TOHONO O'ODHAM REPORTS

VOLUME 3, Edition 3: 2005-2013

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 TO FIRST EDITION

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

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

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

November 1, 2011

Teresa Donahue
Chief Judge

TOHONO O'ODHAM REPORTS
VOLUME 3, Edition 3: 2005 to 2013

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Decided January 4, 2005.

Before Judge Robert Hershey.

Holding: Dismissed with prejudice upon stipulation by the parties.

TOHONO O'ODHAM COURT OF APPEALS

C. V. K. a.k.a. C. O., Appellant,
v.
N. K., Sr., Appellee.

Case No. CTA-0081
(Ref. Case No: 96-D-6497)

Decided April 7, 2005.

Before Judges Roy A. Mendoza, Linda Carlos, and Teresa Donahue.

This is an Appeal arising from a judgment of the Tohono O'odham Tribal Court Children's Civil Division modifying an award of custody from the Appellant/mother C. V. K., a.k.a. C. O. to the Appellee/father N. K., Sr., and granting him legal custody of children R. K., G. K., and S. K. with reasonable visitation rights lodged in the Appellant/mother. The Tohono O'odham Court of Appeals, sitting en banc, has reviewed the Trial Court Record and Orders the Appeal Dismissed.

The original Order dissolving the marriage of the parties on October 20, 1997 allowed the children to remain with the Appellant/mother awarding reasonable visitation to the father/Appellee and required him to pay child support. On May 14, 2002 the Petition for modification of child custody was filed alleged a change of circumstances charging that Appellant/mother with neglecting her responsibilities as a mother.

On March 25, 2003 a hearing before the trial Court was held on the modification of child custody with both Parties represented by Attorneys. The Trial Court found from the testimony

compelling reasons to modify the custody decree supported by Child Welfare Services recommendation that they remain with their Appellee/father based upon past experiences they had with the Appellant/mother and so ordered the modification with regular visitation granted to the Appellant/mother.

On May 20, 2003 the Order Modifying Legal Custody in favor of Appellee/father issued by the Trial Court was filed. On June 19th 2003 Attorney David K. Kovalik who had been Attorney of record for Appellant/mother throughout the proceeding filed a timely "Notice of Appeal pursuant to the Arizona Rules of Civil Procedure" in the Trial Court before he disengaged himself from the case by declaring "Counsel will not represent the Petitioner on Appeal." A Notice of Completion of Record on Appeal was filed on February 8, 2005 and a Certification of Accuracy of the record on Appeal was filed February 12, 2005.

A Review of the record of proceedings by this Tribunal requires a Dismissal of this Appeal. The Notice of Appeal filed by Appellant does not meet the requirements of Rule 12 of the Tohono O'odham Court Rules of Appellate Procedures, effective April 28, 2003. Rule 12(d) states:

> "the notice of appeal shall, at a minimum, include:
> (1) the names, addresses, and telephone numbers of the parties taking the appeal and their counsel……
> (2) A concise statement of the adverse ruling, alleged errors or reasons for reversal made by the lower court.
> (3) The nature of the relief being sought.

Appellant's Notice of Appeal fails to address (2) and (3) above which is the essence of any appeal. Furthermore, Appellant relies on the Arizona Rules of Civil Procedure without any detail as to which Rules are applicable, if any. Since this Court has its own Court approved Appellate Rules which govern, we note that even Rule 8 of the Arizona Rules of Civil Appellate Procedure can require more. Rule 8 (a) states:

> "Failure of an Appellant to take any step other than the timely filing of a notice of appeal, does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which MAY INCLUDE DISMISSAL OF THE APPEAL."

It is the Order of this Court that the Appeal is Dismissed and the prior ruling of the Tribal Trial Court is AFFIRMED.

TOHONO O'ODHAM COURT OF APPEALS

Shirley MANUEL, Appellant,
v.
TOHONO O'ODHAM NATION.

Case No. CTA-0080
(Ref. Case No: CR03-2559-02; *et. al.)*

Decided April 8, 2005.

John Neis, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor by George Traviolia for Appellee.

Before Judges Violet Lui-Frank, Rose Johnson Antone, and Rachel Frazier Strachan.

The parties submitted the Joint Memorandum in Support of Settlement on January 11, 2005.

The parties argue that the Court of Appeals has the authority to approve the proposed settlement under Rule 28(a) and Rule 31(a) of the Tohono O'odham Rules of Appellate Procedure. The Court disagrees with the parties that the proposed settlement is allowed under the Rules of Appellate Procedure. This is a matter of first impression, and the Court will not accept the settlement.

The Court agrees that there are significant problems with the record, particularly the deplorable quality of the audio recording. The problem is such that the defendant is, indeed, denied due process in that she is unable to review and identify the appealable issues, if any, that may have arisen during the course of the trial, including adequacy of legal representation. The record does show that trial defense counsel missed the deadline for the pretrial motion to suppress the defendant's confession, and the Court agrees that this is a serious cause for concern.

On the issue of whether the defendant knew that her legal counsel was not a state licensed attorney, the Court is not convinced that the defendant had no knowledge that Faithe Seota was not a state licensed attorney. Ms. Seota has been in the Tohono O'odham Nation a long time as a practicing advocate. The real issue is that the defendant now believes that she should not have retained Ms. Seota to represent her, given the trial result.

Based upon the foregoing, we find that the defendant's due process rights are denied based upon the inadequate record of the proceedings below, impeding her ability to review and identify legitimate issues for appeal. There is good cause to vacate the judgment below and remand for a new trial.

IT IS THEREFORE ORDERED THAT the decision below is vacated and the case is remanded to the trial court for further proceedings consistent with this Order.

TOHONO O'ODHAM COURT OF APPEALS

S. G., Appellant/Cross-appellee,
v.
J. G., Appellee/Cross-appellant.

Case No. CTA-0033 & CTA-0034
(Ref. Case No: 91-TPR-2078 & 90-D-4900)

Decided June 3, 2005.

Before Judge Violet Lui-Frank.

THE COURT having reviewed the Stipulation between J. G., and S. G., by and through their respective counsel, and good cause appearing;

IT IS HEREBY ORDERED:

1. That Appellant/Cross-Appellee, S. G.'s appeal regarding her opposition to J. G.'s termination of parental rights be vacated and that the termination of parental rights, entered in this Court's decision in 91-TPR-2078, remain in full force and effect.

2. That Appellee/Cross-Appellant, J. G.'s appeal regarding his request to terminate child support effective with the father's termination of parental rights is granted and that no child support is due and owing after October 3, 1991, the termination date, and any child support already received by the mother after that date shall be deemed her property and shall not be repaid to father.

TOHONO O'ODHAM COURT OF APPEALS

Delbert HENDRICKS, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0063
(Ref. Case No: CR08-1963-97)

Decided June 14, 2005.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided July 20, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The Court finds itself in the awkward position of having Rules of Appellate Procedures that are clear, but confronting the fact that the appeal has been pending since 1998, through no fault of the appellant or the appellee, specifically the Tohono O'odham Office of the Prosecutor; the delay has been due to turnover in the appellate panels, and lack of coordination to process the appeals; fairness requires that this Court allow the defendant time to file the brief, especially because he now has legal counsel to assist him. This case shall not be taken as precedent for allowing an appellant more time to file an opening brief merely because the appellant does not have counsel.

IT IS ORDERED THAT appellant John Narcho shall file his brief on appeal within 30 days of receipt of this Order by his counsel, David M. Juarez. All parties shall comply strictly with the Tohono O'odham Rules of Appellate Procedure. Failure to file the appellant's brief in a timely manner shall result in a dismissal of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Idaleen REYES for Ge'e Oidag Community, Appellant,
v.
Julius ANGIANO and FOUR WINDS TOWING, Appellee.

Case No. CTA-0083
(Ref. Case No. 04-TRO-9838)

Decided August 9, 2005.

Before Judges Linda Parley, Roy A. Mendoza, and Rose Johnson Antone.

This is an appeal arising from a judgment of the Civil Division of the Tohono O'odham Judiciary, Dismissing Appellant's Request for a Temporary Restraining Order and Injunctive Relief against Julius Angiano and Four Winds Towing.

First, the Court finds that the Notice of Appeal was timely filed.

Second, after a full review of the record on appeal, the Court, sitting en banc, affirms the trial court's dismissal of the Petition for a Preliminary Injunction. The Court also finds that the policy decisions required to address and resolve the issues presented, concerning boundary lines, land assignments and environmental issues, are not within the authority of the trial court to decide but lie with the affected Districts and its communities, and the Legislative and Executive branches of the Tohono O'odham Nation (Nation) to determine.

Issues regarding land assignments have been presented to the Nation's court and the court has ruled that the issue of land assignments is a matter not to be decided by the court. *Big Fields Community vs. Thomas Johnson*, 2 TOR3d 68 (Trial Ct., Jan. 22, 2002). See also Article IX, Section 5 of the Nation's Constitution.

The Nation's Legislative Council by Article VI, Section 1 (i)(2) is empowered "to manage, protect, preserve and regulate the use of the …. land …. and natural resources (including surface and ground waters) of the Tohono O'odham Nation".

Therefore, in the Court's read of the Nation's Constitution, this court and the Nation's trial court lack jurisdiction to decide the issues raised in this appeal.

We affirm the trial court's order.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided September 20, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The appellant filed a motion on August 25, 2005 for sixty days more to file the opening brief in this appeal. The appellee objected to the motion.

The opening brief was due thirty days from the date that the appellant was served on December 17, 2004 the Order advising that the appeal was accepted and directing the parties to proceed pursuant to the Tohono O'odham Rules of Appellate Procedure, and specifically referring to Rule 26 for the filing of briefs. The appellant had notice as of December 17, 2005 that the opening brief was due thirty days after the receipt of the Order. He did not file anything. The Court issued a followup Order on April 1, 2005 directing the appellant to show cause why the appeal should not be dismissed by April 22, 2005. The appellant timely filed the Statement of Reasons / Motion for Extension of Time. The appellee objected to the reasons as justification and moved to dismiss the appeal.

The Court finds that the reasons for a further extension of time do not support granting another significant period for filing of the opening brief. The time for decision on these matters has in effect given appellant time to prepare for the appeal.

IT IS ORDERED THAT a sixty day extension of time to file the brief on appeal is denied; appellant John Narcho shall file his brief on appeal within three (3) days of receipt of this Order by his counsel, David M. Juarez. Failure to file the appellant's brief as ordered herein shall result in a dismissal of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0074
(Ref. Case No. CR11-2595/2597-97)

Decided November 1, 2005.

David Juarez, Counsel for Appellant.
Tohono O'odham Office of the Prosecutor for Appellee.

Before Judges Robert Hershey, Betsy Norris, and Violet Lui-Frank.

The appellant's legal counsel received this Court's Order of September 21, 2005, denying the extension of time to file the opening brief and requiring the filing of the brief within three days of receipt of the September 21, 2005 Order at the legal counsel's office. The Post Office verified that the certified letter containing the September 21, 2005 Order was delivered to the appellant's counsel's office on October 1, 2005, as confirmed by the Appeals Clerk by telephone. Allowing for mail delivery the appellant's brief was due by or before October 10, 2005. The appellant did not file his opening brief. Pursuant to Rule 26(f), the Court finds good cause to grant the appellee's Motion to Dismiss Appeal, filed April 29, 2005.

IT IS ORDERED THAT the appeal filed herein is dismissed for failure to timely file the opening brief. The judgment below is still effective. The case is remanded to the Trial Court for any matter pending herein.

TOHONO O'ODHAM COURT OF APPEALS

Christopher PRESTON, Appellant,
v.
Andrea PRESTON, Appellee.

Case No. CTA-0085
(Ref. Case No. 05-D-10112)

Decided March 16, 2006.

Tohono O'odham Advocate Program by Sarah Michele Martin for Appellant.

Faithe C. Seota, Counsel for Appellee.

Before Judges Teresa Donahue, Linda Parley, and Roy Mendoza.

The Court of Appeals, *en banc*, having reviewed the Record on Appeal in this matter finds a simultaneous filing by Petitioner/Appellant of a timely Motion for Reconsideration and Notice of Appeal which the Court recognizes pursuant to Rule 8 of the Tohono O'odham Nation Court, Rules of Appellate Procedure and therefore remands the case back to the Trial Court for further consideration and ruling.

TOHONO O'ODHAM COURT OF APPEALS

Ina Jean DENNY, Appellant,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Appellees.

Case No. CTA-0087
(Ref. Case No. 04-PT-9678)

Decided May 8, 2006.

Before Judges Robert Williams, Linda Parley, and Roy A. Mendoza.

The Court of Appeals, sitting en banc, finds it has jurisdiction over this matter and accepts this Appeal pursuant to Rule 13(a) of the Tohono O'odham Court Rules of Appellate Procedure.

Counsel for the Appellee filed a Motion for Dismissal of Appeal on March 25, 2006. The Court finds that the assignment of Judges to the Appellate Panel on March 16, 2006 did not constitute acceptance of the Appeal and thus the Motion for Dismissal of the Appeal is denied.

The Appeal having been accepted by the Tohono O'odham Nation Court of Appeals, the Appellant has 30 days to file a written brief or statement of law in support of the appeal pursuant to Rule 26(a) of the Tohono O'odham Court Rules of Appellate Procedure.

TOHONO O'ODHAM COURT OF APPEALS

Sidney GARCIA, Appellant,
v.
Bernadette GARCIA, Appellee.

Case No. CTA-0040
(Ref. Case No: 1992-4638-E)

Decided August 17, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ina Jean DENNY, Appellant,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Appellees.

Case No. CTA-0087
(Ref. Case No. 04-PT-9678)

Decided September 12, 2006.

Before Judges Robert Williams, Linda Parley, and Roy A. Mendoza.

The Court of Appeals, sitting en banc, finds it has jurisdiction over this matter and accepts this Appeal pursuant to Rule 13 (a) of the Tohono O'odham Court Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellant filed her Complaint based on an accident that occurred, on or about March 16, 2002. Trial was scheduled for January 19, 2006. A pretrial conference was held on January 18. On January 19, 2006, Appellant filed a Demand for the Recusal of the trial Judge Violet Lui-Frank. The Motion was heard by the Honorable Rose Johnson Antone and denied. Appellant failed to appear at the time of trial, and Appellees subsequently moved the court for an Order of Dismissal for failure to prosecute. The court granted Appellees' Motion and the matter was dismissed. Appellant filed her appeal.

ANALYSIS

The Appellate Court finds only two discernible issues that Appellant raises on Appeal. First, failure of the trial court to wholesaledly allow the admission of both Tribal and State Police reports as her case in total. Federal Rule of Evidence 801, prohibits the introduction of hearsay as evidence. Hearsay is defined as follows:

> "Hearsay is a statement, other that one made by the declarant while testifying at the Trial or Hearing, offered in evidence to prove the truth of the matter asserted."

The Trial Court did not err in keeping both Police reports out of evidence.

Next, the Appellant contends that the trial court's dismissal of her case was an abuse of discretion. The facts in the record show otherwise. The trial court went to great lengths to accommodate the Appellant on several occasions including the introduction of another trial court judge to hear her request for removal of the sitting judge. The Court finds that Appellant herself failed to comply with Court Rules of Procedure and Evidence in the prosecution of her claim and at the last moment refused to participate at all. The trial court did as any other Court would do and dismissed the case. The trial court did not abuse its discretion.

Based upon the above, the appellate court dismisses the appeal and affirms the trial court dismissal of appellants' case.

TOHONO O'ODHAM COURT OF APPEALS

Clement ANTONIO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0059
(Ref. Case No: CR04-655-97)

Decided December 21, 2006.

Before Judge Betsy Norris.

Holding: Dismissed upon Appellant's notification.

TOHONO O'ODHAM COURT OF APPEALS

PISINEMO COMMUNITY / Patricia CRUZ, Appellants,
v.
Gloria ANTONE, Appellee.

Case No. CTA-0072
(Ref. Case No: 98-TRO-7220)

Decided December 22, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ivan JOHNSON and Harry JOHNSON, Appellants,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0038 & CTA-0039
(Ref. Case No: CR03-571-93; CR03-405-93; CR03-572/742-93)

Decided December 29, 2006.

Before Judge Violet Lui-Frank.

Holding: Dismissed due to Appellants' abandonment of the appeal.

TOHONO O'ODHAM COURT OF APPEALS

Fernando OCHOA (Rachel ROSS, Real Party in Interest), Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0079
(Ref. Case No: CR12-3607-3611-02)

Decided February 28, 2007.

Before Judges Rachel Strachan, Roy A. Mendoza, and Robert Hershey.

Holding: Remanded for a hearing *de novo* due to an inadequate record.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0089
(Ref. Case No: CR04-810-812-05)

Decided September 11, 2007.

Donna Yellowhair, Counsel for Appellant.
Tohono O'odham Prosecutor's Office for Appellee.

Before Interim Chief Judge Linda Parley and Judges Violet Lui-Frank and Rachel F. Strachan.

The Appellant, through legal counsel, Donna Yellowhair, appealed the Appellant's conviction following his acceptance of a plea agreement on September 28, 2005for Misuse of a Weapon and Threatening. The Appellant was sentenced on both charges. On, October 31, 2005, the Appellant filed a Notice of Appeal with the Tribal Court of Appeals.

Rule 12(a) and (c) of the Tohono O'odham Court Rules of Appellate Procedures state,

> "An appeal shall be taken by filing a notice of appeal with the lower court within thirty (30) days of entry of judgment by the same court…". Rule 12(a)
>
> "Failure to file a timely notice of appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice is filed after the date set by law…". Rule 12(c).

Appellant entered into a plea agreement with the Nation on September 28, 2005 for Misuse of a Weapon and Threatening. On that same date, the Court entered judgment, sentenced the Appellant and entered an order against him. As stated above, the appellate rules require an appellant to file a Notice of Appeal within thirty (30) days of entry of judgment. Therefore, the Appellant had until October 28, 2005 to file a Notice of Appeal which is thirty days from September 28, 2005, the date the Appellant was sentenced. However, the Appellant's Notice of Appeal was not filed until October 31, 2005, thereby making it untimely. Although the Appellant's Notice of Appeal was dated October 28, 2005 it was not filed with the Tohono O'odham Justice Center until October 31, 2005 as evidenced by the Court stamp.

Based upon the foregoing, the Court finds that the Appellant's Notice of Appeal to the Tohono O'odham Nation Court of Appeals was untimely and there being good cause to dismiss the appeal.

IT IS ORDERED THAT the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Nicholas KUTH-LE, Sr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0075
(Ref. Case No: CR05-3193-3195-97; CR05-1291-97)

Decided January 18, 2008.

Before Judge Linda Parley.

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

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM ELECTION BOARD, Defendant/Appellant,
v.
SAN LUCY DISTRICT, a political Subdivision of the Tohono O'odham Nation,
Plaintiff/Appellee.

Case No. CTA-0090
(Ref. Case No: 2007-10985-C)

Decided May 30, 2008.

Before Interim Chief Judge Linda Parley and Judges Violet Lui-Frank and Rachel F. Strachan.

This Appeal arises from a Judgment and Order of the Tohono O'odham Nation Tribal Court Civil Division issued on October 1, 2007, denying Defendant/Appellant's motion to dismiss for lack of subject matter, failure to join an indispensable party and finding Tohono O'odham Legislative Order 07-199 unconstitutional as it applies to the actions of the San Lucy District in conducting its May 26, 2007 General Election of District council seats and the remedial District Council election held thereafter on June 30, 2007.

The court has received the Defendant/Appellant, Tohono O'odham Election Board's *Notice of Appeal and Request for Record* ("Notice of Appeal") filed on October 29, 2007, the Plaintiff/Appellee, San Lucy District's, *Objection to Notice of Appeal of Non-Final Interlocutory*

Order Filed Well After 15 Day Time Limit filed on November 14, 2007, and the Appellant's *Reply to Appellee's Objection to the Notice of Appeal* filed on November 29, 2007.

The Court of Appeals finds it has subject matter jurisdiction to review this matter. The Court of Appeals has jurisdiction to hear all appeals from the Tohono O'odham Courts. Constitution of the Tohono O'odham, Art. VIII, § 7. The scope of the judicial power to adjudicate is set forth in Art. VIII, Sections 2 and 10 of the Tohono O'odham Constitution.

The first issue that this Court must consider is Plaintiff/Appellee San Lucy District's *Objection to the Notice of Appeal* in which it argues that the Defendant/Appellant's *Notice of Appeal* is not in compliance with the Tohono O'odham Rules of Appellate Procedure [henceforth, the "Appellate Rules"], Rules 14 and 15. Plaintiff/Appellee San Lucy District seeks to have this Court treat Defendant/Appellant's Notice of Appeal as an Appeal of an Interlocutory Order and dismiss for lack of timely filing.

A party may appeal the lower court's decision by filing an appeal. The procedure for filing an appeal depends on whether the trial court order is a final decision. If the trial court order is a final order, then the appellant must file a notice of appeal within thirty days. Appellate Rule 12(a). If the order is not final, then the appellant must follow the procedures governing interlocutory appeals. Appellate Rule 14.

Appellate Rule 6(h), "Definitions," states, "Final judgment' or decision" means a judgment or decision which affects a substantial right leaving nothing open to dispute and which ends the action between the parties in the trial court." In its review of the trial record of the case, the Appellate Court, among other things, notes the following: 1) the lack of a written response to the Verified Complaint by Defendant/Appellant 2) the lack of an evidentiary hearing useful to further established an accurate and factual record of the case and 3) the lack of a final order as requested by the plaintiff/Appellee in its initial complaint regarding a preliminary and permanent injunction, mandamus or declaratory judgment. The October 1, 2007 order addressed the legal issues raised by the Defendant's Motion to Dismiss, but did not dispose of all legal claims at issue in the pending litigation. The Court of Appeals, therefore, finds that the trial court order of October 1, 2007 was not a final order that resolved all remaining legal issues raised by Plaintiff/Appellee's *Verified Complaint* filed on June 26, 2007.

Since a final order has not been issued, the Appellant's filing of its *Notice of Appeal* was premature. The Court of Appeals must next examine if the Plaintiff/Appellee's notice of appeal will stand as an interlocutory appeal.

For an interlocutory appeal, the Appellant must first seek the permission of the trial court within fifteen (15) days of entry of the lower court's order which is the basis of the appeal to file the appeal:

> A request for permission to appeal an action or an order of the lower court which is not a final judgment shall be made by filing a request with the respective lower court within 15 days of the judge signing the Record Entry giving rise to the appeal.

Appellate Rule 14 (a).

In the instant matter, the case record does not provide any evidence that Appellant sought permission from the trial court to file an interlocutory appeal. Furthermore, the Appellant's filing of its Notice of Appeal was untimely since the statute merely provides 15 days for the appellant to request permission to file for an interlocutory appeal. The Appellant's Notice of Appeal was filed on October 29, 2007, which was 27 days after the entry of the trial court order. Thus, the Defendant/Appellant's filing of its Notice of Appeal exceeded the statutorily prescribed time limit of 15 days.

According to Appellate Rule 12 (c), "failure to file a timely notice of appeal is jurisdictional and the appellate court *shall* dismiss the appeal if the notice is filed after the date set by law." (Emphasis Added). Because the Defendant/Appellant's Notice of Appeal is untimely, it must be dismissed.

Therefore, based upon the foregoing, the Court of Appeals, en banc, finds (1) the trial court did not resolve all issues in its October 1, 2007 order and (2) dismisses the Appellant's Notice of Appeal and Request for Record as it is not properly before the Court of Appeals as an interlocutory appeal; and (3) remands the case back to the trial court for final adjudication of all remaining matters consistent with this Order.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
J. G., Appellee.

Case No. CTA-0093
(Ref. Case No: 97-TH-036; 97-DC-037)

Decided August 28, 2008.

Tohono O'odham Prosecutor's Office by George Traviolia for Appellant.
Tohono O'odham Advocate Program by Dwight Francisco for Appellee.

Before Judges Rose Johnson Antone, Teresa Donahue, and Roy A. Mendoza.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Enos FRANCISCO, Jr.,[1] Appellant,
v.
Harriet TORO, Chairperson Legislative Council and All Members of the LEGISLATIVE COUNCIL, Appellees.

Case No. CTA-0020
(Ref. Case No: 89-C-4537)

Decided September 4, 2008.

Before Judges Rose Johnson Antone, Violet Lui-Frank, and Rachel Frazier Strachan.

Holding: Dismissed upon Appellant's motion filed March 15, 1990.

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

TOHONO O'ODHAM COURT OF APPEALS

George IGNACIO, Appellant,
v.
TERO COMMISSION, Appellee.

Case No. CTA-0024
(Ref. Case No: 89-C-4595)

Decided September 4, 2008.

Before Judges Rose Johnson Antone, Roy Mendoza, and Rachel Frazier Strachan.

The Tohono O'odham Court of Appeals has jurisdiction over this matter.

On August 28, 1989, the Appellant timely filed Notice of Appeal. The trial court record was not certified.

The Appellee filed a Motion to Dismiss on January 31, 1991. On June 28, 1991, the Appellee filed a second Motion to Dismiss. In each Motion to Dismiss, the Appellee cited Arizona Rules of Civil Appellate Procedures Rule 12 (c).[1] The Appellee contends in each Motion to Dismiss that the Appellant failed to comply with the rule by transmitting the trial court record to the appellate court.

The Court finds the Appellant did not comply with Rule 12 (c). Thus, the trial court record is not complete.

Therefore, IT IS ORDERED the matter is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Alvin Virgil LEWIS, Appellant,
v.
TOHONO O'ODHAM ELECTION BOARD, Appellee.

Case No. CTA-0029
(Ref. Case No: 91-CSRP-5209)

Decided September 4, 2008

Before Judges Robert Hershey, Rachel Frazier Strachan, and Roy Mendoza.

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

[1] Rule 12 (c) is currently known as Rule 12 (d).

TOHONO O'ODHAM COURT OF APPEALS

Lawrence GARCIA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0032
(Ref. Case No: TR05-530-91)

Decided September 4, 2008.

Before Judges Robert A. Hershey, Teresa Donahue, and Roy A. Mendoza.

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

TOHONO O'ODHAM COURT OF APPEALS

Danny GALVEZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0043
(Ref. Case No: TR07-504/505-93)

Decided September 4, 2008

Before Judges Teresa Donahue, Roy A. Mendoza, and Rachel Frazier Strachan.

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

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM HOUSING AUTHORITY, Appellant,
v.
Dorothy ENOS, Appellee

Case No. CTA-0051
(Ref. Case No: 94-TRO-6004)

Decided September 4, 2008.

Before Judges Teresa Donahue, Robert Hershey, and Rachel Strachan.

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

TOHONO O'ODHAM COURT OF APPEALS

Eleanor CASTILLO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0056
(Ref. Case No: CR12-2834-2836-94)

Decided September 4, 2008.

Before Judges Teresa Donahue, Robert A. Hershey, and Rachel Strachan.

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

TOHONO O'ODHAM COURT OF APPEALS

Wayne EVANS, Appellant,
v.
TOHONO O'ODHAM NATION and Edward D. MANUEL, Appellee.

Case No. CTA-0073
(Ref. Case No: 96-C-6751)

Decided September 4, 2008.

Before Judges Roy A. Mendoza, Rose Johnson Antone, and Teresa Donahue.

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

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM ADVOCATE PROGRAM, a department of the Executive Branch of the Tohono O'odham Nation's Government; Sarah Michelle MARTIN and Frederick K. LOMAYESVA in their official capacity as Chief and Deputy Chief Advocates, and the TOHONO O'ODHAM ADVOCATES employed with the Advocate Program, Real Parties in interest, Plaintiffs/Appellants,

v.

The Honorable Betsy NORRIS, in her official capacity as Chief Judge of the Tohono O'odham Judicial Court, a division of the Judicial Branch of Government of the Tohono O'odham Nation; the Honorable Violet LUI-FRANK, in her official capacity as Deputy Chief Judge; and Traci HOBSON, in her official capacity as Judicial Court Solicitor, Defendants/Appellees.

Case No. CTA-0082
(Ref. Case No: 05-PVC-10069)

Decided September 4, 2008.

Before Judges Roy A. Mendoza, Rachel F. Strachan, and Robert A. Hershey.

The trial court in this case entered its Final Order on April 25, 2005. On May 19, 2005 the Plaintiffs/Appellants filed their Notice of Appeal pursuant to Rule 12, Tohono O'odham Rules of Appellate Procedure. On May 27, 2005 the trial Judge signed the certification of trial record for appeal which was filed June 1, 2005. The Defendants/Appellees did not file a responsive brief. Subsequently, there continued to be filings by both parties at the trial court level.

On March 27, 2008, a trial/lower Court Judge Ordered the Dismissal of the Appeal on Stipulation For Withdrawal Of The Appeal And Order for Resolution Of The Case By Mutual Agreement filed January 31, 2007. The Tohono O'odham Nation Advocate Program gave assurance that a Notice of Errata Correcting the omission of the appellate case number would be filed. However, a Notice of Errata was not filed. On June 19, 2008, the same trial/lower Court Judge vacated the prior Order of Dismissal recognizing that jurisdiction lay with the Appellate Court to determine all matters once the Notice of Appeal was filed, a fact that was not considered by counsel for the Parties.. On June 19, 2008, a three member Appellate Court was assigned to the case.

The Appellate Court recognizes its sole jurisdiction and authority to review the matter. Rule 3, Tohono O'odham Court Rule of Appellate Procedure. Further, the Court Finds as a matter of fact and law that the Parties by prior written stipulated agreement found on January 31, 2007, had by clear intent abandoned the appeal.

It is therefore the Order of the Court, seated *en banc*, that pursuant to Rule 31(a), Tohono O'odham Rule of Appellate Procedure the Appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM DEPARTMENT OF HEALTH AND HUMAN SERVICES, Appellant,
v.
H. J. A., Appellee.

Case No. CTA-0095
(Ref. Case No. 05-UPM-179; 2006-053-UDPLC; 2007-3588-CINC)

Decided September 4, 2008.

Before Judges Teresa Donahue, Judge Rachel Frazier Strachan, and Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0096
(Ref. Case No: CR-05-711/712/717/718-94)

Decided September 4, 2008

Before Judges Teresa Donahue, Roy Mendoza, and Violet Lui-Frank.

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

TOHONO O'ODHAM COURT OF APPEALS

Elvira GOMEZ, Appellant,
v.
Richard SAUNDERS, Appellee.

Case No. CTA-0047
(Ref. Case No: 94-CS-5849)

Decided October 9, 2008.

Before Judges Robert Hershey, Rachel Strachan, and Roy A. Mendoza.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

In the Matter of the Estate of Eloisa L. Thomas[1]

Case No. CTA-0097
(Ref. Case No: 96-P-6503)

Decided October 9, 2008

Louis Barassi, Counsel for Appellant.
Tohono O'odham Advocate Program by Cheryl Lopez for Appellees.

Before Judges Robert A. Hershey, Rachel Strachan, and Roy A. Mendoza.

Parties present were Cheryl Lopez from the Tohono O'odham Nation's Advocate Office for Elaine Delahanty and Ronald Thomas, Pro Se. Wilbert Thomas and counsel were not present.

DONE IN OPEN COURT this 9th day of October, 2008, Cheryl Lopez for Elaine Delahanty and Ronald Thomas both motion to dismiss the appeal. The Court of Appeals grants their respective motions and dismisses the above captioned matter pursuant to Rule 31 of the Tohono O'odham Rules of Appellate Procedures.

TOHONO O'ODHAM COURT OF APPEALS

Nancy HUNTER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0098
(Ref. Case No: 2007-03-0650-0652CR)

Decided November 12, 2008

Larry Boswell, Counsel for Appellant
Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellee

Before Judges Robert A. Hershey, Rose Johnson Antone, and Violet Lui-Frank.

Holding: Dismissed upon Appellant's motion.

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[1] *Ed. Note:* Caption corrected.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0092
(Ref. Case No: 2006-01-0876-0878CR)

Decided December 10, 2008.

Before Judges Rose Johnson Antone, Rachel Frazier Strachan, and Violet Lui-Frank.

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

TOHONO O'ODHAM COURT OF APPEALS

Lynn PORTER, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0099
(Ref. Case No: 12-796-82)

Decided December 10, 2008.

Nicholas Lewis, Counsel for Appellant.
Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellee.

Before Judges Roy Mendoza, Violet Lui-Frank, and Rose Johnson Antone.

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

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM HOUSING AUTHORITY, Appellant,
v.
Spencer J. ARNETT and Deborah J. ARNETT, husband and wife doing business as Spencer Arnett Plumbing

Case No. CTA-0084
(Ref. Case No: 97-C-6962)

Decided December 29, 2008.

Before Judges Roy A. Mendoza, Violet Lui-Frank, and Robert A. Hershey.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

William ANTONIO, Sr., Appellant/Defendant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0057
(Ref. Case No: TR01-865-95; CR10-1808-95)

Decided January 27, 2009.

Before Judges Violet Lui-Frank, Teresa Donahue, and Rachel Frazier Strachan.

This Court issued an order on October 23, 2008 accepting the Appellant, WILLIAM ANTONIO, Sr., appeal and setting a schedule for the parties' briefs to be submitted to the court.

The Court's brief schedule required the Appellant to file his opening brief by November 24, 2008. To date, the Appellant has not filed an opening brief.

THEREFORE based upon the foregoing,

IT IS ORDERED that the Appellant's appeal is dismissed for his failure to file an opening brief.

TOHONO O'ODHAM COURT OF APPEALS

V. R. P., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0052
(Ref. Case No. 96-DC-116; 96-AT-117; 96-CS-118; 96-UA-119; 96-AB-120)

Decided February 9, 2009.

Before Judges Roy Mendoza, Violet Lui-Frank, and Rachel Strachan

Holding: Dismissed upon the parties' stipulated motion.

TOHONO O'ODHAM COURT OF APPEALS

Joseph WICHAPA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0057
(Ref. Case No: 2008-1298-1305CR; 2008-1381-1385CR)

Decided February 10, 2009.

Before Judges Rachel Frazier Strachan, Robert Hershey, and Rose Johnson Antone.

This Court is in receipt of the Appellee's Motion to Dismiss Pursuant to Rule 12 (c) requesting that Appellant's appeal be dismissed.

The Appellee contends that Appellant's appeal is untimely.

The Court finds that the Appellant was sentenced by the trial court on September 29, 2008. Appellant filed a Request to Speak with the Court form on December 8, 2008 requesting to appeal these matters.

The Court finds that the Rules of Appellate Procedures, Rule 12 (a), requires that an appeal be filed within 30 days of the entry of judgment by the lower court. Rule 12 (b) states that failure to file a timely notice of appeal is jurisdictional and the appellate court shall dismiss the appeal if the notice is filed after the date set by law.

IT IS ORDERED that the Defendant's request to appeal these matters is untimely; therefore the Appellee's Motion to Dismiss Pursuant to Rule 12 (c) is granted.

TOHONO O'ODHAM COURT OF APPEALS

Carolyn ALVAREZ, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0101
(Ref. Case No: CR-04-571-89)

Decided March 11, 2009.

Before Judges Violet Lui-Frank, Rose Johnson Antone, and Teresa Donahue.

Holding: Dismissed upon Appellant's motion.

TOHONO O'ODHAM COURT OF APPEALS

Ernest MORISTO, Appellant/Defendant,
v.
TOHONO O'ODHAM NATION, Appellee/Plaintiff.

Case No. CTA-0091
(Ref. Case No: TR01-865-95; CR10-1808-95)

Decided June 10, 2009.

Before Judges Violet Lui-Frank, Robert Hershey, and Rachel Frazier Strachan.

The Court has received and considered the Appellant's, ERNEST MORISTO, *Joint Rule 36 Motion to Dismiss* ("Motion to Dismiss") filed on May 19, 2009. According to the Motion to Dismiss the parties are seeking dismissal of the Appellant's appeal.

The Appellant's Motion to Dismiss states that the Appellant and Appellee have reached a stipulated agreement which would vacate the Appellant's conviction of the Criminal Trespass charge and which would permit the Appellant to be resentenced on the Resisting Arrest charged.

Based upon the foregoing and good cause appearing,

IT IS ORDERED that the Appellant's appeal is dismissed. Thus, no further action is required by the parties.

TOHONO O'ODHAM COURT OF APPEALS

Alexander BLAINE, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0094
(Ref. Case No: CR05-2054-2056-98)

Decided September 14, 2009.

Before Judges Violet Lui-Frank, Roy A. Mendoza, and Robert A. Hershey.

The Court of Appeals, en banc, having heard oral arguments and reviewed the written briefs submitted by the parties, pursuant to Rule 31 (a) of the Tohono O'odham Rules of Appellate Procedure, ORDERS that the appeal is denied.

Further, the matter is remanded back to the Trial Court for proceedings consistent with this decision.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM COMMUNITY COLLEGE, Appellant,
v.
TOHONO O'ODHAM TRIBAL EMPLOYMENT RIGHTS OFFICE, TOHONO O'ODHAM TRIBAL EMPLOYMENT RIGHTS OFFICE MISSION, and Marlos NORRIS-ENOS, as Director/Administrator of the Tohono O'odham Tribal Employment Rights Office, Appellee.

Case No. CTA-0103

Decided September 30, 2009.

Before Judges Violet Lui-Frank, Rachel Frazier Strachan, and Robert A. Hershey.

This matter comes before the Court of Appeals as a Notice of Appeal and Request for Record filed by the appellant on June 22, 2009. The appeal is from the Decision and Order, No. 01-09, of the Tohono O'odham Employment Rights Commission, dated 5-18-09.

