JAN - 9 2018

IN THE HUALAPAI NATION COURT OF APPEALS

HUALAPAI RESERVATION, ARIZONA

ROBERT BRAVO, JR. Hualapai Tribal Member, ROBERT BRAVO ENTERPRISES LLC, Appellants v. HUALAPAI TRIBE, HUALAPAI TRIBAL COUNCIL, et al. and INDIVIDUALLY, and GRAND CANYON RESORT CORPORATION, HUALAPAI TRIBE, GCRC BOARD OF DIRECTORS, et al. and INDIVIDUALLY, Appellees	App. Court Case No.: 2017-AP-009 Tribal Court Case No.: 2017-AP-001 **OPINION AND ORDER**

Before Justices Patty Ferguson-Bohnee, Robert N. Clinton, and Wes Williams, Jr.

Opinion by Justice FERGUSON-BOHNEE

Appellant Robert E. Bravo, Jr. [hereafter "Bravo"] is appealing a decision of the Tribal Court, dated March 30, 2017, dismissing his action for injunctive relief against the Hualapai Tribe [hereinafter "Tribe"], Hualapai Tribal Council[1] [hereafter "the Council"], and the Grand Canyon Resort Corporation [hereafter "GCRC"].

Bravo's original Emergency Application for Temporary Injunctive Relief, filed on January 5, 2017, alleged that the Appellees refused to fully hear his proposal to manage a proposed zip line development at the Grand Canyon. After being denied both an opportunity to present his proposal before the GCRC and the ultimate development contract, Bravo filed a complaint pursuant to Hualapai's Tribal Employment Rights Ordinance [hereafter "TERO"]. He

[1] Bravo named as defendants only the Tribe, Council and GCRC, but also included a notation which seemingly indicated his intention to also sue each individual member of the named institutions. The court notes that suing entities with the notation "and individually" is not sufficient to name individual Tribal Council members or corporate directors as defendants to a suit, and encourages future litigants to name individual defendants. *See Wescogame v. Alvirez*, 2017-AP-0001 at page 10 (Hualapai Ct. App. 2017) (requiring plaintiffs to, among other things, name individual tribal officials to defeat a claim of sovereign immunity).

also tried to circulate a petition that would have allowed him to challenge Appellees' decisions through a referendum or initiative process, as provided for in Article XIII of the Hualapai Constitution. Bravo alleges that his TERO complaint was repeatedly rejected, and that his attempts to obtain an official petition form were frustrated by Tribal Secretary Christine Lee [hereafter "Lee"] and Tribal Chairman Damon Clarke [hereafter "Clarke"]. Bravo argues that these refusals violated his rights under TERO and under the due process clause of the Hualapai Constitution, *see* Article IX(d). In his Amended Emergency Application for Temporary Injunctive Relief, filed on March 8, 2017, Bravo also contended that by moving forward with the zip line development project, Appellees exceeded their constitutional authority under Articles V(n) and XI, section 4 of the Hualapai Constitution, which require substantial developments of tribal natural resources to be approved by election.

A Judge Pro Tem was assigned to the case, and ordered a Status Conference on February 10, 2017, to clarify Bravo's initial *pro se* pleadings and to compel Appellees' response. On February 24, 2017, Appellees filed a Motion to Dismiss for Lack of Jurisdiction. Appellees Council and Tribe filed a joint motion to dismiss based on sovereign immunity under Article XVI Section 1 of the Hualapai Constitution, which states,

> [T]he Tribe is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity, or as otherwise provided by this Constitution. No tribal employee or Tribal Council member acting within the scope of his duties or authority is subject to suit.

GCRC also filed a Motion to Dismiss arguing that because it is a corporation wholly owned and operated by the Council, that it is a tribal entity equally entitled to the protections of the Tribe's sovereign immunity. Bravo, now represented by counsel, filed a written reply to the motion to dismiss on March 9, 2017. His response challenged Appellees' invocation of sovereign immunity.

