DEBORAH J. TRUJILLO,

Petitioner-Appellant,

v.

DONOVAN D. TRUJILLO,

Respondent-Appellee.

SWITCA No. 11-007-SCTC
Tribal Case No. DV-08-154

Appeal filed August 3, 2011

Appeal from the Santa Clara Pueblo Tribal Court,
H. Paul Tsosie, Chief Judge

Appellate Judge: Jonathan Tsosie

ORDER DENYING APPEAL

SUMMARY

Appellant filed a Notice of Appeal that did not specify the judgment she was appealing. The Appellate Court found that the Notice of Appeal was insufficient pursuant to SWITCARA #11(e)(2). The Appellate Court examined the record and it appeared that Appellant was appealing a Court Order Amending Child Support. The Appellate Court directed the Appellant to the tribal court as the proper forum to modify child support. Denied.

* * *

Upon review of the above entitled matter, the Southwest Intertribal Court of Appeals denies this appeal for the following reasons.

Appellant's notice of appeal does not specifically state what judgment she is appealing.[1] Appellant merely states that she is filing "an appeal to the decision that was made," and then explains that her basis for filing the appeal was that "Judge Tsosie contradicted the decision he rendered during the hearing on July 1, 2010." Only after examining the record and the date of the notice of appeal does it become somewhat apparent that Appellant is appealing a "Court Order Amending Child Support" entered by the Santa Clara Pueblo Tribal Court on July 11, 2011, the sole effect of which was to vacate the child support obligations of Respondent because Respondent has physical custody of their child. Appellant's only basis for appealing that order, however, is that, according to her, the Santa Clara Pueblo Tribal Court stated in July 2010 that no changes would be made to a parenting plan until mediation sessions had been attended by Appellant, Respondent and their child to resolve familial discord. From what this Court can gather from the notice of appeal, Appellant feels that Respondent should not have been relieved of his child support obligations because no mediation sessions were ever ordered, scheduled or attended. This Court cannot see how the failure to schedule and attend mediation sessions to resolve familial discord has any bearing on child support obligations, which are almost entirely based on the financial circumstances of each parent. Thus the proper forum to protest the modification of child support obligations is the Santa Clara Pueblo Tribal Court. Tribal Courts often modify parenting plans and child support obligations due to changing financial circumstances of the parents and custody of the child.

For the foregoing reasons the appeal in this matter is therefore DENIED.

IT IS SO ORDERED.

January 5, 2012

PUEBLO OF ZUNI,

Appellee,

v.

MICHAEL DAVID VICENTI,

Appellant.

SWITCA No. 11-001-ZTC
Tribal Case No. CR-2010-1924

Appeal filed December 27, 2010

Appeal from the Zuni Pueblo Tribal Court,
John Chapela, Chief Judge

Appellate Judges: Jonathan Tsosie,
Delilah Choneska and Gloria Valencia-Weber

ORDER DENYING APPEAL

[1] Rule 11(e)(2) of the Southwest Intertribal Court of Appeals requires that a notice of appeal specifically refer to the judgment being appealed.

SUMMARY

Appellant objected to his criminal conviction of Domestic Violence in his Notice of Appeal. The Appellate Court decided that the tribal court properly authenticated the evidence and weighed the credibility of the testimony pursuant to tribal law and the Federal Rules of Evidence. Therefore, the evidence was admissible. Denied.

* * *

Upon review of the above entitled matter, the Southwest Intertribal Court of Appeals hereby denies this appeal for any further consideration because Appellant has misconstrued what is required by Section 11.2-2-5 of the Zuni Domestic Relations Code.

In his Notice of Appeal, Appellant objects to his criminal conviction of Domestic Violence because during the trial the judge "included evidence that was never taken by the responding officer." Appellant elaborates that Section 11.2-2-5 of the Zuni Domestic Relations Code requires that the responding officer in a domestic violence investigation take photographs as part of the officer's investigative report and any subsequent complaint. Appellant argues that photographs taken of the victim's injuries and a torn shirt introduced at trial were improperly admitted because the responding officer did not take those photographs nor did he take any photographs of any property damage during his investigation. Appellant is mistaken.

Section 11.2-2-5 is the "Mandatory Investigative Report" section of the Zuni Domestic Relations Code. Subsection B lays out the requirements of such a report which requires that the report contain the following:

> (1) a description of the circumstances of the persons and their surrounding environment when the officer responded to the call;
>
> (2) a description, and photographs, *if any*, of the injuries or harm inflicted upon either or both parties and whether they received medical treatment;
>
> (3) evidence of any property damage;
>
> (4) summaries of the comments from the persons describing the circumstances leading to the call for law enforcement;
>
> (5) if no parties, or more than one party, are arrested, the officer must set forth grounds for arresting no one or more than one party.

(emphasis added).

While it is true that the investigating officer must file a report when responding to domestic violence calls, it is clear from Section 11.2-2-5(B)(2) that the investigating officer is under no obligation to take photographs of any injuries or harm during the investigation. Section 11.2-2-5(B)(2) merely provides that the officer shall include in the report "a description, and photographs, *if any*, of the injuries or harm." (emphasis added). Thus, if the investigating officer had indeed taken photographs of injuries or harm, those photographs should have been included in the report. However, because the investigating officer did not take any photographs at the scene in this matter, the officer was under no obligation to include photographs in his report. Therefore, Appellant's objection regarding the officer's supposed obligation to take photographs at the scene is without merit.

Appellant also raised objections to the admission of photographs and a torn shirt into evidence at trial. In his Notice of Appeal, Appellant objects to two photographs showing bruises by stating that the photographs are "unclear and could be of anything." Appellant also argues that the investigating officer was required to have gathered the torn shirt when responding to the incident.

The Pueblo of Zuni, however, properly authenticated the photographs at trial. The victim in this matter testified under oath that the photographs were taken by her sister the morning after the incident when the victim noticed the bruising. The victim testified that the photographs specifically depicted the injuries on her body that she suffered by Appellant on the night in question. Similarly, the Pueblo of Zuni properly authenticated that the tears in a shirt were caused by Appellant. Appellant was allowed to and did conduct his own cross-examination of the victim as to these items. The trial judge, in the best position to evaluate the credibility of the parties involved, considered the authenticated evidence and the credibility of all testimony pursuant to the laws of the Pueblo of Zuni and the Federal Rules of Evidence, and properly decided that the evidence would be admitted. Because the items admitted in evidence at trial were properly authenticated and admitted, Appellant's argument as to the improper admission of evidence is without merit.

For the foregoing reasons, Appellant's Notice of Appeal in the above entitled matter is hereby DENIED.

IT IS SO ORDERED.

January 6, 2012

In the Southwest Intertribal Court of Appeals for the Ak Chin Indian Community Court

LISA VINCENT,

Petitioner-Appellant,

v.

CARLTON CARLYLE,

Respondent-Appellee.

SWITCA No. 11-011-ACICC
Tribal Case No. CV-11-029

Appeal filed June 1, 2010

Appeal from the Ak-Chin Indian Community Court,
Anthony Little, Associate Judge

Appellate Judge: Anthony J. Lee

ORDER DISMISSING APPEAL

The Southwest Intertribal Court of Appeals has received from Appellant a "Motion to Withdraw Appeal" dated November 17, 2011. Appellant's motion is well taken and hereby granted. The appeal in this matter is therefore DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

January 10, 2012

DENNIS TOYA, JR. and
SHARON LASTYONA,

Petitioners-Appellants,

v.

MARTIKA RAMONE,

Respondent-Appellee.

SWITCA Case No. 10-015-ZTC
Tribal Court Case No. MC-2010-1

Appeal filed October 20, 2010

Appeal from the Zuni Pueblo Tribal Court,
Val Panteah, Sr., Associate Judge

Appellate Judges: Robert Medina,
Stephen Wall and Anthony Lee

OPINION

SUMMARY

This Court finds that Petitioners-Appellants' allegations that the Zuni Tribal Court misinterpreted the Zuni Tribal Code § 11-3-9 when it awarded mother physical custody of her minor child and violated the Petitioners-Appellants' Constitutional Rights, is without merit and the Trial Court's order is affirmed.

* * *

This matter comes before the Southwest Intertribal Court of Appeals ("SWITCA") pursuant to Zuni Tribal Council Resolution No. M70-99-B059 (August 3, 1999), and the SWITCA Rules of Appellate Procedure ("SWITCARA"). It arises out of a child custody matter decided by the Pueblo of Zuni Tribal Court. Appellants have appealed the lower court's order awarding primary custody of child to the mother. Appellants allege the Tribal Court violated their rights to due process and equal protection. For the following reasons this Court AFFIRMS the decision of the Zuni Pueblo Tribal Court.

Factual Background

The child K.T. was born on November 12, 2007, to a 17 year old mother and an 18 year old father. The parents never married. After the child was born, both parents and the child lived in Zuni with Sharon Lastyona, the child's paternal grandmother. All three lived in Zuni until the summer of 2009. Then, mother, father, and child moved to Albuquerque, New Mexico. The three resided there together until a domestic violence incident occurred which

resulted in the father moving out. The parents began having difficulties communicating and arranging for visitation by the father. Father and paternal grandmother filed a petition for custody. On March 4, 2010, the two secured a Default Order sending minor child to live with father and grandmother in Zuni. The child resided in Zuni from March 9, 2010 until September 16, 2010. On September 16, 2010, the Tribal Court held a full hearing on the custody matter. The Court awarded both parties joint legal custody of the minor child with the mother having primary physical custody. Since that day the child has resided with her mother. On October 20, 2010, Appellants filed their appeal.

DISCUSSION

We believe that the issues within this appeal focus on whether the trial judge gave too much or too little weight to evidence presented, and not so much on questions of legal interpretation. Therefore, we review this appeal under the abuse of discretion standard.

Appellants first argue that the trial court misinterprets § 11-3-9 of the Zuni Tribal Code (ZTC or Code) as creating a presumption that the child should live with the mother unless unfit. ZTC § 11-3-9 states "The court shall consider the best interest of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for young children." The Zuni Tribal Code specifically states that the natural presumption is that the mother is best suited to care for young children. We agree with the Appellants that this language creates a presumption, though we believe it is a rebuttable presumption. The Code begins by stating that "past conduct and demonstrated moral standards of each of the parties" shall be considered by the court. Thus, the natural presumption that children should be cared for by their mothers can be overcome with evidence presented at trial that the mother lacks a moral standard and her past conduct conflicts with what is in the best interest of the child. Appellants offered no evidence of her moral standards. Appellants did attempt to show the mother's "instability" but she explained herself through testimony. Thus, the trial judge did give Appellants the opportunity to prove the mother's unfitness.

Appellants further contend that "the statute says that the best interest of the child and the past conduct and demonstrated moral standards of each party should be weighed equally." The Code does not require any equal weighing of each party's moral standard. Appellants are asking the Appellate Court to add the Appellants' language and interpretation to the statute. Absent clear language in the Code to include weighing the best interest of the child with the past conduct and moral standards of each party, this Court is without authority to adopt the Appellants' language and interpretation.

Appellants next contend that the trial court's interpretation of the statute violates the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(8) and the Fifth Amendment to the United States Constitution. Appellants raise this issue for the first time on appeal. In fact, Appellants' argument focuses entirely on the applicability of the U.S. Constitution and foreign case law. Appellants must understand that the U.S. Constitution has no effect within the borders of the reservation. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). Moreover, outside case law is only persuasive and not binding. Appellants should have allowed the trial court to rule on an equal protection argument under the Indian Civil Rights Act, but failed to preserve that issue for appeal.

Appellants next argue that the court's interpretation of the statute reduces the concept of the child's best interest to a tautology. A trial judge is in the best position to view all the evidence presented. Here, the court determined that the mother was a fit and proper custodian of the child based on the evidence presented. Appellants may feel that other considerations were not addressed, but it appears from the record below that the judge's decision was based on the laws of the Pueblo and the evidence presented. Moreover, many courts rarely take into account the wishes of a child this young. Furthermore, any removal from either the mother or father would have a negative effect. We feel the trial court took into consideration all the surrounding circumstances and based its decision well supported by the evidence.

The Pueblo of Zuni, like many Pueblos, is a strong matriarchal society. However this cultural value does not create an irrebuttable presumption. Appellants did have opportunity to overcome that presumption.

Appellants then contend that the judge improperly admitted testimony from the Zuni Tribal Social Worker. It appears from the record that the trial judge did not rely solely on the Zuni Tribal Social Worker's testimony. We believe omitting the Social Worker's testimony would not impact the outcome of the case.

Appellants suggest we interpret the language of ZTC § 11-3-9 to be read in light of the Zuni Children's Code, Title IX of the Zuni Tribal Code. Since this issue concerns a child custody dispute between parents and not a removal from both parents, an adoption, or a child in need of care, we do not see the applicability of the Children's Code in this case.

Appellants lastly argue that the court improperly dismissed Sharon Lastyona as a Party. While we do believe the trial judge should have provided grounds for doing so, we are persuaded with Appellee's contention that this custody dispute is analogous to a divorce rather than an adoption. Under Zuni law, extended family members are favored in adoption. *See* Zuni Tribal Code, § 9-13-1(b)(3). However, this is not an adoption but a matter of child custody between the parents. The natural parents clearly have standing in this child custody case and absent any Zuni codified or case law, we find the grandmother lacks standing. Thus, the trial judge properly removed her as a party.

THEREFORE, IT IS THE ORDER OF THIS COURT THAT THE JUDGMENT OF THE TRIAL COURT IS AFFIRMED.

IT IS SO ORDERED.

March 31, 2012

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant,

v.

TORIVIO BRAVO,

Defendant-Appellee.

SWITCA Case No. 10-004-SUTC
Tribal Court Case No. 10-TR-148

Appeal from the Southern Ute Tribal Court,
Suzanne F. Carlson, Associate Judge

Appellate Judge: Anthony Lee

OPINION AND ORDER DISMISSING APPEAL

SUMMARY

Appellant filed a Notice of Appeal/Petition for Discretionary Appeal of an Order granting Appellee a deferred judgment and sentence for driving under the influence. Tribal law allowed the judge broad discretion in sentencing. The Appellate Court found that the judge did not abuse her discretion. The Notice of Appeal was dismissed and the Petition for Discretionary Appeal was denied.

* * *

This appeal arises from the Southern Ute Indian Tribal Court's April 20, 2010 Order granting the Appellee a deferred judgment and sentence for driving under the influence, over the objection of the Tribal Prosecutor. The Prosecutor, on behalf of the Southern Ute Indian Tribe, filed a timely Notice of Appeal/Petition for Discretionary Appeal on April 22, 2010.

The Appellant argues that Section 4-1-124 of the Southern Ute Criminal Procedure Code does not grant the court the power to defer judgment and sentence for a criminal defendant. While this section does not mention deferred judgments and sentences, it also does not prohibit them. In fact, the sentencing procedure itself states that "[t]he court *may*, as provided for in this part, sentence a person judged guilty of an offense to any one of the following sentences or combinations of such sentences. . .." *See* SUIT Criminal Procedure Code § 4-1-124(3)(a) (emphasis added). The use of this discretionary language appears to not limit the judge's ability to sentence a person. In addition, Section 4-1-124(3)(e), of the same section, states that "[t]his section shall not deprive a court of its authority to cite for contempt, cancel or suspend a license, forfeit property, or do any other act or make any other order authorized by law." *See* SUIT Criminal Procedure Code § 4-1-124(3)(e). This language authorizes broad discretion in sentencing.

