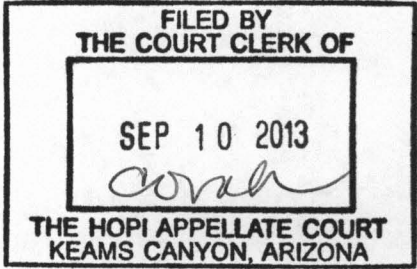


IN THE HOPI APPELLATE COURT  
KEAMS CANYON, ARIZONA



ARCHIE DUWAHOYEOMA; JERRY )  
SEKAYUMPTTEWA, SR.; LEON KORUH; )  
OWEN NUMKENA, JR.; )  
ROBERT MAHKEWA, JR.; )  
FREDERICK KORUH, SR.; ELJEAN )  
SIEWEYUMPTTEWA; CORNELIA )  
HONYAKTEWA; VERNICE KORUH; )  
ANN JAMES; CELESTINO YOUNG; )  
VELMA KALYESVAH; )  
CALEB JOHNSON; LARRY )  
POLINGYUMPTTEWA; ALVIN CHACA; )  
MONICA KAHE; PHILLIP )  
QUOCHYTEWA; and MISHONGNOVI )  
CULTURAL PRESERVATION BOARD, )

Plaintiffs/Appellants, )

vs. )

THE HOPI TRIBE; THE HOPI TRIBAL )  
COUNCIL; the purported MISHONGNOVI )  
INTERIM BOARD OF DIRECTORS; )  
MITCHELL SOCKYMA, JR.; MALINDA )  
ANDREWS; MERVIN YOYETTEWA; )  
LILLIAN DENNIS; MANUELITA )  
COOCHWIKVIA; DANNY HONANIE; )  
CARLEEN QUOTSKUYVA; )  
REBEKAH E. MASAYESVA; CEDRIC )  
KUMANINVAYA; GEORGE MASE; )  
ALPH SECAKUKU; MARSHALL )  
NAMINGHA; EVERETT )  
CALNIMPTTEWA; WAYNE )  
KUWANHYOIMA; LEROY )  
SUMATZKUKU; LEROY )  
SHINGOITTEWA; HERMAN HOANIE; )  
CURTIS HOANIE; HOWARD )  
DENNIS, JR.; ERNEST HONYAKTEWA; )  
WILLIAM VICENTE; BENNETT )  
CHATTER; LEON BEATTY; NEVA )  
TALAYUMPTTEWA; and )  
MARCUS YOYETTEWA, )

Defendants/ Respondents. )

APPELLATE COURT NO. 2012-AP-0002

RE: TRIBAL COURT NO. 2011-CV-0023

OPINION AND ORDER

BEFORE PATRICIA SEKAQUAPTEWA, Justice, FRED LOMAYESVA, Chief Justice,<sup>1</sup> and ROBERT N. CLINTON, Justice.

<sup>1</sup> While a motion to recuse Chief Justice Lomayesva was filed by some of the Defendants in this matter claiming a perceived conflict of interest, Chief Justice Lomayesva determined that the alleged, or more

[1] This matter is before this Court on the appeal of the Plaintiffs/Appellants (hereinafter sometimes collectively referred to as the Mishongnovi Cultural Preservation Board or Mishongnovi Cultural Preservation Board parties), timely filed, to challenge the final Order of the Hopi Tribal Court entered June 1, 2012 following an evidentiary hearing in favor of the Defendants/Appellees (hereafter sometimes referred to as the Mishongnovi Interim Board of Directors or the Mishongnovi Interim Board of Directors parties). Following extensive and helpful briefing by the parties, the Court heard oral argument in this matter on October, 12, 2012 at the Hopi Tribal Courthouse. During oral argument, three issues concerning the meaning of the Hopi Constitution were extensively discussed with the parties. Recognizing that the resolution of those three issues might significantly affect the governance of other Villages, Traditional Leaders, and the future of Village governance, this Court issued an Order, on October 25, 2012, permitting all Villages and purported Village Traditional Leaders to file post-argument supplemental amicus briefs addressing three separate questions:

1. Whether the first sentence in Article III, Section 3 of the Hopi Constitution which reads “Each village shall decide for itself how it shall be organized” reserves primary or exclusive jurisdiction to the Villages to decide most factual and other issues surrounding the legitimate governing authority of the Village other than questions involving the interpretation of the Hopi Constitution. If this provision reserves such primary or exclusive jurisdiction to the Village when, if at all, can the Tribal Court or this Court entertain disputes as to factual or legal questions involving the structure of Village governance that go beyond issues surrounding the interpretation of the Hopi Constitution.
2. Whether the phrase in Article III, Section 3 of the Hopi Constitution that provides that traditional Villages “shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its *leader*” (Emphasis supplied) contemplates the vesting of complete Village sovereignty and governing power in the Kikmongwi or, rather, contemplates a more limited role for the Kikmongwi (in addition to critical religious and ceremonial responsibilities) as a political spokesman, Chief of State, or ambassador for a Village government or political process otherwise controlled by the people. In answering this question the Court is concerned with what this provision meant when adopted in 1936, with how it should be interpreted today, and with whether those two approaches should coincide.
3. Whether the provisions for a Superintendent-supervised election for adoption of a Village Constitution set forth in Article III, Section 4 of the

---

accurately perceived, conflict of interest in question was completely unrelated to this proceeding and so attenuated and indirect as to fail to justify his recusal from this case.

Hopi Constitution constitute the exclusive means by which a Village can (1) adopt a written Village constitution or (2) dispense with a “traditional Hopi organization, [in which] the Kikmongwi of such village shall be recognized as its leader” or whether the use of the term “may” in Article III, Section 4 renders that provision permissive, rather than mandatory, and contemplates the Village also exercising its aboriginal sovereignty to determine or change its form of governance by other means.

That Order was later amended to permit the parties to similarly file supplemental briefs addressing these three issues. The Court received numerous very helpful briefs from Villages and Traditional Leaders, as well as from the parties, and the Court thanks all those who filed such briefs for their views and assistance in this matter.<sup>2</sup>

[2] Given the original round of oral arguments and the extensive briefing in this case, the Court declines to hold a further round of oral arguments. Having reviewed the briefs of the parties as well as the amicus briefs filed by the various Villages and traditional leaders, the Court finds that it must vacate most of the Order entered in this matter by the Tribal Court on June 1, 2012 for lack of jurisdiction. This Court further finds that the jurisdiction of the Tribal Court in relationship to this matter was strictly limited to interpreting, in application to this case, the provisions of the Hopi Constitution referenced in the three legal questions set forth above. Insofar as the result, but not reasoning, reached by the Tribal Court in its June 1, 2012 Order is consistent with the interpretation of the Hopi Constitution offered in this Opinion and Order, that result is affirmed and the remainder of the Order vacated for want of jurisdiction.

### **Background**

[3] This case involves a long-running dispute between the Mishongnovi Cultural Preservation Board parties and the Mishongnovi Interim Board of Directors parties as to whether Mishongnovi Cultural Preservation Board or the Mishongnovi Interim Board of Directors constitutes the lawful and legitimate government of the Village of Mishongnovi. This dispute dates back at least to 1988 when the Village of Mishongnovi purported to adopt by a vote of 17 to none with one abstention a set of Mishongnovi Board of Directors Guidelines that vested regular control of Village governance in the Mishongnovi Board of Directors. Apparently claiming that this action was illegal the Mishongnovi Cultural Preservation Board acting pursuant to authority allegedly delegated by a purported Kikmongwi, or Traditional Village Leader, has repeatedly challenged both legally and by other means the actions of the Mishongnovi Board of Directors, including their control of Village funds. This case constitutes the fourth time this dispute has reached this Court in one form or another.

---

<sup>2</sup> In addition to the parties (Appellants and “Village Board Respondents”), the Court received statements and/or briefs from the following as self designated: Village of Bacavi, First Mesa Consolidated Villages, Village of Hotevilla, Village of Kykotsmovi, Mishongnovi Bear Clan, Mishongnovi Traditional Leadership, the Village of Sipaulovi, and the Sipaulovi Village Leader Gerald Numkena.



[4] In *Village of Mishongnovi (Cultural Preservation Board) v. Humeystewa*, No. 96AP000008 (Hopi Ct. App. 1998) this Court reversed the dismissal of an action brought by the Mishongnovi Cultural Preservation Board, holding that neither the federal doctrines of standing nor the federal political questions doctrine barred the Tribal Court from hearing a dispute over control of Village funds between the two disputing sides since neither federal doctrine applied to the Hopi courts nor were the restrictive nature of such doctrines consistent with Hopi judicial customs. The same dispute later came to this Court in *Village of Mishongnovi Cultural Preservation Board v. Mishongnovi Board of Directors*, No. 04AP000002 (Hopi Ct. App. 2004) this Court held in relevant part that the Tribal Court did not improperly deny a continuance when, on the eve of trial, one of the traditional leaders claimed to be hospitalized and unavailable for trial and Counsel for the Cultural Preservation Board appeared at trial without his other eight witnesses listed on his witness list seeking a continuance but that the dismissal of the case with prejudice pursuant to a claimed stipulation that did not exist constituted reversible error. This Court remanded the case back to the Hopi Tribal Court, which eventually dismissed for failure to prosecute the action brought by the Village of Mishongnovi Cultural Preservation Board.<sup>3</sup>

[5] The present dispute commenced when a group of Mishongnovi Village residents appeared before the Hopi Council on January 13, 2011 raising concerns about alleged financial improprieties by the Mishongnovi Cultural Preservation Board, which apparently for reasons unexplained in the record then had control of the Village financial accounts.<sup>4</sup> The Hopi Tribal Council unanimously responded by authorizing the

---

3 At oral argument, this Court inquired whether doctrines of preclusion, often known as claim and issue preclusion, might not preclude the parties in the present case due to the dismissal with prejudice for failure to prosecute of essentially the same dispute previously brought by the Village of Mishongnovi Cultural Preservation Board. This Court remains concerned about this issue because of the potential abuse of the judicial process shown by the Village of Mishongnovi Cultural Preservation Board in repeatedly initiating legal challenges to the authority of the Mishongnovi Board of Directors and then repeatedly seeking continuances and refusing to present witnesses to substantiate its case as occurred both in Hopi Tribal Court No. 94CV000008 and in this case. In Hopi Tribal Court No. 94CV000008 that refusal resulted in the dismissal in 2007 of the action for failure to prosecute after the Village of Mishongnovi Cultural Preservation Board had failed for 13 years from the time it first filed its action to present witnesses and prove its case. The record in this case also demonstrates a similar abuse of the judicial process by first filing the action and then refusing to substantiate its claim with witnesses at trial. Likewise the alleged hospitalization of a traditional leader on the eve of trial in both cases constitutes an eerie and, perhaps, controllable coincidence intended to prevent the Hopi Tribal Court from actually inquiring about traditional Hopi religious and ceremonial matters required to prove their case. Nevertheless, since none of the parties in this matter appeared concerned that the prior dismissal of an almost identical action should preclude the prosecution of this action and since the affirmative defense of preclusion was not plead or relied upon by the Defendants/Appellants, this Court will, for purposes of its consideration of this particular appeal, ignore the apparent abuse of the Hopi judicial process by the Village of Mishongnovi Cultural Preservation Board parties demonstrated when comparing the record in this case to that of Hopi Tribal Court No. 94CV000008.

4 Since the action in Hopi Tribal Court No. 94CV000008 was initially brought by the Village of Mishongnovi Cultural Preservation Board to regain control of Village of Mishongnovi finances as the alleged legitimate government of the Village and that action was ultimately dismissed without granting the Village of Mishongnovi Cultural Preservation Board the relief it sought, the record does not reflect how the Village of Mishongnovi Cultural Preservation Board regained control of Village finances, which it claimed



Mishongnovi Interim Board of Directors, to “close the Mishongnovi office doors and obtain all village records” and urged all members of the Village to come together by March 11, 2011. Responding to the Tribal Council decision, Hopi Chairman LeRoy Shingoitewa directed the Hopi Tribal Rangers to accompany the Mishongnovi Interim Board of Directors members and their supporters to the Village Offices, to implement the Council directive and to lock the doors. In effect, the Hopi Tribal Council authorized the Village of Mishongnovi Interim Board of Directors to take control of the Village business office and the Village properties, including funds that, for whatever reason (lawful or otherwise), apparently had been under the control of the Village of Mishongnovi Cultural Preservation Board immediately before these events. Accompanied by the Hopi Tribal Rangers, at least one member of the Mishongnovi Interim Board of Directors and their supporters entered the Village offices, seized Village documents and computers and had certain of the Appellants forcibly removed from the building. Subsequently, the papers and other information seized from the Village Offices were turned over to Grant Thornton, an auditing firm located in part in Phoenix, for purposes of conducting a forensic audit at the request of the Hopi Tribe.

[6] As a result of these events, the Plaintiffs filed a Complaint in which they basically claimed certain political rights and violations of their civil rights. The central theme of the Complaint was that the Village of Mishongnovi was allegedly a traditionally organized village, as described in Article III, §§ 3-4, which was led by Archie Duwahoyoema, a purported *de facto* Kikmongwi or Traditional Leader, and that the *de facto* Kikmongwi had appointed the Village of Mishongnovi Cultural Preservation Board to manage the daily governance of the Village. The Complaint further claimed that Village had not complied with the provisions of Article III, § 4 which the Village of Mishongnovi Cultural Preservation Board parties claimed was mandatorily required to effect any change in the form of Village governance or to adopt any Village governing documents.

[7] Shortly after filing their action, the Village of Mishongnovi Cultural Preservation Board parties sought preliminary injunctive relief to preserve the status quo and to require the return for safekeeping to the Court of any and all of the documents and information seized from the Village offices. After all the defendants were served and had entered appearances, the Tribal Court set a hearing on the Motion for Preliminary Injunction for June 20, 2011. Noting that some of the documents seized may have included communications between the Village of Mishongnovi Cultural Preservation Board and its lawyer, the Village of Mishongnovi Cultural Preservation Board parties unsuccessfully requested at that hearing that the Court appoint a special master to review the documents for privilege and attorney work product. At that point, the Village of Mishongnovi Cultural Preservation Board parties were advised that the papers and other information seized from the Village Offices had been turned over to Grant Thornton for purposes of conducting a forensic audit at the request of the Hopi Tribe. Despite holding a hearing on the preliminary injunction request on June 20, 2011, the Tribal Court had not

---

to have accomplished as of January 13, 2011. It appears that this result must have been the product of some extralegal political intervention.

ruled on the issue. Consequently, on or about August 11, 2011, the Village of Mishongnovi Cultural Preservation Board parties filed a Request for Immediate Ruling on the issue. On August 17, 2011, the Tribal Court issued an Order denying all requested preliminary injunctive relief. In this Order, the Court also optimistically hoped the parties could settle some of the central issues in the case, including whether Plaintiff Archie Duwahoyeoma constituted a legitimate and “duly certified” Kikmongwi, during the course of discovery. The Court, accordingly, appointed a special master to assist the parties to resolve both the privilege and attorney work product issues raised by the Village of Mishongnovi Cultural Preservation Board parties as well as to oversee the discovery process generally. Various hearings and orders were entered by the special master to facilitate discovery that continued between January 4, 2012 and May 15, 2012. During this period by the admission of the Village of Mishongnovi Cultural Preservation Board parties, their opponents produced electronic copies of over 34,000 pages of documents seized from the Village business office.

[8] In August, 2011, the Village of Mishongnovi Interim Board of Directors scheduled Village elections to include both seats on the Board of Directors and Mishongnovi seats on the Hopi Tribal Council. After the Tribal Court denied a request from the Village of Mishongnovi Cultural Preservation Board parties to enjoin the election and maintain the status quo, this Court responded to a Petition for Extraordinary Relief filed on the very eve of the election by granting a preliminary injunction against holding the election. That Order originally was only intended to remain in force for 30 days until the parties could attend a hearing on the matter. After several unsuccessful efforts to schedule that hearing, this Court entered an Order requesting the Village of Mishongnovi Cultural Preservation Board parties to show cause why the preliminary injunction should not be dissolved and after it could not do so, this Court dissolved the preliminary injunction in March 2012.

