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CHOCTAW SUPREME COURT
BY: Carol S. Roth
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IN THE SUPREME COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

Mississippi Band of Choctaw Indians, Philip Martin, Chief, and Choctaw Resort Development Enterprise Petitioners/Appellants	)	No. CS 2001-10
v.	)	MEMORANDUM OPINION
Melba Smith, Nancy Joe, and Cindy Bell Respondents/Appellees	)	

Before Chief Justice Vaughn and Associate Justices Vicenti and Pommersheim.
Associate Justice Pommersheim for a Unanimous Court

I. Introduction

This case involves "exigent circumstances which give rise to (an) emergency."[1] The emergency involves several critical questions of Choctaw Constitutional and statutory authority, which arise in circumstances that pose substantial financial risks to the Mississippi Band of Choctaw Indians (hereinafter the Tribe). To be precise, the Tribe acting through the Tribal Council has authorized the building and construction of a new casino to be known as the Golden Moon. Ground has already been broken and construction of the casino has begun. The financial cost of the project is estimated to be in the neighborhood of 250 million dollars. Approximately

[1] Appellant's memorandum in support of Petition for Extraordinary Review of Controlling Questions of Choctaw Constitutional and Statutory Law at 1.

150 million dollars of the project is to be authorized through the sale of (tribal) bonds. The bond financing was specifically authorized by Tribal Council Resolutions 01-035 and 01-036 which were passed on December 8, 2000 and finalized in Resolution 01-071 which was passed by the Tribal Council on February 28, 2001. The sale of the bonds was due to commence on April 21, 2001 unless there was some legal impediment to their sale.[2]

There has already been a referendum challenge to the Golden Moon project. A Tribal wide referendum was held on March 7, 2000 and the referendum to halt the project was defeated soundly by a vote of 1,086 to 722. In addition, the original decision of the Tribal Council to finance part of the Golden moon project through the sale of Tribal bonds was authorized in Tribal Council Resolutions 01-035 and 01-036 that were passed on December 8, 2000. Neither of these Resolutions were challenged through the referendum process.

On or about March 14, 2001, the Respondents/Appellees filed a petition for a referendum vote on Tribal Resolution 01-071.[3] In accordance with Sec. 3 of Art XI of the Constitution of the Mississippi Band of Choctaw Indians[4] and Ordinance 47 of the Tribe,[5] this

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[2] A pending referendum challenge would automatically trigger the economically harmful "special bond redemption" provision of the Golden Moon Casino financing plan. *Id.* at 8-10

[3] Tribal Resolution 01-071 provided final approval of a $150 million dollar bond package which had been expressly authorized by the Tribal Council on December 8, 2000 in Resolutions 01-035 and 01-036. Subsequently, Respondents/Appellees filed referendum petitions challenging Resolution 01-087 (letter filed April 5, 2001) and Resolution 01-088 (letter filed April 11, 2001). Resolution 01-087 authorizes restructuring of financing to buy out the management contact of Boyd Mississippi, Inc., holder of the original Silver Star Casino and Hotel management contract. Resolution 01-088 authorizes specific timing and redemption procedures relative to the bond financing.

[4] Art. XI of the Tribal Constitution reads in its entirety:

Sec. 1. The members of the tribe reserve to themselves the power to propose ordinances and resolution and to enact or reject the same at the polls independent of the tribal council, but subject to approval of the Secretary of the Interior as required by this constitution and bylaws. The members of the tribe also reserve power at their own option to approve or reject at the polls any act of the tribal council.

Sec. 2. The first power reserved by the members of the tribe is the initiative. Thirty percent (30%) of the registered voters shall have the right by petition to propose amendments to this constitution and bylaws and to propose ordinances and resolutions.

The second power is the referendum which shall be ordered upon a petition signed by thirty percent (30%) of the registered voters.

