Southern Ute Tribe, Plaintiff-Respondent
v.
Gilbert Tucson, Defendant-Petitioner.

No. 94-006-SUTC

Appeal Filed January 25, 1995

Petitioner filed a petition for a writ of *habeas corpus* after being placed in custody of the Southern Ute Law Enforcement Division and Peaceful Spirits Alcohol Treatment Center pursuant to a bench warrant issued by the lower court for petitioner's failure to appear for hearings. The lower court released the defendant prior to his serving court-ordered treatment and respondent has moved for a dismissal of the writ as being moot. The defendant not being in custody, the petition for writ of *habeas corpus* is denied.

Michael Mortland, Colorado Legal Services, Inc., for the Appellant
Douglas S. Walker, Tribal Prosecutor, for the Appellee

Appeal from the Southern Ute Tribal Court
Appellate Judge Allan Toledo

The defendant filed his *habeas corpus* petition pursuant to SWITCARA Rule 24 upon the lower court issuing an involuntary commitment order to an inpatient alcoholism treatment center after revoking a plea agreement the defendant had previously entered with the prosecutor.

The respondent, though its prosecutor, had filed a petition for involuntary commitment in the lower court, pusuant to the Southern Ute Indian Tribal Code, §8-3-110, and the defendant by and through his previous counsel of record entered into a stipulation. On March 28, 1994, the Court, by a stipulated order, deferred his commitment to an inpatient alcohol treatment center for six months provided that the defendant attend certain outpatient counselling, and that he provide the court with adequate documentation of his counselling for alcohol use.

The lower court scheduled several judicial review hearings. The defendant's present counsel appeared for hearings scheduled on August 2, 1994, and August 30, 1994, but the defendant failed to appear. As a result, the lower court issued a bench warrant for defendant's arrest.

On September 2, 1994, the defendant was arrested for a show cause hearing and detained until September 7, 1994. At the hearing, defendant was found to be in contempt of court for his failure to appear and because he had not complied, substantially, with the provisions of the stipulated order of March 28, 1994. The lower court ordered the defendant to be committed to an inpatient alcoholism treatment center.

On September 9, 1994, defendant filed his petition for writ of *habeas corpus*. On September 27, 1994, respondent filed its motion to release petitioner, basing it on the fact that the order for involuntary commitment had expired by its own provisions. The defendant had not been admitted into a treatment center under the lower court's order and is not now subject to being placed in custody.

Habeas corpus action may be brought by any person who is contesting unlawful detention, *Scott v. Southern Ute Tribe*, 4 SWITCA 9 (1992),. The defendant is not detained and is not now under the threat of detention as a result of the motion to release, and the petition for writ of habeas corpus is moot.

Pursuant to SWITCARA RULE 24 (f), a petition for writ of habeas corpus which in not acted upon within thirty (30) days after it is filed shall be considered denied.

IT IS THEREFORE ORDERED that the writ of habeas corpus filed herein is denied.

IT IS SO ORDERED.

Dudley Weaver, Appellant,
v.
"Peaceful Spirit" Southern Ute Treatment Center, and its program Director, Arlene Millich, in her official capacity and as an individual; Judy Lansing, Clinical Supervisor, in her official capacity and as an individual; and Toni Tena La Bathe, Counselor, in her official capacity and as an individual, Appellees[1].

No. 93-002-SUTC

Appeal Filed February 2, 1995

[1] "Respondent" was used in previous pleadings. The appellate code of the Southern Ute Indian Tribal Code uses the term "appellee".

Jim Salvator, Colorado Rural Legal Services, Inc., for Appellant.
James A. Casey and Patricia A. Hall, for Appellees.

Appeal from Southern Ute Tribal Court
Appellate Judge Christine Zuni

UPON CONSIDERATION of the stipulation for dismissal with prejudice submitted by the parties hereto, and the Court being fully advised in the premises hereof, it is

ORDERED that the within action be and hereby is dismissed, with prejudice, each party to pay its own costs.

IT IS SO ORDERED.

Williamette Thompson, Plaintiff-Appellant,
v.
Brian Cook, Defendant-Appellee.

No. 94-004-SUTC

Appeal filed February 7, 1995

Petition for determination of paternity was dismissed without a hearing by the trial court because petition failed to comply with tribal statutory requirements regarding acknowledgement of paternity for a child more than five years old by the alleged father. Appellate Court reversed and remanded to trial court with instructions to hold an evidentiary hearing on the issue of the existence of a valid acknowledgment of paternity in compliance with specific statutes.

Jeffrey R. Wilson for Plaintiff-Appellant
Jeffrey Deitch for Defendant-Appellee

Appeal from Southern Ute Tribal Court
Appellate Judge F. Thomas Bartlett

This is an appeal from the Southern Ute Tribal Court's order dismissing the above matter with prejudice. The appeal alleges important issues of tribal law, and, as such, is granted as a matter of discretion. This appeal comes from the trial court's dismissal of appellant's suit for paternity with prejudice based on the appellee's motion to dismiss and appellant's responses to that motion and appellee's replies. No evidentiary hearing or trial was held.

Section 7-1-126 of the Southern Ute tribal code bars paternity proceedings "after a child is five years old unless a father has acknowledged his paternity." The petition for paternity in this case by its own terms and date of filing indicate it was filed to establish the paternity of a child more than five years old.

Appellee filed a motion to dismiss accompanied by an affidavit denying, *inter alia*, any acknowledgment of paternity. In response, appellant filed a response with an attached petition to correct tribal census roll, verification and affidavits, and a supplemental response claiming appellant did, in fact, acknowledge his paternity of petitioner's daughter.

Appellee, in return, filed a reply and supplemental reply denying the existence of an acknowledgment in fact, and under the terms of §6-1-118(3) of the tribal code, which he claims require an acknowledgment to be "accompanied by" a request or filing in the Southern Ute Children's Court to determine paternity.

Appellant, for her part, did not dispute such acknowledgment was never accompanied by such request or filing. Instead, the Appellant disputed, as a matter of law, the application of chapter 6 of the tribal code and, particularly, §6-12-118, cited by appellee.

Whether documents in issue constitute an acknowledgment based on disputed facts is a material question that cannot be resolved on the pleadings alone. An evidentiary hearing must be held to determine the facts in light of the applicable burden of proof. Different from this is a question of law, such as whether the documents in issue legally can constitute an acknowledgment when §6-12-118's requirement of an accompanying filing or request is indisputably not fulfilled. This is a matter of law that the judge can decide on pleadings alone without an evidentiary hearing.

The trial judge's dismissal with prejudice, however, cannot be read as based on anything other than on a finding of fact that no acknowledgment exists, as opposed to being a dismissal as a matter of law on grounds that the claimed acknowledgment, even if made, cannot be valid legally because a requirement of §6-12-118 was not fulfilled.

The order states that "the Respondent has *in no way* acknowledged his paternity of Petitioner's daughter," (emphasis added), which is a finding of fact. The trial court order cites only §7-1-126, which bars paternity proceedings "after a child is five years old unless a father

has acknowledged his paternity," but fails to address the reasons why the claimed acknowledgment cannot be legally valid. The order does not mention the applicability of chapter 6, or §6-1-118, or discuss the meaning and materiality of a requirement of filing with the children's court or any other term.