[9] This time the Village of Mishongnovi Cultural Preservation Board parties returned to the Tribal Court and on April 23, 2012 the Tribal Court held a hearing on their efforts to stay the rescheduled Village election. During the hearing the Tribal Court granted the requested stay but set a two day hearing to address two specific issues: (1) “whether Plaintiff Archie Duwahoyeoma is a duly certified Kikmongwi” and (2) “whether the document entitled Mishongnovi Board of Directors Guidelines is in fact proof that Mishongnovi is not a traditional village.” After discussion with the attorneys regarding their availability, the Tribal Court set the hearing for May 29-30, 2012. When Robert Fillerup, the attorney for the Village of Mishongnovi Cultural Preservation Board parties expressed some concern that there may be Village ceremonies occurring on May 26-27<sup>th</sup>, the weekend before the scheduled hearing, and that these ceremonies may preclude participation of certain witnesses, Chief Judge Trujillo, who presided at the April 23<sup>rd</sup> hearing inappropriately, responded:<sup>5</sup>

---

5 This Court quotes Judge Trujillo's response here because it notes that it disapproves of it both in tenor and substance for its disrespect of both Hopi traditions and ceremonies and for its gratuitous and irrelevant stereotyping of some members of the Hopi community on the then completely irreverent issue of excessive use of alcohol during ceremonial celebrations. This Court notes that the Hopi judiciary should always treat Hopi traditions and ceremonies, including the necessities of the ceremonial cycle, with the utmost respect

Mr. Fillerup – Mr. Fillerup, listen. The religious ceremonies are going to have to take second seat to this issue. You got it. Religious ceremonies will take a second seat to this issue. This is of paramount importance to the community of Mushongnovi [sic] to all the people of that Village, and for that matter to the entire Hopi Tribe. It needs to get resolved, sir. So one festival – and I know that judges tell me that every time there's a ceremony, we end up filling up our jails with intoxicated people. So let's not get into that subject. That's a sore one with the Court.

Despite this potential schedule conflict, Judge Trujillo reaffirmed the May 29-30<sup>th</sup> hearing date to consider these two issues.

[10] Believing that the May 29-30<sup>th</sup> hearing constituted a full trial on the merits, the Village of Mishongnovi Cultural Preservation Board parties filed on May 1, 2012 a request for a jury trial on all issues, including whether the Village of Mishongnovi remained traditionally organized. The Tribal Court denied the request for jury trial, apparently believing that none of the issues to be resolved in the May 29-30<sup>th</sup> evidentiary hearing required a jury trial, as the Plaintiffs basically sought injunctive relief, not damages. Upon further review, it appears that the trial judge approached the hearings as hearings on the petition for extraordinary relief, while Plaintiffs approached the hearings as hearings on their original complaint.

[11] Again seeking to delay the May 29-30<sup>th</sup> hearing, the Village of Mishongnovi Cultural Preservation Board parties, on May 24, 2012, filed an emergency motion for a continuance on the ground that one of the lead Plaintiffs – Leon Koruh – was hospitalized in the intensive care unit of Flagstaff Medical Center. Mr. Koruh had long served as the spokesman for several of the claimed Mishongnovi Kikmongwis and was expected to be an important witness for the Village of Mishongnovi Cultural Preservation Board parties. The next day the Tribal Court held an emergency telephonic hearing on the motion to continue. After the Tribal Court was advised that Mr. Koruh was in a medically induced coma at the time, the Court indicated that since his recovery time was at best unclear it was disinclined to wait for Mr. Koruh whose ultimate availability to testify was unclear at best. Accordingly, the Court temporarily granted an indefinite continuance “until further Order of the court” which would be reexamined. The Court further ordered the Village of Mishongnovi Cultural Preservation Board parties to advise the Court on May 29<sup>th</sup> when, if at all, they anticipated Mr. Koruh would be available to testify. Accordingly, the Court, while temporarily granting a continuance pending further information, did not formally cancel the May 29<sup>th</sup> hearing.

---

and should do everything possible to accommodate continuances or other scheduling orders to harmonize, where possible, with demands of the Hopi ceremonial cycles. Except perhaps in the case of emergency issues involving life or health, Hopi judges should never take the position that “[t]he religious ceremonies are going to have to take second seat to [a judicial] issue” as Judge Trujillo did in this case. The Hopi judiciary should always do the most that it can to accommodate the needs of the judiciary with the Hopi ceremonial cycle or other religious obligations. Additionally, on behalf of the entire Hopi Judiciary, this Court offers its apologies to all members of the Village of Mishongnovi, whichever side they are on this dispute, for the evident disrespect to their traditions, ceremonies, and behavior shown by the trial court in this case.



[12] On May 29<sup>th</sup>, after counsel for the Village of Mishongnovi Cultural Preservation Board parties was unable to provide the Tribal Court with any reasonable date at which Mr. Koruh might become available to testify, the Tribal Court dissolved its temporary continuance and, perhaps to the surprise of both parties, decided to go forward with its originally-scheduled hearing. After a half-day of procedural disputes between the parties, the Tribal Court directed the evidentiary hearing to proceed the next day – May 30<sup>th</sup>.

[13] Prior discussions indicated that part of the defenses offered by the Village of Mishongnovi Interim Board of Directors parties would include the claim that Plaintiff/Appellant Archie Duwahoyeoma could not be a legitimate Kikmongwi since he could not have proceeded through all necessary ceremonies, including the hair washing ceremony, because some of the necessary paraphernalia for performing the ceremony had been lost or stolen over the years. While the Village of Mishongnovi Cultural Preservation Board parties filed this action claiming that Plaintiff/Appellant Archie Duwahoyeoma constituted the legitimate Kikmongwi and traditional governing leader of the Village of Mishongnovi, which they knew was contested by the Village of Mishongnovi Interim Board of Directors parties, and they also knew that as Plaintiffs they had the burden of proof, the Village of Mishongnovi Cultural Preservation Board parties on the very eve of trial sought to withdraw their Count I making such allegations in order, according to their Opening Brief, “to avoid the parading of sacred information in tribal court in front of parties not entitled to be privy to such information.”<sup>6</sup> Specifically, they were concerned that testimony would “include in-depth testimony about what the hair washing ceremony consisted of, which society should perform that ceremony, and how it was performed, along with other testimony on extremely sensitive, private religious issues.”<sup>7</sup> The Village of Mishongnovi Cultural Preservation Board parties advised the Court that since they were withdrawing their Count I, that action obviated the need for the hearing and they requested that the Court vacate the hearing in its entirety. They also advised the Court that they would deal with the issue at the Village level consistent with Article III, § 3 of the Hopi Constitution.

[14] The Trial Court denied the request of the Village of Mishongnovi Cultural Preservation Board parties to withdraw Count I because it was made orally, rather than in writing. The Tribal Court then proceeded with the hearing, surprisingly, taking testimony first from the Defendants/Appellees. Following a subsequent recess, the Village of Mishongnovi Cultural Preservation Board parties directed their counsel to withdraw from the hearing and upon so advising the Tribal Court, the Village of Mishongnovi Cultural Preservation Board parties and their counsel were excused from the courtroom. The hearing continued *ex parte* with only the Village of Mishongnovi Interim Board of Directors parties and their counsel participating. The Court heard six witnesses during this *ex parte* hearing and most of the testimony, surprisingly, was elicited by Counsel for the Hopi Tribe, rather than the Village of Mishongnovi Interim Board of Directors.

---

<sup>6</sup> Appellant's Opening Brief, p. 20.

<sup>7</sup> *Id.*

[15] Following this one-sided hearing, the Tribal Court entered its final Order on June 1, 2012. In that Order the Tribal Court made a number of findings. Specifically, it found that the Village of Mishongnovi adopted the Mishongnovi Board of Directors Guidelines in 1988 and that by doing so it had adopted a contemporary form of government that today governs the people of the Village of Mishongnovi. Accordingly, the Tribal Court found, as had the Tribal Council, that the Village of Mishongnovi Interim Board of Directors, and not the Village of Mishongnovi Cultural Preservation Board, constituted the lawful governing body of the Village. The Court further found that by adopting the Guidelines the Village had removed itself from being a traditional Village. Based on the evidence presented, the Court further found that the Village's last "official" Kikmongwi was Komalewtewa, who passed away in the late 1950's or early 1960's and that the Village has not had a properly ordained "official" Kikmongwi since his demise. Based on that finding, the Tribal Court further found the claim of Archie Duwahoyeoma to be the current Kikmongwi of the Village of Mishongnovi to be "moot," both because of the prior finding, and because of his withdrawal from participation in the proceedings. Finally, the Tribal Court found that the Village of Mishongnovi Cultural Preservation Board parties and their counsel waived their appearance and participation in the hearing that disposed of this proceeding.

[16] Notwithstanding the last finding by the Tribal Court, the Village of Mishongnovi Cultural Preservation Board parties nevertheless filed a timely Notice of Appeal and Request for Extraordinary Writ to contest the Tribal Court Order of June 1, 2012.<sup>8</sup> As noted above, following extensive and helpful briefing by the parties, the Court heard oral argument in this matter on October, 12, 2012 at the Hopi Tribal Courthouse. During oral argument, three issues concerning the meaning of the Hopi Constitution were extensively discussed with the parties. Recognizing that the resolution of those three issues might significantly affect the governance of other Villages, Traditional Leaders, and the future of Village governance, this Court issued an Order, on October 25, 2012, permitting all Villages and purported Village Traditional Leaders to file post-argument supplemental amicus briefs addressing three separate questions:

1. Whether the first sentence in Article III, Section 3 of the Hopi Constitution which reads "Each village shall decide for itself how it shall be organized" reserves primary or exclusive jurisdiction to the Villages to decide most factual and other issues surrounding the legitimate governing authority of the Village other than questions involving the interpretation of the Hopi

---

<sup>8</sup> While this Court has recognized that the right of political abstention constitutes an important part of the Hopi cultural tradition, see *In the Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, No. 2008-AP-0001, ¶18, pp. 9-11 (Hopi Ct. App. 2010), it is one thing to abstain and decline to participate in a legal proceeding and to thereby accept the consequences; it is quite another to do so when one has the burden of proof and then to formally claim by appealing, despite having exercised a lawful tradition of abstention, that the proceeding nevertheless was in error even though the party had failed, by abstaining, to discharge its burden of proof. It is the latter actions that pass beyond legitimate Hopi traditions of abstention.

Constitution. If this provision reserves such primary or exclusive jurisdiction to the Village when, if at all, can the Tribal Court or this Court entertain disputes as to factual or legal questions involving the structure of Village governance that go beyond issues surrounding the interpretation of the Hopi Constitution.

2. Whether the phrase in Article III, Section 3 of the Hopi Constitution that provides that traditional Villages “shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its *leader*” (Emphasis supplied) contemplates the vesting of complete Village sovereignty and governing power in the Kikmongwi or, rather, contemplates a more limited role for the Kikmongwi (in addition to critical religious and ceremonial responsibilities) as a political spokesman, Chief of State, or ambassador for a Village government or political process otherwise controlled by the people. In answering this question the Court is concerned with what this provision meant when adopted in 1936, with how it should be interpreted today, and with whether those two approaches should coincide.
3. Whether the provisions for a Superintendent-supervised election for adoption of a Village Constitution set forth in Article III, Section 4 of the Hopi Constitution constitute the exclusive means by which a Village can (1) adopt a written Village constitution or (2) dispense with a “traditional Hopi organization, [in which] the Kikmongwi of such village shall be recognized as its leader” or whether the use of the term “may” in Article III, Section 4 renders that provision permissive, rather than mandatory, and contemplates the Village also exercising its aboriginal sovereignty to determine or change its form of governance by other means.

[17] That Order was later amended to permit the parties to similarly file supplemental briefs addressing these three issues.

### *Discussion*

[18] At base this case is about the allocation of powers between the Tribe and the Villages in two different contexts. On the one hand the Court is asked to explore this allocation of powers to review the conduct of the Hopi Tribal Council and its officials in seizing Village records and assets. On the other hand we are asked to explore this allocation of powers to review the conduct of the Hopi Tribal Court in declaring a Village non-traditional with adopted guidelines and an elected board of directors. In the first instance the Court must determine whether the Hopi Tribal Council has the power, under the Hopi Constitution, to delegate to the Hopi Tribal Court subject matter jurisdiction to hear and decide the legality of Tribal Council action in seizing Village records and assets. In the second instance the Court must determine whether the Tribal Council has the power to delegate to the Tribal Court subject matter jurisdiction to hear and decide how a Village is organized and who its leaders are. These are “big” questions in the sense that



they involve determining whether the Villages and their members intended to, and did, give certain powers to the Tribal Council, and/or whether the Village retained or reserved certain powers. These “big” questions are to be contrasted with the smaller question of whether the Tribal Council then turned around and gave certain powers to the Hopi Tribal Courts (trial and appellate). The big questions involve a reading of the Hopi Constitution’s provisions as they were originally drafted in 1936 with its accompanying legislative history, as well as any relevant, subsequent constitutional amendments. We begin by addressing the allocation of powers between the Tribe and the Villages with respect to reviewing the conduct of the Tribe and its officials.

A. The Hopi Tribal Court has Jurisdiction to Review the Legality of the Actions of the Hopi Tribal Council and its Officials

[19] In the present case, the Village of Mishongnovi Cultural Preservation Board parties filed a Complaint for Declaratory and Injunctive relief against the Hopi Tribe, Tribal Chairman, Tribal Council members, Rangers and the “purported Mishongnovi Interim Board of Directors.” They argue seven counts requesting various forms of declaratory and injunctive relief and damages (“compensatory and punitive/exemplary damages against Defendants, ... should not be less than \$10,000 each”). In Count I, they ask the trial court to declare that Mishongnovi Village is “under the traditional Hopi organization,” that Plaintiff Archie Duwahoyeoma is the “defacto Kikmongwi of Mishongnovi Village,” and that the “Cultural Preservation Board is the governing entity for Mishongnovi Village.” In Counts II – V, The Village of Mishongnovi Cultural Preservation Board parties complain about Tribal Council action (or the actions of their delegates). In these counts The Village of Mishongnovi Cultural Preservation Board parties seek: (1) a declaration that the “Resolution of January 13, 2011,” is unconstitutional and that the Council members exceeded the scope of their authority and acted ultra vires in passing it; (2) a declaration that the “actions on January 13, 2011,” where they “stormed the Village Office,” were illegal and violated the sovereign rights of Mishongnovi Village and its Kikmongwi; and (3) they ask the court to find that a number of Plaintiffs’ Indian Civil Rights Act rights have been violated. Counts VI and VII seek preliminary injunctions and writs of mandamus for various related purposes. However, it appears that the trial court in this case held hearings and ruled, not on the originally filed complaint, but on a subsequent but directly related matter filed by the Village of Mishongnovi Cultural Preservation Board parties - a second petition for an extraordinary writ cancelling the August 4, 2011 Village election for Mishongnovi Village Representatives to the Hopi Tribal Council. Where that matter contained overlapping issues with Count I of the original complaint, and where it was finally determinative of such issues, this Court will review its jurisdiction for the purposes of the trial court hearing and deciding all counts pending before it (we address our jurisdiction with respect to the tribal defendants in Part A below and with respect to the Village defendants in Part B below).

