KENT WHATONAME, Plaintiff-Appellant,
v.
HWAL' BAY'BA:J ENTERPRISES, Defendant-Appellee

SWITCA Case No. 98-002
HTC No. CV97-004

Appeal filed January 13, 1998

Appeal from the Hualapai Tribal Court
Jolene Marshall, Judge,
Melvin Hunter, Advocate for Appellants,
Judith M. Dworkin, Attorney for Appellees.

Appellate Judge: Ann Berkley Rodgers

ORDER

THIS MATTER comes before the court on its own motion, pursuant to the Southwest Intertribal Court Rules of Appellate Procedure. This appeal was accepted by the Court for consideration on January 13, 1998. Appellate's opening brief was due 30 days after receipt of the scheduling order. A responsive brief was to be filed 30 days after the receipt of the appellant's opening brief and the scheduling order provided for a reply brief. As of this date, August 18, 1999, no briefs have been filed in this Court and the plaintiff-appellant has done nothing to prosecute this appeal.

THEREFORE, it is the order of the Court that this appeal should be and hereby is dismissed with prejudice.

IT IS SO ORDERED.

August 18, 1999

JUDY KNIGHT-FRANK, JEANNIE ADAMS, VENERITA VALDEZ and SHIRLEY ESPARZA, Plaintiffs-Appellants,
v.
UTE MOUNTAIN UTE TRIBAL COUNCIL, RUDY HAMMOND, EDWARD DUTCHIE, JR., BENJAMIN LEHI, CARL KNIGHT, ARTHUR CUTHAIR, MANUEL HEART, UTE MOUNTAIN UTE ELECTION BOARD, STEVIE HEIGHT, SHIRLEY DEER, MARY ANNE WHITEMAN, MARY JANE YAZZIE and CHLOE UTE, Defendants-Appellees.

SWITCA No. 98-008-UMU

Appeal filed October 1, 1998

Appeal from the Ute Mountain Ute Tribal Court
Roger Candelaria, Judge,
Timothy Tuthill, Attorney for Appellants,
Eric Stein, Attorney for Appellees.

Appellate Judge: Ann Berkley Rodgers

ORDER

Pursuant to the stipulation of the parties and Rule 36 of the Southwest Intertribal Court of Appeals Rules of Appellate Procedure, this appeal is dismissed.

IT IS SO ORDERED.

August 11, 1999

PEDRO JIM, Appellant
v.
COCOPAH INDIAN TRIBE, Appellee.

SWITCA NO. 99-001-CTC
Cocopah No. CR 99-0010

Appeal filed February 1, 1999

Appeal from the Cocopah Tribal Court
Kerstin Lemaire, Judge,
Dale Jim, Attorney for Appellant,
D. Long, Attorney for Appellee.

Appellate Panel: Cochran, Flores, Lui-Frank

Summary

State of Arizona properly sought and received a tribal court extradition order for appellant which complied with tribal law. Pursuant to the order, tribal officers arrested appellant peacefully by using a ruse to get his wife out of the family home. The Court holds that law enforcement may use a ruse or pretext to peacefully arrest a person pursuant to a legal arrest warrant to protect innocent persons or to preserve the peace. Affirmed.

OPINION AND ORDER

JURISDICTION

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution CT 91-50 of the Cocopah Indian Tribal Council on behalf of the Cocopah Indian Tribe and pursuant to the appellate rules of the Cocopah Indian Tribe, Article 2, chapter 8, §§ 210-211 of the law and order code, the rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA", as well as the Court's inherent authority to manage its business. The Court convened by

teleconference, determined that oral argument was not necessary because it would not assist it in its deliberations, and now issues the following order.

FACTS

This appeal arose after the Cocopah Tribal Court (lower court) ordered the extradition of the defendant to be tried in Arizona state superior court for a charge of aggravated driving under the influence while a minor present and a charge of aggravated driving while under the influence of intoxicating liquor having a blood alcohol concentration of .10 or more while a minor present. An indictment for these charges was issued by an Arizona grand jury. Apparently the defendant failed to respond to the charges and a warrant for him was issued thereafter for contempt of court for disobeying the court's mandate. Defendant was found living on the Cocopah reservation and an authorized representative of the state of Arizona filed a fugitive complaint in the tribal court requesting defendant's extradition. After a hearing on the matter, the lower court issued its findings and order:

> that the defendant's identity has been established and that he is the same individual as listed in the Yuma County warrant. Probable cause is established by the Yuma Country direct indictment provided to the Court. Defendant moves to appeal and is instructed to contact the Court clerk for appeal directions.