Ordinance No. 01-85 is the duly enacted law providing for administrative proceedings before the Tohono O'odham Employment Rights Commission. Under this Ordinance, appeals from any final order of the Commission may be taken to the "Tribal Court". Ord. No. 01-85, section 15 (G).

The Constitution of the Tohono O'odham Nation, Article VIII, section 7, provides as follows: *The appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham Courts. Decisions of the court of appeals on all matters within its appellate jurisdiction shall be final*.

We find that the Court of Appeals lacks jurisdiction over direct appeals from the decisions of the Tohono O'odham Employment Rights Commission. The Constitution of the Tohono O'odham Nation allows the Court of Appeals"…to hear all appeals from the Tohono O'odham Courts." The appeal in this case must be taken to the Trial Court. The Rules of Appellate Procedure, Chapter II, Judicial Review of Administrative Decisions, addresses the process for appeals such as the one taken now.

IT IS ORDERED dismissing the appeal in the Court of Appeals. The Clerk shall process the appeal in the Trial court under the Rules of Appellate Procedure, Chapter II, Judicial Review of Administrative Decisions.

TOHONO O'ODHAM COURT OF APPEALS

REED'S RENTAL, Plaintiff-Appellant,
v.
Celia NORRIS, Defendant-Appellee.

Case No. CTA-0017
(Ref. Case No: 87-NP-4221)

Decided October 14, 2009.

Westlyn C. Riggs, Attorney for Appellant.
Papago Legal Services by Kenneth Briggs, Counsel for Appellee.

Before Judge Teresa Donahue.

Holding: Dismissed due to earlier remand to the trial court.

TOHONO O'ODHAM COURT OF APPEALS

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

Case No. CTA-0104
(Ref. Case No: 2009-5284-5285CR)

Decided April 22, 2010.

Before Judges Robert Hershey, Violet Lui-Frank, and Rachel Frazier Strachan.

The Court has received and reviewed the Appellant/Defendant's, STEVEN JOSE, Motion for Expansion Of Time To File Appeal Brief And Request For Trial Record And Transcript ("Motion for Expansion of Time") filed on February 4, 2010. In the Motion for Expansion of Time, the Appellant/Defendant requests this court to afford him additional time to obtain a copy of the trial court record, including transcripts, prior to the Appellant filing his opening brief.

In response to the Appellant's motion, the Appellee/Plaintiff, the Tohono O'odham Nation, filed a Motion to Dismiss Appeal on February 17, 2010. The Appellee/Plaintiff asserts that the Appellant/Defendant's Notice of Appeal was required to be filed by December 2, 2009 since judgment was entered against the Appellant/Defendant on November 2, 2009. The Appellee/Plaintiff claims that since the Appellant/Defendant did not timely file a notice of appeal, the Appellant/Defendant's request is untimely.

The court agrees with the Appellee/Plaintiff that the time to file a notice of appeal is set by law in the Tohono O'odham Court Rules of Appellate Procedure ("Rules of Appellate Procedure"). The Rules of Appellate Procedure require an appellant to file a notice of appeal within 30 days of entry of the judgment. Otherwise, the Appellant/Defendant's appeal must be dismissed. In the instant matter, the Appellant/Defendant was sentenced on November 2, 2009. Thus, his notice of appeal was required to be filed no later than December 2, 2009.

Also, it should be noted that court has considered the Appellant/Defendant's Request to Speak to the Court submitted on November 9, 2009 in which the Appellant/Defendant states that he wished to appeal the guilty verdict entered against him for lack of communication with his legal counsel, David Oliver. The court finds that the Appellant/Defendant's attempt to appeal the matter in his Request to Speak to the Court was insufficient. Pursuant to the Rules of Appellate Procedure, a notice of appeal requires, at a minimum, "a concise statement of the adverse ruling… or errors…" and "the nature of the relief being sought". Rule 12 (d). The Rules of Appellate Procedure require both conditions be met. However, the Appellant/Defendant's Request to speak to the Court does not provide a concise statement of the adverse ruling or alleged errors by the trial court, nor the relief being sought by the Appellant/Defendant. As a result, on November 12, 2009 the trial court issued a Trial Record Entry that explained to the Appellant/Defendant that he must file his appeal by December 2, 2009. Furthermore, the Trial Record entry states that the Appellant/Defendant was given a copy of the Rules of Appellate Procedure.

On December 2, 2009, the Appellant/Defendant filed a Motion to Extend Time for Filing of Appeal in which the Appellant/Defendant requested the court to afford him additional time to "evaluate the grounds and merits of Defendant's Appeal", inter alia. (See page 2, lines 8-9 of Appellant/Defendant's Motion to Extend Time for Filing of Appeal (Motion to Extend Time filed on December 2, 2009). Specifically, in the Motion to Extend Time, the Appellant/Defendant requested an additional thirty (30) days to file a notice of appeal. In addition, the Appellant/Defendant stated, "Should this motion not be granted, please treat this as a filing of appeal." Previously, on November 12, 2009 the trial court judge reminded the Appellant/Defendant that the deadline to file his appeal was December 2, 2009. However, on December 2, 2009 the judge granted the Appellant/Defendant's Motion to Extend Time which extended the deadline to file an appeal to January 4, 2010.

This court finds that the trial court lacked the authority to issue an order regarding the filing of a notice of appeal when such a ruling is inconsistent with the Rules of Appellate Procedure. And as a result, the Appellant/Defendant should not have relied upon the trial court's ruling. Moreover, legal counsel for the Appellant/Defendant in the instant matter represented the Appellant/Defendant before the trial court and thus, should have been fully abreast of any "adverse ruling" or "alleged errors" which occurred before the trial court. Thus, this court finds that the Appellant/Defendant's Notice of Appeal was defective and therefore, his appeal must be dismissed.

The Court also finds that legal counsel has failed to adequately represent the Appellant/Defendant in this matter by familiarizing himself with the Rules of Appellate Procedure.

Based upon the foregoing,

IT IS ORDERED that the Appellant's appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Verlon JOSE, Petitioner,
v.
Harriet TORO, Muriel SEGUNDO, Lucinda DELORES, Lavinda ESPUMA, Marion TORO, Cornelius ANTONE, Lisa ANTONE, Ira CHAVEZ, Sr., Caroldene GARCIA, Cornelia NORIEGA, Devorah GARCIA, Sidney GARCIA, Marie NORRIS, Elaine DELAHANTY, Patricia VICENTI, Georgeann JOHNSON, Kenneth WILLIAMS, Tanya SALVICIO, Roland TORO, Riginald TORO, Hutchie TORO, Caroline TORO, Celia TORO, Kenneth JOSE, Jr., Jule JOSE, Francine JOSE, Arline F. JOSE, Kendall JOSE, all in their official capacities as Council Members of the Chukut Kuk District and Marlakay HENRY, incumbent District Chairwoman of the Chukut Kuk District, Respondents.

Case No. CTA-0108

Decided July 27, 2011.

Before Judges Larry K. Yazzie, Maria Borbon, and Robert A. Hershey.

This matter is before the Nation's Appellate Court for a hearing on a Petition for a Writ of Mandamus. Petitioner is Verlon Jose. According to the Election Board of the Tohono O'odham

Nation and resolution of the Tohono O'odham Legislative Council Mr. Jose is the newly elected Chairman of Chukut Kuk District.[1]

The Appellate Court's jurisdiction is derived by Tohono O'odham Code, Title 12, ELECTIONS, Chapter 1 – UNIFORM ELECTION ORDINANCE, Article XIII, PENAL PROVISIONS, §11 Jurisdiction.[2] Section 11 specifically authorizes this Court to grant "such other relief as is necessary and proper for the enforcement of this ordinance". This Court's jurisdiction is also supported by the Constitution of the Tohono O'odham Nation and the Nation's Court's Rules of Appellate Procedure, Rule 23.[3] The Appellate Court is part of the Judiciary and this is consistent with the provisions of the Constitution that grants the Judiciary the power to interpret, construe and apply the laws of; or applicable to the Tohono O'odham Nation.[4]

Pursuant to Rule 13(a) of the Tohono O'odham Court Rules of Appellate Procedures, the Court accepts the Petition for Writ of Mandamus. Pursuant to Rule 23(c) of the Tohono O'odham Court Rules of Appellate Procedures, the court held an order to Show Cause hearing. The Appellate Court allowed the Tohono O'odham Nation to appear as Amicus Curiae in support of the Petition for Writ of Mandamus. The parties were well represented by their respective counsel.

Verlon Jose seeks to have this Court issue a Writ of Mandamus and to Order respondents who are members of Chukut Kuk District's legislative body certify him the winner of the election held on May 28, 2011 and seat him as that District's Chairman as required by the Election Ordinance of the Tohono O'odham Nation.[5] The respondents' refusal to comply is based on a number of irregularities that occurred during the election, procedures requiring an election

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[1] See Attachment A: Tohono O'odham Nation Certification of Election Results CHAIRMAN AND VICE CHAIRMAN OF THE CHUKUT KUK DISTRICT, signed by members of the Tohono O'odham Nation Election Board, dated 28th Day of May 2011, and SEE Attachment B: Legislative Order No. 11-291 of the Tohono O'odham Nation Legislative Council (judgment in Contest of 2011 General Election for Chukut Kuk District Chairperson and Vice Chairperson).

[2] The Tohono O'odham Courts shall have jurisdiction over all violations of this ordinance no herein specifically reserved by the Tohono O'odham Council and may, in addition to the penalties prescribed herein, grant such other relief as is necessary and proper for the enforcement of this ordinance; including but not limited to injunctive relief against acts in violation of this ordinance.

[3] Constitution of the Tohono O'odham Nation, Article VIII § 10(a), (c) and Rule 23: Writs of mandamus and prohibition; contents of petition; procedure; time limits; denial without action.

[4] See: Constitution of the Tohono O'odham Nation, § 10(a).

[5] See: Title 12 Tohono O'odham Code, Chapter 1, Article VII § 6 N.

contest before the Legislative Council of Tohono O'odham Nation (hereinafter the Nation) in order to stay the mandatory regulatory obligations of the Respondents to certify and seat the Plaintiff, Mr. Verlon Jose.[6] The respondents filed five (5) contest statements[7] and appeared before the Nation's Legislative Council for a consolidated election contest hearings held on June 14-16, 2011.[8] The parties' interest were represented by attorneys, and "were given the opportunity to appear, to make opening statements; to call, question, and cross-examine witnesses; to present evidence; to make objections; to present and argue motions; and to make closing statements" before a vote was taken by the Legislative Council.[9] The Nation's Constitution and the Uniform Election Ordinance provide that judgments of the Legislative Council are deemed final as a matter of law.[10]

The Respondents filed three actions with the Nation's Tribal Court seeking to overturn the election of plaintiff, Verlon Jose, based on constitutional grounds. This Court submits that those actions may continue. Mr. Jose is not a party to that action. The action before this Court solely addresses Mr. Verlon Jose. There is no reason for this Court to believe that the trial court actions will be resolved in the immediate future.

The Respondents' arguments regarding sovereign immunity are misplaced. A petition for Mandamus is not a claim for damages. It is in fact a request for equitable relief. The Tohono O'odham Courts have allowed suits for many years against government officials for prospective relief when the court deemed such officials to be acting outside the bounds of their constitutional authority.[11] The Respondents, by refusing to certify Mr. Jose the winner of the election are acting outside the scope of their authority. In fact, they are mandated by the Nation's Uniform Election

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[6] See: Uniform Election Ordinance, Title 12 Tohono O'odham Code, Chapter 1, Article VII, § 6N, Article VIII § 5, Ordinance No. 03-86.

[7] See: LEGISLATIVE ORDER OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL (Judgment in Contest of 2011 General Election for Chukut Kuk District Council Representatives and Alternatives for the Miguel Community, LEGISLATIVE ORDER NO. 11-216, 16th Day of June, 2011.

[8] SEE: LEGISLATIVE ORDERS OF THE TOHONO O'ODHAM LEGISLATIVE COUNCIL, LEGISLATIVE ORDER NO.s 11-213 through 11-221.

[9] See: *Id.*, at n. 6.

[10] See: Nation's Constitution, Article X, § 7 and Article VIII, § 7, Uniform Election Code.

[11] For example See: Tohono O'odham Advocate Program v. Norris, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005*) appeal dism'd*, 3 TOR3d 21 (Ct.App., Sep. 4, 2008).

Ordinance to issue a Certificate of Election, certifying Mr. Jose the winner as Chair of the Chukut Kuk District. This is not a discretionary duty on the part of Respondents.

In that regard the Respondents reliance on Sears v. Hull is unfounded.[12] This Court takes note that on the issue of Mandamus as a remedy, the Arizona Supreme Court acknowledges an "extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty".[13] The problem this Court needs to resolve is not a question of the Plaintiff's or Respondent's interpretation of the law.

IT IS THEREFORE ORDERED that a Writ of Mandamus issues as follows:

1. Respondents captioned above all in their official capacities as Council Members of the Chukut Kuk District, including incumbent Chairwoman Marlakay Henry are to issue Petitioner, Verlon Jose, a Certificate of Election and to seat him as Chairman of the Chukut Kuk District, and
2. Compliance with this Writ of Mandamus shall be no later than 5:00 p.m. on Thursday, July 28, 2011.

TOHONO O'ODHAM COURT OF APPEALS

Angela ORTIZ and Frances RUIZ, Petitioners,
v.
Charlene MONTANA, *et. al.*, Respondents.

CONSOLIDATED WITH

TOHONO O'ODHAM NATION, Plaintiff,
v.
GU-VO DISTRICT GOVERNING COUNCIL, *et. al.*, Respondents.

Case Nos. CTA-0109
CTA-0110

Decided August 24, 2011.

Before Judges Robert A. Hershey, Larry K. Yazzie, and Violet Lui-Frank.

[12] Sears v. Hull, 192 Ariz 65 (Ariz S. Ct. 1998), 961 P2d 1013 (1998).

[13] *Id*, at p. 1016.

These cases come before the Tohono O'odham Court of Appeals upon Verified Petitions for Extraordinary Relief in the Nature of a Writ of Mandamus, and Stipulated Motion for Consolidation and Order. On August 11, 2011 the Court heard arguments on behalf of all interest parties.

I.

JURISDICTION AND SERVICE OF PROCESS

This Court has jurisdiction to hear the matters before it. *Tohono O'odham Council v. Garcia*, 1 TOR3d 10 (Ct.App., Sep. 14, 1989); Constitution of the Tohono O'odham Nation, Article VIII, Sections 2 and 10. Respondents have consented to the jurisdiction of the court by appearing generally and, in fact, litigating against the Petition for Mandamus, TO Code Title 4, Ch. 1 101(b)(a). Service of process rules are designed to give notice of an impending action and an opportunity to be heard. Petitioners sought to serve members of the Gu-Vo District Governing Council in their *official* capacities. Pursuant to Rule 23 of the Rules of Appellate Procedure, Tohono O'odham Nation, that service must be made within 72 hours after the initial filing of the Petition. Service was refused by Ervina Francisco (at the time the resoluted Vice-Chair of Gu-Vo District) at the District office. Could respondents simply defeat the Petition by refusing to accept process in their *official* capacities for three days even though they have *actual* knowledge of the filed case and thereafter have chosen to participate in the litigation The Nation's suit, and by agreement to consolidate, is against the Gu-Vo District Governing Council and its officials. The District cannot complain of lack of service of process if it, in fact and deed, refuses to accept the suit in these circumstances.

II.

THE ELECTION

Respondents' counsel stated in court that he represents all persons of the Gu-Vo District. But how can that be? At the very least he does not represent Angela Ortiz, Frances Ruiz, and those that voted for them. The District prepared and administered the election. Now the *District* complains that the election it *itself* conducted was unconstitutional and wrong. Here is where the problem facing respondents begins.

Article VII of the Election Code prescribes the duties of the Election Board. By law voters are to indicate their choice of candidates by placing an "X" in the appropriate position. What happens if a person does not favor a particular candidate? Articles III and VII provide the answer, and the Court here works a little backwards. Article VII dictates that sample ballots are

to be widely distributed in order to acquaint voters of the candidates. Respondents present no evidence that this was not done. If the ballot did not reflect itself and choices accurately a challenge could have been made to it *prior* to the election. No one did so. To have more than one choice of candidates, Article III provides the mechanism to certify candidates. Did anyone besides petitioners file timely to declare their candidacy? No. In fact, the incumbent chairperson of the District Council, who desired to oppose petitioners sought an injunction in the lower court to place her name on the ballot. To her misfortune, she did not comply with the election rules and her case for injunctive relief was dismissed.

The Board is charged with rejecting votes if it cannot determine the choice of the voter. Respondents claim that by signing, but not marking, the ballot, over one hundred persons voted *against* petitioners. But *not voting* for someone does not necessarily mean they are voting against them. If more than one set of candidates is running for election, then what is the Board to make of a signed, unmarked for preference, ballot? Did the voter intend to vote against all, some, or express no preference? Why should the Board, and this Court, be charged with determining a voter's silence – and intent thereby – where, by law, there are a series of expressly delineated steps that could have been taken to mitigate the likelihood that this matter would ever have to be brought before a court. No evidence was presented at the hearing that it is the custom of the Tohono O'odham people to vote against a candidate by not marking an "X" by that person's name. Indeed, it seems more likely that it is the custom and practice of the voters of the Nation to choose a candidate by placing an "X" by a person's name, as that practice has been carried out routinely now for several decades. The Court adopts the reasoning in Bennett v. Yoshima, 140 F.3d 1218 (9th Cir. 1998), and will not infer intent to the blank votes argued about in this litigation.

Any voter of the District who is unhappy with the outcome of the election and who submitted a blank ballot could have contested the election to the Board and thereafter the Legislative Council. No one did so. Yet, the District complains that irreparable harm will come to it if the Court grants the requested Writ. But will not even greater harm come its way if the Court does not grant the Writ? The Nation has substantial control over and responsibility for the Gu-Vo District's finances. The Court adopts the Nation's position of its fiduciary obligations in insuring that funds are expended only by authorized officials of the District.

The Gu-Vo District Council may proceed, if it should still desire, with its lower court suit challenging the Legislative Council's constitutional authority to enact certain provisions of the

Uniform Election Ordinance, and to uphold respondents' interpretation thereto. It can make its argument to the trial court that *Juan v. Juan*, 2 TOR3d 62 (Trial Ct., Jan. 27, 2000) *appeal dism'd*, 3 TOR3d 1 (Jan. 4, 2005), should not control the outcome. It could also consider the processes of Recall and Initiative, as provided by law. This Court makes no determination on the propriety or likelihood of success of the three actions posited just above.

Good cause appearing, the Writ is granted. *Jose v. Toro*, 3 TOR3d 31 (Ct.App., Jul. 27, 2011), is controlling. The defendants are ORDERED to fulfill their duty under the Uniform Election Ordinance and to issue Certificates of Election and to seat Angela Ortiz as Chairwoman of the Gu-Vo District and Frances Ruiz as Vice-Chairwoman of the Gu-Vo District on or before August 31st, 2011.

TOHONO O'ODHAM COURT OF APPEALS

Clifford TANNER, Appellant,
v.
TOHONO O'ODHAM GAMING, Appellee.

Case No. CTA-0112

Decided September 16, 2011.

Before Judge Teresa Donahue.

Holding: Case forwarded to the Civil Division of the trial court due to the case being misfiled with the Court of Appeals.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0111
(Ref. Case No: 2009-5284-5285CR)

Decided September 27, 2011.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Strachan.

The Appellee has filed a Motion to Dismiss Appeal on the grounds that the Appellant failed to file his notice of appeal within thirty (30) days of the entry of judgment in his case as required by Rule 12(a), Tohono O'odham Rules of Appellate Procedure.

According to the record, the sentencing order was filed on June 9, 2011. The record does not reveal when the sentencing order was mailed or delivered to the Appellant. The Appellant contends that he did receive the sentencing order until July 2, 2011. Assuming the Appellant is correct and that he was not served with the order until July 2, 2011, Rule 12(a) required that he file his notice of appeal no later than August 2, 2011. The Appellant's Notice of Appeal was not filed until August 22, 2011 – twenty days after the expiration of the Rule 12(a) deadline.

The Tohono O'odham Rules of Appellate Procedure state that unless a notice of appeal is filed in a timely manner, the appellate lacks jurisdiction and the appeal must be dismissed. Rule 12(c), Tohono O'odham Rules of Appellate Procedure. This Court has held that the trial may not extend the period for filing a notice of appeal and has strictly adhered to the mandatory language of Rule 12. *See Jose v. Tohono O'odham Nation*, 3 TOR3d 29 (Ct.App., Apr. 22, 2010); *Narcho v. Tohono O'odham Nation*, 3 TOR3d 13 (Ct.App., Sep. 11, 2007). This Court will not disturb that precedent.

The workings of Rule 12 may seem to be unduly rigid, especially in a case such as this where the Appellant's Notice of Appeal raises issues of grave concern to the interests of justice. However, a defendant, the Nation and the victims of a criminal offense are all entitled to finality. Rule 12 serves the vital interest of promoting the finality of cases. The impact of Rule 12 in criminal matters is moderated by the fact that a convicted defendant has the right to pursue a writ of habeas corpus in this Court pursuant to Rule 24, Tohono O'odham Rules of Appellate Procedure.

Based upon the foregoing, the Court finds that the Appellant's Notice of Appeal to the Court of Appeals of Tohono O'odham Nation was untimely and good cause exists to dismiss the appeal.

IT IS THEREFORE ORDERED that the Appellee's Motion to Dismiss Appeal is granted and the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Willard R. MANUEL, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0105
(Ref. Case No: 2009-0624-0644CR)

Decided November 9, 2011.

Before Judges Maria Borbon, Larry K. Yazzie, and Robert Hersey.

Defendant/Appellant appeals his conviction and judgment following a jury trial that resulted in guilty verdicts on all three charges alleged in the Criminal Complaint. On July 1, 2010, a jury found Mr. Manuel (hereinafter Appellant) guilty of Embezzlement (2009-0624CR), Abuse of Office (2009-0643CR) and Criminal Contempt of Court (2009-0644CR). Defendant who appears pro se files an appeal and later an Amended Notice of Appeal.

Appellant's Arguments on Appeal

1. "Denial of Right to Counsel at all stages of the proceedings.
2. Violations of Due Process and Equal Protection
3. Trial Court's refusal to submit Jury Instructions submitted by Appellant
4. "Trial Court undermined the pending Attorney-client relationship in open court with disparaging statements about Defendant's choice of counsel. . ."
5. Prosecutorial misconduct
6. Trial court purging from records, defendant's Notice of Appeal
7. Trial court laughing with prosecutor"

Amended Notice of Appeal

This Court received an Amended Notice of Appeal that was filed on July 15, 2011.

Appellant's Amended Appeal more clearly defines the nature of defendant's arguments.

> "Appellant alleges the trial court violated both constitutions of the United States and the Tohono O'odham Nation because counsel of his choice was not present to represent him at all phases of the proceedings".
>
> "The Trial Court violated his constitutional rights to due process and equal protection and rights under the Indian Civil Rights Act (25 USC § 1301) by engaging in bias, prejudice and unfairness pre-trial, trial and post-trial and by denying his right to counsel".
>
> "Appellant's constitutional and federal rights were violated when the trial court eliminated all of Defendant's jury instructions and

> by refusing to grant a Motion for a Mistrial, resulting in prejudicial error".
>
> "The Trial Court undermined the "pending Attorney-client relationship in open court with disparaging statements about Defendant's choice of counsel resulting in severe prejudice and instilling a chilling effect of Defendant's trust in the Judicial System resulting in reversible error".
>
> "The trial court ratified the Tohono O'odham Nation's repeated misconduct of violating Defendant's Constitutional and Federal rights above said and his misrepresentations of fact, selective presentation of the law and misrepresentations of law both verbally and in-writing to Defendant, jury and the trial court resulting in bias, prejudice and prosecutorial misconduct resulting in reversible error".

Appellant is an enrolled member of the Tohono O'odham Nation. The record reflects he served both as Acting Director of the Ki:Ki Association, the Nation's housing authority and Vice-Chairman of the Board of Directors for the same organization. On November 9, 2005, along with officials of the Ki:Ki registered to attend a trade show in Honolulu, Hawaii to take place on May 20-27, 2006.[1] On May 10, 2006, a check was issued in the amount of $1,879.65 (one thousand eight hundred seventy-nine dollars and sixty-five cents) to Appellant to attend the trade show. On May 12, 2006, the check was deposited by Appellant into his Bank of America checking account. Appellant did not attend the trade show because he was ordered not to attend by the Chairwoman of the Legislative Branch's Housing Committee, the legislative oversight committee for the Ki:Ki Association.

On July 19, 2006, the Ki:Ki Association Interim Director sent Appellant a certified letter requesting that he repay the amounts he received for per diem, hotel expenses and travel fare totaling $2,311.95 (two thousand three hundred eleven dollars and ninety-five cents).[2]

After failing to respond, Appellant was subjected to a civil complaint for the full costs associated with the travel including airfare. As plaintiff in the civil action, Ki:Ki Association sought $2,906.95 plus 12% interest for a total of $3,272.28 (three thousand two hundred seventy-two dollars and twenty-eight cents). On March 22, 2007, Appellant signed a settlement

[1] The stipulated facts identify Appellant as a member of the Board of Directors of the Ki:Ki Association. The jury instructions identify Appellant as Acting Director.

[2] See: Nation's Exhibit C: Letter from Ki:Ki Association Interim Director, dated, July 19, 2006 and Nation's Exhibit #12: TIMELINE @ entry number 4.

agreement agreeing to pay $529.59 (five hundred twenty-nine dollars and fifty-nine cents) per month until paid in full. Appellant testified during trial that he signed the settlement agreement under protest. The record reflects that Appellant made two payments pursuant to the settlement agreement. Appellant testified during trial that he used the monies he received to fix his truck. A witness also testified he observed Appellant gambling at a casino.

The criminal complaint was filed on March 5, 2009.

Several meetings ensued within the Ki:Ki Association and its Board of Directors. Appellant was diligent in requesting access to these recordings for use in his defense, to no avail. At all times, Appellant believed issues pertaining to the Ki:Ki Association at the time he served its Board of Directors could aid his defense. By letter dated May 5, 2010, an assistant prosecutor for the Nation requested from an attorney representing the Ki:Ki Association, a number of items, including telephone records canceling plane and hotel reservations, three resolutions concerning the trip to Hawaii and records of board minutes of the Friday before the trip was scheduled to occur.

A written response from counsel for the Ki:Ki Association indicated that recordings of certain meetings were available as well as a transcript of at least one meeting.[3] Apparently, even with the use of "counsel" as discussed below, he was not able to obtain any of the information. This court cannot determine to what extent it would have been helpful, if at all. Instead, Appellant stipulated to facts to be used at trial.

Denial of Right to Counsel of Choice

The premise of Appellant's argument is the denial of his right to counsel of his choice. Unfortunately, while Native Americans are citizens of the United States, the United States Constitution does not apply to Indian tribes.[4] Instead, Native Americans are subject to the Indian Civil Rights Act.[5] The Sixth Amendment right to counsel was not provided for in the Indian Civil Rights Act.[6] A defendant facing criminal charges in tribal court is only entitled to counsel

[3] See: Letter dated May 21, 2010 addressed to the prosecutor from counsel for Ki:Ki Association.

[4] *State of Montana v. Spotted Eagle*, 71 P.3d 1239, p. 1243 (citations omitted)(Mont.S.Ct. 2003).

[5] 25 U.S.C. § 1302.

[6] *State of Montana v. Spotted Eagle*, at p. 1243-1244.

at his or her own expense.[7] The Constitution of the Tohono O'odham Nation adopted the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77).[8] Accordingly, the Rules of the Court of the Tohono O'odham Nation provide:

> Any party to a matter before the Court shall have the right to assistance of counsel at his or her own expense, provided that such counsel, whether a licensed attorney or lay advocate, must be authorized to practice in accordance with any applicable law or court rule.[9]

The Nation's Court of Appeals is not authorized to appoint counsel for Appellant.[10]

On October 30, 2009, Appellant's counsel of choice, (as attorney for defendant Willard Manuel) filed a "Motion for Reconsideration of Release Conditions to Own Recognizance" with the Trial Court. Appellant signed off on the front page of the motion as "In Pro Per." The last page was signed by Appellant's counsel of choice as "Attorney for Willard Manuel."[11] It is not clear to this Court whether this filing permitted by the Trial Court was inadvertent.

Numerous continuances were granted throughout the proceedings. Continuances of the scheduled pre-trial hearings and of the scheduled trials were granted. At least one hearing was continued because the prosecutor failed to appear. There were requests by Appellant for additional discovery, in addition to his requests to continue regarding his choice of counsel.

On January 25, 2010, Appellant's proposed counsel filed an affidavit with the Court declaring:

1. That he was in the process of seeking admission to practice before the Tohono O'odham Tribal Court to represent Appellant in his criminal matter, and
2. He anticipated his admission would be approved within the next 45-60 days and would file a proper Notice of Appearance to represent Appellant, and
3. That based upon his "review of information," he believed "Mr. Manual's criminal defense is greatly meritorious and has a strong chance of prevailing on the merits and be acquitted."[12]

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[7] *Id.*, citing 25 U.S.C. § 1302(6), p. 1244, *United States v. Ant*, 882 F.2d 1389, p. 1392, 1398 (9th Cir. 1989) [According to ICRA, "[n]o Indian tribe . . . .shall deny to any person in a criminal proceeding the right . . . .at his own expense to have assistance of counsel," citing 25 U.S.C. § 1302(6)].

[8] See: *Article III – RIGHTS OF MEMBERS*, Section 4, Constitution of the Tohono O'odham Nation.

[9] Title 6-Courts, Chapter 1 – COURTS AND PROCEDUERS, Section 1108, Right to Counsel.

[10] See: Tohono O'odham Court Rules of Appellate Procedure, Rule 12(h).

[11] See: Notice and Motion for Modification of Release Conditions to Own Recognizance. October 30, 2008.

[12] See: Affidavit, filed with the Court on January 25, 2011, along with Appellant's Notice and Motion to Reset Pre-Trial Hearing. ("Counsel has the application completed, the Letter of Good Standing is waiting for the two original Letters of

Waiver of Right to Counsel

The facts of this case are problematic for both the Trial Court, this Court, and Appellant for a number of reasons. First and foremost, Appellant is not entitled to legal representation as provided for non-Native peoples under American general jurisprudence. The Court's finding that Appellant has waived his right to counsel[13] is without legal justification, even if he is not entitled to appointed counsel as we understand Federal Indian Law and the Indian Civil Rights Act. The record below is void of any discussion between the Trial Court and Appellant that he knowingly and voluntarily waived his rights to either his counsel of choice at his own expense or waived his right to substitute counsel under the circumstances.

Appellant's Choice of Counsel

While it is through no fault of the parties or of the trial court that Appellant's choice of counsel did not complete his application timely, appellant expressly relied on his choice of counsel to do so as evidenced by his requests to continue the trial. This is clearly not a matter of requesting continuances for purpose of delay, as the Appellant at all times was led to believe his choice of counsel would eventually appear to represent him. After realizing that his counsel of choice would not appear, Appellant sought representation from the Tohono O'odham Nation's Advocate Program on or near the day his trial was scheduled to begin. Appellant told the jury in closing that due to a conflict of interest they could not represent him.

A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction.[14] A Sixth Amendment violation is not subject to harmless-error analysis,[15] "in sum, the right at stake here is the right to counsel of choice, not the right to a fair trial."[16] The right of counsel of choice is not derived from the Sixth Amendment's purpose of ensuring a fair trial.[17] Instead it has been regarded as the "root meaning of the constitutional

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Recommendation then the admission package will be complete and will be filed with the Committee. It is necessary to continue the matter for at least sixty (60) days to allow counsel to get current in the case after admission").

[13] See: Trial Record Entry, dated June 11, 2010.

[14] *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), pp. 144-152.

[15] *Id.*, at p. 414. (This Court construes the rights affected in the case before it as one included in the Indian Civil Rights Act, rather than one under the Sixth Amendment).

[16] *Id.*, at p. 146. (Cases submitted by the government involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice).

[17] *Id.*, at p. 147.

guarantee."[18] While the Sixth Amendment is not included in the Indian Civil Rights Act, the right to counsel of choice at one's own expense clearly is.

This Court recognizes the authority of the Tohono O'odham Nation's Trial Court, consistent with *Gonzalez-Lopez*, supra, to establish criteria for admitting lawyers and or advocates who practice before them and requires that a defendant's counsel of choice be a member of the bar where the trial will occur.[19] Consistent with *Gonzalez-Lopez* this Court agrees with the trial court's power to enforce rules and to balance the right of Appellant to his counsel of choice as against scheduling decisions.[20]

Appellant's choice of counsel submitted his application for admission to practice before the Nation's Court on June 7, 2010. Appellant requested a final continuance while his counsel of choice's application was reviewed. The record before this Court does not include the status of the application for admission to practice before the Nation's Courts. There is however, an Order of Recusal, filed on November 8, 2010, signed on October 7, 2010[21] by a judge assigned to the Appellate panel in this case; whose recusal is based on the fact that she is evaluating Appellant's choice of counsel's application for admission to practice before the Nation's Courts.

While Appellant's choice of counsel never formally entered a Notice of Appearance to represent him, it is clear that he acted as an informal standby counsel of sorts. The trial court acknowledged so. Generally the role of stand-by counsel is provided where a defendant chooses to represent himself. This Court's experience has been that a stand-by counsel is available in the event a defendant is not able to proceed or if anything develops during the course of a trial requiring advice or information. The stand-by counsel is generally appointed by the court and available throughout the duration of the trial.

During the discussion regarding jury instructions, the Court initially expressed comfort with proposed Jury Instruction # 19 which states:

> Evidence of Any Kind
> The Nation must prove guilt beyond a reasonable doubt based upon the evidence. The defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant acting with the advice of an

[18] *Id.*, at pp. 147-148.

[19] *Id.*, at pp. 151-152.

[20] See: *Id.* at p. 152.

[21] *Ed. Note.* Date error appears in the original.

> attorney. The defendant's decision not to produce any evidence is not evidence of guilt.

The trial court declared on the record that Appellant "has represented on many occasions that he sought legal help from Mr. Randy Lang for preparation of motions and with this matter." The trial court submitted the instruction leaving out "acting with the advice of an attorney," in order to prevent confusing the jury who never witnessed an attorney representing Appellant.

The problem for this court arises because the informal representation was sanctioned by the trial court without the appropriate acknowledgment afforded a non-Native defendant and his or her standby counsel under similar circumstances. The trial court was thereby restricted from properly recognizing and appointing stand-by counsel all in the same proceedings.

More disturbing is the lack of clarity regarding side bar discussions. Numerous conversations were held outside the hearing of the jury but in their presence. Some did not appear to have been recorded. After hearing the entire recording, including the unintelligible side bar discussions, this Court is not able to determine whether or not Appellant's efforts to raise his arguments at side bar were undermined and denied due process within the meaning of the Indian Civil Rights Act.

During the end of the proceedings, prior to the reading of the instructions to the jury, the court explained the following to Appellant:

> But I will tell you that when you use an affirmative defense; the burden is on you to provide evidence and you have to reach your burden and your burden is preponderance of the evidence in establishing that affirmative defense, so, unless you can tell the court; right now, how you've satisfied that burden; of these affirmative defenses; you did not raise any of this prior to today's jury instructions; you have not shown the court that you have satisfied that burden of these affirmative defenses;
> You raise them; you present evidence to that effect; then you submit the jury instructions; the jury instructions should not be the first time the court is informed of what your affirmative defense was.

The Trial Court accurately advised Appellant regarding the role of counsel of record during a trial. Appellant, purportedly through "his counsel" raised plausible issues and arguments throughout the proceedings. However, Appellant in the end was left without an attorney and relegated to self-representation by default. In this case, however, the occasion of "jury instructions" was not the first time that Appellant had raised affirmative defenses. On September

21, 2009, Appellant in his first pleading filed with the Trial Court, a Notice of Defenses as "Date of Alleged Offense: May 12, 2006."[22]

The question regarding Appellant's Choice of Counsel does not end the inquiry in this Court's opinion.[23] This Court addresses the ways the role of counsel would have aided his defense.[24]

For example, this court is aware that a civil proceeding was filed against Appellant in order to collect monies paid to him by the Ki:Ki Association. Appellant notified the trial court of his intent to use as evidence in the criminal proceedings, records relating to the civil action. The record however is void regarding what if anything in the civil action would have aided Appellant in defending the criminal matter. While the Nation's prosecutor moved to amend one of the criminal charges (Count 3) prior to trial, he told the jury in closing argument "There's the Court Order telling him to pay it." This Court's review of the record failed to identify the Order from the civil action that the Nation's prosecutor addressed during closing arguments. While the Nation's prosecutor documented one payment throughout the proceedings, the record reflects that Appellant made two payments of $529.59, approximately one-third of the monies involved in the criminal case.[25] The role of Appellant's counsel of choice could have more fully developed a defense of the lack of criminal intent.

This Court believes that the role of Counsel of Choice would have aided the defendant greatly during trial on the preparation of jury instructions. This Court's recollection in reviewing the recording indicated that time was of the essence for the Trial Court and both parties were scrambling to submit jury instructions suitable for the Trial Court to instruct. There is some question as to the interpretation of the Nation's Criminal Code for the purposes of the jury instructions. This is important to this Court, as we recognize that ambiguities in criminal statutes be construed in favor of the defendant particularly where more than one interpretation may apply.[26]

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[22] List of Appellant's defenses include for example, Lack of Intent, Statute of Limitations, etc.

[23] See: *United States v. Kloehn*, No. 07-50274 (9th Cir. August 30, 2010).