Sec. 3. Upon receipt of a request for an election in the form of an initiative or referendum petition, the tribal chief shall, after ascertaining that a sufficient number of registered voters have signed, cause to be held an election on the question or issue within sixty (60) days of receipt of said petition; provided, however, that an election on a constitutional amendment must be called by the Secretary of the Interior as provided in Article XIII. Thirty percent (30%) of the registered voters shall constitute a sufficient number of voters under this section.

Sec. 4. Any measures referred to the tribe by the initiative or by the referendum shall take effect and be in force when approval by a majority of the votes cast in such election in which at least forty percent (40%) of the registered voters have voted, except that measures requiring approval of the Secretary of the Interior shall not be effective until approved by him.

Sec. 5. All measures referred to the tribe for approval or disapproval by election shall begin with the words; "Be It Enacted by the Members of the Mississippi Band of Choctaw Indians."

Sec. 6. Referendum or initiative petitions filed under Article XI must be submitted under a cover letter signed by at least three (3) sponsors who are members of the tribe and who are registered to vote in tribal elections. Said cover letter must be signed by the sponsors in the presence of a registered notary public and said petitions must be filed in accordance with a procedure to be established by the tribal council.

[5] Ordinance 47 states in relevant part:

SECTION 1. (a) Pursuant to Article XI, Section 6, of the Constitution of the Mississippi Band of Choctaw Indians, the Tribal Council hereby establishes the following procedures to be employed in the handling of initiatives or referendums contemplated by said Article. A 'referendum" is any proposed measure which, if approved, would have the effect of rejecting, superseding, amending, modifying or revoking any prior ordinance or resolution enacted by the Tribal Council, or any action taken on behalf of or in the name of the Mississippi Band of Choctaw Indians or the Tribal Council pursuant to any such ordinance or resolution. An "initiative" is any proposal by members of the Tribe to adopt an ordinance or resolution, except for an ordinance or resolution that would amend or change a prior resolution or ordinance. A "constitutional initiative" means any initiative measure which, if approved, would have the effect of amending or modifying the Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians in Accordance with Articles XI and XIII of such Revised Constitution and Bylaws.

(b) If any qualified electors of the Mississippi Band of Choctaw Indians desire to propose a referendum or initiative, they shall first file with the Tribal Chief, or the Tribal official designated by the Chief to act for him in his absence, in the form of a cover letter an application for a petition for the proposed referendum or initiative, accompanied by an affidavit that the sponsors are qualified electors of the Mississippi Band of Choctaw Indians. At least three (3) qualified sponsors shall be required to sign any such application letter in the presence of a registered notary public.

(c) The application letter shall include (1) a short and plain statement of the referendum measure proposed

Petition was filed with Tribal Chief, Philip Martin. Chief Martin - in consultation with legal counsel - did not forward the referendum petition to the Election Committee as Ordinance 47 directs, but instead informed the three Respondents in writing that he believed that their petition for a referendum was 'unconstitutional'.

Immediately thereafter, on March 28, 2001 the Petitioners/Appellants filed *simultaneous* actions in both the Tribal Trial Court and this Supreme Court. This Court took no immediate action. Meanwhile, on April 2, 2001, the Trial Court pursuant to a motion by the Petitioners 'certified' four questions[6] for immediate review by the Supreme Court. This Court promptly

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and (2) a good faith estimate of the amount and source of revenue required to implement the initiative or referendum measure, should it be enacted, or, if the initiative or referendum measure would require a reduction in any source of tribal revenue, or a reallocation of funding from currently funded programs, a description of the program or programs whose funding must be reduced or eliminated if the proposed initiative or referendum is approved. In addition, sponsors must attach to the application letter for a petition for an initiative the full text of the proposed ordinance or resolution, and applications for a petition for a constitutional initiative must also contain the full text of all sections of the Revised Constitution as then currently in force and reflecting the text of the proposed amendments.

SECTION 2. The application for a petition for a proposed referendum must be filed with the Tribal Chief, or with the Tribal official designated by the Chief to act for him in his absence, not more than fourteen (14) working days following the date of enactment by the Tribal Council of the ordinance or resolution sought to be affected or from the effective date of this ordinance, whichever is later. The application for a petition for a proposed initiative measure may be filed with the Tribal Chief at any time.