The defendant filed a motion to appeal on the same day the lower court issued its order, stating the following grounds for appeal:

> The rules of evidence, By which the Cocopah Tribal Police enacted on issuing the warrant of extradition from the Superior Court. [*sic*]
>
> The Cocopah Tribal Police failed to follow the procedure set forth by the Cocopah Law and Order Code.
>
> That are there to protect and to serve and to serve the people. [*sic*]

DISCUSSION

The Cocopah Indian Tribal code, §211a(2), requires that the petition for appeal state one or more of 6 specific reasons listed in that subsection. Defendant's motion to appeal does not state which of the 6 specific reasons that he relied on for his appeal and this Court will not substitute its determination for that of the defendant. Because the reasons for the appeal were not clear, this Court issued an order on February 10, 1999, directing the defendant to comply with the Cocopah code and state specifically which acts or failure to act of the police did not comply with the tribal code and to explain the harm done to the defendant. The order stated that defendant's failure to comply would result in the appeal being denied. Defendant has failed to comply with the order of this Court by not filing any further pleading.

This Court determines from the audio record of the extradition hearing that the specific wrongful police act defendant complains of was that they used a ruse or pretext to arrest him on the outstanding tribal warrant by pretending that a report of a domestic disturbance had been made to them. Officers used this report to get his wife out of the home before they served the warrant and took him into custody. This deception is apparently the basis for defendant's appellate claim. There is no allegation that the outstanding Arizona warrant was illegal or that the tribal warrant and extradition procedure were not based on the tribal code. In fact, Cocopah code §209 allows extradition and sets up a procedure for the tribal court to determine if extradition will be ordered. However, defendant in his motion does not claim that §209 was not followed by the lower court..

At the extradition hearing, defendant claimed that the ruse or deception used by the police to get him into custody wasn't fair even though all the warrants were proper and correct tribal procedure was followed. Is this claim sufficient under the laws of the Cocopah Tribe to overturn the lower court's order? The simple answer is no.

When tribal case law is not available, this Court will look to other jurisdictions for assistance in its deliberation *Hualapai Tribe v. D.N.*, SWITCA 97-005-HTC, 5 SWITCA 2 (1998) *Shack v. Lewis, et al*, SWITCA 98-004-ZTC, 9 SWITCA 29 (1998). This Court is not aware of available Cocopah tribal case law on this issue, but both federal and state courts have determined this issue in the favor of law enforcement. Police may use a ruse or pretext to serve an otherwise legal warrant where they determine that it is necessary to preserve the peace or to protect innocent bystanders, the police, or the defendant. *U.S. v. Phillips*, 497 F.2d 1131 (9th Cir.Ct.App. 1974), *reh'ng den., Aug. 5, 1974*; *Leahy v. U.S.*, 272 F.2d 487 (9th Cir.Ct.App. 1960); *State v. Carrillo*, 750 P.2d 883 (Ariz. 1988). Testimony at the extradition hearing shows that the officers executed the warrant at the defendant's home where his wife, an innocent party, also resided. Law enforcement may use a ruse or pretext to obtain the peaceful arrest of a person named in warrant while protecting innocent persons or to preserve the peace.

The appeal is denied and the order of the tribal court granting extradition is affirmed.

IT IS SO ORDERED.

March 23, 1999

IN THE MATTER OF THE PETITION FOR RECALL OF EARL HAVATONE and EDGAR WALEMA, Petitioners-Appellants,

v.

HUALAPAI ELECTION BOARD Chairperson MARJORIE ONA QUERTA, Respondents - Appellees.

SWITCA No. 99-002-HTC
HTC. No. CV-98-212

Appeal filed April 5, 1999

Appeal from the Hualapai Nation Court
J. Cooney, Judge,
Marcia L. Green, Attorney for Appellant,
David W. Barrow, Attorney for Appellee.

Appellate Judge: Ann B. Rodgers

SUMMARY

A tribal recall election was stayed by this Court pursuant to a motion and appeal by appellants, elected officials subject to a petition for recall. Tribal recall election procedures set by the Tribe's constitution and election procedure ordinance may not be infringed upon by an administrative rule of the election board. Pursuant to the tribal constitution, the right to hold office is an important liberty right which cannot be withheld from an elected official without due process of law which includes notice of any proposed action by an official tribal administrative body and an opportunity to be heard before that body; however, the parties have received proper due process during the legal process, remand would serve no purpose, and the recall election should procede. Stay lifted. Affirmed in part; reversed in part.

