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(Court Order re: Opinion dated April 29, 2024

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In the Appellate Court of the Tohono O'odham Nation
In the State of Arizona

Tohono O'odham Gaming Enterprise, Appellant, v. Tohono O'odham Gaming Office, et. al., Appellee.	)	Case No.: AP2022-0004 (Re: AV2022-0056) OPINION

Erin F. Byrnes, Counsel for Appellants Tohono O'odham Gaming Enterprise.

Howard Shanker, Tohono O'odham Nation Attorney General, Counsel for Appellee, Tohono O'odham Gaming Office.

Before Judges David M. Osterfeld, Barbara Atwood, and Tessa L. Dysart.

Having considered the Tohono O'odham Nation Trial Court record, the filings on appeal, and argument presented February 15, 2024, this Court affirms the Trial Court's decision that sovereign immunity bars this lawsuit but modifies the Trial Court's interpretation of the Tohono O'odham sovereign immunity provisions.

I. FACTUAL BACKGROUND

The Tohono O'odham Nation ("Nation") owns and runs several gaming facilities within its boundaries. These gaming activities are federally regulated under the Indian Gaming Regulatory Act ("the Act"). *See* 25 U.S.C. §§ 2701-21.

In 1993, the Nation's Legislative Council enacted the Nation's Gaming Ordinance ("the Ordinance") to provide for the "orderly and honest" conduct of gaming activities within the Nation. *See* Tohono O'odham Code, Title 16, Chapter 1, §101(a). The Ordinance requires "comprehensive regulation of all people, practices, and activities related to the operation of the Nation's gaming facilities." *Id.* at §101(c). In addition, the Ordinance requires the Nation to maintain an office dedicated to this regulatory duty, which the Nation identified as the Tohono O'odham Gaming Office ("Gaming Office" and "TOGO"). *Id.* at §§ 401, 403(a). The Gaming Office has authority to license the people and facilities that conduct gaming activities, and through that licensing, the Nation regulates those parties. *Id.* at §101(d).

a. <u>The TOGO and TOGE</u>

TOGO is housed within the Nation's Executive Branch and "[has] overall civil regulatory authority over gaming activities within the Nation and the Gaming Facility Operator" as provided in the Ordinance. *Id.* at § 401. TOGO's regulatory functions primarily include licensing the following: gaming facility operators, an operator's board of directors, gaming device manufacturers, distributors, gaming vendors, financers, and employees. *Id.* at §§ 501, 502, 601, 701, 801.

The Gaming Facility Operator is the Tribal Enterprise that the Nation designates as having authority and responsibility for conducting gaming activities

in the Nation. *Id.* at §201(n). The Tribal Enterprise is defined as a wholly-owned enterprise of the Nation authorized and chartered under the Nation's Constitution, which the Nation's Legislative Council designates as the Gaming Facility Operator. *Id.* at §201(gg). The Nation's Legislative Council created the Tohono O'odham Gaming Enterprise ("Enterprise" and "TOGE") as the Nation's operator for its gaming facilities. 16 T.O.C. Ch. 2, §1.

TOGE is established according to a plan of operation that the Legislative Council adopts. *Id.* at § 502(a). TOGO must license all of TOGE's Board of Directors, gaming device manufacturers, distributors, gaming vendors, financers, and employees. *Id.* at §§ 501, 502, 601, 701, 801.

b. <u>The Food and Beverage Director</u>

In September 2021, TOGE advertised for a Food and Beverage Director for its West Valley casino (F&B Director). Two months later, the Nation's Legislative Council amended TOGE's Charter to require that it "give preference to qualified Indians, with first preference to enrolled members of the Tohono O'odham Nation and then to other local Indians, in all hiring, promotion, training, layoffs, and all other aspects of employment." 16 T.O.C. Ch. 2, § 6(l)(1). The Nation's Legislative Council made no similar amendment to the Gaming Code. A "local Indian" was defined as "any member of a federally-recognized tribe" who either lives within the exterior boundaries of the Tohono O'odham Nation or who has lived near the

Nation for not less than 60 days before the "start of the project at issue." 13 T.O.C. Ch. 1, §§ 1102(I) and 1104. This definition is found in the Tohono O'odham Nation's law implementing the Tribal Employment Rights Office and Commission.