SECTION 3. Upon receipt of any letter of application for a petition for referendum or initiative, the Tribal Chief, or his designated representative, shall date stamp the application letter showing the date received and shall promptly transmit it to the Tribal Election Committee and give written notice thereof to the persons filing the application. The Tribal Election Committee shall promptly examine the application and determine whether it conforms to the Constitution and these procedures. If the application is deficient in any respect, it shall be promptly rejected and returned to the sponsors by certified mail, return receipt requested, without prejudice. The sponsors shall have three (3) days from their receipt of a rejected application for a referendum within which to amend their application or file a new application. There is no time limitation applicable to submittal of new or amended applications for an initiative.

[6] These questions are:

1. Whether the referendum procedure of Article XI - Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians may be used to challenge all Resolutions of the Choctaw Tribal Council or only those which constitute legislative actions of the Council.

issued its own order on April 4, 2001. That order requested the Respondents/Appellees to submit their brief by April 13, 2001. Oral argument was heard on April 14, 2001.[7] Appellants were represented by Bryant Rogers, Esq. and Appellees by Melba Smith acting *pro se* for herself and the two other Appellees.

On April 19, 2001, this Court issued its order (attached hereto as Appendix 1) in this matter and ruled in favor of the Appellants. The order stated that the particular referendum at issue in case was constitutionally flawed and could not proceed.[8] The order indicated that a full opinion would follow. This is that opinion.

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2. Whether the referendum procedure of Article XI - Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians may be used to challenge all Resolutions of the Choctaw Tribal Council which merely implement or carry out prior legislative judgments of the Council to undertake a particular project which were either not challenged pursuant to Article XI or were upheld by referendum vote of the community in a previous referendum on the same project.

3. Whether the actions reflected in Choctaw Tribal Council Resolution CHO 01-071 (adopted February 28, 2001) or CHO 01-087 (adopted March 19, 2001) or CHO 01-088 (adopted March 22, 2001) constitute legislative actions which are subject to referendum challenge under Article XI, or constitute administrative actions which are not subject to referendum challenge under Article XI.

4. Whether, if the said Resolutions are determined not to be subject to challenge through an Article XI referendum, Plaintiff Martin may lawfully decline to forward to the Choctaw Election Committee Respondents' sponsorship letter seeking to initiate referendum challenges to those Resolutions, or any of them, under Ordinance No. 47 or Article XI.

[7] At oral argument, Respondents/Appellees also filed a motion to recuse Petitioners/Appellants' counsel, C. Bryant Roger or any member of his firm of Roth, Van Amberg, Rogers, Ortiz, Fairbanks, and Yepa, from any further participation in this case. The motion alleged that there was a conflict of interest between counsel and this Court because there is a contract between Mr. Rogers' firm and the Tribe for the provision of certain services to the tribal court system of the Mississippi Band of Choctaw Indians. In response by Mr. Rogers, it was noted (correctly) that his firm does not provide any services to <u>this</u> Court and that because of the services his firm provides to lower court non-law trained personnel, his firm does not engage in litigation in the lower courts of the Tribe. Therefore there is no conflict of interest in this matter and the motion to recuse Mr. Rogers, counsel for Petitioners/Appellants, is denied.

[8] On April 20, 2001, Appellees subsequently filed a motion for Reconsideration. That motion was denied by an Order of this Court that issued on April 23, 2001.

II. Issues

In addition to the specific certified questions, this appeal raises four issues, namely: (1) whether this Court has proper jurisdiction in this matter; (2) whether this case is before this Court as a proper appeal; (3) whether the contested referendum is beyond the scope of Art. XI of the Tribal Constitution; and (4) whether Chief Martin's action in not forwarding the referendum petition to the Election Committee was a violation of his duty as set out in Ordinance 47. Each issue will be discussed in turn.