1. The Hopi Tribal Court has broad civil subject matter jurisdiction, given to it by the Hopi Tribal Council in Ordinance 21 and the new Hopi Code,

pursuant to its delegated powers under Article I, Article VI, Section 1(g), & Article III, Section 2 of the Hopi Constitution

[20] The Village of Mishongnovi Cultural Preservation Board parties and Amicus Curiae Village of Kykotsmovi make the argument that the Hopi Tribal Council, like the United States Congress, has limited powers, and that Hopi Tribal Courts (trial and appellate) are, like the United States Supreme Court and its federal courts, courts of limited jurisdiction. The argument goes that when the Hopi Constitution was adopted in 1936, the pre-existing sovereign Villages agreed to give only certain enumerated powers to the newly established central tribal government (in the form of the Hopi Tribal Council) - the power to hear and decide intra-village governance disputes, not being one of them. Further, the argument goes, that if the Hopi Tribal Council does not have a given power, it cannot give that power to the courts that it establishes by ordinance - here the power to hear and decide cases involving claims between individuals and/or entities within the same Village about the nature of Village government and leadership. The Village of Mishongnovi Cultural Preservation Board parties also read the provision of Article III, Section 3 of the Hopi Constitution, "*Each village shall decide for itself how it shall be organized,*" to mean that the Hopi Constitution reaffirmed (or reserved) that Villages have exclusive jurisdiction to hear and decide claims involving the nature of Village government and its leadership. Put another way, they argue that the Tribal Council does not have this power itself and thus cannot give it to the Hopi Tribal Courts.

[21] This view would be contrary to the view in the case of *Village of Mishongnovi v. Humeyestewa*, No. 98AP000008 (Hopi Ct. App. 1998) ("*Village of Mishongnovi I*"). In *Village of Mishongnovi I*, the Court characterized the jurisdiction of the Hopi Tribal Court as a "court of general jurisdiction." In 1994 the Mishongnovi Cultural Preservation Board, a predecessor entity to the Village of Mishongnovi Cultural Preservation Board, sued Bernita Humeyestewa, Rolanda Morris, and Manuelita Coochwikvia (a named defendant in the current lawsuit) for negligently allowing the improper expenditure of funds from the Village account. The 1994 Cultural Preservation Board sought replevin of the funds and a declaration that it was the lawful owner of the funds. The defendants in the 1994 case cross-claimed to enjoin the 1994 Cultural Preservation Board from usurping their public authority. In 1996, that Cultural Preservation Board appealed an order of the Tribal Court applying United States federal standing principles and dismissing its complaint for lack of standing. The named defendants argued that the 1994 Cultural Preservation Board lacked standing because it merely alleged generalized complaints about the political process that could be best raised in a political forum. This Court found that it was inappropriate to apply federal standing doctrine to proceedings in the Hopi Tribal Court where "[t]he exclusionary and highly formalistic operation of federal standing doctrine is a poor fit in the Hopi tribal court system, which exists in a radically different cultural and institutional context." This Court stated that the Hopi tribal court system operates squarely within a custom and tradition of open and consensual dispute resolution; and that Hopi traditions of discussion and consensus decision-making emphasize maximizing opportunities to air grievances and encourage participation by clan and Village members. This Court stated further, that imposing a restrictive standing regime on the Hopi Tribal Courts would deny tribal members access

to an important neutral arena for adjudication of disputes. This Court then stated that, "... unlike the [United States] federal judiciary, the Hopi [T]ribal [C]ourts are courts of general jurisdiction."<sup>9</sup> In light of our reassessment below it would be more accurate to say that the Hopi Tribal Courts are statutorily authorized to exercise broad, but not unlimited, civil subject matter jurisdiction, and since August 28, 2012, to exercise jurisdiction over "all civil actions or controversies, whether at law or equity, arising under the Constitution, laws, customs, and traditions of the Tribe,"<sup>10</sup> that are not otherwise vested elsewhere by the Hopi Constitution.

[22] The Court looks first to the legislative history of the Hopi Constitution, specifically to its technical drafter – Oliver LaFarge. Oliver LaFarge in his early notes on Hopi organization listed as a major query the question: "What line is to be drawn between tribal and village powers?"<sup>11</sup> Upon submitting the final proposed draft of the Hopi Constitution to John Collier, the United States Commissioner of Indian Affairs, in August of 1936, LaFarge expressed his thoughts that the Hopi Constitution memorialized a balance between traditional Hopi Village organization and "more modern methods":

... it is necessary so to write the document that the old Hopi organization is recognized and protected, and at the same time, so that when the various villages reach the point at which their majorities will wish to take up more modern methods, they will be free to do so. This balance, or open choice, occurs in various places in the Constitution, as in Article III ...<sup>12</sup>

Article III in the final proposed draft read: "The Hopi Tribe is a union of self-governing villages sharing common interests and working for the common welfare of all ..."<sup>13</sup> Our present day Article III has the same language.

[23] He went on to state that the Constitution had been drafted to suit the needs and wishes of both progressives and conservatives:

Leaders and committees in all the villages have considered this Constitution most carefully. Again and again it has been corrected to suit their needs and wishes. Progressives and Conservatives alike are agreed upon the document thus formed. It

---

<sup>9</sup> *Village of Humeyestewa (Cultural Preservation Board) v. Humeyestewa et al.*, No. 96AP000008, p.11 (Hopi Ct. App. 1998).

<sup>10</sup> Hopi Code Sections 1.4.4 and 1.2.4, enacted August 28, 2012.

<sup>11</sup> See LaFarge Hopi Constitution and Organization Notes – Major Queries, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

<sup>12</sup> See The Constitution, with Letter of Transmittal and Comment by Oliver LaFarge, Memorandum for the Commissioner of Indian Affairs, p. 1, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

<sup>13</sup> See The Constitution, with Letter of Transmittal and Comment by Oliver LaFarge, Constitution and Bylaws of the Hopi Tribe, Article III – Organization, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.



provides at once, protection for those who wish to continue in the old Hopi way, and the means of change for those who want it.<sup>14</sup>

[24] He did not intend that the Constitution's provisions hardwire in traditional government above all:

Anyone dealing with the Hopis should have a clear understanding of the spirit of certain points in the Hopi constitution, which are not self-evident. It was necessary to write a constitution which would be completely in line with the Hopi path and which at the same time would not crystallize unchangeably a situation which is probably in a state of flux.<sup>15</sup>

[25] On the specific question of Tribal Council and the power to resolve particular disputes, LaFarge, in the beginning, was inclined to vest such power solely in the Tribal Council. In his early notes, he characterized the then existing nature of Village government but recognized that it was ill suited to handle certain types of disputes:

The Hopi tribe is a loose confederation of independent villages. No village will submit to having its internal affairs run by others. At the same time the traditional mechanism of semi-theocratic guidance under the kikmongwi ("chief") and kaletaka ("war captain") ... fails to touch two major sources of difficulty: 1. Adjustment of inter-village disputes, 2. Adjustment of disputes between stockmen and farmers. It also fails to provide any method of inter-village cooperation or common action.<sup>16</sup>

He went on to say that he "believe[d] that the power to make ordinances governing the relations of stockmen and farmers, and to adjudicate their disputes, [could] be given to the Council,"<sup>17</sup> as "[i]t [was] very doubtful whether the Hopis [were then] yet ready to administer tribal courts of the rigid and ill-fitting type set forth in the [then] new [federal] regulations ... ."<sup>18</sup> Early on LaFarge recognized the need for "methods of common action," and for a centralized forum to adjudicate certain types of disputes. Ultimately, despite the more limited concerns and recommendations described in his notes, the finally proposed and finally adopted language in the Hopi Constitution was broad in that it empowered the Hopi Tribal Council "[t]o make ordinances ... to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes ... ."<sup>19</sup>

---

<sup>14</sup> See The Constitution, with Letter of Transmittal and Comment by Oliver LaFarge, Memorandum for the Commissioner of Indian Affairs, p. 2, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

<sup>15</sup> Notes for Hopi Administrators, February 1937, p. 29, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

<sup>16</sup> See Memo by Oliver LaFarge, May 1936, General Consideration on Hopi Organization, p. 1, as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

<sup>17</sup> *Id.* at p. 2.

<sup>18</sup> *Id.*

<sup>19</sup> Constitution and By-laws of the Hopi Tribe, Article VI, Section 1(g), approved December 19, 1936.

[26] The Preamble of the 1936 Hopi Constitution supports the view that it was intended to balance the protection of the traditional way of life with the creation of a central authority that would regulate and adjudicate for the common welfare. The Preamble read:

This Constitution ... is adopted by the self-governing Hopi and Tewa villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems.

The present day preamble retains this same wording. All of the Hopi ordinances adopted by the Hopi Tribal Council since 1936 deal with one or more of these purposes, including regulating traffic and motor vehicles (Ordinance 8), regulating the safety of food service provision (Ordinance 12), providing for the exclusion and removal of harmful persons (Ordinance 13 & 46), regulating trespassing animals, the movement and branding of livestock, the issuance of grazing permits and to generally regulate the range (Ordinances 18, 19, 20, 22, 24, 40, & 43), establishing courts and setting out a criminal code (Ordinance 21 & the new Hopi Code), to protect wildlife and to regulate outdoor recreation (Ordinance 25 & 27), to protect sacred and historical places and objects (Ordinance 26), to govern enrollment (Ordinance 33), to govern tribal elections (Ordinance 34), to protect abandoned or maltreated children and juveniles (Ordinance 35), to govern educational entities (Ordinance 36), to regulate the workplace and to set out and enforce rights of employees (Ordinance 37), to regulate solid waste (Ordinance 44), to provide protection for victims of violence (Ordinance 50), to provide financial support for children in divorce or where paternity is in question (Ordinance 53), as well as a number of others. While the drafters and voters in 1936 could not have anticipated all of these need areas in 1936, they drafted and adopted provisions that were balancing and forward-looking to accommodate future needs and future structural change.

[27] Other provisions of the 1936 Constitution established the core powers of the central tribal government to regulate for the common welfare. These provisions contain the same wording today. Article I, entitled "Jurisdiction," provides that "[t]he authority of the Tribe ... shall cover the Hopi villages and land ... ." As discussed above, Article VI, Section 1(g) under the title "Powers of the Tribal Council," provides that the Hopi Tribal Council shall have the power "[t]o make ordinances ... to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes ... ." Finally, under Article IX, Sections 1 & 2, under the title "Bill of Rights," the 1936 Constitution set out tribal member rights that only a central authority could enforce, including an "equal opportunit[y] to share in the economic resources and activities of the jurisdiction," and that "[a]ll members ... shall be free to worship in their own way, to speak and write their opinion, and to meet together."

[28] Still other provisions of the 1936 Constitution reflected the balance struck between protecting traditional ways and providing for change with respect to the Tribal government. These provisions remain the same today. Article VI, Section 3, provides that "[t]he Hopi Tribal Council may exercise such further powers as may in the future be

delegated to it by members of the Tribe” (as opposed to “the Villages”). It is also important to point out that the Hopi Constitution has been amended three times, in 1969, 1980, and 1993 – not only by a vote of village representatives in the Hopi Tribal Council, but also by popular vote, as required by Article X: “If the Council shall th[e]n approve such proposed amendment by a majority vote, it shall request the Secretary of the Interior to call a referendum ... at which the proposed amendment may be adopted ... .”

[29] Pursuant to its broad power under Article VI, Section 1(g), “to make ordinances to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes ... ,” the Hopi Tribal Council adopted Ordinance 21 in 1972.<sup>20</sup> In Ordinance 21 the Tribal Council gave the Hopi Tribal Courts (trial and appellate) a broad grant of civil subject matter jurisdiction (Ordinance 21, Sections 1.7.1 and 1.2.5 as amended):

The Hopi Tribal Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Hopi Indian Reservation upon which to base the exercise of jurisdiction, consistent with the constitution and laws of the Hopi Tribe and the United States. It is the intent of this section to authorize the broadest exercise of jurisdiction consistent with these limitations.

The Appellate Court of the Hopi Tribe shall have jurisdiction to hear appeals from final judgments and other final orders of the Tribal Court of the Hopi Tribe ...

Or more recently, and more expansively, (2012 Hopi Code, Sections 1.4.4 and 1.2.4):

The Trial Court has original jurisdiction over all civil actions or controversies, whether at law or equity, arising under the Constitution, laws, customs, and traditions of the Tribe, including cases in which the Tribe or its officials and employees shall be a party.

The Court of Appeals has appellate jurisdiction over any case on appeal from the Trial Court, and the power to make conclusions of law in those cases.

[30] With the broad statutory grant of civil subject matter jurisdiction in 1972, the Hopi Tribal Courts have since heard and decided all manner of civil cases. Further, with

---

<sup>20</sup> It is not the case that the Hopi Tribal Council and the Hopi Tribal Courts are necessarily similar to the United States Congress and the United States Supreme Court and its federal courts - as conceived and characterized in their respective governing documents. The United States Constitution, in Article III, Section 2, limits the judicial power of the United States Supreme Court and the federal courts to nine types of cases: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizen of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” The Hopi Constitution by contrast, in its Article VI, Section 1(g) sets out no such limitations on the Hopi Tribal Council in establishing its courts, but rather empowers the Hopi Tribal Council to give its established courts broad subject matter jurisdiction by statute: “The Hopi Tribal Council Shall have the following powers .... To make ordinances to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes ... .”



one exception, this Court has found that the Villages may disclaim their interest in resolving a dispute by “waiving” their jurisdiction to the Tribal Courts or by consenting to the exercise of jurisdiction of the Tribal Courts over matters that would otherwise be originally within Village authority under Article III, Section 2. Where the Villages have engaged in such “waivers” or “consent” this Court has found that it may effectively exercise concurrent jurisdiction. Article III, Section 2 provides that:

- The following powers which the Tribe now has under existing law or which have been given by [the Indian Reorganization Act] ... are reserved to the individual villages:
- (a) To appoint guardians for orphan children and incompetent members.
  - (b) To adjust family disputes and regulate family relations of members of the villages.
  - (c) To regulate the inheritance of property of the members of the villages.
  - (d) To assign farming land, subject to the provisions of Article VII.

[31] One of the early appellate cases interpreting Article III, Section 2, the exception, was the case of *Ross v. Sulu*, No. AP-010-88 (Hopi Ct. App. 1991). *Ross* involved the reserved Village power under subsection 2(d) over farming land: “The following powers ... are reserved to the ... villages ... [t]o assign farming land.” This was a First Mesa Consolidated Villages case where the Tewa Kachina clan leader, on behalf of his clan, sought a temporary restraining order, a permanent injunction, and damages against Ross, the assignee of land from the Hopi Village and clan leaders. Ross had moved a mobile home onto land claimed by the Tewa. The trial judge granted the temporary restraining order, and after allowing an attempt at negotiation that ultimately failed, held an evidentiary hearing on the issue of which clan had the right to assign the land in question. After taking testimony on the history of the Tewa, their arrival to First Mesa, and recent use of the land, the trial judge found that the Hopi leaders had assigned land to the Tewa people at some point in history, granted a directed verdict in favor of the Tewa, found Ross to be trespassing, and enjoined her from maintaining her home on the land. Ross appealed and raised two issues relevant to the present case: (1) whether under the Hopi Constitution, such property disputes are to be resolved, not by the Tribal Court, but through traditional Village procedures; and (2) whether Article III, Section 2, reserves the assignment of farming land exclusively to the Villages. The Court held that, pursuant to Article III, Section 2(d), the Tribal Courts do not have subject matter jurisdiction over intra-village disputes over land assignments between clans as these types of disputes are reserved exclusively to the Villages. The Court held that “such clan *disagreements are to be resolved through established village custom* rather than through tribal court adjudication.”<sup>21</sup> Finally, the Court held that “ordinary trespass” actions may come to the Tribal Court but that “where the resolution of the trespass action turns on a determination of *which clan within the village has the right to assign certain land*, jurisdiction to decide the underlying dispute is in the village, not the Tribal Court.”<sup>22</sup>

---

<sup>21</sup> *Ross v. Sulu*, No. AP-010-88, p.8 (Hopi Ct. App. 1991).