After three months, TOGE had received only 19 applicants for the F&B Director position. While one applicant met the Tohono O'odham preference requirements, TOGE concluded that the applicant did not meet all other minimum qualifications. TOGE eventually selected a non-Indian applicant, Jeffrey George, for the position. On or about January 17, 2022, TOGE submitted Mr. George's name to TOGO for licensing.

After receiving TOGE's request for licensure for this applicant, TOGO told TOGE it was concerned the Indian preference requirements had not been followed. TOGO asked for more information on this applicant and an explanation as to why the Nation's member applicant had not been selected. In response, TOGE gave TOGO the Nation's member's application material and cited his lack of experience as the reason he did not qualify.

c. <u>TOGO's Final Decision</u>

On March 30, 2022, the Gaming Office issued a memorandum with the subject "Final Decision: 'In re: TOGE WVR Food & Beverage Director Hiring Matter.'" The Final Decision found that TOGE did not follow TOGE's charter in

preferring qualified Indians, with first preference to members of the Nation and then other local Indians.

TOGO declared it would license no applicant if it concluded on review that TOGE had not followed the Nation's hiring preference laws. This declaration was based largely on a November 2021 amendment the Nation's Legislative Council had made to TOGE's Charter to require preference for qualified Indians and first preference for enrolled members of the Nation.

On May 25, 2022, the Gaming Office amended its final decision for the F&B Director ("Amended Final Decision") and temporarily withdrew it for 120 days to let TOGO and TOGE discuss ways to settle their disagreement on the application of hiring preference. On May 27, 2022, the Enterprise filed its notice of appeal, asking for judicial review/administrative appeal of the Final Decision, under Section 1204 of the Nation's Gaming Ordinance[1] (judicial review of a final Gaming Office decision) and Section 8 (Administrative Appeals) of the Tohono O'odham Rules of Court. The Enterprise also moved for immediate stay of the TOGO's Final Decision on June 28, 2022.

In its subsequent Complaint, the Enterprise alleged that TOGO (1) acted in excess of its lawful authority, (2) exceeded its legal authority in issuing its final decision, (3) refused to carry out its statutory duty to issue a license to the preferred

[1] 16 T.O.C. Ch. 1.

applicant, and (4) violated TOGE's right to procedural due process. TOGE asked the Trial Court to take *de novo* review of TOGO's final decision issued in its letter dated March 30, 2022. The Gaming Office filed its Motion to Dismiss TOGE's Complaint on August 18, 2022.

d. Stay of Final Decision in Favor of the Enterprise

After briefings and oral argument on TOGE's Motion to Stay the Final Decision, the Trial Court granted TOGE's motion and issued an order on August 23, 2022, ("Stay Order") partially staying the Final Decision under Chapter 1, Section 1204(b) of the Gaming Ordinance and the Tohono O'odham Rules of Court Section 8, Rule 10(1). On September 1, 2022, TOGO issued another letter, stating the Final Decision and Amended Final Decision "are hereby rescinded and the Gaming Office will be closing this file." In that letter, TOGO recognized that Jeffrey George was no longer interested in the F&B Director position, given he had accepted employment with another casino.

e. Subsequent Filings on the Motion to Dismiss

The Trial Court held oral argument on the TOGO's Motion to Dismiss on October 25, 2022. Based on the hearing, the Trial Court concluded that because TOGO had fully and unconditionally rescinded its decisions on March 30 and May 20 of 2022, it could not review TOGE's claims that TOGO had exceeded its legal authority in issuing those decisions and had violated TOGE's right to procedural

due process. The Trial Court also held that sovereign immunity barred TOGE's claims that TOGO had acted in excess of its lawful authority and had refused to carry out its duty to issue a license to the preferred applicant. The Trial Court dismissed all of TOGE's claims.

f. <u>TOGE Appeals the Trial Court's Decision</u>

TOGE filed this appeal on November 23, 2022. On November 30, 2022, TOGO objected to this Court's jurisdiction, arguing that TOGO's sovereign immunity barred jurisdiction over TOGE's claims and, therefore, this Court had no jurisdiction. On February 21, 2023, this Court held that it had jurisdiction to hear this appeal under the Tohono O'odham Nation Constitution, Article VIII, Section 7, and the Tohono O'odham Nation Rules of Appellate Procedure 3(c)(1). The Court also narrowed the issues on appeal, directing the parties to answer whether TOGE's action for declaratory judgment was barred by sovereign immunity and whether TOGE's action for declaratory judgment was moot because the original applicant under review was no longer seeking employment with TOGE.