Moreover, the order concludes that "this action is barred and must fail since more than five years have passed *since the initiation of paternity proceedings*," (emphasis added) a fact that is nowhere to be found in the record before this Court, in that, no evidence of any prior proceedings are in the record in this case.[1]

The trial court's statement the "Respondent Brian Cook has not acknowledged his paternity of Petitioner's daughter, Reagena Thompson," could, standing alone, be read by this Court as well-within the province of the trial judge as a legal conclusion that certain code provisions prevent the claimed acknowledgment from being valid. Nonetheless, when the statement is taken together with the other statements in the order and the lack of legal conclusions on the issue, such a reading of the statement is foreclosed.

Therefore, this Court concludes the trial court erred in dismissing the case with prejudice on the pleadings without an evidentiary hearing on the issue of the existence of a valid acknowledgment as a matter of fact under the appropriate code provisions and burdens of proof or, in the alternative, for dismissing the case without an order that states sufficient findings of fact and conclusions of law supporting why the alleged acknowledgment cannot be valid, even if made in the time and manner claimed by Appellant, such as would be sufficient for this Court to adequately review the judge's legal reasoning and conclusions on the applicability of §6-12-118.

The order of dismissal with prejudice is reversed and remanded to the trial court for further proceedings consistent with this order.

IT IS SO ORDERED.

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[1] It also appears the form of the order of dismissal containing this statement was supplied to the Judge by Appellee's counsel.

Dennis F. Vigil, Petitioner/Appellee
v.
Kathy Vigil, Respondent/Appellant

No. 94-005 NTC

Appeal Filed February 24, 1995

Without findings that appellant is incapable of properly managing child support funds, or that children have been removed from appellant's care during the time for which support was owed, or that the best interest of the children require it, trial court's order placing back child support in an escrow account is not proper and funds should be released to appellant. Further, Nambe' Pueblo law, not New Mexico law, covers the determination and calculation of child support.

Raymond Z. Ortiz, for Appellant
Dennis Vigil, *pro se*

Appeal from Nambe Pueblo Court
Appellate Judge Maylinn Smith

The above entitled matter came before the Southwest Intertribal Court of Appeals on a notice of appeal filed with the Pueblo of Nambé Tribal Court on August 17, 1994, by the appellant, Kathy Vigil, and transmitted to the Southwest Intertribal Court of Appeals on September 7, 1994. The notice of appeal requests modification of the partial final decree which directed that the past due child support owed by appellee, Dennis Vigil, be placed in an escrow account on behalf of the involved children. In addition, the notice requests that the guidelines established by New Mexico be followed in connection with any imposition of child support, specifically in regard to review and modification of support.

In consideration of the information provided in support of appellant's request and after reviewing general legal principles of family law which might be applicable to the appellant's request, this Court modifies the partial final decree entered on August 4, 1994, by eliminating the requirement that past due child support be placed in an escrow account on behalf of the involved children. Nothing in the record transmitted to this court reflects that any or all of the children for whom support was imposed had been removed from appellant's care during the period of time for which support was owed. In addition, there is nothing to reflect that any type of conservatorship is necessary in order to ensure that the best interests of the involved children are met. No information appears in the lower court record which might imply that appellant is in

any way incapable of exercising proper fiscal management over funds received on behalf of the parties' minor children. In the absence of any such findings by the lower court and based on the information found in the record before this Court, it appears that, as a matter of law, payment of any past or current child support owed should be transmitted to the party entitled to receive said child support by order of the lower court. It is, therefore, ordered that all child support monies currently being held in escrow in accordance with the lower court's decree be transmitted to appellant as the party entitled to receive said support. This transmittal shall be made within thirty days of entry of this order.

Respondent also asks as part of her appeal for modification of the partial final decree to allow for automatic periodic recalculation of child support in accordance with the requirements established by the state of New Mexico. In support of this position, appellant cites Chapter I, Section 17c, which requires that "the laws of the State of New Mexico" be applied in the absence of applicable tribal or federal legislation. After reviewing Title X of the Law And Order Code for the Pueblo of Nambé, it appears that applicable tribal law exists to cover this situation in that the lower court "may order: A. the husband and wife to provide for the separate maintenance of his or her spouse and children as the Court may deem just upon application therefor or in the disposition of a divorce proceeding." [emphasis added]. Although this provision does not set forth any specific guidelines for calculating child support, it does enable the sitting judge to impose child support based on what is determined to be just. Since child support is, in fact, addressed under the Nambé Code, the application of any New Mexico law pertaining to child support issues is unwarranted in this case. Appellant's request for modification of § 4 of the partial final decree to reflect New Mexico law is, therefore, denied.

Any future modification of the partial final decree in regard to the issue of support would require that the lower court exercise its inherent equitable powers to determine what is just when there is an alleged change in circumstances which could impact the amount of child support currently being imposed under court order. Since the Nambé Code does not require periodic recalculation of child support, the lower court need only address the issue of child support modification upon motion of a party to this action which reflects that a potentially material change in circumstances has occurred since the latest court order regarding child support was entered and which would be sufficient grounds for changing the amount of child support imposed.

For the reasons set out above, the matter is remanded to the lower court with the instruction that the partial final decree be modified to reflect the decision of this Court.

IT IS SO ORDERED.

Ronald Williams, Petitioner.

v.

Southern Ute Indian Tribe, Respondent.

No. 95-001-SUTC

Appeal Filed February 24, 1995

Petitioner does not have an absolute right to counsel at this stage of the proceedings; this appellate court has jurisdiction to hear this petition under the Southern Ute Tribe code and under the Southwest Intertribal Court of Appeals rules (SWITCARA) where the tribal resolution has appointed, by resolution, SWITCA to act as the tribe's appellate court and the tribe's code does not deny the privilege to petition for the writ, in fact, preserving English common law remedies until altered by tribal law; tribal law directs the court to proceed in any manner not inconsistent with its code and SWITCA rules may be applied so long as they are not inconsistent with the tribal code and, in cases where the tribal code is silent, in its place; both tribal code and SWITCA rule permit a trial court judge to set an appeal bond up to the amount of any fine or judgment imposed and the court had the power to order a cash-only appeal bond pursuant to SWITCA rule; requiring a cash-only bond does not constitute excessive bail where it is not arbitrary, capricious, or a denial of due process; petitioner must exhaust tribal court remedies to determine whether his administrative segregation constitutes cruel and unusual punishment in violation of his rights under tribal law where existing tribal law is silent as to tribal standards of cruel and unusual punishment, and therefore, the petition for a writ of *habeas corpus* is denied

Ronald Williams, Petitioner *pro se*
Douglas S. Walker, for Respondent

Appeal from Southern Ute Tribal Court
Appellate Judge Ann Rodgers

FACTS

THIS MATTER is before the Court on the petition for a writ of *habeas corpus* filed by Ronald Williams

pursuant to Title 4, §4-1-115, ¶3 of the Southern Ute Indian Tribal Code and the Indian Civil Rights Act, 25 U.S.C. §1303. Petitioner is presently incarcerated at the LaPlata County Jail, Durango, Colorado, pursuant to a Southern Ute tribal court order requiring a previously imposed $2,950.00 appeal bond be a cash only bond.

