2001. Defendant argued that the sentence was effective upon imposition, and due process notice to the defendant was that probation began on September 10, 2001. The Nation argued that the defendant was serving time in another case, and that there was no provision in the sentence in CR05-1974-01 for concurrent time while the defendant completed his sentence in CR06-2307-01.

The parties agreed on February 28, 2003 that the court could rule on the motion to dismiss after reviewing the taped arguments from September 9, 2002 and September 17, 2002. Having done so, the court makes the following findings: there is no case precisely on point under Arizona case law; neither party offers case law from any other jurisdiction; the Court uses the Arizona Rules of Criminal Procedure to the extent that the rules work under existing Tohono O'odham law.

If the sentencing order in this case had imposed the 120 days, without probation, when would the sentence have begun, under the law and the applicable rule? Rule 26.13 is clear that a sentence is consecutive, unless the judge expressly orders otherwise. The 120 days would have begun no earlier than October 17, 2001, when the defendant completed his sentence in the other case. The jail time was suspended as of the day it would have begun, October 17, 2001. Therefore, the probation period could not have begun earlier than that same date.

Finally, the defendant signed the Conditions and Regulations on October 17, 2001. At that time the defendant was on notice that the probation period began on that day and ended on August 17, 2002. He did not file any objection, nor appeal any part of the sentence, and neither did he object to the notice that his probation began on October 17, 2001 and ended August 17, 2002.

The Court concludes that the answer to the question presented is that a sentence of imprisonment begins on the day that it can be implemented. Thus, if a defendant is serving time on one sentence, and a new sentence has been imposed, which is consecutive, the new sentence begins after the other sentence is completed. If probation is allowed and the new sentence is suspended, the probation for the suspended sentence begins only when that sentence of imprisonment would have started.

IT IS ORDERED, for the reasons stated above, that the defendant's motion to dismiss on grounds that the probation period expired as of July 10, 2002 is denied.

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

C. V. K. a.k.a. C. O., Plaintiff,
v.
N. K., Sr., Defendant.

Case No. 96-D-6497
(aff'd by *C. V. K. a.k.a. C. O. v. N. K., Sr.,* 3 TOR3d 1 (Apr. 2, 2005))

Decided May 19, 2003.

Before Judge Violet Lui-Frank.

This matter was brought into the Children's Court in connection with a CINC proceeding, 01-CINC-3339, and pursuant to the Children's Court's exclusive jurisdiction over custody matters, when CINC proceedings are pending. The CINC case has been closed with resolution of the issues involving the mother of the children. This proceeding is based upon the respondent/father's petition to modify custody under the Order of the court dissolving the marriage of the parties on October 20, 1997, wherein the children remained in the petitioner/mother's custody, awarding reasonable visitation to the father, and requiring him to pay child support.

The Court heard testimony from both parties on March 25, 2003 on the modification of child custody.

The parties agreed that A.R.S. 25-403 can serve as guidance for the court in considering the request to modify custody. The Arizona statute is appropriate guidance, and congruent with this court's concern for the best interests of the children.

The Court finds that, notwithstanding the issue of the father's conviction regarding the mother's oldest child from another relationship, the mother called upon him to help with the children when she was ill; when Child Welfare Services ["CWS"] removed the children from their mother's custody, they took the children to the father; the mother successfully completed her disposition plan under the CINC case, and CWS recommended that custody be restored to the mother; the recommendation was appropriate in that context, and was the basis for the closing of the CINC case; the children remained in the father's physical custody pending resolution of the petition to modify custody.

The Court finds the following as compelling reasons to modify the custody decree: on two separate occasions, when the mother believed her circumstances were very bad, and she was

desperate for money, she agreed to a very risky enterprise, transporting illegal entrants into the United States for money; such action could have jeopardized her liberty and life, as well as the life and welfare of the baby she had with her, another son not a party herein, and the welfare of her other children; the basis for the CINC proceeding involved physical abuse of one of the children by the mother; the father has provided a stable home for the children since September 2001; and Child Welfare Services recommended at trial that they remain with their father. This last recommendation is very compelling, given the agency's knowledge of past incidents with the mother.

The mother has custody of other children, who share their mother with the K children; the relationship with the siblings can be maintained through visitation.

The Court is convinced that the children love, appreciate and need both parents.