The Tribal Court granted the motion to dismiss on March 30, 2017, addressing only the question of jurisdiction. The Tribal Court's brief opinion dismissed Bravo's claims with prejudice on the basis of the Tribe's sovereign immunity, finding that the challenged actions of the Council and GCRC were "wholly legislative" official actions and thus entitled to protection

from suit. The opinion did not address Bravo's individual claims, and instead dismissed all of them under the same broad sovereign immunity analysis.[2]

Bravo filed a timely Notice of Appeal, raising only his constitutional claims.[3] Following the submission of briefs, this Court held oral argument on October 6, 2017. On November 27, GCRC filed a Motion to Dismiss for Mootness, or in the alternative, Motion to Dismiss Appellants' Constitutional Art. XI, § 4 Claim. Appellant Bravo did not file a responsive pleading. According to the Motion to Dismiss for Mootness and supporting documents, the zip line facility was completed on November 17, 2017.

While this Court is limited in the ability to grant relief to Appellant Bravo, the case is not moot where the actions are capable of repetition, yet evading review. Therefore, this Court now concludes that while Bravo's Article XIII claims were properly dismissed, Bravo nevertheless successfully stated a claim against Appellees under Article XI, section 4 of the Hualapai Constitution, which explicitly provides an exception to the Tribe's sovereign immunity.

DISCUSSION

1. Mootness

The first issue to decide is whether the completion of the zip line renders this case moot. Article VI, Section 2 of the Hualapai Constitution provides that the judiciary shall "exercise jurisdiction over all cases and controversies within the jurisdiction of the Tribe." The cases and controversies provision in the Hualapai Constitution mirrors Article III of the United States Constitution. Ordinarily, an appeal in which the court's decision will not affect the rights of the parties is beyond the power of the Court to decide. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (holding that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated). The U.S. Supreme Court has adopted exceptions to this limitation, and this Court deems it appropriate to consider exceptions as well.

The most notable exception to mootness is the "capable of repetition, yet evading review" exception. *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). In

---

[2] Because the appropriateness of barring Bravo's suit due to sovereign immunity creates a question of law, this Court reviews the Tribal Court's decision *de novo*. Hualapai Rules of Appellate Procedure, Rule 2(a)(ii).

[3] Although Bravo initially made claims regarding the Tribe's treatment of his TERO complaint, those claims were not presented to this Court because Bravo did not raise them in his Notice of Appeal.

Roe v. Wade, 410 U.S. 113 (1973), Roe challenged a Texas law forbidding abortion. The state argued that the case was moot because plaintiff Roe was no longer pregnant by the time the case was heard. The Court found that the 9-month gestation period "is so short that the pregnancy will come to term before the usual appellate process is complete." Because of this, the Court found that the law should not be so rigid as to dismiss claims because the litigation and appellate timeframe would render the case moot. In *Roe v. Wade*, the Supreme Court held that the conclusion of a pregnancy did not moot a challenge to a statute prohibiting abortions without any showing that the plaintiff was likely to suffer another unwanted pregnancy. *Id.* at 124.

To overcome mootness, this Court adopts an exception of capable of repetition, yet evading review. Conduct is capable of repetition but evading review when (1) the duration of the challenged action is too short to be litigated fully before the cessation or expiration of the challenged conduct, and (2) it is reasonably expected that the matter will arise again in the future. Determining whether this exception applies therefore requires an assessment of the probability of repetition or recurrence, the risk that repeated harm will be of sufficiently short duration so as to evade review and remedy, and the extent to which repetition may affect the parties.

Here, the timeframe for the litigation process is slower than the construction process. Appellant challenged the constitutionality of a tourism zip line project in the Grand Canyon. According to the Motion to Dismiss, the agreement to build the zip line project was entered into in March, the access road was constructed in April, the construction permit was issued in June, the building permit was issued in August, construction began in September, the foundation for the project was complete in October, and construction was complete in November. The construction project for the zip line is shorter than the gestation period for a normal pregnancy.

"There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues" in this case. *Norman v. Reed*, 502 U.S. 279, 288 (1992) (finding that an action involving a challenge to the statutory requirements for a political party to gain a place on the ballot would be considered even though the election had been concluded); *see also S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911) (finding that the case was not moot where a challenged ICC order had expired); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (finding case was not moot where petitioners sought to be certified as candidates in an election that had already been held). Appellees are likely to act contrary to the rights asserted by Bravo in the future. Therefore, although this Court

is limited in its ability to issue relief for Bravo, this case is not moot as to the issues presented in this matter.

2. Article XIII

Bravo alleges that Appellees violated Article XIII of the Hualapai Constitution, which outlines the procedures for a referendum and initiative process.