Petitioner was sentenced to a total of 285 days in jail on various charges on or about August 31, 1994. Pursuant to petitioner's notice of appeal and request for a stay of the sentence, the trial court set an appeal bond of $2,950.00 to be posted either in cash or by a surety. On September 1, 1994, petitioner posted a surety bond. October 12, 1994, the surety, after giving petitioner over a month to pay the premium, notified the court that he was revoking the bond due to petitioner's failure to pay the premium and requested to be released as surety on petitioner's appeal bond. The court granted the bondsman's motion on November 7, 1994. Thereafter the tribal prosecutor filed a motion requesting that petitioner's bond be increased and that only a cash bond be authorized. The trial court declined to increase the amount of bond, however, based upon the petitioner's failure to appear in the past, and the bondsman's revocation of the surety bond, petitioner was required to post a cash bond.

Petitioner asks this Court to issue the writ of *habeas corpus* for three reasons:

1. The lower court improperly relied upon SWITCARA #19, a court rule that allegedly has not been adopted for use in appeals from the decisions of the Southern Ute Tribal Court;
2. The bond ($2,950.00) is excessive; and
3. Petitioner's confinement constitutes cruel and unusual punishment.

Respondent argues that if the tribal council did not intend for the SWITCA rules to apply, then this Court does not have any jurisdiction to hear this petition because only the SWITCA rules provide a procedure for hearing this type of petition.

This Court has reviewed the petition, the response, the documents in the record and the tape of the hearing. Based upon the foregoing, and being apprised of the pertinent law, the Court concludes that it does have jurisdiction to consider this petition and the petition should be denied. The reasons are set out below.

I. PRELIMINARY MATTER.

In the hearing below, petitioner requested a continuance because he did not have counsel. He also asserted in the hearing that he felt he had a right to counsel at this stage of the proceedings against him. Petitioner did not appeal the denial of the continuance and did not assert in this petition that he was denied any rights under the Southern Ute or United States' Constitution. The right to counsel being a fundamental right, and the Petitioner having proceeded as a *pro se* party, caution is required to avoid fundamental error. If the right to counsel was denied unlawfully, there might be some issue as to the lower court's jurisdiction.

As a practical matter, the Court finds that, assuming solely for the purposes of argument such a right exists under the tribal constitution[1], and that it is applied in substantially the same manner as the right to counsel under the Sixth Amendment of the United States Constitution, no such right existed at this stage in the proceedings. In a post-conviction proceeding in which no additional allegations of criminal activity were at issue, and which did not result in any substantive change in Petitioner's sentence for the underlying convictions, there is no absolute right to assistance of counsel. The hearings at issue in this petition were not critical stages in the prosecution of a criminal case. *Holcomb v. Murphy*, 701 F.2d 1307, *cert. den.* 463 U.S. 1211 (10th Cir. 1983). The hearings did not involve any change in the sentence previously applied. Thus, there was no effect on the reliability of the trial process and right to counsel. *Lockhart v. Fretwell*, ___ U.S. ___, 113 S.Ct. 838 (1993).

II. UNDER THE SWITCA RULES OR THE LAW AND ORDER CODE OF THE SOUTHERN UTE TRIBE, THIS COURT HAS JURISDICTION TO HEAR THIS PETITION.

This petition seeks the writ of *habeas corpus*. SWITCARA #24 clearly provides a procedure. This does not end the inquiry. SWITCA rules do not govern the existence of this Court's jurisdiction. In this case the Southern Ute tribal code and other tribal resolutions determine what the Court has the power to do. SWITCARA #2 declares that SWITCA is a court of limited jurisdiction. As a shared, inter-tribal appellate court, SWITCA only has that power that each tribe confers on it. To determine what that power is, one must look to tribal resolutions and protocols, not court rules.

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[1] The sixth amendment right to counsel, as interpreted by the United States Courts, does not automatically apply in prosecutions in Indian tribal courts. *U.S. v. Ant*, 882 F.2d 1389 (9th Cir. 1989); *Glover v. U.S.*, 219 F.Supp. 19 (D.C. Mont 1963). The Southern Ute Tribal Code does provide that a person has the right to obtain counsel at their own expense. §4-1-104 (c).

A. THE GOVERNING TRIBAL RESOLUTION REFERS TO TRIBAL LAW.

The governing resolution for the Southern Ute Tribe is denominated as Resolution No. 90-86. Because of this resolution's recurring importance in this opinion and order, portions of the text are included:

> WHEREAS, authority is vested in the Southern Ute Indian Tribal Council by the Constitution adopted by the Southern Ute Indian Tribe and approved November 4, 1936 and amended October 1, 1975, to act for the Southern Ute Indian Tribe, and
>
> **WHEREAS, the Southern Ute Indian Tribal Council has enacted legislation providing for the establishment of a Tribal Court of Appeals under Section 3-1-101 of the Southern Ute Indian Tribal Code.**
>
> NOW, THEREFORE BE IT RESOLVED, that the Southern Ute Indian Tribal Council Authorizes the Southwest Intertribal Court of Appeals to act as an independent appellate court on behalf of the Southern Ute Indian Tribe **for appeals taken from the Southern Ute Tribal Court, in accordance with the procedures and laws set forth in the Southern Ute Indian Tribal Code.** (emphasis added)

This resolution expressly states that SWITCA jurisdiction must be exercised "in accordance with the procedures and laws set forth in the Southern Ute Indian tribal code". SWITCA only has the jurisdiction to hear this petition if permitted under the tribal code.

B. THE TRIBAL CODE ALLOWS A WRIT OF HABEAS CORPUS TO BE BROUGHT IN ITS TRIBAL COURTS.

Does the Southern Ute Indian tribal code allow its appellate court to hear writs of *habeas corpus*? Although the tribal prosecutor argues that no one provision of the tribal code explicitly states that petitions for the writ of *habeas corpus* can be heard by the tribal appellate court, a review of the entire law and order code, coupled with the legal history surrounding the writ of *habeas corpus*, implies that a tribal appellate court would have the power to hear a petition for issuance of the writ.

SUTC §1-1-120 states:

> (2) Liberal Construction. All general provisions, terms, phrases, and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the Tribal Code may be fully carried out.
>
> (3) Intentions in the Enactment of Statutes. In enacting a statute it is presumed that:
> (a) Compliance with the Constitution of the Southern Ute Indian Tribe and the United States is intended;
> (b) The entire statute is to be effective;
> (c) A just and reasonable result in intended;. . .
>
> SUTC §1-2-101(4) states:
>
> (4) Common Law. Where there is no law contrary, the common law of the United States as adopted from England, insofar as the same is applicable and of a general nature shall be the rule of decision, and shall be considered as of full force until repealed or altered by tribal members.

SUTC §4-1-115(3) states:

> (3) Bail Release Pending Approval. Every person who has been convicted of a tribal offense and who has filed a petition for a writ of *habeas corpus* shall be treated in accordance with the provisions of Section 4-1-115(1) above, unless the judge has substantial reason to believe that no condition of release will reasonably assure the appearance of the accused or that release of the accused in likely to pose a threat of imminent danger to the community, to the accused or to any other person.