OPINION AND ORDER

I. Introduction

THIS MATTER is a dispute about the appropriate procedures to be used when a tribal member files a statement calling for the recall of a tribal official. Oral argument was heard on June 22, 1999, and the Court issued its oral judgment at that time affirming the lower court in part and reversing in part. At that time the Court concluded that the election board violated petitioners' due process rights by not requiring they be notified that an appeal of a prior decision canceling the recall had been filed, or that the election board would hear the appeal. However, the lower court and the election board did reach the correct legal conclusion concerning the law governing the recall process. This written opinion sets out the reasoning used by this Court to reach its decision on the appealed issues. It also concludes with an order directing the recall election to go forward because the issue decided by the election board in the appeal has now been decided with petitioners having had a full and fair opportunity to be heard on it.

II. Statement of Facts

The relevant facts in this case were not disputed by the parties. On October 13, 1998, a member of the Hualapai Nation filed a statement with the election board that served in the previous election. *Supplemental Petition for Injunctive Relief, in record* (hereafter "Petition"). The statement sought the recall of the chairman, vice-chairman and one member of the tribal council.[1] It specifically alleged that the tribal council "neglected to protect our financial obligations to the Hualapai people" and "provided special services to the white people who are employed for the Hualapai Tribe". The statement also alleged several specific facts to support these two points. The statement ended by providing that the tribal member had been terminated from his employment with the tribe for voicing these concerns. *Exhibit A to Petition.* Signed petitions containing signatures of twenty percent of the eligible voters were submitted to the election board on or before December 7, 1998. *Petition.* Two of the officials, Tribal Chairman Earl Havatone and Vice-Chairman Edgar Walema, provided the election board with their responses on December 28 and December 30 respectively. *Exhibits B and C to Petition.* The vice-chairman's response asserted that the tribal member's statement did not meet the requirements set out in proposed rule 1 of the election board: "To be legally sufficient, the statement must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office."

On December 30, 1998, a petition was filed with the tribal court seeking an immediate injunction to stop all recall proceedings on the grounds that the initial statement failed to allege misconduct; that there was no evidence submitted in support of the petition; and that the election board may have violated recall procedures.

On January 4, 1999, the election board voted to stop the recall proceeding. The notice sent to the vice-chairman states:

> The election board has a rule regarding recall procedures as was brought to our attention by [an attorney for the Tribe]. Rule No. 1's recall procedures were adopted in September 1993, making the current recall petition invalid.
>
> Rule No. 1 has always been in effect since its adoption back in 1993, and the election board will abide by this rule for all recall petitions. Although the current election board was not previously aware

[1]The tribal council member did not participate in this appeal.

> of Rule No.1 until [an attorney for the Tribe], informed us of its existence. It is still a current and active rule of the election board and the current election board will abide by the rule's guidelines.

Evidently without giving any notice to the chairman or vice-chairman, the tribal member appealed this decision to the election board, essentially asking for the proceeding to go forward. Without giving the chairman or vice-chairman notice of the appeal or an opportunity to respond to the appeal, the election board reversed its January 4 decision on January 19, 1999. The letter notifying the vice-chairman stated that the board's decision was based upon the following factors: rule 1 was not adopted into the election ordinance by the tribal council; the election board was not aware of rule 1 at the time that the recall proceeding was initiated; and the election board decided only to follow the tribal constitution and the election ordinance, not rule 1.

Three days later, on January 22, 1999, the chairman and vice-chairman filed the supplemental petition for injunctive relief with the tribal court. On January 25, 1999, the court issued a temporary injunction prohibiting the recall election from going forward. On February 24, 1999, the court heard the matter. On March 2, 1999, the court issued an order dissolving the injunction, thereby permitting the election board to continue with the recall election proceedings.