III. Discussion

A. Jurisdiction

The Respondents/Appellees challenge the jurisdiction of this Court, the Mississippi Band of Choctaw Supreme Court. More specifically, Appellees claim that the Tribal Council legislation, namely Tribal Council Ordinance #16-III establishing the Mississippi Band of Choctaw Supreme Court contains no express authority for this Court to engage in any adjudication which involves interpretation of the Constitution of the Mississippi Band of Choctaw Indians. Without such express authority, according to the Appellees, the power to engage Constitutional adjudication does not exist and therefore there is a want of jurisdiction in the case because its central concerns (by the admission of both sides) are matters of Tribal Constitutional law.

The Appellees cite no authority - either federal or tribal - to support their contentions. Normally, failure to cite any supporting authority waives the issue. Yet in this instance, Appellees do make a colorable legal argument that it was the intent of the Tribal Council to prevent constitutional adjudication by this Court. Here, the Appellees cite the transcript of Tribal Council discussion of the breadth of this Court's review power. That discussion does evince some concern in this area, and ultimately did result in a Tribal Council vote to remove express reference to the ability of this Court to engage in Constitutional adjudication.[9]

Nevertheless, this isolated action needs to be both placed in context and to be further examined in light of subsequent action by the Tribal Council. As to context, the above action referenced by the Appellees included not only the Tribal Constitution but the *tribal code* as well.[10] If this action would be the given literal application suggested by the Appellees, The Mississippi Band of Choctaw Indians Supreme Court would be a nullity because it would have nothing to do. If this court is not to interpret tribal constitution and code, what would be the purpose for its existence? As noted by the Appellants, it makes more logical and coherent sense to understand the Tribal Council's action in this regard as authorizing the ordinary duty of courts to interpret the law.

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[9] The transcript of the Tribal Council meeting of July 25, 2000 states in relevant part:

BY MR. BEN: The motion was to take the words, "including the tribal constitution and this code" out. So we're going to vote on it.

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BY MR. BEN: Resolution adopted. Unanimous vote.

[10] *Id.*

Appellees' argument concerning the action of the Tribal Council in establishing the Supreme Court is also incomplete and therefore potentially misleading. Despite the action by the Tribal Council described above and relied on by Appellees, the final language of Ordinance 16-III, "An Ordinance to Approve an Appellate Court Structure and Procedure for the Choctaw Tribal Court System" (now codified at Title VII, Choctaw Tribal Code) reads: "The Supreme Court shall be the final authority within this jurisdiction for the interpretation of *Tribal law*." (emphasis added) This language is clear and obviously includes the deleted language - arguably redundant - that referred "to the Tribal Constitution and this Code." The term "tribal law" naturally comprehends both the Tribal Code and Tribal Constitution. Indeed, none of the Choctaw Tribal Courts could function without regularly interpreting and enforcing tribal code and tribal constitutional provisions such as due process and search and seizure, which they have done since their inception. *See e.g. Brantley Willis v. Chief Philip Martin*, cv. No. 5901-93 (Sept. 29, 1993).

It is also quite significant that this interpretation is the understanding of the very Tribal Council that established the Supreme Court. The Tribal Council via Resolution CHO 01-088[11] specifically endorsed Chief Martin's decision to bring this lawsuit, which is wholly directed to

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[11] That Resolution states in relevant part:

WHEREAS, the Tribal Chief has determined, based upon the foregoing, not to forward the said referendum sponsorship letter to the Tribal Election Committee pursuant to Tribal Ordinance 47, as it seeks to initiate a referendum challenge not authorized by the Constitution, and the Council has concurred in this determination, and has further concurred in the Chief's decision to seek prompt judicial review of this determination in an effort to mitigate the severe financial harm to the Tribe which will otherwise result unless the referendum process which would otherwise result from the said unlawful sponsorship letter is not promptly brought to an end through the judicial process or otherwise;

questions of Tribal Constitutional law. If the Tribal Council was of the mind Appellees contend, it would have decided this matter on its own without submitting it for (proper) adjudication in this Court.[12] Resolution CHO 01-088 is most persuasive in revealing the Tribal Council's own understanding and expectation that the adjudicatory mission of the Choctaw Supreme Court includes Constitutional and tribal law interpretation. This direct and unambiguous reflection of legislative intent cannot be ignored by this Court.