The writ of *habeas corpus* is a common law remedy of ancient English origin. Plucknett, *A Concise History of the Common Law, 5th Ed.* at p. 57. In the United States' Constitution, it is given great protection. Article 1, §9, cl. 2 states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This particular remedy has been described as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, *rehr'g den.* 394 U.S. 286, (1969). Southern Ute tribal law expressly preserves

English common law remedies until repealed or altered by tribal law. There is no portion of the tribal code that supports even an implication that this common law remedy was not preserved. There is no section denying the common law privilege to petition for the writ. There is no section denying tribal court power to hear the petition. The writ of *habeas corpus* is expressly mentioned as justifying release on bond pending appeal.

Southern Ute tribal law directs this Court to interpret statutes as intending to comply with the Constitution of the United States. When each of the sections of the Southern Ute tribal code is considered as a part of the whole body of law, the parts can only be harmoniously combined in an interpretation which gives the tribal appellate court the power to hear a petition for a writ of *habeas corpus*. Any interpretation denying this Court's power would be contrary to the explicit intentions of the Tribe to be governed by the English common law and its remedies and to comply with the Constitution of the United States. Therefore, this Court hold that it has jurisdiction to hear this petition.

C. IN THE ABSENCE OF AN EXPLICIT TRIBAL LAW DESCRIBING A SPECIFIC PROCEDURE, IT IS NOT A VIOLATION OF TRIBAL LAW TO FOLLOW THE PROCEDURES SET OUT IN THE SWITCA RULES OF APPELLATE PROCEDURE.

The code also recognizes that explicit procedures may not be included for all possible actions. It directs the court to proceed in any manner not inconsistent with the code. SUTC §4-1-130(1) states:

> Procedure Not Otherwise Specified. If no procedure is specifically prescribed by this Code, the court may proceed in any manner not inconsistent with this Code.

Rather than limiting the procedures available to that explicitly stated in the tribal code, Southern Ute tribal courts may devise procedures where none exist in the tribal code. The tribal courts are given broad power to construct their own procedures as long as those procedures are "not inconsistent" with the code. No section of the code suggests that using the SWITCA procedural rule for petitions for writs of *habeas corpus* would be inconsistent with the tribal code. Therefore, the Court holds that where the tribal code gives the court the power to act but does not explicitly state the procedure to be used, the tribal appellate court can apply the SWITCA rules of appellate procedure, here SWITCA rule 24.

III. THE TRIBAL COURT'S RELIANCE ON SWITCARA # 19 WAS NOT CONTRARY TO TRIBAL LAW, AND DOES NOT MANDATE THE ISSUANCE OF A WRIT OF HABEAS CORPUS.

Petitioner argues that the Southern Ute Tribal Council did not authorize the Southwest Intertribal Court of Appeals to apply its own rules, although it has empowered SWITCA as an independent court to hear appeals from the trial court. Therefore, the Court did not have the power to require him to post a cash-only appeal bond. The Tribe argues that with the approval of the resolution in which the Tribe determined it would take part in SWITCA, the tribal council, by necessary implication, did authorize the use of SWITCA rules of appellate procedure.

If this was a situation where there was absolutely no guidance from the tribal council as to its intent in enacting the resolution, the Court would agree with respondent because of the general principle that a court has the inherent power to determine its own rules. This question cannot be answered solely with reference to that general principle. Petitioner asserts that the court erred in deciding the tribal prosecutor's motion by relying on SWITCARA #19. Instead, he urges the Court that tribal law code has a specific provision that must be applied instead: SUTC §4-1-115(3) (quoted above).

The Court agrees with petitioner that where the tribal code does have a specific procedure set out, that procedure, not that set out in the SWITCA rules, must be applied. Petitioner errs by assuming that SUTC §4-1-115(3) applied to him when the trial court ruled on the tribal prosecutor's motion concerning the appeal bond. That particular section did not apply at that time. SUTC §4-1-115(3) becomes effective when two conditions are met: a person must have:

(a) been convicted of a tribal offense, **and**

(b) filed a petition for a writ of *habeas corpus*.(emphasis added)

At the time that the motion was heard, petitioner had been convicted of a tribal offense, but he had not filed a petition for a writ of *habeas corpus*. The petition was filed several weeks later. No other section of tribal law specifically addresses release on a bond pending appeal. Under petitioner's theory, then, he would not be entitled to release on bond pending appeal. The Court cannot agree with this approach because it would be inconsistent with tribal law concerning interpretation of the tribal code.

Section I(C) of this opinion and order explored the question of what law applies in the absence of an explicit rule of procedure in the tribal code. The same answer applies here. The tribal court could look to the SWITCA rules of appellate procedure as long as the SWITCA rules were "not inconsistent" with tribal law. A comparison of the general tribal code sections concerning bail with the SWITCA rules concerning bond (SWITCARA #19) and release pending appeal of a conviction (SWITCARA #21) convinces the Court that the tribal court's application of SWITCARA #19 was not inconsistent with tribal law.

SWITCARA #19 permits the tribal trial court judge to require an appellant to deposit a bond with the tribal court to guarantee the judgment will be enforceable. The only limitation is that the security required shall not be greater in value that the amount of the judgment or fine imposed, plus costs. There is no issue that the amount of the bond required in this case exceeds the limit.

SUTC §4-1-115 sets out the general principles and procedures to guide tribal courts in setting conditions of release for persons charged with a crime pending trial, SUTC §4-1-115(1). These same principles and procedures must be followed when a person who has previously filed a petition for a writ of *habeas corpus* seeks release pending a court ruling on the petition, SUTC §4-1-115 (3). Although not technically applicable to petitioner when the trial court entered its order, these general principles appear to be the tribal law concerning release pending further action in a criminal case. This part of the code lists several conditions of release and the court can select "whichever one or more of the following conditions is necessary to assure the appearance of the defendant at any time required". Of particular interest here is subparagraph (d):

> (d) Release after deposit by the accused or any other person of a bond and cash or pledge of sufficient collateral in an amount specified by the judge or bail schedule. The judge in his discretion may require that the accused post only a portion of the total bond, the full sum to become due if the accused fails to appear as ordered.

Both the SWITCA rule and the tribal code permit a tribal court judge to set an appeal bond up to the full amount of any fine or judgement imposed. The tribal code clearly gives the trial court judge broad discretion in determining the amount of the bond, and what type of bond it can be, case or surety. There is no inconsistency between SWITCARA #19 and the general principles behind the rules applied to similar situations in the tribal code. Therefore, the court had the power to order the cash-only appeal bond pursuant to SWITCARA #19.

IV. REQUIRING PETITIONER TO POST A CASH BOND DOES NOT CONSTITUTE EXCESSIVE BAIL.

The petitioner challenges the lawfulness of his present incarceration as a denial of due process because requiring a cash only bond constitutes excessive bail. Although there are at least three pending appeals related to the underlying criminal cases, petitioner has not, in any of those appeals, challenged the amount of the bail.[2] Petitioner alleges that the cash bond is excessive because he is financially unable to post it. The Court finds that petitioner has failed to set forth facts, even if taken to be true, which would establish a genuine issue concerning excessive bail.