[24] *Id.*

[25] See: Tohono O'odham Judiciary Receipt No. A 20119, dated 4/10/07, for Restitution and Tohono O'odham Judiciary Receipt No. A 20131, dated 5/4/07, for Restitution.

[26] See: *Frank Douglas Hughes v. Hon. Cindy Jorgenson, Judge of the Superior Court of the State of Arizona*, Supreme Court of Arizona, en banc, 2002 AZ 123).

It is clear to this court from listening to the recording of the trial below that Appellant muddled through the proceedings to the best of his ability. He was at all times respectful of the proceedings, court and the Nation's prosecutor.

The right to any attorney is significant and the court acquiesced by continuing with the trial with Appellant's counsel's input in whatever capacity, to his detriment. One last continuance while Appellant's Counsel of Choice application was reviewed under all circumstances is the best approach considering the significant rights that were at stake.

This Court's decision is fact specific and is not intended to open the door for similar situations whereby a defendant's choice of counsel is not admitted to practice before the Nation's Courts or where a request to continue a trial is denied. The Appellate Court by its ruling does not intend to suggest that a defendant is entitled to representation by an individual not admitted to practice before the Tohono O'odham Nation's Courts nor may a defendant insist on representation by an advocate he cannot afford.[27]

IT IS ORDERED, reversing the conviction in the Trial Court below and remanding for a new trial.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0111
(Ref. Case No: 2009-5284-5285CR)

Decided November 29, 2011.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Johnson.

Inmate Glenn Frank has filed several Requests to Speak to the Court. The Court addresses the Requests in the chronological order, beginning with the oldest request.

Request to Speak to the Court filed 9/2/11

On August 30, 2011, the Nation filed a Motion to Dismiss Appeal. On September 2, 2011, the Appellant Glen Frank ("Frank") filed a Request to Speak With the Court ("Request"). In this

[27] See: *Wheat v. United States*, 488 U.S. 153 at 159 (1988).

Request, Mr. Frank responds to the Nation's Motion to Dismiss. This Court has already entered an order granting the Nation's motion and ordering the dismissal of Mr. Frank's appeal. *Frank v. Tohono O'odham Nation*, 3 TOR3d 37 (Ct.App., Sep. 27, 2011). Although Mr. Frank's response was filed in a timely manner, the Court notes with concern that his response was not transmitted to this Court until October 31, 2011. Nonetheless, the Court has considered Mr. Frank's response and finds that there are no grounds for reconsidering the order granting dismissal of the appeal.

Request to Speak to the Court filed on September filed 9/9/11[1]

In this Request, which was also labeled as "Petition for Writ of Habeas Corpus," Mr. Frank alleges that the conditions of his incarceration and denial of access to legal research materials violate his right to due process of law. A copy of the Request/Petition was sent to the Nation on September 9, 2011. The Nation has not filed a response to the Request/Petition. The Request/Petition was transmitted to this Court on October 31, 2011.

Petitions for writs of habeas corpus are governed by Rule 24, Tohono O'odham Rules of Appellate Procedure. Mr. Frank's petition substantially complies with the requirements of Rule 24. Rule 24 provides that if this Court does not act on a petition within thirty days after it is filed, it shall be considered denied. However, in light of the fact that this Court did not receive the Request/Petition until October 31, 2011, the Court will assert jurisdiction over this matter and order that the Nation file a response to the Request/Petition no later than thirty (30) days from the filing of this order.

Request to Speak to Court filed 9/21/11

In this Request, Mr. Frank requests that the Court provide him with a copy of the log indicating when his sentencing order was served on the Corrections Department as well as a copy of the minute entry from May 5, 2011. The Request was transmitted to this Court on October 31, 2011. A copy of the Request was not sent to the Nation; however, since the request is administrative nature rather legal,[2] the Court finds it unnecessary to provide notice to the Nation or for the Nation to respond to the Request. This Court will not deny Mr. Frank reasonable access to documents related to his case. It is ordered that copies of the requested documents be attached to this order and served on Mr. Frank.

Requests to Speak to the Court filed 10/13/11 and 10/14/11

[1] *Ed. Note. Sic.*

[2] *Ed. Note. Sic.*

In the three requests which were filed between October 13, 2011 and October 14, 2011, Mr. Frank essentially alleges that he has been denied access to legal research materials and other supplies necessary to pursue legal action in this Court. The Requests were transmitted to this Court on October 31, 2011. Copies of the requests were forwarded to the Nation on October 13, 2011 and October 14, 2011. The Nation has not filed a response.

The issues in these requests are similar to the issues raised in the Request/Petition filed on September 9, 2011, but allege that the on-going denial of access to legal materials is preventing Mr. Frank from pursuing relief in this Court. In light of the allegation, the Court will treat these Requests as motions made pursuant to Rule 25, Tohono O'odham Rules of Appellate Procedure. The Nation is ordered to file a response to Mr. Frank's motion no later than fifteen (15) days from the filing of this order.

IT IS THEREFORE ORDERED that the Order of Dismissal in CTA-0111 is affirmed.

IT IS FURTHER ORDERED that the Nation file a response to the Appellant's Request/Petition for Habeas Corpus no later than thirty (30) days from the filing of this order.

IT IS FURTHER ORDERED that copies of the service log reflecting service of Appellant's sentencing order on the Corrections Department and the court minute entry from May 5, 2011 be attached to this order and served on the Appellant.

IT IS FURTHER ORDERED that the Nation file a response to the Requests to Speak to the Court filed on October 13, 2011 and October 14, 2011, no later than fifteen (15) days from the filing of this order.

TOHONO O'ODHAM COURT OF APPEALS

Wayne MANUEL, Appellant,
v.
Frank HECHT, Jail Supervisor, Tohono O'odham Corrections Facility, Appellee.

Case No. CTA-0113
(Ref. Case No: 2010-1315-1323C)

Decided March 23, 2012.

Tohono O'odham Advocate Program by David Oliver for Appellant.
Tohono O'odham Office of the Attorney General by Vanessa Saavedra for Appellee.

Before Judges Veronica Darnell, Nicholas Fontana, and Rachel Frazier Johnson.

THE COURT having reviewed the Petition for Habeas Corpus,

THE COURT FINDS that the Petitioner has not moved the trial court to dismiss the charges against the Petitioner on the grounds that the Nation's failure to provide for a competency exam violates the Petitioner's right to the effective assistance of counsel and due process of law,

IT IS THEREFORE ORDERED that the Court declines to accept jurisdiction in this matter.

IT IS FUTHER ORDERED remanding the matter to the trial court for action consistent with this order.

TOHONO O'ODHAM COURT OF APPEALS

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. CTA-0107
(Ref. Case No. 2008-0283AV)

Decided July 19, 2012.

Before Judges Michael Telep, Jr., Larry Yazzie, and Veronica Darnell.

Holding: Dismissed upon the parties' stipulated motion.

TOHONO O'ODHAM COURT OF APPEALS

TOHONO O'ODHAM NATION, Appellant,
v.
Wilford GARCIA, Appellee.

Case No. CTA-0106
(Ref. Case No: 2010-2370CR)

Decided April 3, 2013.

Tohono O'odham Prosecutor's Office by Chief Prosecutor George Traviolia for Appellant.
Tohono O'odham Advocate Program by David Oliver for Appellee.

Before Judges Walter Marcus, Rachel Johnson, and Violet Lui-Frank.

SUMMARY

The hearing on Defendant's [henceforth Appellee's] Motion to Strike the Plaintiff's [henceforth Appellant's] Notice of Appeal was held on January 29, 2013. David Oliver, Tohono

O'odham Advocate Program, for Appellee, and George Traviolia, Chief Prosecutor, Tohono O'odham Nation, for Appellant, appeared. The matter was taken under advisement. The parties agreed that the Court could decide the appeal on its merits, as well as the Motion to Strike. The Appellant's Notice of Appeal concerns the acquittal of defendant on one count of Abuse of a Person.

The trial court directed a verdict of acquittal on the charge of Abuse of a Person, 2010-2370CR. Any subsequent trial of the Appellee on the same charge after judgment of acquittal would be in violation of his right not to be twice put in jeopardy for the same offense. 25 U.S.C. §1302(a)(3). For the reasons set forth in this opinion, the Appeal is denied and the judgment of acquittal of Abuse of a Person is affirmed. The Court does not have to rule on the Motion to Strike as it is made moot by the Court's ruling on the Appeal.

FACTS

Appellee Wilford Garcia was charged with the following violations of the Tohono O'odham Code: 1312(A)(I)- Driving Under the Influence, 8.4A3- Abuse of a Person and 12.4- Unlawful Possession of Liquor. He pled not guilty to the charges and a bench trial was held on February 9, 2010 before the Honorable Maria Borbon. After testimony was presented in the Appellant's case, but before Appellant formally rested, the Appellee made a Rule 20 motion for a directed verdict of acquittal on the charge of abuse of a person and the trial court granted the motion. The Appellant ("Nation") objected that he was not given an opportunity to respond to the motion and the Judge reconsidered her decision and allowed argument by the Nation. The Appellee "suspended" his motion until the prosecution case closed. Later, the Appellee said "Accordingly, if counsel has rested his case I will move for a directed judgment of acquittal." The trial court granted the motion as to the charge of Abuse of a Person only and directed a verdict of acquittal on that charge. The Nation rested its case. Further evidence was taken as to the remaining charges and the Appellee was eventually found guilty of Driving Under the Influence and not guilty of Unlawful Possession of Liquor. At the end of the trial the Nation moved that the Judge reconsider her ruling on the Rule 20 motion for a directed verdict of acquittal on the charges of Abuse of a Person and she denied his motion. The Nation filed its Notice of Appeal on April 20, 2011, and the Appellee filed his Motion to Strike the Notice of Appeal on July 26, 2011.

DISCUSSION

The issue in this case is whether the Appellee's rights under the Indian Civil Rights Act and the Tohono O'odham Constitution not to be twice put in jeopardy for the same offense are implicated in this matter, and, if so, when jeopardy attached.

The Fifth Amendment of the United States Constitution states in part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

The Indian Civil Rights Act of 1968 ("ICRA"), as amended by the Tribal Law and Order Act of 2010, was passed by Congress in order to provide protections similar to those of the provisions of the Bill of Rights to persons subject to tribal government actions. The principal guarantees of the ICRA are found in 25 U.S.C.A. § 1302, and the portion relevant to this case states, "No Indian tribe exercising powers of self-government shall …(3) subject any person for the same offense to be twice put in jeopardy." The Tohono O'odham Constitution explicitly adopts the protections of the ICRA in Article III, Section 4: "The listing of the foregoing rights shall not be construed as denying or abridging other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77)."

The similarity between the double jeopardy prohibition of the Fifth Amendment and the ICRA makes examination of federal cases interpreting the Fifth Amendment useful in construing double jeopardy in the ICRA. Generally, double jeopardy prohibits subsequent prosecution of a defendant after acquittal of that defendant. The core issue of this case is whether jeopardy attached to the Defendant, and if so, at what point? Federal cases have held that jeopardy in a bench trial attaches "when the judge begins to receive evidence." *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), See also, *Serfass v. United States*, 420 U.S. 377, 388 (1975) (jeopardy attaches when the first witness is sworn in during a bench trial). Acquittal by a directed verdict, as in this case, strengthens the argument that jeopardy has attached. Acquittal by directed verdict … cannot be appealed by the prosecution since it would subject a person for the same offense to be twice put in jeopardy. *Fong Foo v. United States*, 369 U.S. 141 (1962).

It is the opinion of this Court for the reason stated below that jeopardy attached to the Appellee when the Appellant's witness was sworn in and testified. Granting the appeal would subject the Appellee to double jeopardy.

ORDER

The Appeal is denied.

TOHONO O'ODHAM COURT OF APPEALS

Gary CIPRIANO, Jr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0115
(Ref. Case No: 2009-5998-6003CR; 2009-6391-6400CR; 2010-2042-2047CR; 2011-0189CR; 2011-0301-0305CR)

Decided May 3, 2013.

Tohono O'odham Office of the Attorney General by Virjynia Torrez for Appellee.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

On March 28, 2012, the Petitioner filed a Petition for Writ of Habeas Corpus seeking to vacate, set aside, or correct an illegal sentence or order of confinement. On March 28, 2013, the Court of Appeals held a hearing on Petitioner's Petition for Writ of Habeas Corpus. Gary Cipriano, Jr., Petitioner, and Virjynia Torrez, Assistant Attorney General, Office of the Attorney General, Tohono O'odham Nation, for Respondent, appeared. The matter was taken under advisement. Petitioner, Gary Cipriano, Jr., was charged with numerous criminal violations of the Tohono O'odham Code including robbery, armed robbery, threatening, and disorderly conduct, misuse of deadly weapon and or dangerous instrument, and conspiracy. He was represented by Demitri Downing, a lay advocate who filed an appearance on May 2, 2011. On October 9, 2011, the Petitioner signed a consolidated plea agreement. On October 31, 2011, the consolidated plea agreement was incorporated into the Court's Order. Petitioner's counsel indicated that Petitioner understood and agreed to the plea agreement. If the Petitioner had filed an appeal, it had to be filed within 30 days of entry of judgment. (Rule 12(a)). The Petitioner did not appeal the Court's action, but filed Petition for Writ of Habeas Corpus on March 28, 2012.

There is an error in the case numbers in the Petition. One set of the case numbers was 2009-6391-6400CR. It is cited in the Petition and the heading of the pleadings as 2009-6391-6460CR. It includes all of the Petitioner's cases, but also includes 40 additional cases which are not his cases. The Petitioner has sufficiently indicated his cases for purposes of the action

Given a review of the entire file and the totality of the circumstances, the Court finds that the Petitioner has suffered harm, and a Petition for Writ of Habeas Corpus should be granted.

ORDER

The Petition for Writ of Habeas Corpus is granted, the plea agreement is vacated, the convictions are set aside, the case is remanded to the Trial Court, and the Petitioner shall continue to be held until his conditions of release are decided by a Trial Court Judge.

TOHONO O'ODHAM COURT OF APPEALS

Lester LOPEZ, Jr., Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0120
(Ref. Case No: 2012-3005CR)

Decided August 30, 2013.

Before Judges Larry Yazzie, Walter Marcus, and Veronica Darnell.

This Appellant failed to file his notice of appeal within thirty (30) days of the entry of judgment in his case as required by Rule 12(a), Tohono O'odham Rules of Appellate Procedure.

According to the record, the Appellant was found guilty of violating his probation on April 8, 2013. On April 8, 2013, the Defendant was sentenced. Rule 12(a) therefore required that he file his notice of appeal no later than May 8, 2013. The Appellant did not file his Request to Speak with the Court, in which he requested to appeal his Probation Violation case, until May 21, 2013 – 13 days after the expiration of the Rule 12(a) deadline.

The Tohono O'odham Rules of Appellate Procedure state that unless a notice of appeal is filed in a timely manner, the appellate court lacks jurisdiction and the appeal must be dismissed. Rule 12(c), Tohono O'odham Rules of Appellate Procedure.

Based upon the foregoing, the Court finds that the Appellant's Request to Speak with the Court, which served as his Notice of Appeal to the Court of Appeals of the Tohono O'odham Nation, was untimely and good cause exists to dismiss the appeal.

IT IS THEREFORE ORDERED that the appeal is dismissed.

TOHONO O'ODHAM COURT OF APPEALS

Glen FRANK, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0114
(Ref. Case No: 2009-6318-6328CR)

Decided November 8, 2013.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

THE COURT OF APPEALS FINDS THE FOLLOWING FACTS:

1. On August 8, 2011, in a Trial Record Entry for case number 2009-6318-6328CR, Judge Borbon with Prosecutor Traviola, Romina Martin of Corrections, the Defendant, and Laura Berglen of the Attorney General's Office were in Court, the Court Ordered, "The parties have agreed to a resolution of access to library legal materials on-line. The Nations corrections staff believes that w/in 60 days; there will be computer access for Mr. Frank. The Attorney General's office will provide Rules of Appellate Procedure to Mr. Frank. The Corrections Office will allow Mr. Frank to listen to remainder of CDs oral recording of trial." (Exact wording of the judge with no corrections)
2. On March 11, 2013, the Court Ordered the Appellant to file his brief by April 15, 2013 and the Appellee to file its brief 30 days thereafter and the Court would schedule oral arguments after it received Appellee's brief.
3. The Appellant filed his brief on April 11, 2013.
4. The Appellee requested and was granted extension of time to file its brief.
5. On August 12, 2013, the Appellee filed a Motion to Dismiss and Remand to Trial Court, but did not file a brief. The Appellee's Motion to Dismiss was not filed within 15 days of it receiving the Notice of Appeal as required by the Tohono O'odham Rules of Court, Section 10, Rules of Appellate Procedure, Rule 12i.
6. The Court was incorrect when it Ordered the case heard as appeal.
7. The Tohono O'odham Constitution provides that "[T]he appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham Courts. Decisions of the court of appeals on all matters within its appellate jurisdiction shall be final." Tohono O'odham

Constitution Article VIII, § 7. The Tohono O'odham Rules of Appellate Procedure place sole authority in the Appellate Court to hear appeals, and a strict interpretation of the Constitution would dictate that since a habeas corpus action is not an appeal, but is instead a special writ, that the Appellate Court lacks jurisdiction to hear the matter and that the habeas corpus matter must be remanded back to the trial court to be heard.

8. The Court does not require oral argument and it is not scheduling oral argument.

THE COURT OF APPEALS ORDERS AS FOLLOWS:

1. Appellee's Motion to Dismiss is denied.
2. The case shall be heard as a Petition for a Writ of Habeas Corpus.
3. The case is remanded to the Trial Court to either enforce the Court's August 8, 2011 Order regarding legal materials or to hear the Appellant's Petition for a Writ of Habeas Corpus.

TOHONO O'ODHAM COURT OF APPEALS

Joseph WICHAPA, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.

Case No. CTA-0121
(Ref. Case No: 2008-1100CR; 2008-1298-1305CR; 2008-1381-1385CR)

Decided November 14, 2013.

Before Judges Barbara A. Atwood, Robert A. Hershey, and Violet Lui-Frank.

Appellant Joseph Wichapa filed a Petition for Writ of Habeas Corpus in this Court on May 3, 2013. On July 26, 2013, Chief Judge Violet Lui-Frank designated herself and Judges Pro Tem Robert Hershey and Barbara Atwood to serve on the appellate panel. After convening to consider the matter, the Court has decided that the Petition for Writ of Habeas Corpus must be remanded for determination by the trial court in the first instance.

Because the authority of the judiciary is defined by the Tohono O'odham Constitution, we interpret the Rules of Appellate Procedure, Tohono O'odham Rules of Court, in a manner that is consistent with constitutional restrictions. Article VIII, Section 7, of the Tohono O'odham Constitution provides that "the appellate power of the Tohono O'odham Nation shall be vested in the court of appeals, which shall have jurisdiction to hear all appeals from the Tohono O'odham

Courts." In the constitutional framework, the Court of Appeals is to exercise appellate jurisdiction rather than original jurisdiction.

Rule 24 of the Rules of Appellate Procedure prescribes procedures for adjudicating a petition for a writ of habeas corpus. Although the Rule allows for resolution by the Court of Appeals in the first instance, a question arises as to the Rule's conflict with the Tohono O'odham Constitution, in light of the constitutional provision on this Court's jurisdiction, we remand to the trial court to process Appellant's Petition for Writ of Habeas Corpus in the first instance. If a decision is rendered that is adverse to the Appellant, he can return to this Court and invoke its appellate jurisdiction.

Furthermore, in light of this Court's deliberations on the matter and our decision to remand, we find that the period prescribed in Rule 24(f) is tolled. The thirty-day period will begin to run on the date that Appellant's Petition for Writ of Habeas Corpus is refiled in the trial court.

TOHONO O'ODHAM COURT OF APPEALS

Swan MORISTO, Appellant,
v.
TOHONO O'ODHAM NATION, Appellee.[1]

Case No. CTA-0118
(Ref. Case No: 2012-0425-0436CR)

Decided December 3, 2013.

Before Judges Walter Marcus, Rachel Johnson, and Veronica Darnell.

Holding: Appeal dismissed and trial court judgment vacated upon stipulation by the parties.

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[1] *Ed. Note:* Caption corrected.

TRIAL COURT DECISIONS

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

TOHONO O'ODHAM NATION, a federally recognized Indian tribe, Plaintiff,
v.
Rodney LEDBETTER, a single man, ADVANTAGE 99 TD TRUST, a Delaware business trust; ESI 97, an unknown entity; Brian SANFORD, a single man; COYOTE MOUNTAINS CACTUS COMPANY, an Arizona limited partnership; Henry A. WHITAKER, a single man; Jimmy D. LINKER and Linda LINKER, husband and wife; Anita H. BACA, a widow; Bryan CARSON, a single man; Kate WHITE, a single woman; Susan N. SILVAS, a widow; Gary Chalk CLEMONS and Dawn Ellen CLEMONS, husband and wife; Randy L. HOURSCHT and Hertha HOURSCHT, husband and wife; Thomas D. PERROW, Jr., a single man; Leila Kathleen BRADLEY, a single woman; David A. HURD, a single man; Jason J. SINCLAIR, a single man; Danny BRYAN, a single man; Donald Gene CRUSE and Janice J. CRUSE, husband and wife; Susan Kay CLAFFEY, a single woman; Alfred C. GALLEGOS and Josie M. GALLEGOS, husband and wife; Robert SALINAS and Carmen E. SALINAS, husband and wife; and Thomas BOSSERT, a married man as to his separate property, Defendants.

Case No. 03-VC-9343

Decided March 23, 2005.[1]

Before Rose Johnson Antone.

This matter having come before the Court on Plaintiff's Motion for Partial Summary Judgment pursuant to Rule 56, Ariz.R.Civ.P. as to Defendants Advantage 99 TD Trust, ESI 97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas, and the Court having considered the Motion and having heard oral argument on same, finds as follows:

1. That there is no genuine issue of any material fact as to liability and the Plaintiff is entitled to a judgment as a matter of law;

2. That the first mile of Coleman Road south of Arizona State Highway 86 is on Rangeland, as defined by the Nation's Trespass Ordinance;

3. That the undisputed facts establish that Defendants have trespassed upon the Nation's Rangelands in violation of the Nation's Trespass Ordinance;

4. That Defendants, as Southwest Properties' successors in interest, have no right to use that portion of Coleman Road that lies on the Plaintiff's land, between Arizona State Highway 86 and the development commonly known as the Hayhook Ranch;

[1] *Ed. Note.* Date of decision corrected by the Second Edition of the Tohono O'odham Reports.

5. That Plaintiff has properly served notice of said trespass upon each of the Defendants and has properly brought this Trespass Action against the Defendants;

6. That Plaintiff has established that there exists an actual and justiciable controversy between the parties; and

7. That Plaintiff has established that the issuance of a permanent injunction against Defendants to prevent their future use of Coleman Road is warranted.

Based upon the foregoing findings, and good cause appearing therefore;

IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment as to Defendants **Advantage 99 TD Trust, ESI 97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas** is GRANTED.

IT IS FURTHER ORDERED that Defendants **Advantage 99 TD Trust, ESI97, Brian Sanford, Bryan Carson, Thomas D. Perrow, Jr., Edward S. Corrie III, Jason J. Sinclair, Donald Gene Cruse, Janice J. Cruse, Alfred C. Gallegos, Josie M. Gallegos, Robert Salinas and Carmen E. Salinas** are hereby permanently enjoined from any present or future unauthorized use of that portion of Coleman Road located on the Nation's land.

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

TOHONO O'ODHAM ADVOCATE PROGRAM, a department of the Executive Branch of the Tohono O'odham Nation's Government; Sarah Michelle MARTIN and Frederick K. LOMAYESVA in their official capacity as Chief and Deputy Chief Advocates, and the TOHONO O'ODHAM ADVOCATES employed with the Advocate Program, Real Parties in interest, Plaintiffs,

v.

The Honorable Betsy NORRIS, in her official capacity as Chief Judge of the Tohono O'odham Judicial Court, a division of the Judicial Branch of Government of the Tohono O'odham Nation; the Honorable Violet LUI-FRANK, in her official capacity as Deputy Chief Judge; and Traci HOBSON, in her official capacity as Judicial Court Solicitor, Defendants.

Case No: 05-PVC-10069
(appeal dism'd *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 21 (Sep. 4, 2008))

Decided April 25, 2005.

Plaintiffs, *Pro Se*.
Robert Palmquist, Attorney for Defendants.

Before Judge Rose Johnson Antone.

The above captioned matter comes before the Tohono O'odham Adult Civil Court for a hearing on April 19, 2005 regarding the Plaintiffs' Petition, Application for Preliminary Injunction, Response to Defendants' Motion to Dismiss and the Defendants' Response, Motion to Dismiss, Motion to Exclude.

Parties present: Plaintiffs, Sarah Michele Martin, Fred Lomayesva, Dwight Francisco, and Cheryl Lopez; Defendant, Honorable Betsy Norris, Honorable Violet Lui-Frank, and Traci Hobson; Defendants' attorney, Robert Palmquist.

The court having taken into consideration the issues raised pursuant to the pleadings, arguments, and comments, **FINDS** and **ORDERS** the following:

The Plaintiff's submit a DVD prepared by their staff that provides statements from tribal members; however, the Defendants move to exclude the DVD for the reason that the statements made are in O'odham and the Plaintiffs provide no written transcript regarding these statement; thus leaving the Defendant at a disadvantage; two of the Defendant do not speak or understand the O'odham language. Further that the court too is not clear about what the statements are being referred to; therefore, the Defendants' motion to exclude the DVD is granted.

The court recognizes the vital roles culture and tradition play in the application of O'odham Law. However, the facts of this case, which revolve around the simple interpretation of a constitutional provision, do not require the court to expend valuable time and resources on a matter where a consensus already exists between the parties.

Sovereign immunity does not apply. The Plaintiffs seek a declaratory action; sovereign immunity is not a bar to declaratory or injunctive relief. *Native Village of Noatak v. Blatchford, 38 F 3d 1505.*

The court has inherent authority to regulate the practice of law and establish rules to such effect pursuant to the Tohono O'odham Nation (Nation) Constitution, *Article VIII, Section 10(d), Establish court procedures for the Tohono O'odham Judiciary."*

Definition of Judiciary[1]: 'n. That branch of government invested with judicial power; the system of courts in a country; the body of judges; the bench. That branch of government which is intended to interpret, construe and apply the law; *Board of Com'rs of Wyandotte County v. General Securities Corporation, 138 P 2nd 479, 478.*

[1] Black's Law Dictionary

Definition of Judicial Power[2]: The authority exercised by that department of government which is charged with declaration of what law is and its construction. The authority vested in courts and judges, as distinguished from the executive and legislative power. Courts have general powers to decide an pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision; **and also such specific powers as contempt powers, power to control admission and disbarment of attorneys, power to adopt rules of court etc….** (*emphasis added*)

Article VIII, Section 1(e) of the Nation's Constitution does establish the authority to "authorize, regulate, and charter public or private corporation or associations, whether organized for profit or for non-profit or charitable purposes." It is the duty of the court to ensure that its decisions are consistent with the Nation's Constitution. The only way to construe Article VIII Section 10(d) and Article VII, Section 1(e) as consistent as follows:

a) The judiciary has the authority (inherent and mandated by the Constitution) to establish court procedures. The very definition of judicial power includes the authority to regulate who may practice before the court. Therefore, the court may establish procedures regulating who may practice within the Nation.
b) A regulatory mechanism would be very helpful to the court as it moves forward in accomplishing (a). However, the words of the Constitution are express and the court does not have the authority to establish a bar association, if the words are to be read literally and not for their intent.

The Constitution is silent regarding attorney's costs; however, the Law & Order Code does permit the court to award costs. Therefore, the Plaintiffs shall pay one half of the Defendant's attorney's fees and costs.

Based on the foregoing the Defendant's Motion to Dismiss is denied in part and granted in part.

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[2] *Id.*

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

Idaleen REYES for Ge'e Oidag Community, Plaintiff,
v.
Julius ANGIANO and FOUR WINDS TOWING, Defendant.

Case No. 04-TRO-9838
(aff'd by *Reyes v. Angiano*, 3 TOR3d 6 (Aug. 9, 2005))

Decided May 11, 2005.

Before Judge Violet Lui-Frank.

This matter was referred to a Settlement Judge by Order dated January 12, 2005. The Settlement Judge issued her Order on January 26, 2005.

The settlement process was used in this case to allow the parties to present the issues and the relevant facts in a more informal setting than a trial. The settlement judge made some very important findings which this court has considered carefully and adopted as the basis for this Order. The undisputed facts of the case are that the respondent has had a business on the land in question for a while, and he is building an auto storage yard. The dispute centers around the petitioner's objection to the business, especially the auto storage yard, the respondent's right to have a business on the land in question, petitioner's allegations of harm to the environment, and respondent's argument that his lease agreement with the persons who hold the land assignment allow him to conduct his business and build the auto storage yard, and there are no laws that prohibit such business.

The court finds that the settlement process in the Tohono O'odham Court has been useful in identifying the threshold issues which can only be resolved by the Ge'e Oidag Community and the Sells Community and the Sells District; the issue of the Ge'e Oidag Community boundary is unresolved, but related to the issues of this case; there is the open issue of whether or not individual families are allowed to lease land assignments; there are serious questions as to what policies the Nation and the Economic Development Office have put in place for protection of the environment in the operation of a business like respondent's; and there is a need for policies which have not yet been implemented through codes to regulate businesses that might create some type of hazard to the environment; the issues raised in this action involve the powers of the District, the community, and the Legislative Council and Executive Branch. The court is

mindful that its jurisdiction is limited, and issues of land do require the participation of community, district and the Nation.

The settlement judge recommended that the court refer the parties to the Ge'e Oidag Community and the Sells Community/District to begin to address these concerns. The court finds that this recommendation is well-founded; essentially, the issues are serious ones, but the policy decisions are not within the authority of the court; the issues raised here must be taken first to the Communities and the District, and may require that the parties also approach the Legislative Council and its committees, and the Executive Branch and its programs.

THEREFORE, IT IS ORDERED dismissing the request for the Temporary Restraining Order without prejudice. The parties are referred to the appropriate administrative processes of the Communities involved, the Sells District and the Tohono O'odham Nation.

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

Ina Jean DENNY, Plaintiff,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Defendants.

Case No. 04-PI-9678
(appeal dism'd *Denny v. Lopez and Martinez*, 3 TOR3d 10 (Sep. 12, 2006))

Decided January 19, 2006.

Plaintiff, *Pro Se.*
Todd Rigby, Counsel for Defendants.

Before Judge Rose Johnson Antone.

This case is set for trial today and Plaintiff has filed a Demand of Recusal of Judge Violet Lui-Frank, the assigned judge in this case, at 0840 hours, January 19, 2006.

The court **FINDS** and **ORDERS** that the Plaintiff is absent from the courtroom; however, counsel for the Defendants, Todd Rigby, is present; the court is informed by the court officer that the Plaintiff is in the lobby and refuses to enter the courtroom; upon proceeding with the motion hearing, the Plaintiff enters the courtroom and addresses the court without permission of the court; the Plaintiff then proceed to exit the courtroom again; the court proceeds with the motion hearing recognizing that the Plaintiff has waived her right to be heard on the motion by exiting the courtroom; the court, by the court's Administrative Order III, applies the Arizona Civil Rules

of Procedures; based on Rule 42(f) the parties have had notice of the hearing set for today well beyond the 60 day limit per the Rule, that this motion is filed untimely pursuant to Rule 42(f); the Plaintiff has known that Judge Lui-Frank is the assigned judge and the Plaintiff has not raised issue with Judge Lui-Frank being the judge until the filing of this motion; that the Plaintiff does not provide specific reasons why the motion is filed this late; therefore, the Plaintiff's motion is denied for being filed untimely.

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

Ina Jean DENNY, Plaintiff,
v.
Christopher James LOPEZ and Rufus Dennis MARTINEZ, Defendants.

Case No. 04-PI-9678
(appeal dism'd *Denny v. Lopez and Martinez*, 3 TOR3d 10 (Sep. 12, 2006))

Decided January 25, 2006.

Plaintiff, *Pro Se.*
Todd Rigby, Counsel for Defendants.

Before Judge Violet Lui-Frank.

The first day of trial was January 19, 2006. A panel of jurors reported for jury service. The defendants' counsel appeared at the call of the case. The plaintiff was not present in the courtroom. Court Officer Alvin Salazar informed the Court that the plaintiff was present in the lobby when he called the case, but refused to enter the courtroom.

Before the case was called the plaintiff had filed a Demand for Recusal of Judge Violet Lui-Frank on January 19, 2006, at 8:40 a.m. The plaintiff's motion was heard by the Honorable Rose Johnson Antone, and denied.

The Court finds that the plaintiff has the responsibility and burden to go forward in presenting her case. The plaintiff represents herself. Defense counsel argues that the plaintiff's refusal to comply with procedures would support sanctions, including dismissal. The Court concludes that the plaintiff's refusal to appear and present her case constitutes an abandonment of her lawsuit. Further the time for filing an action in this case expired on March 15, 2004, therefore, a new filing in this case is barred.

IT IS ORDERED THAT the complaint is dismissed with prejudice.

JUDICIAL COURT OF THE TOHONO O'ODHAM NATION

CHILDREN'S COURT

TOHONO O'ODHAM NATION, Plaintiff,
v.
H. J. A., Respondent Child.

Case No. 05-UPM-179; 2006-053-UDPLC; 2007-3588-CINC
(appeal dism'd *Tohono O'odham Department Health and Human Services v. H. J. A.*, 3 TOR3d 22 (September 4, 2008))

Decided April 16, 2007 (as amended Apr. 17, 2007).

Tohono O'odham Prosecutor's Office by George Traviolia for Plaintiff.
Tohono O'odham Advocate Program by Fidelis Manuel for Respondent Child.
Office of the Attorney General by Rosalynde Alexander and Jennifer Espino for Tohono O'odham Department of Health and Human Services.

Before Judge Rose Johnson Antone.

The above-named minor child, having been advised of her constitutional rights and present with without his parent or guardian at the hearing regarding Detention on the offense of 12.3A – UNDERAGE POSSESSION OF LIQUOR BY CONSUMPTION:

THE COURT FINDS: Nation states they have concerns when a juvenile is detained in JDC[1] because no adult available to have him released to, the court should consider temporary custody be given to CPS,[2] legal and physical custody; OAG[3] states that their client, CPS, is not a party to this case and the court cannot order and Executive Branch department to do as requested; Respondent's counsel requests Respondent's release, he's been in detention for 26 days or more; court order dated 022701 does not indicate that the guardians were present at that hearing or that they were willing to become the Respondent's guardian; OAG states that the court should have reviewed the electronic recordings regarding the guardianship appointment, CPS believes that the court did order the appointment and the guardian(s) have not come in to have the guardianship terminated; Nation reiterates its position that Respondent should be released; OAG requests to have their objection noted; the court makes its findings pursuant to Chapter 1, Section 6 of the Tohono O'odham Children's Code, Respondent has been detained for 26 or more days,

[1] *Ed. Note:* Abbreviation for Juvenile Detention Center.

[2] *Ed. Note:* Abbreviation for Child Protective Services.

[3] *Ed. Note:* Abbreviation for Office of the Attorney General.

reasonable efforts have been made to contact the Respondent's guardian to release the Respondent from JDC, no parent/guardian has come to release the Respondent; therefore, good cause to place Respondent in shelter care pending a review hearing and to give CPS temporary legal and physical custody of Respondent.

Child Protective Services is awarded temporary care, custody, and control of the Respondent pending a CINC[4] hearing; the Nation did inform the court that they will be filing the CINC upon Ms. Nixon's return to their office.[5]

IT IS ORDERED: Respondent is placed in shelter care, pursuant to Chapter 1, Section 6, Tohono O'odham Children's Code, with CPS given temporary legal and physical custody of the Respondent pending a review hearing on 050807, 930 AM. Parties have their notice to appear.

Child Protective Services is awarded care, custody, and control of the Respondent pending the CINC and/or review hearing on 050807, 930 AM.[6]

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Justin Michael ANTONE, Defendant.

Case No. 2007-03-0701-0704CR

Decided September 25, 2007

Before Judge Roy A. Mendoza.

COURT DATE: SEPTEMBER 25, 2007

CALENDAR EVENT: Other: ORDER DENYING MOTION TO LIMIT SENTENCING TO 360 DAYS.

ADDITIONAL ORDERS: Defendant Motions to limit this Court's ability to assess consecutive sentences for separate charges to which the Defendant has entered guilty pleas, asking the Court to apply the finding in Spears v. Red Lake Band of Chippewa Indians, 363 Federal Supp. 2nd dated March 30, 2006 issued by a U.S. District Court in Minnesota. That Court interpreted the

[4] *Ed. Note:* Abbreviation for Child in Need of Care.

[5] *Ed. Note:* The Court on April 17, 2011 issued an amended order including the language in this paragraph to the April 16, 2007 Record Entry.

[6] *Id.*

"intent" of Congress to limit separate crimes arising out of a single criminal episode to be treated as a single offense for sentencing purposes under the Indian Civil Rights Act. Factually however, its application is limited to that single U.S. District Court boundaries and the decision even recognizes a contrary view in Ramos v. Pyramid Tribal Court, 621 Fed Supp 967, District of Nevada, 1985.

In this case, the Court holds, as the Spears Case in rejecting the holding in the Ramos case, that Spears is not binding on this Court and the Court declines to follow it for the reasons that each charge in this case is separate and distinct, the Spears decision is narrow in its scope and not controlling in this jurisdiction, and the Tohono O'odham Nation Tribal Court is the judicial arm of a Sovereign and Independent Nation which has historically applied consecutive sentencing in cases resulting in jail terms of over 1 year in probation & other criminal cases.