> Upon petition of at least twenty-five percent of the eligible voters of the Tribe . . . any enacted or proposed ordinance, resolution, or other official action of the Tribal Council shall by submitted by the Tribal Council to popular initiative or referendum . . . Official petition forms shall be issued by the Tribal Secretary and shall be circulated and completed within one-hundred-twenty days of the date of issuance.

Bravo claims that Lee did not issue the official petition form, despite his requests. He alleges that both Lee and Clarke instead responded to his request with letters stating that they could not issue a petition form because they were "unable to certify" his petition. Bravo claims that both Clarke and Lee frustrated his efforts to obtain the referendum petition form he requested, and therefore violated his constitutional rights under Article XIII.

The Tribal Court dismissed Bravo's Article XIII claims based on Appellees' sovereign immunity. After Bravo's papers were filed for this appeal, we decided *Wescogame v. Alvirez*, holding that "sovereign immunity is not a bar to suit in the Tribal Constitution when the action is brought to enforce provisions of Article IX of the Hualapai Constitution (the Hualapai Bill of Rights)." *Wescogame v. Alvirez*, 2017-AP-0001 at page 3 (Hualapai Ct. App. 2017).

In *Wescogame*, the plaintiffs alleged that tribal officials wrongfully revoked Angelique Jackson's First Attendant to Little Miss Hualapai title, and that the allegedly inadequate grievance processes they subsequently provided violated Jackson's due process rights. The defendants argued that the Tribe's sovereign immunity should bar the suit. We found that the purpose of the Hualapai Bill of Rights "is to stop the Tribe and its officials from using their coercive power to treat individuals unfairly." *Id.* at 9. Accordingly, we held that

> [t]ribal officials will be deemed to have lost their official capacity when they are alleged to have acted to deny rights protected under the Hualapai Bill of Rights, and they are sued solely for injunctive relief. Under those circumstances the Hualapai courts will have jurisdiction to proceed to determine whether the plaintiff has in fact been denied such rights.

Id. at 10. Therefore, *Wescogame* establishes three basic criteria for plaintiffs seeking to overcome the Hualapai Tribe's sovereign immunity: (1) the plaintiff must identify a violation of constitutional rights, as enumerated in the Hualapai Bill of Rights; (2) the plaintiff must sue the tribal official alleged to have committed the violation; and (3) the plaintiff must seek only injunctive relief.

Bravo's Article XIII claim meets two of the three criteria outlined in *Wescogame*: he alleged a constitutional violation under Article XIII and sought injunctive relief for his claim. Bravo claims that both Lee and Clarke frustrated his efforts to receive a referendum petition form. Lee has a non-discretionary constitutional duty under Article XIII to issue petition forms when requested, and Bravo claims that she failed to issue a petition form upon his request. Bravo, however, did not individually name a tribal official—specifically, he failed to name Lee—which means that his Article XIII claim must fail under the *Wescogame* sovereign immunity standard. Accordingly, the Court dismisses Bravo's Article XIII claims.

Even if Bravo had named a proper defendant, however, he has not raised a claim under Article XIII because the petition for referendum he proposed was invalid.[4] Bravo's proposed petition text stated that voters would be approving "a zip line by Robert Bravo Enterprises LLC to manage and operate and Bonsai to construct and maintain the zip line" under specified conditions. Approving a zip line is not, on its face, an "enacted or proposed ordinance, resolution, or other official action of the Tribal Council" as Article XIII requires. Bravo did not refer to any of the Council's official actions in his proposed petition, and therefore did not propose a valid question for referendum. We agree with the decisions from other tribal and state jurisdictions holding that official actions in the context of referenda must be final and permanent, rather than temporary or intermediary. *See, e.g.*, Mashantucket *Pequot Tribal Nation v. McKeon*, No. MPTC-CV-GC-2008-127 (Mashantucket Pequot 07/09/2008) (holding a referendum petition invalid where the Council had not taken any specific budgetary action and was "still deciding what—if any—specific action to take" at the time the petition was filed); *State ex rel. Becker v.*

---

[4] This distinction is especially important considering Bravo's reference during oral argument to *Vaughn & Hunter v. Hualapai Tribal Election Board*, 2013-AP-003 (Hualapai Ct. App. 2013) (reversing the Tribal Court's improper invalidation of a recall election). Bravo correctly stated that he was entitled to a petition form issued by the Tribal Secretary, regardless of the content of his petition. He cited *Vaughn* as authority for this proposition, likely referring to our holding that "[n]either the merits of the specific reasons for recall, nor the merits of the response are to be decided by the Election Board. These matters are left to the voters." *Id.* at 5.