This order was based on the court's finding that rule 1 was never adopted as an amendment or supplement to the election ordinance, and was therefore invalid. The court also found that the election board acted within the scope of their constitutional authority when the board decided not to apply rule 1. *Opinion and Court Order, March 2, 1999.* The chairman and vice-chairman asked the court to reconsider its March 2, 1999, order, which was denied because the documents submitted did not establish that rule 1 had ever been duly adopted by the tribal council. *Order of March 12, 1999.* On March 19, 1999, the chairman and vice-chairman filed a notice of appeal in this matter, and requested the trial court to stay the matter pending appeal. The trial court issued an order denying the stay on April 2, 1999. *Order of April 2, 1999.* On that same day the chairman and vice-chairman filed an emergency motion for stay with this Court. The recall election was scheduled to go forward on April 5, 1999. On April 5, 1999, this Court entered an order staying the recall election until resolution of this appeal.

III. Applicable Tribal Law

A. The Hualapai Constitution

The Hualapai Constitution gives any member of the Hualapai Nation of voting age the power to seek the recall of any member of the tribal council. *Hualapai Constitution, Article IV, Section 12.* A written statement of specific reasons why recall is sought must be filed with the election board. *Id.* The election board then allows the tribal member seeking recall to circulate petitions amongst tribal members for their signature. Twenty percent of the Nation's eligible voters must sign the petitions to require a recall election. The tribal council is directed to adopt an election ordinan to "carry out the details of this section." *Id.* Appointment to the election board is only for one general or special election *Hualapai Constitution, Article VIII, Section 3.* The duties of the election board are to be addressed in the election ordinance. *Id.*

The Constitution also contains a bill of rights which prohibits the Nation, in exercising its powers of self-government, from "deny[ing] to any person within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law." *Hualapai Constitution Article 10 (d).* An important concept of liberty in the Hualapai Constitution is the right of each tribal member who meets the constitutional qualifications to run for and, if successful, to hold a tribal office. *Hualapai Constitution Article VIII, Section 5(a).* Thus, this important liberty interest cannot be denied without due process. See *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). At a minimum, due process requires notice of any proposed action that could affect the right, and a meaningful opportunity to be heard in relation to the proposed action. For example, in relation to removal of the tribal council member by the tribal council, the specific grounds for proposing removal are set out in the Constitution and the due process rights of the member a set out as including "a written statement of the charges, t right to respond to those charges and the right to present witnesses and other evidence in his defense." *Hualapai Constitution, Article IV, Section 11.*

B. The Election Ordinance

Article XVIII of the election ordinance governs recall elections. Section 2 sets out recall election procedures. The election board which served in the most recent general election also addresses any subsequent recall proceeding. *Election Ordinance, Article XVIII, Section 2.* Once a tribal member provides a written statement of reasons for seeking recall to the election board, the board issues the official petition forms. *Id.* The ordinance sets out the requirements for the official petition form: "The official petition form shall include the allegations on the top of each page and shall include spaces for twenty (20 signatures per page." *Election Ordinance, Article XVIII, Section 2.* The tribal member has sixty days to collect the required number of signatures. *Id.* It is the duty of the election board to inform the tribal member as to how many signatures are needed for a valid petition. *Id.*

The election board then verifies the signatures. If there are sufficient signatures to require a recall election, the election board must give the official whose recall is soug an opportunity to respond to the charges in writing. *Id.* T official ballot must include the allegations of the tribal

member seeking recall and the response to the allegations. *Id.*

C. Hualapai Election Board Rule No. 1

In 1993, the election board that was appointed for the prior general election recommended to the tribal council that the Rule No. 1 be adopted. (Letter from election board to tribal council dated September 22, 1993, in the record). The proposed rule would have limited a tribal member's ability to seek the recall of a tribal official by providing:

> A discretionary act of a council member is not a basis for recall if the act is an exercise of discretion by the council member in performance of his or her duty. This includes voting on any issue, question or resolution.

(Rule No.1, proposed to the tribal council by an election board on September 22, 1993 (in record)). The proposed rule would have given the election board the ability to determine whether a tribal member's statement of reasons was sufficient to merit a recall proceeding. *Id.* Additional requirements were placed on what would be sufficient to merit a recall proceeding, specifically that the council member committed act or acts of "malfeasance" or "misfeasance", or "otherwise violated their oath of office". These terms are narrowly defined in the proposed rule. The record does not contain any documentation that this proposed rule was ever adopted by the tribal council.