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

SAN LUCY DISTRICT, a political Subdivision of the Tohono O'odham Nation, Plaintiff.
v.
TOHONO O'ODHAM ELECTION BOARD, Defendant,

Case No. 2007-10985-C
(appeal dism'd *Tohono O'odham Election Board v. San Lucy District*, 3 TOR3d 14 (May 30, 2008))

Decided October 1, 2007.

Before Judge Rose Johnson Antone.

The Court issues this Order after having heard the oral arguments on August 28, 2007 and having considered Defendant's Motion to Dismiss, Plaintiff's Response to Defendant's Motion to Dismiss, and Defendant's Reply to Plaintiff's Response.

A. <u>BRIEF HISTORY.</u>

The Plaintiff San Lucy District (the Plaintiff) brings this action against the Defendant Tohono O'odham Election Board (the Defendant) requesting the Court to issue, initially, a preliminary injunction enjoining the Defendant to include all three District Council representative seats, at issue from the May 26, 2007 General Election, on the ballot for the Remedial Election of District Council representatives on June 30, 2007; however, the date had passed before this matter was assigned by the Court.

The Plaintiff asserts that Remedial Election is unconstitutional for the reason that the election is not in accordance with the San Lucy District Council action and the Tohono O'odham Nation's Election Ordinance.

On January 25, 2007, the San Lucy District Council approved Resolution No. 01-08-07 eliminating the Ajo voting constituency created in 1985. Subsequent to the San Lucy District Council's action Virginia Garcia filed an appeal to the Tohono O'odham Legislative Council (TOLC) appealing the San Lucy District Council's Resolution No. 01-08-07.

The TOLC by Legislative Order 07-199 "finds the San Lucy District's January 25, 2007 adjustment to its schedule of representatives was invalid; the adjustment is therefore void." Legislative Order 07-199, page 2 of 2, lines 8-10. By this same action the TOLC granted Ms. Garcia's appeal.

B. JURISDICTION.

The Plaintiff is a political subdivision of the Tohono O'odham Nation (Nation) and the Plaintiff is governed by the San Lucy District Council pursuant to the Nation's Constitution. T.O.N. Const. Art IX, §§ 1 through 7.

The Defendant was established in accordance with the Nation's Constitution. T.O.N. Const. Art. VI, § 1 (g) and Art. X, §7.

The Tohono O'odham Nation's Constitution, adopted on January 18, 1986 and ratified on March 6, 1986, directed the TOLC to enact an election ordinance. The Election Ordinance. ORD 03-86, was enacted on November 18, 1986 and sets forth the requirements for District Council members, specifically, "Must be a member and qualified voter of the Tohono O'odham Nation." Election Ordinance, Art. VI, §3 (A) (1).

The Election Ordinance, Article II, Section 1 (A) states:

> There is created an Election Board which shall be composed of five (5) bilingual members of the Tohono O'odham Nation.

Pursuant to Article VI, Section 3 (A) (1), Article II, Section 1 (A), and Article XIII, Section 11 of the Election Ordinance, and Article VIII, Section 2 and 10 of the Tohono O'odham Nation's Constitution this Court has personal and subject matter jurisdiction to hear this case.

C. SOVEREIGNTY IMMUNITY

The Defendant's assertion that it has sovereign immunity and cannot be sued is without merit. The Defendant is empowered by the Election Ordinance with conducting the Nation's elections. The Election Ordinance provides that this Court has jurisdiction "including but not limited to

injunctive relief against acts in violation of this ordinance." Article XIII, § 11, Election Ordinance. Therefore, the Plaintiff and the Defendant are properly before this Court.

An express wavier by the TOLC is not required for the Plaintiff to bring forth this action. The Tohono O'odham Nation's Constitution, Article VIII, Section 10 empowers the Court to decide the matter at issue here.

D. LEGISLATIVE ORDER 07-199.

The TOLC by Legislative Order 07-199 "finds the San Lucy District's January 25, 2007 adjustment to its schedule of representatives was invalid; the adjustment is therefore void." Legislative Order 07-199, page 2 of 2, lines 8-10. Legislative Order 07-199, therefore, kept in place a voting constituency outside the boundaries of the Nation.

The Election Ordinance provides in pertinent part:

> Number of Representatives: Each district council shall consist of at least five (5) representatives, or their alternatives, who shall be elected either from the district at large, or from communities consisting of villages or groups of villages within the district and recognized or established as separate voting constituencies.

Article VI, § 3 (B), Election Ordinance.

The Tohono O'odham Nation's Constitution, Article I, § 2, provides that "the sovereign powers, authority and jurisdiction of the Tohono O'odham Nation and its government shall extend to all persons and activities carried on within the boundaries of the Tohono O'odham Nation consistent with federal law." Therefore, voting constituencies shall be established within the boundaries of the Nation.

The Court finds that the action taken by the TOLC, Legislative Order 07-199, permits a voting constituency outside the boundaries of the Nation and is in violation of the Tohono O'odham Nation's Constitution, Article I, Section 2, and the Election Ordinance, Article VI, Section 3 (B).

IT IS ORDERED that:

1) Defendant Tohono O'odham Election Board's Motion to dismiss is denied.
2) The Tohono O'odham Legislative Council, Legislative Order 07-199, is in violation of the Tohono O'odham Nation's Constitution, Article I, Section 2, and the Election Ordinance, Article VI, Section 3 (B). Any elections conducted by the Defendant Tohono O'odham Election Board shall be held within the boundaries of the Tohono O'odham Nation.

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

In re the Matter of: J. J. M., A Minor Child.

Case No. 2007-11170-PCA

Decided December 18, 2007.

Tohono O'odham Advocate Program by Director Dwight Francisco, Counsel for Petitioner.

Before Judge Roy A. Mendoza.

This matter is before the Court for an evidentiary hearing set by the Court to clarify whether a Certification to Adopt is necessary when the Petitioner is the child's Godparent. Present is the Petitioner M. J. L., minor child J. J. M., and counsel Dwight Francisco, Nation's Advocate Program Director appearing for the Petitioner. A Certification to Adopt is ***not*** necessary under Chapter II, sect. 32(I)(2) of the Tohono O'odham Nation Children's Code in the instance where a person seeking to adopt is an "extended family member" as set forth therein as defined by tribal custom. Also impacted if a Godparent is found to be a "extended family member" is the necessity for a 90 day waiting period which can be waived if a "relative" adopts.

Petitioner calls Kathleen Carmen, Tohono O'odham Child Welfare Specialist for the Tohono O'odham Department of Health and Human Services who is sworn, seated and offers testimony. Kathleen Carmen has qualified as an expert witness in the Superior Courts of Arizona on Tohono O'odham custom and tradition regarding family issues and issues related to the Federal Indian Child Welfare Act. The Court finds for the record that Kathleen Carmen qualifies in this Nation's Courts as an expert witness. Carmen testifies that in the Tohono O'odham tradition a "Godparent" found to have been designated as such in any religious ceremony of baptism assumes the place of a natural parent for the care and custody of the baptized child in the event the natural parent cannot and is considered a vital family member.

Based upon the above and for good cause appearing, it is the Finding and Order of this Court that:

1) Tohono O'odham custom and tradition includes official Godparents in the definition of "extended family";
2) When a Petitioner is an official Godparent, he or she is a "extended family member" as defined under Chapter II, Section 31 E, Tohono O'odham Children's Code;

3) As an "extended family member" no pre-certification of a Godparent is needed prior to the filing of a Petition to adopt under Chapter II, Section 32 I (2), Tohono O'odham Children's Code,

4) All other statutory requirements under Chapter II, Adoptions, O'odham Children's Code, apply.

The Petition for Certification to Adopt is dismissed as unnecessary.

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

In the Matter of F. A. M. and C. L. M., Minor Children.

Case No. 2006-10417-CCV

Decided May 27, 2008.

Tohono O'odham Advocate Program by Sarah Michele Martin, Counsel for Petitioner.

Before Judge Roy A. Mendoza.

The Court is convened this day for the purpose of hearing a motion for a *ex parte* emergency order to rescind the K. S. M. relinquishment of minor child C. L. M.'s membership in the Tohono O'odham Nation. Petitioner S. M. appears as the court appointed temporary guardian of C. L. M. with her counsel Sarah Michelle Martin, of the Tohono O'odham Advocate Program. Also giving the Court an Oral Notice of Appearance is Samuel Daughety, Assistant Attorney General of the Tohono O'odham Nation and observing the proceedings without objection is Michael Ehlerman, Tohono O'odham Legislative Counsel.

Petitioner, the Temporary Legal Guardian/Grandmother of C. L. M. since 1998 states that she and the Tohono O'odham Nation's Courts have been involved in a long standing legal dispute with the natural mother K. S. M. a member of the Crow Nation over custody of the child now located in the State of Pennsylvania with non-Indian individuals named R. and C. H. who took the child from Arizona with her mother's permission. The natural father of the child is M. L. M., Petitioner's son and a member of this Nation. A lower Pennsylvania court ruling has recognized the jurisdiction of the Tohono O'odham Nation's Court over the child pursuant to the Indian Child Welfare Act, and is on appeal through the Pennsylvania Appellate Courts. The mother applied for and was granted the relinquishment of the child C. L. M.'s membership in the Tohono O'odham Nation without the disclosure of any of the above information to the Nation's

Enrollment Office and without notice to the Petitioner; and has enrolled the child in the Crow Tribe of Montana. This Nation's statutory Relinquishment of Membership process was followed, which resulted in the child's membership being relinquished. Petitioner now seeks to have this Court declare the action of the nation's enrollment committee and the Nation's Council in accepting the relinquishment void *ab initio* as it was fraudulently obtained.

Legal analysis

This Court acknowledges and respects the authority of the Tohono O'odham Council under Article VI, Powers of the Tohono O'odham Council under Article VI, Powers of the Tohono O'odham Council, Section 1(h) of the Nation's Constitution to enact laws and ordinances regarding loss of membership in the Nation. The Legislative Council adopted an Enrollment Ordinance, that sets forth the process for relinquishment of membership, Title 14, Chapter 1, Article IX, Section 1 which provides:

> ARTICLE IX – RELINQUISHMENT AND LOSS OF MEMBERSHIP
>
> A Member of the Nation may relinquish his membership in the Nation by submitting a written statement clearly expressing an intent to relinquish his membership to the Council, a copy of which must be signed by the person wishing to relinquish his membership or, if a minor or incompetent, by the parent(s), guardian or other person legally authorized to act on his behalf. Relinquishment does not require approval of the Council but is effective upon receipt of the statement by the Council and cannot be subsequently denied. Upon recognition by the Council that the individual has renounced his membership, his name shall be deleted from the membership roll. Tohono O'odham Code, Title 14, Chapter 1, Article IX, Section 1. (emphasis added)

This pertinent section does not provide for any judicial review of any relinquishment decisions. The decisions lay exclusively with the Legislative body and are final. To rule otherwise, no matter how meritorious the facts may be, infringes upon the sole powers of the Legislative Branch of the Tohono O'odham Nation as plainly expressed by the Constitution of the Tohono O'odham Nation and the Enrollment Ordinance.

Therefore, based upon the above, the Court DENIES the motion for an Ex Parte Order to set aside the relinquishment of the membership of minor child, C. M., for lack of jurisdiction.

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

In the Matter of R. V., Minor Child.

Case No. 2006-10417-CCV

Decided July 10, 2008

Tohono O'odham Attorney General's Office by Vanessa Franco, Counsel for Health and Human Services.

Before Judge Linda Parley.

This matter comes before the Court for a Shelter Care Hearing, continued from July 8, 2008. Present: Tohono O'odham Attorney General's Office, Vanessa Franco, Counsel for Health and Human Services; Tina Scott, Child Welfare Investigator; Myra Lawson, Child Welfare Division Supervisor. M. V., Grandmother to the minor child. Not Present: A. V., Natural Mother of the minor child.

THE COURT FINDS that this hearing was set to determine if the Court had jurisdiction over the mother and child.

THE COURT FINDS that the motion by counsel to proceed (in absentia) of the natural mother is granted and the hearing proceeds.

THE COURT FINDS that the Nation presents opening statements that the infant is eligible for enrollment by the mother being eligible for enrollment with the Tohono O'odham Nation ("Nation"). The grandmother is a member of the Nation. The Nation states the natural mother is mostly domiciled on the Nation.

THE COURT FINDS that testimony is heard from Grandmother. Grandmother is the natural mother to the Mother. Grandmother is an enrolled member of the Tohono O'odham Nation. Grandmother states that the Mother is eligible for enrollment and the infant is eligible for enrollment. Mother stays here and there. Grandmother also testifies that she found the Mother in Casa Grande yesterday, the house smelled like marijuana. She tried to tell her daughter to come home, but her daughter got angry and told her to leave. The most consistent place the Mother stays is with her aunt in Chui Chi, the last time she stayed for four months. The Mother recently asked her aunt if she could come stay again, but the aunt told her she did not want any drugs or alcohol around. The Mother got angry and left.

THE COURT FINDS that the Nation believes it has jurisdiction over this matter and has established that the grandmother of the minor child is an enrolled member of the Nation, the most current residence of the mother of the minor child is on the Nation and there is sufficient evidence to accept jurisdiction.

THE COURT FINDS that the Constitution of the Tohono O'odham Nation, Article II – Membership, Section 1(b), states, The membership of the Tohono O'odham Nation shall consist of the following: "All children born to resident members."

THE COURT FINDS that the Civil Code, Title III – Civil Actions, Chapter 1: Civil Jurisdiction, 1-101.b.1.; states that civil jurisdiction of the Tohono O'odham Courts shall extend to the following persons: "any person who is domiciled within the territorial jurisdiction of the Tohono O'odham Nation. The Code also defines domicile as the person's true, fixed and permanent home and the place to which a person intends to return even though actually residing somewhere else and shall mean a person's actual place of residence."

THE COURT FINDS that the natural mother is not an enrolled member of the Nation.

THE COURT FINDS that there is no subject matter jurisdiction over the minor child as the minor child would not be eligible for enrollment based on the Constitutional requirements for membership.

THE COURT FINDS that there is no personal jurisdiction over the natural mother as the testimony presented did not establish when the natural mother stayed on the Nation for four months. Since the birth of her child, she has not returned to the Nation. There is no evidence that the natural mother intends to return to the Nation to make it her permanent residence.

THE COURT ORDERS that the case is dismissed for lack of subject matter and personal jurisdiction.

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

Veronica MORENO, Petitioner,
v.
Michelle MORENO, Defendant,

Case No. 2009-0025AV

Decided February 17, 2009.

Tohono O'odham Advocate Program by Dwight Francisco and David Oliver for Petitioner.
Legal Services by Rebel Harjo for Respondent.

Before Judge Roy A. Mendoza.

This matter comes before the Court for hearing with Petitioner Veronica Moreno appearing with Dwight Francisco and David Oliver, Advocate Program and Respondent Michelle Moreno appears with Rebel Harjo, Legal Services. Petitioner is the natural mother of decedent in the matter, Michael Eddie Moreno Sr. The Respondent is the widow of the decedent. The Court finds it has both subject matter and personal jurisdiction to proceed as the Petitioner and decedent are members of the Nation, pursuant to Article I, Section 3, of the Constitution of the Tohono O'odham Nation and Title 4 (Title IV), Section 1-101(a) and (b) of the Tohono O'odham Code (1st ed. 2006). The Respondent submits to the jurisdiction of this Court for the purposes of this hearing as she is of Yakama and Nez Perce tribal descent. The decedent being an enrolled member of the Nation is found to be domiciled within the Tohono O'odham Nation as defined in Chapter I, Section 1-101 (c) (4).

The following witnesses were sworn, testified, and cross examined. For Petitioner, Deborah Moreno, Karen Sabori, Michael Moreno Jr., Joseph Joaquin, Mary Miguel, Camillus Lopez, and Veronica Moreno. For Respondent: Lucy Zaueta, Mary Jane Juan Moore, Marie Ortiz, DJ Ortiz, and Michelle Moreno.

The Court finds the relationship between decedent Michael Eddie Moreno Sr. and Respondent Michelle Moreno was one of husband and wife. Also, that both lived together in Lapwai, Idaho for approximately 10 years and have 3 children. He then returned to this Nation on November 16, 2008 to work on the border fencing project where he stayed with family members, got his Tohono O'odham identification card reissued, received some mail here, and brought his family for the Christmas holidays during which time he mentioned to his wife of his desire to move here while visiting the San Xavier Mission. Petitioner witness Karen Sabori testified that shortly after

his return in November 2008 he on at least 4 occasions, mentioned to her his wish to be buried next to his grandmother. Further, his son, Michael E. Moreno, Jr., also commented on his father's desire to be buried here.

Several witnesses testified about their understanding of custom and tradition which must be followed as common law by this court by the fact that no law exists in the Tohono O'odham Constitution or Code giving express authority as to who of several family members has the final say on how and where a loved one is to be buried. Tohono O'odham Civil Code provision 1-102, makes it clear that when no law exists custom and tradition must be followed, further supported by a prior written decision of this Court in case No. 04-PI-9723, *IN THE MATTER OF JOE L. MIGUEL, Decedent*, 2 TOR3d 75 (Trial Ct., Apr. 2, 2004).

The Court finds that normally as a matter of course once a Tohono O'odham family member passes on a family meeting is usually held where funeral arrangements are agreed to usually by a consensus. However, there was no written statement produced by the deceased as to how and where he wanted to be buried. All parties were present at the meeting and the only statement made by Petitioner mother was that she could understand why Respondent wanted to take him to Idaho to be buried because of his small children. There was no debate or other divisive oratory expressed which is a significant trait of the Tohono O'odham people, culture, and tradition to avoid conflict. The Court received testimony that if no consensus is reached custom and tradition requires the decedent wishes are to be followed and that the elder is the ultimate arbiter. Some agreement for a funeral service on the Nation was made and while a service was held the Petitioner and other family members changed their mind about his removal and burial outside of the Nation which led to the filing of this lawsuit due to a perception that the Nation and Petitioner had been disrespected by Respondent. Thus, the wishes of the decedent and elder (mother) is found by this Court to be of paramount importance in resolving this issue limited to the facts as they exist in this case under Tohono O'odham common law. The Custom and Tradition of the Tohono O'odham Nation is to be followed and honored.

Therefore, based upon the above and for good cause shown, it is ORDERED, ADJUDGED, AND DECREED that the Temporary Restraining Order issued in this case is made PERMANENT and Respondent Michelle Moreno or any other person or persons are Permanently Restrained and Enjoined from possessing and or removing the remains of decedent Michael Eddie Moreno Sr. anywhere outside the boundaries of this Nation.

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

Cecilia D'ALESSIO, an individual and as mother and guardian of Alejandro GRIVALVA-D'ALESSIO and Miguel GRIVALVA, Jr., Plaintiff,
v.
DESERT DIAMOND CASINO and TOHONO O'ODHAM GAMING AUTHORITY, Defendants,

Case No. 05-C-10043

Decided August 27, 2009.

Law Office of Durazzo & Eckel, P.C. by Neil Eckel and Eric Hawkins, Tucson, for Plaintiff.
Jones, Skelton & Hochuli, P.L.C. by James Curran and Gary Burger, Phoenix, for Defendants.

Before Judge Roy A. Mendoza.

A civil bench trial in the above matter was conducted before the Tohono O'odham Nation Tribal Courts, Sells, Arizona on July 8, 2009 with Tribal Court Judge Roy A. Mendoza presiding.

The Court renders its Verdict as follows:

STATEMENT OF FACTS

The Court as the trier of facts finds the following derived from video recordings, depositions, statements, police reports, exhibits and testimony received at trial. On January 28, 2004, Miguel Grijalva and Plaintiff Cecilia D'Alessio were at the Desert Diamond Casino ("Casino"), located on Old Nogales Highway in Tucson, Arizona, and located within the exterior boundaries of the Tohono O'odham nation. Grijalva and Plaintiff, an unmarried couple who had lived together for six years and had children in common, visited the Casino three to four times a week to drink and gamble. On January 28, 2004 they arrived at the Casino at approximately 2:30 p.m. At 4.30 p.m., they both left the Casino to cash a check. Unsuccessful, they returned to the Casino around 5:00 p.m., where Plaintiff cashed a personal check. Grijalva and Plaintiff departed the Casino at 10:07 p.m. During their stay at the Casino they played slots, Blackjack, and drank Heineken beer. Grijalva purchased for himself and others at most 12 beers during his seven hours at the Casino. All beer purchases were made by Miguel Grijalva and were purchased at a Casino bar and none from any server during their entire stay. The beers were purchased two at a time. Shortly before 10:00 p.m. and their departure from the Casino at 10:07 p.m., Plaintiff made a derogatory statement to a female server whom she believed was flirting with Grijalva. Plaintiff was also angered because Grijalva left a large tip. The video recording of their departure at 10:07 p.m.

clearly shows both pausing briefly for a discussion at the exit to the Casino, then walking in the parking lot separated from each other by several feet to the Plaintiff's vehicle where Grijalva entered the driver's side and sat behind the wheel. Plaintiff then walked to the front of the vehicle for a few seconds, returned to the driver's side next to where Grijalva was seated with the door opened, appeared to say something to him and then she slammed his door shut. Plaintiff then walked around to the front passenger side door, opened it and sat. Plaintiff is next seen tossing out what appears to be an empty bottle through her passenger side window just seconds before Grijalva backed out and proceeded to drive off.

Within a few minutes thereafter, Grijalva, driving Plaintiff's vehicle north on Old Nogales Highway at a high rate of speed, ran the red traffic signal at the Valencia Road intersection smashing into a tractor trailer, causing his death and injuring Plaintiff.

Plaintiff told the police at the scene that "they were arguing after leaving the Casino. Miguel got made when the light (traffic signal) turned red. Miguel drove through the red signal light." Plaintiff further stated they both were drinking at the Casino and they "only had a few drinks." Grijalva's Ameritox Toxicological Laboratory Report results at autopsy showed his blood alcohol, Ethyl as 0.21% and Vitreous Alcohol, Ethyl as 0.23%. Testimony indicated Grijalva was a "practiced drinker" who had learned to mask any outward signs of intoxication.

APPLICABLE LAW

Plaintiff's cause of action is predicated solely on a violation of Arizona Revised Statutes, Section 4-311, Liability for serving intoxicated person. Sections (A) and (D) read as follows:

> Section A. A licensee is liable for property damage and personal injuries or is liable to a person who may bring an action or wrongful death pursuant to section 12-612, or both, if the Court or jury finds all of the following:
>
> 1. The licensee sold spirituous liquor to a purchaser who was obviously intoxicated.
> 2. The purchaser consumed the spirituous liquor sold by the licensee.
> 3. The consumption of spirituous liquor was a proximate cause of the injury, death, or property damage.
>
> Section D. For purposes of this section, "obviously intoxicated" means inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or

> significant physical dysfunction that would have been obvious to a reasonable person.

It should be noted that under the Tohono O'odham Nation's Alcohol Beverage Licensing and Control Regulations, section 3.1.17, "it is unlawful for a licensee or other person to serve, sell, or furnish liquor to a disorderly or obviously intoxicated person" and under Section 1.2.12 thereof, the definition of "obviously intoxicate" mirrors the term as defined under A.R.S. 4-311(D).

LIABILITY

The sole question of Casino liability lies on whether Plaintiff met her burden of proof that the Casino sold spirituous liquor to an "obviously intoxicated" Miguel Grijalva and thus this impairment was the proximate cause of his death and injury to Plaintiff Cecilia D'Alessio shortly after Grijalva was allowed by Plaintiff to drive Plaintiff's motor vehicle from the Casino parking lot to the scene of the crash. Without establishing the first, the second is moot.

In rendering its decision, the Court finds the following facts compelling: 1. Both Grijalva and Plaintiff were "regulars" at the Desert Diamond Casino, and were therefore known to the bartending staff. 2. Grijalva purchased beer two at a time and never bought any beer from a cocktail/drink floor server. 3. Grijalva purchased beer that was consumed by himself, the Plaintiff, and others during the 7-8 hours he and Plaintiff were at the Casino. 4. Only Grijalva made the beer purchases at the Casino. 5. Grijalva and Plaintiff left the Casino for approximately 30 minutes in the mid-afternoon. 6. As evidenced on the video tapes condensed from several hours of recordings and reinforced by both expert witnesses called by each party, there were some "cues" that Grijalva appeared to be animated, happy, unhappy, and unsteady at times in his movements – some apparently depending how Plaintiff or he were doing gambling. 7. Plaintiff, who had lived with Grijalva for six years, did not express any concern about his ability to operate her motor vehicle and let him drive upon leaving the Casino. 8. the last video of both leaving the Casino shows them engaged in a verbal discussion, then Grijalva walking to Plaintiff's motor vehicle without stumbling, staggering, or leaning on any motor vehicle he passed. He then entered the Driver's side and eventually with Plaintiff as his front seat passenger, backed out safely, avoided a pedestrian on the way to the exit gate, stopped, turned right and drove forward to the Old Nogales Highway without swerving or striking any objects on the way out.

Based upon these facts, the Court does not find Grijalva significantly impaired, uncoordinated, or physically dysfunctional that would show and be interpreted by a reasonable

person in that setting that he was "obviously intoxicated" and continuously served by Casino staff to the point of "obvious intoxication".

The Court in the above-entitled and numbered action finds in favor of the Defendants and it is Ordered, Adjudged, and Decreed on the verdict aforesaid that the Plaintiff recover nothing from Defendants.

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

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided March 11, 2010.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

By amended Petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction, the Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch through the office of the Chairman of the Tohono O'odham Nation from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law," or "Code"). An Order Granting Emergency Preliminary Injunction was filed January 6th, 2009, and modified January 28, 2009. The Legislative Council seeks to intervene in the litigation.

There are no named individual litigants. Rather, this dispute is between co-equal branches of the Tohono O'odham Nation, though captioned as *In Re: The Petition of the Judicial Branch*. The ability of one branch of the government to sue one another is a matter of first impression. And, here the Judiciary itself is, unenviably, the litigant and arbiter of the outcome by virtue of its Constitutional Authority under Article VIII, Section 10.

This Court begins its analysis of the appropriateness of Intervention by echoing the words of former Chief Justice Hilda Manuel. "The motives of the parties are not for this Court to scrutinize provided that the purposes are not expressed or sought to be enforced through means

that offend the Constitution." *Francisco v. Toro*, 1 TOR3d 68, at 69 (Trial Ct., Jan. 12, 1989) *appeal dism'd* 3 TOR3d 17 (Ct.App., Sep. 4, 2008).

Choice of Law

Administrative Order 03-09 rescinds Administrative Orders III and 01-04. Nevertheless, the parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent Arizona law. This Court agrees.

Jurisdiction

The Jurisdiction of the Court to hear the Amended Petition will be discussed below.

Intervention

I

The procedure and criteria for intervention under the Arizona Rules of Civil Procedure are found in Ariz.R.Civ.Pro. Rule 24 (a)-(d). Under those provisions, any party whose interests may be affected by pending litigation can apply to intervene either as a plaintiff or as a defendant.[1] Ariz.R.Civ.Pro. Rule 24 (a)-(b). Depending upon the circumstances, intervention may be a matter of right or merely permissive. *Id.* The party pleading to intervene has the burden of showing the propriety of and/or entitlement to intervention. *Morris v. Southwest Sav. & Loan Ass'n*, 449 P.2d 301 (Ariz. Ct. App. 1969). However, the intervener takes the case as he or she finds it. In other words, the scope of the case cannot be broadened by the intervention. *Ariz. Real Estate Dept. v. Ariz. Land Title and Trust Co.*, 449 P.2d 71 (Ariz. Ct. App. 1968).

Intervention is a matter of right when a statute confers an unconditional right to intervene or when disposition of the action may impair or impede the applicant's ability to protect his or her interest in the subject matter of the action – that is, "unless the applicant's interest is adequately represented by existing parties." Ariz.R.Civ.Pro. Rule 24(a).

Intervention is permissive when a statute confers a conditional right to intervene or when a common question of law or fact exists. Ariz.R.Civ.Pro 24 (b). In exercising its discretion in permissive intervention situations, the court considers whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.*

In the case at hand, no statutory right to intervene exists, either permissively or as a matter of

[1] An application to intervene must be timely whether made as a matter of right or as a permissive intervention, and a motion to intervene filed after judgment is considered timely only in extraordinary and unusual circumstances. *See Weaver v. Synthes Ltd.*, 784 P.2d 268 (Ariz. Ct. App. 1989). Here, because the case is in its preliminary stages, it is unlikely that the proceedings will be unduly delayed by the intervention.

right. Thus, the ability of the Tohono O'odham Legislative Council ("Council") to intervene hinges on 1) whether the injunction prayed for by the Judicial Branch of the Tohono O'odham Nation ("Judicial Branch") will obstruct the Council's ability to protect its interests; 2) whether the Council's interest is adequately represented by an existent party; and 3) whether the Council's action has a question of fact or law in common with the Judicial Branch's request for an injunction.

First, it is arguable whether the injunction prayed for by the Judicial Branch—a finding of unconstitutionality as to §§ 1102(B)(1), 1103(D), 1106(B), 1106(C) and 1107(C) of 6 Tohono O'odham Code Chapter 1 ("Courts and Procedures Law")[2]— will obstruct the Council's ability to protect its interests. In short, the Council argues that, because they have been granted broad power to enact laws providing for the "administration of justice" – more specifically, the power to set judicial compensation, appoint judges,[3] and approve budgets for the expenditure of the Nation's funds, including Judicial Branch budgets – their interests are in preserving those laws. Thus, the Council argues that it has an interest warranting intervention in any suit contending the constitutionality of those laws.

However, under the rule announced in *Greene v. U.S.*, 996 F.2d 973 (9th Cir. 1993), to meet the threshold permitting intervention, although no specific legal or equitable interest must be established, "the movant must demonstrate a 'significantly protectable interest'" in the matter. *Id.* at 976. Under this test, the "interest" threshold will not be met if "a holding 'will not affect a statute or regulation governing the applicant's actions, nor will it directly alter . . . other legally protectable rights of the proposed interveners.'" *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989); *see also Hill v. Alfalfa Seed and Lumber Co.*, 297 P. 868, 869 (Ariz. 1931) (holding that "interest" entitling a party to intervene must be in matter in litigation and of such direct character that intervener will either gain or lose by direct legal operation of judgment). Thus, the Council's assertion that a decision denying or affirming the constitutionality of the contested sections of the Courts and Procedures Law will affect its ability to enact laws begs the question: Will the Council lose or gain a protectable right by the direct operation of the judgment? The answer to this question rests with the Court, as it is the ultimate question

[2] By Order of this Court, dated January 28, 2009, good cause existed to modify the Emergency Preliminary Injunction to enjoin only the implementation of the following provisions of Title 6, Chapter 1 of the Tohono O'odham Code that remain in dispute: The final sentence of Subsection 1102(B)(1); Subsection 1103(D); Subsection 1106(B); the first sentence of Subsection 1106(C); and Subsection 1107(C).

[3] In their brief, the Council also argues that they have the power to remove judges under Constitution, Art. XIII, Sec. 1, 3.

presented in the constitutional challenge. If this Court decides that the Council has the constitutional power to enact those provisions of the Courts and Procedures Law, then the Council loses nothing and gains nothing. On the other hand, if this Court decides that the Council does not have such power, the Council still loses nothing, because it did not have the power to pass the Courts and Procedures Law in the first place. The Judicial Branch asked, originally, only for an injunction declaring certain provisions of the Courts and Procedures Law unconstitutional; however, by subsequent pleading it has sought to restrain the passage of future laws affecting the subsections of the Code which might then alter the subject matter of this controversy.

The Council also argues that the disposition of the case will, as a practical matter, impair the ability to protect its interest. It argues that an unfavorable ruling on any of these constitutional issues will significantly restrict the Council's ability make any laws regulating the Judicial Branch in the future. Were the Council not to intervene, it argues, the *stare decisis* effect would be a serious impediment to any future litigation. As the State Bar Committee Note to Ariz.R.Civ.Pro. 24(a)(2) 1966 Amendment makes clear, whether "a party is in fact so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interests is a question to be determined by the court, it is not sufficient that such an impairment or impediment is pleaded." In *McGough v. Insurance Co.*, 691 P.2d 738 (Ariz. Ct. App. 1984), the Arizona Court of Appeals held that where collateral estoppel prevents a party from protecting its interests in the future, the potentially estopped party has the requisite interest necessary for intervention under Ariz.R.Civ.Pro. Rule 24. *Id.* at 743. Likewise, in *John F. Long Homes, Inc. v. Holohan*, 396 P.2d 394 (Ariz. Ct. App. 1964), the same court held that intervention as a matter of right is absolute where an applicant may be bound by a judgment involving his or her interests. *See also Green*, 996 F.2d at 977 ("Intervention may be required when considerations of stare decisis indicate that an applicant's interest will be practically impaired."); U.S. v. Oregon, 839 F.2d 635, 638 (9th Cir. 1998) ("a *stare decisis* effect is an important consideration in determining the extent to which an applicant's interest may be impaired."). However, the Court need not reach this argument if it determines that the Council's interest is not "significantly protectable" in the first place. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

Although the Council's argument in favor of intervention is questionable, a significant amount of precedent exists suggesting that intervention as of right is to be "construed broadly in favor of applications for intervention." *Green*, 996 F.2d at 973; *see also Cascade Natural Gas Corp. v El*

Paso Natural Gas Co., 386 U.S. 129 (1967); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 536 F.3d 980 (9th Cir. 2008); *California ex rel. Lockyer v. U.S.*, 450 F.3d 436 (9th Cir. 2006); *U.S. v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004); *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001). In *Harris v. State*, 11 P.3d 403 (Ariz. Ct. App. 2000) the Arizona Court of Appeals held that an analysis for intervention should include, at least, the nature and extent of the intervener's interest, the intervener's standing to raise legal issues, the legal position the intervener seeks to assert, whether intervention would unduly prolong litigation, and whether the intervener would significantly contribute to the proceedings.

Second, it is unlikely that an existent party adequately represents the Council's interest. In *Harris*, 11 P.3d 403, the Arizona Court of Appeals held that organizations are not allowed to intervene in constitutional matters as a matter of right where the state had provided all the information regarding the drafting of the law, the purpose behind it, the public policy reasons for it, and the history of similar provisions in the nation. However, in *Saunders v. Superior Court*, 109 Ariz.424, 510 P.2d 740 (Ariz. 1973), the same Court held that city firemen and incorporated policemen and firemen associations were allowed to intervene in a constitutional question case as a matter of right, where the intervening party under such statute would have no chance in future proceedings to have the constitutionality of the statute upheld. In *Saunders*, although the Attorney General was made party to the action, because the Attorney General represented only named state officials in the proceedings, the petitioners were allowed to intervene as a matter of right, to protect their own constitutional interests. *Id.* at 742. In a case such as the one at hand, where the Attorney General is unable to weigh in upon the law in question at all, it is not inconceivable to consider the proposition that the Council be allowed to intervene as a matter of right.[4] Unless the Council enters the case, no parties involved in the suit will defend the constitutionality of the Courts and Procedures Law.[5] Such situation would upset longstanding

[4] The Attorney General has declared a conflict of interest that prevents that Office from representing any branch of the Tohono O'odham Nation against another. This Court adopts the ethical considerations expressed by the Attorney General's pleading and relieves it from appearing pursuant to the subpoena previously issued. *See* Statement of the Office of Attorney General, Jan. 20, 2009.

[5] The Judicial Branch argues in its brief that the Chairman of the Tohono O'odham Nation, as a party to this suit, has the obligation to defend the law against constitutional challenges, and, thus, the interest of the Executive Branch is adverse to the Judicial Branch. Therefore, they argue, any interest in upholding the constitutionality of the Courts and Procedures Law will be fully represented by the Executive Branch. However, the Chairman has made clear the Executive Branch's position that it is not adverse to the Judicial Branch and, in fact, supports the Judicial Branch's position. For that reason, the Executive Branch has endorsed the Council's motion to intervene. *See* Respondent Executive Branch's Response Brief, Jan. 21, 2009 at p.4.

precedent establishing that, at the least, one party must be adverse to the petitioning party, "proceeding with diligence [,] and [appraising] the court of the issues and law on the subject." *Mitchell v. City of Nogales*, 320 P.2d 955, 958 (Ariz. 1958); *see also Flast v. Cohen*, 392 U.S. 83 (1968) ("the 'gist of the question of standing' is whether the party seeking relief has 'alleged . . . concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'").

Third, the Council's action likely has a question of fact or law in common with the Judicial Branch's request for an injunction. This question at hand is analogous to the issue presented in *City of Tucson v. Pima County*, 19 P.3d 650 (Ariz. Ct. App. 2001). In that case, the Arizona Court of Appeals allowed the Town of Oro Valley to intervene in the constitutional challenge of a statute allowing certain communities within Pima County to incorporate as towns, without the City of Tucson's consent. The Court ultimately held that, because both the Town of Oro Valley and the City of Tucson were arguing apropos the constitutionality of the same statute, the lower court did not abuse its discretion in allowing Oro Valley to participate. *Id.* at 656. Like *City of Tucson*, because the intervening Council asserts questions of fact and law in common with the Judicial Branch, the Council argues credibly that it should be allowed to intervene.