As this matter progressed on appeal, the parties filed notice that on March 8, 2023, the Tohono O'odham Legislative Council had amended TOGE's Charter to show that the Tohono O'odham Nation Gaming Office "is vested with authority to adopt licensing or other regulations enforcing the Gaming Enterprise's implementation and application of 'preference' as defined herein . . . ." *See*

Resolution No. 23-070. That same Resolution also found that TOGO, through its broad civil oversight authority over TOGE, was responsible for overseeing TOGE's implementation and application of the preference mandate described under Section 6(l)(1) of TOGE's Charter.

TOGE filed its Opening Brief on May 8, 2023, TOGO filed its Response Brief on June 6, 2023, and TOGE filed its Reply Brief on June 6, 2023. This Court held oral argument on February 15, 2024.

2. ISSUES

I. Whether sovereign immunity bars TOGE's action for declaratory judgment.

II. Whether TOGE's action for declaratory judgment was moot because the original applicant, Jeffrey George, was no longer seeking employment with TOGE.

3. STANDARD OF REVIEW

Here, TOGE has argued the Trial Court wrongly decided the legal issue of sovereign immunity as promulgated under 1 T.O.C. Ch. 2, §2102(A), a question of law. We exercise *de novo* review over questions of law. *See Tohono O'odham Council v. Garcia*, 1 TOR3d 10, 15 (Ct. App. 1989). TOGE has also argued the Trial Court erred when it found that, because the original applicant, Jeffrey George, was no longer seeking employment, the action was moot. This is a mixed question of law and fact. When we have a mixed question of law and fact, "we defer to the trial court's factual findings but review *de novo* all legal conclusions." *See*

Helvetica Servicing, Inc., v. Pasquan, 249 Ariz. 349, 352, ¶ 10, 470 P.3d 155, 158 (2020). Based on these challenges, the Court defers to the Trial Court's factual findings but decides, *de novo*, questions of law and legal conclusions. This Court's review need only extend to the existing record and the accepted filings on appeal, as that is enough to resolve this appeal.

4. ANALYSIS

The first issue before this Court is whether the Nation's and TOGO's sovereign immunity bar a claim for declaratory judgment that TOGO lacks legal authority over all matters of Indian preference, including Tohono O'odham preference, in TOGE employment decisions. This Court affirms that sovereign immunity is a bar to this action but for reasons different from those relied on by the Trial Court.

The Nation's Sovereign Immunity

In April 2010, the Nation enacted its sovereign immunity law. That law declares the Nation is absolutely immune from suit, court process, or liability and includes the Nation's districts, enterprises, entities, and any officials, employees, and agents acting within the scope of their capacity for such entities. *See* 1 T.O.C. Ch. 2, § 2101(A), (B). While this absolute immunity can be waived, waiver occurs only through the Tohono O'odham Legislative Council's express written act and is

limited in strict conformity with the terms of that written waiver. The Gaming Office is a department of the Nation's Executive Branch, *see* 16 T.O.C., Ch. 1, § 401, and is covered within that sovereign immunity.

Here, there is no direct, written waiver of the Nation's or TOGO's absolute immunity from suit specifically tailored to the facts of this case. But there are two general exceptions to this absolute immunity within the Nation's sovereign immunity law.

a. Appeals from Administrative Agency Final Decisions

The first general, conditional exception is the right to appeal final decisions of the Nation's Administrative Agencies to this Court when the Tohono O'odham Legislative Council authorizes such suit. *See* 1 T.O.C. Ch. 2, § 2102(B). This express permission is seen in the right of TOGE to challenge TOGO's licensing decisions as described in 16 T.O.C. Ch. 1, § 1204(b).

Specifically, the Enterprise challenged TOGO's March 30, 2022, final decision denying licensure to TOGE's chosen applicant for F&B Director, Jeffrey George. Because the Enterprise must be licensed to conduct gaming activities within the Nation, *see* 16 T.O.C. Ch. 1, § 501, it can qualify as a party allowed to seek judicial review of the TOGO's final actions such as the decision of March 30, 2022. *See* 16 T.O.C. Ch. 1, § 1204(b).