If one considers more fully the position of the Appellees, one finds that it is rife with practical contradictions and doctrinal incoherence.[13] The Appellees claim that this Court is without jurisdiction and the issue must be resolved by the Tribal Council. Yet the Tribal Council is the specific governmental body that authorized the action that is being challenged and further authorized this very lawsuit to vindicate its action.[14] The Court, while not unmindful of the slippery slope the Appellees are tumbling down, does not rest its jurisdictional decision on these troubling inconsistences, but only point out their most illogical and self-defeating components.

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[12] The Tribal Council, of course, remains free in the future to expand or contract this Court's jurisdiction.

[13] From a certain perspective, the claim of the Appellees is not only legally flawed, but it is inconsistent and confusing as well. It is inconsistent and confusing because Appellees refused to meet with the Tribal Council to discuss this very matter that they claim that only the Tribal Council may decide! *See* letter from the Tribal Council to Appellees and Appellees' response which states in part:

> We, the undersigned members of the Choctaw Tribal Council are requesting another opportunity to meet with you personally and discuss your concerns that you have against the Tribe's issuance and sale of bonds to major institutional investors.
> (Memorandum of March 19, 2001 to Respondents/Appellees.)
>
> Thank you for your memorandum. . .
> Obviously, none of you or Philip Martin read or understood the bond offering to convince us that this was the best investment and the meeting would be a fruitless event.
> (Memorandum of March 19, 2001 from Respondents/Appellees)

[14] See Resolution CHO 01-088 *supra* at note 11.

Despite these quixotic detours, it is necessary to indicate that it is axiomatic that an essential element of the highest court of any jurisdiction is the ability to engage in constitutional adjudication. Indeed this is the classic holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1805) in which the United States Supreme Court held that United States Supreme Court -- despite the absence of any express textual authorization in the United States Constitution -- did possess the authority to engage in constitutional adjudication. As noted by Chief Justice Marshall, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule". *Id.* at 177-78.

This pivotal principle of judicial review and constitutional adjudication is by no means limited to jurisprudence that exists outside of Indian country. It is more often than not the guiding principle within Indian country as well. In fact, the Navajo Supreme Court despite the absence of a written tribal constitution, has nevertheless held that the principle of judicial review (including the authority to find tribal ordinances 'unconstitutional') inheres in Navajo law. *Halona v. McDonald*, 1 NAVAJO RPTR. 189 (Navajo Sup. Ct. 1978). See also *LaCompte v. Jewett*, 12 ILR 6025 (Chey. Riv. Sx. Ct. of App. 1985).

To be clear, this Court in adopting the principle of judicial review and constitutional interpretation is merely carrying out its judicial mission in accordance with its authorizing legislation as enacted by the Tribal Council (including the subsequent endorsing actions of the Tribal Council) and in accord with well established and well respected juridical principles.

B. Appealability

Although the issue of appealability was not directly raised by either party, it remains an essential and inherent power of this Court to determine whether any matter - by way of appeal or original jurisdiction - is properly before it. The analysis of this issue is primarily directed to not only resolving the appealability question in this case, but also to provide some clarity for future guidance.

At the outset, Petitioners/Appellants filed this case both as an original action with the Supreme Court and as a case before the trial court. Each petition sought similar (emergency) relief, namely that this Court act with prompt dispatch to answer the four constitutional questions[15] identified in their initial pleadings. This Court neither accepted nor rejected the petition filed originally with this Court, but simply indicated in its Order of April 4, 2001 that it expected the parties to brief the issues in accordance with the four questions certified to this Court by the Trial Court in its order of April 2, 2001.