Whether to grant a motion to intervene as a permissive matter is a decision that rests within the discretion of this Court. *Purvis v. Hartford Acc. and Indem. Co.,* 877 P.2d 827, 830 (Ariz. Ct. App. 1994). However, as the Arizona Court of Appeals made clear in *Bechtel v. Rose*, 722 P.2d 236 (Ariz. Ct. App. 1986), permissive intervention is remedial and should be liberally construed with a view toward assisting parties in obtaining justice and protecting their rights.[6] Even where, under usual circumstances, the intervener would not be a proper party at the beginning of the suit, Arizona's liberal standard allows the party to intervene where justice so demands, at the discretion of the Court. *Arizona Dept. of Economic Sec. v. Superior Court of State, Juvenile Div.*, 839 P.2d 446, 448 (Ariz. Ct. App. 1992).

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[6] In fact, *Bechtel* goes so far as to overturn a lower court's denial of intervention because it did not make an "individualized determination of the petitioner's motion to intervene," based upon obtaining justice and protecting rights. 722 P.2d at 242.

II

Traditionally, the Tohono O'odham (Papago)[7] had no central government, were not organized under a central chief, and were, at best, "loose confederations among village units."[8] As illustrated in their creation stories, civil divisions were firmly integrated as an essential part of the Papago identity.[9] However, these "village units" did share a common language, like economic systems, and, most importantly, similar religious, social, and political customs.[10] Ultimately, although there was certain marriage preferences involving other units, most Papagos "possessed a latent 'in group' feeling," referred to themselves in common as "O'otam," and were organized in "a moiety organization that was pan-Papago in scope."[11] A mutually dependent trade relationship – the Desert People supplying labor in exchange for food from the river dwellers – helped to cement this relationship.[12]

By the close of the nineteenth century, what was left of traditional civil divisions began to collapse.[13] Due to a number of factors – Spanish encroachment, the introduction of European disease, and Apache attacks – the Papago were forced into an ever-shrinking range, and the

[7] "Though outsiders erroneously referred to them as 'Papago,' these desert dwellers call themselves the O'odham, which means "the People." Peter MacMillan Booth, Creation of a Nation: The Development of the Tohono O'odham Political Culture, 1900-1937, 1 (March 2, 2000) (unpublished Ph.D. dissertation, Perdue University). For the purpose of this memo, the terms will be used interchangeably. This Court agrees with the Respondent that some of the written documents referred to herein are authored by Non O'odham and are translations from O'odham to English. In translations, words can lose their original meanings. "As the late Frances Manuel of San Pedro Community explained, *English kills the meaning you have to speak Papago to really understand. Papago is a different dialogue…if you really want to [say something] it has to come from your feeling, it has to come from your heart.* Frances Manuel and Deborah Neff, *Desert Indian Woman, stories and dreams*, (2001) Appendix A at 201," as *cited* in Respondent's Supplemental Pleading, p.4, filed September 28, 2009. Petitioner and Intervenor/Movant have chosen not to present evidence of customary and traditional dispute resolution and how such cultural knowledge could advise the Court in determining whether or not to grant intervention. Respondent Executive Branch has provided a brief summary which the Court takes judicial notice of. Respondent's Supplemental Pleading p.4, line 23-p. 10, line 3.

[8] Bernard L. Fontana, *The Papago Tribe of Arizona*, *in* PAPAGO INDIANS III, 151, 166 (David A. Horr ed., 1974).

[9] *See generally* Henriette Rothschild Kroeber, *Traditions of the Papago Indians*, 25 J. AM. FOLKLORE 95 (1912); Jonathan Elliott Skinner, Ecopoetics: Outsider Poetries of the Twentieth Century (May 13, 2005) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with Venito Garcia Library, Tohono O'odham Community College).

[10] Fontana, *supra* note 7, at 166.

[11] *Id. See also* Booth, *supra* note 6, at 2 ("The O'odham saw themselves as separate peoples within a collective *Himdag*, or 'way of life.'").

[12] Booth, *supra* note 6, at 3.

[13] *Id.* at 4.

desert-river cooperative relationships began to collude.[14] The organization was permanently altered in 1916, when President Woodrow Wilson established the Papago reservation.[15] Although guaranteeing protection for the remaining O'odham land, the establishment of the reservation trapped these non-united peoples within a common area.[16] "Through both external and internal forces, the O'odham began (voluntarily and involuntarily) the process of forming a common identity."[17] By the 1930's, a common political unity was formed, which culminated in 1937 when the Tohono O'odham accepted the Indian Reorganization Act (IRA) in 1937, and adopted a single constitution.[18]

Internally and practically, however, until recently power remained vested at the local/village level.[19] In all actuality,

> the O'odham political culture did not fundamentally change, even after the people formed a single tribal entity. On the contrary, defense of the autonomy of the village remained paramount, regardless of the time or the village-complex involved. Many of the Desert People felt the need to create a united front to deal with the changing world. However, others feared that a central tribal government would upset village authority. As a compromise, after two decades of heated debate and political conflict, the O'odham took the ironic path of protecting village independence by constructing a single tribe. The majority of O'odham viewed the formation of semi-independent councils, linked by a weak central council, as the best way to protect the cultural and political integrity of their villages.[20]

A large component of the Papago ethos is "primarily concerned with corporate social cohesion . . . ."[21] This often meant that a comprehensive perspective was sought; in order respect

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[14] *Id.*

[15] *Id.* at 2.

[16] *Id.* at 4.

[17] *Id.*

[18] *Id.* at 2, 5.

[19] Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 202 (Eric D. Lemont ed., 2006).

[20] Booth, *supra* note 6, at 6.

[21] Skinner, *supra* note 8, at 224-25. This philosophy is illustrated by the O'odham's continuing practice of the "cactus ritual," long after desert subsistence patterns were no longer the preferred method of survival (at least since after the U.S. government forced the O'odham to change their method of survival by drilling wells in their traditional lands). *Id.* at 225.

and take into account the viewpoints of all tribal members equally.[22] According to traditional Papago spiritual beliefs:

> The O'odham's supreme being, *Íitoi*, gave the *Himdag* to the people who orally passed on this philosophy of existence from generation to generation. *Himdag* means more than just a religion, but instead it "encompasses the whole way of life." This O'odham doctrine stresses the need to interact harmoniously. It recognizes the reality that power cannot be centralized and no matter what one does, other entities can affect ones existence.[23]

As a widely esteemed Papago political figure active in creating the *Constitution and By-Laws of the Papago Tribe of Arizona* in 1937, Peter Blaine, stated: "A white man hears one thing and okays it right away. Indians, they don't. They wait and wait. They consider everything. In a way, they really put their minds to it. It's just a good way."[24]

The responsibility to retain this cohesion also "carries an obligation to settle disputes amicably."[25] Traditionally, recourse to legal authority was taken only when the dispute was between a Papago and persons or entities outside of the tribe.[26] Matters that required local collaboration were usually handled without hostility: the situation was brought to a leader, and his decision was followed.[27] Leaders were respected because of their positions, and their decisions were accepted when people felt that those decisions were "based on a thorough knowledge of the recognized way of doing things and . . . made after discussion and expression of 'what all people think.'"[28] As Blaine has noted, "Leadership and respect for leadership is where education starts. If that breaks down, the life of the Papago breaks down."[29]

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[22] *See* PETER BLAINE, SR., PAPAGOS AND POLITICS 42 (Michael S. Adams ed., 1981).

[23] Booth, *supra* note 6, at 21.

[24] BLAINE, *supra* note 21, at 87. *See also* James R. Simpson, *Uses of Cultural Anthropology in Economic Analysis: A Papago Indian Case*, 29 HUMAN ORGANIZATION 162, 163 ("noting that, in explaining economic farming decisions, "[t]he answer seems to lie in Papago traditionalism in which group rather than individual decisionmaking . . . .").

[25] ALICE JOSEPH, ROSAMOND B. SPICER, & JANE CHESKY, THE DESERT PEOPLE: A STUDY OF THE PAPAGO INDIANS 55 (1949).

[26] *Id*. Even in 1949, though, the traditional dispute settlements were breaking down, and Papagos were resorting to legal recourse among themselves. *Id.*

[27] *Id.* at 65.

[28] *Id.*

[29] BLAINE, *supra* note 21, at 131.

In all, "few individuals are willing to assume the role of 'policeman' when all of the pressures are toward a sensitivity in personal contacts and a kind of introversion that precludes setting oneself up as a dominant leader rather than a social conformer."[30] This does not mean, though, that traditionally there were no decisionmakers. Customary Papago authority was vested in the *kobanal* (chief) and his two assistants.[31] The chief was usually elected by the village unanimously, and retained office until people became dissatisfied, or he wished to retire.[32] Thus, although the empowerment of individuals was expected, it was only legitimate at the village level, the chief having gained his authority by and at the will of a particular village.[33] In his non-judicial capacity the chief served as head of the village council (where village problems were discussed, such as land assigned for farm use and dealings with other governments.)[34] In the council, all villagers had an equal vote, and a proposition was acted on unless there was unanimity throughout the village population.[35] In his judicial capacity, the chief acted as an arbitrator of disputes.[36] However, he was not the last resort – if one wished, he could take his case to the tribal court, or the district councilman:

> In one case . . . the defendant was not satisfied with the tribal court's decision and so brought the matter to the village chief, and then through the district councilman back to the tribal court. There were apparently no negative sanctions . . . against this procedure; a man [was] free to take his legal problems wherever he wishe[d]."[37]

This situation changed fundamentally with the passage of the IRA in 1934. After the IRA, many tribes adopted constitutions that demanded an elected Council and chairman, and an

[30] Simpson, *supra* note 23, at 163.

[31] JOSEPH, *supra* note 24, at 63.

[32] *Id.* "Everyone has a say if it takes all night. In the old days, unanimity of opinion had to precede a decision, for the concept of majority rule was not known to the Papago." *Id.*

[33] *See* Kalt, *supra* note 18, at 202.

[34] JOSEPH, *supra* note 24, at 63.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 65.

appointed judiciary - much like the U.S. Constitution.[38] However, as Blaine put it, "The [Papago] people didn't know nothing about organizing a government. . . . What the chief said was law. The people had accepted this way of village government for who knows how long."[39] Thus, although the Papago Constitution was similar to the U.S. Constitution in many instances, the by-laws informing the Papago Constitution were based principally upon Papago custom and tradition.[40] This was largely due to Papago common law principle of inclusiveness mentioned above. For example, when the Papago began drafting their Constitution, the drafters

> told the old people, "If you want the old traditions, we'll put them in." The San Xavier people wanted certain things and other parts of the reservation wanted something else. Each part of the reservation had their own ways. The [C]onstitution would not change the existing customs of our people. All traditions and ways were to be continued just as if there was no [C]onstitution.[41]

This principle was also carried out in initial Council proceedings.[42] When the Constitution was first implemented, councilmembers sought the approval of all members of the tribe, "never start[ing] a program without the people agreeing."[43] Even though they started the first reservation-wide government, the leaders "still wanted all villagers to know and understand what the Council was doing."[44] As an increasing amount of individuals sought work outside of the reservation, this principle of customary Papago law did not waiver – the tribe sought, and

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[38] *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 301 (1998). Even tribes that chose not to adopt such constitutions acquired similar institutions by other means. *See id.* at n.49 (noting that "the Navajos never adopted such a constitution, yet their government is much the same as that of neighboring tribes like the Papagos . . . who did.").

[39] BLAINE, *supra* note 21, at 81.

[40] *Id.* at 67. In January, 1937, at the inception of the Papago Constitution, the *Arizona Daily Star* ran an article comparing the Papago district council meetings more to New England town meetings than the United States legislature. *See Tribal Council Now Completed*, ARIZONA DAILY STAR, Jan. 21, 1937.

[41] BLAINE, *supra* note 21, at 82.

[42] The Council "was set up to handle two phases of activity: [To] regulate behavior, handle legal matters, and [to] develop government for the Indians . . . ." *Program and Proceedings of the Arizona Commission of Indian Affairs: "The Off-Reservation Papagos"* 58 (Dec. 7, 1957) [hereinafter Commission Proceedings] (statement of William H. Kelly, Member of the Commission).

[43] BLAINE, *supra* note 21, at 126. *See also* HENRY F. DOBYNS, REPORT ON INVESTIGATIONS ON THE PAPAGO RESERVATION 3 (1949) ("When the Council takes action, this generally means the people as a whole are decided, and the Council action represents the will of the people. . . . [T]his is true generally of Papago leaders.").

[44] BLAINE, *supra* note 21, at 126.

eventually enacted, a provision to include those persons in the Council decision-making process.[45]

As Henry Dobyns recognized as far back as 1949, Papago governmental entities are "successful for the people only when . . . entirely solid: planned and executed by them."[46] Tohono O'odham common law recognizes the need for social cohesion established through including all peoples, now represented by the political branches, in the decision-making process.[47] Although the Papago's *Himdag* has gone through some drastic alterations, molded to fit the changing world, it is thoroughly embedded in the Tohono O'odham political structure as an interpretative backdrop to the text within the Constitution.[48]

There is little discussion in the later opinions of the Tohono O'odham Judiciary that reference the effect of the 1986 Constitution on customary inclusion in dispute resolution. *Francisco v. Toro*, 1 TOR3d 68 (Trial Ct., Jan. 12, 1989), written just three years after the adoption of the "newest" Constitution expresses the following:

> The Constitution only provides the framework and the content must come from the true nature of governing with deeply embedded traditional ways of government as well as new, modern ideas incorporated into a workable system. There must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive and Judicial. There is no guarantee that friction will not occur, but by means of the friction, and reason, wisdom and self-restraint, the formation of a working government can be achieved…and draws consolation from the thought that the Executive and the Legislative will work together to safeguard the intent of the Constitution and preserve the heritage of the O'odham.

The Preamble of the 1986 constitution states, among other aspirations, that it is established "to preserve, protect and build upon our unique and distinctive cultures and traditions…and to show our gratitude to Í'itoi our Maker." It is obvious from these expressions that the establishment of three branches of government did not erase a fundamental governing principle of inclusion.

This Court is placed in the unique situation of setting concrete precedent regarding the

[45] *See generally* Commission Proceedings, *supra* note 41.

[46] DOBYNS, *supra* note 42, at 3.

[47] *See* Booth, *supra* note 6, at 437.

[48] *Id.* at 439.

distinction of powers[49] within the constitutional construction of the Tohono O'odham Nation. Recognizing as much, this Court should be undiscriminating in obtaining input from the Tohono O'odham community – whether this input is represented by the Judicial Branch, the Council, the Executive Branch, Tohono O'odham common law, or community elders. Justice demands so.

Two more points counsel toward granting intervention. Article VII, Section 2(C) grants to the Chairman, as Chief Executive Officer, the power "to *oversee* the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham Council." "Oversee" means to survey, watch, inspect, examine, supervise, run, control, manage, handle, conduct, look after, be responsible for, administer, preside over, keep an eye on, superintend, etc.[50] Article VI, Section 1(C)(6) provides that the Legislative Council has the power to administer justice. Subsection (l) gives the Council the express ancillary authority "to enact laws, ordinances and resolutions necessary or incidental to the exercise of its legislative powers." Pursuant to this authority, on April 15, 1986[51], the Legislative Council passed Resolution No. 223-86, which delegated the Authority of the Council to the Chairman and Vice Chairman *of the Council* to "Follow up on the implementation of legislation." "Follow-up" is defined as to further an end or increase effectiveness, to review developments, or an activity that continues something that has already begun, etc.[52]

Article IV – Form of Government – creates "three independent branches." As expressed in Articles V, VI, VII and VIII, each branch has distinct delineated powers and duties. While it is obvious that the Constitution intends to provide a system of checks and balances of authority, the term *separation of powers* is never articulated. Given the historical background of the creation of the Nation, the Court will not read into the Constitution that the governing processes must necessarily be *adversarial*. If, and this Court repeats, "if," an enactment of the Legislative Council proves to be unconstitutional, that determination will be made in the interest of harmonizing the strength and sovereignty of the Nation as a whole.

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[49] The Court has chosen to avoid the nomenclature, "separation of powers." Such characterization necessarily demands an exploration into an entire body of Non O'odham constitutional law.

[50] See www.merriam-webster.com/netdict/oversee;www.thefreedictionary.com/oversees.

[51] The 1986 Constitution passed on January 18, 1986 and was approved by the Secretary of the Interior on March 6, 1986.

[52] www.thefreedictionary.com/follow-up.

Paying heed to this backdrop, the Court holds that the Legislative Council's Motion to Intervene is granted, but only to the limited extent permitted by the discussion below.

Jurisdiction

The Court must determine its subject-matter jurisdiction, and it is for this purpose, at this stage in the proceedings that the Court permissively allows intervention.

This Opinion becomes part of a body of Tohono O'odham common law. Counsel for the parties have cited a series of cases that have but tangents to the central issue before this Court; which is, under what circumstances, if any, can one branch of the Tohono O'odham Nation sue another? This question provokes a number of interior enquiries.[53]

1. Who has the authority to waive the Sovereign Immunity of a Tribe/Nation in a three branch government?[54] Counsel have spent a good deal of time writing about legislative immunity, but does the Legislative Council have the power to waive solely its own subordinate immunity? What is the nature of subordinate immunity? Can it be waived by simple pleading? And to what extent? Can a party waive immunity and not be bound by the judgment? Must the Executive and Judicial branches also waive immunities? This Court regards Judge Williams' analysis of sovereign immunity in *United Linings, Inc. v. VI-IKAM DOAG Industries* 2 TOR3d 39 (Trial Ct., Dec. 20, 1998) measurably persuasive, yet it is unnecessary and immaterial at this time to determine the correctness of that case's holding.

2. Is sovereign immunity even implicated? Does it further O'odham sovereignty to incorporate the doctrine of *Ex Parte Young* into its common law jurisprudence. *See, e.g. Blatchford v. Native Village of Noatak,* 896 F.2d 1157(9th Cir.(1990) *remanded on other grounds* 501U.S.775 (1981)*; Jackson as Chairperson of the 1939 Committee v. Kahgegab, Chief of the Saginaw Chippewa Indian Tribe of Michigan,* 33ILR6105 (Saginaw Chippewa Indian Tribe Appellate Court 2003); *Le Compte v. Jewett,* 12 ILR 6025 (Cheyenne River Sioux Ct. App. 1985).

3. Does this case involve a non-justiciable political question?

4. Does there exist a case or controversy?

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[53] A mechanism to "certify" questions of constitutional interpretation to the court is not codified under Tohono O'odham law.

[54] This Court is unaware of any Solicitor's or Attorney General's opinion for the Nation that cements the authority to just one branch of the government. It has searched over extensively the National Indian Law Libraries to limited avail. *See e.g. A. D. Ellis v. Muscogee (Creek) Nation National Council*, No. SC-05-03/05-05(S. Ct. Muscogee [Creek] Nation 2006).

5. Are Petitioner's Arguments ripe for review? One only has to look at the claimed offending passages of the Code to query who could bring the case before the Court for a determination as to their constitutionality, or when the matter provoked sufficiently an antagonist interest. Must a judge be in jeopardy of not receiving his or her salary before a contention of unconstitutionality is raised? *See, e.g., In the matter of the Constitutionality of NCE 98-102*, 4MVS L REP 177( ).

The Court is prepared to rule on these issues quickly in order to determine if subject matter jurisdiction is established. At that time, it will decide whether further intervention is necessary or moot.

Lastly, there is pending a Motion by Petitioner to expand the scope of the original Order granting an emergency injunction. A decision thereupon will be rendered in open court.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Max A. CHAVEZ, Defendant,

Case No. 2008-3328-3567 CR

Decided March 12, 2010.

Before Judge Rachel Frazier Strachan.

On February 3, 2010, Defendant filed a Motion to Reconsider Motion to Dismiss for Lack of Jurisdiction Due to Expiration of Statute of Limitations ("Motion to Reconsider). The Defendant requests this court to reconsider its denial of the Defendant's Motion to Dismiss for Lack of Jurisdiction Due to Expiration of Statute of Limitations ("Motion to Dismiss") filed with this court on September 30, 2009. Furthermore, the Defendant asserts in his Motion to Reconsider that this court failed to make any findings of acts or application of law in support of the court's denial of the Defendant's Motion to Dismiss.

After careful review of the Defendant's Motion to Reconsider, Motion to Dismiss and the Nation's responses to each, this court denies the Defendant's Motion to Reconsider and Motion to Dismiss on the basis that the court lacks jurisdiction due to the expiration of the statute of limitations. The court's decision is based upon the following Findings of Facts and Statements of Law.

Findings of Facts

This court finds that the Defendant was the Court Administrator beginning in November 1984. The Tohono O'odham Judiciary conducted an administrative investigation into alleged misconduct of the Defendant, Max A. Chavez, in June 2007. The investigation was performed by Court Solicitor, M. June Harris. Ms. Harris was given the responsibility of determining whether the Defendant's alleged conduct was a violation of the Judicial Branch's General Personnel and Procedures Manual. Ms. Harris shared the findings of her investigation with Chief Judge Linda Parley who was the supervisor for Ms. Harris and the Defendant. On May 10, 2007, prior to commencement of the investigation, the Defendant and his assistant, Sandra Sixkiller, were suspended without pay.

On June 6, 2007, Ms. Harris issued Preliminary Findings of her investigation. Ms. Harris enumerated her findings in a document titled, "Preliminary Findings", dated June 6, 2007. The following day, June 7, 2007, staff of the Tohono O'odham Judiciary interviewed the Defendant and others pursuant to the court's investigation regarding alleged salary overpayments by the Defendant. The Defendant and Ms. Sixkiller were terminated from employment with the Tohono O'odham Judiciary on June 15, 2007.

Subsequently, on November 7, 2007, Chief Judge Linda Parley requested the Tohono O'odham Police Department to conduct a criminal investigation into the Defendant's alleged misconduct. The Tohono O'odham Judiciary provided information and documents to the Tohono O'odham Police Department relevant to its investigation of the alleged misconduct.

In December 2007, the Defendant was hired as the Property and Supply Manager for the Tohono O'odham Nation Executive Branch. During his tenure as the Property and Supply Manager, the Defendant was issued and accepted the funds for a paycheck which included 302 hours of annual leave and 3,498 hours of sick leave. The annual leave and sick leave were purportedly earned while the Defendant was the Court Administrator and transferred with him as he started his new employment as the Property and Supply Manager.

On June 30, 2008, Lucille Campillo, Judicial Accountant, was interviewed by the Tohono O'odham Police Department. Ms. Campillo informed the Tohono O'odham Police Department that in her role as Judicial Accountant she was responsible for making modifications to budget and payroll records referred to the Court Administrator for correction. Ms. Campillo states that the Defendant directed her to make changes to budget and payroll, as requested, but not to make

changes to his salary. Ms. Campillo informed law enforcement that she complied with this directive by the Defendant.

A few months later on November 20, 2008, Ms. Campillo signed a written statement summarizing her interview by the Tohono O'odham Police Department on June 30, 2008.

On November 7, 2008, Criminal Investigator Charles Dimond of the Tohono O'odham Police Department executed an Affidavit of Probable Cause. On the same day, Chief Prosecutor, George Traviolia filed a Criminal Complaint alleging 240 criminal counts against the Defendants, including Criminal Fraud, Abuse of Office, Theft and Criminal Conspiracy.

A Probable Cause Hearing ("Hearing") was held on May 18, 2009 and May 22, 2009, at the Defendant's request. At the Hearing, many documents including Ms. Harris' document titled "Preliminary Findings" were entered into evidence. The Nation's prosecutor marked Ms. Harris' Preliminary Findings and other documents it sought to have admitted into evidence for purposes of the Hearing.

Following the Hearing, this court found that the Tohono O'odham Nation had provided sufficient evidence for a finding of probable cause that criminal offenses had been committed and a likelihood that the Defendant had committed them.

Statements and Application of Law

The law is well-settled that the statutes of limitations in criminal cases are jurisdictional. The statute of limitation is the power of the sovereign to act against the accused. (*See* Price v. Maxwell, 140 Ariz. 232, 234, 681 P.2d 384, 386 (1984). However, the statute of limitations in a criminal matter does not begin to run until the State having jurisdiction over the matter, discovers or should have discovered that the offense occurred. According to Section 1.5 (A) of the Tohono O'odham Code, a person shall not be prosecuted, fined or punished unless a complaint is filed within one year after discovery that an offense has been committed. This section further states that if the offense is based upon a series of acts, the statute of limitations begins "at the time the last discovered act is alleged to have been committed". The burden is on the State to establish that the statute of limitation has not run for purposes of prosecution. Thus, in this instance the Tohono O'odham Nation must satisfy this burden to establish that the period has not run to prosecute the Defendant for the charges alleged.

The Defendant argues that the charges against the Defendant should be dismissed because the Tohono O'odham Nation had *actual knowledge* of the Defendant's alleged misconduct prior to June 6, 2007. The Defendant claims that Ms. Harris' investigation of the Defendant and a

document she prepared titled "Preliminary Findings". The Defendant asserts that the document prepared by Ms. Harris is an indicator that Ms. Harris' findings supported a finding of probable cause by law enforcement for their issuance of a criminal complaint. The court finds the Defendant's assertion flawed.

The Defendant's conclusion would require this court to make a finding that Ms. Harris' investigation was a criminal investigation rather than an administrative investigation. The court finds that Ms. Harris' investigation was merely administrative and was the result of a request by Chief Judge Linda Parley. Furthermore, this court finds that Ms. Harris' investigation into alleged misconduct by the Court Administrator consistent with Ms. Harris' duties and responsibilities as the Court Solicitor for the Tohono O'odham Judiciary.

In regards to the Defendant's argument regarding the markings "Probable Cause Hearing" and "Nation's Exhibit #3" located in the upper right hand corner of Ms. Harris' document titled "Preliminary Findings", the court finds that the phrases were not added by Ms. Harris. The court finds the two phrases were later added to the document by the Prosecutor's Office in preparation of the Probable Cause Hearing, pursuant to this court's request that all exhibits be marked prior to the hearing.

Furthermore, the Defendant asserts that at the time of Ms. Harris' investigation and the interviews conducted by judiciary staff, the statute of limitations commenced because court personnel were aware that a crime had been committed. The Defendant cites People v. Moore which states that the statute of limitations begins when either the "victim" or "law enforcement" learn of facts which if investigation would make the person aware that a crime has occurred. 176 Cal. App. 4th 687, 97 Cal.Rptr. 3d 844 (Cal.App.2 Dist. 2009). This court finds that neither Ms. Harris nor the court staff are law enforcement officials. As a result, the investigation they were conducting was an internal administrative investigation into the alleged misconduct of a manager, the Court Administrator. None of the facts presented to this court suggests that the investigation conducted by Ms. Harris and court personnel was criminal in nature.

Moreover, it was not until June 30, 2008 when the Tohono O'odham Police Department interviewed Ms. Campillo did law enforcement discover that the Defendant may have committed a crime. At this point, law enforcement established that probable cause existed to file criminal charges and the statute of limitations began to toll. Therefore, the criminal complaint filed by the Tohono O'odham Nation against the Defendant on November 7, 2008 was well within the one year period.

Lastly, the court finds that the Defendant's argument baseless that all of the counts against the Defendant should be dismissed because they are either inadequate on their face or inadequate as a matter of law. The court finds that the statute of limitations for counts 1-238 commenced on June 30, 2008 which is the date of the Tohono O'odham Police Department's interview with Ms. Campillo that law enforcement discovered there was probable cause to file criminal charges against the Defendant. As stated, it was during this interview that law enforcement learned that the Defendant instructed Ms. Campillo to not make changes to his payroll/salary. Since Ms. Campillo's interview was June 30, 2008 and the criminal charges were filed against the Defendant on November 7, 2008, this timeframe was within the one year statute of limitations for criminal prosecution.

Furthermore, Counts 239 and 240 provide a period over which the Defendant is alleged to have committed the respective charges. The Defendant asserts that no possible "overt act" could have occurred after the Defendant and Ms. Sixkiller were terminated on May 15, 2007. The Defendant's reasoning is flawed. This court agrees that when the Defendant accepted the paycheck which afforded him unearned annual leave and sick leave this was the final stage of the conspiracy between the Defendant and Ms. Sixkiller.

Furthermore, in regards to Count 239, the alleged Criminal Fraud occurred during a specific period of time which is stated in the criminal complaint. The Criminal Fraud count provides specificity that the charge relates to the Defendant's acceptance of annual leave hours which were not earned. Moreover, Count 240 relates to the Conspiracy count. Once again, this count provides a timeframe in which the Defendant in collaboration with Ms. Sixkiller to allegedly submit documents to the Judiciary and the Legislative Council and accepted an unauthorized higher rate of pay.

The court disagrees that the last opportunity for the Defendant and Ms. Sixkiller to conspire to commit Criminal Fraud, Theft or Abuse of Office was on June 15, 2007. Both the Defendant and Ms. Sixkiller set into effect a series of events through their actions and which the results of were not known until months later.

Thus, this court finds that the criminal charges filed by the Tohono O'odham Nation against the Defendant were timely. Thus, the Motion to Reconsider filed against the Defendant and the criminal charges are not dismissed.

IT IS ORDERED that as a result of the court's denial of the motions, a Status Hearing shall is scheduled on April 7, 2010 at 10:00 a.m. in this matter.

IT IS ALSO ORDERED that the jury trial scheduled for April 12 through April 20, 2010 is also affirmed.

IT IS FURTHER ORDERED that the Defendant's current release conditions shall remain in effect.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Jesse VAVAGES, Defendant,

Case No. 2009-5938-5944 CR

Decided October 20, 2010.

Before Judge Larry Yazzie.

This matter is before the Court on Defendant's Motion for Mistrial and For New Trial. The motion is fully briefed pursuant to the Court's briefing schedule. The basis for the motion is Defendant's argument that (1) the testimony of the arresting officers is inadmissible hearsay and, accordingly (2) deprived the defendant of his sixth amendment right to confront witnesses against him.

On July 21, 2010 trial was held without a jury. As a preliminary matter the Court inquired as to the number of witnesses to be called by the Nation and Defendant. The Prosecutor informed the Court two officers were present to testify. Defense counsel stated they did not intend to call any witnesses. The prosecutor observed that the defense did not provide disclosure or a witness list and further advised that the alleged victim/witness specifically informed him that she would not appear for trial.

I. FACTS:

On October 4, 2009 Officer Radcliff was contacted by dispatch regarding a possible injury by use of a pipe at the Anthony Blackwater residence. The time was 0438. The officer was in the Sells area and traveled 55 miles per hour or slightly faster. The 15-20 miles to arrive at the Blackwater residence was approximately 30 minutes. Officers Radcliff and Rosales found the victim, Annette Manuel waiting outside the house. Ms. Manuel made the call to dispatch. She was crying, very upset, excited, frightened, and scared that the suspect would come back. The suspect had run off into the desert. The victim sustained injury to her hand from what she

described as a "machete" and that Jesse Vavages while swinging the machete cut her. The injury appeared fresh and bloodied. The incident occurred recently within 30 minutes of the police arriving. The victim however refused medical treatment. The suspect, victim and others had been drinking alcoholic beverages. A fight started between Jesse Vavages and Anthony Blackwater. Victim Manuel attempted to stop the fight and was cut by the machete. No weapon or machete was found.

The officers continued with their efforts to locate and apprehend the suspect. Approximately two (2) hours later they were called back to the scene and were contacted by Renae Anselmo. Ms. Anselmo was scared and described the incident wherein Jesse was swinging the machete that resulted in the injury to Annette Manuel. She thereupon informed the officers that the suspect was in the house.

The suspect Jesse Vavages was located in the back bedroom. He was intoxicated and very belligerent and aggressive towards the officers. One officer drew her weapon in a defensive posture and the suspect yelled for her to shoot him. The officers then wrestled with the suspect to get the handcuffs on and escorted him out. The suspect was cussing and yelled out ,"(you) have no weapon, or victims and I will be out in 8 hours."

At trial, the officers testified as to the statements made by the victim, Annette Manuel and witness, Renae Anselmo during the investigation of the incident. Defense counsel objected to the testimony of both officers as inadmissible hearsay evidence. The Prosecution however persuaded the Court that the testimony regarding the Manuel statement fits within the hearsay exception of an "excited utterance". No specific finding was made as to the testimony regarding the Anselmo statement.

Defense counsel, as he indicated at the outset of the trial, did not call any witnesses and rested his case. The Prosecutor presented his closing argument. Defense Counsel, instead of a closing argument, made an oral motion to reopen his case because he was informed that the victim/witness was in the courtroom and they should be allowed to call her as a witness.

The Court denied the motion to reopen the case based upon Defense counsel's failure to subpoena any witnesses, representation to the Court that the Defendant was not calling any witnesses to testify, and prior statement that the Defendant rested his case. Defense counsel thereupon submitted a motion for mistrial and a new trial based upon a violation of Defendant's right of confrontation guaranteed by the Indian Civil Rights Act and the 6th Amendment of the Constitution of the United States. The motion for a mistrial was denied based on the Court's

ruling on the hearsay exception of "excited utterance" wherein the availability of a witness is immaterial.

The Defendant was found guilty of all counts except count 4 of the Complaint, Disorderly Conduct/Domestic Violence. The Prosecution failed to establish cohabitation as an element of the domestic violence charge. Defense counsel concedes the charges of disorderly conduct, unlawful possession of liquor and disturbing the peace (counts 1,2,3 and 7) as having been proven beyond a reasonable doubt. A pre-sentence report was ordered and a sentencing date was scheduled.

On August 02, 2010, a status hearing was held pursuant to the defendant's request to speak to the Court. The parties were directed to brief the issue of defendant's right of confrontation and if such right overcomes the exception to the hearsay rule as argued by defense counsel.

II. THE EXCITED UTTERANCE OF ANNETTE MANUEL IS NOT EXCLUDED BY THE HEARSAY RULE EVEN THOUGH SHE IS AVAILABLE AS A WITNESS

A. Excitement.

"When a hearsay statement is offered under this exception, the trial court must make a preliminary factual determination that the declarant was so excited or distraught at the moment of utterance that he did not reflect (or have an opportunity to reflect) on what he was saying." United States v. McLennan, 563 F 2nd 943,948 (9th Circuit 1977), cert. denied 435 U.S. 969, 98 S.Ct. 1607(1978). Additionally, "the contents of the statement itself, along with circumstances including the declarant's appearance, behavior and condition, may be relied upon to establish the occurrence of an excited event, United States v. Moore, 791 F 2d 566, 570-71 (7th Cir. 1986) and the declarant's personal perception of it," McLaughlin v. Vinzant, 522 F2d 488, 451 (1st Cir. 1975), cert denied, 423 U.S. 1037, 96 S.Ct. 573 (1975).

The hearsay statement of Annette Manuel was made under such circumstances and based upon her personal perception that establish the occurrence of an excited event. Ms. Manuel was very recently assaulted with a machete and obviously distraught, frightened, and excited under such circumstances named the defendant as her assailant. She called the police for assistance and was waiting in fear that the defendant might return when they arrived. The cut on her hand from the machete was still bloodied. Defendant had just run off into the desert with the machete. The victim's perception of the event was as a potentially life threatening situation and without question establish the occurrence of an excitement engendering event.

B. Lapse of Time.

The hearsay statement was made while the declarant was under the stress caused by the excited event as required by Rule 803(2) of the Arizona Rules of Evidence, as adopted by Administrative Order 03-09. If the event is sufficiently startling as in this instance, the period of stress may persist for some time. "Several factors must be considered, including: (1) The lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; (5) the subject matter of the statements." Morgan v. Foretich, 846 F.2nd 941,947 (4th Cir. 1988) ; accord, United States v Marrowbone , 211 F.3rd 352 (8th Cir. 2000). Finally, " The rationale of the excited utterance exception is that 'the stress of nervous excitement or physical shock stills the reflective faculties, thus removing an impediment to truthfulness." United States v. DeMarce, 564 F3rd 989, 997 (8th Cir. 2009).

In this instance, the victim was under the stress of nervous excitement up to an including the time she was questioned by the officers: a thirty (30) minute period of time. The victim, an adult female, had reasonable basis to be stressed, excited, and afraid. The suspect was still in the immediate area in an intoxicated condition and armed with a machete. The victim was neither calm nor in a safe environment. She was facing an ongoing emergency and the interrogation provided the necessary information to enable police assistance to meet the emergency situation.

In the case of witness Renae Anselmo, however the lapse of time was too great to qualify her statements as an excited utterance. Two hours had passed since the initial event and her declarations. Her statements to the police are inadmissible hearsay.

III. THE HEARSAY STATEMENTS OF ANNETTE MANUEL ARE NONTESTIMONIAL AND THE CONFRONTATION CLAUSE DOES NOT APPLY

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (U.S. Wash. 2006), held: The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant has had a prior opportunity for cross-examination." Crawford v Washington, 541 U.S. 36, 53-54. These cases require the Court to determine which police "interrogations "produce statements that fall within this prohibition. Without attempting to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial, it suffices to decide the present cases to hold that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there

is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In applying Crawford's testimonial – nontestimonial distinction in the context of an "excited utterance " case, the Davis decisions provide some guidance:

> The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events as they were actually happening, rather than 'describing past events,' Lilly v. Virginia, 527 U.S. 116,137 (1999) (plurality opinion). Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an on going emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against a bona fide physical threat. Third, the nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon….And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator would make out) safe." Id. at 547 U. S. 827.

Based on the above, the interrogation of victim Manuel at the scene is held nontestimonial. The statements were made for the primary purpose of obtaining police assistance to meet the ongoing emergency.

IT IS THEREFORE ORDERED THAT:

1. Defendant's Motion for a Mistrial and a New Trial is Denied.
2. The sentencing of the Defendant shall be scheduled.

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

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided October 22, 2010.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

The Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch, through the office of the Chairman of the Tohono O'odham Nation, from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law") by amended petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction. The Emergency Preliminary Injunction was granted through an Order, filed January 6, 2009, and modified January 28, 2009. The Legislative Council of the Tohono O'odham Nation filed a motion to intervene in the litigation on January 21, 2009.