Common Council of City of Milwaukee, 101 Wis. 2d 680 (Ct. App. 1981) (affirming that "no confidence" resolution could not be referred to the electorate because the resolution was temporary in effect and operation).

Bravo references an August 2016 council motion in his pleadings; this motion was neither permanent nor final because it required additional review by attorneys representing GCRC before the Council could even decide whether to permanently award the contract to Bravo. Moreover, the motion does not actually bind the Tribal Council to award the contract to Bravo. The Council motion Bravo refers to is not an official action subject to referendum, and thus Bravo's proposed petition is invalid.[5]

3. Article XI, Section 4

Bravo also argues that the Council exceeded its constitutional authority by commencing development of the zip line without first putting the project to a vote, as required by Article XI, section 4 of the Hualapai Constitution. Article XI, section 4 prohibits the Council from "develop[ing] on a commercial or industrial basis any natural resources of the Tribe without the consent of the majority of the total number of eligible votes of the Tribe," if the cost of the proposed development exceeds fifty thousand dollars. Crucially, the provision also creates an exception to sovereign immunity, explicitly stating that "[a]ny tribal member may enforce this section in Tribal Court." During oral argument of this appeal, the parties agreed that the cost of the zip line project exceeds fifty thousand dollars.

Appellant Tribe argues that the Grand Canyon Resort Corporation is not the Tribal Council, and therefore is not subject to the limitations in Article XI, section 4. However, Appellant GCRC filed a response to the Notice of Appeal acknowledging that that it is "a wholly-owned economic enterprise of the Hualapai Indian Tribe." In that pleading, GCRC moved to dismiss the appeal arguing that GCRC enjoys sovereign immunity from suit as a subordinate entity of the Tribe created to carry out its business activities. This is similar to the claims GCRC made to the lower court. The Tribe cannot evade the limitations of Article XI by delegating its authority to a development corporation that itself is an arm of the Tribe.

---

[5] Although Bravo was not requesting a petition for initiative, we note that under federal law, initiatives cannot be used to award a contract because impairing a party's contractual rights violates the contracts clause. *See, e.g., City of Middletown v. Ferguson*, 495 N.E.2d 380 (Ohio 1986).

Thus, the sole remaining question is whether the project constitutes development of the "natural resources of the Tribe." We agree with Bravo that development of a zip line at the Grand Canyon constitutes a development of natural resources, and is therefore subject to the electoral process mandated by Article XI, section 4.

Appellees claim that the proposed zip line develops *land*, not natural resources, and therefore does not require a vote of tribal members. To support this argument, Appellees' turn to the text of the Hualapai Constitution, claiming that its provisions draw a clear distinction between the two types of development. However, close examination of the text reveals that the Hualapai Constitution does not clearly define the distinction between "land" and "natural resources." On one hand, the text of the Constitution implies that "land" and "natural resources" are different terms with distinct meanings. *See* Preamble (adopting the Constitution to "protect our land and natural resources"); Article V(n) ("all sales or exchanges of tribal lands, natural resources, or other tribal assets"). On the other hand, the Hualapai Constitution also seems to treat "land" and "natural resources" as overlapping categories. *See* Article XI, section 3 (compelling a comprehensive land use ordinance to include "natural resources management"); Article XI, section 4 (natural resource development restrictions organized under an Article titled "Land"). Thus, the Hualapai Constitution presents, at best, a muddled view of whether "land" and "natural resources" are distinct classifications. This inconsistency in the use of terms creates potential difficulties in interpreting and applying Article XI, section 4. "Land" is itself a broad term that encompasses many types of resources. Land can take many topographic forms, from mountainous canyons to low valleys, and it can be used for a wide variety of diverse purposes depending upon its location, composition, and social or cultural history. Land also can include mineral resources buried within the land as well as timber or other resources growing on the land. This Court recognizes that there may sometimes be important practical reasons for Indian nations to treat the surface development of land separately from other types of natural resources, such as the desire to incentivize housing and commercial development without risking overutilization of specific resources such as water and wildlife. Nevertheless, development of surface resources sometimes adversely impacts other natural resources of the Tribe, such as timber, water, or cultural food sources. If the drafters of the Hualapai Constitution indeed intended to strike some kind of balance through their treatment of the terms "land" and "natural resources," as argued by the Appellees, that balance is less than clearly stated in Article XI.