<sup>22</sup> *Id.* at p. 8. Contrast *Sipaulovi Village Board of Directors v. Sunrise Quoyavema*, No. 04AP000004, pp. 7-13 (Hopi Ct. App. 2005) (Tribal Court had jurisdiction over an “ordinary trespass claim” where Appellee was not a member of the village, and Appellee claimed his rights to the land via western-styled land assignment – which did not flow from a clan land assignment - and through his continuous use of the land).

[32] A subsequent case and decision, *Coin v. Mowa*, No. AP-005-95 (Hopi Ct. App. 1997), involved subsection 2(b) which reserves Village power to adjust family disputes and to regulate family relations: "The following powers ... are reserved to the ... villages ... [t]o adjust family disputes and regulate family relations of members of the villages..." This contract dispute came from the Village of Shungopavi. In this case Plaintiff Coin entered into a contract to purchase a mobile home from the Mowas. After a number of payments were made a disagreement arose over the lack of repairs, the Mowas expressed an intention to repudiate the contract and demanded that Coin vacate the premises. Coin sued for breach of contract. During the trial court proceedings the Kikmongwi of Shungopavi, by letter, expressed his desire to handle the matter. The trial judge dismissed the action pursuant to Article III, Section 2(b), as it appeared the parties were distant clan relatives. Coin appealed the dismissal arguing that the trial court erred in determining that this was a "family matter" under Article III, Section 2(b), and in dismissing for lack of subject matter jurisdiction. The Court in *Coin* held that *there is a presumption that the Tribal Court has jurisdiction over disputes not described in Article III, Section 2* (citing Ordinance 21, Section 1.7.1 (a), "The Hopi Tribal Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Hopi Indian Reservation ... . It is the intent of this section to authorize the broadest exercise of jurisdiction consistent with these limitations."). The Court went on to hold that the Tribal Court, not the Village, had jurisdiction as *Article III, Section 2(b) does not apply to disputes in which the parties' familial relations are not an essential factor giving rise to the underlying cause of action*, here an arms length contract dispute.<sup>23</sup>

[33] It would appear that the combined effect of *Ross* and *Coin* would be a reading of Article III, Section 2, where if the subsection applied, the Villages would have exclusive jurisdiction over the matter, and where no subsection applied, the Tribal Court has jurisdiction. However, a review of the subsection "a" (re: orphans and incompetents), and other "b" (re: family disputes and regulation of family relations) cases reveals a more complex arrangement. It has been the practice of the Hopi Tribal Council, particularly with respect to subsection "a" matters, to respect original (non-exclusive) jurisdiction with the Villages in non-emergency child and family matters, but then also to recognize concurrent Tribal Court jurisdiction with the Tribal Courts. For example, under the Hopi Children's Code (Ordinance 35, Chapter III, Sections C.1.b., C.1.c. & C.4.d.) the Tribal Court is authorized to exercise concurrent jurisdiction over child maltreatment and juvenile matters, and where the Villages decline or fail to handle such matters:

The Children's Court shall exercise jurisdiction over: b. all minor-in-need-of-care matters arising on the Reservation which are not handled by the respective villages; c. all juvenile offender cases arising on the Reservation ...

Article III, Section 2, of the Constitution and By-Laws of the Hopi Tribe reserves jurisdiction to the villages ... to appoint guardians for orphan children and incompetent members; and to adjust family disputes and regulate family relations of members of the villages.

---

<sup>23</sup> See also *Dallas v. Curley*, No. AP-005-94 (Hopi Ct. App. 1996) (Article III, Section 2, does not apply to a paternity/child support action between a tribal member and a non-member Indian).

If the child's village does not assume jurisdiction or does not respond to the agent for notice by the given deadline, the agent for notice shall request the Children's Court to assume the right of concurrent jurisdiction ...

Other Tribal ordinances contain similar provisions. See for example Ordinance 50, Sections 6.01(a) & (b) governing protection orders, and Ordinance 53, Sections 4.A., B., & C. governing child support. Children and family cases make up a significant portion of the Tribal Court caseload every year. According to the most recent available statistics (for the period of 2007 to 2011), the Tribal Court handled 925 children's maltreatment cases (averaging 185 per year) and 693 juvenile cases (averaging 138 per year).<sup>24</sup>

[34] The Court set out the jurisdictional law with respect to subsection "c" (re: inheritance of property) cases as there is no Hopi Tribal probate statute. The foundational case and decision here is *In the Matter of the Estate of Komaquaptewa*, 01AP000013 (Hopi Ct. App. 2002). In *Komaquaptewa*, the Court had to address the question of whether the Tribal Court has jurisdiction over probate and inheritance claims when the Village waives its jurisdiction,<sup>25</sup> and in the absence of a tribal probate statute (ordinance). This Court found, as a matter of law, that the Tribal Court has concurrent subject matter jurisdiction over probate and inheritance matters under Ordinance 21, Sections 1.7.1(a) and 1.7.1(d)(3):

The Hopi Tribal Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Hopi Indian Reservation ... . It is the intent of this section to authorize the broadest exercise of jurisdiction ...

Any person ... who ... commits any of the acts hereinafter enumerated, thereby submits to the civil jurisdiction of the Hopi Tribal Court as to any cause of action relating to such act: 3. The ownership, use or possession of any real or personal property within the Reservation;

---

<sup>24</sup> Statistics provide by the Tribal Court Administrator of the Hopi Tribal Court.

<sup>25</sup> The thornier task is determining which entity within a village has the authority to waive village jurisdiction. In the *Matter of the Estate of Komaquaptewa*, No. 01-AP-000013 (Hopi Ct. App. 2002), the private party Appellant claimed that the Bacavi Village Board of Directors lacked authority to waive the Village's jurisdiction because it was neither organized as a traditional village nor pursuant to a village constitution. This Court held that it would view as authoritative, a response from a Village governing entity, whether traditional or modern, unless there was a challenge to the Village's governing power. The Court explained that there was a presumption of the existence of established Hopi village governments under the provisions of the Hopi Constitution (under Article III, Section 1, Section 3, and Section 4), and that the Court did not read the provisions of the Constitution to compel the previously existing villages to organize or enact a constitution before being recognized as a legitimate government. In *Nutongla-Sanchez v. Garcia*, No. 98AP000014 (Hopi Ct. App. 1999), this Court recognized that, in a hybrid village, where it is generally accepted that there is no Kikmongwi and no constitution, other entities may possess legal authority under tradition and custom: "It cannot be assumed that the language of section 2(c) vests the power to resolve inheritance disputes in the ... Village Board exclusively. Outside of the ... Village Board, other ... village members possess legal authority within the village. The basis of this legal authority is tradition and custom. Traditional legal authorities, as well as the Village Board, may possess the power to resolve inheritance disputes and distribute property pursuant to the Hopi Constitution."



This Court also found that important public policies argue for the finding of Tribal Court jurisdiction over probate matters:

If the Tribal Court did not exercise jurisdiction after a village declined its right to decide a member's probate claim, village members would be left without a tribal forum in which to assert their property rights. Hopi tribal members would be unable to raise factual and legal matters affecting their cultural and legal interests in property, leading to a violation of substantial rights and leaving aggrieved parties to contest probate matters in non-tribal judicial forums. Moreover, Hopi tribal and village customs and traditions would not receive the same consideration in non-tribal forums and the result could be devastating to Hopi parties, the Tribe and the villages. Therefore, this Court finds as a matter of law and public policy that the tribal court has jurisdiction to decide inheritance matters when a village declines or avoids its responsibility to do so.

Having determined that the trial court has subject matter jurisdiction once a village affirmatively waives its jurisdiction to decide probate matters affecting its members the trial court stands in the place of the village to probate the estate. The trial court must therefore apply the traditions and customs of the affected village(s) in the absence of village probate laws before resorting to foreign (federal or state) law.<sup>26</sup>

Most Villages would agree with the Court's observation that the Villages would prefer to have the Hopi Tribal Courts handle not only probate matters, but also most private intra-village property disputes. While current statistics are lacking, the Hopi Tribal Court has experienced a steady flow of this type of litigation, where in many cases, the Villages have either referred the matter to the tribal court in the first place, and/or have waived their jurisdiction.

[35] The Court also set out a process for the recognition of Village decisions given the practical reality that the Villages lack a law enforcement arm (there are no Village police departments) and given the Court's duty to protect rights under the Hopi Constitution and the Indian Civil Rights Act. The foundational case is *Honie v. Hopi Tribal Housing Authority*, 96AP000007 (Hopi Ct. App. 1998). *Honie* involved two competing land assignments to the same piece of land within the First Mesa Consolidated Villages, one from the Hopi Tribal Housing Authority (presumably backed by the Hopi Kikmongwi and/or Hopi clan leaders) to X, and one from the Tewa Sand Clan leader to Y. In *Honie*, the Tewa Sand Clan leader was alleged to have threatened employees of the construction company that were attempting to clear the land to build the HTHA house with a steel pipe and to have hit a backhoe with a baseball bat. The Hopi Tribal Housing Authority sued the Tewa Sand Clan leader for declaratory, injunctive, and monetary relief. The trial court stayed proceedings and "remanded" the matter to the First Mesa Consolidated Villages to resolve the issue. The First Mesa Consolidated Villages then filed its "Notice of Decision" with the trial court whereby it abrogated all previous land assignments, set out a formal procedure for land assignments, and then assigned the land to X following such procedure. The trial court then filed a "Recognition of Decision of the First Mesa Consolidated Villages. The Sand Clan leader filed a motion to set aside and quash this trial court order which was denied. The trial court proceeded with the Hopi Tribal Housing Authority's request for a permanent injunction and enjoined the Tewa Sand Clan

---

<sup>26</sup> *In the Matter of the Estate of Komaquaptewa*, No. 01AP000013, pp. 15-16 (Hopi Ct. App. 2002).

leader from interfering with future construction. He appealed. This Court heard the matter via its special actions jurisdiction under Rule 35 and addressed the question of whether the trial court erred when it, in effect, certified the Village decision for enforcement by tribal law enforcement, but where it failed to hold a hearing with notice to all parties prior to doing so. This Court held that the trial court erred in failing to provide an evidentiary hearing to ensure that interested parties were provided with notice and an opportunity to participate in the Village decision-making process before the Village made its decision. This Court vacated the trial court certification of the Village decision and remanded for the conducting of such an evidentiary hearing. This Court also set out a process for Tribal Court certification evidentiary hearings. Under this process any person can request that the Tribal Court certify a Village decision for enforcement. Once the trial court receives such a petition, it must hold an evidentiary hearing to determine whether, before the Village made its decision, interested parties were provided with notice of when the Village would be considering the matter and were given an opportunity to be heard, before the Village made its decision. In the trial court certification hearing the burden is on the petitioner to establish these facts by clear and convincing evidence. In *Honie*, the Court was concerned with its legal duty to protect Hopi Constitutional and ICRA rights when asked by a Village sovereign to use the Tribe's police power to enforce a Village decision. At the same time the Court was concerned to avoid placing such onerous due process requirements on the Villages that they would be, in effect, forced to transform their chosen decision-making process into a western-styled adjudicatory process, in order to obtain tribal enforcement of their decisions. The *Honie* certification process was a compromise, allowing the Hopi Tribal Courts to meet their legal obligations under the Hopi Constitution and the Indian Civil Rights Act, while making very minimal fair process (notice and an opportunity to be heard), at the Village level, the price of tribal enforcement of their decisions. The Court carefully stopped short of permitting or requiring any trial court review of the merits of any Village decision.

[36] The Hopi Constitution, from the start, embodied a balance between meeting the needs and wishes of traditional people and more progressive people; between protecting traditional organization and providing for more modern methods; and between recognizing and reinforcing pre-existing sovereign Village powers and establishing and delegating powers to a central tribal authority. The Constitution as originally conceived provided for change at both the tribal and Village levels. One of its primary purposes was to establish a central authority in the form of the Hopi Tribal Council to regulate and adjudicate for the common welfare. Under a broad, but not unlimited, grant of authority from Article I, and Article VI, Section 1(g), the Tribal Council enacted Ordinance 21 establishing the Tribal Court and giving it broad, but not unlimited, civil subject matter jurisdiction. This Court's case law has since recognized that the Constitution, under Article III, Section 2, reserves original, exclusive jurisdiction in the Villages over intra-village, inter-clan disputes over land assignments and related trespass claims, and original, but concurrent, jurisdiction in the Villages over children, family and inheritance matters.

[37] Why has this Court treated the *Ross* intra-village land dispute differently from scenarios that fall within the other Article III, Section 2 subject matter areas? Or, for that matter, from other intra-village land disputes, for example, from private disputes over homes and land in general or from private disputes surrounding the inheritance of homes and land? First, the action in *Ross* was brought on behalf of one clan against another, but more importantly, it was a lawsuit between the Tewa and the Hopi at First Mesa. In the case of *Ross*, there were very old agreements between the Hopi and Tewa clan leaders, very likely including the land in question, that laid the foundation for the confederation of the First Mesa Consolidated Villages. The *Ross* land dispute may very well have been, in essence, an intra-village religious or governance dispute. Second, this dispute involved “the assignment of farming land” at First Mesa, a subject matter category specially singled out for Village resolution under the Hopi Constitution in Article VII, Section 1 (“*Assignment of the use of farming land within the traditional clan holdings of the Village of First Mesa ... as in effect at the time of approval of this Constitution, shall be made by each village according to its established custom.*”). Third, given the nature of the *Ross* dispute, it would have been quite difficult for the Tribal Courts to avoid disrespecting traditional authorities and institutions as part of its resolution of the dispute. Private property and inheritance disputes do not necessarily implicate matters of intra-village governance or religion nor do they necessarily involve constitutionally designated “assignments” of “farming land within the traditional clan holdings of [the listed villages] as in effect at the time of approval of [the Hopi] Constitution,” as described in Article VII, Section 1.

[38] Further, in private family and property disputes, the Villages, up to this time, have lacked the legal infrastructure, resources, and political will to handle such disputes. In recognition of this fact, both the Tribal Council and the Tribal Courts have seen fit to have the Tribal Court exercise concurrent jurisdiction. The policy considerations supporting Tribal Court concurrent jurisdiction are weighty and compelling. They include the lack of a forum to protect vulnerable populations like children, the elderly, and victims of violence; the lack of forum to protect Hopi Constitutional and ICRA rights (including traditional rights); the inability of secular Village bodies, particularly in hybrid Villages (those where it is generally accepted that there is no Kikmongwi and where there is no village constitution), to find and apply Village custom and tradition in private Village disputes; and finally, the inability of the Villages, given the absence of local law enforcement arms, to enforce their decisions. The Hopi Tribal Courts have been in operation since 1972 and have significant experience in providing protections for the vulnerable; for enforcing rights; they have the legal infrastructure to conduct Village custom and tradition finding hearings in private Village disputes (for example, in children’s, paternity, divorce, child support, and probate cases); and they have two tribal law enforcement divisions that will enforce their orders. For all these reasons, and given explicit Constitutional and statutory provisions, under Article I (“*The authority of the Tribe under this Constitution shall cover the Hopi Villages and ... land ...*”), Article VI, Section 1(g) (“*The Hopi Tribal Council shall have the following powers ... To make ordinances to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes ...*”), and Article III, Section 2 (“*The following powers which the Tribe now has ... are reserved to the villages ...*”), we hold that the Hopi Tribal



Courts have a broad, but not unlimited, statutory grant of civil subject matter jurisdiction, and that, in Article III, Section 2 matters, where the Villages have original but not exclusive jurisdiction, and where they have consented to the jurisdiction of the Hopi Tribal Court, or where they have waived the exercise of their jurisdiction, the Hopi Tribal Court has concurrent jurisdiction.