There is no absolute right to bail pending appeal. However, where a government, be it tribal or state, does have laws permitting bail upon appeal, as does the Southern Ute Tribe, the court cannot deny bail arbitrarily or unreasonably. Excessive bail is, in all practical respects, a denial of bail. The actual amount of the bond was not been challenged; Petitioner only challenges the court's requirement of a cash bond.

Absent something more, the mere allegation in a petition that Petitioner is financially unable to post bond in the amount set by the Court does not establish that the bail set was excessive. *White v. U.S.*, 330 F.2d 811, *cert. den.* 379 U.S. 855 (1964). Further, the record below does not show any unreasonable, arbitrary, or capricious conduct in requiring a cash bond.

Southern Ute tribal law gives the court discretion to impose bail. Where a court is given such discretion in making a decision, the trial court's decision should only be reversed if it is arbitrary, capricious, or constitutes a denial of due process.

There is no ground for reversal here; the lower court order gives the reasons for requiring a cash only bond. The trial court took into consideration that petitioner's bondsman revoked his bond for failure to pay the

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[2] The Court can take judicial notice of facts within its files. At this time there are at least three appeals docketed with this Court concerning the underlying criminal cases against Petitioner. The court records establish that the amount of bail as originally set has not been challenged by Petitioner. (SWITCA Dkt. No. SUTC-94-007; SUTC-94-008; and SUTC-94-009).

premium for over two months. Under those circumstances, and in the absence of anyone ready and willing to provide surety for petitioner, it was not arbitrary or capricious for the court to require a cash only bond prior to releasing petitioner pending this Court's determination on his appeals.

The only other alternative was to release petitioner without requiring any bail. Petitioner's past record established that a bond of some sort was absolutely necessary because in the past he had failed to appear in the court when ordered to do so. Requiring a cash bond as the minimum necessary to assure Petitioner's appearance in light of these facts, was not arbitrary or capricious.

V. THE COURT CANNOT ADDRESS PETITIONER'S REMAINING GROUND FOR RELIEF BECAUSE THE RECORD BELOW DOES NOT ESTABLISH EXHAUSTION OF TRIBAL REMEDIES ON THE QUESTION OF WHETHER PETITIONER'S INCARCERATION IN THE LA PLATA COUNTY JAIL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OR VIOLATES THE AMERICANS WITH DISABILITIES ACT.

The last basis for the petition is: whether restraints placed on petitioner in the La Plata County jail, due to petitioner's physical disabilities which require him to use braces and crutches to stand and walk, constitute cruel and unusual punishment.[3] Petitioner argues he is subject to cruel and unusual punishment because the jail does not comply with the Americans with Disabilities Act. Petitioner is subject to administrative segregation because his braces and crutches could pose a danger to other inmates and, if removed, his inability to walk would put him in great danger of physical harm from other inmates or other hazards.

Under federal court precedent, administrative segregation similar to that imposed on Petitioner is not considered to be cruel and unusual punishment. *McCray v. Burrell*, 516 F.2d 357, *cert. dismis'd*, 426 U.S. 471 (1975). That does not answer whether any right held under tribal law is being violated. The Court notes that resolution of this issue could involve several factual and legal issues, none of which have been addressed in the first instance by a trial court. As pointed out below, there is little written law to guide the Court. Due to the nature of the inquiry and the need for some guidance from the trial court, this Court must decline consideration of the issue at this time.

One of the requirements of *habeas corpus*, whether under the common law or by written law (SWITCARA # 24), is that all other remedies have been exhausted. In determining whether the appellate court should consider this issue and require an evidentiary hearing, it is important to consider the principles behind the exhaustion requirement. Whether exhaustion of tribal remedies requires a stay of federal court action requires consideration of the principles of law that the doctrine springs from: congressional support for tribal self-governance and self-determination, judicial efficiency, and the benefit of tribal "explanation and expertise". *Burlington Northern R.R. v. Blackfeet*, 940 F.2d 1239, 1245-46 (9th Cir. 1991); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985); *Wellman v. Chevron*, 815 F.2d 577, 579 (9th Cir. 1987) (comity concerns require abstention). Of these three imperatives, the benefit of tribal "explanation and expertise" is paramount here. This Court could hold an evidentiary hearing. That would not provide, necessarily, the expertise to determine the substantive content of any tribal right. There is little in the Southern Ute tribal code to guide this Court.

The first question would be what constitutes cruel and unusual punishment under tribal law. There are no bright lines or rigid standards as to what is or is not cruel and unusual punishment under tribal law. Penal measures must be evaluated against "broad and idealistic concepts of dignity, civilized standards, humanity and decency." The substantive content of those concepts are part of a society's history and traditions. *Gregory v. Wyse*, 512 F.2d 378 (10th Cir. 1975); *U.S. v. Georgia*, 545 F.2d 467 (5th Cir. 1977). It would not be consistent with self-government for this Court to blindly apply societal standards developed and used in other federal, state or tribal courts.

While the Southern Ute tribal code does state that it is intended that the written law comply with the United States Constitution, unlike other rights stated in the code (See, SUTC-4-1-104), there is no statement of a tribal law analogous to the right to be free of cruel and unusual punishment. There is nothing in the written law which sets out the policy of the tribe from which the Court could

[3]There is some question as to whether Petitioner is claiming a violation of the Americans with Disabilities Act. That statute may not apply to tribes in all instances; 42 U.S.C. A. §§ 12111 (4)(B)(i); 12131 (I). Also, Petitioner does not allege that it applies to prisons and jails.

begin to interpret the substantive content of any similar right.

These circumstances compel this Court to deny the petition absent exhaustion of tribal court remedies to determine the scope of any tribal right to be free from cruel and unusual punishment.

VI. CONCLUSION

The Court has reviewed every possible basis for issuing the writ requested by petitioner. There is no lawful basis for this Court to do as requested at this time:

- There was no fundamental error in the hearing below due to the absence of any counsel for petitioner;
- The Court did not exceed its authority under the law of the Tribe when it applied SWITCARA #19 to determine that any appeal bond had to be a cash bond;
- Requiring a cash bond does not constitute unlawfully excessive bail;
- Petitioner has not exhausted his tribal court remedies on the issue of whether his administrative segregation constitutes cruel and unusual punishment in violation of his rights under law.

THEREFORE, IT IS THE ORDER OF THE COURT that the PETITION FOR THE WRIT OF HABEAS CORPUS SHOULD BE, AND HEREBY IS, DENIED.

IT IS SO ORDERED.

Southern Ute Tribe, Plaintiff-Appellee,
v.
Ronald Williams, Defendant-Appellant.

No. 94-007-SUTC

Appeal Filed June 9, 1995

Under tribal law which takes precedence over SWITCA rules, the filing of briefs is discretionary; factual issues not raised before or at trial may not be raised for the first time on appeal; appellee's use of a document entitled "affidavit of probable cause subsequent to warrantless arrest" rather than a complaint to initiate criminal charges is proper where the affidavit meets the tribal law's requirements for a criminal complaint and the affidavit gave adequate notice of the nature of the charges and meets the requirements of the due process section of the Indian Civil Rights Act; the trial court's denial of appellant's challenge for cause of a potential juror was proper when the juror did not hear sufficient facts to prevent the juror from giving a fair verdict and Appellant's conviction is affirmed.