The Court's findings support the conclusion that the best interests of the three children are served by custody being given to the father, with regular visitation to the mother.

IT IS ORDERED THAT custody of R. K., G. K. and S. K. is modified and awarded to the father, N. K., Sr., with reasonable visitation to the mother, consistent with the Court's Order of December 26, 2002 for alternating weekends. The parties are urged to resolve the summer visitation schedule and holiday schedule visitation, and file a proposed schedule with the Court as soon as possible, to avoid future difficulties.

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

Reynaldo Velasco LEON, Jesus Ramon Ballesteros SOTO, Reuben Sosa VALENZUELA, Norma HERMOSILLO, Ramon Marcial VELASCO, Jose Servando LEON LEON, Jose A. LEON LEON, Plaintiffs,
v.
Rita MARTINEZ, Chair, and MEMBERS of the TOHONO O'ODHAM LEGISLATIVE COUNCIL; Matilda JUAN, Chair, and MEMBERS of the ELECTION BOARD; Nancy GARCIA, Director, Enrollment Services, Defendants.

Case No. 03-C/TRO-9346

Decided May 19, 2003.

Ruben Valenzuela, Counsel for Plaintiffs.
Tohono O'odham Attorney General's Office by Assistant Attorneys General Veronica Geronimo and Mark Curry for Defendants.

Before Judge Rose Johnson Antone.

The above captioned matter coming before the Tohono O'odham Judiciary Adult Division for oral argument hearing on Plaintiffs' **EMERGENCY PETITION FOR TEMPORARY RESTRAINING** and **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** and Defendants' **OPPOSITION TO THE APPLICATION FOR PRELIMINARY INJUCTIVE RELIEF**.

Parties present: Plaintiffs, Reynaldo Velasco Leon, Jesus Ramon Ballesteros Soto, Ruben Valenzuela, Ramon Marcial Velasco, Jose Servando Leon Leon, Jose A. Leon Leon; Counsel for Plaintiffs, Ruben Valenzuela with Legal Assistant, Jose Rodriquez; Defendants, Rita Martinez, Matilda Juan, and Nancy Garcia; Counsel for Defendants, Assistant Attorneys General, Veronica Geronimo and Mark Curry.

The Court makes the following FINDINGS of FACT and CONCLUSIONS OF LAW:

The Court finds that it has jurisdiction to hear this matter pursuant to Article VIII, Section 2 and Section 10 of the Tohono O'odham Nation Constitution and Title III, Chapter 1, Section 1-101 of the Tohono O'odham Nation Civil Code.

The Court agrees the constitutional right to vote of otherwise eligible members of the Nation is fundamental to the Nation's democracy and is a principle of equality for all enrolled members of the Nation. Plaintiff's Complaint at Paragraph 26.

In finding the right to vote is a fundamental right, the Court also finds the right to vote has its limitations in accordance with case law and legislative action. In *Tohono O'odham Council v. Garcia,* 1 TOR3d 10 (Ct.App., Sep. 14, 1989) the privilege to exercise the right to vote is summarized in a process. The process for an enrolled member of the Nation to exercise their right to vote is relatively simple, a person must be a member of the Nation and 18 years of age. Moreover, the Tohono O'odham Legislative Council (hereafter Council) has adopted the Election Ordinance which establishes the criteria for voter eligibility and also states to be eligible to vote, a member must register not less than 60 days prior to the general, primary or special election by providing the name of the voter, his date of birth, home address, and the district in which he or she will be permitted to vote. Election Ordinance, Ord 03-86.

Pursuant to the Election Ordinance for a person whose name has not been added to the voter registration list of a district they may appeal to the Council. Plaintiffs did appeal to the Council; however, following a full hearing the Council adopted Legislative Order 03-207, tabling final decision on voter eligibility petitions until Legislative Council determines the petitioners are

entitled to appeal under Election Ordinance, it adopts hearing procedures and sets voter eligibility appeal hearings. By this action, the Council has not denied the Plaintiffs' appeal, but has set forth an avenue for the Plaintiffs to address their grievance.

More specifically, the Council determined it does not have the power to grant the right to vote unless the registration requirements of Article III Section 1 of the Election Ordinance are first met; and the Council by its resolution stated it currently lacks adequate information to determine whether the Petitioners have satisfied the eligibility or registration requirements of the Election Ordinance. (Emphasis added). In addition, it is unclear from the argument, the resolutions, or the petition if application by the Plaintiffs to register to vote was made within the 60 day requirement.