Appellants argue that the Court has inherent authority in these exigent circumstances pursuant to the doctrine of necessity to accept jurisdiction as an original proceeding or in its appellate capacity to adjudicate the certified questions. *See e.g. Hall v. Lakeside State Bank of New Town*, 26 ILR 6052 (Three Aff'd Tribes of Ct. of App. 1999) (recognizing that exigent

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[15] *See* footnote 6, *supra* at 4-5.

circumstances can sometimes justify proceeding in a unique manner when grave harm might occur to the Tribe); *In re Election of September 19, 1998* (No. YAA Case 3-98) (recognizing that exigent circumstances can sometimes justify a tribal court granting expedited or extraordinary review, especially where fundamental disputes regarding tribal constitutional issues are involved).

As to this Court's original jurisdiction, the Tribal Code, specifically Ordinance 16, neither expressly authorizes nor prohibits original actions in this Court. Therefore any original jurisdiction this Court might have would have to flow from some kind of emergency or extraordinary circumstance. Fortunately, the Court does not have to make such a decision in this case and indicates that it would greatly profit from express action of the Tribal Council to provide legislative guidance as to the matter of this Court's original jurisdiction.[16]

This case is before this Court as a result of the action of the Appellants having requested that the Trial Court 'certify' the four central questions[17] in the matter for immediate and emergency review and adjudication by this Court. The request for certification was summarily granted by the Trial Court. In the petition and accompanying memorandum submitted to the Trial Court, Petitioners/Appellants cited no tribal code provision that expressly authorized said

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[16] By way of example, *see e.g.* 1.514.2(d) of the Saginaw Chippewa Tribal Code that provides:

All matters involving extraordinary writs of habeas corpus, mandamus, and prohibition and such *original* and remedial writs as may be necessary or proper to the complete exercise of its [i.e. Saginaw Chippewa Tribal Court of Appeals] jurisdiction. (emphasis added)

[17] *See* footnote 6, *supra* at 4-5.

certification process. Nevertheless and as a likely result of the perceived emergency, the Trial Court certified the questions. Given the exigent nature of these proceedings, the decision of Trial Court to promptly certify the relevant questions, and the failure of any party to object, we acknowledge, at least in this instance, the propriety of the certification process to facilitate a prompt appeal under extraordinary circumstances. Yet as noted above, there is no express legislative authorization for this process and it would be advisable for the Tribal Council to establish legislative guidance in this area.

Appellants do cite the broad contours of § 7-1-1 of the Tribal Code for expedited review under the Court's authority "to sit at such times and places as proper and necessary to hear and decide appeals from judgments and . . . any other orders of the Tribal Court in any and all civil . . . matters." This provision is a tad too broad and general to encompass or truly authorize appellate review based solely on the certification of questions by the trial court. Nor does the posture of the case conform to any notion of an interlocutory appeal because there is no trial court order or judgment per se from which an appeal is being taken.

Appellants also point to Rule 2 of the Federal Rules of Appellate Procedure (FRAP)[18] as a potential course of authority because of the textual language:

[18] The Federal Rules of Appellate Procedure apply pursuant to their express authorization in § 1-1-4 of the Choctaw Tribal Code.

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

This language of the federal rule does appear on its face to permit the suspension of normal procedural requirements for "good cause shown." The Court acknowledges that due to the severe economic hardship facing this tribe in this matter that "good cause" has been adequately demonstrated to authorize this expedited appeal. *See e.g. In re McMillin*, 642 So.2d 1330 (Miss.1994) for an example in the Mississippi state setting. Yet the Court cautions that such emergencies are likely to be few and far between and that all concerned would be better served if the grounds for such expedited appeal were developed (legislatively) with more precision.

C. Scope of Tribal Constitution Referendum Authority

This issue is at the substantive heart of this case. The Appellees claim that the plain and unambiguous language of Article XI of the Tribal Constitution governs this matter in its entirety. The key language reads:

> Sec. 1. The members of the tribe reserve to themselves the power to propose ordinances and resolution and to enact or reject the same at the polls independent of the tribal council, but subject to approval of the Secretary of the Interior as required by this constitution and bylaws. The members of the tribe also reserve power at their own option to approve or reject at the polls *any act* of the tribal council. (emphasis added)