Furthermore, Section 4-1-114(4)(c) of the Southern Ute Criminal Procedure Code authorizes deferred sentencing for a reasonable time in order to obtain any information he deems necessary for the imposition of the sentence. *See* SUIT Criminal Procedure Code § 4-1-114(4)(c). While this language appears to be limiting in nature, it also is not prohibitive. No other section of the Southern Ute Indian Tribal Code mentions any specific power of the court to grant a deferred judgment and sentence. However, the Code also does not prohibit the use of a deferred judgment and sentence. If a procedure is not specified by the Southern Ute Criminal Procedure Code, the court may proceed in any manner not inconsistent with the Code. *See* SUIT Criminal Procedure Code § 4-1-130. The Order granting a deferred judgment and sentence is not inconsistent with tribal law. The fact that it is not mentioned in the Tribe's sentencing procedure does not make it unlawful. It is a clear matter of discretion for the Tribal Court Judge.

Under the Southern Ute Indian Tribal Code, only criminal defendants sentenced in excess of ten (10) days in jail or fined in excess of two hundred dollars ($200) are entitled to appeal as of a matter of right. *See* SUIT Appellate Code § 3-1-102(2). For all other appeals, the appellate court has the discretion to grant the Petition for Discretionary Appeal. *See* SUIT Appellate Code § 3-1-102(3).

This Court will not reverse a lower court's decision unless it is not supported by substantial evidence in the record or unless "there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision." *See Hualapai Nation v. D.N.*, 9 SWITCA Rep. 2, 3 (1997). Upon review of this matter and the applicable tribal law, this Court exercises its discretion to dismiss the Notice of Appeal and deny the Petition for Discretionary Appeal, as the Tribal Court Sentencing Order is not inconsistent with tribal law.

The Appellant's request for oral argument is denied.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPEAL IS HEREBY DISMISSED.

IT IS SO ORDERED.

April 11, 2012

NORMAN COOEYATE
& DANCY SIMPLICIO,

Petitioners,

v.

HON. JOHN A. CHAPELA,
CHIEF TRIBAL JUDGE,
IN AND FOR ZUNI TRIBAL COURT,
PUEBLO OF ZUNI,

Respondent.

SWITCA No. 12-001-ZTC

Petition filed January 11, 2012

Appellate Judges: Jonathan Tsosie,
Delilah Choneska and Gloria Valencia-Weber

WRIT OF MANDAMUS AND OF PROHIBITION

SUMMARY

Petitioners filed a Petition for Expedited Writ of Mandamus and Prohibition with the Appellate Court. Upon review of Respondent's Orders and his arguments at the show-cause hearing, the Appellate Court determined that Respondent lacked regard for Petitioners' due process rights and abused his discretion in issuing Orders. The Appellate Court found that it was premature to prevent the imposition of attorneys' fees because the complete record would need to be before this Court and, therefore, ordered the tribal court to forward the entire record. The Appellate Court also found that the Respondent could not continue to preside over this matter in a fair and impartial manner based upon his Orders and his own admission and behavior at the show-cause hearing. Petition issued.

* * *

This matter came before this Court by way of a Petition for Expedited Writ of Mandamus and Prohibition filed on January 11, 2012, in which Petitioners ask this Court: (1) to vacate orders of Chief Judge John A. Chapela, Zuni Tribal Court, requiring Petitioners to post a $4,000 appeal bond, which was raised to the amount of $10,000; (2) to order the Zuni Tribal Court to forward to this Court the entire record of the above-captioned matter for appeal; (3) to order the Zuni Tribal Court to refrain from imposing attorneys' fees on Petitioners as requested by the Quetawki Group[1] and (4) to prohibit Chief Judge Chapela from further presiding over any future proceedings in the above-captioned matter. This Court ordered Chief Judge Chapela to respond to the petition and to show cause at hearing that occurred on February 13, 2012, as to why the foregoing relief should not be granted to Petitioners. In response to the petition, Respondent filed an Answer to Petition for Writ of Mandamus and for Writ of Prohibition on January 25, 2012.

This Court has jurisdiction over this matter pursuant to the powers conferred on it by Zuni Tribal Resolution No. M70-99B059 (August 3, 1999), which provides that SWITCA is to act as the appellate court to the Pueblo of Zuni. The Resolution also incorporates this Court's Rules of Appellate Procedure ("*SWITCARA"*) into the Zuni Tribal Code. Thus the rules of appellate procedure for the Pueblo of Zuni are *SWITCARA*. Where the *SWITCARA* may be inconsistent with the Zuni Tribal Code, this Court will apply the Zuni Tribal Code.

This Court initially scheduled two successive show-cause hearings, the first of which was to address the petition above, and the second to address another closely related matter involving another petitioner who also claims to be a member of the Zuni Tribal Council. *See Wemytewa v. Hon. Chapela*, 12-001-ZTC. We elected to treat the matters separately, though they are related. We have focused on the procedural matters as the underlying merits remain to be decided. Of necessity, our decision in 12-002-ZTC will refer to this decision.

For the reasons below, this Court hereby issues this Writ of Mandamus and of Prohibition and (1) orders the Zuni

[1] The "Quetawki Group" consists of Arlen Quetawki, Sr., Willard Zunie, Steve Boone and Loren Leekela.

Tribal Court to vacate the appeal bond of $10,000, (2) orders the Zuni Tribal Court to certify and to forward the entire record of this matter to this Court for appeal; and (3) prohibits Chief Judge John Chapela from further presiding over this matter.

I. INTRODUCTION

This Court must explain its decision in this complex set of issues, and will initially address the procedural relief of extraordinary writs. We will then address the core issues from which all related issues emanate: the due process and equal protection right of parties to appeal an adverse judgment.

The appeal process should occur in accord with established rules. We apply the *SWITCARA* and may look to the Federal Rules of Civil Procedure for guidance. Whether an appeal bond can appropriately be required is also subject to the norms of fairness and nondiscriminatory treatment of parties. Issues of sanctions and attorneys' fees are matters for post-appeal consideration. After the final decision on the underlying merits has been issued, the course of the litigation and the parties' conduct can be reviewed. At this point a court can determine whether sanctions are warranted, and whether attorneys' fees are mandated by the applicable law.

II. EXTRAORDINARY WRITS

Rule 36 of the Zuni Rules of Civil Procedure ("ZRCP") allows for the issuance of extraordinary writs "where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion." ZRCP 36(A)(2). A writ of mandamus and a writ of prohibition are extraordinary writs. Black's Law Dictionary (6th ed. 1991). Writs of mandamus and prohibition are extraordinary, in part, because they may issue without the full benefit of the judicial process, or before the conclusion of all judicial proceedings.

A court only issues such writs in exceptional circumstances, and where it is necessary to serve the ends of justice and fairness. Federal courts traditionally used the writ of mandamus to confine an inferior court to a lawful exercise of the inferior court's jurisdiction, or to compel an inferior court to exercise its authority when the inferior court had a duty to do so. Petitioner must demonstrate a clear legal right to the writ, as well as a clear legal duty on the part of the respondent to perform the act demanded. Thus a writ of mandamus is appropriate if a lower court has wrongly decided an issue, if failure to reverse that issue would cause irreparable harm, and if there is no other available remedy for relief. The existence of another remedy, however, will not foreclose a writ of mandamus unless the other remedy is specific and appropriate for the matter at issue.

Similar to the writ of mandamus, the writ of prohibition may be issued to a lower court to prevent the lower court from exceeding its jurisdiction, but the writ of prohibition particularly applies to prohibiting acts not yet completed, rather than to the undoing of any previous acts.

This Court's Rules of Appellate Procedure ("*SWITCARA*") provides that petitions for extraordinary writs may "be directed at the presiding judge of the lower court." *SWITCARA* #23(A). Pursuant to this Rule, Petitioners properly brought their petition.

III. FINALITY AND APPEAL

At this juncture, this Court does not possess a full record of the proceedings below. The conclusions comprising this writ are solely based upon the arguments and exhibits of Petitioners and Respondent in their petition and answer, and upon the oral arguments of the show-cause hearing held on February 13, 2012.

This Court is not deciding any of the underlying merits, which involve constitutional issues. We are, rather, determining whether Respondent abused his discretion or exceeded his jurisdiction in his treatment of Petitioners' constitutional arguments. As a judge, Respondent has the duty to act fairly and impartially when considering legal arguments. A judge's unfair and biased treatment of a party may violate that party's rights to due process and to the equal protection of the law. A fundamental right of due process is access to the courts. Thus the right to appeal an adverse judgment is a due process right. The right to appeal, however, is not absolute, as the law may impose certain conditions to its exercise. The conditions, however, must be reasonable and consistent with due process.

We must acknowledge at the outset that certain requirements of the Zuni Constitution were never met, and that certain powers not specified by the constitution were exercised. Neither the Head Cacique nor his aides administered the oath of office to newly-elected tribal council members, as mandated by the constitution. The Head Cacique instead delegated that authority to the Sakisda:kwe, when the constitution is silent as to whether such a delegation is permissible. The constitution also requires a legal quorum of five council members to conduct official tribal business, yet Respondent allowed four members to act as a quorum. Thus when Petitioners argue that specific constitutional provisions were not followed, and when a plain reading of the Constitution appears to support their argument, we must conclude that Petitioners' arguments are, at the very least, plausible.

Whether Petitioners' arguments are correct, however, cannot be decided now.

Respondent, of course, found in his April 8, 2011, Decision and Order, that the Head Cacique's delegation of authority was permitted by the constitution, that the oath of office as administered by the Sakisda:kwe was sufficient to duly install the newly-elected council members, and that four council members could act as a legal quorum to conduct official tribal business. Respondent also found that Petitioners are not holdover council members as described in the constitution. Because such findings appear to either change the terms of the constitution or to give no effect to certain provisions, we asked Respondent at the show-cause hearing to explain why he did not apply certain constitutional provisions. Respondent eventually explained that the Head Cacique was not bound by the Zuni Constitution, and that the Head Cacique's word was essentially the supreme law of the Pueblo. Respondent then went further, stating that he, too, was not bound by the Zuni Constitution if the constitution required Respondent to contradict the instructions of the Head Cacique.

This Court must emphasize its utmost respect for the Head Cacique, for the traditions and customs of the Zuni Pueblo that pre-date the Zuni Constitution, and for the Zuni Pueblo's sovereignty and rights of self-determination. We do not issue this decision lightly. As the appellate court for several Indian tribes, however, we have the duty to accord tribal constitutions the greatest weight possible. The constitution establishes the very government itself. It describes the character and organization of the government, and prescribes the limits of the government's powers and the manner of its exercise. Constitutions are organic, however, and are thus amenable to changes. The Zuni Constitution prescribes a particular procedure for amending its terms, which requires the extensive participation of Zuni Tribal members.

IV. APPEAL BOND

Generally, the purpose of an appeal bond is to secure the performance of a money judgment by a lower court. Thus in the event the judgment debtor loses on appeal, the appeal bond will satisfy all or part of the judgment debtor's obligations to the judgment creditor as found by the lower court. An appeal bond may also be imposed to secure ordinary court costs associated with bringing the appeal. While an appeal bond may have the effect of being an obstacle to appeal, especially to appellants of little means, that effect should be ancillary to the valid purposes of the appeal bond. In other words, the purpose of an appeal bond cannot be to prevent appeal.

Rule 38(e) of the Zuni Tribal Code allows a judge to impose an appeal bond in order to guarantee performance of a judgment: "At the time of filing the Notice of Appeal, the appellant shall also file cash or a bond in an amount set by the Tribal Court to guarantee performance of the judgment if such performance is stayed on appeal plus, in any event, sufficient to guarantee payment of such costs or interest as the Appellate Court may award." Rule 19 of *SWITCARA* provides, "The lower court may require the appellant to deposit a bond with the lower court to guarantee the judgment will be enforceable. The security required shall not be greater in value than the amount of the judgment or fine imposed, plus costs." *SWITCARA* #19.

Petitioners argue that Section 1-8-5(3) of the Zuni Tribal Code applies to their appeal. The statute precludes the imposition of appeal bonds in certain circumstances: "Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be required to post security by bond or otherwise for any purpose." Zuni Tribal Code § 1-8-5(3).

We note that Respondent's Decision and Order of April 8, 2011, which is the subject of Petitioners' appeal, does not impose any sort of money judgment on any party. The decision is actually a declaratory judgment that describes, among other things, the rights of four members of the Quetawki Group. No obligations were imposed on Petitioners by that judgment. Petitioners, in fact, are not mentioned anywhere in that decision.

The appeal bond that Respondent imposed on Petitioners in the amount of $4,000, which Respondent later increased to $10,000, is invalid because it is punitive and arbitrary, imposed with the sole objective of preventing Petitioners from appealing this matter. A judicial decision is arbitrary when it is founded on prejudice or preference, rather than on reason or fact. The intent to deprive Petitioners of appeal is an intent to curtail Petitioners' access to the courts, in clear violation of Petitioners' due process rights. We arrive at this conclusion by examining Respondent's written orders pertaining to the appeal bonds, and by what Respondent argued at the show-cause hearing.

(A)

Respondent imposed the initial appeal bond of $4,000 on May 2, 2010, in a volatile context. Petitioners had asserted their holdover council member status, had resigned that status, and had attempted to rescind their resignations. The Bureau of Indian Affairs had expressed its doubts as to whether the new council was legitimate, and had questioned whether an improper attempt to amend the Zuni Constitution had occurred. Respondent had, of course, issued his April 8, 2011, decision, on the subject of Petitioners' appeal. In addition to their constitutional

arguments, Petitioners had alleged in their notice of appeal that Respondent had a conflict of interest that merited his disqualification.

In his Order Requiring Posting of Appeal Bond, Respondent wrote: "The Court determines that the intent of the appeal filed by appellants in their capacities as the former Governor and Lieutenant Governor . . . is to undermine and to subvert the will of the Zuni people," "to undermine and to subvert the duties and responsibilities of the duly elected [tribal council]," and "to return the Zuni Tribal Government to the state of uncertainty and paralysis that existed prior to the Decision and Judgment that was issued . . . on April 8, 2011." Respondent stated these findings without explanation. Respondent then wrote that he had "a duty to require each appellant to post an appeal bond with the Court to guarantee the Decision and Judgment that was issued by this Court on April 8, 2011 will be enforceable." Then, with no explanation as to how he arrived at the amount of $4,000, Respondent imposed an appeal bond in that amount.

Over six months later, Petitioners moved for relief from the appeal bond under Rule 31 of the Zuni Rules of Civil Procedure ("ZRCP 31"). Petitioners re-asserted their constitutional arguments and alleged violations of due process. Petitioners cited Section 1-8-5(3) of the Zuni Tribal Code as the statutory basis for their contention that "[t]he requirement of the appeal bond was improper." Motion for Relief from the Order Requiring Posting of a Bond, Nov. 23, 2011. As to Respondent's April 8, 2011, decision, Petitioners argued that "The Decision is void and should not be enforced[.]"