Therefore, while the Plaintiffs do have an avenue for registration available to them, it appears the petition to the Council may be untimely, it was heard only 18 days before the 2003 general election leaving insufficient time for the Plaintiffs to qualify for registration for this election.

Plaintiffs assert they are not attempting to stop the elections but want the Plaintiffs to have the right to vote. In that regard until the action of the Council is final this action is premature. Contrary to their argument the Plaintiffs and other members are not disenfranchised of their free speech right and their right to vote. By filing this petition they are asserting those rights.

Plaintiffs allege they have approached District Councils and have been dismissed because they are not able to provide proof sufficient contacts with that District to be eligible to vote in that particular District. Plaintiffs state that each District has their own criteria in making this determination and do not have consistent criteria that any of the Plaintiffs are able to satisfy. Much as the United States is divided into individual states each state legislates its own voter registration requirement, each district of this Nation asserts that same right.

Plaintiffs argue that the Council has made a decision and this will cause the Plaintiffs and others not to be able to vote in the upcoming election. By this action the Council has taken power away from the Court as described above. Additionally, that this Court must see the importance of this issue and not allow the Council to take away the individual's fundamental right (to vote), a right granted by the Constitution. But by creating this process the Council has taken into consideration the Plaintiffs' application to register.

Defendants counter that Plaintiffs are indeed attempting to stop the election. Plaintiffs request relief to postpone the election and establish the Plaintiffs' fundamental right to vote. In the *Garcia* matter, the Court outlined the voter application requirement that a member must provide

evidence of their historical ties to a particular district in which that member wishes to be registered to vote.

Defendants argue the harm to the remaining voters is greater than the benefit to the Plaintiffs. Further, the Plaintiffs have not been denied their right to register to vote and should not be treated differently than other voters who have been required to meet the same standards. Here the Court agrees

Thus the Court concludes that the Council has, pursuant to the vote registration requirement, Ord.03-86, Article III, requested additional information be provided by the Plaintiffs and therefore; the Plaintiffs have not exhausted their administrative remedies and this matter is prematurely before the Court.

IT IS THE ORDER of the Court that Plaintiffs have not met their burden of proof as required by Rule 65, Arizona Rules of Civil Procedure and denies the Plaintiffs' Emergency Restraining Order and the Plaintiffs' Complaint for Declaratory Injunctive Relief is dismissed.

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

In the Matter of Joe L. MIGUEL, Decedent.

04-PI-9723

Decided April 2, 2004.

Tohono O'odham Advocate Program by Fred Lomayesva, Counsel for Petitioners.
Renay Peters, Counsel for Respondent.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Judiciary Adult Civil Division for hearing regarding a **Petition for Injunctive Relief**.

Present: Petitioners, Layne Miguel, Amelia Miguel; Counsel for Petitioners, Fred Lomayesva, Tohono O'odham Advocate Program; Respondents, Donna Jackson, Jeremy Miguel, Jason Miguel; Counsel for Respondent, Renay Peters.

The Court having heard the testimony of the parties **FINDS**:

1) This Court has jurisdiction over the parties, the Petitioners are members of the Tohono O'odham Nation, the Decedent was an enrolled member of the Tohono O'odham Nation, the

Respondents submit to the jurisdiction of this Court for purposes of this hearing. All parties have been given the opportunity to be heard.

2) That the relationship between the Decedent and the Respondent Jackson was not a legal marriage pursuant to Chapter 3, Section 4 of the Tohono O'odham Civil Code

3) The Decedent being an enrolled member of the Tohono O'odham Nation is found to domiciled within the Tohono O'odham Nation as defined in Chapter 1 Section 1-101 (c) (4) of the Tohono O'odham Civil Code.

4) That there is no dispute regarding the Decedent's wishes. The custom of the Tohono O'odham Nation is to follow and honor the wishes of the Decedent.

THEREFORE IT IS ORDERED that the Court declares that statements made by a member of the Tohono O'odham Nation regarding their wishes of where they want to buried to be O'odham common law.

IT IS FURTHER ORDERED that the Petition for Injunctive Relief is granted.

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