That controversy was live when TOGE first filed its challenge to TOGO's March 30, 2022, Final Decision. But TOGO then withdrew that final action for 120 days through an "Amended Final Order" designed to let the parties meet and discuss settlement. As that time ran, TOGO then permanently rescinded the Final Decision and the Amended Final Order on September 1, 2022, closing the file.

Because of the rescission, no final action of TOGO affecting TOGE remained open. The rescission thus removed the issue on review before the Trial Court, as the Court found in its decision dismissing TOGE's action. *See* Order Granting TOGO's Motion to Dismiss, filed October 26, 2022, at 8-9. Absent administrative review, there must be some other basis for the Trial Court to continue exercising subject matter and personal jurisdiction over TOGO, part of the Nation's Executive Branch. That other basis could come through (1) the Nation's Legislative Council's express written waiver of TOGO's sovereign immunity when TOGE sues, (2) any general waiver of immunity allowing suit against the Nation that includes TOGO, or (3) an equitable relief exception to sovereign immunity recognized under common law through this Court's precedent.

b. No express written waiver of TOGO's sovereign immunity for TOGE suits

The Nation's Legislative Council gave the Enterprise the right to sue and be sued, including the right of the Nation and its regulatory agencies and departments to sue the Enterprise. *See* 16 T.O.C. Ch. 2, § 8(a). But the Nation's Legislative

Council also expressly provided that the Nation, including TOGO, retained immunity from suit. *Id.* This clarifies that the Gaming Code only lets TOGE sue TOGO for administrative review of licensing decisions affecting TOGE. As explained above, no final agency action remains subject to review.

c. General Waiver of the Nation's Immunity

According to the Nation's sovereign immunity law, a party, including TOGE, can seek injunctive or declaratory relief to determine the validity of a law, rule, or regulation. *See* 1 T.O.C. § 2102(A). The Enterprise's complaint and the Trial Court's decision on appeal identified no such law, rule, or regulation under challenge. Instead, the Enterprise challenged TOGO's Final Decision issued March 30, 2022, throughout its Complaint. That document is not a law, rule, or regulation, and its author, the Gaming Office, rescinded it on September 1, 2022.

On March 8, 2023, the parties filed notice that the Tohono O'odham Legislative Council had, via Resolution No. 23-070, amended TOGE's Charter to provide that the Tohono O'odham Nation Gaming Office is "vested with authority to adopt licensing or other regulations enforcing the Gaming Enterprise's implementation and application of 'preference' as defined herein . . . ." That same Resolution also found that TOGO, through its broad civil oversight authority over TOGE, was responsible for overseeing TOGE's implementation and application of the preference mandate described under Section 6(l)(1) of TOGE's Charter.

The Enterprise, by its own admission at argument, brought no claim against the Nation or TOGO based on Resolution No. 23-070. The original complaint and the bases for this appeal come from the TOGO's now-rescinded Final Decision issued March 30, 2022. With no challenge to a law, rule, or regulation, the exception to the Nation's sovereign immunity under § 2102(A) is not available.

The Enterprise relies on *Escalante v. Sells District Council*, 2021 TOR Supp. 36 (Ct. App. 2017), as authority for why TOGO's Final Decision letter to enforce Tohono O'odham and Indian preference carries the force of law through the "Nation's coercive powers." *See* TOGE's Opening Brief, filed May 8, 2023, ("Opening Brief"), at 15. *Escalante* dealt with a Sells District resolution permanently banishing two tribal members from entering Sells District, the place where they both lived and where one was a registered member of that District. *Escalante*, 2021 TOR Supp. at 1-2. There, this Court reasoned that because any violation of the resolution could be the basis of criminal sanctions subjecting the violator to jail and fines, the resolution carried the force of law through the Nation's coercive powers and the challengers had the right to due process review. This Court thus recognized a narrow exception to the Sells District Council's sovereign immunity under 1 T.O.C., Ch. 2, § 2102(A), for that purpose only. *Id.* at 6-8.