This dispute is between co-equal, independent branches of the Tohono O'odham Nation. The ability of one branch of the Tohono O'odham government to sue another is a matter of first impression. Although the Judicial Branch acts as petitioner here, it is also under a constitutional duty to adjudicate the litigation under Article VIII, Section 10 of the Tohono O'odham Constitution.

This Court begins by determining whether the Legislative Council may properly intervene. In doing so, it will rule on Petitioner's Motion for Summary Judgment, Consolidated Motion for Judgment on the Pleadings, and Request to File Interloculatory Appeal. This Court will then determine whether it has jurisdiction to address the ultimate issue, the constitutionality of the contested portions of the Courts and Procedures Law. Parties are referred to the Court's Order, dated March 11, 2010, as the law of the case.

Choice of Law

The parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent Arizona law. The Court agrees, noting that the use of foreign law will be considered if it aligns with Tohono O'odham custom, which fosters a spirit of inclusiveness—a spirit this Court emphasized in its March 11, 2010 Order.

Jurisdiction

As discussed below, the Court has jurisdiction to hear Petitioner's Amended Petition.

Discussion

I. Intervention

The Court grants the Legislative Council permissive intervention, but has not been adequately briefed to rule on whether the Legislative Council possesses a statutory right to intervene. The question of the constitutionality of 1 T.O.C. Chap. 2, Sovereign Immunity; Legislative Immunity (hereinafter the "Sovereign Immunity Law"), purporting to give the Legislative Council a right to intervene in cases that challenge the validity of the Nation's laws, will be reserved for a more appropriate time in which the issue is a central element to the cause of action. Sovereign immunity is not implicated here by the Judicial Branch's petition for injunction or by the Legislative Council's petition to intervene, and waiver of sovereign immunity is therefore not necessary in establishing the Court's subject matter jurisdiction.

A. The Court grants the Legislative Council general permissive intervention.

A party may intervene in pending litigation either as a matter of right or permissively. Ariz.R.Civ.Pro. Rule 24. However, the intervening party bears the burden of showing its entitlement to intervention. *Morris v. Southwest Sav. & Loan Ass'n*, 449 P.2d 301, 304 (Ariz. Ct. App. 1969).

Intervention is a matter of right when mandated by statute or when the intervening party claims an interest in the subject of the action and disposing of the action may impair or impede the party's ability to protect its interests—unless the party's interests are adequately represented by existing parties. Ariz.R.Civ.Pro. Rule 24(a). Permissive intervention is proper when a statute confers a conditional right to intervene or when the intervening party's claim or defense shares a common question of law or fact with the main action. Ariz.R.Civ.Pro. Rule 24(b).

> *i. The Court will not rule on whether the Legislative Council has a statutory right to intervene due to the question such ruling raises about the constitutionality of the Sovereign Immunity Law.*

This Court originally granted the Legislative Council limited permissive intervention in its March 11, 2010 Order. *In Re: Petition of the Judicial Branch*, 3 TOR3d 81 (Trial Ct., Mar. 11, 2010), *appeal dism'd*, 3 TOR3d 49 (Ct.App., Jul. 19, 2011). However, the Legislative Council now argues that, due to the recently enacted Sovereign Immunity Law, it possesses a statutory right to intervene in the present case.

The Sovereign Immunity Law purports to give the Legislative Council a right to intervene in "an action to determine the validity of a Nation's law or a Legislative Council decision or action when authorized by a majority vote of the Council." 1 T.O.C. § 2102(D)(2). As proscribed by the Sovereign Immunity Law, the Legislative Council cast a majority vote to exercise its statutory right to intervene in the present case. Legislative Order No. 09-019, *available at* http://www.tolc-nsn.org/docs/actions09/09019.pdf.

However, the Judicial Branch asserts that the Sovereign Immunity Law is unconstitutional, encroaching on the Executive Branch's constitutional authority to enforce the Nation's laws. Petitioner's Reply to Respondent Legislative Council's Response to Petitioner's Brief on Additional Questions, 2 (June 4, 2010). The Sovereign Immunity Law sets forth the Legislative Council's ability to defend the Nation's laws within the judiciary while Article VII, Section 2(C) of the Tohono O'odham Constitution grants the Executive Branch's Chairman the power to oversee the implementation of the Nation's laws. In raising this concern, the Judicial Branch asks the Court to address this case's ultimate question—to what extend does each governmental branch within the Tohono O'odham government possess independent powers that it alone may exercise.

Tohono O'odham common law and custom encourage cooperation and a sharing of power between the government's three independent branches. Although the current Tohono O'odham Constitution contains Article IV, which states that the government will be composed of three independent branches, it should be interpreted in conjunction with Tohono O'odham tradition, including the "fundamental governing principal of inclusion." *In Re: Petition of the Judicial Branch*, at 92. In *Francisco v. Toro*, 1 TOR3d 68 (Trial Ct., Jan. 12, 1989), *appeal dism'd*, 3 TOR3d 17 (Ct.App., Sep. 4, 2008), the Court began its "separation of powers" analysis with the notion that "a viable government must depend on the cooperation and interrelationship between all three branches of government." *Id.*, at 71. The Court set forth a three-prong test for determining whether one branch has usurped another's power. *Id.*, at 71-72. A court should consider 1) the nature of the power being exercised, 2) the objective sought by the allegedly

offensive action, and 3) the practical effect of blending powers. *Id.* This test asks whether the power allegedly usurped should be shared between branches, and if so, whether the action was taken in the spirit of cooperation. It also inquires into what the practical effects of sharing will be.

It seems that authority to ensure the Tohono O'odham Nation's laws are implemented may be exercised by both the Legislative and Executive Branches. The Tohono O'odham Constitution states that the Executive Branch possesses the constitutional power to "oversee the implementation of all laws, ordinances, resolutions and rules made by the Tohono O'odham Council." TOHONO O'ODHAM CONST. art. VII § (2)(C). However, the Legislative Council also possesses constitutional power "to enact laws, ordinances and resolutions necessary or incidental to the exercise of its legislative powers," *Id.* at art. VI § (1)(L), and to "create laws, ordinances, or resolutions to provide for the maintenance of law and order and the administration of justice." *Id.* at art. VI § (1)(C)(6). Pursuant to this constitutional authority, the Legislative Council passed a resolution giving authority to the Chairman and Vice Chairman of the Council to "follow up on the implementation of legislation." Resolution No. 223-86 (April 15, 1986).

One may infer that the Legislative Council's objective in enacting the Sovereign Immunity Law, giving itself a right to intervene in cases that determine the validity of the Nation's laws and decisions made by the Legislative Council, was to further the Tohono O'odham principal of inclusiveness and to provide continued support in defending the Nation's laws. The Sovereign Immunity Law's practical effect would be that, in cases dealing with any enactment by the legislative council, both the Executive and Legislative Branches would be eligible to act as litigants. Here, the Executive Branch vetoed adoption of the Courts and Procedures Law, while the Attorney General has declared a conflict of interest. Respondent's Response Brief, 2 (Jan. 21, 2009); Statement of the Office of Attorney General, 1 (Jan. 20, 2009). In this situation, the Sovereign Immunity Law would provide for an interested party, the Legislative Branch, to be heard respecting the validity of the law in question.

However, the Court has not been adequately briefed about whether the Sovereign Immunity Law is constitutional or whether it usurps the Executive Branch's powers. Additionally, this important question should not be answered on the sidelines of a tangentially related cause of action. We reserve this question for another day, when it is central to the issue presented to the Court and when the parties have had a more thorough opportunity to provide their arguments on the matter.

Additionally, ruling on the constitutionality of the Sovereign Immunity Law in this context would create precedent that leads in the wrong direction. The Judicial Branch, in alleging that the Sovereign Immunity Law is unconstitutional, is doing so on behalf of the Executive Branch, whose power it alleges was usurped. To allow the Judicial Branch to challenge the Sovereign Immunity Law—or any other law for that matter—on behalf of the Executive Branch would create a downward spiraling cyclone in which the Legislative Branch enacts a law and the Judicial Branch challenges its validity without itself experiencing the requisite harm necessary to establish standing. This does not comport with the Tohono O'odham custom of harmony between governmental branches, recognized in the March 11, 2010 Order. Although the issue has been briefed in a professional manner, this Court will not allow this litigation to become a tempest of its own. Instead, this Court chooses to uphold the Tohono O'odham principal of *s-ba:bigĭ*. This Court will slowly and methodically address each issue relevant to the ultimate question—the constitutionality of the Courts and Procedures Law—without allowing this litigation to become a whirlwind spinning out of control.

As stated below, the Court finds adequate support to extend its previous grant of limited permissive intervention to a general grant of permissive intervention, removing the necessity to rule on the constitutionality of the Sovereign Immunity Law at this point.

ii. The Court grants the Legislative Council permissive intervention.

The Court's March 11, 2010 Order recognized that the Legislative Council had sufficient interest in the present litigation to warrant a limited permissive intervention to address specific jurisdictional questions pertaining to this case. 3 TOR3d, at 86. A court may grant permissive intervention where 1) the petitioner shows an independent ground for jurisdiction, 2) the motion is timely, and 3) the petitioner's claim or defense has a question of law or fact in common with the main action. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989).

Additionally, where the "intervenor does not demonstrate interests sufficiently weighty to warrant intervention as of right, the court may nevertheless consider eligibility for permissive intervention." *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990). An Arizona Court of Appeals reasoned that permissive intervention should be liberally construed so as to assist parties in protecting their rights. *Bechtel v. Rose*, 722 P.2d 236, 240 (Ariz. Ct. App. 1986). Ultimately, whether to grant a permissive motion to intervene is a decision that rests within the discretion of the court. *Purvis v. Hartford Acc. And Indem. Co.*, 877 P.2d 827, 830 (Ariz. Ct. App. 1994).

The Legislative Council's interest in arguing for the constitutionality of the Courts and Procedures Law remains applicable for the remainder of this litigation, and the Court grants the Legislative Council general permissive intervention. In this special circumstance, the Legislative Council is the only party that will argue for the validity of the law, giving more weight to the necessity of the Legislative Council to protect its interests. Respondent-Applicant's Supplemental Brief on Legislative Immunity and Traditional Dispute Resolution, 5 (Sept. 28, 2009). Granting permissive intervention in this case does not establish the Legislative Council's ability to intervene in future cases challenging the validity of the Nation's laws.

Additionally, inclusion of the Legislative Council in the present litigation comports with the Tohono O'odham custom of inclusiveness. *In Re: Petition of the Judicial Branch*, at 3 TOR3d, at 92-93; Respondent's Supplemental Pleading (Sept. 28, 2009); Petitioner's Brief (Sept. 28, 2009). The Legislative Council's motion to intervene is timely and comports with this court's jurisdiction, as discussed below.

B. Sovereign Immunity

> *i. The Tohono O'odham Nation does possess Sovereign Immunity within its own tribal judicial system and the Legislative Council possesses authority to waive such sovereign immunity on behalf of the Nation.*

Tribes exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Therefore, a tribe possesses sovereign immunity from suit in federal and state courts unless Congress or the tribe waives this immunity. *Kiowa Tribe v. Manufacturing Technologies Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 164 (1977).

However, a tribe's sovereign immunity in federal and state court does not automatically translate to sovereign immunity within its own tribal judicial system. *United Linings, Inc. v. Vi-Ikam Industries*, 2 TOR3d 39, 43-44 (Trial Ct., Dec. 20, 1998). Although the question of whether the tribe possesses sovereign immunity within its own judicial system has been raised, *Id.* at 44-45, many Tohono O'odham cases have proceeded as if it does. *Evans v. Tohono O'odham Nation*, 2 TOR3d 35 (Trial Ct., Jul. 17, 1998), *appeal dism'd*, 3 TOR3d 20 (Ct.App., Sep. 4, 2008) (dismissing for lack of waiver of sovereign immunity); *Juan v. Juan*, 2 TOR3d 62 (Trial Ct., Jan. 27, 2000), *appeal dism'd*, 3 TOR3d 1 (Ct.App., Jan. 4, 2005) (dismissing for lack of waiver of sovereign immunity); *San Lucy District v. Tohono O'odham Election Board*, 3 TOR3d 68 (Trial Ct., Oct. 1, 2007), *appeal dism'd*, 3 TOR3d 14 (Ct.App., May 30, 2008)

(determining the tribe waived sovereign immunity for a particular issue through a statute); *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60 (Trial Ct., Apr. 25, 2005), *appeal dism'd*, 3 TOR3d 21 (Ct.App., Sep. 4, 2008) (reasoning that sovereign immunity did not apply to a claim against a government agent seeking injunctive relief from unconstitutional conduct). Additionally, Tohono O'odham sovereign immunity from suit within the tribe's own judicial system can be inferred by the Tohono O'odham Constitution's preamble, which recognizes the "sovereign powers, authority, and jurisdiction of the Tohono O'odham Nation and of its government." TOHONO O'ODHAM CONST. pmbl. This sovereign protection can also be gathered from Article I of the Tohono O'odham Constitution, which states that the sovereign powers, authority and jurisdiction of the Tohono O'odham Nation extend to all Tohono O'odham lands and all people and activities carried out within that land. *Id.* at art. I. Sovereign immunity is reaffirmed in the Civil Actions Chapter of the Tohono O'odham Code which states that "[n]othing in this chapter shall be construed as a waiver of sovereign immunity of the Tohono O'odham Nation." 4 T.O.C. § 1-106.

Who then, has authority to waive the Tohono O'odham Nation's sovereign immunity? To examine how other multi-branch governments address this question, we will look to United States procedures for waiver of sovereign immunity.

Both the United States' federal and state systems recognize a legislature's authority to waive a government's sovereign immunity from suit. In the United States federal system it is the Congress. *McGuire v. U.S.*, 550 F.3d 903, 913 (9th Cir. 2008). In many states it is only the legislative body. *See e.g. Murray v. Missouri Highway and Transp. Com'n*, 37 S.W.3d 228, 235 (Mo. 2001); *Vincent v. Prince George's County*, 157 F.Supp.2d 588, 594 (D. M.D. 2001); *Alewine v. State*, 803 P.2d 1372, 1375 (Wyo. 1991); State of Ohio v. Madeline Marie Nursing Homes No. 1 and No. 2, 694 F.2d 449, 460 (6th Cir. 1982). This is also true in Arizona, as dictated by Article IV of the Arizona Constitution. A.R.S. Const. art. 4, § 18; *City of Phoenix v. Fields*, 201 P.3d 529, 571 (Ariz. 2009).

The Tohono O'odham trial court in *United Linings, Inc. v. Vi-Ikam Industries* called on the Legislative Council to enact a sovereign immunity statute, stating "the Nation's Constitution vests the Council with ample authority to enact legislation . . . preventing the Nation's courts from entertaining suits against the tribe." 2 TOR3d, at 45.[1] In enacting the Sovereign Immunity Law on April 6, 2010, the Legislative Council acted on the Court's encouragement. The statute

[1] This Court subscribes to parts of the Court's reasoning in *United Linings, Inc. v. Vi-Ikam Industries* without discussing the merits of the case or concurring with that Court's conclusion that sovereign immunity was waived.

reaffirms the tribe's sovereign immunity and dictates that such immunity can be waived only by a resolution or other official act of the Legislative Council. 1 T.O.C. § 2101(C). Such waiver must be expressly granted in a separate writing. *Id.*

Although this Court will not rule on the constitutionality of the Sovereign Immunity Law today, the statute does serve as persuasive evidence that the Legislative Council intended to uphold Tohono O'odham common law adopting a broadened version of the U.S. *Ex Parte Young* doctrine, which will be discussed in more depth in Part (I)(B)(iii). The Sovereign Immunity Law reaffirms that "sovereign immunity does not preclude . . . lawsuits brought against the Nation . . . for injunctive or declaratory relief to determine the validity of a law, rule, or regulation of the Nation." 1 T.O.C. § 2101(A). The Sovereign Immunity Law should be read in conjunction with the Tohono O'odham Code, which defines persons able to waive sovereign immunity through conduct as "any other group of individuals acting in concert; a government, any of its political subdivisions . . . ." 4 T.O.C. §1-101 c.3. The Sovereign Immunity Law's attempt to waive sovereign immunity for the Nation should be read to include political subdivisions, including governmental branches. The Sovereign Immunity Law, read in conjunction with the Tohono O'odham Code, indicates that the Legislative Council supports Tohono O'odham common law allowing suit against governmental entities, including governmental branches, for injunctive or declaratory relief.

Some courts have also held that a government's simple act of voluntarily intervening in a case effectively waives its sovereign immunity. *See, e.g., Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 289 n. 10 (1959) (stating that when a state voluntarily intervenes in a case, it waives its sovereign immunity); *State of California v. Taylor*, 535 U.S. 553 (1957) (a state's intervention in an action brought against the National Railroad Adjustment Board served as a voluntary submittal of the state to the federal court's jurisdiction); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916); *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914); *McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) (stating that initiation of a lawsuit by the tribe established consent to the court's adjudication over the merits for that particular controversy); *Wyandotte Nation v. City of Kansas*, 200 F.Supp.2d 1279, 1284 (D. Kan. 2002) (holding that the tribe waived sovereign immunity by bringing suit). This line of cases is not to be confused with the line that holds a tribe does not waive its sovereign immunity for counterclaims that could not otherwise be brought against the tribe simply because they are pleaded in a case filed by a tribe. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509

(1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (9140). In the second case, the court is protecting tribes' sovereign immunity in situations where they have voluntarily submitted to suit and an opposing party attempts to bring other claims under the court's jurisdiction.

The Tohono O'odham Code bolsters the assertion that voluntary intervention acts as a waiver of sovereign immunity. The Code provides that civil jurisdiction of the Court shall extend to "[a]ny person who consents to the jurisdiction of the Tohono O'odham Court whether expressly, by filing an action, by appearing as a defendant, or in any other manner . . . ." 4 T.O.C. §1-101 b. 9. As discussed above, the Code defines persons to include "any other group of individuals acting in concert; a government, any of its political subdivisions . . . ." *Id.* at c.3. Voluntary intervention may qualify as either "appearing as a defendant" or as consenting to the Court's jurisdiction "in any other manner." Additionally, a governmental branch is encompassed within those entities that may consent to civil jurisdiction through conduct.

Here, the Legislative Council is voluntarily submitting itself to the court's jurisdiction regarding the very issue at the heart of this case, the constitutionality of the Courts and Procedures Law. Whether the Legislative Council's act of inserting itself into the litigation serves as a waiver of sovereign immunity or not, it does serve as evidence of the Legislative Council's intent to disallow sovereign immunity from barring this kind of suit.

By a separate analysis, this case does not implicate sovereign immunity, because Tohono O'odham common law has adopted a broader reading of the U.S. *Ex Parte Young* doctrine. Therefore, waiver of sovereign immunity is not necessary. However, the Legislative Council, a body of government recognized as holding the power to waive the Nation's sovereign immunity, has passed a statute upholding this common law doctrine and has attempted to intervene in a case implicating this doctrine. These acts serve as persuasive evidence of the Legislative Council's intent to reaffirm this common law doctrine, allowing suits for injunctive or declaratory relief against the Nation's governmental entities acting outside the scope of their constitutional authority.

ii. The party bearing the burden of establishing the Court's subject matter jurisdiction over the Legislative Council's waiver rests on whether the Legislative Council is an indispensible party.

The party seeking to invoke the court's jurisdiction bears the burden of establishing subject matter jurisdiction over all parties. *United Linings, Inc. v. Vi-Ikam Industries*, 2 TOR3d, at 43; *Juan v. Juan*, 2 TOR3d, at 63; *Parraz v. Desert Diamond Casino*, 2 TOR3d 61, 61-62 (Trial Ct.,

Jun. 30, 1999) (dismissing because plaintiff did not prove the defendant tribe's waiver of sovereign immunity). Establishing waiver of sovereign immunity is an essential element of establishing subject matter jurisdiction over a party possessing such immunity. *Smith v. U.S.*, 507 U.S. 197, 197 (1993); *Juan v. Juan*, 2 TOR3d, at 63.

This case is different than most joinder cases that come before courts. Often, a governmental entity attempts to prove that its presence in litigation is necessary and that it is an indispensable party according to Rule 19 of the Federal Rules of Civil Procedure[2], but that joinder is not feasible due to lack of subject matter jurisdiction caused by the governmental entity's sovereign immunity. *See, e.g., Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2nd Cir. 2010); *United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.2d 1161 (9th Cir. 1993); *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F.Supp. 791 (D. D.C. 1990).

Rule 19(a) states that a necessary party must be included in litigation. Ariz.R.Civ.Pro. Rule 19(a). Rule 19(b) lists factors to consider when determining whether a necessary party, whose joinder is not feasible, is also an indispensable party, meaning that litigation cannot continue without the party's presence in the case. When considering whether a necessary party is also indispensable to the action, a court should consider 1) whether a judgment rendered in the party's absence might prejudice the party or an existing party, 2) whether prejudice could be lessened by relief or measures alternative to dismissal, 3) whether a judgment rendered without the party would be inadequate, and 4) whether the plaintiff would have an adequate remedy if the action were dismissed. Ariz.R.Civ.Pro. Rule Rule 19(b). When a party is deemed to be both necessary and indispensable, but joinder cannot be accomplished because the intervening party's sovereign immunity would remove the court's subject matter jurisdiction, the case must be dismissed.

In the present case, the Legislative Council has not asserted that it is a necessary and indispensable party nor that sovereign immunity precludes its being joined in the case, but has instead asserted its right to intervene under Rule 24. However, Committee notes from the 1966 Amendment to Arizona Rules of Civil Procedure Rule 24 indicate that Rule 24 should be read in conjunction with Rule 19[3] and case law has recognized the possibility that a party possessing a

[2] *Macpherson v. Taglione*, 762 P.2d 596, 598 (Ariz. App. 1988) ("[s]ince the Arizona Rules of Civil Procedure were adopted from the Federal Rules of Civil Procedure, Arizona courts should give great weight to the interpretation given to similar federal rules.").

[3] It is unclear whether these Committee Notes imply that a statutory right to intervene under Rule 24 should be read in conjunction with Rule 19. The Committee Notes simply state that a petitioner is entitled to intervene under Rule 24 when his situation is comparable to a person under Rule 19(a)(2)(i), which establishes when a party is necessary to the litigation.

statutory right to intervene under Rule 24 may also be an indispensable party under Rule 19. *Brotherhood of R.R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519 (1947). Therefore, it seems that, the Council's statutory right to intervene under Rule 24 could qualify the Council as a Rule 19 necessary, and possibly indispensable, party. If the Court recognized the Legislative Council's right to intervene pursuant to the Sovereign Immunity Law, and that the Legislative Council was an indispensable party, the Judicial Branch would bear the burden of establishing the Court's subject matter jurisdiction over the Legislative Branch in order to avoid dismissal.

However, we have chosen to reserve the question of the constitutionality of the Sovereign Immunity Law for another day and instead grant the Legislative Council a general permissive intervention. Therefore, this Court does not address whether the Legislative Council is a necessary and indispensable party under the Sovereign Immunity Law.

When a party is intervening permissively, the intervening party must show an independent ground for jurisdiction. *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989). This is because joinder of the party is not necessary, and the court may use its discretion not to join the party if joinder would upset subject matter jurisdiction. Therefore, in this instance, the Legislative Council bears the burden of showing that sovereign immunity does not bar the court from exercising subject matter jurisdiction over it. In granting permissive intervention, the Court bases part of its reasoning on the fact that the Attorney General and Executive Branch have no real interest in defending the law. Respondent-Applicant's Supplemental Brief on Legislative Immunity and Traditional Dispute Resolution, 5 (Sept. 28, 2009). This unique fact pattern does not set precedent making the Legislative Council a necessary or indispensable party in later actions challenging the validity of any of the Nations' laws as enacted by the Legislative Council.

iii. This case does not implicate sovereign immunity.

In *Ex Parte Young*, the Court permitted an injunctive action in federal court against the Minnesota attorney general to prohibit him from enforcing an allegedly unconstitutional statute. 209 U.S. 123 (1908). The Court reasoned that the 11th Amendment, the amendment in the U.S. Constitution prohibiting suits against state governments, did not apply in injunctive actions against a government actor acting outside the scope of his constitutional authority. *Id.* at 159-60 ("If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or

representative character and is subjected in his person to the consequences of his individual conduct.") In order to sue a government official under the *Ex Parte Young* doctrine, "such officer must have some connection with the enforcement of the act." *Id.* at 157.

A broader version of the U.S. *Ex Parte Young* doctrine's exception to the sovereign immunity bar was directly incorporated into Tohono O'odham common law in *Tohono O'odham Advocate Program v. Norris*, where the plaintiff was not barred by sovereign immunity from suing members of the judicial branch because the matter involved declaratory or injunctive relief. *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d, at 61. The Court cited directly to *Native Village of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir. 1994), a Ninth Circuit opinion, for its assertion that "sovereign immunity is not a bar to declaratory or injunctive relief." *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d, at 61. *Native Village of Noatak v. Blatchford* held that U.S. sovereign immunity did not bar claims for prospective relief, either injunctive or declaratory, against state officials acting in their official capacity. 38 F.3d 1505, 1511-12, 1513 (9th Cir. 1994). In asserting that a state's sovereign immunity does not bar suits for injunctive relief against state officers in their official capacity, the Court in *Native Village of Noatak v. Blatchford* cited directly to *Ex Parte Young*. *Id.* at 1511. Thereby, in citing to *Native Village of Noatak v. Blatchford*, which relied on *Ex Parte Young*, the Court in *Tohono O'odham Advocate Program v. Norris* incorporated a modified version of the U.S. *Ex Parte Young* doctrine into its jurisprudence.

Tohono O'odham courts, before explicitly adopting this evolved *Ex Parte Young* doctrine in *Tohono O'odham Advocate Program v. Norris*, have allowed suits for many years against government officials for prospective relief when the court deemed such officials to be acting outside the bounds of their constitutional authority. In *Francisco v. Toro*, an injunctive action, the Court examined whether the Legislative Council was acting outside the scope of its legislative authority in enacting specific regulations. 1 TOR3d 68. Similarly, in *Francisco v. Legislative Council*, another injunction case, the Court examined whether the Legislative Council was acting within the scope of its constitutional authority in removal proceedings against the Chairman and Vice Chairman of the Nation. *Francisco v. Legislative Council*, 1 TOR3d 76 (Trial Ct., Mar. 7, 1989) *appeal dism'd*, 2 TOR3d 14 (Ct.App., Oct. 5, 2004). Again, in *Tohono O'odham Legislative Council v. Manuel*, the Court examined whether the Chairman acted outside the scope of his constitutional authority in calling the Legislative Council to a

special session. *Tohono O'odham Legislative Council v. Manuel*, 2 TOR3d 64 (Trial Ct., Oct. 18, 2000).

Each of these cases employs the basic elements of the *Ex Parte Young* doctrine, allowing suits for injunctive or declaratory relief against government officials deemed to be acting outside the scope of their constitutional authority. In employing the U.S. *Ex Parte Young* sovereign immunity exception, Tohono O'odham common law has slightly altered the doctrine, allowing plaintiffs to bring suit against groups of government officials to be sued in their official capacity, rather than limiting plaintiffs to suing just one government figure. This can be seen in *Francisco v. Toro*, and even more clearly in *Francisco v. Legislative Counsel*. In *Francisco v. Toro*, the plaintiff named the Chairperson of the Legislative Council, as well as the Council itself, as a defendant. 1 TOR3d 68. However, in analyzing the case, the Court examined whether the Legislative Council, as a group of government officials, was acting outside the scope of its constitutional authority. *Id.* In *Francisco v. Legislative Council*, the plaintiff simply named the Legislative Council itself as the sole defendant and the Court analyzed whether it, as a governmental entity, was acting outside the bounds of its constitutional authority. 1 TOR3d 76. *Cf. Imperial Granite v. Pala Band of Mission Indians*, 940 F. 2d 1269 (9th Cir. 1991).

Tohono O'odham common law has adopted a modified version of the U.S. *Ex Parte Young* doctrine which does not limit suit to individual governmental officials. Instead, plaintiffs are free to bring suit against groups of governmental officials, including entire branches of government, for injunctive or declaratory relief if they are acting outside the scope of their constitutional authority and within their official capacities. This Court adopts a bright line rule, explicitly recognizing this doctrine as valid within the Tohono O'odham judicial system. Perhaps, it should be called, henceforth, the *Ex Parte Norris* doctrine.[4]

Here, the Judicial Branch asks for injunctive relief against a statute enacted by the Legislative Council. The Judicial Branch brought suit against "the Tohono O'odham Nation Executive Branch through the office of the Chairman of the Tohono O'odham Nation," a government official charged with the authority to implement and defend the law. Amended Petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction, 1 (Jan. 26, 2009). Additionally, the chairman has recognized that, although he vetoed the law, his veto was overridden by the Legislative Council, and therefore "the Chairman is required by the

[4] *Ex Parte* connotes in actuality only one party seeking relief from the Court and, to be true to its sense, should not necessarily be employed when multiple litigants are embedded in the litigation. A more literally correct nomenclature would express the litigation as *In Re.* Nevertheless, the Court uses the phrase here to mean the "concept" of injunctive or declaratory relief envisioned in cases such as the one now before us.

Constitution to oversee and implement this law." Respondent's Response Brief, 4 (Jan. 21, 2009). According to the Judicial Branch, the Courts and Procedures Law is unconstitutional, and enforcement of such law by the Chairman falls outside the scope of his constitutional authority. Additionally, the Legislative Council, as discussed in Part (I)(A)(i), also possesses authority to ensure the Nation's laws are implemented. Although the entire Legislative Council asks to intervene as a defendant, rather than a single government official, Tohono O'odham common law has altered the U.S. *Ex Parte Young* doctrine, allowing injunctive or declaratory suits against groups of governmental officials acting in their official capacities. Accordingly, this case does not implicate the Nation's sovereign immunity and the Court has subject matter jurisdiction over all parties.

C. Judicial Branch's Motions

Petitioner's Motion for Summary Judgment, Consolidated Motion for Judgment on the Pleadings and Request to File Interloculatory Appeal are inappropriate vehicles for challenging the Court's grant of permissive intervention to the Legislative Council. For this reason, each motion is denied. Additionally, the Court has granted the Legislative Council general permissive intervention, recognizing that the Court has subject matter jurisdiction over the Legislative Council. Therefore, the arguments the Judicial Branch raised in its motions are no longer applicable.

Rule 56 governs petitioner's motion for summary judgment. Ariz.R.Civ.Pro. Rule 56. A motion for summary judgment is proper when a party seeks "to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment." Ariz.R.Civ.Pro. Rule 56(a). The Judicial Branch seeks summary judgment on the Legislative Council's motion to intervene, rather than on its own original petition for declaratory relief. A motion to intervene does not qualify as a claim and, therefore, summary judgment on such motion is inappropriate and the Judicial Branch's summary judgment motion must be dismissed.

Rule 12 governs petitioner's motion for judgment on the pleadings. Ariz.R.Civ.Pro. Rule 12. Judgment on the pleadings is limited to matters within the pleadings. Pleadings are defined as a complaint or an answer, a reply to a counterclaim, an answer to a cross-claim that contains a cross-claim, a third-party complaint if a person was summoned under Rule 14, or a third-party answer if a third-party complaint is served. Ariz.R.Civ.Pro. Rule 7(c). A motion, such as a motion to intervene, is not a pleading. *Mallamo v. Hartman*, 222 P.2d 797, 798 (Ariz. 1950). Additionally, the purpose of a motion on the pleadings is to test the sufficiency of the complaint.

Giles v. Hill Lewis Marce, 988 P.2d 143, 144 (Ariz. Ct. App. 1999). Again, this vehicle is inappropriate because a motion to intervene does not qualify as a pleading. The Judicial Branch's motion for judgment on the pleadings must be dismissed.

Petitioner's request for interlocutory appeal is governed by Rule 14 of the Tohono O'odham Rules of Appellate Procedure. Rule 14 provides an avenue for parties to "appeal an action or an order of the lower court which is not a final judgment." T.O. Rules of Appellate Procedure Rule 14. A request for interlocutory appeal is only appropriate for final orders. 25 Fed. Proc., L. Ed. § 59:444 (2010). Neither the Court's decision to deny reconsideration of intervention, or the grant of intervention itself, are appropriate subjects for interlocutory appeal. *See Elliot v. White Mountain Apache Tribe*, WMATCA: C-03-97 (2006) (dismissing an interlocutory appeal because denial of a motion to dismiss does not constitute a final decision or order); 15 A.L.R. 2d 336 § 2(c) (2010) ("Most courts hold that an order granting the right of intervention is not appealable, since obviously any of the original parties to the proceedings may appeal from an adverse decision granting the intervener relief on the merits, and in such a situation procedural economy requires that only the latter appeal be permitted."). Instead, the proper procedure would be to appeal the final judgment of the case. 25 Fed. Proc., L. Ed. § 59:444 (2010).

However it should be noted that the Tohono O'odham interlocutory rule is broader than other jurisdictions' rules. Rule 14 allows for a party to appeal not just final decisions and orders, but "actions." T.O. Rules of Appellate Procedure Rule 14. The Merriam-Webster dictionary defines "action" as "the initiating of a proceeding in a court of justice by which one demands or enforces one's right" as well as "the proceeding itself." Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/action (last visited Oct. 14, 2010). The plain meaning of Rule 14 indicates that the "action" eligible for interlocutory appeal is the original claim brought by the plaintiff, not an intermediate motion to reconsider a grant of intervention.

Additionally, Rule 14 does not impose a duty to approve the request for permission to appeal upon the Court. Instead, it simply requires the lower court to "issue its order granting or denying the request." T.O. Rules of Appellate Procedure Rule 14(d). The Court has ruled that it has subject matter jurisdiction over the Legislative Council and has granted permissive intervention. Therefore, in its discretion and due to the inappropriate use of interlocutory appeal, it denies the Judicial Branch's request.

Each of the Judicial Branch's motions and its request for interlocutory appeal are denied. The Judicial Branch's motions and request are procedurally inappropriate and arguments it made

pertaining to lack of subject matter jurisdiction over the Legislative Council are no longer applicable.

II. Jurisdiction

A. This case does not involve a non-justicible political question.

Political questions, or issues reserved for the political branch, are non-justicible in the U.S. judicial system. *Coleman v. Miller*, 307 U.S. 433, 450 (1939). "The nonjusticiability of a political question is primarily a function of the separation of powers," because it is based on the rationale that issues reserved for the political arena should not be decided by the judiciary. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Therefore, the validity of the political question doctrine in the Tohono O'odham judiciary hinges partially on the outcome of this case. However, for the time being, we will proceed as if the Tohono O'odham Constitution establishes a distinction of powers sufficient to trigger the political question doctrine in Article IV, which calls for "three independent branches" of government. TOHONO O'ODHAM CONST. art. IV.

A case presents a non-justicible political question when 1) the issue has been demonstrated textually to be commitment to a coordinate political department, 2) there lacks a judicially discoverable and manageable standard for resolving the issue, or 3) judicial resolution of the issue may result in embarrassment due to multiple departments answering the same question. *Goldwater v. Carter*, 444 U.S. 996, 998-1000 (1979). Whether the issue has been committed to a political branch is of primary importance to the analysis. *Powell v. McCormack*, 396 U.S. 486, 519-20 (1969). A true conflict must exist and the "mere possibility of political overtones inconveniencing petitioner's claim does not amount to inextricable textual commitments." *Los Angeles County Bar Ass'n v. EU*, 979 F.2d 697, 702 (9th Cir. 1992).

The issue in the present case is whether the Courts and Procedures Law is unconstitutional, in that it encroaches on power the Constitution reserves for the Judicial Branch. The Tohono O'odham Constitution clearly vests the Judicial Branch with authority to review the Nation's laws when they are alleged to be unconstitutional. TOHONO O'ODHAM CONST. art. VIII § 10(b). The Courts and Procedures Law is alleged to be unconstitutional due to its encroachment on powers reserved to the Judicial Branch. The judicial standard for distinction of powers issues has been clearly delineated in *Francisco v. Toro*. 1 TOR3d, at 71-72. Last, the authority to render laws unconstitutional is reserved specifically to the Judicial Branch, so there is no harm of embarrassing other branches of government by a contradicting decision. TOHONO O'ODHAM

CONST. art. VIII § 10(b). The issue of whether the previously enacted Courts and Procedures Law is unconstitutional due to its usurping judicial authority is not a political question.

B. The present case does present a case or controversy.

Article III of the U.S. Constitution restricts federal courts to the resolution of cases and controversies. *Davis v. Federal Election Com'n*, 128 S.Ct. 2759, 2768 (2008). A plaintiff that claims his interest in the proper application of the Constitution and laws has been harmed, and who is seeking relief that does not directly benefit him more than it would benefit the general public, does not state a case or controversy under Article III of the U.S. Constitution. *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (U.S. 2007).

i. The Judicial Branch does have standing to bring suit.

Derived from the case or controversy requirement is the requirement that a person have standing to bring suit. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 27 (1976); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Whitmore v. Arkansas*, 495 U.S. 149 (1990). A party has standing if it is the proper person or entity to bring an action for adjudication. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A party meets the U.S. Constitution's standing requirement by showing that it personally suffered an actual or threatened injury as a result of illegal conduct. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The U.S. judicial system has constructed a three-part test to determine whether a plaintiff has standing. First, a party must show that it suffered an injury in a personal way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Second, there must exist a causal connection between the injury felt by the party and the illegal conduct complained of. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Last, it must be likely, rather than speculative, that a favorable decision will address the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The Tohono O'odham Constitution does not possess a case or controversy clause. Instead, Article VIII of the Constitution grants the Judicial Branch broad jurisdiction to hear cases. TOHONO O'ODHAM CONST. art. VIII § (2) (power extends to cases and matters arising under the Tohono O'odham Constitution, laws, ordinances and Tohono O'odham customs). Additionally,

Tohono O'odham custom values inclusiveness and the broad ability for individuals to bring grievances. *In Re: Petition of the Judicial Branch*, 3 TOR3d 81; Respondent's Supplemental Pleading (September 28, 2009); Petitioner's Brief, 14 (Sept. 28, 2009).