Douglas S. Walker for the Appellee,
Ronald Williams, *pro se.*

Appeal from Southern Ute Tribal Court
Appellate Judge Ann Rodgers

THIS MATTER is before the Court on appellant's appeal and other motions filed subsequent to the notice of appeal. The Court, having reviewed the record on appeal and the pertinent law, concludes that the tribe's motion to dismiss the appeal for failure to file a brief should be denied; the appellant's motion to amend and restate the notice of appeal should be denied; and the decision of the tribal trial court should be affirmed. The Court's reasoning is set out below.

I. Motion to dismiss appeal for failure to file brief.

The Appellate Court issued an order in this case on or about January 31, 1995 accepting the appeal. At the same time a scheduling order was entered in the case which stated:

> 1. Appellant's Opening Brief shall be filed within thirty (30) days of the entry of this order, unless a party requests, pursuant to SWITCARA #7, the suspension of time schedules, or the parties submit to the Court a written waiver of briefing requirement signed by both parties. This would allow the Court to proceed with determination of the appeal based upon the existing court file, notice of appeal, response to notice and court transcripts.

As of March 9, 1995, appellant had not filed any opening brief. Appellee filed this motion seeking dismissal of the appeal pursuant to SWITCARA #26(a) which states:

> Within thirty days of notice indicating that the court of appeals has accepted the appeal, the appellant shall file * * * a written brief or statement in support

of the appeal and shall serve a copy of the brief on appellee.

If the SWITCARA rule was the primary procedure to be used, the Court would have to agree with appellee. However, as has been previously decided in a related matter, *Williams v. Southern Ute Tribe*, SWITCA No. 95-001-SUTC (opinion and order entered February 24, 1995), in deciding appeals from the Southern Ute Tribal Court, the Southwest Intertribal Court of Appeals (SWITCA) applies its own procedural rules only where the appellate procedure set out in the tribal code does not have a set procedure and where application of the SWITCA rules would not be inconsistent with tribal law. In this instance, I conclude that dismissing an appeal for failure to file a brief is inconsistent with the Southern Ute Tribal Code concerning appeals.

Title 3 of the Southern Ute Indian Tribal Code (SUTC) governs appellate practice. SUTC §3-1-104 (1) states "[a]n appeal shall be commenced by filing a notice of appeal * * * [.]". SUTC §3-1-107 describes the record of appeal. The record must contain, among other documents, the notice of appeal, the appellee's response, and motions for oral argument to the appeals judge. Significantly, no legal briefing is required. Paragraph (2) of this section states:

> At any time twenty (20) days after delivery of the above documents to the appeals judge by the court clerk, appellant **may submit** a supplemental memorandum of legal authority supporting his position. A copy of such memorandum shall be mailed to the opposing party who shall have fifteen (15) days in which to reply. (emphasis added).

Thus, under the tribal code, the filing of legal briefs is discretionary. While the Court's scheduling order was not contrary to this by permitting the parties to submit a written waiver of the briefing requirement, it would be inconsistent with the tribal code for this Court to dismiss an appeal for failure of the appellant to do something that is discretionary, and not mandatory, under tribal law. Therefore, appellee's motion to dismiss appeal must be denied.

II. Motion to dismiss revision and amendment of appeal.

The notice of appeal was filed on August 31, 1994. On or about December 12, 1994, appellant filed a revision and amendment of appeal. Neither Title 3 of the SUTC governing appeals, nor the SWITCA rules of appellate procedure permit the filing of a revised and/or amended notice of appeal as a matter of right. SWITCARA #25 does permit a party to file a "motion for an order or other relief during an appeal". Consistent with the overriding goal of the judicial system that cases be determined on the merits and not on procedural technicalities, the Court will treat the appellant's filing as a motion and the Appellee's filing as a response to the motion.

The original notice of appeal in this case raised two issues for the Court to address:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint; and

(2) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the Court to dismiss a member of the jury pool who had previously overheard statements made by tribal law enforcement officers to the effect that defendant had been charged with certain crimes.

In the proposed revised and amended notice of appeal the appellant seeks to add two additional issues to this appeal:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the Court to require appellant to make his challenges for cause as to the prospective jurors prior to the appellee making his challenges for cause; and

(2) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the alleged failure of the tribal prosecutor to provide discovery as requested by defendant.

The Court has reviewed all pertinent tribal court records and tapes of all hearings in this case and based on existing law, the court concludes that allowing appellant to amend and revise the notice of appeal would be a futile act. The record is devoid of any attempt by appellant to raise these new appellate issues in the proceeding below.

The tapes of the hearing do not show any objection to the tribal court proceedings based on these issues. Prior Southern Ute Tribal Appellate Court decisions establish that absent fundamental error, an appellate court will only consider issues properly raised in the lower court. See *Burch v. Southern Ute Tribe*, SWITCA No. 93-003-SUTC, citing *Shoshone Business Council v. Skilling, et al*, 20 Ind. L. Rep. 6001 (Shos. and Arap. Ct.App. 1992).

The proposed revised and amended notice of appeal in this case show the wisdom behind this rule. For example, the allegations in the proposed revised and amended notice of appeal and appellee's response establish a factual issue as to whether appellee in fact complied with discovery. However, in the absence of any objection by appellant **prior to or at trial** that he was denied discovery, there has been no development of the facts below and no ruling of the lower court that this Court can measure against existing law to determine validity.

Under these circumstances, the Court concludes that appellant's motion to revise and amend the notice of appeal should be denied. The Court will now consider the two issues raised in the original notice of appeal.

III. Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code were denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint.

When appellant was arrested he was served with a citation entitled Southern Ute Tribe v. Ronald Williams, notifying him to appear in Southern Ute Tribal Court on Wednesday April 20, 1994, at 9:00 a.m., to answer charges of violating Title 14, Section 14-1-116 (1)(a) - Driving Under the Influence of Alcohol. (pg. 1 of record on appeal). On April 20, 1994, a document was filed with the tribal court entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest." The document begins as follows:

> I, Johnny Wallace, a peace officer with the Southern Ute Police Department, by signing my name below before the Notary Public or Clerk named below, swear and affirm that the following facts and information establishing probable cause for the warrantless arrest of Ronald Williams, Date of Birth 3/15/54, on April 19, 1994, at 7:11 p.m. the Southern Ute Reservation, for the Crime(s) or offense(s) of:
>
> 1. Driving Under the Influence of Alcohol, 14-1-116(1)(a)
> Disorderly Conduct, 5-1-106(1)(a)
>
> 2. Driving under Revocation, 14-1-103(11)
> Registration Provisions, 14-1-104(3)(a)
>
> 3. Careless Driving, 14-1-116(7)
>
> are true and correct to the best of my knowledge, information and belief.

The document continues with six handwritten pages of facts in support of the charges listed in the beginning of the document. The document concludes with the notarized signature of the affiant.

Appellant correctly states that the Southern Ute Tribal Code requires all criminal prosecutions to be "initiated by complaint". SUTC 4-1-102(1). When a person is arrested without a warrant, as was the case here, the complaint must be filed with the court prior to or at the time of the arraignment. SUTC 4-1-102(5). The issue that must be decided is whether the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" meets the requirements of a criminal complaint under tribal law. SUTC 4-1-102(2) gives the following requirements for a criminal complaint:

(a) The signature of the complaining witness sworn to before a tribal judge or individuals designated by the chief judge;
(b) A written statement by the complaining witness describing in ordinary language the nature of the offense committed including the time and place as nearly as may be ascertained;
(c) The name or description of the person alleged to have committed the offense; and
(d) The section of the tribal code allegedly violated.