2. The Hopi Tribal Court has Jurisdiction to Enforce the Hopi Constitution & to Protect Rights Under the Hopi Constitution & the Indian Civil Rights Act

[39] The Hopi Tribal Court, under its broad statutory grant of civil subject matter jurisdiction, has properly entertained suits against the Tribe and/or its officials, in their individual and/or official capacities, where: (1) the Tribe has been shown to waive its sovereign immunity;<sup>27</sup> or where (2) the doctrine of sovereign immunity does not apply to the actions of a tribal official, who exceeds his or her scope of authority or official duty, and where the relief sought is limited to injunctive relief;<sup>28</sup> or where (3) a tribal official

---

<sup>27</sup> In *Martin et al. v. Tribe et al.*, No. AP-004-95 (Hopi Ct. App. 1996), tribal employees sued the Tribe and one of its officials for wrongful termination. This Court found that provisions in the Hopi Tribe's Personnel Policies and Procedures Manual waived the Tribe's immunity from suit in the Hopi Tribal Court and remanded the case for a hearing on the merits of the complaint.

In *LaRance v. Hopi Tribe, et al.*, No. 2010-AP-0001 (Hopi Ct. App. 2010), the former Chief Judge of the Hopi Tribal Court sued Vice Chairman Todd Honyaoma and the Hopi Tribal Council members in their official capacity after they passed a resolution removing him. He argued that the Constitution was violated when the Vice Chairman, instead of the Hopi Tribal Council, made and adopted written charges, delivered them, and called a legislative session to remove him; that Ordinance 21, governing removal of judges, was violated when the Council simply deliberated and legislatively removed him instead of holding a "full, quasi-judicial, impeachment hearing;" that his right to Hopi fundamental fairness and his due process rights were violated under the Indian Civil Rights Act where the written charges failed to state what constituted "cause" to impeach, where no burden of proof was placed on person charging him, and no proofs were offered, where he was not allowed to confront and cross-examine witnesses or to call his own witnesses, and where the Council failed to make any findings of fact or conclusions of law. He also argued that the Tribe breached his employment contract. This Court found that his employment contract contained a waiver of sovereign immunity sufficient to resolve any disputes under the contract. This Court went on to hold that Ordinance 21's judicial removal provision requires an impeachment style adjudicatory hearing before a judge may be removed; that the Council never formally adopted the charges against the Chief Judge, that no standard for "cause" to remove was ever articulated prior to the legislative removal, that all five charges were defective (he was charged for the mere fact of being arrested and for showing disregard and disrespect for the Hopi judicial system (based upon newspaper articles and public opinion), that no evidence was offered to support the charges, that the legislative session did not meet the requirements of Hopi fundamental fairness nor the Indian Civil Rights Act, and that his employment contract had been breached. This Court reversed the inconsistent portions of the trial court order, voided the removal resolution, found his contract to be valid and still in force, and awarded back pay and back contributions.

<sup>28</sup> In *Youvella v. Dallas*, No. 96-AP-00002 (Hopi Ct. App. 1998) ("*Youvella I*") and *Youvella v. Dallas*, No. 99-AP000008 (Hopi Ct. App. 2000) ("*Youvella II*"), two representatives from the First Mesa Consolidated Villages to the Hopi Tribal Council sued the Tribal Treasurer for refusing to issue their paychecks after the Council received a letter from the Hopi Kikmongwi purporting to decertify them. The Representatives filed a complaint seeking to be reinstated and sought an order compelling the Treasurer to pay all checks due. This Court held that the doctrine of sovereign immunity did not apply to the actions of the tribal treasurer where he exceeded his official duty in stopping payments – where the Tribal Council's

has attempted to enforce an unconstitutional law, and where the relief sought is limited to declaratory and injunctive relief.<sup>29</sup>

3. The Hopi Tribal Court has Ancillary Jurisdiction to Hold Evidentiary Hearings on Village Organization and Leadership for the Purpose of Determining the Legality of Tribal Council Conduct & the Conduct of its Officials

[40] The Tribal Court, under its broad statutory grant of civil subject matter jurisdiction, and where the Tribe's sovereign immunity is found to be waived or inapplicable, has the power to hear Plaintiffs' still pending Counts I – VII. And because, these Counts constitute live litigation (although it appears, based on their arguments before this Court, that the Village of Mishongnovi Cultural Preservation Board parties would likely run to dismiss them), we address whether this Court has ancillary jurisdiction over questions surrounding Village organization and leadership, for the purpose of determining the lawfulness of Tribal actions. We hold that it does. Ancillary jurisdiction is defined as “A court's jurisdiction to adjudicate claims and proceedings that arise out of a claim that is properly before the court.”<sup>30</sup> We hold that where the Tribal Court has subject matter jurisdiction to hear and decide the lawfulness of a tribal action or that of one or more of its officials, it has ancillary jurisdiction over questions concerning Village organization and leadership, for the narrow purpose of deciding whether the Tribe and/or its officials acted lawfully. However, given our reasoning in Part B below, the Tribal Court's subject matter jurisdiction does not extend to hearing, and ultimately deciding, how a Village is organized or who its legitimate leaders are where the dispute is wholly internal.

B. The Hopi Tribal Court Lacks Subject Matter Jurisdiction to Hear & Decide, Wholly Internal Disputes Over How a Village is Organized and/or Who its Legitimate Leaders Are

[41] After invoking the jurisdiction of the Hopi Tribal Court numerous times over the years, and in the instant case to file a series of actions seeking declaratory, injunctive, and extraordinary relief, as well as the original complaint seeking damages, Appellants now

---

direction was informal and unclear to direct the Tribal Secretary and the Tribal Treasurer to stop payments – and, consequently, the Tribal Treasurer could be sued. The case was remanded to the trial court for hearings on the merits for the purpose of obtaining injunctive relief.

<sup>29</sup> In *Honyaoma v. Nuvamsa*, No. 2007-AC-0005 (Hopi Ct. App. 2008) (Decision and Order of January 25, 2008, as amended), the recently elected and certified Tribal Chairman sued the Vice Chairman and Tribal Secretary, and the members of the Hopi Tribal Council, in their official and unofficial capacities, asking the Hopi Tribal Court to declare that the Hopi Tribal Council acted beyond its powers and that its resolution purporting to nullify his election was unlawful and void. This Court held that a tribal official, enforcing an unconstitutional law, may be sued in his or her official capacity in the Hopi Tribal Court for declaratory and injunctive relief.

<sup>30</sup> Black's Law Dictionary, Seventh Edition.

ask this Court to find that it lacks subject matter jurisdiction over its requests, to find that that trial court erred in exercising jurisdiction over a portion of its requests, to reverse those findings, and to dismiss the issues before us on appeal. Appellants now argue that the Hopi Constitution, via Article III, Section 3, reaffirms (reserves) the exclusive jurisdiction of the Villages to hear disputes regarding the manner in which they are organized. Article III, Section 3 reads: “Each village shall decide for itself how it shall be organized.” They further argue that, if such a power is affirmed in the Villages, the Hopi Tribal Council (and its delegate, the Hopi Tribal Courts, trial and appellate) would not have the power to hear disputes regarding the manner in which the Villages are organized.

[42] It might seem that the posture of the arguments in this case are the inverse of the posture of things in the *Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, (certified by the Village of Bacavi), 2008-AP-0001 (Hopi Ct. App. 2010), answered by this Court in 2010. In the *Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, the Tribe argued that a Constitutional provision, Article V, Section 2, delegated exclusive power to the Hopi Tribal Council to remove Village representatives for cause. The question the Court addressed was whether, despite this delegation, and in the absence of an explicit constitutional provision reserving such a power to the Villages, the Villages, nevertheless, had an inherent power to “remove, recall, or decertify” their representatives. The Court found that such a parallel power indeed existed, and that it derived from their “pre-existing aboriginal sovereignty.”

The Constitution established a new central government for the Hopi Tribe and its powers needed to be and were expressly delegated by the Hopi and Tewa Villages in the Constitution. Thus, if the Tribal Council was to exercise any authority to remove officials and Village representatives for cause, such powers needed to be expressly delegated in the Constitution and they were in Article V, section 2. By contrast, the Villages possessed pre-existing aboriginal sovereignty over the selection, removal, recall and decertification of political spokespersons. No express delegation was required to reaffirm that sovereignty since they already possessed it. Article IV, section 2 simply reaffirms that view for purposes of the selection of the Tribal Council Representatives but is otherwise silent on the question of removal, recall and decertification. The existence of the automatic removal provisions for conviction of described offenses set forth in Article V, section 1 of the Constitution further suggests that the powers of the Tribal Council over removals for cause are not exclusive. Since nothing in the Constitution suggests that the pre-existing sovereign power of the Hopi and Tewa Villages to remove, recall, or decertify their representatives was removed from them or exclusively delegated to the Tribal Council by Article V, section 2 of the Constitution, this Court finds that the Villages continue to retain that authority under the Hopi Constitution.<sup>31</sup>

But Village powers and tribal powers are not analogous. Village powers are pre-existing, aboriginal, and inherent. Tribal powers are delegated. Nevertheless hard questions remain as to what was intended when the provisions of the Hopi Constitution were drafted and adopted. With respect to Village powers, what other pre-existing, aboriginal, and inherent powers exist and how do we discern and recognize them? Were

---

<sup>31</sup> In the *Matter of Certified Question of Law Re: Village Authority to Remove Tribal Council Representatives* (certified by the Village of Bacavi), No. 2008-AP-0001, pp. 8-9 (Hopi Ct. App. 2010).



Constitutional “reservations” intended to be “re-affirmations” of pre-existing, aboriginal, and inherent powers? And when were Constitutional reservations or reaffirmations intended to be exclusive and when were they intended to be concurrent? With respect to tribal powers, were Constitutionally delegated powers via “enumeration” intended to be exclusive?

[43] Appellants and some of the Amicus Curiae would have us take a simple analytical approach, to find that if a power is not explicitly granted to the Hopi Tribal Council, that it must remain exclusively with the Villages under its pre-existing aboriginal sovereignty. Conceptually this makes sense but things get complicated when we look at specific provisions in the Hopi Constitution. For example, why did the drafters enumerate (set out a specific list) for Tribal and Village powers in, Article VI (Powers of the Tribal Council), and Article III, Section 2 (a.k.a., Village Reserved Powers)? Presumably, if they intended that not all powers delegated to the central Hopi Tribal Council would be reserved to the Villages, they would not have needed an Article III, Section 2. The dual enumerations suggest an intent that, the Tribal Council will have the power to “make ordinances to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes, but so will the Villages have the power (and it will be original) to “appoint guardians for orphan children and incompetent members ... to adjust family disputes and regulate family relations of members of the villages ... to regulate the inheritance of property ... [and] to assign farming land.” The dual enumerations suggest, at least, that the Tribal Court be able to exercise effectively concurrent jurisdiction in the Article III, Section 2 areas where the Villages waive their jurisdiction and/or consent to the exercise of the Tribal Court’s jurisdiction, but not where the Constitution commits a matter exclusively to the Villages.

[44] Appellants and some Amicus Curiae argue further that the central Hopi Tribal Council lacks any power to regulate or adjudicate when it comes to the internal affairs of a Village. But this argument goes too far. Many provisions within the Constitution delegated to the Tribal Council the power to regulate in ways that might affect the internal affairs of a Village. The Constitution gives the Hopi Tribal Council authority over the Hopi Villages and land (Article 1), to make ordinances to protect the peace and welfare of the Tribe (Article VI, Section 1(g)), to regulate the activities of voluntary cooperative associations of members for business purposes (Article VI, Section 1(j)), to protect the arts, crafts, traditions, and ceremonies of Hopi (Article VI, Section 1(k)), to protect the rights of individuals occupying and beneficially using farming lands outside clan Village holdings in 1936 (Article VII, Section 1), to protect the right to use springs (Article VII, Section 3), and to enforce rights granted in the Constitution, including the right of resident members to have an equal opportunity to share in the economic resources and activities of the jurisdiction, and to be free to worship in their own way, to speak and write their opinion, and to meet together (Article IX, Sections 1 &2). The real question is when, and under what circumstances, does the Hopi Constitution delegate powers to the Hopi Tribal Council over internal Village affairs? Two explicit delegations are found in the areas of dispute resolution. The Tribal Council has been delegated the power to set up courts for the settlement of claims and disputes (Article VI, Section 1(g)),

and it has been delegated the power to sit as a court to hear and decide inter-village disputes when requested by the Kikmongwi (Article VII).

[45] Appellants assert that Article III, Section 3, reaffirms (reserves) that the Villages have exclusive jurisdiction to hear disputes regarding the manner in which they are organized. This Court agrees that the Villages had and continue to have the power to hear disputes regarding the manner in which they are organized as part of their pre-existing aboriginal sovereignty. However, given that the Hopi Constitution delegated to the Tribal Council the power to set up courts for the settlement of claims and disputes and that the Tribal Council then gave a broad grant of civil subject matter jurisdiction to the Hopi Tribal Courts, the critical question is whether Article III, Section 3, reaffirmed exclusive, or effectively concurrent jurisdiction, to hear disputes about Village organization. We agree with Appellants that Article III, Section 3, should be read to reaffirm the exclusive jurisdiction of the Villages to hear and decide wholly internal disputes over how a Village is organized, and/or who the rightful leader is. Consequently the Hopi Tribal Courts lack subject matter jurisdiction to hear and decide wholly internal disputes over how a Village is organized, and/or who the rightful leader is.

[46] This Court's analysis begins with the important observation set forth in *In the Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, No. 2008-AP-0001, ¶9, p.4 (Hopi Ct. App. 2010):

[T]he entire structure of the Hopi Constitution indicates that the authority of the central government of the Hopi Tribe rests on the bedrock of the aboriginal sovereignty of the Hopi and Tewa Villages. The Villages delegated limited powers to the central Hopi government. Under Article II, section 4 of the Constitution the Villages determine Village membership. As already noted, the Constitution expressly reserves certain powers of dispute resolution to the Villages in Article III, section 2.

Elsewhere in the same opinion, this Court noted:

Prior to adoption of the Hopi Constitution there was no central Hopi government and therefore each of the Hopi and Tewa Villages unquestionably possessed inherent aboriginal powers of self-government. *In re Komaquaptewa*, No. 01-AP-00013 (Hopi Ct. App. 8/16/2002); *see also*, Frank Waters, *The Book of the Hopi* 316 (1977); Ragsdale, *The Institutions, Laws and Values of the Hopi Indians: A Stable State Society*, 55 U.M.K.C. L. Rev. 335, 376 (1987); L. Thompson and A. Joseph, *The Hopi Way of Law* 48 (1944)."

Various provisions of the Hopi Constitution clearly demonstrate an effort to preserve certain matters for Village resolution. For example, Article II, Section 4 of the Hopi Constitution reserves the determination of Village membership to the Villages by providing "Village membership shall be determined by the individual Hopi Villages." Similarly, Article III, Section 2 expressly reserves original power over certain designated issues to the Villages by providing that:

The following powers . . . are reserved to the individual villages:  
(a) To appoint guardians for orphan children and incompetent members.

- (b) To adjust family disputes and regulate family relations of members of the villages.
- (c) To regulate the inheritance of property of the members of the villages.
- (d) To assign farming land, subject to the provisions of ARTICLE VII.

As discussed in Part A above, Article III, Section 2 reserves original and effectively concurrent jurisdiction to the Villages over these subject matter areas, except for those subsection “c” matters where it reserves exclusive jurisdiction to the villages over intra-village, inter-clan land assignment disputes.

[47] The first question posed by this Court is whether the very next sentence found in the Hopi Constitution – the provision of the first sentence of Article III, Section 3 which provides “Each village shall decide for itself how it shall be organized” – operates to expressly limit the jurisdiction of the Hopi Tribal Courts by preventing them from deciding internal Village disputes over the nature of Village governance. Having reviewed the briefs of the parties and the various friend of court briefs from the Villages and Traditional Leaders, this Court has concluded that the first sentence of Article III, Section 3 operates, like the provision of Article III, Section 2(c) in intra-village, intra-clan land assignment disputes, to reserve to the Villages the power to decide questions of the form of Village organization and concomitant questions as to which form of organization constitutes the lawful government of the Village.