Respondent denied Petitioners' motion for relief on December 1, 2011, ostensibly because Petitioners did not conform to Rule 31 of the Zuni Rules of Civil Procedure. Respondent found that Petitioners "failed to state which of the seven grounds set forth in rule 31 that they are relying upon and leaves the Court to guess at which ground(s) is being used as grounds for their motion." Respondent also stated that "Rule 31 requires all motions to be filed within a reasonable time." Respondent concluded: "The filing of [Petitioners'] motion is untimely and would further [sic] the cause of justice. Said motion must therefore be denied." Respondent never addressed Petitioners' 1-8-5(3) claim. Order Denying Motion for Relief from Order, December 1, 2011.

Petitioners then filed a renewed Notice of Appeal on December 14, 2011, in which they again asserted violations of the constitution and the applicability of Section 1-8-5(3). Five days later Respondent raised the appeal bond amount to $10,000 in his Order Requiring Posting of Appeal Bond. Much of the reasoning in that order is identical to Respondent's initial order denying relief from the appeal bond. Respondent, however, added his findings from May 2, 2011, that "the intent of the appeal . . . is to undermine and to subvert the duties of [the Tribal Council] to provide a stable and functioning government[.]" Respondent also finally addressed Petitioners' ZTC 1-8-5(3) argument: "The [Petitioners] are not tribal officials as alleged in the Renewed Notice of Appeal and the Court will require an increased amount to be posted as an appeal bond as the Appellees have adopted numerous Tribal Council Resolutions and have made hundreds of official decisions on behalf of the Zuni Tribal Government which the [Petitioners] seek to undermine since the Decision and Order of this Court was issued."

The events delineated by the parties reveal that the Zuni Pueblo has experienced discord and "uncertainty and paralysis." However, these circumstances do not excuse a court from considering viable constitutional claims and those claims based on Section 1-8-5(3) of the Zuni Tribal Code. Increasing the appeal bond was not responsive to Petitioners' claims and created an even greater barrier to a proper appeal.

In the order increasing the appeal bond, Respondent noted that Petitioner Cooeyate had been certified by the Zuni Election Board to be a candidate in a general election to be held in January, 2012. Because Article V, Section 3 of the Zuni Constitution does not allow a member of the tribal council to simultaneously hold any other elective office, Respondent found that Petitioner Cooeyate's decision to run for a tribal council position in the upcoming election was tantamount to admitting that Cooeyate was no longer the holdover Governor. But Respondent also stated: "If elected to the Tribal Council during the General Election, Appellant Cooeyate would be holding two elective offices in violation of Article V, Section 3 of the Constitution." Respondent made contradictory findings. He found at one point in the order that Petitioners were not tribal officials, and then in the same order stated that if Petitioner Cooeyate were elected in the general election of 2012, Petitioner Cooeyate "would be holding two elective offices in violation of Article V, Section 3, of the Constitution."

At the show-cause hearing, we questioned Respondent as to why he found that Section 1-8-5(3) did not apply to Petitioners, and how he arrived at the amounts of $4,000 and $10,000. Respondent explained that Petitioners were no longer tribal officials because they had resigned from their tribal council positions on January 14, 2011. Petitioners had since become ordinary individuals, no different than the average tribal member. When asked about Petitioners' attempt to rescind the resignations and their constitutional arguments in support thereof, Respondent stated that the rescission letter was of no effect because Petitioners had already resigned and did not have the power of rescission. In short, by the time

Petitioners filed their notice of appeal, their arguments were so meritless that the appeal was essentially frivolous.

When we asked Respondent why he imposed a $4,000 appeal bond and how he arrived at that number, Respondent stated that the daily costs of running the tribal court and the tribal government were very high. Respondent also stated that the council had passed numerous resolutions and had conducted a great deal of official business. Respondent's reasons for raising the appeal bond to $10,000 were the same. Respondent did not explain, though, how he calculated the amounts of $4,000 and $10,000.

After extensive questioning, Respondent finally stated that he imposed such a high bond because he wanted to prevent Petitioners' claims from reaching this Court, and that he thought a high bond would force Petitioners to abandon this case.

(B)

We are not convinced by Respondent's justifications. We find, rather, that much of Respondent's reasoning and actions reflect a lack of impartiality and fairness, and that the imposition of the appeal bond was punitive and arbitrary.

When Respondent imposed the initial appeal bond of $4,000, he found, without explanation, that Petitioners' intent was "to subvert" and "to undermine" the tribal council, and to essentially cause chaos in the tribal government. He did so in response to constitutional arguments that were viable, as the Petitioners had invoked express constitutional law. If Respondent felt that Petitioners' arguments were invalid because they had resigned, Respondent did not mention Petitioners' resignations at all in that order. Moreover, Respondent stated that he had a duty to impose an appeal bond to ensure that his April 8, 2011, decision would be "enforceable." We fail to understand how the posting of $4,000 would ensure the enforceability of the April 8, 2011, declaratory judgment. Additionally, the declaratory judgment imposed no debt obligations that might be secured by the posting of an appeal bond. Respondent did not explain how he arrived at the amount of $4,000, nor could he explain at the show-cause hearing how he arrived at that amount. Thus the inability to determine the value of the declaratory judgment is inconsistent with Rule 19 of *SWITCARA*, which recognizes an appeal bond to be security for a monetary judgment, and states that any appeal bond or security "shall not be greater in value than the amount of the judgment or fine imposed[.]" *SWITCARA* #19.

This Court finds even more reasons for concern in Respondent's order denying Petitioners' motion for relief from the $4,000 appeal bond. First, it is somewhat difficult to accept that a judge as experienced as Respondent felt that he had "to guess" as to which of the ZRCP 31 grounds Petitioner had asserted. While ZRCP 31(B) indeed contains seven subsections describing the possible grounds for relief from an order, ZRCP 31(B)(5) simply provides that relief can be granted if "the judgment is void."[2] ZRCP 31(B)(5). Thus when Petitioners specifically argued that Respondent's order imposing the appeal bond was "improper" due to ZTC 1-8-5-(3), Petitioners were clearly arguing that a judgment (the order imposing the appeal bond) was void. Even more explicit was Petitioners' contention that Respondent's April 8, 2011 "Decision is void and should not be enforced[.]" This statement leaves no room for guessing as to which grounds of ZRCP 31(B) Petitioners had invoked. Moreover, ZRCP 31(B) is a wide-reaching, inclusive rule, as it contains a 'catch-all' clause. If the grounds for relief described in the first six subsections are not relied upon in a claim, then ZRCP 31(B)(7) provides that relief may be granted for "any other reason justifying relief from the operation of the judgment." ZRCP 31(B)(7). Respondent, however, made no mention of that subsection.

Also, Respondent denied, in part, relief from the appeal bond because "[i]f the Court were to grant [Petitioners'] motion, it would bring into question the validity of all of the actions and resolutions that have been passed by the Tribal Council which would undermine the stability of the Zuni Tribe." While this Court certainly understands Respondent's concern for the stability of the tribal government, Respondent's rationale reflects a lack of regard for due process. It is tantamount to saying: "I cannot remove the barrier to appeal because if I do, you will appeal. And when you appeal, it is possible that actions and laws that have passed since I imposed this barrier will be found to be illegal." Imposing a barrier to the appellate process in order to prevent possibly illegal laws and actions from being recognized as illegal is clearly inconsistent with the principles of due process. The law cannot be manipulated to prevent other laws from the possibility of being found illegal.

The <u>Order Requiring Posting of Appeal Bond</u> of December 14, 2011, in which Respondent increases the appeal bond to $10,000, is even more alarming. Much of Respondent's reasoning in this order is identical to the reasoning in his May 2, 2011, imposing the initial appeal bond, and in his order denying relief from that bond on December 1, 2011. As far as this Court can tell, the only two differences between Respondent's December 1, 2011,

[2] The term 'judgment' includes a decree and any order from which an appeal lies. Black's Law Dictionary. A 'void judgment' is of no legal effect; a nullity.

order denying relief from the $4,000 bond and the order raising the appeal bond to $10,000 are a reiteration of Petitioners' intent to undermine and subvert, and Respondent's reference to Article V, Section 3 of the Zuni Constitution. Respondent's reference to Article V, Section 3, stated that Petitioner Cooeyate was not a tribal official. The latest order was also issued only thirteen days after the order denying relief from the $4,000 appeal bond. This Court fails to see what circumstances changed within thirteen days that would justify more than doubling the appeal bond to $10,000. Given the virtual identicalness of the two orders and the short time frame between them, this Court must conclude that Respondent acted punitively and arbitrarily when raising the appeal bond to $10,000.

As for Respondent's justifications for the appeal bond at the show-cause hearing, Respondent first implied that Petitioners should be responsible for the high operational costs of government, and then finally admitted that he imposed the appeal bond to prevent appeal. First, this Court is not convinced that Petitioners should be responsible for the costs incurred in running the tribal government or the tribal court, especially when Petitioners assert plausible constitutional arguments. If the current council is indeed an invalid council, requiring Petitioners to pay any costs that might have been incurred by an invalid council would be absurd. If the current council is, on the other hand, a valid council, then the costs of operating the tribal government and the tribal court will have been incurred validly, in which case imposing upon Petitioners the responsibility of paying valid operational costs would be similarly absurd.

We must particularly emphasize Respondent's admission at the show-cause hearing with respect to why he imposed the appeal bonds. When asked if he imposed the appeal bonds so that Petitioners "would go away," Respondent explicitly replied, "Yes." Clearly, then, Respondent imposed the appeal bond to curtail Petitioners' access to the appeal process. In doing so, Respondent violated Petitioners' due process rights.

Thus in imposing, upholding and raising the appeal bond, Respondent often ignored or inadequately addressed plausible arguments, and often employed faulty or disingenuous reasoning in order to prevent appeal. Respondent's intent to deprive Petitioners of appeal reflects his lack of regard for due process. Petitioners' due process rights include the access to courts. As Chief Judge of the Zuni Tribal Court, Respondent had the duty to apply the laws of Zuni Pueblo fairly and impartially. When Respondent imposed prohibitively expensive appeal bonds in furtherance of his intent to deprive Petitioners their due process right to appeal, Respondent abused his discretion and exceeded his jurisdiction. The appeal bond is therefore not valid.

(C)

This Court finds itself in a bit of a quandary with respect to Section 1-8-5(3) of the Zuni Tribal Code. To state with any certainty whether the statute applies might implicitly decide whether Petitioners are tribal officials, which, of course, is the very issue that Petitioners wish to have decided on appeal. "Neither the Tribe *nor its officers or employees* when involved in a civil action arising from the performance of their official duties shall be required to post security by bond or otherwise for any purpose." ZTC 1-8-5(3) (emphasis added). Petitioners are, at the very least, former tribal officers or employees, a status that Respondent acknowledged when he wrote that Petitioners had brought their appeal "in their capacities as the former Governor and Lieutenant Governor" of the Pueblo. <u>Order Recruiting Posting of Appeal Bond</u>, May 2, 2011. If Petitioners brought their appeal in their capacities as former tribal officials, then it is fair to say that the action arises out of the performance of their official duties. But whether the statute applies to former tribal officers is unclear.

On the other hand, there is the distinct possibility that the statute must apply because Petitioners are rightfully tribal officers. But Petitioners have been foreclosed from the opportunity to prove that they are tribal officers by a prohibitively expensive appeal bond. Thus we have the strange scenario where Petitioners may indeed be immune from all requirements of an appeal bond, yet they cannot prove this because they cannot afford a prohibitively expensive appeal bond.

Respondent, of course, believes Petitioners are ordinary, average members of the tribe, and therefore do not deserve the protections of a statute that applies to tribal officers or employees. While Respondent may be correct in that Petitioners forever resigned their council member positions which they could not rescind, we disagree with his characterization of Petitioners as simple, ordinary members of the Pueblo. Council members, whether former or current, are rather unique individuals in a community the size of Zuni Pueblo's, especially when council members serve fairly long terms of four years. When former council members bring civil actions in their capacities as former council members, such actions often require the application of tribal laws that do not apply to the average tribal member. Likewise, when someone brings suit against a former tribal council member based on official actions that the former council member performed while in office, a court must consider tribal laws that do not apply to the average citizen. In light of the above, Respondent's dismissive characterization of Petitioners may reflect an unfair bias.

(D)

If the appeal bond is not vacated, Respondent will have effectively denied forever Petitioners' right to appeal. The permanent loss of one's right to appeal that results from an abuse of discretion is an irreparable harm. Moreover, if the appeal bond is not vacated, it is possible that impermissible constitutional violations will remain uncorrected indefinitely. If Petitioners are indeed correct as to their holdover status but cannot prove so due to the appeal bond, the loss of such status would be an irreparable harm. Our conclusion is reinforced by Respondent's own words from the show-cause hearing, where he expressed a disregard for the Zuni Constitution, and where he admitted that he imposed the appeal bonds with the intent of preventing appeal.

The only available and appropriate remedy for relief is to order the Zuni Tribal Court to vacate the appeal bond in its entirety. Further, this Court orders the Zuni Tribal Court to forward to this Court the entire record of this matter for appeal.

V. ATTORNEYS' FEES

In their petition, Petitioners state that the Quetawki Group filed on January 3, 2012, a motion for attorneys' fees in the Zuni Tribal Court in the amount of $2,480. The petition does not state whether Respondent awarded those attorneys' fees. In his answer, Respondent does not at all address these attorneys' fees. Respondent, however, included in his answer an exhibit entitled Order Sanctioning Plaintiff's Attorney, which he had issued on December 29, 2011. That order was issued by Respondent in a different but related matter. *See Wemytewa v. Hon. Chapela*, 12-002-ZTC. The order bears a different Zuni Tribal Court Cause Number and it names a different plaintiff. The Petitioners here are not mentioned anywhere in that order, and that order issued five days before January 3, 2012, the date Petitioners claim that the Quetawki Group filed their motion for attorneys' fees. This Court does not possess the January 3, 2012, motion. Petitioners request that this Court prevent Respondent from imposing attorneys' fees in this matter.

Because this Court has not yet seen the Quetawki Group's motion for attorneys' fees, nor the affidavit of fees listing all costs, nor any order imposing upon Petitioners attorneys' fees, it is premature to prevent the imposition of attorneys' fees at this time. A complete record would need to establish when the attorney whose service generated the requested fees made his appearance in these cases. Petitioners may, however, appeal the imposition of any and all attorneys' fees when the entire record in this matter is forwarded to this Court for appeal. Petitioners will not have to post any appeal bond to appeal attorneys' fees.

VI. DISQUALIFICATION

It has become clear to this Court that Respondent must be disqualified from further presiding over this matter. Simply put, this Court cannot see how Respondent would provide Petitioners a fair trial. Respondent has made it abundantly clear, through his written orders and by his own admission, that he never wanted this matter to be appealed. Respondent imposed two punitive appeal bonds in order to prevent appeal entirely, which indicates a personal bias against Petitioners. Respondent's characterizations of Petitioners as simply ordinary members of the tribe who also have the intent to undermine and to subvert the tribal government similarly reflect personal bias against Petitioners. Respondent has also stated that he is not bound by the tribal constitution.