IV. The Lower Court Correctly Concluded That Recall Proceedings Were Not Governed By Rule 1.

It is not disputed that there is no evidence that rule 1 was ever adopted by the tribal council as required by the Hualapai Constitution and the election ordinance. At best, it was a proposal put together by a previous election board for the council's consideration. It was never made part of the tribe's governing law. The election ordinance clearly states that matters concerning recall elections not addressed in the ordinance (or duly adopted amendments to the ordinance) shall be decided by the election board. Therefore, the election board had the authority to decide if proposed rule 1 should govern this recall effort. Here, the election board ultimately decided that it should not follow proposed rule 1. I can find no legal error in that decision. Upon reviewing the Hualapai Constitution and the election ordinance, I conclude that even if rule 1 had been adopted by the tribal council, it could not be applied by the election board to a recall proceeding because its terms would destroy the rights of the tribal electorate as set out in the Hualapai Constitution.

A recall election is one of the most democratic of processes. The electorate is given the right to get rid of officials they do not like. It is very different from a formal action to remove an official where wrongdoing must be proven. The difference is that in a recall election the very people who put the officials in power are being asked whether those officials should be able to continue in office.

This distinction is very clear in the Hualapai Constitution. Section 10 governs removal and suspension from office by the tribal council. In order to prevent the tribal council from overriding the decision of the electorate as to who should be in charge of tribal government. the section only contains three specific reasons for removal failing to attend three consecutive tribal council meetings without good cause; conversion of tribal property or monies without authorization through the omission or misrepresentation of facts; and final conviction by any tribal. federal or state court of either a felony, three misdemeanors or contempt of court. *Hualapai Constitution Section 10(a).*[2]

The section governing recall explicitly gives tribal members the right to begin recall proceedings against elected tribal officials. *Hualapai Constitution Section 11.* The only limits on this right are set forth in that section: specific reasons must be given to initiate a recall effort; and petitions to force a recall election must have the signatures of at least twenty percent of the eligible voters. The tribal council is explicitly given authority to adopt ordinances to carry out the details. It is not given the authority to place further constraints on what would constitute sufficient reasons for the election board to permit a recall to proceed.

Consistent with the Constitution, the election ordinance sets out procedures to be followed in recall proceedings. The board is responsible for providing official petition forms. These forms must contain the specific reasons why recall is sought and the number of signature spaces permitted on a page is limited. The board verifies the signatures once petitions are returned to the board. If sufficient signatures are verified, the person who is subject to recall is given the opportunity to respond in writing. It requires the official ballot used in a recall election to include both the statement seeking recall and the written response of the person subject to recall. The board is not to decide the merits of the specific reasons for recall or the merits of the response. This is left to the voters under the election ordinance, and more importantly, the Hualapai Constitution.

V. The Election Board Violated Due Process When It Decided The Appeal Of Its January 4, 1999, Decision Without Notice Or Opportunity To Be Heard Given To Petitioners.

The undisputed facts are that no notice was given to petitioners that an appeal or request for reconsideration had been presented to the election board. Also, petitioners were not given any notice that the board would consider the

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[2]Section 9 of the Hualapai Constitution also authorizes the tribal council to adopt a code of ethics to govern the conduct of tribal officials. The ethics code can contain disciplinary procedures "so long as the tribal official in question is afforded full due process rights. "

appeal. Under the applicable tribal law, petitioners' rights to run for, and if elected, serve as public officials, are very important liberty interests. Any decision of an official tribal entity such as the election board concerning what must be done to deprive them of this interest must be made only after due process has been afforded to them. In every instance where an official tribal entity is given the power to affect this liberty interest, the Hualapai Constitution requires that the person is entitled to due process: notice and a full and fair opportunity to be heard.

In *Mathews v. Eldridge*, 425 U.S. 319 (1976) the United States Supreme Court looked to three factors to determine what process is due : (1) the individual's interest that will be affected; (2) the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards; and (3) the government's interest and the fiscal and administrative burdens additional requirements would entail. While due process does not always require that notice and the opportunity to be heard must occur before a person is deprived of any liberty or property right, in this particular instance the question concerns the law to be applied to determine if the person is subject to recall a substantial individual right. The risk of erroneous deprivation is high, and the burdens associated with procedural safeguards minimal. Therefore, the requirements of due process must be met before a decision is made. The election board need only do three things to address this problem: (1) require any party requesting reconsideration of a decision in a recall proceeding to deliver a copy of the request to the opposing party; (2) notify the party requesting reconsideration and the opposing party of the date and time when the parties can present their views on the issue to the election board; (3) give each party a full opportunity to present their views on the issue before making any decision.