[48] This Court views the first sentence of Article III, Section 3 as a limitation on the jurisdiction of the Hopi Courts for several reasons. First, prior to adoption of the Hopi Constitution disputes over the proper structure and organization of Village governments clearly were left to the Villages and, if not properly resolved there, sometime resulted in Villages schisms and the creation of new Villages. Most famous among that history are the 1890 split of some less traditional members from Old Oraibi to form the Village of Kykotsmovi, sometimes called New Oraibi in the early documents; the famous Oraibi Split in 1906 in which Oraibi leaders on differing sides of the traditionalist/progressive schism engaged in non-violent processes to determine questions of policy and legitimate government which ultimately resulted in the expulsion of the traditionalists, who left to found the village of Hotevilla; and the subsequent unsuccessful effort to facilitate reintegration of displaced residents which resulted in an additional split with one group forming the Village of Bacavi. These important events in Hopi history demonstrate that before the adoption of the 1936 Hopi Constitution internal Village disputes over the proper form of Village governance were always worked out internally within the Villages and when such internal processes failed to produce a harmonious resolution the result sometimes was schism and the creation of new Villages. Clearly the Hopi Way had worked out processes, sometimes successful and sometimes unsuccessful, to resolve such matters at the Village level long before the adoption of the 1936 Hopi Constitution. Thus, unless something in the 1936 Hopi Constitution expressly changed this traditional reliance on the Hopi Villages to resolve their internal disputes over proper governance and delegates authority to resolve Village internal disputes over proper Village governance to the central Hopi government, including its Courts, the Villages would accordingly retain the exclusive power over such internal Village disputes over lawful Village governance according to Village traditions.



[49] Second, nothing in the 1936 Hopi Constitution, with the exceptions noted below, purports to permit the government of the Hopi Tribe, including the Hopi Courts, to intervene in and resolve *wholly internal* Village disputes over the lawful form of Village governance. Quite to the contrary, by expressly providing that “[e]ach village shall decide for itself how it shall be organized” the first sentence of Article III, Section 3 purports to expressly reserve such questions exclusively to each Village, not to the Hopi Tribe or the Hopi Courts. Thus, except as noted below, nothing in the 1936 Hopi Constitution purports to permit the government of the Hopi Tribe or the Hopi Courts to intervene in, adjudicate, or resolve *completely internal* Village disputes over the lawful form of Village governance.

[50] Third, the location of the first sentence of Article III, Section 3 in the 1936 Hopi Constitution indicates that it was intended to reserve *completely internal* Village governance questions to Villages and to deny any such authority to the Hopi Tribe or the Hopi Courts. The phrase “[e]ach village shall decide for itself how it shall be organized” found in the first sentence of Article III, Section 3 constitutes an express reservation. And, unlike Article III, Section 2, it does not begin with the phrase “The following powers which the Tribe now has ... .” Further, every next sentence in the Hopi Constitution appears similarly designed to enumerate an area of concern *exclusively* reserved for Village resolution. The precise scope of that exclusive reservation of authority to the Village was “how [the Village] shall be organized,” i.e. internal Village decisions regarding the lawful governance of the Village.

[51] Fourth, the unfortunate history of this case and its handling by the Tribal Court demonstrates both the correctness and the wisdom of this Court's interpretation of the first sentence of Article III, Section 3 in the 1936 Hopi Constitution as an exclusive reservation of Village authority over *wholly internal* disputes concerning the lawful government and organization of a Village. Believing it had full jurisdiction over such matters, the Tribal Court purported to conduct a hearing that included the question of whether Plaintiff Archie Duwahoyeoma is a properly ordained or duly certified Kikmongwi. This issue led to sensitive and often secret questions of Hopi traditions and religion to be paraded before the Court in culturally insensitive and improper ways. Worse still, Chief Judge Trujillo is non-Hopi and found himself purporting to make decisions as to whether the Village of Mishongnovi actually had a properly ordained Kikmongwi, despite the fact that such religious issues properly should be decided solely by the Village religious societies to which such questions that are central to the ceremonial life of the Village are left. Judge Trujillo's finding that the last properly ordained Kikmongwi at the Village of Mishongnovi was Komalewtewa who died in the late 1950s or early 1960s may or may not be historically correct, the point is that it was not his decision to make. For the Village of Mishongnovi, that ruling was the functional equivalent of having a non-Catholic federal or state judge declaring that Pope Francis was not properly selected or ordained and that as a result the Catholic Church lacked any proper head of the Church. Clearly, nothing in federal or state Constitutions cloaks any federal or state judge with such authority to interfere in the internal religious operations of the Catholic Church. Likewise, nothing in the 1936 Hopi Constitution or Ordinance

21 authorized Judge Trujillo to intervene and interfere with Hopi religious and ceremonial ways in the manner his inquiry purported to do. This observation suggests that conceding jurisdiction over completely internal Village governance disputes to the Tribal Courts invariably may result in such unfortunate interference by the Tribal Court with Hopi religious customs and traditions. That fact bolsters this Court's view that the first sentence of Article III, Section 3 exclusively reserves such questions for resolution by the Villages, not the Tribal Courts.

[52] Fifth, as will become more evident in light of the discussion of the last two constitutional questions below, this Court notes that virtually nothing in either the 1936 Constitution nor in the Hopi Codes affords the Hopi Courts any legal standards or guidelines to resolve completely internal Village governance disputes. Consequently, the lack of any meaningful legal standard by which the Hopi Courts can meaningfully resolve completely internal Village governance disputes cautions against recognizing any such subject matter jurisdiction in the Hopi Courts.

[53] This Court recognizes that numerous prior decisions of this Court tangentially have addressed governance questions, not the least of which are the two prior appeals brought by the Village of Mishongnovi Cultural Preservation Board raising precisely the same questions at issues here. *See, Village of Mishongnovi Cultural Preservation Board v. Mishongnovi Board of Directors*, No. 04AP000002 (Hopi Ct. of App. 2004); *Village of Mishongnovi (Cultural Preservation Board) v. Humeystewa*, No. 96AP000008 (Hopi Ct. App. 1998); *see also, Kavena v. Hopi Tribal Court*, No. CV-016-88 (Hopi Ct. App. 1989). Unfortunately, in none of these cases did any of the parties or the Court raise the question of subject matter jurisdiction raised by this Court's first question and, consequently, none of these cases purported to address or resolve the jurisdictional limitation raised by the first sentence of Article III, Section 3 in the 1936 Hopi Constitution. Thus, this Court need not overrule or otherwise disapprove these prior decisions other than to note that in light of the decision rendered in this Opinion and Order, it seems clear, with the benefit of hindsight, that the Hopi Courts, including this Court, may have lacked subject matter jurisdiction over some of these prior decisions, including in particular, the two prior appeals brought by the Village of Mishongnovi Cultural Preservation Board to contest the lawful power of the Village of Mishongnovi Board of Directors.

[54] As a result of this interpretation of the first sentence of Article III, Section 3 of the Hopi Constitution, it is clear that insofar as the Complaint filed by the Village of Mishongnovi Cultural Preservation Board parties sought to assert its legitimacy and contest of the authority of other members of the Village of Mishongnovi, including the Mishongnovi Interim Board of Directors, the Tribal Court lacked subject matter jurisdiction over such aspects of the Complaint. Accordingly, insofar as the Order of the Tribal Court dated June 1, 2012 purported to resolve such governance questions as between the Village parties, it must be vacated for lack of subject matter jurisdiction.

[55] The Plaintiffs' Complaint, however, was not merely brought against other Village parties, including the Village of Mishongnovi Interim Board of Directors, it was also brought against the Hopi Tribe and the Hopi Tribal Council as a consequence of the action of the Tribal Council recognizing the lawful authority of the Village of Mishongnovi Interim Board of Directors and effectively placing it in control of the Village offices, Village properties, including Village funds most of which were supplied by the Hopi Tribe, and Village documents, information, and computers.

[56] While this Court has held that the first sentence of Article III, Section 3 exclusively reserves to the Villages resolution of *completely internal* disputes over Village governance, nothing in that holding indicates that the Tribal Courts cannot entertain actions that implicate Village governance when issues involving the government of the central Hopi Tribe are at issue. Two types of such questions over which the Tribal Court could properly exercise jurisdiction are apparent in this case. First, much of the argument of the Village of Mishongnovi Cultural Preservation Board parties rests on an interpretation of various provisions of the 1936 Hopi Constitution, as amended. Clearly interpreting the provisions of the 1936 Hopi Constitution, as requested by the Village of Mishongnovi Cultural Preservation Board parties, quintessentially involves a function and power that properly rests with the Hopi Courts, including this Court. The mere fact that the interpretation of the Hopi Constitution may indirectly affect internal Village governance does not divest the Hopi Courts of jurisdiction to interpret the Hopi Constitution so long as they stop short of purporting to directly resolve completely internal Village governance disputes. In other words, the Hopi Courts, including this Court, act within their subject matter jurisdiction if they offer their considered judgment on the meaning of the Hopi Constitution in application to the Villages, leaving to the Villages how to incorporate that articulated meaning into their understanding and traditions regarding Village governance. Consequently, this Court's Order of October 25, 2012 expressly recognized this point by requesting supplemental briefing on the question of "when, if at all, can the Tribal Court or this Court entertain disputes as to factual or legal questions involving the structure of Village governance *that go beyond issues surrounding the interpretation of the Hopi Constitution.*" (Emphasis supplied). Thus, even though interpreting the 1936 Hopi Constitution may indirectly affect or impact Village governance, undertaking such interpretation is squarely within the subject matter jurisdiction of the Hopi Courts.

[57] Second, the 1936 Hopi Constitution expressly recognizes that no sovereign Hopi or Tewa Village is a self-contained island. Hopi and Tewa Villages interact with and impact other governments, including the central government of the Hopi Tribe. When Village decisions, including decisions about lawful governing organization, affect others outside the Village, the structure of the 1936 Hopi Constitution recognizes broader authority and power in the Hopi Tribe, including the Hopi Courts. For example, Article VI, Section 1(h) expressly grants the Tribal Council the power "[t]o act as a court to hear and settle claims or disputes between villages in the manner provided in ARTICLE VIII"



and Article VIII details an elaborate procedure for purposes of resolving such inter-Village disputes. Likewise, since Article IV, Section 4 leaves to each Village the manner in which it chooses its Tribal Council Representatives and such Representatives are to be recognized by the Tribal Council only if certified by the Kikmongwi of their respective Village, questions of the form of governance obviously will interact with decisions of the Tribal Council on whether to seat or recognize particular Tribal Council Representatives. The decisions of the Tribal Council on such questions obviously may be affected by their decisions on whether any particular Village currently has a legitimate Kikmongwi or whether the Representative seeking recognition by the Tribal Council was properly selected by a lawful Village government that the Tribal Council acknowledged and recognized. While the Hopi Courts may lack subject matter jurisdiction over completely internal Village governance disputes as a consequence of the language of the first sentence of Article III, Section 3 of the Hopi Constitution, the Hopi Courts clearly would have jurisdiction to entertain challenges to lawfulness of decisions of the Tribal Council in deciding to seat or exclude Tribal Council Representatives even though such cases may indirectly implicate Village governance. In such cases, however, great deference should be given to the political judgment of the Tribal Council as to which Village government it has chosen to recognize.

[58] Likewise since many of the budgetary funds expended by the Hopi Villages historically have been dispersed to them by the Tribal Council from the Tribal treasury, the Tribal Council clearly has an interest in assuring that the Village government expending such allocated Hopi tribal funds constitutes a legitimate and recognized Village government. Reviewing the lawfulness of Tribal, as opposed to Village, decisions on such questions squarely falls within the subject matter of the Hopi Courts even though it may indirectly implicate issues of Village governance.

[59] In hearing cases within their jurisdiction that implicate Village governance, the Hopi Courts nevertheless should be highly sensitive to minimize the extent to which they intrude on the reservation to the Villages of exclusive authority to decide how they are politically organized contained in the first sentence of Article III, Section 3.

[60] In the present case, the Village of Mishongnovi Cultural Preservation Board parties sued not only the Village of Mishongnovi Interim Board of Directors and other Village parties, they also sued the Hopi Tribe and the Hopi Tribal Council, seeking to contest the Tribal Council's decision to recognize and place the Village of Mishongnovi Interim Board of Directors in effective control of the Village of Mishongnovi governance. Temporarily setting aside, solely for purposes of argument, any concerns about tribal sovereign immunity involved in naming these parties (as opposed to the individual Representatives of the Tribal Council),<sup>32</sup> clearly, if properly named (which this

---

32 Since this Court concludes in its analysis below that the Plaintiffs' remaining claims must fail on their merits, it has concluded that addressing the formal sovereign immunity concern regarding the Plaintiffs' decision to name The Hopi Tribe and The Hopi Tribal Council, rather than naming the individual Representatives who comprised the Tribal Council, would not be productive in this Opinion and Order. Additionally, since the Plaintiffs' Complaint failed to name any non-Village defendant as to which the Hopi Tribal Court had any authority to award compensatory damages, the refusal of the Hopi Tribal Court

Court does not concede), the Plaintiffs properly invoked the jurisdiction of the Tribal Court to address the lawfulness of Tribal Council, as opposed to Village, actions.

- C. Plaintiffs' claims that Article III, Section 3 recognizes only the Kikmongwi or his designee as the lawful government of a traditionally organized Village and that the only way to change from a traditional form of government is to successfully invoke the Secretarial election procedures of Article III, Section 4 (with respect to the Hopi Tribal Council's and its officials' actions) are without merit

[61] This Court will address the merits of the claims of the Village of Mishongnovi Cultural Preservation Board parties solely to decide whether the actions of the Hopi Tribal Council recognizing and placing the Village of Mishongnovi Interim Board of Directors in effective control of the Village of Mishongnovi governance were lawful.

1. Interpreting the 1936 Hopi Constitution in application to the Plaintiffs' claims

[62] Reduced to a bare minimum, the entirety of the Plaintiffs' claims against the lawfulness of the Tribal Council action in this case rests on the interpretation of two clauses of the 1936 Hopi Constitution which they believe are inexorably tied together and, which they argue, support their claims. First, the Village of Mishongnovi Cultural Preservation Board parties argue that the provisions of the second sentence of Article III, Section 3, establishes that the Kikmongwi of any Village governed by a traditional form of government is the governing authority of that Village and, accordingly, fully vested with the aboriginal sovereignty of that Village in a fashion not unlike a monarch. That sentence reads "Until a village shall decide to organize in another manner, it shall be considered as being under a traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader." The Village of Mishongnovi Cultural Preservation Board parties argue that this provision recognizes that under the traditional Hopi organization only the Kikmongwi or his designees can be recognized as the lawful government of a traditionally organized Village. In a related argument, the Village of Mishongnovi Cultural Preservation Board parties further argue that any Village that seeks to organize any other form of government or to adopt any written governance documents must successfully invoke the Secretarial election procedure set forth in Article III, Section 4. Thus, the Village of Mishongnovi Cultural Preservation Board parties claim (1) that the second sentence of Article III, Section 3 mandates Kikmongwi governance of traditionally organized Villages and (2) that the Secretarial election procedure set forth in Article 3, Section 4 constitutes the exclusive means by which a Village can exercise its pre-existing Village sovereignty to change its form of government or adopt any written governance documents. Similarly, the Tribal Court appeared by its findings in its June 1, 2012 Order to have adopted the stark dichotomy advanced by the Plaintiffs that Villages are either traditional or non-traditional and that the adoption of any written governing documents, like the Village of Mishongnovi Board of Directors Guidelines adopted in 1988, necessarily meant that the Village was no longer under traditional governance.

---

to grant the Plaintiffs the jury trial they requested was not in error since no jury trial was required if no damages could be awarded.