But what most convinces this Court that Respondent could not provide a fair trial to Petitioners is the high degree of animosity that exists between Respondent, Petitioners, and Petitioners' counsel. This animosity, unfortunately, was on full display at the show-cause hearing. Throughout the heated and tense hearing, Petitioners' counsel and Respondent repeatedly interrupted each other, despite the rules of the hearing. This Court was particularly struck by Respondent's distinct disdain for Petitioners' counsel. There were many instances where Respondent called Petitioners' counsel a "liar," or that she was "lying," and Respondent often interrupted Petitioners' counsel to do so. The animus between the parties is undeniable. Given what this Court observed at the show-cause hearing it is impossible to believe that Respondent could continue to preside over this matter in a fair and impartial manner.

Given such circumstances, this Court is forced to take the extraordinary step of prohibiting Respondent from further presiding over this matter.

CONCLUSION

For the foregoing reasons, this Court issues this Writ of Mandamus and of Prohibition and hereby orders:

(1) the Zuni Tribal Court to vacate all appeal bonds imposed on Petitioners in this matter;

(2) the Zuni Tribal Court to certify and to forward to this Court for appeal the entire record in this matter;

(3) the disqualification of Chief Judge John Chapela in this matter.

IT IS SO ORDERED.

April 13, 2012

EDWARD WEMYTEWA,

Petitioner,

v.

HON. JOHN A. CHAPELA,
CHIEF TRIBAL JUDGE,
IN AND FOR ZUNI TRIBAL COURT,
PUEBLO OF ZUNI,

Respondent.

SWITCA No. 12-002-ZTC

Petition filed January 19, 2012

Appellant Judges: Jonathan Tsosie,
Delilah Choneska and Gloria Valencia-Weber

WRIT OF MANDAMUS AND OF PROHIBITION

SUMMARY

Petitioner filed a Petition for an Emergency Writ of Mandamus and Prohibition with the Appellate Court. Upon review of the record, tribal law, and show-cause hearing, the Appellate Court found that Respondent repeatedly abused his discretion and exceeded his jurisdiction by imposing sanctions on Petitioner's counsel and Petitioner. The Appellate Court ordered the disqualification of the judge from presiding further on the matter and ordered the tribal court to vacate all attorneys' fees and to refrain from imposing any future attorneys' fees. Petition issued.

* * *

THIS MATTER came before this Court by way of a Petition for an Emergency Writ of Mandamus and Prohibition filed on January 19, 2012, in which Petitioner asks this Court to vacate an Order Sanctioning Plaintiff's Attorney (hereinafter "S.O.") issued by Respondent, Chief Judge John Chapela, Zuni Tribal Court, on December 29, 2011. Specifically, Petitioner asks this Court: (1) to vacate Chief Judge Chapela's order requiring Petitioner's counsel, Catherine Stetson, to pay attorneys' fees in the amount of $8,400 to the Zuni Tribe's counsel; (2) to order Chief Judge Chapela to refrain from further awarding attorneys' fees or issuing sanctions in this matter; (3) to prohibit Chief Judge Chapela from further presiding over this matter. This Court ordered Chief Judge Chapela to respond to the petition and to show cause at hearing that occurred on February 13, 2012, as to why the foregoing relief should not be granted to Petitioners. In response to the petition, Respondent filed an Answer to Petition for Writ of Mandamus and For Writ of Prohibition (hereinafter "Answer") on January 25, 2012.

This Court has jurisdiction over this matter pursuant to the powers conferred on it by Zuni Tribal Resolution No. M70-99B059 (August 3, 1999), which provides that the Southwest Intertribal Court of Appeals ("SWITCA") is to act as the appellate court to the Pueblo of Zuni. The Resolution also incorporates this Court's Rules of Appellate Procedure ("*SWITCARA*") into the Zuni Tribal Code. Thus the rules of appellate procedure for the Pueblo of Zuni are *SWITCARA*. Where the *SWITCARA* may be inconsistent with the Zuni Tribal Code, this Court will apply the Zuni Tribal Code.

This order is companion to the order we issue in *Cooeyate v. Hon. Chapela*, 12-001-ZTC. This order will refer to that order, and some of the text here is identical. We elected to treat the matters separately, but many of the underlying facts and circumstances are the same, and there is some inevitable overlap as to certain arguments, characters and behavior, and each matter has affected the other. Our decision in that matter often makes reference to this one.

The underlying matter has not been fully litigated in the Zuni Tribal Court, as no final judgment has issued there. As this Court is a court of appeal, it would be improper at this time to assume jurisdiction, as requested by Petitioner, of the underlying matter. In the event the Zuni Tribal Court issues a final decision on the underlying merits that ends the litigation in this matter, the party adversely affected by that judgment may bring an appeal. Thus the primary focus of this order concerns the sanctions of attorneys' fees that Respondent imposed on Petitioner's counsel.

For the reasons below, this Court hereby issues this Writ of Mandamus and of Prohibition and (1) orders the Zuni Tribal Court to vacate the attorneys' fees imposed on Petitioners' counsel, Catherine Stetson, in the amount of $8,400; (2) orders the Zuni Tribal Court to refrain from imposing any further attorneys' fees upon Ms. Stetson; and (3) prohibits Chief Judge John Chapela from further presiding over this matter. In the event of appeal of the underlying matter after final judgment, no appeal bond shall be imposed on Petitioner as a prerequisite for appeal.

I. EXTRAORDINARY WRITS[1]

Rule 36 of the Zuni Rules of Civil Procedure ("ZRCP") allows for the issuance of extraordinary writs "where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion." ZRCP 36(A)(2). A writ of mandamus and a writ of prohibition are extraordinary writs. Black's Law Dictionary (6th ed. 1991). A writ is essentially an extraordinary court order. Writs of mandamus and prohibition are extraordinary, in part, because they may issue without the full benefit of the judicial process, or before the conclusion of all judicial proceedings. A court only issues such writs in exceptional circumstances, and where it is necessary to serve the ends of justice and fairness. Federal courts traditionally used the writ of mandamus to confine an inferior court to a lawful exercise of the inferior court's jurisdiction, or to compel an inferior court to exercise its authority when the inferior court had a duty to do so. Petitioner must demonstrate a clear legal right to the writ, as well as a clear legal duty on the part of respondent to perform the act demanded. Thus a writ of mandamus is appropriate if a lower court has wrongly decided an issue, if failure to reverse that issue would cause irreparable harm, and if there is no other available remedy for relief. The existence of another remedy, however, will not foreclose a writ of mandamus unless the other remedy is specific and appropriate for the matter at issue.

Similar to the writ of mandamus, the writ of prohibition may be issued to a lower court to prevent the lower court from exceeding its jurisdiction, but the writ of prohibition particularly applies to prohibiting acts not yet completed, rather than to the undoing of any previous acts.

This Court's Rules of Appellate Procedure ("*SWITCARA*") provides that petitions for extraordinary writs may "be directed at the presiding judge of the lower court." *SWITCARA* #23(A). Pursuant to this Rule, Petitioners properly brought their petition.

II. INTRODUCTION

Generally, the parties to an adversarial matter are responsible for their own attorneys' fees regardless of the outcome of the litigation. Attorneys' fees may be imposed upon a party by the presiding judge, however, when a party has brought a claim that is utterly or substantially without merit and brought in bad faith. Attorneys' fees may also be imposed to punish certain egregious behavior or actions that occurred during the course of litigation. Usually, attorneys' fees are not imposed until the conclusion of litigation, when the presiding judge may fully assess the behavior and actions of the parties.

The Zuni Rules of Civil Procedure ("ZRCP") allows the Zuni Tribal Court to impose attorneys' fees.

> "The Court shall not award attorney's fees in a case unless such have been specifically provided for by a contract or agreement of the parties under dispute, or unless it reasonably appears that the case has been prosecuted for purposes of harassment only, or that there was no reasonable expectation of success on the part of the affirmatively claiming party. In any action in which the Tribe and/or any of its officers or employees are sued for a cause of action arising out of, or in the course of, the performance of a Tribal function or duty, or in any action, except by the Tribe, against the bond of any such officer or employee, if judgment shall be against the plaintiff the Court shall award a reasonable attorney's fee against such plaintiff and in the favor of the defendant or defendants." ZRCP Rule 26(E).

The Zuni Tribal Code provides, "All judges of the Courts of the Zuni Tribe shall conform their conduct to the Code of Judicial Conduct as adopted by the American Bar Association." Z.T.C. § 1-3-5(3). All lawyers practicing in the Zuni Courts must conform their behavior to the Code of Professional Responsibility as adopted by the American Bar Association. Z.T.C. § 1-5-5 (hereinafter "ABA CPR").

For the reason below, we find that Respondent abused his discretion and exceeded his jurisdiction when he imposed sanctions on Stetson and Petitioner based on repeatedly inaccurate interpretations of Rules 3.6, 4.1, 4.2 and 4.4 of the ABA CPR. Respondent's inaccurate interpretations occurred so often and to such a degree that this Court must conclude Respondent's sanctions were based on personal preference and bias, rather than on sound reasoning.

III. BACKGROUND

The underlying matter pertains to a petition brought in the Zuni Tribal Court in which Petitioner asks the tribal court to declare the Petitioner to be a duly-installed member of the Zuni Tribal Council. The effect of such a declaration would preclude the need for a special election that had been scheduled to fill a vacancy on the tribal council. Stetson entered her appearance in this matter on November 2, 2011. Stetson immediately moved

[1] Much of the text here, and in other parts of this order, is identical to text in *Cooeyate v. Hon. Chapela*, 12-001-ZTC.

Respondent to disqualify himself from presiding over this matter due to Petitioner's belief that Respondent could not provide Petitioner a fair trial.

At a hearing on November 4, 2011, Respondent denied Petitioner's motion to disqualify and granted Petitioner leave to amend his petition. On November 7, 2011, Mr. Daniel Press wrote an email to the President/Chair of the Zuni Election Board ("ZEB"), which began, "I am the attorney for the Zuni Tribe on the case filed by Edward Wemytewa against the Tribal Council. Ava asked me to get in touch with you." On November 8, 2011, Mr. Press wrote another email to the President of the ZEB in which he stated, "All the court did on Friday was to dismiss Mr. Wemytewa's case and give him a chance to refile it." Mr. Press's emails had a confidentiality clause at the end of the emails.

The ZEB President then forwarded Mr. Press's emails to another member of the ZEB, Ms. Arlene Bobelu. Ms. Bobelu then provided Mr. Press's emails to Stetson. Stetson noticed that Mr. Press had stated that her client's case had been dismissed on November 4, when it in fact had not been dismissed.

On November 18, 2011, Stetson wrote to the ZEB in which she explained that she was in possession of Mr. Press's emails, and was writing to correct Mr. Press's "dismissal" statement. Stetson explained her client's legal position, and that her client's case was still pending. Because her client's case had not been resolved, she warned the ZEB that proceeding with a special election scheduled for December 13, 2011, would be "quite ill-advised." Stetson also pointed out to the ZEB that the Zuni Election Code provided the proper protocol for the removal of a tribal council member, and that such protocol had not occurred.

On November 20, 2011, the Gallup Independent published a statement by the Tribal Administrator, Ava Hannaweeke, in which she explained that the special election was necessary to fill vacancy in the tribal council, one of which was created by Petitioner, who "has not showed up for work." In response, Stetson then wrote an email to the Gallup Independent in which she explained her client's legal position, and that Petitioner did indeed show up to work but was not allowed to assume his seat on the tribal council because the defendants in the underlying matter did not recognize Petitioner's oath of office. Stetson also explained that her client's case was still pending.

On November 28, 2011, Stetson added the ZEB as a party to the underlying matter.

On December 1, 2011, Mr. Press filed a motion for sanctions, accusing Stetson of two ethical violations based on the above events. Respondent scheduled the hearing for that motion to occur on December 9, 2011. On December 8, 2011, Stetson filed <u>Plaintiff's Response to Defendant's Motion for Sanctions and Plaintiff's Restated Motion for Continuance</u>.

On December 8, 2011, the defendants in the underlying matter issued an open letter to the community of the Zuni Pueblo (the so-called "blast fax"), in which they stated that they were the validly constituted tribal council, and that Petitioner did not have a valid claim to be a council member.

At the hearing on the motion for sanctions on December 9, 2011, Stetson claimed that Mr. Press's oral statements revealed a question as to whether Mr. Press was the attorney representing the ZEB. At that hearing Respondent also warned Stetson and Mr. Press against arguing their cases publicly, and that sanctions would be imposed if either of them did so.

On December 13, 2011, Stetson filed <u>Plaintiff's Supplemental Response to Defendant's Motion for Sanctions and Written Motion to Sanction the Defendant's Attorney for Multiple Ethical Violations of the ABA Model Code of Professional Responsibility</u>. In that response, Stetson alleges that Respondent engaged in ex parte communications with Mr. Press, and that the Tribal Administrator was the sister-in-law of Respondent. Stetson also alleges that according to the Zuni Tribal Code, Mr. Press is not qualified to practice in the Zuni Courts. Stetson also takes issue with the "blast fax," and objects to the underlying defendants' perceived ability to argue their position publicly without repercussion. Stetson argues that the ABA CPR permitted her to correct the Tribal Administrator's prejudicial statements to the Gallup Independent.

On December 17, 2011, Mr. Press moved for more sanctions in the amount of $12,000, to be imposed on Petitioner.

On December 20, 2011, Stetson filed a <u>Motion for Reconsideration of Scheduling Order</u>, in which she makes three arguments that the Zuni Tribal Code allows/requires twenty days for her to file a response to motions.

On December 29, 2011, Respondent issued his <u>Sanctioning Order</u>, in which he required Stetson to pay $8,400 in attorneys' fees within sixty days.

On January 17, 2012, Respondent issued to Stetson an order to show cause as to why Stetson should not be held in criminal contempt for failure to comply with the December 29, <u>Sanctioning Order</u>.

On January 19, 2012, Stetson filed in this Court a petition requesting extraordinary writs of mandamus and prohibition.

IV.

A. ABA CPR 4.1 Truthfulness in Statements to Others

Rule 4.1(a) of the ABA CPR provides, "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person[.]" A "material fact or law" is a fact or law that is significant or essential to the issue or matter at hand.

Respondent found that Stetson wrote the November 18 letter to the ZEB "for the sole purpose of misinforming and intimidating members of the Special Election Board, in violation of Rule 4.1 of the ABA Code of Professional Responsibility." S.O. #21. Specifically, he found that Stetson's assertion that the Zuni Election Code provided the proper protocol for the removal of a tribal officer was a knowing false statement of material fact or law made to the ZEB. S.O. #21. Respondent also found that the caption of the November 18 letter, which listed the parties in the 12-001-ZTC matter and not Petitioner, was also a knowing false statement of material fact. S.O. #20.