Accordingly, Tohono O'odham courts have dealt with standing requirements in distinction of powers cases differently, because standing is not specifically prescribed by the Constitution. A plaintiff has satisfied the Tohono O'odham three-part test for standing in a distinction of powers case when he is 1) a duly authorized head of a governmental branch, *Francisco v. Toro*, 1 TOR3d 68 (allowing the case to go forward with the Chairman alleging that actions taken by the Legislative Council encroached on constitutionally protected Executive Branch interests), 2) that has been authorized to assert an invasion of a constitutionally protected branch interest, *Tohono O'odham Legislative Council v. Manuel*, 2 TOR3d 64 (stating that the Legislative Council could claim encroachment on its constitutional authority by the Executive Branch if it properly delegated authority to the Legislative Chairman to act as its representative), 3) if the court has authority to fashion a remedy to redress the injury, *Francisco v. Legislative Council*, 1 TOR3d 76 (stating that a party's asserted interest in an intra-governmental suit must be protected by the Tohono O'odham Constitution and that the Court have the authority to grant the relief requested).

In the present case, the Chief Judge of the Judicial Branch, a duly authorized head of a governmental branch, initiated litigation. She asserts that the Legislative Branch has usurped the Judicial Branch's constitutional powers to set court procedures, has violated the constitutional clause stating that judicial pay may not be lowered and has violated the independent branch clause. Judicial pay, an asserted branch interest protected by the Tohono O'odham Constitution, has been considered of extreme importance for preserving the independence of the judiciary. *Evans v. Gore*, 253 U.S. 245, 248-49 (1920) (stating that the rule against the diminishment of judicial pay is meant to free the judiciary from coercion from other branches). If the Court finds that the Legislative Council has violated the Tohono O'odham Constitution by usurping the Judicial Branch's powers or by violating the rule against diminishment of judicial pay, the Court may declare portions of the statute unconstitutional and void, providing a remedy for the Judicial Branch. The Judicial Branch has, therefore, met the more inclusive standing threshold for Tohono O'odham courts.

ii. Petitioner's arguments are ripe for review.

Ripeness is again a function of the case or controversy requirement found in Article III of the U.S. Constitution, but "while standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). Plaintiffs must experience an injury or immediate threat of harm in order for their arguments to be ripe. *In the Matter of the Constitutionality of NCA* 98-02, No. SC-99-02 (Aug. 19, 1999). This harm must be "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 496 U.S. 149, 155 (1990)). Declaratory judgments also require "concrete legal issues, presented in actual cases." *United Public Worker v. Mitchell*, 330 U.S. 75, 89 (1947).

Although the Judicial Branch succeeded in obtaining an emergency injunction, preventing portions of the Courts and Procedures Law from taking effect until the Court determines whether they are constitutional, the Judicial Branch has adequately plead that it is facing imminent harm sufficient to satisfy its ripeness requirement. The Judicial Branch waited until the Courts and Procedures Law had been duly enacted through the legislative process to file its claim. Additionally, had the Judicial Branch failed to file its claim, just days later it would have been required to submit certifications showing that no cases had been pending more than 60 days pursuant to the Courts and Procedures Law. This provision would place conditions on the Judicial Branch's compensation, which the Judicial Branch alleges are in violation of the Tohono O'odham Constitution. TOHONO O'ODHAM CONST. art. VIII § (9). Additionally, just days after filing the claim, the Judicial Branch would have been in violation of publication and meeting requirements set out in the Courts and Procedures Law. These proscriptions are, again, alleged to be in violation of the Judicial Branch's constitutional right to create courtroom proceedings. TOHONO O'ODHAM CONST. art. VIII § (10)(d). The Judicial Branch's arguments are ripe.

Conclusion

The Court has adequately answered the five questions it posed in its March 11, 2010 Order.

1) In the Tohono O'odham Nation, the Legislative Council has authority to waive sovereign immunity for the Nation and did so for cases challenging the validity of the Nation's laws in its Sovereign Immunity Law. However, this Court defers a ruling on whether that law is or is not constitutional.

2) Sovereign immunity is not implicated in this case. Rather the matter involves a suit against a government official, the Chairman of the Nation, with the Legislative Council intervening, to

enjoin him from enforcing an allegedly unconstitutional law, an action that would be outside the scope of his constitutional authority. Such cases do not implicate sovereign immunity.

3) This case does not involve a non-justicible question. The Judicial Branch possesses sole constitutional authority to decide the constitutionality of the Nation's laws.

4) There does exist a case or controversy. The Judicial Branch, in a case brought by the Chief Judge, alleges that its constitutional authority is being usurped and that its constitutional right to undiminished pay is being violated, and a declaration that the Courts and Procedures Law is void would provide relief to the Judicial Branch.

5) Petitioner's arguments are ripe for review. The Courts and Procedures Law was duly enacted through the legislative process and, if not for the emergency injunction, would currently be affecting the Judicial Branch's alleged independent constitutional rights. According to the Judicial Branch's pleadings, harm alleged by the Judicial Branch is imminent.

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

TOHONO O'ODHAM NATION, Petitioner,
v.
D. A. T., Jr., Respondent Child.

Case No. 2009-0302-0309COP; 2009-031209314COP

Decided November 15, 2010

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Petitioner.
Tohono O'odham Advocate Program by William Callaway, Attorney for Respondent Child.

Before Judge Violet Lui-Frank.

This matter came for hearing on October 6, 2010 on the Respondent's Motion for Revocation of Detention Order. Eric L. Hager, Assistant Chief Prosecutor, appeared for the Nation. William Callaway, attorney for Respondent Child, from the Tohono O'odham Advocate Program, appeared.

The issue is whether the Tohono O'odham Nation is prohibited by the Indian Civil Rights Act [the ICRA], specifically, 25 U.S.C. sec. 1203(7), from imposing more than one year for all the offenses for which the Respondent is being held pending adjudication. Respondent seeks immediate release pending adjudication because he has been in custody since August 15, 2009, and the total time in custody at the time of the hearing was 417 days. He argues that, if he is

adjudicated a child offender for the offenses charged, he cannot be required to serve more than one year for all the offenses; that he has been held for more than one year; and, therefore, he should be released immediately.

25 U.S.C. sec. 1302(7) provides:

> No Indian tribe in exercising powers of self-government shall (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and [sic] a fine of $5,000, or both;

Respondent cites a United States District Court decision, Spears v. Red Lake Band of Chippewa Indians, 363 F. Supp. 2d 1176 (D. Minn. 2005), for the proposition that 25 U.S.C. sec.(7) means that the one year limitation on sentences imposed by tribes applies to all offenses charged in an incident, that is, the most that a defendant or child offender could serve is one year, no matter how many separate offenses were proven in a single criminal event. In the Arizona federal courts, one District Court decision, Miranda v. Nielsen, et al., No. CV-09-8065-PCT-PGR (ECV), is in accord with Spears, but another District Court Judge rejected the reasoning of Spears, holding there was no ambiguity in the phrase "any one offense" of 25 U.S.C. sec. 1302 (7), Bustamante v. Valenzuela, et al., CV-09-8192-PCT-ROS. In New Mexico, a United States Magistrate Judge agreed with the decision in Miranda v. Nielsen.

The Nation's argument is in line with the Bustamante decision, and presents the case law supporting the holding that "one offense" is not ambiguous and means what it says.

This Court now finds that there is no ambiguity in the phrase "any one offense", and there is no need to engage in contortions of construction that create a result contrary to Congress' express language in sec. 1302(7) of the Indian Civil Rights Act. If the Nation is able to prove the charges, the Respondent Child can be subject to dispositions that may amount to several years.

The Court is concerned about the amount of time pending the scheduling of the adjudication, but the record is clear that the investigation and the involvement of federal authorities have delayed access to the evidence for the prosecution and the Respondent Child. In addition, release under conditions was considered again on July 28, 2010, but the Respondent was not able to provide sufficient assurances that the Respondent would comply with release conditions.

IT IS ORDERED denying the Motion for Revocation of Detention Order.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Michael Thomas LEWIS, Defendant,

Case No. 2010-2896-2899CR

Decided December 14, 2010.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.

Before Judge Rachel Frazier Strachan.

On December 16, 2010, a hearing on the Nation's Motion for Change of Judge for Cause filed on November 22, 2010. Legal counsel for the Nation, Eric Hager and the Defendant were present. The court heard argument regarding the motion from both parties. The court took the matter under advisement.

The court has considered the parties' arguments, the Tohono O'odham Administrative Order 01-09, Sections II(A) and (B)[1] as well as Canon 4 of the Tohono O'odham Judicial Canons of Conduct. Based upon the foregoing, the court grants the Nation's Motion for Change of Judge for Cause and orders the matter reassigned. The basis of the court's decision is based upon the following:

First, Judge Telep is the subject of an investigation by the Tohono O'odham Police Department. Although Judge Telep claims the police department's investigation is not "adverse", Judge Telep's impartiality must be questioned. According to Canon 4(C), Judge Telep should have disqualified himself from the case.

Secondly, Judge Telep offered to have a "conference" with the Defendant in the courthouse lobby to discuss the Defendant's conditions of release. Judge Telep said the following,

And you can drop that [request to speak with the court] off and actually, we don't even need to set that in for a hearing. You can just make a request to speak to me and bring it into the court, bring it out in the lobby and they'll let me know and I'll come out and have a conference with you, and take a look at it and then if we need to we'll have a hearing regarding any modifications of the conditions of your release. (Emphasis added.)

[1] *Ed. Note.* Administrative Order 01-09 was amended and incorporated into the Tohono O'odham Rules of Court.

Judge Telep clearly stated that the matter did not need to be set for a hearing but that he would have a "conference" with the Defendant to discuss the Defendant's conditions of release. Such communication between the judge and the Defendant is an ex parte communication and prohibited.

In addition, Judge Telep made comments during an October 15, 2010 hearing relating to the Defendant's conditions of release. Statements made by Judge Telep indicate that he has a personal bias against the alleged victim in the instant case. Judge Telep stated during the hearing, But, you, you Mr. Lewis you have to, you have to, you have, if, but, you know that the ball's in your court. You have to take the initiative to make sure that you don't have any contact with her 'cause she's gonna get you in trouble. That's just my perception. If what you're telling me is true, and I have no reason to doubt it, my perception is that is the type of person she is". (Emphasis added.)

During the same hearing, Judge Telep also said,

And I had you, Mr. Lewis, get a hold of your friends, get a hold of her, which they did. And she had the opportunity to be here today and give testimony regarding the conditions of your release. So everybody's had ample notice that this hearing is going on today." Moreover, Judge Telep, Jr. declared during the same hearing "…everybody's had ample notice that this hearing is going today. And when the victim blows off the court, my sympathy for the victim isn't as strong as it used to be". (Emphasis added.)

Judge Telep's biasness is displayed when he commented that the alleged victim had "blown off" the hearing although Judge Telep did not give the alleged victim proper notice of the hearing. Instead, Judge Telep relied upon the Defendant and his friends to notify the alleged victim of the hearing. Furthermore, Judge Telep made reference to the "type of person" the alleged victim is and would get the Defendant "in trouble".

In accordance with Administrative Order 01-09II(B), this court finds Judge Telep's actions in this matter and statements provide sufficient facts to establish that he has an actual bias and personal interest against the Nation's witnesses which prevent him from being impartial. The court further finds that the instant matter is assigned to Judge Telep and the Nation's motion was timely filed.

Based upon the foregoing, and good cause appearing,

IT IS ORDERED that the Nation's motion is granted. Thus, Judge Telep is disqualified for cause from presiding over the instant matter.

IT IS ALSO ORDERED that at Chief Judge Rose Johnson Antone's discretion, another judge be assigned to this case.

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

In Re: PETITION OF THE JUDICIAL BRANCH

Case No. 2008-0283AV
(appeal dism'd *In re: Petition of the Judicial Branch*, 3 TOR3d 50 (Jul. 19, 2012))

Decided May 18, 2011.

M. June Harris, Counsel for Petitioner Tohono O'odham Judicial Branch
Veronica Geronimo, Counsel for Respondent Tohono O'odham Executive Branch
Tohono O'odham Legislative Attorney's Office by P. Michael Ehlerman for Intervenor Tohono O'odham Legislative Council

Before Judge Robert Alan Hershey.

The Judicial Branch of the Tohono O'odham Nation seeks to enjoin the Executive Branch, through the office of the Chairman of the Tohono O'odham Nation, from implementing portions of Resolution 08-704 pertaining to Title 6, Chapter 1, Courts and Procedures (hereafter the "Courts and Procedures Law") by amended petition for Declaratory Judgment and Emergency Preliminary Injunction and Permanent Injunction. The Emergency Preliminary Injunction was granted through an Order, filed January 6, 2009, and modified January 28, 2009. The Legislative Council of the Tohono O'odham Nation filed a motion to intervene in the litigation on January 21, 2009 and in its March 11, 2010 Order, the Court granted limited intervention. In the October 26, 2010 Order, the Court determined that it has jurisdiction to address the ultimate issue, the constitutionality of the contested portions of the Courts and Procedures Law. The parties have since filed briefs on the merits. The legal conclusions and accompanying rationales of all prior orders in this proceeding are thereby incorporated into this Order.

At this time, the Court will address the underlying substantive matters of the case, namely the constitutionality of Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C) of Resolution 08-704, hereafter the "Courts and Procedures Law."

Choice of Law

The parties have interpreted Order 03-09, for purposes of this litigation, as adopting Tohono O'odham laws, rules, customs and traditions, the Arizona Rules of Civil Procedure, and pertinent

Arizona law. The Court agrees, noting that the use of foreign law will be considered if it aligns with Tohono O'odham custom, which fosters a spirit of inclusiveness—a spirit this Court emphasized in its March 11, 2010 and October 26, 2010 Orders.

Jurisdiction

The Court has jurisdiction to hear Petitioner's Amended Petition under Article VIII of the Tohono O'odham Constitution and the October 26, 2010 Order.

Discussion

I. Constitutionality of Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C) of the Courts and Procedure Law

This controversy revolves around the constitutionality of several provisions enacted as part of the Courts and Procedures Law: Sections 1102(B)(1), 1103(D), 1106(B)–(C), and 1107(C).

The contested portion of Section 1102(B)(1) addresses the judicial calendar and provides that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once every calendar quarter until the final, written judgment is entered."

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount

> equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

Section 1106(B) addresses the application of court rules and provides that:

> [i]n order to ensure that all persons appearing before the Court are guaranteed equal protection and due process of the law, the application of the rules of court shall not be discretionary but shall be applied by all judges to the matters before the Court. Court rules promulgated by another jurisdiction or entity and adopted by the chief judge that directly conflict with a Tohono O'odham Nation law or Judicial Court rule or order shall be inapplicable.

Section 1106(C) concerns the publication of court rules. Its contested language states that "[a]ll court rules shall be compiled in a single volume, shall be made available to the public in electronic and paper formats, and be distributed to all persons who practice before the Judicial Court."

Similarly, Section 1107(C) sets out procedures for publishing court decisions and provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

Petitioner argues that these provisions violate both the express language of the Tohono O'odham Constitution and the related doctrine of separation of powers. Because this is a matter of constitutional interpretation, we must first review the canons of interpretation that guide this Court's analysis. As the Tohono O'odham courts have previously articulated, a constitution must be construed within the limits of the document to the extent possible. *Harvey v. Tohono O'odham Council*, 1 TOR3d 43, 46 (Trial Ct., Jan. 26, 1987). However, where a provision is not clear on its face or is susceptible of more than one interpretation, then it must be construed in light of the intent and purposes of both the framers and the people who adopted it. *Id.* Relatedly, legislative enactments are presumed to be constitutional and the burden of proof rests upon the

party asserting that a particular exercise of governmental authority is unconstitutional. *Williams v. Chukut Kuk District*, 2 TOR3d 57, 60 (Trial Ct., Jun. 9, 1999).

An additional canon, expressly utilized by other jurisdictions and implicitly embraced by Tohono O'odham courts, is that of *expressio unius est exclusio alterius*. This canon holds that "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (9th ed. 2009). Past Tohono O'odham decisions implicitly employ this canon to a degree. For example, *Williams v. Chukut Kuk District* dealt with a legislative resolution to reduce a district chairman's compensation to zero dollars in response to the chairman's failure to perform his governmental duties. *Williams*, at 57-58. That court found that because there exist constitutional provisions prohibiting the diminishment of compensation for *specified* government officials, by implication *non-specified* officials are not within the scope of that prohibition and could have their compensation diminished. *Id.*, at 60. Similarly, in *Francisco v. Legislative Council*, the court held that because the Constitution expressly provides only the Legislative Council, and no other branch, with the power of removal, this power is exclusively legislative. *Francisco v. Legislative Council*, 1 TOR3d 76, 76-77 (Trial Ct., Jul. 17, 1989) *appeal dism'd* 2 TOR3d 14 (Ct.App., Oct. 5, 2004). While this Court adopts the canon of *expressio unius est exclusio alterius* as an instructive tool of interpretation, it recognizes that the canon is of limited import and does not amount to irrefutable evidence of constitutional meaning. This is particularly true where many governmental powers go unexpressed in constitutional documents but rather are inherent to those powers expressed therein.

a. The Separation of Powers Doctrine

A critical aspect of the constitutional analysis in this case is the *related* doctrine of separation of powers. The Tohono O'odham Constitution announces that the "government of the Tohono O'odham Nation shall be composed of three independent branches:" the Council, Executive, and Judiciary. T.O. Constitution Art. IV. While the phrase "separation of powers" is not itself articulated in the Constitution, the doctrine is implied by this system of three separate and independent government branches.[1] In contrast to its predecessor—the 1937 Papago Constitution that established a single governing body—the 1986 Constitution of the Tohono O'odham Nation consciously decentralized governmental power. This decentralization of power reflects traditional Tohono O'odham governance: a system that relied on consensus of all tribal

[1] In its March 11th, 2010 Order, this Court specified its ideation of the term, "distinction of powers," given the Tohono O'odham preferences for inclusivity among its three "independent branches." Yes, of course, the powers are "separate," in ordinary nomenclature. But, the Court still wants to avoid incorporating wholesale, from other jurisdictions, foreign doctrinal analyses of the term "separation of powers."

members and diffusion of power through local decision-making. *See Francisco v. Toro*, 1 TOR3d 68, 74 (Trial Ct., Jan. 12, 1989) *appeal dism'd* 3 TOR3d 17 (Ct.App., Sep. 4, 2008).

The concept of separate, or distinct, governmental powers is not unique to the Tohono O'odham but exists in a multitude of other jurisdictions, including the U.S. federal government. In jurisdictions that adhere to the separation of powers doctrine, time and experience have demonstrated that this theoretical framework does not, and perhaps cannot, exist in a pure form. *See, e.g.*, *Francisco v. Toro*, 1 TOR3d, at 71 ("Judicial history points out…that this theoretical framework has never existed in pure form"); *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (recognizing that the powers are not "hermetically sealed" from one another). Particularly where, as in here, a newly formed constitutional government arises from deeply embedded traditional forms of governance, "[t]here must be sufficient flexibility to experiment and to blend together the powers of the Legislative, Executive, and Judicial." *Toro,* at 76. While such a system necessarily creates a degree of friction between the three branches, "by means of the frictions, and reason, wisdom and self-restraint, the formation of a working government can be achieved." *Id.* Consequently, "it is imperative that the government recognize the theoretical distinction [of separate powers] but keep in mind that the formation of a viable government must depend on the cooperation and interrelationship between all three branches of government." *Id.*, at 71. Intergovernmental cooperation and interrelation strongly resonate with Tohono O'odham culture and tradition, which stress the importance of harmonious interactions and fosters a spirit of inclusiveness. *See*, *In Re: Petition of the Judicial Branch*, 3 TOR3d 81, 89 (Trial Ct., Mar. 11, 2010, appeal dism'd *In Re: Petition of the Judicial Branch*, 3 TOR3d 50 (Ct.App., Jul. 19, 2012) (discussing the *Himdag* philosophy of living—passed down to the O'odham from Íitoi—which recognizes the reality that power cannot be centralized and no matter what one does, other entities can effect one's existence). An important aspect of this O'odham ethos is the patient deliberation of all factors. *See id.* at 89 (quoting Papago activist Peter Blaine). Therefore, as we proceed with our discussion of constitutional distinction of powers, we must do so against the backdrop of these Tohono O'odham values.

The coalescence of a traditional distinction of powers doctrine with Tohono O'odham custom and tradition is exemplified by *Francisco v. Toro*. The first Tohono O'odham decision to squarely address a potential separation of powers violation, *Toro* looked at whether a council resolution directing the executive to make appointments violated the executive's constitutional power to create administrative plans. *Toro,* 1 TOR3d, at 69, 73–75. In concluding that the

Council had not, in fact, encroached upon the Executive's power, the court set up a three-prong encroachment analysis. First, the court examined the nature of the power being exercised, asking whether it is a power exclusively inherent in one branch or a blend of two branches. *Id.* at 71-72. Second, the court looked at whether the exercise was intended to act as a coercive influence or as a mere cooperative venture. *Id.* at 72. Under this step, the objective of the acting branch is important; was the action intended to aid another branch or was the acting branch declaring superiority in an area exclusively reserved to another branch? *Id.* Third, the court evaluated the practical effect of blending powers as shown by actual experience over time. *Id.* This framework, while not offering an easy bright-line rule, carefully incorporates considerations of constitutional fidelity, adherence to customary governance, and the evolution of the Tohono O'odham's nascent government. *Id.* at 69. This Court will primarily utilize the *Toro* test for the remainder of the opinion.

In order to determine whether the contested provisions amount to a violation of the separation of powers, the Court must first articulate what exactly is the power at issue. The parties have framed the underlying exercise of power in two distinct ways. According to the Petitioner, the contested provisions demonstrate an effort by the Legislature to establish judicial procedure. *See* Petitioner's Brief at 21–22. Conversely, Respondent Legislative Council views these provisions as an exercise of the Council's power to protect individual rights. *See* Respondent's Response at 3. While the Court assumes that the latter interpretation is correct, it will examine each of these powers in their own right.

b. The Right to Create Judicial Procedure Lies Exclusively in the Judicial Branch.

A central point of contention in this case is whether the power to enact judicial procedure is shared between the Judiciary and the Legislative Council, or whether the Judiciary holds this power to the exclusion of all other branches. Under Article VIII of the Constitution, the judicial branch has the power to "[e]stablish court procedures for the Tohono O'odham Judiciary." T.O. Constitution Art. VIII § 10(d). However, Article VI, which sets forth the Council's assorted powers, states that the Council has the power to "provide for the maintenance of law and order and the administration of justice." T.O. Constitution Art. VI § 1(c)(6). Petitioner argues that because the power to establish court procedure is explicitly enumerated in Art. VIII § 10(d), by implication no other branch holds this power. Petitioner's Reply at 3–4. Furthermore, Petitioner maintains that the legislative power to provide for the "administration of justice" refers only to the Council's authority to enact substantive civil and criminal law, as well as to regulate the

Nation's police force. *Id.* at 3. While Respondent does not argue that "administration of justice" implies unfettered power to enact judicial procedure, it interprets this language as authorizing legislation that directly affects judicial affairs. Respondent's Response at 4.

To determine the constitutional import of Articles VI § 1(c)(6) and VIII § 10(d), the Court must employ the canons of construction set forth above. On its face, the phrase "administration of justice" is ambiguous and could be construed broadly to include the power to enact court procedure. However, set against the specific delegation of power to create court procedure in Article VIII, it appears clear that "administration of justice" was intended by the framers to denote powers other than court rulemaking. This interpretation is bolstered by the canon of *expressio unius est exclusio alterius*—the fact that framers explicitly addressed the power to create court procedures in Article VIII implies that they considered the issue and decided to award the Judiciary this power to the exclusion of the Legislature and Executive.

An examination of both the framers' intent and underlying constitutional principles further supports this interpretation, although inconclusively. As discussed above, the Tohono O'odham traditionally maintained a decentralized form of governance and decisionmaking. By enacting the 1986 Constitution, the O'odham hoped to reinforce this decentralization of power through the establishment of a tripartite government complete with separate and independent zones of authority. Inherent in that division of power is the notion that each branch is best equipped to determine its own procedures and rules of operating. *See, e.g.*, *Francisco v. Legislative Council*, at 77 (finding that the Judiciary cannot tell the Legislative Council "when to meet, what its agenda should be or what legislation to consider"). Nevertheless, the premium placed on inclusiveness and intergovernmental cooperation, as well as the *Toro* conception of blended powers, lends credence to the notion that "administration of justice" enables the Legislature to create court procedures alongside the Judicial branch. However, a careful look at O'odham case law strengthens the argument that the Judiciary alone has authority to enact judicial procedure.

In *Tohono O'odham Advocate Program v. Norris*, the court held that the Judiciary could not create a bar association where the Constitution explicitly grants only the Legislative Council the authority to establish organizations. *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 58 (Trial Ct., Apr. 25, 2005) *appeal dism'd* 3 TOR3d 21 (Ct.App., Sep. 4, 2008)). The court recognized the Judiciary's inherent authority to regulate the practice of law and establish rules to such effect under the Tohono O'odham Constitution, yet it clarified that such authority may only be exercised in accordance with the express language of the Constitution. *Id.* at 60. In other

words, not only must a branch act in furtherance of constitutionally appropriate objectives, it must utilize constitutionally appropriate means. And where only one branch is delegated a means—e.g. the power to set up organizations—by implication no other branch may employ such means. *See also, Francisco v. Legislative Council*, 1 TOR3d, at 77 (finding that because removal power is expressly delegated to the Legislative Council, no other branch may exercise that power).

Because the power to create judicial procedure has been discussed at length in other jurisdictions, it is illustrative to examine foreign law. In the United States federal system, Congress has "undoubted power" to regulate the practice and procedure of federal courts. *Sibbach v. Wilson*, 312 U.S. 1, 9 (1941). Congress has delegated this power to the federal courts under the Rules Enabling Act. *See* U.S.C. §§ 2071–77; *id.* § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress… ."); *Sibbach*, 312 U.S. at 9 (explaining that Congress may delegate its power to regulate court procedure). However, Congress remains involved in the regulation of judicial procedure and may intervene to disapprove or modify rules promulgated under the Rules Enabling Act. *See Jackson v. Stinnett*, 102 F.3d 132, 143 (5th Cir. 1996) (explaining that despite the delegation of rulemaking authority via the Rules Enabling Act, "Congress maintains an integral, albeit passive, role in implementing any rules drafted by the court" and "all such rules are subject to review by Congress); House Report Accompanying Judicial Improvements & Access to Justice Act, H.R. Rep. 100-889, 1988 U.S.C.C.A.N. 5982, 5987 (describing the increased level of congressional intervention in judicial rulemaking as demonstrated by the 1973 substitution of judicially created Federal Rules of Evidence with a congressional drafted version). Essential to the federal system of a shared power to enact judicial procedure is the underlying constitutional language. In contrast to the T.O. Constitution, the U.S. Constitution does not expressly set up *independent* governmental branches. Furthermore, it fails to address judicial procedure entirely, including which branch has the power to create it. Therefore, the U.S. framework is of limited persuasiveness for the Tohono O'odham.

The State of Arizona operates under a constitution more similar to that of the O'odham and therefore is more useful in its approach to judicial procedure. The Arizona Constitution explicitly requires separation of powers in Article III:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Although the power to enact judicial procedure is not itself addressed, Article VI states that the judicial power of the state shall be vested in its supreme court and inferior courts. A.Z. Constitution Art. VI § 1. The Arizona Supreme Court has examined whether the power to make court rules and procedure is judicial or legislative in nature, and found that "courts have the inherent power to prescribe rules of practice and rules to regulate their own proceedings in order to facilitate the administration of justice, without any express permission from the legislative branch." *See Burney v. Lee*, 59 Ariz. 360 (1942). However, the *Burney* Court tacitly recognized the concurrent power of the legislature to create judicial procedure by leaving untouched the statute at issue: A.R.S. § 12-109. *See Burney* at 364–65. Section 12-109 is a delegation by the Arizona legislature to the courts of the authority to promulgate court rules and procedure. Therefore, while the judiciary may have "inherent" power to create judicial procedure, in Arizona the legislature may also legislate in this arena. *See, e.g., Anderson v. State*, 54 Ariz. 387, 389 (1939) (holding that a procedural *statute* supersedes any conflicting rules of court except to the extent that it "unreasonably limits the court in the performance of its constitutional duty"); *Burney* at 364 (highlighting that among states, the legislature may generally exercise rulemaking power and courts will bow to this authority unless such legislatively created rules "unreasonably limit or hamper" the courts in the performance of their duties).

Colorado law is perhaps an even better example due to certain constitutional similarities between the State of Colorado and the Tohono O'odham. The Colorado Constitution expressly provides that "[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases." Colo. Constitution Art. VI § 21. The Colorado Supreme Court interpreted this provision as providing the judiciary with "plenary authority" (i.e. full or complete power) to create procedural rules. *City of Broomfield v. Farmers Reservoir & Irrig. Dist.*, 239 P.3d 2370, 1278–79 (Colo. 2010). Other Colorado case law elucidates that the judiciary has the power to promulgate rules of practice and procedure, while the legislature has the power to enact substantive rules and statutes. *People v. Diaz*, 985 P.2d 83, 87 (Colo. App. Div. V. 1999). However, *Diaz* recognized that the line between substance and procedure is often inscrutable

and, accordingly, conceded the legislative policymaking and judicial rulemaking may overlap to some extent. *Id.* Ultimately, Colorado has reached a compromise concerning judicial procedure: "where a statute is a statement of legislative policy but also affects the practice and procedure of the courts, it will not be deemed an unconstitutional intrusion into matters exclusively judicial unless it conflicts with a court rule adopted by the supreme court." *Id.*

This sojourn into foreign law demonstrates that all jurisdictions grapple with the issue of who may create judicial procedure and, relatedly, when substantive law impermissibly amounts to judicial procedure. Each jurisdiction has answered these questions uniquely, a uniqueness intimately tied to the specific language of each jurisdiction's constitution. Therefore, our analysis is brought full circle to the express language of the Tohono O'odham Constitution. In light of the explicit grant of power to the Judiciary, as well as O'odham case law and constitutional history, the Court finds that the Judiciary has the primary authority to establish court rules and procedures. However, this right is not absolute and the Legislative Council may enact substantive laws with procedural effects so long as these laws are in furtherance of a constitutionally delegated power and do not impermissibly encroach upon the Judiciary. Furthermore, the Court adopts the proposition that such laws with procedural effects are assumed constitutional unless they conflict with a court rule adopted by the Judiciary.

c. All Three Governmental Branches Share the Power to Protect Individual Rights.

The prior holding segues naturally into the next phase of our analysis. Rather than framing the issue as the power to create judicial procedure, Respondent argues that the contested provisions are valid exercises of its power to enact substantive laws protecting individual rights. Respondent's Response at 3. Article III of the Constitution provides that the Tohono O'odham Nation was established to "protect and maintain [the people's] individual rights." T.O. Constitution Art. III § 1. Furthermore, the government "shall not deny to any member of the Tohono O'odham Nation the equal protection of the laws or deprive any member of liberty of property without due process of law." *Id.* The Court agrees that Article III both obligates and empowers the Legislative Council to protect the individual rights of its members. Furthermore, the Court finds that the unambiguous language of this provision, which addresses the Tohono O'odham government as a whole, provides all three branches with a shared power to protect these rights. However, the provision does not grant each branch unlimited power to effectuate this protection using any means available. Rather, the protection of individual rights must be accomplished within each branch's constitutionally appropriate zone of power.

As determined above, the Legislative Council may enact substantive laws with procedural effects so long as these laws are in furtherance of a constitutionally delegated power and do not impermissibly encroach upon the Judiciary. Accordingly, the Legislative Council may legislate to protect individual rights and such legislation may have procedural effects *unless* it amounts to an encroachment of the Judiciary's power to set court procedure. Encroachment, in turn, is to be determined by an application of the *Toro* test to each legislative act. Because the Court characterizes the contested provisions of the Courts and Procedures Law as exercises of the shared power to protect individual rights, it will apply *Toro* to each and determine whether encroachment has occurred and, consequently, whether the Council has overstepped its constitutional authority.

i. Section 1102(B)(1) Is an Unconstitutional Exercise of Legislative Power.

Section 1102(B)(1) requires that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once ever calendar quarter until the final, written judgment is entered." Under step one of *Toro*, we must examine the nature of the power being exercised. Respondent emphasizes that this provision promotes due process and the right to appeal by ensuring that appeals are reviewed in a timely matter. Respondent's Response at 22. However, the focus on these individual rights is overshadowed by the explicit objective of setting the appellate court calendar, an objective that is inherently judicial in nature. Furthermore, such an exercise of control over the court calendar is antithetical to the Tohono O'odham notion of distinct powers. *C.f. Francisco v. Legislative Council*, 1 TOR3d, at 77 (finding that the separation of powers principle clearly prohibits the Judiciary from telling the Legislative Council when to meet).

As per the second step of *Toro*, the Respondent argues that Section 1102(B)(1) is not coercive but rather complements existing court rules to ensure the timely review of appeals. Respondent's Response at 22. While the Court has no reason to question the Council's stated objective, it must recognize that the establishment of the appellate calendar represents a legislative intrusion into an area traditionally reserved to the Judiciary and, as such, ties the Judiciary's hands in managing its time and resources.

Lastly, the Court must look at the practical effect of such a provision as shown by actual experience. Respondent highlights Section 20 of the Children's Code as another example of legislatively set court timeframes. *Id.* at 21. However, the Court finds this example distinguishable, where Section 20 does not actually require the appellate court to convene for a

hearing on the merits but rather establishes a back-up plan pending the appeal. Admittedly, this does in a sense create judicial procedure; however, that effect is ancillary to the main thrust of the provision, which is to provide a safety net for children whose welfare is at stake.

Therefore, under the principles articulated in *Toro*, Section 1102(B)(1) is an unconstitutional encroachment of judicial power.

ii. Section 1106(B) Is a Constitutional Exercise of Legislative Power.

Section 1106(B) provides that:

> [i]n order to ensure that all persons appearing before the Court are guaranteed equal protection and due process of the law, the application of the rules of court shall not be discretionary but shall be applied by all judges to the matters before the Court. Court rules promulgated by another jurisdiction or entity and adopted by the chief judge that directly conflict with a Tohono O'odham Nation law or Judicial Court rule or order shall be inapplicable.

Although Petitioner appears to take issue with only the first sentence, the Court will examine the constitutionality of the entire provision and therefore apply *Toro* to each sentence separately.

1. Uniform Application of Court Rules

Under step one, the power being exercised is the promotion of individual rights; specifically, the guarantee of equal protection and due process. As already established, this is a shared power between the three branches. The particular application of this power here does interfere, to a certain extent, with matters traditionally within the scope of judicial authority, namely judicial discretion to apply court rules. However this intrusion is not as egregious as prescribing rules of court or constraining judicial discretion to determine which rules are triggered by a given case. Furthermore, Tohono O'odham law does not provide for absolute judicial discretion; there are constitutionally imposed outer limits to this discretion, such as requirements of equal protection and due process.

Next, the Court finds that this provision does not amount to coercion. The objective is clear: to ensure fairness, uniformity, and notice to all parties before the court as to the body of rules by which they will be bound. While the Petitioner may perceive any legislative actions that affect judicial discretion as inherently coercive, this Court believes the provision is more appropriately characterized as a cooperative effort to ensure equal protection and due process.

Lastly, the primary effect of this exercise of power is that parties before the court will have both notice of the court rules and assurance that everyone else before the court is subject to the same set of rules. This satisfaction of equal protection and due process does not interfere with

the vast discretion of Tohono O'odham judges to control their proceedings and arrive at decisions, nor does it hinder the Chief Judge's ability to promulgate court rules.

Therefore, the first sentence of Section 1106(B) is a constitutional exercise of legislative power.

2. Choice of Law

Again, the power at issue is the protection of individual rights through the guarantee of equal protection and due process—a shared power amongst the three branches. This particular application of that power involves a conflict of laws provision. It is widely recognized that conflict-of-law, or choice-of-law, rules may be enacted by legislatures or formulated through jurisprudence. *See, e.g.*, Restatement 2d Conflicts of Laws § 6(1) (1971) (announcing the fundamental choice-of-law principle that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law" but if none exists, a court will follow the Restatement choice-of-law framework). Although not easily characterized as substantive or procedural, it is clear that choice-of-law rules are treated as substantive law for the purpose of federal diversity suits. *See Klaxon Co. v. Stentor Elec. Manuf. Co.*, 313 U.S. 487 (1941) (holding that federal courts must abide by state choice-of-law rules in diversity suits). Therefore, for the purposes of *Toro*'s first step, this provision involves a shared power among the Judiciary and Legislative Council.

The Court finds that its analysis for steps two and three as applied to the first sentence of Section 1106(B) is equally applicable to the second sentence. The choice-of-law provision is not inherently coercive where it does not interfere with the power to create court rules, nor does it eliminate judicial discretion in determining which rules are implicated be the facts of a case. Rather, it promotes equal protection and due process by assuring parties of the primacy of Tohono O'odham court rules and substantive law. In practice, this type of law fairly balances judicial discretion against the legislative power to enact substantive laws and protect individual rights.