[63] After considering the briefs and responses to the last two legal questions raised in this Court's Order of October 25, 2012, this Court is of the view that the Plaintiffs' argument and the dichotomy set up by the Tribal Court set up an incorrect set of alternatives based on improper interpretations of Article III, Sections 3 and 4.

2. Article III, Section 3 does not vest Village governance responsibility in the Kikmongwi

[64] Article III, Section 3 of the 1936 Hopi Constitution reads in full:

Each village shall decide for itself how it shall be organized. Until a village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village *shall be recognized as its leader*.

Emphasis supplied. The argument of the Village of Mishongnovi Cultural Preservation Board parties essentially seeks to leverage the Kikmongwi's designated role as "leader" of the Village into a claim of complete governing authority over the Village. Reduced to its most basic proposition, the Plaintiffs' interpretation of Article III, Section 3 is that, so long as a Village is "under traditional Hopi organization," all of the aboriginal sovereignty of the Village remains vested in the Kikmongwi.

[65] This Court finds that it must reject the Plaintiffs' interpretation of Article III, Section 3 since it is inconsistent with the language of that provision, inconsistent with the roles described for Kikmongwi elsewhere in the 1936 Hopi Constitution, as amended, inconsistent with the traditional roles and understandings of the authority of Kikmongwi at the time the Hopi Constitution was adopted in 1936, and inconsistent with the evolving understanding of the authority of Hopi and Tewa Villages to chart their own course when it comes to governing authority. First, the Village of Mishongnovi Cultural Preservation Board parties focus primarily on the last phrase in Article III, Section 3 dealing with the authority of the Kikmongwi as "leader," rather than trying to harmonize all portions of Article III, Section 3 as should be done in proper constitutional interpretation. The section begins with the important principle that "[e]ach village shall decide for itself how it shall be organized." That provision does not expressly provide that the Kikmongwi shall decide how the Village is organized, but, rather, that the Village itself shall make the decision. The notion of Village autonomy in governance organization is reinforced by the beginning of the next sentence which commences "[u]ntil a village shall decide to organize in another manner." Thus, both the first and second sentences of Article III, Section 3 expressly recognize that the retained aboriginal Village sovereignty to decide how the Village is governed is retained by the Village, not the Kikmongwi, after the adoption of the 1936 Hopi Constitution.

[66] Notwithstanding the fact that the Hopi Constitution expressly vests the power over forms of Village governing organization in the Village, not the Kikmongwi, the Plaintiffs' argument that the last portion of Article III, Section 3, by designating the Kikmongwi as the "leader" of traditionally organized Villages, effectively equates the



Kikmongwi with the Village. As set forth below, both the language of the 1936 Hopi Constitution and the evolving history of the role of Kikmongwi both before and after adoption of the Constitution refute this interpretation of the Hopi Constitution.

[67] Second, the consistent roles established by the 1936 Hopi Constitution for Kikmongwi in relationship to the Hopi Tribe reflect the fact that the use of the term “leader” as employed in Article III, Section 3 was limited to the formal spokesman for the Village, what would be called a head of state in international law. In addition to the reference in Article III, Section 3, the other references to Kikmongwi in the 1936 Constitution rather consistently reference the Kikmongwi functioning as spokesperson for the Village – a conduit for communicating or receiving information to or from the Hopi Tribe. Article IV Section 4 of the 1936 Hopi Constitution contains the same dichotomy between the Village and the Kikmongwi, limiting the Kikmongwi to a communicative certifying role. It provides in full:

Each village shall decide for itself how it shall choose its representatives, subject to the provisions of SECTION 5. Representatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages. Certifications may be made in writing or in person.

Thus, under Article IV Section 4, the Village, not the Kikmongwi, selects the method of choosing Representatives to the Tribal Council and the Kikmongwi merely certifies, as official spokesman for the Village, a preexisting decision made by others in the Village. Similar provisions exist in Article IV Section 5. A virtually identical role for the Kikmongwi as the official conduit of information between the Village and the Hopi Tribe is specified in Article VIII, Section 1 of the 1936 Hopi Constitution dealing with the procedures for resolving disputes between Villages. Under the procedures of Article VIII, Tribal Council resolution of such disputes between Villages are initiated by “the Kikmongwi of any village party to the dispute [informing] the Chairman of the Tribal Council of the nature of the dispute . . . .” Similarly, Article VIII, Section 3 specifies that if any village party finds the Tribal Council resolution of the inter-village dispute to be unjust, the Kikmongwi, as spokesperson for the Village, may initiate an appeal by notifying the federal Superintendent of the Hopi Reservation. Finally, when the Hopi Tribe amended the 1936 Hopi Constitution in 1969 to adopt staggered terms for Tribal Council Representatives, the amended version of Article IV, Section 2 designated “the Kikmongwi or Governor” as the official Village party to receive information from the Tribal Council as to which Representatives would serve one year, as opposed to two year, terms in the initial session of the staggered selection of Tribal Council Representatives.

[68] Thus, rather consistently, the structure of the Hopi Constitution separates the Village as a political entity from the Kikmongwi and recognizes that the Kikmongwi primarily plays a spokesman role for the Village, rather than functioning as the lawful government of the Village. While there is little doubt that Hopi Villages long have been to a greater or lesser extent theocracies in the sense that religious authorities played significant roles in the Villages, that fact did not mean that the Kikmongwi constituted the only lawful government of the Village. Rather, Article III, Section 3 expressly provides that “[e]ach village shall decide for itself how it shall be organized” and

expressly recognizes that each “village [may] decide to organize in another manner.” Thus, the Tribal Constitution reaffirms the pre-existing aboriginal sovereignty of each Village and expressly recognizes that each Village may exercise that sovereignty in whatever way they choose to decide how they shall be governmentally organized. Based on comparison of the roles assigned to Kikmongwi elsewhere in the Hopi Constitution, this Court concludes that the reference to the Kikmongwi as a “leader” in Article III, Section 3 recognizes only his role as official spokesman, communicator, or head of state for the Village, not as the repository of the Village sovereignty.

[69] To be clear what this Court means by head of state, this Court offers some analogies, even though it expressly recognizes that the analogies to western forms of governance do not describe entities similar to Hopi Village theocratic traditional organization. Those modern western countries with monarchs, like the United Kingdom, treat their monarch, in the case of Great Britain’s Queen Elizabeth, as their head of state and the embodiment of their national sovereignty even though the monarch may have no direct governing authority because such authority is for all practical purposes vested in their Parliament. Likewise, many Parliamentary democracies, such as Israel, have a President whom they treat as they head of state even though all effective daily governing authority is vested elsewhere, usually in the Parliament, known as the Knesset in the case of Israel, their Prime Minister, and his or her cabinet. While there are many variations on these themes, many western countries separate the role of head of state and formal spokesperson for the nation from the regularly daily governance of the country.

[70] As this Court reads the various roles recognized in the 1936 Hopi Constitution for the Village Kikmongwi, this Court does not interpret or understand those provisions as recognizing any more than a spokesperson or head of state role for the Kikmongwi of the various Hopi and Tewa Villages. Thus, when Article III, Section 3 designates the Kikmongwi of traditionally organized Villages as the “leader” it refers to no more than a spokesperson role and does not purport to allocate to the Kikmongwi the governing authority of the Village, which by the express terms of same provision, is left to the decision of the Village as to how it desires to organize itself.

[71] Finally, the Court also must reject the Plaintiffs’ artificial dichotomy drawn between those Hopi Villages that are traditionally organized and therefore, according to the Plaintiffs, governed by a Kikmongwi and those that had adopted more modern forms of government including written governing documents, like the 1988 Village of Mishongnovi Board of Directors Guidelines. This artificial dichotomy suggests that there are only two forms of Village organization – traditional and modern. The various Friend of Court Briefs filed with this Court in response to this Court’s Order of October 25, 2012 convinces this Court that no such binary dichotomy exists in the way in which Hopi and Tewa Villages can and have exercised their right to decide for themselves how they will be politically organized. There may well be nothing inconsistent with a traditional Village recognizing the leadership and authority of its Kikmongwi as its official spokesperson while adopting written governing documents vesting regular financial management and governance in an elected Board of Directors. To deny such hybrid Village organization and the myriad and different forms that Village governance

has taken, as the Plaintiffs' argument would have this Court do, would be to reject the authority of each Village, expressly recognized in Article III, Section 3, to decide for itself how it should be organized.

[72] Accordingly, as a matter of proper interpretation of the 1936 Hopi Constitution, this Court must reject the claims of the Village of Mishongnovi Cultural Preservation Board parties that Article III, Section 3 establishes the Kikmongwi as the lawful governing authority of any traditionally organized Hopi Village. Rather, that provision merely recognizes the preexisting aboriginal sovereign right of each Village to organize itself as it deems proper and recognizes the authority of the Kikmongwi or his designee as the official spokesperson of the Village, but not as its lawful governing authority. When, as here, a purported Kikmongwi or Traditional Leader, seeks to convert his role as head of the Village into a claim of lawful governing authority he has exceeded any authority expressly recognized in the Hopi Constitution and his claimed power must be substantiated, if at all, by decisions of the Village itself to concede such power to the Kikmongwi, by some governing documents or accepted traditional Village acquiescence well accepted among Village members. Since the Village of Mishongnovi Cultural Preservation Board parties based their claim to lawful governing authority largely on the basis of Article III, Section 3, that claim must be rejected as a matter of law.

[73] Third, not only are the claims of the Village of Mishongnovi Cultural Preservation Board parties inconsistent with the proper interpretation of the 1936 Hopi Constitution, they also appear to be inconsistent with long held understandings of the role of the Kikmongwi both at the time the 1936 Constitution was adopted and now. See for example Mischa Titiev's observations at the Village of Oraibi from 1932:

A general feeling seems to prevail that no other contentions [other than the settlement of land disputes] should be aired before the Village chief. He is regarded as the father of the people, and it is considered highly improper to worry him with petty grievances. On his part too the chief maintains a paternal attitude toward his subjects. His thoughts are always concerned with their welfare, and the people look to him to lead them on a path of good life. To his prayers they attribute the success or failure of their crops, and so great is his responsibility for the health and welfare of his subjects, that no matter how little part he plays in the active business of governing, the cares of the Village chief are by no means light.

....

On the whole, the Village Chief is looked upon rather as a guide and an adviser than an executive; and as an interpreter of Hopi tradition rather than as a legislator. A chief's word is respected and his opinion usually sought on any vital matter, but there is virtually no provision for his active participation in government. No compulsion is brought to bear on those who do not care to consult the chief on matters that do not come directly under his personal supervision, and he lacks the power to enforce such decisions as he may render.

....

The policy of the 'state' is one of nearly complete laissez-faire, and the phrase 'Pi um I' ('It's up to you') may well be the motto of Hopi society." The great emphasis on individual freedom of behavior is checked by a fear of non-conformity.<sup>33</sup>

---

<sup>33</sup> Mischa Titiev, *Old Oraibi, A Study of the Hopi Indians of Third Mesa*, p. 65.



The testimony from the witnesses below similarly characterize the role of the Kikmongwi. See for example, the testimony of Mr. Richard Navenma, an 81 year old elder from Mishongnovi Village and a member of the Rabbit Tobacco clan:

Q. I've heard that the village people view the Kikmongwi as their father and he is -- and they are his children?

A. Yes.

Q. And is that one of the reasons why he must live in the village with his children?

A. He should have lived in the village if he want to be a village leader.<sup>34</sup>

See also, the testimony of Ms. Marilyn Tewa, a member of the Mishongnovi Village and a former elected Representative to the Hopi Tribal Council:

Q. Are you familiar with the role of a Kikmongwi in village government?

A. Yes.

Q. What is that role?

A. Kikmongwi is the highest spiritual leader of the village.

Q. Is his role in the village strictly a spiritual role then?

A. Yes, it is.

Q. Does the Kikmongwi have any role in the political issues that might affect the village?

A. No.

....

Q. Is the selection of a Kikmongwi a highly sensitive one to the village? Let me withdraw that question. Let me ask it maybe a different way. Is it something that the men in the societies take lightly or take for granted?

A. Well, the way -- when I was growing up that position was really something to be really -- you know, a respectful position, because in our society, in our cultural, religion is the most important in our, you know, society, our culture. So that position, whoever is in that position, must be, you know, willing to be open, but humble as well. And that position, whoever the Kikmongwi is, must, ... but he is the leader. He is the leader who is in the front to make sure that all religious functions are carried out in accordance to each religion.<sup>35</sup>

---

<sup>34</sup> Testimony of Mr. Richard Navenma, elder from Mishongnovi Village, Transcript of Proceedings, May 30, 2012, filed as part of the Appellate Record, as part of Appellants' Appendix to Opening Brief, Exhibit 20, pp. 53-54.

<sup>35</sup> Testimony of Ms. Marilyn Tewa, member of the Village of Mishongnovi and former elected representative to the Hopi Tribal Council, Id. at pp. 64, 66-67.

See also, the testimony of Mr. Edward Bahyesva, a member of the Bear Clan of Mishongnovi Village:

... a Kikmongwi's position is not to be in that – in that Council. His only job is to be at the Village to take care of his children, everybody at the Village. He has nothing to do with sitting on the representative's chair.<sup>36</sup>

See also, the testimony of Mr. Howard Dennis, "Masilen Mongwi" (Grey Flute Chief) of Mishongnovi Village:

Q. Now, we've heard discussion about 'Kikmongwi' and 'Village Leader.' Are those two things the same in some sense?

A. Kind of, yeah.

Q. How so, and how are they different?

A. A Kikmongwi, his role is purely ceremonial. His role is to look after the children of the Village – well, all the people are his children, but within a ceremonial – in a ceremonial view, it's not just only the people, but everything within the world, that's his responsibility.

Q. And how would a Village leader be different?

A. I guess you would – a Village leader couldn't be ordained.<sup>37</sup>

It is also significant that Oliver LaFarge, in reflecting in 1937 on what was intended when he drafted the Hopi Constitution in 1936, "ascribed" to the Kikmongwi the limited function of certifying representatives to the Hopi Tribal Council:

At the head stands the Kikmongwi – literally 'Houses-Chief.' All the ceremonial lines lead to him, and he has true authority in the villages, but like the cacique in the pueblos it is not proper for such an individual to be mixed up in ordinary quarrels. Somebody might speak insultingly to him, or he might be forced to perform some violent or unworthy action. In his religious capacity, he must keep away from strife. Therefore he is sheltered, and while he exercises real authority, must be protected from unpleasant contacts. Several well meaning attempts by the Indian Service to give authority to chiefs have failed because they forced them into public activities of a profane nature inconsistent with their religious position. Thus a chief cannot act as judge. Hence the constitution gives the Kikmongwi the controlling authority to certify representatives to the council and new members for adoption, but ascribes to him almost no other specific function.<sup>38</sup>

---

<sup>36</sup> Testimony of Mr. Edward Bahyesva, a member of the Bear Clan from Mishongnovi Village, Id. at pp. 99-100.

<sup>37</sup> Testimony of Mr. Howard Dennis, "Masilen Mongwi" (Grey Flute Chief) of Mishongnovi Village, Id. at p. 107.

<sup>38</sup> Notes for Hopi Administrators (February 1937), p. 7 as part of the LaFarge collection with the Harry Ransom Humanities Research Center at the University of Texas at Austin.

Thus the primary drafter of the Hopi Constitution, Oliver LaFarge, clearly did not believe that committing the certification role to the Kikmongwi would involve them in regular governance which would otherwise have them exercising duties improper to their high religious station. As LaFarge points out, it is not proper for Kikmongwi to be involved in "ordinary quarrels." Historical records, the record in this case, and the experience and understandings of the Hopi members of this Court demonstrate that the Kikmongwi and related religious leaders traditionally controlled and were responsible for the religious and ceremonial life that formed the important center of Village life, but traditionally would not concern themselves with the mundane non-ceremonial aspects of Village finances or governance. Thus, to the extent that Village Kikmongwi have purported to extend their claims of authority and leadership beyond their traditional roles and to intrude into matters of Village finance or governance, they have exceeded any role or responsibility traditionally exercised by them and intruded into matters that under the express terms of the 1936 Hopi Constitution were left exclusively to Village decision.