Here, the facts do not include a District Council resolution imposing banishment or potential criminal sanctions. This Court does not find a correlation

sufficient between the *Escalante* holding and the facts of this case, especially when there is no resolution, law, rule, or regulation challenged in the Trial Court. Instead, there is only a challenge to a rescinded Final Decision of the Gaming Office. Because of the rescission of the Final Decision on September 1, 2022, the Final Decision has no continued application, let alone the force of law.

d. Equitable Relief Exceptions to Sovereign Immunity

The final option for TOGE to overcome the Nation's and TOGO's sovereign immunity is an equitable relief exception. The Court's analysis of the equitable relief theory necessarily addresses elements that are also relevant to the analysis of Section 2101(A). Both exceptions to sovereign immunity require a claim that a Tohono O'odham law, rule, or regulation is beyond constitutional or statutory authority. This Court has recognized such exceptions in challenges to the Nation's laws on compelling facts, and those decisions have authority as common law. *See In re Petition of the Judicial Branch*, 3 TOR 3d 105, 117 (Ct. App. 2010); *Escalante v. Sells District Council*, 2021 TOR Supp. 36, 39 (Ct. App. 2017); and *Jose v. Toro*, 3 TOR3d 31 (Trial Ct. 2011). Each case, however, gives no support for this Court to find an equitable relief exception on the facts of this case.

First, TOGE argues that administrative agency pronouncements have the "force of law." *See* Opening Brief at 13. The Enterprise points to TOGO's Final Decision on March 30, 2022, where it declares it would regulate Tohono O'odham

and Indian preference, as an example of an administrative decision with such coercive effect resulting in unauthorized formal rulemaking that can carry the force of law. *Id.* at 12-13.

While TOGO can still argue it can enforce Tohono O'odham or Indian preference today, that is not a result of the Final Decision, but instead the Nation's existing law that requires "[t]he Enterprise [to] give preference to qualified Indians, with first preference to enrolled members of the Tohono O'odham Nation . . . in all hiring, promotion, training, lay-offs, and all other aspects of employment." *See* 16 T.O.C. Ch. 2, § 6(l)(1). The recent Tohono O'odham Legislative Council Resolution 23-070, effective March 8, 2023, clarifies that:

> the Tohono O'odham Gaming Office, consistent with its broad grant of civil oversight authority over the Gaming Enterprise and the Nation's Constitution Art. VII § 2(c), is responsible for overseeing the Gaming Enterprise's implementation and application of the 'preference mandate' set forth at Section 6(l)(1) of the Gaming Enterprise's Charter.

These sections of the Nation's Gaming Code and the Legislative Council's Resolution 23-070 were not before the Trial Court for its decision and are not on review here.

The Enterprise also argues the Trial Court erred in dismissing this action based on sovereign immunity because it did not recognize this Court's precedent finding an equitable relief exception to sovereign immunity similar to that found in *Ex Parte Young*, 209 U.S. 123 (1908). That decision held that sovereign immunity

did not bar judicial review of claims seeking specific relief against a government officer who has acted beyond the powers delegated to him. *Id.* at 159-60. The general theory is that if a government officer is acting beyond the authority the sovereign gives him in that official capacity, the officer is stripped of his official representative character and must answer for his individual conduct—the sovereign should not be held responsible for those acts nor should its immunity from suit be lent to that officer. *Id.*

In the matter *In re Petition of the Judicial Branch*, 3 TOR 3d 105, 117 (Tr. Ct. 2010), the Nation's trial court expounded on the *Ex Parte Young* doctrine, as interpreted in *Ex Parte Norris*,[2] and set a "bright line rule" explicitly recognizing previous decisions of this Court letting plaintiffs sue groups of government officials, "including entire branches of government," for unauthorized actions. The following year, this Court applied the *Ex Parte Young* doctrine in *Jose v. Toro*, 3 TOR3d 31, 33 (Ct. App. 2011), where we affirmed that our courts have for many years allowed suits against government officials for prospective relief when they were deemed to have acted outside the bounds of their constitutional authority.