We fail to see how Stetson's incorrect attribution to the Zuni Election Code is a knowing false statement of material fact or law made to a third person. To focus on that misattribution ignores the intent of Stetson's email, which was to remind the ZEB that there is a proper protocol for the removal of tribal officials. The misattribution of the material law's source has no bearing upon the existence or effect of the material law. Nor does Stetson's misattribution reflect any intent to mislead or to deceive the ZEB about the existence of the removal protocol. The fact that a removal protocol indeed exists convinces this Court that Stetson was simply mistaken when attributing its source to the Zuni Election Code rather than to the Zuni Constitution. Because she asserted a protocol that indeed exists, but was merely mistaken in writing that the protocol could be found in the Zuni Election Code rather than the constitution. Stetson's letter clearly did not rise to the level of a *knowing* false statement of *material* fact or law.

Respondent's finding that the caption of the November 18 letter violates Rule 4.1 is even less tenable. Stetson's caption simply lists the parties and cause number in another, closely related, matter, instead of listing Edward Wemytewa and the correct cause number. Stetson clearly stated in the body of the letter, however, that she was writing that letter on behalf of Edward Wemytewa and his pending legal matter, thereby diminishing the significance, if any, of the incorrect caption. At worst, the caption was an inadvertent clerical mistake. We cannot see how a caption listing incorrect parties and cause number in a letter could possibly have any substantive effect on the underlying issues. Thus the incorrect caption is clearly not a material fact or law to the underlying matter.

It is obvious to this Court that Stetson made no knowing false statements of material fact or law to the ZEB in her November 18 letter. Stetson's November 18 letter merely contained two inadvertent mistakes. Stetson referred to the Zuni Election Code when she should have referred to the Zuni Constitution as the correct source for a removal protocol that truly exists, and she listed the wrong parties and cause number in the caption to the letter. For Respondent knowing false statements of material law or fact in such mistakes, and then to impose sanctions based on ABA CPR Rule 4.1 because of them, is deeply troubling to this Court.

Respondent abused his discretion and exceeded his jurisdiction when imposing sanctions on Stetson based on ABA CPR Rule 4.1

B. ABA CPR Rule 4.4. Respect for Rights of Third Persons

ABA CPR Rule 4.4(a) provides, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Rule 4.4(b) provides, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 to 4.4(b) states that the rule "does not address the legal duties of the lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person."

Respondent found that "Ms. Stetson's statements are not only wrong but are intended to embarrass, harass, and intimidate the individuals that the statements are directed toward, in violation of Rule 4.4 of the ABA Code of Professional Responsibility." S.O. #19. Thus, presumably for the purposes of Rule 4.1(a), Respondent found that Stetson's November 18 letter had no other substantial purpose than to embarrass, delay, or burden the ZEB, and also to intimidate and threaten the ZEB. S.O. #20.

Respondent's interpretation and reliance upon Rule 4.1(a) with respect to the November 18 letter is incorrect. First, the November 18 letter indeed had a substantial purpose, as it was intended to correct Mr. Press's prejudicial misstatement of law to the ZEB that Petitioner's case had been dismissed. Because the November 18 letter had a substantial purpose in correcting an incorrect and prejudicial legal statement, its intent was not to delay,

embarrass, or burden the ZEB. Moreover, Respondent's S.O. indicates that Rule 4.1(a) prevents a lawyer from intimidating or threatening a third party. Neither the Rule nor any of its Comments indicate any prohibition on intimidating or threatening a third party. Respondent has thus sanctioned Stetson under Rule 4.1(a) for violating standards that do not exist in Rule 4.1(a). This is not permissible.

Moreover, attorneys correct inaccurate legal statements all the time, especially when such statements are prejudicial to their client. Attorneys often warn of potential litigation when making such statements. The recipient of such statements might feel intimidated or threatened by such statements, but that does not matter to the Rule when the Rule does not proscribe intimidating or threatening statements, and especially when the statement has a legitimate and substantial purpose.

As for imposing sanctions under Rule 4.2(b), Respondent found that Stetson was unethical when she wrote the November 18 letter directly to the ZEB, and when Stetson ignored the confidentiality clause in Mr. Press's emails to the President of the ZEB. We find Respondent's rationale with respect to Rule 4.2(b) deficient, as the rule requires that an attorney have actual knowledge that a third party is represented by counsel. Stetson has clearly raised large questions as to whether she knew that the ZEB was represented by an attorney on November 18.

The personal message that Mr. Press wrote in his November 7, 2011, email suggests that there was no prior relationship between the President of the ZEB and Mr. Press: "I am the attorney for the Zuni Tribe on the case filed by Edward Wemytewa against the Tribal Council. Ava asked me to get in touch with you." Such words appear to indicate a first-time communication, an introduction. Former ZEB member Arlene Bobelu's resignation letter of December 9, 2011, also states that she did not know the ZEB was represented by any attorney on November 18, and that she had not even learned that the ZEB was represented by an attorney until the day of her resignation. Also, Ms. Stetson points out that there has been no entry of appearance by Mr. Press with respect to his representation of the ZEB.

Moreover, Stetson learned during her former tenure as counsel to the Zuni Tribe that, with respect to disputed election results, tribal officials retained their own attorneys independent of the attorney obtained by the ZEB. Stetson already knew that defendants below were represented by Mr. Press. Stetson was also familiar with the process that Zuni Governmental entities had to complete in order to obtain an attorney, which involves the procurement of a Tribal Council Resolution. Thus if Mr. Press was already representing the defendants in the underlying matter, it was reasonable for Stetson to presume that Mr. Press was not representing the ZEB when Mr. Press sent his emails on November 7 and 8. We also believe Stetson when she states that upon her information and belief, no Tribal Council Resolution had been passed as of November 18 that would have indicated that the ZEB was represented by any attorney. Stetson has also brought up an issue raised by Mr. Press at the December 9 hearing, in which Stetson claims that even Mr. Press wavered as to whether he was the attorney for the ZEB as of November 18. Given these surrounding circumstances, Respondent should not have imputed on Stetson the actual knowledge required by Rule 4.2(b), as to the ZEB's representation by any attorney.

Stetson was also under no obligation to abide by the confidentiality clause in Mr. Press's emails to the President of the ZEB. This is because the emails did not indicate to Stetson that they were communications between an attorney and his client, and because any confidentiality that may have existed was waived when ZEB member Arlene Bobelu voluntarily shared the emails with Stetson.

For the purposes of Comment 2 to Rule 4.4(b), it is clear that Stetson did not receive Mr. Press's emails inadvertently. The emails themselves indicate that the intended recipient of the emails, the President of the ZEB, purposely sent them to ZEB member Bobelu, who then provided them to Stetson. It is clear that Bobelu was in rightful possession of the emails when she shared them with Stetson. Thus it cannot be argued that Stetson knew or reasonably should have known that the email was wrongfully obtained.

We find that Respondent abused his discretion and exceeded his jurisdiction when he imposed sanctions on Stetson based on ABA CPR Rule 4.4. Despite Stetson's viable arguments as to whether she knew the ZEB was represented by counsel on November 18, 2011, Respondent imputed upon Stetson the actual knowledge of that representation in order to impose sanctions. Moreover, Respondent incorrectly found that Stetson had a duty to abide by the confidentiality clauses in Mr. Press's emails when any such confidentiality was waived when the emails were shared with Stetson by a person in rightful possession of the emails.

C. <u>ABA CPR Rule 3.6. Trial Publicity</u>

ABA CPR Rule 3.6(a) states, in general terms, that a lawyer may not make extrajudicial prejudicial statements about a pending matter that will be publicly communicated. Rules 3.6(b) and (c), however, are exceptions to 3.6(a). Rule 3.6(b) prescribes what a lawyer may say when making a statement that will be publicly disseminated. In pertinent part, a lawyer may state: "(1) the claim, offense or defense involved and,

except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation[.]"

Rule 3.6(c) provides that "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate recent adverse publicity."

Respondent imposed sanctions on Stetson based on statements that Stetson made to the Gallup Independent. Respondent, however, applied Rule 3.6 in an unjustifiably narrow manner, as Respondent only looked to Rule 3.6(a) and completely ignored the Rule's exceptions in subsections (b) and (c). Thus Respondent found that Rule 3.6 completely prohibited Stetson from contacting the Gallup Independent to correct statements published by the Gallup Independent in which the Tribal Administrator had said that the upcoming special elections were necessary, in part, because Petitioner Wemytewa did not show up to work. Such a statement was clearly prejudicial to Petitioner's case in this matter.

Thus Rule 3.6(b) and (c) allowed Stetson to email the Gallup Independent in order to correct the Tribal Administrator. Stetson's email did not in any way overstep the parameters of 3.6(b) and (c). Stetson's email explained her client's legal position, as allowed by 3.6(b)(1), and explained that the matter was still ongoing, as allowed by 3.6(b)(3). Then, in a clear attempt to correct the undue prejudicial effect of the Tribal Administrator's statements, as allowed by Rule 3.6(c), Stetson explained to the Gallup Independent that her client had indeed shown up for work as a council member, but was not allowed by the council members to work, hence the current litigation. Stetson gave no more information than the above.

Respondent, however, only applied Rule 3.6(a) when imposing sanctions, and completely ignored the exceptions to the rule in 3.6(b) and (c), despite Stetson's arguments. The fact that Respondent refused to even consider Rule 3.6(b) and (c) while only applying Rule 3.6(a), leads this Court to conclude that Respondent ignored subsections (b) and (c) in a willful manner. When Respondent then imposed sanctions on Stetson based on such an unfair reading of Rule 3.6, we can only conclude that Respondent abused his discretion and exceeded his jurisdiction.

D. <u>Other Grounds for Sanctions</u>

According to Respondent's S.O., Respondent also based his sanctions on certain statements by Stetson that cannot be properly considered under any of the ABA CPR rules above. It is unclear, in fact, whether Respondent specifically meant to apply any of the above ABA CPR rules to the following statements and assertions. Regardless, the following statements and assertions do not justify the imposition of such high attorneys' fees.

Respondent has taken particular offense to Stetson's assertions that the Tribal Administrator is his sister-in-law, and Respondent has repeatedly referred to that assertion as a lie. Stetson has argued that she based that claim on conversations with her clients and with several members of the Zuni Pueblo community. Stetson has argued that such a relationship would constitute a conflict of interest in Respondent that would merit his disqualification from this matter. While Respondent has maintained that the Tribal Administrator is not his sister-in-law, he has not denied the existence of some kind of personal relationship with the Tribal Administrator's sister. We do not know the nature of Respondent's relationship with the person in question, nor does it particularly matter at this point. What matters is that Stetson made such an assertion based upon information and belief derived from conversations with members of the community, and that she acted in good faith.

In other words, Stetson was merely trying to point out an appearance of impropriety that would merit having another judge preside over this matter. The American Bar Association's Code of Judicial Conduct provides that a judge should remove himself from presiding over a matter due to an appearance of impropriety that might arise from a conflict of interest. *See* Rule 2.11 of the ABA Code of Judicial Conduct.

Because we find that Stetson asserted her arguments about Respondent's relationship with the Tribal Administrator in good faith, Respondent abused his discretion and exceeded his jurisdiction when he imposed sanctions on Stetson based on that argument.

Similarly, we find that Respondent abused his discretion and exceeded his jurisdiction when he based sanctions on Stetson's assertions that Mr. Press was not qualified to argue in the Zuni Tribal Court, and on Stetson's assertion that the Zuni Tribal Code allowed Stetson twenty days to respond to motions. Whether Mr. Press is allowed to practice in the Zuni courts is not the issue of this order, but based on a plain reading of the Zuni Tribal Code and what Mr. Press has admitted in open court, Stetson made a plausible argument as to whether Mr. Press is allowed to practice in the Zuni Tribal Court. The Zuni Tribal Code appears to require that lawyers be licensed to practice in a

state, whereas Mr. Press is licensed by the District of Columbia and is on inactive status in Arizona. Thus if Stetson were incorrect, she at least asserted a viable argument based on a plain reading of the Zuni Tribal Code. Plausible arguments may be considered meritless, but to hold a plausible argument meritless and then impose sanctions based on the assertion of that plausible argument, as Respondent did here, may amount to an abuse of discretion and exceed Respondent's jurisdiction.

Respondent also imposed sanctions on Stetson because Stetson had argued that the Zuni Tribal Code allowed twenty days for Stetson to respond to motions. Respondent maintains that the Zuni Rules of Civil Procedure do not have any such rule. Stetson, however, cites Rule 7(A) of the ZRCP, which provides, "A defendant or other party against whom a claim has been made for affirmative relief shall have 20 days from the date of service upon him to answer or respond to the claim." ZRCP 7(A).

We cannot discern any instance in the Zuni Tribal Code that specifically allows twenty days to respond to a motion, thus Respondent may be correct in this regard. On the other hand, ZRCP 7(A) does allow "a defendant or other party" twenty days to respond to a claim for affirmative relief. While Stetson may be mistaken in that the Zuni Tribal Code mandates the allowance of twenty days to respond to motions, we consider her argument in light of the language of ZRCP 7(A). We also consider how Respondent has repeatedly offered inadequate reasons in order to impose sanctions. We must conclude that Stetson's argument in the Zuni Tribal Court that the Zuni Tribal Code allows twenty days to reply to all motions is not a valid basis for sanctions as imposed by Respondent. Given the pattern of Respondent's repeated abuses of discretion and exceeding of jurisdiction when imposing sanctions on Stetson, we must conclude that sanctions based on Stetson's reading of ZRCP 7(A) are invalid for the same reasons, especially when ZRCP 7(A) contains language that might support Stetson's position.

E. Petitioner's Sanctions

Given Respondent's repeated abuses of discretion and excess of his jurisdiction in the underlying matter, we have no choice but to conclude that his unfairness and bias extends to the attorneys' fees imposed on Petitioner Wemytewa himself. The very amount of such fees, in excess of $12,000, supports our conclusion.

F. Mandamus

Mandamus must issue because Respondent has rendered a series of incorrect decisions that were imposed with the sole intent to impose sanctions on Stetson and Petitioner. Respondent's orders exhibited a pattern of disregard for due process and the equal protection of Zuni's laws. If the sanctions are not vacated, Stetson and Petitioner will suffer irreparable harm. The only appropriate remedy is to vacate all sanctions and prevent the imposition of further sanctions.

V. Respondent's Order to Show Cause

This Court is particularly alarmed by Respondent's January 17, 2012, order to Stetson to show cause as to why she should not be held in criminal contempt for failure to pay the sanctions ordered in Respondent's S.O. We are aware that Respondent vacated that order before its hearing was ever held, but the fact that Respondent even imposed that order reflects a blatant disregard for the due process and equal protection rights of Stetson and Petitioner.

Respondent's S.O. required payment of the $8,400 within sixty days. Well before the expiration of sixty days, however, Respondent ordered Stetson to show cause at a hearing that was to occur *within* the sixty-day time frame, or else Stetson would be held in criminal contempt. Not only did Respondent's order to show cause clearly contradict the terms of his own S.O., but Respondent provided no reason for doing so. To threaten Stetson with criminal contempt for failing to obey the terms provided by his own order is absurd, and demonstrates an alarming lack of regard for due process and the equal protection of the law of Zuni Pueblo.