[74] Thus, the constitutional legal claims of the Village of Mishongnovi Cultural Preservation Board parties that Article III, Section 3 vested the lawful governing authority of traditional Villages in the Kikmongwi or his designees must be rejected as inconsistent with the full language of Article III, Section 3 and the various roles recognized elsewhere in the 1936 Hopi Constitution for the Kikmongwi as merely a formal spokesman or head of state for the Villages without any direct governing authority.

3. The Secretarial Election procedures set forth in Article III, Section 4 do not constitute the exclusive means by which a Village may adopt written governance documents or cease traditional organization

[75] Article III, Section 3 clearly recognizes and reaffirms the pre-existing aboriginal sovereign right of each Village to determine for itself how it is to be organized and further recognizes that the Villages retain a continuing sovereign right to change their form of organization from time to time as they so desire. Nevertheless, while purporting to defend Village sovereignty, the Village of Mishongnovi Cultural Preservation Board parties make the highly ironic argument that Article III, Section 4 somehow significantly limited Village sovereignty by providing an exclusive means by which the Villages could adopt written governance documents and remove themselves from traditional forms of governance. In short, they claim that the 1988 Village of Mishongnovi Board of Directors Guidelines were improperly and invalidly adopted since the Guidelines that established the Mishongnovi Board of Directors were not adopted in conformity with the Secretarial election procedure set forth in Article III, Section 4.

[76] Article III, Section 4 of the Hopi Constitution provides:

Any village which does not possess the traditional Hopi self-government, or which wishes to make a change in that government or add something to it, may adopt a village Constitution in the following manner: A Constitution, consistent with this Constitution and By-laws, shall be drawn up, and made known to all the voting members of such village and a copy shall be given to the Superintendent of the Hopi jurisdiction. Upon the



request of the Kikmongwi of such village or of 25% of the voting members thereof, for an election on such Constitution, the Superintendent shall make sure that all voting members have had ample opportunity to study the proposed Constitution. He shall then call a special meeting of the voting members of such village, for the purpose of voting on the adoption of the proposed Constitution, and shall see that there is a fair vote. If at such referendum, not less than half of the voting members of the village cast their votes, and if a majority of those voting accepts the proposed Constitution, it shall then become the Constitution of that village, and only officials chosen according to its provisions shall be recognized.

The Village Constitution shall clearly say how the Council representatives and other Village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution. Such village Constitution may be amended or abolished in the same manner as provided for its adoption.

[77] The immediate preceding section of the Hopi Constitution had reaffirmed the sovereign right of “[e]ach village shall decide for itself how it shall be organized” and had recognized that the traditional form of Village organization would remain only “[u]ntil a village shall decide to organize in another manner.” Hopi Constitution, Art. III, Sec. 3. That section had not expressly conditioned the exercise of Village sovereignty to choose or change the form of its political organization on either federal approval or oversight. Nevertheless, the Village of Mishongnovi Cultural Preservation Board parties argue that Article III, Section 4 somehow curtailed the Villages' sovereign rights, recognized in Article III, Section 3, by permitting the Villages to adopt formal written governance documents or change their form of political organization only under the oversight of and with the approval of the federal government through the Secretarial election procedure specified in Article III, Section 4.

[78] This Court expressly rejects the interpretation of Article III, Section 4 offered by the Village of Mishongnovi Cultural Preservation Board parties for several reasons. First, the right of each Village to decide for itself how it is politically organized is part of the pre-existing aboriginal sovereignty of each Hopi and Tewa Village, which the Court held in *In the Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, was not curtailed by the adoption in 1936 of the Hopi Constitution, except to the extent expressly and exclusively delegated to the Hopi Tribe. Furthermore, as already noted, Article III, Section 3 expressly reaffirms Village sovereignty to choose its form of political organization and, if necessary, to change it from time to time. Article III, Section 3 does not expressly condition the exercise of such sovereign Village rights on approval or oversight by either the federal government or the Hopi Tribe. Thus, by its express terms the Hopi Constitution in Article III, Section 3 recognizes the sovereign right of each Village to choose or change its form of political organization without interference, oversight, or approval from anyone outside the Village. To interpret Article III, Section 4 as limiting the sovereign rights of the Villages, as suggested by the Village of Mishongnovi Cultural Preservation Board parties, would read a limit onto the sovereign prerogatives of the Villages that does not expressly appear in either the terms of Section 3 or Section 4 of Article III. As this Court pointed out in *In the Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, it should not find a limitation on the sovereign rights of the Hopi and Tewa Villages without some clear and unambiguous statement in the Hopi

Constitution. No such evidence of an intent to curtail the right of the Hopi and Tewa Villages to organize themselves politically however they wish can be found in either Section 3 or 4 of Article III of the Hopi Constitution.

[79] Second, by its express terms, Article III, Section 4 does not expressly purport to curtail Village sovereign prerogatives but offers a choice of one procedure (but not necessarily the only procedure) by which a Village may adopt formal governing documents or relieve itself of a traditional form of government. Specifically, Section 4 provides that “[a]ny village which does not possess the traditional Hopi self-government, or which wishes to make a change in that government or add something to it, *may adopt a village Constitution in the following [prescribed] manner* [by invoking the described Secretarial election procedure].” (Emphasis supplied).

[80] While the Village of Mishongnovi Cultural Preservation Board parties argue without much support that the Secretarial election procedure specified in Article III, Section 4 constitutes the exclusive means by which a Village may adopt written governance documents or change its form of organization away from a traditional form, they do so with very little textual, legal or other support. First, while the Village of Mishongnovi Cultural Preservation Board parties would like Article III, Section 4 to be read as providing a mandatory procedure, the express language of the section is to the contrary. The section offers one, but not the only, mechanism by which a Village may reorganize, adopt written governance documents, or change a traditional form of organization. It expressly says that any Village wishing to make such changes “may” employ this procedure, not that it must do so. The use of the permissive verb “may” to indicate that a Village could invoke the Secretarial procedure constitutes far too slender a reed to predicate a decision that the sovereign Village prerogative recognized in Article III, Section 3 to choose for itself without interference how it would be politically organized had somehow been significantly curtailed - through an exclusive procedure requiring oversight and the administration of an election by the federal government - as the Village of Mishongnovi Cultural Preservation Board parties argue.

[81] In addition to the language of Article III, Section 4, the Village of Mishongnovi Cultural Preservation Board parties rely heavily on this Court decision in *Kavena v. Hopi Indian Tribal Court*, No. Civ.-016-88 (Hopi Ct. of Appeals 1989). In that case a Village had sought to employ the optional Secretarial election procedure of Article III, Section 4 and a dispute emerged as to whether they had garnered the requisite number of signatures to force the holding of the Secretarial election, which in turn depended on what list or source was consulted to determine the number of eligible voters in the Village. This Court held that by failing to consider the Kikmongwi's list of eligible Village members, the federal Superintendent had undercounted the number of signatures necessary to invoke the Secretarial election under Section 4. Accordingly, it enjoined the scheduled election. This Court wrote that the decision to adopt a new form of government is one with “extremely important potential consequences for the village, its members and residents, and the entire Hopi Tribe” and further suggested that it was “essential . . . that the procedures provided by the Hopi Constitution [in Article III, Section 4] be strictly followed” when they are invoked. *Id.* at ¶ 40. This Court reaffirms those sentiments in

*Kavena*. Nevertheless, the opinion in *Kavena* ventured one other view on an issue not then actually before the Court when this Court wrote that the Secretarial election procedures of Article III, Section 4 “provides the only method by which a village which is under the traditional Hopi organization may adopt a different form of government.” *Id.* Since the parties in *Kavena* had not sought to adopt new governance documents through any other means than the Secretarial election procedure of Section 4, the exclusiveness of that procedure was not at issue before this Court, had not been briefed, and was unnecessary to the decision in that case. Furthermore, nothing in the *Kavena* opinion grappled with the thorny question of the relationship of the Hopi Constitution's express re-affirmance of the aboriginal sovereign right of each Village to decide how they are to be organized and to change the form of organization from time to time, which is recognized in Section 3, and the availability of Secretarial election procedure established by Section 4. Thus, this Court regards the last quoted language from *Kavena* suggesting the exclusivity of the Section 4 Secretarial election procedure, the very language extensively relied upon by the Village of Mishongnovi Cultural Preservation Board parties, as ill-considered, off-handed and non-persuasive dicta, which upon further reflection and analysis this Court expressly disapproves and rejects as inaccurate. Since the cavalier language in *Kavena* of which this Court disapproves merely constituted dicta on a tangential question unrelated to the factual holding of the case, nothing contained in this Opinion and Order should affect the value of *Kavena* as precedent beyond the rejection of this dicta as ill-considered and inaccurate.

[82] Third, the 1936 Hopi Constitution was adopted and approved under the procedures established by Section 16 of the federal Indian Reorganization Act of 1934, codified as amended at 25 U.S.C. § 476. While the Indian Reorganization Act of 1934 expressly required a Secretarial election to adopt the Act and approve the Hopi Constitution under Section 16, absolutely nothing in the Indian Reorganization Act of 1934 purported to curtail the preexisting aboriginal sovereign rights of the Hopi and Tewa Villages to organize their Village government in any fashion they choose or to change the form of organization from time to time. The Secretarial election incorporated in Article III, Section 4 constitutes an element of tribal, not federally-mandated law. As this Court pointed out in *In the Matter of Certified Question of Law Regarding Village Authority to Remove Tribal Council Representatives*, it should not lightly interpret tribal law in a fashion that would curtail the preexisting sovereign rights of the Hopi and Tewa Villages that the 1936 Hopi Constitution was adopted in great part to protect. Since the interpretation of Article III, Section 4 of the Hopi Constitution as providing the exclusive means of changing the form of Village organization, as advanced by the Village of Mishongnovi Cultural Preservation Board parties, would significantly curtail the sovereignty, autonomy and right of choice of the Village of Mishongnovi as guaranteed by Article III, Section 3, that interpretation must be rejected.

[83] Thus, this Court expressly rejects both of the legal premises on which the Village of Mishongnovi Cultural Preservation Board parties rest their claims regarding the illegality of the actions of the Hopi Tribe and the Hopi Tribal Council in recognizing and facilitating the governance of the Village of Mishongnovi by the Village of Mishongnovi Interim Board of Directors under the 1988 Village of Mishongnovi Board of Directors



Guidelines. Accordingly, for this reason, as well as the refusal of the Village of Mishongnovi Cultural Preservation Board parties, who as Plaintiffs had the burden of proof, to present any evidence supporting their claim or to otherwise participate in the proceeding, this Court finds that insofar as the Tribal Court granted judgment for the Defendants the Hopi Tribe and the Hopi Tribal Council (the only defendants against whom the Village of Mishongnovi Cultural Preservation Board parties even arguably had a claim within the subject matter jurisdiction of the Hopi Courts), its judgment, but not its reasoning, must be affirmed.

### Conclusion

[84] We hold that under Article I, Article VI, Section 1(g), and Article III, Section 2 of the Hopi Constitution, the Hopi Tribal Council has the power to statutorily delegate broad, but not unlimited, civil subject matter jurisdiction to the Hopi Tribal Court, which it did in Ordinance 21, Sections 1.7.1 and 1.2.5, and in the new Hopi Code, Sections 1.4.4 and 1.2.4. We further hold that the Tribal Court has effectively concurrent jurisdiction over Article III, Section 2 matters, originally reserved to the Villages, where such matters are not exclusively reserved to the Villages, and where the Villages have waived their jurisdiction and/or consented to the exercise of jurisdiction by the Hopi Tribal Court. Where the Tribe's sovereign immunity has been found to have been waived or to be inapplicable, the Tribal Court has jurisdiction to hear and decide the lawfulness of the actions of the Hopi Tribal Council and its officials. We hold that this includes ancillary jurisdiction over questions concerning Village organization and leadership for the narrow purpose of deciding whether the Tribe and/or its officials acted lawfully.

[85] We hold that the Hopi Tribal Court lacks subject matter jurisdiction to hear and decide wholly internal Village governance disputes, including the ultimate resolution of questions about how a Village is organized and/or who a Village's legitimate leaders are, where the power to hear and decide such disputes is exclusive in the Villages and derives from the Villages' pre-existing aboriginal sovereignty, and where such power was reaffirmed in Article III, Section 3 of the Hopi Constitution.

[86] We find that Plaintiffs'/Appellants' claims with respect to the actions of the Hopi Tribal Council and its officials and delegates, under Counts I-VII of their original complaint are still pending. However, we find that certain of their foundational claims are without merit - specifically the claims that Article III, Section 3 recognizes that where a Village is traditionally organized, only the Kikmongwi or his designee can be recognized as the lawful government of a traditionally organized Village; and the claim that any Village that seeks to organize any other form of government or to adopt any written governance documents must successfully invoke the Secretarial election procedures of Article III, Section 4.

[87] We hold that Article III, Section 3 of the Hopi Constitution expressly recognizes that the retained aboriginal Village sovereignty to decide how the Village is governed is retained by the Village, not the Kikmongwi, after the adoption of the 1936 Hopi

Constitution. We further hold that the term “leader” as used in Article III, Section 3, limits the role of the Kikmongwi, in relationship to the Hopi Tribe, to a formal spokesman, communicator, or head of state for the Village, as opposed to the lawful government of the Village.

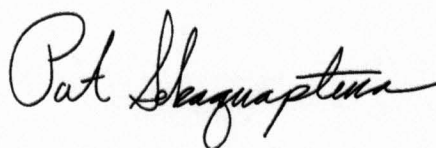
[88] We hold that the Secretarial Election procedures set forth in Article III, Section 4 do not constitute the exclusive means by which a Village may adopt written governance documents or cease traditional organization. We hold that the right of each Village to decide for itself how it is politically organized is part of the pre-existing aboriginal sovereignty of each Hopi and Tewa Village. We hold that Article III, Section 3 expressly reaffirms Village sovereignty to choose or change its form of political organization without oversight or approval from the United States government or the Hopi Tribe. We hold that Article III, Section 4 cannot be read to curtail Village sovereign prerogatives but offers a choice of one procedure by which a Village may adopt formal governing documents or to change from the traditional form of government.

#### Order of the Court

[89] Insofar as the Order of the Tribal Court dated June 1, 2012 purported to resolve governance questions as between the Village parties, it must be vacated for lack of subject matter jurisdiction.

[90] Insofar as the Tribal Court granted judgment for the Defendants the Hopi Tribe and the Hopi Tribal Council (the only defendants against whom the Village of Mishongnovi Cultural Preservation Board parties even arguably had a claim within the subject matter jurisdiction of the Hopi Courts), its judgment, but not its reasoning, must be affirmed.

Entered this 10th day of September, 2013, on behalf of the entire panel,



---

Patricia Sekaquaptewa  
Justice

I hereby certify that copies of the foregoing were mailed and emailed to:

Attorney for Plaintiffs

Erin Byrnes, 4600 East Washington St., Suite 300, Phoenix AZ 85034  
[ebyrnes@udalllaw.com](mailto:ebyrnes@udalllaw.com)

Robert Fillerup, 1107 S Orem Blvd, Orem UT 84058  
[rcf@code-co.com](mailto:rcf@code-co.com)

Attorney for Hopi Tribal Respondents

Martin Clare, 101 N First Ave, Suite 2500, Phoenix AZ 85003-0001  
[mclare@cycn-phx.com](mailto:mclare@cycn-phx.com)

Attorney for Board of Directors Respondents

Kevin B Sweeney, 886 N Cofco Center Ct, #1101, Phoenix AZ 85008  
[kevin.sweeney@cox.net](mailto:kevin.sweeney@cox.net)

by Carol Ovah on 09/16/2013