Appellees claim "any act" means "any act" and that their initial petition to Chief Martin complied with the operative procedural requirements of Ordinance 47 to place the referendum process in motion. Despite this apparent textual clarity, every court that has confronted the meaning of similar constitutional or statutory language has held that there is at least one central distinction and limitation that qualifies the phrase "any act." That limitation is the distinction between "legislative" and "administrative" actions. This distinction has been parsed by at least one court as follows: "the power to be exercised is legislative in nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body." *City of San Diego v. Dunkl*, 103 CAL. RPTR. 269, 280 (CA App. 2001). *See also City of Idaho Springs v. Blackwell*, 731 P.2d 1250 (Col. 1987); *Town of Whitehall v. Preece*, 956 P.2d 726 (Mont. 1998); *State v. Leeman*, 32 N.W.2d 918 (Nev. 1948).

While apparently no tribal court has yet to confront this issue, the above reasoning is quite sound. The democratic thrust of the referendum process is directed to the legislative, policy making aspects of the law making branch not to the administrative details of carrying out the legislative mandate. This is especially sanguine in the case at bar. In fact, there was a referendum challenge to the Tribal Council legislation that authorized the Golden Moon casino project in the first instance. This referendum to halt the Golden Moon project was soundly defeated.[19] If every single subsequent Tribal Council action about architectural plans, management, and financing was subject to full blown referendum challenge, such a large and

[19] As noted *supra* at p.2, the referendum to halt the Golden Moon project took place on March 7, 2000 and was defeated by a vote of 1,086 to 722.

significant project could be held permanently hostage to the actions of the few and could conceivably make such projects impossible to bring to fruition. Once the legislative decision of the Tribal Council has passed either without challenge or has survived a referendum vote it ought not be subject to renewed (perhaps pernicious) challenge with each implementing administrative decision.

In the instant case, there is no doubt that the challenged Tribal Resolution 01-071 is not legislative in nature, but rather completely administrative. It is directed to changes in the decision to issue bonds to help finance the Golden Moon project. The very decision to issue bonds was authorized by Tribal resolutions 01-035 and 01-036, and they were <u>not</u> challenged through the referendum process.

The referendum process is not meant to be a substitute for effective Tribal Council representation by elected officials. If people feel that some elected officials are not adequately informing or representing people in their district, redress exists in the electoral process not in a distortion of the Constitutionally sanctioned right of referendum to voice discontent and potentially grind significant Tribal economic development to a costly and pulverizing halt.

D. Ordinance 47

Ordinance 47 of Tribal Code establishes the rules and procedures for initiatives and referendums under Art. XI of the Tribal Constitution. At issue in this case is the role of the

Tribal Chief in this process. The procedural guidelines in this regard are principally set out in Sections 1-3. These Sections require that "at least three (3) qualified sponsors" (i.e. qualified elector) "shall first file with the Tribal Chief, or the Tribal official designated by the Chief to act for him in his absence, in the *form* of a cover letter an application for a petition." (emphasis added) This application must be filed "not more than fourteen (14) working days following the date of enactment by the Tribal Council of the ordinance or resolution" to be challenged. Then, most significantly Ordinance 47 specifically states:

> Upon receipt of any letter of application for a petition for referendum or initiative, the Tribal Chief, or his designated representative, shall date stamp the letter showing the date received and shall promptly transmit it to the Tribal Election Committee and give written notice thereby to the persons filing the application.

In the case at bar, Chief Martin did not "promptly transmit it [i.e. the petition] to the Tribal Election Committee." In fact, he informed the Appellees in writing that he would <u>not</u> be doing so because he believed their petition to be unconstitutional. In accordance with this decision, he promptly (with Tribal Council endorsement) brought this action.