The facts of *Jose v. Toro* required the Court to decide whether the members of the Chukut Kut District's legislative body had followed their duties to certify the

[2] *See In Re Pet. of Jud. Branch*, 3 T.O.R.3d at 117; *Tohono O'odham Advocate Program v. Norris*, 3 TOR3d 60, 61-62 (Trial Ct. 2005), *appeal dism'd*, 3 TOR3d 21 (Ct. App. 2008).

winner of an election under the Nation's Election Ordinance. *Jose v. Toro*, 3 TOR3d 31, 32-33 (Ct. App. 2011). That decision held that sovereign immunity did not bar a claim alleging that a government body had exceeded its statutory authority, clarifying that the exception to sovereign immunity is not limited to claims alleging violations of only constitutional authority.

Here, the Trial Court held the principles of *Ex Parte Young* applied only to those claims where a government officer or government branch is alleged to have violated constitutional authority. *See* Trial Court's Order Granting TOGE's Objection to Affidavit, and TOGO's Motion to Dismiss, filed October 26, 2022, ("Trial Court Dismissal") at 7-8, 10. The Trial Court referred any violation of *statutory authority* to the Tohono O'odham Legislative Council for solution and relief. That reasoning overlooks this Court's precedent recognizing that sovereign immunity does not bar a challenge to a government body's alleged non-compliance with statutory authority. *See Jose v. Toro*, 3 TOR3d 31, 32-33 (Ct. App. 2011).

In its reading of our precedent to recognize an equitable relief exception to sovereign immunity only for noncompliance with constitutional powers, the Trial Court gave an overly broad construction of the powers of TOGO. The Trial Court credited the Gaming Office with the full constitutional power to "oversee the implementation of all laws, ordinances, resolutions, and rules made by the Tohono O'odham Council," powers otherwise held by the entire Executive Branch in the

Tohono O'odham Constitution, Article VII, §(2)(C). *See* Trial Court Dismissal, at 7. The Trial Court characterized TOGO's consideration of employment preference mandates for licensing-related activities as "constitutional authority," *Id.* at 8, 10, and TOGO's refusal to accept and process licensing applications as within its broad constitutional authority to "oversee the implementation of all laws, ordinances, resolutions, and rules made by the Tohono O'odham Council" (citing T.O. CONST. ART. VII, § (2)(C)). This interpretation of TOGO's authority is overly broad.

Instead, the Gaming Office's authority comes from the power the Tohono O'odham Council expressly provides through the laws it enacts, such as relevant sections of the Gaming Code directing preference for Tohono O'odham and Indian applicants. The Trial Court's broad attribution of constitutional power to TOGO would mistakenly give TOGO the powers available to the entire Executive Branch.

The Gaming Office's acts must follow the Nation's laws. This Court presumes those laws are deliberatively issued through the political calculus of soliciting and weighing the collective input of the electorate, government, and public and private industry, considering judicial opinions interpreting those subjects. We hold, as each party has argued and as the law states, that the Gaming Office has overall civil regulatory authority over Gaming Activities within the Nation and over the Enterprise as provided in the Gaming Ordinance. *See* 16 T.O.C. Ch. 1, § 401.

Nevertheless, *Ex Parte Young* and *Ex Parte Norris* have no application here. TOGO's full rescission of its Final Decision and Amended Final Decision on September 1, 2022, leaves no remaining act of government officials or of a government branch that this Court can examine. We disagree with TOGE's argument that TOGO's March 30, 2022, Final Decision was a "written announcement, and conclusive evidence, of the New Licensing Regulation," made under the "pretext of constituting a licensing decision," *See* Opening Brief at 31. Instead, the record on appeal clarifies that TOGE's Complaint is a challenge to a licensing decision for the F&B Director applicant Jeffrey George, not a challenge to a law, rule, or regulation.

Having found no waiver of the sovereign immunity afforded the Tohono O'odham Gaming Office, or that of its Executive Director and Licensing Investigative Manager under the Nation's laws, this Court need not decide the second issue on review, that being whether TOGE's action for declaratory judgment was moot because the original applicant, Jeffrey George, was no longer seeking employment with TOGE.

CONCLUSION

On review, this Court affirms the Trial Court's dismissal of TOGE's Complaint on sovereign immunity grounds but vacates the Trial Court's analysis.

This Court dismisses all four counts in the Tohono O'odham Gaming Enterprises Complaint filed in this matter under the analysis given in this decision.

Signed this 29th day of April 2024

Judge David M. Osterfeld

Judge Barbara Atwood

Judge Tessa L. Dysart

TOHONO O'ODHAM JUDICIARY