Nevertheless, this Court need not resolve the question of whether Article XI draws the distinction advanced by the Appellees since it is clear to this Court that there is no more precious natural resource for the Hualapai Tribe than the Grand Canyon, the development of which is the issue in this case.

Given these problems and considerations, it is conceivable that situations may arise in which it is difficult to draw the line between "land" and "natural resources." We are not presented with such a case here. Black's Law Dictionary defines "natural resources" to include "[e]nvironmental features that serve a community's well-being or recreational interests, such as parks." The Grand Canyon easily fits this description.

The Grand Canyon is not just a piece of land. It is a unique natural phenomenon, an amalgamation of natural resources which combine to form a globally-recognized natural wonder of the world. National Park Service, *Grand Canyon: Natural Features & Ecosystems*, https://www.nps.gov/grca/learn/nature/naturalfeaturesandecosystems.htm ("The Grand Canyon is considered one of the natural wonders of the world because of its natural features."). Within the Hualapai Nation, the characterization of the Grand Canyon as a discrete natural resource is perhaps even more important. The Grand Canyon is among the largest and most recognizable resources of the Hualapai Nation. On a tribal land base scarce in important natural resources such as water and arable land, the Grand Canyon assumes special prominence. *See* Testimony of Hualapai Tribal Chairman Damon Clarke before the Senate Indian Affairs Committee, Sept. 14, 2006 ("The Hualapai Reservation does not have the natural resources to permit agriculture, timber or mineral development, but its virtually unique location on the Grand Canyon gives it a strong basis to create a self-sustaining tourism-based economy.").

Additionally, it is undisputed that the Grand Canyon is an important cultural resource for the Hualapai Nation. *See* Hualapai Tribal Council Res. No 67-2009, ("The Hualapai Tribe considers the entire Grand Canyon from rim to rim to be a culturally significant landscape which includes hundreds of particular places that hold religious and cultural significance.") Customarily, the Hualapai Tribe may not recognize a clean division between cultural and natural resources; "[f]or the Hualapai people, culture and nature are inextricably linked." *Kinship to the Canyon: Hualapai Tek in the Grand Canyon*, Bennett Wakayuta and Carrie Calisay Cannon, Department of Cultural Resources at the Hualapai Tribe, Presentation at the Bureau of Land Reclamation, Jan. 26–27, 2016. Given the great natural, practical, and cultural importance of the

Grand Canyon to the Hualapai Nation, we believe that the drafters of the Hualapai Constitution likely intended for any attempts to substantially develop this important natural resource to be covered by Article XI, section 4.

Because we have determined that the Grand Canyon is a natural resource under Article XI, section 4, we decline to further address the land and natural resource distinction at this time. Accordingly, any commercial development of the Grand Canyon by the Tribe or any of its corporations involving more than fifty thousand dollars is subject to a vote as required by Article XI, section 4 of the Hualapai Constitution.

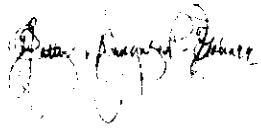
CONCLUSION

Bravo's Article XIII claims were properly dismissed. This Court concludes, however, that Bravo successfully stated a claim under Article XI, section 4 of the Hualapai Constitution to enjoin Appellees from commencing development of a zip line at the Grand Canyon without first submitting the proposed development to an election. Because Article XI, section 4 explicitly provides an exception to the Tribe's sovereign immunity, the Tribal Court erred in dismissing this claim based solely on Appellees' sovereign immunity. Although there need not be a determination if all lands on the Hualapai Reservation is a natural resource, the Grand Canyon is a natural resource. The Constitution sets forth protections of natural resources that must be followed before commercial development will be allowed.

Accordingly, the decision of the Tribal Court dismissing Bravo's petition with prejudice is REVERSED IN PART and AFFIRMED IN PART. This matter will not be remanded because the zip line project is complete and relief cannot be granted as to Bravo's claims. All projects involving the commercial development of the Grand Canyon are subject to a vote if the project meets the monetary requirements of Article XI, section 4 of the Hualapai Constitution.

IT IS SO ORDERED.

Entered this 9th day of January, 2018
BY:



Justice Patty Ferguson-Bohnee