The question presented is whether these actions of the Chief are authorized under Ordinance 47. The text of Ordinance 47 does not appear to grant the Chief the substantive, discretionary authority to review the alleged merits, legal or otherwise, of any proposed referendum, but rather creates the ministerial duty to review the application for (procedural) form only and to forward it to the Election Committee. If the Chief had any substantive review

authority in this process, Ordinance 47 would surely identify and specify its parameters. Ordinance 47 identifies no such substantive review authority and therefore this Court cannot fully ratify the Chief's actions in this matter. To the Chief's credit, he did not attempt to act unilaterally or put an undue burden on Appellees. He moved swiftly with support of the Tribal Council to challenge the putative referendum petition in the Mississippi Choctaw Courts. Given the exigent circumstances and grave economic concerns, his action was not unwarranted but it is not within the textual letter of Ordinance 47.

To be sure, the Chief (especially with support of the Tribal Council) has the authority, perhaps even the duty, to seek judicial review of constitutional questions that impact the Tribe but that authority cannot be extracted from the plain language of Ordinance 47 which is strictly ministerial in nature. Again, it is not improper for the Tribe to seek constitutional resolution of a pending referendum, but as such it must be harmonized with the more routine requirements of Ordinance 47. There is no need to permit a constitutionally flawed referendum to go forward without challenge, but there is a balance that needs to be struck between the right of referendum and the ability to challenge the potential improper exercise of that right. Ordinance 47, as currently drafted, does not create the requisite balance.

In order to avoid this situation in the future, it is urged that Ordinance 47 be revisited by the Tribal Council for review and clarification. To be clear, Ordinance 47 as a general matter cannot bear the weight the Chief seeks except in this very limited one of a kind situation.

IV. Conclusion

For all of the above reasons, the four certified questions are answered as follows:

1. Whether the referendum procedure of Article XI - Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians may be used to challenge all Resolutions of the Choctaw Tribal Council or only those which constitute legislative actions of the Council.

The answer is that the referendum procedure of Art. XI may be used only to challenge *legislative* actions of the Tribal Council.

2. Whether the referendum procedure of Article XI - Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians may be used to challenge all Resolutions of the Choctaw Tribal Council which merely implement or carry out prior legislative judgments of the Council to undertake a particular project which were either not challenged pursuant to Article XI or were upheld by referendum vote of the community in a previous referendum on the same project.

The answer is that the referendum procedure of Art. XI may not be used to challenge resolutions that implement or carry on prior legislative judgments of the Tribal Council that either were not challenged pursuant to Art. XI or were upheld by a previous referendum.

3. Whether the actions reflected in Choctaw Tribal Council Resolution CHO 01-071 (adopted February 28, 2001) or CHO 01-087 (adopted March 19, 2001) or CHO 01-088 (adopted March 22, 2001) constitute legislative actions which are subject to referendum challenge under Article XI, or constitute administrative actions which are not subject to referendum challenge under Article XI.

The answer is that the challenged Resolutions are administrative, not legislative, in nature and therefore they are not subject to referendum challenge under Article XI.

4. Whether, if the said Resolutions are determined not to be subject to challenge through an Article XI referendum, Plaintiff Martin may lawfully decline to forward to the Choctaw Election Committee Respondents' sponsorship letter seeking to initiate referendum challenges to those Resolutions, or any of them, under Ordinance No. 47 or Article XI.

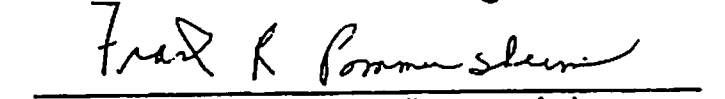
The answer is yes in this extraordinary instance only.

In sum, the proposed referendums of the Appellees are not constitutionally authorized because they attempt to challenge mere administrative actions rather than any legislative enactment of the Tribal Council. Therefore the challenged referendums may *not* proceed. Incident to this substantive holding, the Court also holds that it has proper jurisdiction in this matter, that the certified questions from the trial court are properly appealable in this instance, but Ordinance 47 standing alone, except in this most extraordinary instance, does not routinely

authorize the Chief to substantively review the adequacy, constitutional or otherwise, of any referendum petition submitted to him.

June 11, 2001

Chief Justice, Rae Nell Vaughn



Associate Justice, Frank R. Pommersheim

Associate Justice, Carey N. Vicenti