VI. Disqualification[2]

It has become clear to this Court that Respondent must be disqualified from further presiding over this matter. Simply put, this Court cannot see how Respondent would provide Petitioner a fair trial. Respondent has made it abundantly clear, through his written orders and by his own admission, that he never wanted this matter to be appealed. Respondent imposed two punitive appeal bonds in order to prevent appeal entirely, which indicates a personal bias against Petitioner. Respondent's characterizations of Petitioner as a simply ordinary member of the tribe who also has the intent to undermine and to subvert the tribal government similarly reflect personal bias against Petitioner. Respondent has also stated that he is not bound by the tribal constitution.

But what most convinces this Court that Respondent could not provide a fair trial to Petitioner is the high degree of animosity that exists between Respondent, Petitioner, and

[2] This section comprised a section of our order in 12-001-ZTC.

Petitioner's counsel. This animosity, unfortunately, was on full display at the show-cause hearing. Throughout the heated and tense hearing, Petitioner's counsel and Respondent repeatedly interrupted each other, despite the rules of the hearing. This Court was particularly struck by Respondent's distinct disdain for Petitioner's counsel. There were many instances where Respondent called Petitioner's counsel a "liar," or that she was "lying," and Respondent often interrupted Petitioner's counsel to do so. The animus between the parties is undeniable. Given what this Court observed at the show-cause hearing it is impossible to believe that Respondent could continue to preside over this matter in a fair and impartial manner.

Given such circumstances, this Court is forced to take the extraordinary step of prohibiting Respondent from further presiding over this matter.

CONCLUSION

For the foregoing reasons, this Court issues this Writ of Mandamus and of Prohibition and hereby orders:

(1) the Zuni Tribal Court to vacate all attorneys' fees imposed on Catherine B. Stetson;

(2) the Zuni Tribal Court to vacate all attorneys' fees imposed on Edward Wemytewa, Petitioner;

(3) the Zuni Tribal Court to refrain from imposing any future attorneys' fees on Catherine B. Stetson or on Edward Wemytewa, Petitioner;

(4) the disqualification of Chief Judge John Chapela in this matter.

IT IS SO ORDERED.

April 16, 2012

MARTIKA RAMONE,

Petitioner,
on her own interest and on behalf of KST,
a minor child

v.

THE ZUNI CHILDREN'S COURT
and DENNIS TOYA,

Respondents,
concerning KST, a Minor Child.

SWITCA No. 12-005-ZTC
Tribal Court Case No. MC-2010-0001

Petition for Habeas Corpus filed March 29, 2012

Appeal from the Zuni Pueblo Children's Court
Val Panteah, Sr., Judge

Appellate Judge: Stephen Wall

ORDER

SUMMARY

Petitioner filed a petition for a Writ of Habeas Corpus, arguing that the children's order limiting her custody for ninety days was a restraint of her and her daughter's liberties. The Appellate Court determined that the Writ of Habeas Corpus was not an appropriate remedy at this time because the ninety-day continuance indicated that tribal remedies had not been exhausted and a final order had not been issued. Denied.

* * *

Presiding Judge Stephen Wall, writing for the Southwest Intertribal Court of Appeals:

I

This matter comes before the SWITCA upon petition by Martika Ramone for a Writ of Habeas Corpus. The Petition, filed on March 29, 2012, is based on an order issued by the Zuni Children's Court, extending a temporary custody order by ninety (90) days.

This case is a continuation of an on-going custody dispute between the parents of KST which has gone through several iterations, including a previous SWITCA decision, SWITCA 10-015-ZTC. The current iteration of this case is the result of ongoing challenges by each parent to custody and visitation vis-à-vis the other parent. From the lower court record it appears that between November 2010 and February 2012 there were seven (7) motions by

either the father or mother of KST challenging visitation or custody arrangements.

In March of 2011, challenges to custodial and visitation arrangements began to include allegations of abuse and neglect, but more importantly, allegations of sexual abuse of KST. Both parents made allegations of sexual abuse occurring during visitation or custody of the opposing parent. On two occasions evidence entered into the lower court record indicates that KST had possibly been sexually abused.

On March 9, 2011, the Petitioner Martika Ramone filed a Motion for Emergency Suspension of Visitation Rights (No. 5 in lower court record), alleging that there was sexual abuse while KST was visiting her father in Zuni. Medical reports from UNM Hospital were filed with the motion containing a diagnosis of molestation.

Similarly, on June 16, 2011 the Petitioner filed a motion for enforcement of a parenting plan established by an order dated November 22, 2010. Respondent Toya filed a response to the Petitioner's motion on July 23, 2011 (No. 16 in the lower court record), including a medical report dated April 17, 2011 from Zuni Indian Health Services that expressed suspicion of sexual abuse. That report implicated the Petitioner's boyfriend. This medical report has also surfaced as part of the Respondent Toya's brief in opposition to the Writ of Habeas Corpus.

In response to the Petitioner's motion of March 9, 2011, the Zuni Children's Court ordered a Zuni Tribal Social Services investigation. The referral to the Zuni Tribal Social Services also triggered an FBI forensic interview. The lower court record indicates that neither of the investigations substantiated the allegations of sexual abuse.

As for the medical report filed on July 23, 2011 as part of the Respondent's response to the Petitioner's motion of June 16, 2011, there was no reference to that report in the Court's order and the lower court record is silent on whether there was any police or social services involvement based on that report.

On December 8, 2011 Respondent Toya filed for Temporary Custody of KST. The motion was based, in part, on the Zuni Indian Health Services report of April 17, 2011. The Zuni Children's Court immediately granted the custody request without a hearing. Then on February 1, 2012, the Petitioner filed a Motion for Physical Custody based on a State of New Mexico, Children, Youth and Family Department finding of "unsubstantiated" in their investigation of the allegations of the Zuni Indian Medical Services report of April 17, 2011. Two days later, on February 3, 2012 the Petitioner filed a Motion for Reconsideration of the existing custody and visitation order. The Respondent filed a response to the Petitioner's motion on February 15, 2012. The Zuni Children's Court, after a hearing on the matter, entered an order denying the Petitioner's request for physical custody and continued the temporary custody order for an additional ninety (90) days. The Court also ordered, *inter alia,* that an evidentiary hearing would be held after ninety (90) days to determine custody of the child.

II

The Petitioner, in her Petition for a Writ of Habeas Corpus, has stated that the Zuni Children's Court has restrained her and her daughter from exercising their liberties, in this case, the liberty to be together. Petitioner cites the Zuni Rules of Civil Procedure, 36 Z.R. Civ. P., that provides, "Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the Court that any person is unjustly imprisoned or otherwise restrained of [her] liberty." Petitioner states that the actions of the Zuni Children's Court, through its failure to apply procedural requirements of the Zuni Children's Code relating to child abuse and neglect in this matter, as well as failing to provide hearings and other procedural safeguards have acted to deprive the Petitioner of her liberty to be with her child.

The Respondent has urged the SWITCA not to issue the Writ of Habeas Corpus based wholly on the unresolved issues raised by the report from Zuni Indian Medical Services, April 17, 2011 and the fact that the last order extending the temporary custody order ninety (90) days requires an evidentiary hearing.

III

The rules of the Southwest Intertribal Court of Appeals control the issuance of a writ of habeas corpus in this matter. SWITCA Rule 24 defines the basic procedure for filing and reviewing a Petition for a Writ of Habeas Corpus. This panel has found that the Petition has met the minimal standards for consideration. Once the Petition has been accepted, the focus turns back to the Zuni Tribal Code provisions authorizing the Writ of Habeas Corpus as a remedy.

Rule 36 Z.R. Civ. P. authorizes the use of the extraordinary writ of habeas corpus as an appropriate remedy. The SWITCA accepts the Petitioner's claim that habeas corpus can be an appropriate remedy in child custody cases. However, in this case SWITCA finds that the Writ of Habeas Corpus is not an appropriate remedy at this time.

First, until a final order is issued denying contact between

the Petitioner and her daughter, we cannot state that liberties have been restrained. The SWITCA acknowledges that educational opportunities and economic conditions may interfere with the Petitioner's desire to spend time with her child or comply with the Court's order concerning visitation. According to the Court order of February 16, 2012, the Petitioner has the liberty to be with her child, but under certain conditions. It appears that the Petitioner sees the current limitations placed on her visitation as a restraint because of the inconvenience they pose. But the degree of restraint, based in the inconvenience to the Petitioner, is not an absolute restraint and, therefore, does not rise to the level of restraint necessary to issue an extraordinary writ. It is incumbent upon the Petitioner to negotiate with her school to create opportunities to comply with the court order.

Second, the ninety (90) day continuance indicates that tribal remedies have not been exhausted. We can only find that a restraint of liberty exists once there is an exhaustion of tribal remedies and there are no options or opportunities to remedy the restraint. At that point the restraint becomes absolute. As long as tribal remedies are available within a reasonable time frame, the restraint, while frustrating and hurtful, has the chance of being remedied. While ninety (90) days may seem like an eternity to the Petitioner, the Court was being reasonable considering the time for the necessary investigations and preparation of reports.

IV

The SWITCA will note that the Zuni Children's Court has mismanaged this matter. The lower court case record has corroborated the statements by the Petitioner concerning the lack of due process. The Court has overlooked the rights of both parties, but more so of the Petitioner.

The April 17, 2011 report from Zuni Indian Medical Services was first entered into the Court's record on July 23, 2011. But the court record is silent concerning what became of the report, although it was apparently the foundation of the flurry of activity around the first part of December that resulted in an order granting the Respondent Toya custody without any hearing. This report, as well as the UNM Hospital report used in the Petitioner's March 9, 2011 motion, should have gone directly to Zuni Tribal Social Services for them to file for custodial change if they found the accusations to be substantiated rather than allowing the parties to use the report for continued harassment of each other. The Zuni Children's Court has confused the best interests of the child with the ongoing drama between the parents and has failed to follow the procedure the Tribe has established for handling an abuse and neglect case. The Court has allowed the custody battle between the parents of KST to consume far more resources than it should.

The SWITCA hereby denies the Petition for Writ of Habeas Corpus, based on its timeliness and this denial should not be seen as absolving the lower Court and its actions. It is not necessary for the SWITCA to address the issues of denial of due process because of the absence of a final order.

IT IS SO ORDERED.

April 24, 2012

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant,

v.

AARON BURCH,

Defendant-Appellee.

SWITCA Case No. 11-002-SUTC
Tribal Court Case No. 010-CR-476; 10-AP-133

Appeal filed February 9, 2011

Appeal from the Southern Ute Tribal Court,
Suzanne F. Carlson, Associate Judge

Appellate Judge: Anthony Lee

OPINION AND ORDER DISMISSING APPEAL

SUMMARY

Appellant filed a Notice of Appeal stating that the tribal court erroneously amended a sentencing order and altered a plea agreement. The Appellate Court reasoned that the judge was within her discretion to amend the sentencing order pursuant to the tribal code. During the Appellate Court's review of this matter, Appellee violated his probation, was sentenced, and completed his sentencing requirements. The Appellate Court finds this matter moot. Dismissed.

* * *

This matter comes before the Southwest Intertribal Court of Appeals (SWITCA) from the Southern Ute Tribal Court, and arises out of Appellant's Notice of Appeal that asserts that the lower court erroneously amended a sentencing order and altered a plea agreement.

On December 2, 2010, the Appellee pled guilty to driving under the influence in violation of Section 14-2-102(1) of the Southern Ute Tribal Code. Under the plea agreement,

the Appellee was to be sentenced to two hundred seventy (270) days in jail with twelve (12) months of supervised probation. The parties agreed that one hundred twenty (120) days of the jail term was to be served with the remaining one hundred fifty (150) days to be suspended, if the Appellee successfully completed his probation.

On January 21, 2011, the Appellee filed a Motion to Amend Sentencing Order, wherein he requested that the lower court modify his sentence to allow him to serve the last forty (40) days of his sentence at a residential treatment program. The Tribe filed a Response to the Appellee's Motion on January 26, 2011, requesting that the court deny the motion based on community safety and the plea agreement entered into by the parties and accepted by the court. Thereafter, on February 4, 2011, the Tribe filed a Motion to Enforce Plea Agreement.

The lower court held a hearing on February 8, 2011 and granted the Appellee's motion to amend the court's prior sentencing order that was based on the plea agreement. This was ordered over the objection of the Tribal Prosecutor. In the Order, the court stated that pursuant to Section 4-1-124(9), it could reduce or modify a sentence if new factors bearing on the sentence become known. The court also stated that the Appellee is in need of rehabilitation and treatment and that this would help him complete his probation. The judge further noted that although the Southern Ute Tribal Code does not specifically prescribe her action, the court may proceed in any manner not inconsistent with the Code, pursuant to Section 4-1-130 of the Southern Ute Tribal Code.

The Prosecutor, on behalf of the Southern Ute Indian Tribe, filed a timely Notice of Appeal on February 9, 2011. No briefs were filed in this case as provided for in Section 3-1-107 of the Appellate Code of the Southern Ute Indian Tribe.

SWITCA recently received notice from the lower court that the Appellee violated his probation and was sentenced on January 17, 2012 to a ninety-nine (99) day jail sentence. Since the Appellee was released on April 25, 2012 and has completed his sentencing requirements before this Court had the opportunity to decide the appeal, it is insignificant for this court to opine on this matter now. Therefore, this Court finds that this appeal is moot and will not be considered by the Court.

Although this case is moot, this Court offers clarification on this matter. As Judge Carlson noted in her February 8, 2011 Order, if a procedure is not specified by the Southern Ute Criminal Procedure Code, the court may proceed in any manner not inconsistent with the Code. *See* SUIT Criminal Procedure Code § 4-1-130. While the lower court was not clear in the Order, this Court finds that it is within the discretion of the judge to determine the need for rehabilitation and the willingness of a defendant to attend inpatient treatment, to be a new factor for the court to consider in reducing or modifying a sentence pursuant to Section 4-1-124(9). The Southern Ute Tribal Code does not prohibit this action. It is a clear matter of discretion for the tribal court judge. Without this clear prohibition, it is this Court's opinion that the Tribe intended on keeping this discretion with the tribal court.

While the Tribal Prosecutor cites several state and federal authorities in his Notice of Appeal as guidance for this Court, this Court is not aware of any tribal law requiring the Southern Ute Tribal Court, or SWITCA, to follow state or federal laws on this matter of criminal procedure, and this Court finds that the Southern Ute Indian Tribe is best suited to determine its own laws.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPEAL IS HEREBY DISMISSED.

IT IS SO ORDERED.

April 30, 2012

Related Opinion: 23 SWITCA REP. 30 (2016)

TONIETTE BACA,

Appellant,

v.

SOUTHERN UTE INDIAN TRIBE,

Appellee.