A review of the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that each element is present. Defendant does not assert that the individual before whom the complaining witness took an oath did not, in fact, have the power to administer the oath. The written statement by the complaining witness does state, in ordinary language the nature of the offenses, and the time and place the offenses were committed. There are facts in the affidavit to establish the elements of each charge. Defendant is described by name and by birth date. Finally, each section of the tribal code that defendant was charged with violating is set out. Furthermore, it is clear from the record that this document

was filed with the court at or before the time of arraignment on April 20, 1994.

The law does not require exactness. While it would be perhaps less confusing for the tribal prosecutor to title the form "Complaint with Affidavit of Probable Cause Subsequent to Warrantless Arrest", the fact that the word "complaint" does not appear in the document does not change the substantive nature of the document. The Court holds that the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" filed in this case meets all requirements of the tribal code for a criminal complaint.

Defendant also asserts as a grounds for appeal that this tribal practice violates the Indian Civil Rights Act, particularly, 25 U.S.C. §1302(8):

> No Indian tribe in exercising powers of self-government shall
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

For the purposes of due process, a complaint is "the preliminary charge or accusation against an offender before a committing magistrate". 22 C.J.S. §324. The document need only state the essentials of the offense intended to be charged so as to enable a person of average intelligence to understand the nature of the charge. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). No formality is required; substantial compliance is sufficient. *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345, *reh'g den.* 382 U.S. 873, 86 S.Ct. 19, 15 L.Ed.2d 114 (1965). Here, even a cursory review of the document entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that the requirements of due process concerning the adequacy of a criminal complaint have been met in this case.

IV. Whether Appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code were denied when the tribal court found no cause for challenge to a prospective juror.

Appellant also appeals the court's finding of no cause for challenging a prospective juror, Ms. Washington, who had stated that she knew of the charges against defendant during voir dire. Appellant does not allege that he, in fact, made a challenge for cause to the selection of this juror, and no challenge is reflected in the record. (challenge for cause chart). In his notice of appeal, appellant states: "The defendant stated to the court that the juror was a borderline juror" (notice of appeal p. 3). However, treating appellant's statement as a challenge for cause, the trial court found that while the juror knew of appellant and did overhear statements made by police officers that charges had been filed, she did not know any of the specific facts of the case, and therefore, could serve as an impartial juror. The notice of appeal also acknowledges that "[t]he juror further indicated that she left the room and didn't really hear any facts of the case" (notice of appeal, p. 3).

The trial court has great discretion in determining whether to grant a challenge for cause as to a potential juror. *United States v. Frank*, 901 F.2d 846 (10th Cir. 1990). An appellate court should only reverse if the appellant can establish that the trial court judge acted arbitrarily or capriciously. *Id.* SUTC 4-121(4)(d) sets out what must be established to challenge a prospective juror for cause. It states:

> (d) A Challenge for Cause. A challenge for cause may be made by the Tribe or by the defendant and must specify the facts constituting the causes thereof. It may be made for any of the following causes:
>
> (i) Having served as a juror in a civil action brought against the defendant for the act charged as an offense;
>
> (ii) Being a party adverse to the defendant in a civil action, or having complaint against or been accused by the defendant in a criminal action;
>
> (iii) Being a witness or a victim in the pending criminal action;
>
> (iv) Having formed or expressed an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a fair verdict upon the evidence submitted on the trial;
>
> (v) A relationship between the juror and the defendant that in the opinion of the judge would cause a juror to be unable to render an impartial decision.

The Court assumes that appellant was attempting to challenge Ms. Washington's inclusion in the jury on the basis of cause (iv). However, in the absence of any knowledge of the facts of the case, all that Ms. Washington had heard was that appellant had been charged with certain crimes. This is no different then when a person reads about an arrest in the newspaper or sees it on television. Neither of these circumstances have been sufficient to establish a challenge for cause. *United States v. Lamb*, 575 F.2d 1310, *cert. den.*, *Clary v. United States*, 439 U.S. 854, 99 S.Ct. 165, 58 L.Ed.2d 160 (10th Cir. 1978). It does not establish "an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a fair verdict". *Id.* Once the trial court learned that Ms. Washington had not heard any of the specific facts of the case against appellant, it was not arbitrary or capricious to deny an objection for cause as to the seating of Ms. Washington on the jury.

V. Conclusion

Appellant has failed to establish any violation of his rights under either the Southern Ute Tribal Law and Order Code or the Indian Civil Rights Act.

THEREFORE, IT IS THE ORDER OF THE COURT THAT the conviction of appellant should be and hereby is, AFFIRMED.

IT IS SO ORDERED.

Southern Ute Tribe, Plaintiff - Appellee,
v.
Ronald Williams, Defendant - Appellant.

No. 94-008-SUTC

Appeal Filed June 9, 1995

Under tribal law which takes precedence over SWITCA rules, the filing of briefs is discretionary; absent fundamental error, factual issues not raised before or at trial may not be raised for the first time on appeal; appellee's use of a document entitled "affidavit of probable cause subsequent to warrantless arrest" rather than a complaint to initiate criminal charges is proper where the affidavit meets the tribal law's requirements for a criminal complaint and the affidavit gave adequate notice of the nature of the charges and meets the requirements of the due process section of the Indian Civil Rights Act and Appellant's conviction is affirmed.

Douglas S. Walker, for Appellee
Ronald Williams, *pro se*.

Appeal from Southern Ute Tribal Court
Appellate Judge Ann Rodgers

Appellant seeks review of a his conviction in the Southern Ute Tribal Court for disobeying an order of the tribal court, in violation of Southern Ute Tribal Law and Order Code (SUTC) §5-1-107(3)(i). Also considered are several motions filed subsequent to the notice of appeal. The Court, having reviewed the record on appeal and the pertinent law, concludes that the tribe's motion to dismiss the appeal for failure to file a brief should be denied; the appellant's motion to amend and restate the notice of appeal should be denied; and appellant's conviction should be affirmed. The Court's reasoning is set out below.

I. Motion to dismiss appeal for failure to file brief.

This Court issued an order in this case accepting the appeal on or about January 31, 1995. At the same time a scheduling order was entered which stated:

> 1. Appellant's opening brief shall be filed within thirty (30) days of the entry of this order, unless a party requests, pursuant to SWITCARA #7, the suspension of time schedules, or the parties submit to the Court a written waiver of briefing requirement signed by both parties. This would allow the Court to proceed with determination of the appeal based upon the existing court file, notice of appeal, response to notice and court transcripts.

As of March 9, 1995, Appellant had not filed any opening brief. Appellee filed this motion seeking dismissal of the appeal pursuant to SWITCARA #26(a) which states:

> Within thirty days of notice indicating that the court of appeals has accepted the appeal, the appellant shall file * * * a written brief or statement in support of the appeal and shall serve a copy of the brief on appellee.

If the SWITCARA rule was the primary procedure to be used, the Court would have to agree with appellee.