VI. The Failure Of The Election Board To Provide Petitioners With Due Process Before Determining Not To Apply Rule 1 To This Recall Proceeding Does Not Require This Court To Stay The Recall Proceeding Pending Another Hearing Of The Elections Board On Whether Rule 1 Should Be Followed.

This Court has given much thought as to what should be the ultimate outcome of this appeal. If the Court were to remand this matter to the election board to consider the applicability of rule 1 once again, there is no question but that the board could not decide to follow the rule because it has been found to violate the Hualapai Constitution. Thus any such remand would only increase the expenses of the parties; it could not result in a decision to require the application of rule 1 to this recall effort. Therefore, the Court will not remand this matter to the elections board for redetermination of whether it should apply rule 1 because it would be contrary to the interests of justice.

Similarly, any order enjoining this election board from making decisions without affording those affected adequate notice and a meaningful opportunity to be heard, would be of little use since it would not be any more binding on future election boards than this opinion and order is already.

Through this process, the parties have been given a full and fair opportunity to be heard on this matter. There is no just reason to delay the recall election. It is time to place the future in the hands of the voters.

THEREFORE, it is the order of the Court that the decision of the court below on the invalidity of rule 1 should be and hereby is affirmed;

It is further ordered that the decision of the court below that the election board complied with due process in determining that rule 1 should not apply is reversed;

It is further ordered that the stay issued by this Court pending appeal of this matter should be and hereby is lifted: the elections board is to proceed with the recall election forthwith as required by the laws of the Hualapai Nation.

IT IS SO ORDERED.

August 23, 1999

JOHN P. DELEO, Petitioner - Appellant,
v.
SOUTHERN UTE INDIAN TRIBE and EUGENE NARANJO, INDIVIDUALLY and IN HIS OFFICIAL CAPACITY AS THE FORMER TRIBAL EXECUTIVE OFFICER OF THE SOUTHERN UTE INDIAN TRIBE,
Respondents - Appellees.

SWITCA No. 99-003
SUTC No. 98-CV-94

Appeal Filed: April 5, 1999

Appeal from the Southern Ute Indian Tribal Court
E. Callard, Judge,
Reid Kelly, Attorney for Appellant,
Sam W. Maynes, Attorney for Appellee.

Appellate Judge: Ann B. Rodgers

SUMMARY

Petitioner sought a discretionary appeal from the tribal court's dismissal of his claims because of sovereign immunity, alleging that the tribe had waived its immunity by acquiring an insurance policy which contained a written waiver of sovereign immunity. Such waiver language contained in tribal insurance policies purchased or provided pursuant to the Indian Self-Determination and Education Act does not waive tribal immunity. Affirmed.

OPINION AND ORDER

IT IS SO ORDERED.

November 5, 1999

THIS MATTER comes before the Court on a petition for discretionary appeal and notice of appeal. The Court, having reviewed the notice of appeal and the written opinion and order of the trial court, concludes that there is no basis for appeal of the lower court's decision. The Court's reasoning is set forth below.

The trial court's opinion is almost exclusively tied to issues of law which this Court can review *de novo*. In reviewing that decision, the Court could find no error of the law applied in this case. There was one evidentiary issue which the Court did not note, but which constitutes harmless error because it does not change the result in this case. Petitioner asserted that the Southern Ute Tribe had waived sovereign immunity by acquiring an insurance policy for the alleged claims. Petitioner alleged that the policy or contract of insurance contained a waiver of sovereign immunity. Respondents alleged that the insurance policy only prohibited the insurance company from raising a sovereign immunity defense on behalf of the tribe.

Absent other controlling law, this allegation would have constituted a factual issue that should be determined at trial. However, in this particular instance, federal law addresses this issue. The Indian Self-Determination and Education Act, 25 U.S.C.A. §450f (c) states:

> (c) Liability insurance, waiver of defense
>
> (1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter...[.]
>
> * * *
>
> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, ...[.]

Cases interpreting this section of the United States Code establish that the existence of the liability insurance policy pursuant to this provision does not constitute a waiver of tribal sovereign immunity. *Evans v. Little Bird*, 656 F.Supp.872, *affirmed in part and reversed in part* ,869 F.2d 1341 (D. Mont. 1987). Absent an allegation that the alleged insurance policy was in addition to any acquired pursuant to this statute, which was not alleged in this case, the complaint does not contain allegations from which one can imply a that a waiver of sovereign immunity is an issue in the case.

THEREFORE, it is the order of this Court that the petition for discretionary appeal, should be and hereby is dismissed with prejudice.