Therefore, the second sentence of Section 1106(B) is a constitutional exercise of legislative power.

iii. *Sections 1106(C) and 1107(C) Are Unconstitutional Exercises of Legislative Power.*

Due to their underlying similarities, Sections 1106(C) and 1107(C) will be analyzed concurrently. The contested portion of Section 1106(C) states that "[a]ll court rules shall be

compiled in a single volume, shall be made available to the public in electronic and paper formats, and be distributed to all persons who practice before the Judicial Court." Similarly, Section 1107(C) provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

As per *Toro* step one, the basic power exercised in these provisions is the protection of individual rights, specifically the due process right to notice of the applicable procedure and substantive law. However, in enacting Sections 1106(C) and 1107(C), the Legislative Council prescribes in great detail the procedure for accomplishing this right and in doing so, treads upon a generally protected realm of judicial authority.

Respondent makes a persuasive argument under *Toro* step two that these provisions are in furtherance of a cooperative effort between the Judicial Branch and the Legislative Council to make court rules and decisions accessible to the public. *See* Respondent's Response at 12–13, 19–20. In support of its argument, Respondent cites to examples of past or ongoing interbranch cooperation. *Id.* (discussing a joint effort to publish court rules in printed and electronic form, as well as the Council's attempt to compile scattered court decisions and provide them to the Judiciary). While these collaborations are praiseworthy attempts to increase public access to Tohono O'odham law, it must be noted that they are voluntary in nature. In other words, neither branch has been legally required by the other branch to perform these actions. By transforming this effort into an extensive framework of mandatory procedure, the Legislative Council exercises a degree of inappropriate coercion.

In Respondent's consideration of step three, it reiterates the numerous examples of intergovernmental cooperation detailed under step two. However, Respondent's argument ignores the fact that in the past the Judiciary has voluntarily worked with the Legislative Council, rather than being required to do so by legislatively set procedural rules. In practice, the ability of the Legislature to enact detailed judicial procedure that will incur monetary costs and require human resources ignores the intimate knowledge the Judiciary has of its own needs and capabilities. Not only could this result in frustration within the Judicial branch, but it has the potential to create inefficiencies and misuse of judicial resources that negatively impact the public's ability to utilize the Nation's justice system.

Therefore, Sections 1106(C) and 1107(C) are unconstitutional encroachments upon judicial power.

iv. *Section 1103(D) Is an Unconstitutional Exercise of Legislative Power.*

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

Section 1103(d) requires a unique analysis. Rather than perceiving this section as primarily a matter of encroachment, similar to the other contested provisions, Petitioner argues that Section 1103(d) directly violates the express language of the Constitution's Compensation Clause. The Compensation Clause requires that "[t]he judges of the Tohono O'odham Courts shall receive for their services a compensation to be established by the Tohono O'odham Council, *which shall not be diminished during their continuance in office*." T.O. Constitution Art. VIII § 9 (emphasis added). Respondent defends Section 1003(d) as a valid legislative measure to protect the

individual rights of the Nation's members to timely judicial decisions and further contends that it does not fall within the meaning of "diminishment" as prohibited by the Compensation Clause. Respondent's Response at 25–28. Because this is primarily a matter of strict constitutional interpretation, the Court will evaluate Section 1103(d) according to the language of the Constitution, taking into consideration relevant case law from foreign jurisdictions.

Article VIII § 9 expressly prohibits any measure that diminishes judicial compensation during a judge's term of office. While the Tohono O'odham courts have had few occasions to examine the scope of this prohibition, there is an extensive body of federal and state case law analyzing analogous compensation clauses. These jurisdictions have highlighted the intention behind compensation clauses, primarily the protection of judicial independence from overbearing legislatures and executives. *See, e.g.*, *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). In order to fulfill that purpose, courts have construed broadly the terms "compensation" and "diminishment." *See* Petitioner's Brief at 14–15 (citing *O'Donogue v. U.S.*, 53 S. Ct. 740 (1933); *Hatter v. U.S.*, 64 F.3d 647 (C.A. Fed. 1995), *aff'd by U.S. v. Hatter*, 117 S. Ct. 39 (1996); *Evans v. Gore*, 40 S. Ct. 550 (1920). As articulated by the Supreme Court in *Evans*, "all [forms of diminishment] which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle." 40 S. Ct. at 553. This Court acknowledges that the holding of *Evans*—finding the imposition of a nondiscriminatory income tax on federal judges after their appointment date violative of the compensation clause—was later overruled. Nonetheless, the Court still finds persuasive the underlying rationale that the compensation clause was enacted to protect judicial independence and therefore must be interpreted broadly. The Court recognizes, however, that the protection against diminishment is not absolute. As Respondent illustrates, judicial salaries are not shielded from nondiscriminatory taxes or taxes enacted following judicial appointment. *See* Respondent's Response at 24. Nonetheless, our case is distinguishable where it does not involve a general nondiscriminatory tax, but rather legislative actions directed specifically at the Tohono O'odham Judiciary for the purpose of *molding* judicial behavior.

The Court finds persuasive the reasons provided by other jurisdictions for construing compensation clauses broadly; namely, the protection of judicial independence. Section 1103(D), while not reducing the amount of compensation, explicitly withholds judicial compensation if certain conditions are not met. It is clear to this Court that the Tohono O'odham

prohibition against diminishment encompasses actions that indefinitely withhold judicial compensation. It is further evident that a legislative action wielding the Judiciary's paycheck as the proverbial "stick" to incentivize certain behavior is exactly the type of legislative interference that the Compensation Clause was designed to protect against. Therefore, Section 1103(D) violates Article VIII § 9 of the Constitution and, accordingly, is invalid.

Assuming for argument's sake that Section 1103(D) does not violate the clear language of the Tohono O'odham Compensation Clause, it still fails as a matter of encroachment under the *Toro* analysis. Under step one, the nature of this power is ostensibly the protection of individual rights, specifically the right to a timely ruling. *See* Respondent's Reply at 28. In actuality, this section is heavily laden with procedural requirements, such as the imposition of strict timelines on judicial decisionmaking and mandatory certification processes. As noted *above,* judicial procedure is generally reserved to the Judiciary. Next, every component of Section 1103(D) exhibits a degree of coercion on the Judiciary. Not only does it withhold judicial pay if certification requirements are not met, it penalizes court employees involved in the issuance of paychecks to noncompliant judges. It also places the Legislative Council in a supervisory position over judicial practice and procedure by forcing the Chief Justice to regularly submit time-consuming certification requirements to the Council. Lastly, this Court can only speculate as to the practical effect of such a provision since it does not mirror any prior certification framework between the Judiciary and Legislative Council. It is clear, however, that it would amount to an unprecedented and unwelcome intrusion by the Legislative Council into the inner workings of the Judiciary—an intrusion likely to interfere with management of judicial resources and case administration.

Accordingly, Section 1103(D) is an unconstitutionally encroachment upon the Judiciary's power.

d. Severability

Title One (General Provisions) of the Tohono O'odham Code provides that:

> The Nation's laws are severable. If any word, clause, phrase, sentence, subsection, section, or other provision … of a Nation's law or its application to any person or circumstances is held invalid by a court of competent jurisdiction, the invalidity shall not affect any other provisions or applications of the law that can be given effect without the invalid provision or application.

1 T.O.C. § 1101.

This severability clause empowers the Court to eliminate unconstitutional provisions from otherwise constitutional statutory schemes. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (embracing the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected"). Accordingly, the Court will evaluate each invalidated provision to determine whether severability may be applied.

i. Section 1102(B)(1) Is Severable.

Section 1102(B)(1) requires that "[e]ach designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules and shall convene at least once ever calendar quarter until the final, written judgment is entered." The Court's primary issue with this provision is its attempt to dictate the appellate calendar. *See above* Part I(c)(i). However, by striking the latter clause, the Court eliminates the undue intrusion into the details of the judicial calendar while preserving the underlying objective of promoting the right to a timely appeal. Section 1102(B)(1) should read: "Each designated appellate panel shall meet promptly upon appointment in accordance with the appellate rules."

ii. Sections 1106(C) and 1007(C) Are Not Severable.

Section 1106(C) provides, in relevant part, that "[a]ll court rules shall be compiled in a single volume, shall be made available to the public in electronic and paper forms, and be distributed to all persons who practice before the Judicial Court." Similarly, Section 1107(C) provides that:

> [u]nless expressly prohibited by law, the Court shall, on an annual basis, publish and make available to the public all decisions of the court of appeals and trial court decisions of significant interest. The chief judge may adopt a rule of court not inconsistent with this Chapter governing the publication and availability of Court decisions.

As the Court explains *above* Part I(c)(iii) , these provisions impermissibly encroach upon the judicial authority to set court procedures due to their exacting level of detail. However, there is no graceful manner in which this Court could parse the language of Sections 1106(C) and 1107(C) so that they satisfy the distinction of powers doctrine while remaining faithful to the legislative objective. Therefore, the Court declines to apply severability. Nonetheless, the Court appreciates the Legislative Council's concern with providing public access to court rules and precedential decisions. In attempting to legislate on this issue, the Council should consider articulating its legislation so that it both focuses on the protection of the substantive right and

refrains from over-specifying judicial procedures for achieving such right. For example, a provision stating that "all individuals before the Tohono O'odham Court shall have access to court rules and decisions" would satisfy *Toro* strictures while furthering the same objective. In implementing such a provision, the Legislative Council and Judiciary should work collaboratively to identify rules, locate decisions, share resources, and construct a system of public access. By collaborating, the parties will be able to attain a comprehensive perspective, one that respects and takes into account all viewpoints and comports with traditional O'odham ethos. *See In Re: Petition of the Judicial Branch*, 3 TOR3d, at 88-89.

iii. Section 1103(D) Is Not Severable.

Section 1103(D), dealing with judicial compensation, states the following:

> (1) The judges of the Tohono O'odham Judicial Court shall receive for their services a compensation to be established by the Legislative Council, which shall not be diminished during their continuance in office, provided, however, that a judge shall not receive his or her salary until such judge either:
>
> (a) has certified in the previous month that no cause before such judge remains pending and undetermined for 60 days after it has been submitted for decision or
>
> (b) the chief judge submits a certification that such judge has been physically disabled during the preceding 60 days or that good and sufficient cause exists to excuse the application of this section to particularly identified litigation then pending.
>
> (2) Any certification submitted by the chief judge pursuant to this subsection (D) shall set forth in detail the nature and duration of the physical disability involved or reason why subsection (D)(1) should not apply to the specified pending litigation.
>
> (3) Any judicial branch employee or official who issues or causes to be issued any check or payment to a judge knowing that, pursuant to this subsection, such judge should not receive his or her salary shall be guilty of a civil offense and fined an amount equal to the check or payment issued.
>
> (4) The chief judge shall, on June 30 and December 30 of each year, certify in writing to the Legislative Council and Chairperson of the Nation that all trial court, appellate, and pro tempore judges are in compliance with § 1103(D) of this Article or provide written notice of any noncompliance and circumstance thereof.

The Court found, *above* Part I(c)(iv), that the portions of this section authorizing the withholding of judicial compensation directly violate the prohibition against diminishment in Article VIII § 9. Furthermore, it found that the assorted certification requirements and penalties violate separation of powers as defined by *Toro*. Therefore, no parts of Section 1103(D) are severable.

Conclusion

By enacting the relevant portions of the Courts and Procedures Law, the Legislative Council undoubtedly wished to strengthen the protection for individual rights by fine-tuning court administration and procedure. This goal, while noble, cannot sway the Court from its responsibility to invalidate laws that violate the letter and spirit of the Tohono O'odham Constitution. In striking down Sections 1102(B)(2), 1103(D), 1106(C), and 1107(C) in whole or in part, this Court is confident that the Legislative Council will find other constitutionally appropriate means of obtaining the same objectives. Such means should involve the wisdom and experience of the Judiciary, for it is only when the branches function in harmony with one another that the rights of the Tohono O'odham can be confidently guaranteed.

Petitioner's request for declaratory judgment is granted in part and denied in part.

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

Altha HANSEN and James SCOTT, Plaintiffs,
v.
Tohono O'odham Gaming Enterprise, Defendant.

Case No. 2008-0220AV

Decided March 2, 2012.

Richard L. Keefe, Counsel for Plaintiff.
Jones, Skelton & Hochuli, P.L.C. by James P. Curran for Defendant.

Before Judge Michael T. Telep, Jr.

This matter is before the court on the Defendant's Motion for Summary Judgment. A trial court properly grants summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt 2; Orme Sch. V. Reeves, 166 Ariz. 301, 309, 802 P.2nd 1000, 1008 (1990). A trial court should only grant

a motion for summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. Orme Sch., 166 Ariz. at 309, 802 P.2d at 1008. In Arizona, a summary judgment motion sets in play shifting burdens. Initially, a party moving for summary judgment has the burden of showing there are no genuine issues of material fact and it is entitled to summary judgment as a matter of law. Only if the moving party satisfies this burden will the party opposing the motion be required to come forward with evidence establishing the existence of a genuine issue of material fact that must be resolved at trial.

We begin with the portion of Arizona Rule of Civil Procedure 56 that sets out what a court must do when presented with a motion for summary judgment. Rule 56(c) directs a court to enter summary judgment in favor of the moving party "if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). Accordingly, to obtain a judgment under Rule 56(c), the moving party must come forward with evidence it believes demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor. Orme School v. Reeves, 166 Ariz. 301, 310, 802 P.2d 1000, 1009(1990); Allyn, 167 Ariz. at 195, 805 P.2d at 1016(moving party bears burden of demonstrating both absence of any factual conflict and right to judgment). The moving party's responsibility to produce evidence is often referred to as the moving party's initial burden of production; the moving party's responsibility to persuade the court that there is no genuine issue of material fact for a reasonable jury to find is often referred to as the moving party's burden of persuasion or burden of proof. In a motion for summary judgment the moving party has the burden of persuasion while at trial one has the burden of proof. See Aguilar v. Atlantic Richfield Co., 24 P.3d 493, 506 n.4 (Cal. 2001). The moving party's burden of persuasion on the motion remains with that party; it does not shift to the non-moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 300, 106 S.Ct. 2548, 2556, 91 L.Ed.2d 365(1986)(Brennan, J., dissenting). Regardless of the party that must prevail on the burden of proof at the time of trial, the burden of persuasion to show no genuine issue of material fact remains with the moving party. Lujan v. MacMurtie, 94 Ariz. 273, 277, 383 P.2d 187, 189(1963); State v. Crawford, 7 Ariz. App. 511, 557, 441 P.2d 586, 592(1968).

The burden of persuasion on the summary judgment motion is heavy. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. Allyn, 167 Ariz. at 197, 805 P.2d at 1016. Further, a court must view the evidence in a light most favorable to the non-moving party and draw all justifiable inferences in its favor. Sanchez v. City of Tucson, 191 Ariz. 128, 130; 953 P.2d 168, 170(1998); Orme School, 166 Ariz. at 309-10, 802 P.2d at 1008-09. The court need not "decide whether the moving party has satisfied its ultimate burden of persuasion" on the summary judgment motion unless it first finds "the moving party has discharged its initial burden of production." Celotex, 447 U.S. at 330-31, 106 S. Ct. at 2556 (Brennan, J., dissenting); Schwab, 207 Ariz. at 60, 83 P.3d at 60 ("if a moving party's summary judgment motion fails to show an entitlement to judgment, the non-moving party need not respond to controvert the motion"); Hydroculture Inc. v. Cooper & Lybrand, 174 Ariz. 277, 283, 848 P.2d 856 862 (App 1992).

PLAINTIFF OPPONENT:

When faced by a motion for summary judgment, a plaintiff has the duty to show that a genuine fact issue is present. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202, 4 Fed. R. Serv.3 d 1041 (1986); Whalen v. City of Atlanta, 539 F. Supp. 1202 (N. D. Ga. 1982); Taylor v. Alson, 79 N. M. 643, 447 P.2 523, 29 A.L.R.3d 653 (Ct. App. 1968). The mere allegations of the complaint do not constitute proof sufficient to defeat a motion by defendant for summary judgment. Champion v. Artuz, 76 F.3d 483, 34 Fed. R. Serv. 3d 1124 (2d Cir. 1996); Epprecht v. Delaware Valley Machinery, Inc., 407 F. Supp. 315 (E.D. Pa. 1976). The requirement that a party opposing a motion for summary judgment set forth specific facts showing a genuine issue for trial applies to a plaintiff. Markwell v. General Tire & Rubber Co., 367 F.2d 748 (7th Cir. 1966). Summary judgment for a defendant is appropriate if the plaintiff fails to make a showing sufficient to establish the existence of an element essential to the case, and on which he or she will bear the burden of proof at trial. Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999).

A plaintiff is not required to establish his or her opposition to a motion for summary judgment by a preponderance of proof; it is sufficient that the affidavits, there were no affidavits provided in this matter supporting plaintiff's position, show that there is a genuine triable issue, and that the plaintiff will have some proof to support his or her allegations at the date of the trial. Copeland v. Lodge Enterprises, Inc., 2000 OK 36, 4 P.3d 695 (Okla.2000). However, a mere existence of a

scintilla of evidence in support of the plaintiff's position is not sufficient; there must be evidence on which a jury could reasonably find for the plaintiff.

CONCLUSION:

This court finds that the defendant casino has met its burden of production and consequently there need be no testimony to satisfy the defendant's burden of persuasion. The plaintiff failed to provide evidence of a genuine issue of material fact upon which it could possibly prevail at the time of trial. Construction of the casino was irrelevant to the violent conduct of the un-identified female that forcibly pushed another patron into the plaintiffs causing the plaintiffs to fall to the ground in such a manner that caused their injuries. The casino has a duty to assure the establishment is safe from hazards both obvious and hidden to prevent injury to its invitees. It also must ban those patrons that have a history of or the casino has knowledge of that patron's propensity for violence or unacceptable intoxication that the casino knows would lead to violence with this particular patron. The casino was unaware of either. Neither construction nor intoxication of one of the patrons involved in the incident lead to the plaintiff's injuries. The violent nature of the un-identified female and ultimately her conduct was the proximate cause of the plaintiffs injuries. Plaintiff never names those patrons as defendants but concentrates only on the casino where there was no causation or knowledge. Upon discovery of the incident casino security responded immediately and provided the attention that was necessary under the circumstances. The information regarding the true defendant was provided by Ms. Penick and Mr. Scott. Their depositions provided, in part, the factual basis for this opinion.

The impulsive spontaneous actions of a third party were clearly the cause of plaintiff's injuries. The casino defendant had no knowledge of the un-identified patron's intentional conduct. In addition, the level of intoxication of Mr. Acosta is of little significance. It was the violent conduct of the unidentified women patron that caused Mr. Acosta to fall into the plaintiffs resulting in their injuries.

IT IS THEREFORE ORDERED: the motion for summary judgment in favor of the defendant is granted.

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

Dionne BAHYESVA, Plaintiff,
v.
Keith MIGUEL, Defendant.[1]

Case No. 96-CS-6731

Decided March 7, 2012.

Tohono O'odham Advocate Program by Raenna DeJesus for Plaintiff
Rose Johnson Antone, Counsel for Defendant

Before Judge Nicholas Fontana.

IN CHAMBERS

On February 8, 2012, Petitioner Dionne Bahyesva and Respondent Keith Miguel appeared before the Court for a scheduled hearing regarding arrearages or the overpayment of child support. Petitioner appeared with Legal Counsel Raenna DeJesus of the Tohono O'odham Advocate Program and Respondent appeared with Legal Counsel Rose Johnson Antone.

Ms. Bahyesva contends that she is entitled to the payment of child support arrearages in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00). Mr. Miguel asserts that Ms. Bahyesva abandoned her obligations as the primary physical custodian of the minor children and is not entitled to any child support arrearages.

The Court heard testimony from two of the minor children, Marisa Miguel and Kristen Miguel. The Court also reviewed the child support ledger. Neither party disputed the accuracy of the ledger at the hearing. In addition to the evidence presented at the hearing on February 8, 2012, the Court also received evidence and heard testimony from Kristen Miguel at a hearing on January 4, 2012.

FACTS

Ms. Bahyesva and Mr. Miguel were divorced in 1997. Ms. Bahyesva was awarded physical custody of the minor children and Mr. Miguel was ordered to pay child support. The child support ledger reflects that Mr. Miguel's child support payments are in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00).

[1] *Ed. Note.* Case caption corrected to reflect the actual parties.

Marisa Miguel testified that in January, 2005, all of the minor children left Ms. Bahyesva's residence and moved into the residence of their maternal aunt. Marisa testified that Ms. Bahyesva would sporadically provide financial assistance or other support in the form of clothing and school supplies. She also testified that Mr. Miguel would also purchase clothing for the children. Marisa testified that in terms of supervision and parenting, the minor children were essentially abandoned by Ms. Bahyesva.

Kristen Miguel also testified that she and all of the other minor children left Ms. Bahyesva's residence in 2005 and moved in with their maternal aunt. Kristen lived with relatives while attending Hopi High School in 2007 and 2008. Kristen testified that she lived with Mr. Miguel during the 2008-2009 school year, and that from 2009 until she graduated from Hopi High School, she lived with relatives and friends. According to Kristen's testimony, Ms. Bahyesva paid for Kristen's cell phone during her junior and senior years of high school and paid for bus tickets from Sells to the Hopi Reservation. Kristen also testified that Mr. Miguel would also pay for bus tickets and was primarily responsible for providing her with school supplies.

DISCUSSION

The Tohono O'odham Nation recognizes that the parents' obligation to support their minor children is not extinguished by a decree of divorce. The law of the Nation specifically authorizes the Court to order one of the parties in a divorce to pay child support for the "present comfort and future well-being" of the minor children. 9 T.O.C. § 13. When neither the code or Tohono O'odham custom address a specific issue regarding child support, the Court has the discretion to look to Arizona law for guidance. 4 T.O.C. § 1-102; *Garcia v. Garcia*, 1 TOR3d 108, 110 (Trial Ct., Jan. 24, 1994) *app. dism'd* 3 TOR3d 10 (Ct.App., Aug. 17, 2006); *C.V.K. a.k.a. C.O. v. N.K., Sr.*, 2 TOR3d 71 (Trial Ct., May 19, 2003) *aff'd* 3 TOR3d 1 (Ct.App., Apr. 2, 2005).

Support payments are for the support and maintenance of the minor child. *Cole v. Cole*, 101 Ariz. 382, 420 P.2d 167 (1966). The purpose of child support is not to raise the standard of living of the custodial parent. *Edgar v. Johnson*, 152 Ariz. 236, 237, 731 P.2d 131, 133 (App. 1986).

Mr. Miguel asserts that he is not liable for any child support arrearages because the minor children were not in Ms. Bahyesva's physical custody after January, 2005. Mr. Miguel's position fails to recognize that under the terms of the order granting divorce and the law, he is obligated to provide support for his children until they reach the age of majority. The fact that

the minor children were no longer in Ms. Bahyesva's physical custody does not relieve him of this obligation, especially in light of the fact that Mr. Miguel was entitled to seek a modification of child support. A.R.S. § 25-503(E). The issue is whether Ms. Bahyesva is entitled to payment of the arrearages.

Divorce and child support proceedings have long been recognized as equitable actions. *Cole*, 101 Ariz. at 384, 420 P.2d at 169. As one court observed, "the equities of natural justice in a given situation may turn a court of conscience away from the cold realm of legalism." *Crook v. Crook*, 80 Ariz. 275, 278, 296 P.2d 951, 952 (1965). Even in equity, the Court is obligated to consider the best interests of the child. *Garcia v. Garcia*, 1 TOR3d, at 109.

Is it equitable and in the best interests of the children to order that Ms. Bahyesva receive payment for child support arrearages incurred after January, 2005? The Court finds that the answer is no: to do so would be of no benefit to the children and would unjustly enrich Ms. Bahyesva. Unjust enrichment occurs when a party retains money or benefits that in justice and equity belong to another. *City of Sierra Vista v. Cochise Enterprises, Inc.*, 144 Ariz. 375, 382 (App. 1984). Arizona has recognized that the defense of unjust enrichment may apply to child support cases. *Savage v. Thompson*, 22 Ariz.App. 59, 63 (1974).

The evidence is not clear as to the exact date in January, 2005, when the children left Ms. Bahyesva's custody, so the Court finds that Ms. Bahyesva is entitled to child support through the end of January, 2005. According to the child support ledger, as of January, 2005, Mr. Miguel's child support obligations were not only current, but in fact in overpayment status in the amount of five-hundred and forty-nine dollars ($549.00). Ms. Bahyesva is entitled to keep the overpayment. *S.G. v. J.G.*, 3 TOR3d 4.

After January, 2005, the children were no longer in Ms. Bahyesva's custody. Mr. Miguel did not seek a modification of his child support obligations after the children left Ms. Bahyesva's custody. Mr. Miguel was still legally obligated to pay child support for the children. The child support ledger indicates that as of September, 2011, Mr. Miguel's child support obligation was in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00). Although Ms. Bahyesva is not entitled to any of the arrearages, it may be that the person or persons who had custody of the children after January, 2005 are entitled to seek payment from Mr. Miguel. *Murren v. Murren*, 191 Ariz. 335 (App. 1998). It may also be that the children themselves may seek payment of the arrearages. *Moody v. Moody*, 565 N.E.2d 388, 391 (Ind.App., 1991); *Thacker v. Thacker*, 710 N.E.2d 942 (Ind.App.,

1999). Since neither the children nor a guardian other than Ms. Bahyesva are seeking payment of the arrearages, that issue is not before the Court.

IT IS THEREFORE ORDERED that Dionne Bahyesva is not entitled to any additional child support payments from Keith Miguel after January 31, 2005.

IT IS FURTHER ORDERED that Dionne Bahyesva may retain any overpayment of child support.

IT IS FURTHER ORDERED that Keith Miguel's child support obligations are in arrears in the amount of twenty-two thousand two-hundred and forty-one dollars ($22,241.00), which may be subject to claim by the children or the person/persons with custody of the children after January 31, 2005.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Herbert GARCIA, Defendant,

Case No. 2012-0569-0582CR

Decided March 22, 2012.

Before Judge Veronica Darnell.

At the pre-trial hearing of Herbert Garcia on Friday, March 16, 2012, the Court erred when it granted the Nation's motion to set a jury trial. The defendant requested a bench trial and the Nation argued that the government has just as much of a right to a jury trial as the defendant. The defendant's right to a jury trial rests in federal law. The Indian Civil Rights Act provides that no Indian Tribe shall deny to any person the right to a trial by jury (25 U.S.C. 1302 (10). The Indian Civil Rights Act does not provide that the government has a right to a jury trial. The Court vacates the jury trial that was set for May 3, 2012 at 9:00 am and sets a bench trial for May 9, 2012 at 10:30 am.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Kirklin L. FRANCISCO, Defendant,

Case No. 2012-0037-0041CR

Decided April 19, 2012.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.
Belinda BreMiller, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The Defendant is charged with Threatening/Domestic Violence, Sec. 7.3(A)(1) / 8.9(A); Criminal Damage to Private/Personal Property/Domestic Violence, Sec. 5.2(A)(1) / 8.9(A); Disturbing the Peace/Domestic Violence, Sec. 3.6(A)(1) / 8.9(A), of the T.O.N. Criminal Code. He is a member of the Tohono O'odham Nation.

The threshold issue for this case was raised by the Defendant in the Motion for Appointment of Expert for Competency Evaluation, which included the names of three mental health professionals who are on the list of mental health experts used by the Pima County Superior Court. The Motion was heard on March 30, 2012. Nation did not object to the competency evaluation. The Court found there were reasonable grounds to Order the competency evaluation.

The Defendant claims he is unable to pay for the competency evaluation and any other expenses associated with these proceedings. He is under the guardianship of his parents, although he is over the age of 18 years. He is low functioning intellectually, and does not work. He is represented by attorney Belinda BreMiller, licensed in Arizona. Ms. BreMiller's fee is paid for by the Tohono O'odham Nation ["the Nation"] under a contract with the Nation to provide legal representation services to the Nation's members in the Tohono O'odham Court when a member cannot be represented by the attorneys or advocates of the Tohono O'odham Advocate Program [the "Advocate Program"] because of conflicts from their representation of other members. The Advocate Program is part of the Executive Branch of the Nation's government, providing free legal services to the Nation's members without regard to indigency, and to the extent of the Advocate Program's budget. (Not every tribal member in a criminal proceeding is represented by an Advocate Program attorney or advocate or by conflict counsel.) The Court is informed that the contract for

the "conflict counsel" does not include any funds or expenses such as a competency evaluation or the costs of the report or court appearance fees for testimony by the evaluating expert(s).

Competency proceedings in this Court are not governed by Rule 11 of the Arizona Rules of Criminal Procedure, or by A.R.S. Section 13-4503, because the Tohono O'odham Court is not authorized by ordinance to use the Nation's funds for competency evaluations in the same way that the Arizona Superior Court is authorized to do so. Competency of a defendant to stand for trial is an issue of due process. The Nation's Criminal Code does not specifically address competency of a defendant to stand for trial, to enter a plea, or to assist the defendant's attorney. Section 1.7 of the Tohono O'odham Criminal Code, Chapter 1, provides for a defense of mental disease or defect to a criminal charge.

The Constitution of the Tohono O'odham Nation, Article III, Section 1 provides:

> All political power is inherent in the people. The government of the Tohono O'odham Nation derives its powers from the consent of the governed and is established to protect and maintain their individual rights. It shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law.

Article III, Section 3 continues: "All members of the Tohono O'odham Nation shall be given equal opportunity to participate in the economic resources and activities of the Tohono O'odham Nation." Article III, Section 4 also provides: "The listing of the foregoing rights shall not be construed as denying or abridging other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Stat. 77)."

Title II of the Indian Civil Rights Act ["the ICRA"], 25 U.S.C. 1302, as amended by the Tribal Law and Order Act in 2010, (124 Stat. 2258), Section 6 states, in part, that an Indian tribe shall not deny to any person in a criminal proceeding the right to hire his or her own counsel, subject to specific situations that are not relevant here. Section 8 of the ICRA also provides that an Indian tribe exercising its powers of self-government shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law." The United States Supreme Court has held that a defendant was deprived of his constitutional right to a fair trial when the trial court failed to hold a hearing on his competency to stand trial where there was evidence of insanity. *Pate v. Robinson*, 383 U.S. 375 (1966). The defendant, Robinson, was tried and convicted in spite of consistent claims of incompetence to be tried, and evidence that he had a history of disturbed behavior from childhood into adulthood, with episodes of violence and hallucinations. The Supreme Court held that "the evidence introduced on Robinson's behalf

entitled him to a hearing on this issue [competence to stand trial]. The Court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial." *Id.*, at 385.

There is no dispute in the instant case on whether Defendant should have a competency evaluation. The only question is how to pay for it. Defendants represented directly by the Advocate Program apparently are able to schedule competency evaluations approved by the Court, and the Tohono O'odham Nation has provided funds or arranged for funds through the Advocate Program to pay for the evaluations, reports, and any contemplated court appearance by the mental health expert(s).

Although the Nation is not required by law to provide any defendant with free legal counsel, it has chosen to do so for members of the Nation through the Advocate Program and the "conflict counsel" under contract with the Nation. Based upon the clear language of Article III of the Tohono O'odham Constitution, (1) identifying the purpose of the government is to protect and maintain the individual rights of its members, and (2) providing for the right of a member to equal protection of the laws and for due process in any action to deprive a member of liberty or property, and the similar mandate of the federal law in Section 8 of the ICRA, *supra*, the Court finds that the Defendant in this case is in the same position as a tribal member who is actually represented by legal counsel from the Advocate Program, and is in need of a competency evaluation before he or she can be tried. As a matter of due process and equal opportunity to use the economic resources of the Nation, the Defendant is entitled to have the Nation provide the necessary funding for his competency evaluation and the accompanying costs of the report and any court or other appearance by the mental health expert(s).

The competency evaluation of a defendant is fundamental to the due process of law required under Article III, Section 1 of the Constitution of the Tohono O'odham Nation and Section 8 of the ICRA, 25 U.S.C. 1302 when the defendant is subject to criminal charges that may result in incarceration and / or fines, and the defendant provides sufficient proof that competence is an issue.

IT IS ORDERED THAT:

1. Declaratory judgment is entered for the Defendant that he is constitutionally entitled to apply for and receive funding from the Nation for the competency evaluation(s), reports, court appearances of the evaluating expert(s) and related fees as part of the representation provided for him by conflict counsel. Except for good cause shown, the Defendant shall be able to be evaluated by at least one, but no more than two, of the expert evaluators named in the Defendant's Motion and Memorandum within thirty days of the date of this Order, but not more than sixty days from the date of this Order. Defense counsel shall make all

arrangements in accordance with directions for how to ensure and process payments from the appropriate Nation funding source.

2. Should the defendant be denied funding for the competency evaluation(s) and related costs and fees, the charges shall be dismissed.
3. Because this is a matter of first impression in this Court and involves the provision of services to members of the Nation, the Clerk shall distribute copies of this Order to the immediate parties, the Nation's Prosecutor, the Defendant and defense counsel, as well as to the Special Counsel to the Chairman, the Legislative Counsel, the Nation's Attorney General, and to the Advocate Program.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Michael MATTIAS, Defendant,

Case No. 2011-2406-2417CR

Decided May 31, 2012.

Tohono O'odham Prosecutor's Office by Assistant Chief Prosecutor Eric L. Hagar for Plaintiff.
Larry Boswell, Counsel for Defendant.

Before Judge Violet Lui-Frank.

The Court required counsels to appear regarding the re-opening of the Nation's case. On May 23, 2012 the Nation presented its case and rested; the Defense presented its case and rested; after closing arguments the Court took the matter under advisement. The Defense stipulated to the Nation's motion to re-open the Nation's case.

"[t]he trial court has a large discretion in respect to order of proof and permitting a party to reopen its case after it has rested." *Lucas v. United States*, 343 F.2d 1, 3 (8th Cir., 1965), cert. denied, 382 U.S. 862; *Massey v. United States*, 358 F.2d 782 (10th Cir., 1966), cert. denied, 385 U.S. 878, cited in *Rhyne v. United States*, 407 F.2d 657 (7th Cir., 1969). See, also, *U.S. v. Woodring*, 444 F.2d 749 (9th Cir., 1971). The Court is satisfied that permitting the re-opening of the Nation's case is not to initiate new proceedings, and the Court has not yet rendered a verdict. Trial shall resume June 14, 2012 at 9 a.m.

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

TOHONO O'ODHAM NATION, Plaintiff,
v.
Bernadette K. LOPEZ, Defendant,

Case No. 2010-0625-2627CR

Decided August 6, 2012.

Tohono O'odham Prosecutor's Office by Cindy Burnett for Plaintiff.
Belinda BreMiller, Counsel for Defendant.

Before Judge Violet Lui-Frank.

Defendant's lawyer explains that she has not been able to obtain a firm answer from anyone within the government of the Tohono O'odham Nation regarding payment for a qualified competency evaluator for the defendant. The Advocate Program referred Ms. BreMiller to Dr. Nye of HIS, who referred her to someone else, and there has not been a response. The defendant's motion for a competency hearing under Rule 11 of the Arizona Rules of Criminal Procedure was granted on July 2, 2010. Since that time the defendant has sought to arrange an appropriate evaluation. The defendant has not had access to the same resources that a direct client of the Tohono O'odham Advocate Program has for a competency evaluation. The Constitution of the Tohono O'odham Nation states in Article III, Section 1 that the government of the Tohono O'odham Nation "shall not deny to any member of the Tohono O'odham Nation the equal protection of its laws or deprive any member of liberty or property without due process of law." The Constitution also states in Section 3, Article III, that all members are to be given equal opportunity to participate in the economic resources and activities of the Tohono O'odham Nation. Section 4, Article III of said Constitution refers to "other fundamental rights of the people guaranteed by Title II of the Indian Civil Rights Act of April 1, 1968 (82 Sta. 77). The Indian Civil Rights Act ("the ICRA"], Title II, 25 U.S.C. 1302, as amended by the Tribal Law and Order Act in 2010, (124 Stat. 2258), provides, in Section 8, that an Indian tribe shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law." It is settled law that "A criminal defendant may not be tried unless he is competent." Godinez v. Moran, 509 U.S. 389 (1993), citing Pate v. Robinson, 383 U.S. 375, 378 (1966).

The defendant is not able to pay for an evaluation by a psychologist or psychiatrist experienced in conducting competency evaluations, based upon financial information provided to the Court. Defendant's lawyer represents the defendant under a contract with the Tohono O'odham Nation for representation of individual members when the Tohono O'odham Advocate Program is unable to do so because of a conflict, e.g., the Program represents the adverse party. The lawyer's contract does not provide for costs of engaging experts or other witnesses, in general. The competency evaluation of a defendant is fundamental to the due process of law required under Article III, Section 1 of the Constitution of the Tohono O'odham Nation and Section 8 of the ICRA when the defendant is subject to criminal charges that may result in incarceration and/or fines, and defendant provides sufficient proof that competence is an issue. The Court agreed that competence is an issue on July 2, 2010, and the defendant has not had appropriate assistance from the Tohono O'odham nation to obtain appropriate evaluation(s) for competency. Based upon the time that has passed, the defendant's motion to dismiss for lack of resources to determine competency is hereby granted. Without an appropriate evaluation for competency, the defendant cannot be tried. The charges of Abuse of Office 2010-0625CR, Embezzlement 2010-0626CR, and Criminal Fraud 2010-0627CR are dismissed without prejudice.

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