SWITCA Case No. 11-003-SUTC
Tribal Court Case Nos. 11-AP-39; 10-CR-514

Appeal filed March 7, 2011

Appeal from the Southern Ute Tribal Court,
Suzanne Carlson, Associate Judge

Appellate Judge: Anthony Lee

OPINION AND ORDER DISMISSING APPEAL

SUMMARY

Appellant filed a Notice of Appeal and a Motion for Stay of Judgment pursuant to the SUIT Appellate Code. The Appellate Court found this matter moot because it received a Review Order and Order Closing the Case from the tribal court. Dismissed.

* * *

This matter comes before the Southwest Intertribal Court of Appeals ("SWITCA") from the Southern Ute Tribal Court, and arises out of Appellant's Notice of Appeal.

The Southern Ute Tribal Court held a hearing on February 24, 2011, wherein the Appellant pleaded guilty to disorderly conduct and the Court issued an Order sentencing her for the offense. Thereafter, the Appellant filed a timely Notice of Appeal on March 7, 2011, stating several alleged errors made by the trial judge. The Appellant filed a Motion for stay of judgment that was included with the Notice of Appeal, as required by SUIT Appellate Code § 3-1-104.

SWITCA Rule 20 requires the lower court to rule on the stay within 15 days of the motion being filed. *See* SWITCARA #20(b) (2001). If the lower court does not rule on the motion, the SWITCA may motion the lower court for a stay if SWITCA determines it would be justified under the facts of the case. *See* SWITCARA #20(d) (2001).

On January 9, 2012, SWITCA received a copy of a Review Order dated July 21, 2011, that closed the Appellant's case and an Order Closing the Case, dated July 29, 2011. Since this matter was closed by the lower court before this Court had the opportunity to decide the appeal, it is insignificant for this Court to motion the lower court for a stay or opine on this matter now. Therefore this Court finds that this case is moot and will not be considered by the Court.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE APPEAL IS HEREBY DISMISSED. IT IS SO ORDERED.

May 10, 2012

ERNEST MIRABAL,

Defendant-Appellant,

v.

DENNIS F. VIGIL, CARLOS O. VIGIL, TONY B. VIGIL and DAVID A. PEREZ,

Plaintiffs-Appellees.

SWITCA Case No. 11-004-NTC
Nambe Pueblo Court Case No. CV-2011-005

Appeal filed April 11, 2011

Appeal from the Nambe Pueblo Tribal Court,
Frank Demolli, Judge *Pro Tem*

Appellate Judge: Jonathan Tsosie

OPINION

SUMMARY

Appellant, in his capacity as Governor, appealed an Order to pay stipends to council members who attended a meeting he had canceled. The Appellate Court found that the doctrine of sovereign immunity clearly applied because this matter involved a claim against a tribal official, in his official capacity, for monetary relief from the tribal treasury. The Appellate Court also found that the tribal court erred in basing its judgment on traditional law when the record clearly lacked evidence to support the existence of any traditional law that could apply. Reversed and remanded.

* * *

I

This is an appeal by Ernest Mirabal,[1] in his capacity as Governor of Nambe Pueblo, from an order of the Nambe Pueblo Tribal Court in which Governor Mirabal was ordered to pay four tribal council members (Plaintiffs-Appellees)[2] a stipend of two hundred dollars from the Tribal Treasury. Appellees sought payment of the stipends after conducting a scheduled tribal council meeting that Governor Mirabal attempted to cancel. The tribal court judge held in favor of Appellees on the basis of Nambe Pueblo tradition, and found that tribal sovereign immunity did not apply. This Court has appellate jurisdiction pursuant to Nambe Pueblo Resolution No. NP-2008-20 (June 18, 2008). For the reasons below, the

[1] Hereinafter "Governor Mirabal," or "Mirabal."
[2] Hereinafter "Appellees."

Nambe Pueblo Tribal Court's decision in this matter is reversed.

As a procedural matter, this Court must note that Appellees did not file a response to Governor Mirabal's opening brief, as ordered by this Court when accepting this appeal on October 28, 2011. In that Order, this Court also directed Appellees to provide this Court with April 23, 2008, tribal council meeting minutes upon which Appellees base their claim, and to elaborate upon the significance of those minutes. The April 23, 2008 minutes were not a part of the certified record on appeal, but were apparently read into the record by the tribal court judge during the hearing.[3] Appellees did not provide those minutes, nor have they indicated any intention to do so. Consistent with Rule 5 of this Court's Rules of Appellate Procedure ("*SWITCARA"*), review is thus limited to the record of the lower court proceeding and Governor Mirabal's opening brief.

II

At the outset, this Court recognizes the sensitive matters involved with respect to tribal tradition and tribal sovereign immunity.

This Court has the utmost respect for the traditions and customs of tribes and tribal governments. This Court acknowledges that some traditions and customs may be so important and established that they carry the force of law within a tribe, and that such laws are often not written in a tribe's code. Tribal governments may therefore operate and govern according to traditional laws that are not apparent to those unfamiliar with the tribe's traditions and customs. In tribal court, unwritten traditional law often presents a large problem to the judge who must resolve a dispute in which traditions and customs are potentially dispositive. The judge must decide whether a tradition or custom exists based on the evidence put forth in written pleadings and oral testimony.

This Court will not overturn a tribal court's findings of tradition or custom lightly. This Court will give wide deference to a tribal court's finding of a tradition or custom if the finding logically follows from the evidence in the record. Given the sensitive nature of deciding whether a tribal court has properly considered the tribe's traditions and customs, this Court has found it helpful to describe, in perhaps more detail than usual, the contents of the pleadings and the oral statements at the hearing.

This case may be decided solely on the grounds of sovereign immunity. Alternatively, the lower court's finding of a tribal tradition that decides this case is not supported by the facts or arguments presented to the tribal court by Appellees.

III

(a)

Nambe Pueblo Tribal Councilmembers receive a two hundred dollar ($200) stipend for every tribal council meeting that they attend in which a legal quorum is present. The Governor of the Pueblo has the sole authority to issue these stipends. Regularly scheduled tribal council meetings occur twice a month. When necessary, "special" meetings may be held in order to consider important tribal affairs. Meetings are usually chaired by the Pueblo's Governor, though other tribal officers may chair the meeting when the Governor is unable to attend.

In November, 2010, seven council members unanimously voted to hold a special meeting to discuss matters of "high importance," and scheduled that meeting to occur on December 10, 2010 ("December 10 meeting"). On December 6, Governor Mirabal wrote a memorandum to each council member notifying them that he was canceling the December 10 meeting because he had to attend an important matter in Washington, D.C. Despite the Governor's memorandum, however, Appellees decided that they would hold the December 10 meeting anyway. Appellees attempted to persuade the other three members of the council, who had originally voted in favor of the December 10 meeting, to join them, but the other three members refused due to the Governor's cancellation.

Three days after the meeting, one or all of the Appellees drafted a letter ("December 13 letter") to the whole tribal council in which they explained that they held the meeting despite Governor Mirabal's cancellation "because of the important nature of the issues." The letter further asked Governor Mirabal to acknowledge the legality of the December 10 meeting and to issue them stipends. The December 13 letter does not mention or allude to "tradition" or "custom."

When Governor Mirabal refused to issue the stipends, Appellees brought a civil complaint against the Governor on January 21, 2011, in which they each sought the $200 stipend, plus late fees and interest. The civil complaint named Governor Mirabal as defendant, and asked for nothing more than the stipend plus late fees and interest. All parties admit that Governor Mirabal was not being sued personally, and that any stipends would be drawn

[3] In his Notice of Appeal, Governor Mirabal claims that he "was not provided copies of written exhibits filed in open court by the petitioners[.]" Because the only "written exhibit[] filed in open court" at the hearing appears to be these minutes, it is possible that Appellees brought the minutes to the hearing for the judge to consider, and then left the hearing with the minutes without having provided a copy to Governor Mirabal or to the tribal court.

from the Tribal Treasury. The civil complaint did not contain any terms of, or references to, "tradition" or "custom."

In his answer filed in Nambe Pueblo Tribal Court on February 22, 2011, Governor Mirabal claimed that Appellees could not force him to pay them a stipend because of the doctrine of sovereign immunity, and that the request for stipends amounted to a claim for money damages. Governor Mirabal argued that he was acting within his official capacity as Governor when he canceled the December 10 meeting, and that there had been no express waiver of sovereign immunity by the Pueblo, nor any federal abrogation of the Pueblo's sovereign immunity. Governor Mirabal further claimed that, traditionally, council meetings are called by the Governor, who also has the sole authority to cancel such meetings. This is the first and only time that either party invoked "tradition" in any pleading.

On January 11, 2011, a special tribal council meeting was held, and the minutes of that meeting are in the certified record on appeal, labeled "Petitioners Exhibit C." These minutes show that the council members discussed the December 10 meeting, and asked an attorney who was present whether the December 10 meeting was legal, as Governor Mirabal was not acknowledging the validity of that meeting.

> Minutes: [The attorney] responded, to his knowledge there are no written rules to the council meetings. But in practices [sic] if the meeting was cancelled it should be rescheduled. No precise legal advice can be given out without any written rules. Councilman Tony Vigil a quorum [sic] consists of four (4) or more members. Lt. Govern [sic] could have chaired the meeting. The Tribal Sheriff was here. There was nothing to hide in that meeting. Even though there is not written rules, Council has traditional law. Precedence has been set.[4]

This is the only instance in the entirety of those minutes, which consist of six typed pages, where "tradition" was mentioned.

On March 28, 2011, Governor Mirabal wrote a letter addressed to the Nambe Pueblo Tribal Court explaining why he had canceled the December 10 meeting. He explained that he felt he was within his right, as Governor, to cancel that meeting, and that the meeting was invalid. Because the meeting was invalid, he would not issue any stipends. Governor Mirabal also wrote that Appellees "are suing the tribe and their people because I do not pay these members of council personally to attend Council meetings. This money is coming from tribal funds that should benefit the people." At no point in the letter did Governor Mirabal mention or allude to "tradition" or "custom."

On March 29, 2011, the matter was heard in Nambe Pueblo Tribal Court. At that hearing, each Appellee was allowed to give statements in support of their position. The hearing was relatively informal, and Appellees took turns speaking in support of their argument.[5]

(b)

The first Appellee to give a statement was not identified, but it is reasonably certain that this was Dennis Vigil. D. Vigil opened by stating that there are tribal council minutes which indicate that any council meeting where a legal quorum of council members is present requires the mandatory payment "by the administration" of a stipend to the attending council members. D. Vigil further stated that, traditionally, any tribal council member, or any member of the tribe, may call for a meeting of the tribal council, and that such meetings could be chaired by various tribal officials. He also testified that a presiding Governor does not have to be present at council meetings in order for the attending council members to be paid stipends. He explained that Mirabal had "set precedent" during his tenure as Head Councilman of calling for and holding tribal council meetings without the knowledge or approval of the presiding Governor.[6] The tribal court judge then posed a question.

> Judge: Let me ask you a question, and I did read this pleading: You're saying that traditionally it's the council members who

[4] No quotation marks appear in the minutes that might denote or attribute a verbatim statement.

[5] The Appellees did not identify themselves before speaking, except for one instance where Appellee David Perez introduced himself, and the judge did not clarify for the record which Appellee was about to speak or had just spoken. It therefore required some effort to discern from the audio recording of the trial which Appellee is which.

[6] It became apparent that in 1995, Mirabal was Head Councilman to the tribal council, and that he called for and conducted council meetings without the knowledge or approval of the presiding Governor, Tony Vigil (who is now one of the Appellees). Mirabal called for and conducted those meetings as part of an attempt by the tribal council to impeach the presiding Governor. Whenever an Appellee referred to the "precedent" that had been set by Mirabal, the reference was to these 1995 events.

> can call a council meeting. What I understand from what Governor Mirabal has presented is it's the Governor's right to call those meetings. And so it seems there's a question of tradition here that I don't understand how it is done on the Pueblo of Nambe.
>
> D. Vigil: Traditionally, when there was an uprising called the (inaudible) for freedom, Governor Mirabal was part of that, was part of, of the council then, and he was, he was, he set the precedent by having meetings in other, in other places, with other council people in their, in their homes. So it does not, he wasn't Governor at that time, he was, he was Head Councilman. He did not, he did not have to be called by the Governor because the Governor was, was at that process (inaudible) was (inaudible) trying to be impeached. But him, as Head Councilman, did set the precedent by calling council meetings at different locations. So it does not have to be the Governor because that Governor at that time was in a, in a litigation, I guess to, for impeachment or removal. But he did set the precedent in that sense.

(c)

At this point the judge asked the parties if there was anyone that the tribal council and the Governor deferred to in matters of tradition who might be asked about what the tradition is with respect to council meetings. Governor Mirabal answered, "Not that I can recall." D. Vigil did not answer yes or no, but instead stated that council member Joe Garcia would remember when Mirabal called and held tribal council meetings as a Head Councilman because Joe Garcia was a council member during the 1995 administration. D. Vigil then stated again that Mirabal had "set the precedent" for calling council meetings as a council member when the tribal council was trying to impeach then-Governor Tony Vigil. This is the extent of the parties' answers to the judge concerning any traditional authority.

(d)

Appellee Carlos Vigil then addressed the court: "I agree that the precedent has been set on this particular case," again referring to Mirabal's actions in 1995. In support of his argument, C. Vigil then told of how he, as a council member, called for and chaired two special meetings within the past year that the Governor attended. He further explained why Appellees felt that the matters on the agenda for the December 10 meeting were so important.

(e)

David Perez presented an official Nambe Pueblo document reflecting the fact that he called for the special December 10 meeting in late November, and that all council members unanimously approved the December 10 meeting. Later in the hearing, Perez spoke about his time as Governor, and stated that on the occasions when he could not attend a scheduled council meeting due to a scheduling conflict or to an emergency, he would have another tribal official chair the council meeting. "We wouldn't cancel the meeting - unless there was a death in the family."

(f)

When Appellee Tony Vigil took his turn, his first point was that "precedent has been set" when former council members in 1995 had called for and held council meetings "without the knowledge or the approval of the governor. And, at that time, I was the Governor." T. Vigil did not mention whether the council members who attended those meetings were paid a stipend. As for any mention of the payment of stipends, he related the following story:

> T. Vigil: Number two is that, back in March of (inaudible) two to three years ago, about two years ago, in the neighborhood, a meeting was held, that was called for, that was scheduled, was called for, and a quorum was not present. There were, four councilmen were not there, but the meeting still was held and those individuals got paid at that meeting. And what I am referring to was my brother had passed away down in Dallas, and I went down to, for that, for that (inaudible). And, out of respect, four councilmen did not attend that meeting, but that meeting was held, and those individuals that were there, which a quorum did consist of, because a quorum is four, those individuals were, were paid.

(g)

Appellees rely upon tribal council meeting minutes from April 23, 2008, which they claim obligates the Governor to pay these stipends. Appellees could not locate the minutes when first asked by the judge to produce them, at which point the judge formally swore Dennis Vigil in to testify about their contents. D. Vigil testified that the minutes would prove that Governor Mirabal must issue a stipend to any council member who attends any regular or special meeting, as long as any such meeting is attended by a legal quorum of four council members. When the

minutes were finally located later in the hearing, Appellees presented them to the judge, who read them into the record:

> Judge: Let the record reflect that this is a review of tribal council minutes that is signed by four of seven councilmembers [Unidentified voice: "Which is a quorum"] which is a quorum. And it states on April 23, 2008, page four, bullet eight, and bullet fourteen, councilman Joe Garcia indicated that there was a question on the difference between a regular meeting and a special meeting. It was indicated that all meetings regardless of the nature should be paid.

This is the entire extent of the minutes relied upon by Appellees.

IV

The doctrine of sovereign immunity describes a sovereign's jurisdictional immunity from suit. It is derived from the English common-law notion that a sovereign cannot be sued without its consent. As sovereigns, tribal governments are presumed to enjoy complete sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).[7] A tribe may waive its sovereign immunity, but any such waiver must be clear and unambiguous. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). Similarly, Congress may waive or abrogate a tribe's sovereign immunity, but such waiver or abrogation must be clear and unambiguous. *United States v. Testan*, 424 U.S. 392, 399 (1976). Sovereign immunity thus protects a tribe's treasury from suit.

Tribal sovereign immunity does not shield a tribal officer from every kind of suit. *Puyallup Tribe, Inc. v. Dept. of Game of Washington*, 433 U.S. 165 (1977). A tribal officer is immune from suit for money damages if the officer was acting within the scope of his official capacity, but the relief sought would be satisfied by the tribe itself. *See, e.g. Fletcher v. U.S.*, 116 F.3D 1315, 1324 (10th Cir. 1997); *Linneen v. Gila River Indian Community,* 276 F.3D 489, 492 (9th Cir. 2002), *cert. denied*, 536 U.S. 939 (2002). Tribal officers, however, are not immune from actions seeking declaratory and injunctive relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).
A tribal officer acting outside the scope of her official capacity is acting in an individual capacity, and is therefore not immune from any suit for money damages that might arise from such conduct. This tribal officer would be personally liable for the satisfaction of such damages. *See Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1159-61 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002).

With respect to a tribe's traditions or customs, this Court will give wide deference to a tribal court's finding of a tradition or custom if the finding logically follows from the evidence in the record. If the record clearly does not contain evidence supporting the existence of a tradition or custom, any judgment based on such a finding is in error.

Even if the existence of traditional or customary law is established, its application may not be appropriate if it is inconsistent with federal law. Pursuant to Chapter I, Section 17 of Nambe Pueblo's code, a court may apply (1) federal law, (2) customary and traditional law that is not inconsistent with federal law, and (3) the laws of the State of New Mexico where federal law and customary/traditional law are silent.[8]

The standard of review on appeal for questions of tribal sovereignty immunity is *de novo*, *U.S. v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

V

A thorough review of the pleadings and testimony does not support the tribal court judge's decision in this matter.

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[7] This Court's Rules of Appellate Procedure are consistent with the U.S. Supreme Court: "The following rules are not intended to diminish the authority of nor create an implied waiver of sovereign immunity by any participating pueblo or tribe." *SWITCARA #1(c).*

[8] Section 17. Law Applicable to Civil Actions

a. In all civil cases, the Nambe Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department and any ordinances or customs of the tribe not prohibited by such federal laws.
b. Where any doubt arises as to the customs and usages of the tribe, the court may request the advice of tribal members and other experts familiar with these customs and usages.
c. Any matters that are not covered by tribal ordinances or the traditional customs and usages of the tribe, or by applicable federal laws and regulations, shall be decided by the court according to the laws of the State of New Mexico.

Nambe Pueblo reaffirmed its adoption of the New Mexico Criminal and Traffic Law Manual by Resolution NP-96-28 (June 24, 1988).

Because this case is a claim for monetary relief against a tribal officer, in his official capacity, to be satisfied by the Tribal Treasury, the doctrine of sovereign immunity clearly applies. In order to be successful, Appellees must show that there has been a clear and unambiguous waiver of Nambe Pueblo's immunity from suit for the payment of stipends to council members who attend council meetings. Because tribal sovereign immunity is a matter of federal law, any traditional law or customary law of the Pueblo that might guarantee payment of these stipends must be consistent with the doctrine of sovereign immunity. The existence of any such traditions or customs should be supported by Appellees' assertions and testimony. Further, because this case is primarily about monetary relief, this Court stresses that it is not deciding whether the December 10 meeting was a legal meeting or not.

Appellees did not assert in their pleadings at any time that the doctrine of sovereign immunity did not apply to this matter. Appellees primarily relied upon precedent – from 1995 and from personal experiences as Governors – and upon the tribal council meeting minutes from April 23, 2008. Appellees' precedent, at most, demonstrated that tribal council members could call for and hold tribal council meetings without the knowledge or approval of the presiding Governor. Appellees' precedent did not establish, however, any kind of history of paying stipends to tribal council members who held meetings that were canceled by the Governor.

The tribal court's finding that there is a "traditional duty" in the Governor to pay a stipend to council members who hold a council meeting despite the Governor's cancellation of that meeting is also in error, as that finding does not logically follow from any of Appellees' pleadings or testimony. There is a complete lack of any assertions based on "tradition" or "custom" in any of Appellees' pleadings. In all of Appellees' pleadings and statements submitted to the tribal court before the hearing, the only mention of "tradition" occurs in the special council minutes from January, 2011, in which a council member says, "Council has traditional law," and "Precedence has been set." There is no explanation as to what those statements mean in the minutes, nor any mention of those minutes in the hearing. Without further explanation, those statements are cryptic, and certainly do not assert or establish any "tradition" or "custom" with respect to paying stipends.

From the hearing it is apparent that aside from the importance of the April 23, 2008, minutes, the only consistent testimony among Appellees is that "precedent" had been set by Mirabal in 1995 with respect to the ability of a tribal council member to call for and conduct tribal council meetings without the knowledge or approval of the presiding Governor.

Dennis Vigil did not mention whether the council members who attended those 1995 meetings were paid a stipend, nor did he discuss any instance where a Governor had attempted to cancel a scheduled council meeting. D. Vigil's opening remarks were also the first time in the course of litigation that Appellees had used the term "traditional," and the reference was made with respect to the ability of tribal council members to call council meetings. At no point did he claim that the payment of stipends was "traditional." This Court also notes that when answering the judge's request to clarify what the tradition is, D. Vigil cited events that occurred, at most, sixteen years prior to the hearing.

Carlos Vigil only cited two recent meetings he called for as a councilman. He did not describe a situation where a Governor canceled a meeting, much less an instance where council members held a meeting in spite of the Governor's cancellation and were paid a stipend for it. Moreover, the presiding Governor attended the two meetings that C. Vigil called. C. Vigil did not discuss the payments of stipends, nor did he ever mention "tradition" or "custom" in his testimony.

David Perez's statement similarly did not describe a situation similar to the one at issue. He only stated that when he was Governor, he never canceled a council meeting, but would have another tribal officer chair the meeting in his place. Perez never discussed the payment of stipends, nor made any mention or reference to "tradition" or "custom."

Tony Vigil did not mention what type of tribal officer called for the meeting in Dallas, nor whether the Governor attended the meeting. Aside from the question of whether there was a legal quorum or not, T. Vigil did not mention whether the Governor at that time approved or disapproved of that meeting. If that Governor did not approve of that meeting but issued stipends anyway, the Governor's reasons for doing so might have been instructive. Also, T. Vigil did not speak of "tradition" or "custom" at any time in his testimony. Instead, he stated twice that "precedence has been set," in reference to the events of 1995, and cited the meeting in Dallas that had occurred only two or three years prior.

Thus Appellees' testimonial statements agree that for the prior sixteen years, council members could call for and hold tribal council meetings. This Court is not deciding whether such meetings are legal or not. It is clear from the pleadings and testimony, however, that Appellees never put forth an argument based in "tradition" or "custom" with respect to the payment of stipends.

This Court also notes the lack of any testimony by anyone who might be considered an authority on matters of tradition on Nambe Pueblo. When the judge asked the

parties if there was any such person, Governor Mirabal stated that he could not recall one, and Appellees only stated that another council member would remember Mirabal's 1995 actions. Appellees never stated that they were traditional authorities, but even if they were, they never asserted an argument as to any tradition of paying stipends, much less a tradition of paying stipends for holding meetings that the Governor has canceled.

As for the April 23, 2008, tribal council meeting minutes, this Court understands that the tribal councils of some pueblos, including Nambe Pueblo, pass laws and ordinances by approving the minutes of council meetings. This Court must therefore consider the legal force of the following words: "[C]ouncilman Joe Garcia indicated that there was a question on the difference between a regular meeting and a special meeting. It was indicated that all meetings regardless of the nature should be paid."

Because a tribe's waiver of its sovereign immunity must be clear and unambiguous, it is impossible for this Court to interpret these words as a clear expression by Nambe Pueblo that it is now willing to allow itself to be sued for the payment of monetary stipends. These words simply do not waive, in a clear and unambiguous way, the Pueblo's sovereign immunity.

Moreover, the April 23, 2008 minutes do not at all reflect the existence of any kind of tradition or custom on Nambe Pueblo, much less a tradition of paying stipends. If anything, the words of the minutes themselves reflect the existence of some confusion among the council as to what kind of meeting merited a stipend.

VI

For the foregoing reasons, this Court finds that Governor Mirabal, in his official capacity, is immune from Appellees' civil complaint seeking the payment of $200 stipends.

Further, because Appellees failed to put forth any facts or arguments in support of any "tradition" or "custom" on Nambe Pueblo with respect to the payment of stipends to council members, Governor Mirabal is therefore not compelled by any tradition or custom to pay Appellees a stipend.

If Nambe Pueblo wishes to allow the Pueblo or its officers to be subject to suit for monetary relief, the tribal council may elect to waive its sovereign immunity to the extent it so chooses, but any such waiver must be clear and unambiguous.

This Court hereby REVERSES the decision of the Nambe Pueblo Tribal Court in this matter, and REMANDS this matter for judgment consistent with this opinion.

IT IS SO ORDERED.

July 5, 2012

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant,

v.

AARON BURCH,

Defendant-Appellee.

SWITCA Case No. 11-002-SUTC
Tribal Court Case No. 010-CR-476; 10-AP-133

Appeal filed February 9, 2011

Appeal from the Southern Ute Tribal Court,
Suzanne F. Carlson, Associate Judge

Appellate Judge: Anthony Lee

MOTION FOR RECONSIDERATION OF OPINION AND ORDER DISMISSING APPEAL AND CLARIFICATION FILED MAY 16, 2011

OPINION AND ORDER

SUMMARY

Previously, the Appellate Court had dismissed this matter as moot in an "Opinion and Order Dismissing the Appeal." Appellant then filed a motion for reconsideration of that opinion and order, and also requested a formal clarification of that opinion and order. The Appellate Court explained that the "Opinion and Order Dismissing the Appeal" should be considered to be an order denying Appellant's petition for discretionary appeal. The Appellate Court further explained that the "clarification" within the "Opinion and Order Dismissing the Appeal" "was a means to inform the Appellant of the Court's opinion so that an amendment to existing tribal law could be explored." Because the petition for discretionary appeal had already been denied by the Appellate Court and the underlying circumstances of the matter have made the case moot, the Appellate Court denied the motion for reconsideration.

* * *

This Court formerly rendered an Opinion and Order Dismissing the Appeal on April 30, 2012 on the grounds that the appeal was moot due to the fact that the Appellee completed his sentencing requirements before this Court had an opportunity to decide the appeal. The Appellant,

through the Tribal Prosecutor, filed a timely Motion for Reconsideration of Opinion & Order Dismissing the Appeal and Clarification on May 16, 2012.

The Appellant correctly asserts in the Motion that the Tribe's only avenue of appeal in a criminal case is by a petition for discretionary appeal. *See* SUIT Appellate Code § 3-1-102(2) & 3-1-102(3). Although the Appellant filed a Notice of Appeal and did not reference that the Notice of Appeal was a Petition for Discretionary Appeal, this Court treated said Notice as a Petition for Discretionary Appeal.

Accordingly, this Court makes the following clarification. The Opinion and Order Dismissing the Appeal should be considered as an order denying the petition for discretionary appeal, and not be given any precedential value. The clarification given in the Opinion and Order Dismissing the Appeal was a means to inform the Appellant of the Court's opinion so that an amendment to existing tribal law could be explored. Therefore there is no need to reconsider this case or brief this case.

The Appellant incorrectly asserts that there is no opportunity for the Tribe to file a brief in this case. Section 3-1-107(2) of the Tribe's Appellate Code sets forth the procedure for filing a supplemental memorandum of legal authority. It allows an Appellant the right to submit said memorandum at *any time twenty (20) days after delivery of the notice of appeal* and other documents to the appeals judge. *See* SUIT Appellate Code § 3-1-107(2) (emphasis added). Therefore, the opportunity clearly exists, as indicated by tribal law. Typically upon accepting an appeal, the Court will set a briefing schedule, if the parties have not already submitted such legal briefs. However, because the petition for discretionary appeal was denied, such briefing was not required. The Appellant references the writ of certiorari procedure for the United States Supreme Court that has no bearing on this case. The Appellant attempts to "read in" a procedure that is not mentioned in tribal law. Interestingly, here, the Appellant is trying to argue its point by referencing a procedure not mentioned in the tribe's code, while at the same time arguing that the Court cannot do the same thing, albeit the Court has discretion pursuant to Section 4-1-130 of the SUIT Criminal Procedure Code to proceed in a manner not inconsistent with the Code, if a procedure is not specified by the Southern Ute Criminal Procedure Code. *See* SUIT Criminal Procedure Code § 4-1-130.

The Appellant further expresses frustration in the Motion regarding the timeliness of this Court's response. This Court understands the frustration of waiting to hear from the appellate court. It is not uncommon for a party to wait an extended amount of time, and even more so, if the docket for the appellate court system includes numerous cases from various tribes, as is the case here. Oftentimes, this Court is not made aware of a status change of a pending matter. It is important for an Appellant to keep the Court apprised of any foreseeable change in the status of the case, especially if the change impacts the relevancy or potential mootness of the pending case. If a party is facing a matter of urgency, it is recommended that they notify the Court accordingly. The Court is responsible for handling all appellate cases in the docket as expediently as possible, given the caseload and the requirements of tribal law and appellate rules. To suggest that this Court has done otherwise is clearly an inappropriate and disrespectful opinion of the Appellant that has no place in the Motion or any pleading to this Court.

Further, attorney for the Appellant should exercise better care in addressing this Court. Attorney for the Appellant states in his Motion that "[t]aken the court's reasoning to its logical extreme, public hanging, lashing or waterboarding are permissible sentences since these are not mentioned in the Southern Ute Code and therefore cannot be inconsistent with it." Any statement suggesting that this Court would condone unlawful acts will not be tolerated in the future.

ACCORDINGLY, IT IS THE ORDER OF THIS COURT THAT THE MOTION IS DENIED IN PART AND GRANTED IN PART. RECONSIDERATION IS DENIED AND CLARIFICATION IS HEREBY GRANTED.

IT IS SO ORDERED.

July 12, 2012

Related Opinion: 23 SWITCA REP. 22 (2016)