However, in deciding appeals from the tribal court, the Southwest Intertribal Court of Appeals (SWITCA) applies its own procedural rules only where the appellate procedure set out in the tribal code does not have a set procedure and where application of the SWITCA rules would not be inconsistent with tribal law. *Williams v. Southern Ute Tribe*, SWITCA No. 95-001-SUTC (opinion and order entered February 24, 1995).

Title 3 of the Southern Ute Indian Tribal Code (SUTC) governs appellate practice. SUTC §3-1-104 (1) states "[a]n appeal shall be commenced by filing a notice of appeal * * * [.]". SUTC §3-1-107 describes the record of appeal. The record must contain, among other documents, the notice of appeal, the appellee's response, and motions for oral argument to the appeals judge. Significantly, no legal briefing is required. Paragraph (2) of this section states:

> At any time twenty (20) days after delivery of the above documents to the appeals judge by the court clerk, appellant **may submit** a supplemental memorandum of legal authority supporting his position. A copy of such memorandum shall be mailed to the opposing party who shall have fifteen (15) days in which to reply. (emphasis added).

Under tribal law the filing of legal briefs is discretionary. While the Court's scheduling order was not contrary to this by permitting the parties to submit a written waiver of the briefing requirement, it would be inconsistent with the tribal code for this Court to dismiss an appeal for appellant's failure to do something that is not mandatory under tribal law. Therefore, appellee's motion to dismiss appeal must be denied.

II. Motion to dismiss revision and amendment of appeal.

The notice of appeal was filed on August 31, 1994. On or about December 12, 1994, appellant filed a revision and amendment of appeal. Neither Title 3 of the SUTC governing appeals, nor the SWITCA rules of appellate procedure permit the filing of a revised and/or amended notice of appeal as a matter of right. SWITCARA #25 does permit a party to file a "motion for an order or other relief during an appeal". Consistent with the overriding goal of the judicial system that cases be determined on the merits and not on procedural technicalities, the Court will treat the appellant's filing as a motion and the appellee's filing as a response to the motion.

The original notice of appeal raised one issue:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint.

The proposed revised and amended notice of appeal has two additional issues:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the Court to require appellant to make his challenges for cause as to the prospective jurors prior to the appellee making its challenges for cause; and

(2) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the alleged failure of the tribal prosecutor to provide discovery as requested by defendant.

After reviewing all pertinent tribal court records and tapes of all hearings in this case, and based on existing law, the Court concludes that allowing appellant to amend and revise the notice of appeal would be a futile act because the first additional issue could not have been raised in this case because there was no jury trial (tape of hearing, July 25, 1994), and the second new issue was not raised in the trial court. The record is devoid of any attempt by appellant to raise the second new appellate issue in the proceeding below. Prior SWITCA decisions establish that absent fundamental error, an appellate court will only consider issues properly raised in the lower court. See *Burch v. Southern Ute Tribe*, SWITCA No. 93-003-SUTC, citing *Shoshone Business Council v. Skilling, et al.*, 20 Ind. L. Rep. 6001 (Shos. and Arap. Ct.App. 1992).

The proposed revised and amended notice of appeal shows the wisdom behind this rule. The proposed revised and amended notice of appeal and appellee's response establish a factual issue as to whether appellee in fact complied with discovery. However, in the absence of any objection by appellant **prior to or at trial** that he was denied discovery, there are no factual findings or ruling by the trial court that an appellate court can measure against existing law to determine validity. The Court concludes that appellant's motion to revise and amend the

notice of appeal should be denied. The Court will now consider the issue raised in the original notice of appeal.

III. Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code were denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint.

The day before appellant's arraignment on May 6, 1994, a document was filed with the tribal court entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest." The document begins as follows:

> I, Jake Candelaria, a peace officer with the Southern Ute Police Dept., by signing my name below before the Notary Public or Clerk named below, swear and affirm that the following facts and information establishing probable cause for the warrantless arrest of Ronald Williams, Date of Birth 3/15/54, on 5 May, 19 94, at 8:26 on the Southern Ute Reservation, for the Crime(s) or offense(s) of:
>
> 1. Disobedience to Court Order, 5-1-107(3)(i)
> (Crime) (Tribal Code Section)
>
> are true and correct to the best of my knowledge, information and belief.

The document continues with one handwritten page of facts in support of the charge listed in the beginning of the document. The document concludes with the notarized signature of the affiant.

Appellant correctly states that the Southern Ute Tribal Code requires all criminal prosecutions to be "initiated by complaint". SUTC 4-1-102(1). When a person is arrested without a warrant, as was the case here, the complaint must be filed with the court prior to or at the time of the arraignment. SUTC 4-1-102(5). The issue that must be decided is whether the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" meets the requirements of a criminal complaint under tribal law. SUTC 4-1-102(2) gives the following requirements for a criminal complaint:

(a) The signature of the complaining witness sworn to before a tribal judge or individuals designated by the chief judge;
(b) A written statement by the complaining witness describing in ordinary language the nature of the offense committed including the time and place as nearly as may be ascertained;
(c) The name or description of the person alleged to have committed the offense; and,
(d) The section of the tribal code allegedly violated.

A review of the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that each element is present. Defendant does not assert that the individual before whom the complaining witness took an oath did not, in fact, have the power to administer the oath. The written statement by the complaining witness does state, in ordinary language the nature of the offense, and the time and place the offense was committed. There are facts in the affidavit to establish the elements of each charge. Defendant is described by name and by birthdate. Finally, the section of the tribal code that defendant was charged with violating is set out. Furthermore, it is clear from the record that this document was filed with the court before the time of arraignment on May 6, 1994.

The law does not require exactness. While it would be perhaps less confusing for the tribal prosecutor to title the form "Complaint with Affidavit of Probable Cause Subsequent to Warrantless Arrest", the fact that the word "complaint" does not appear in the document does not change the substantive nature of the document. The Court holds that the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" filed in this case meets all requirements of the tribal code for a criminal complaint.

Defendant also asserts as a grounds for appeal that this tribal practice violates the Indian Civil Rights Act, particularly, 25 U.S.C. §1302(8):

> No Indian tribe in exercising powers of self-government shall:
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

For the purposes of due process, a complaint is "the preliminary charge or accusation against an offender before a committing magistrate". 22 C.J.S. §324. The document need only state the essentials of the offense intended to be charged so as to enable a person of average intelligence to understand the nature of the charge. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). No formality is required;

substantial compliance is sufficient. *Jaben v. United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345, *reh'g den.* 382 U.S. 873,86 S.Ct. 19, 15 L.Ed.2d 114 (1965). Here, even a cursory review of the document entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that the requirements of due process concerning the adequacy of a criminal complaint have been met. The affidavit states that an existing court order prohibited appellant from consuming alcoholic beverages; the police received complaints from private persons that appellant had been drinking; upon going to appellant's residence and coming into contact with appellant the odor of alcohol led the police officer to conclude appellant had violated the court order. It is clear that a person of average intelligence could understand the nature of the charge against him based upon these facts and the charge on the first page of the document.

V. Conclusion

Appellant has failed to establish any violation of his rights under either the Southern Ute Tribe Law and Order Code or the Indian Civil Rights Act.

THEREFORE, IT IS THE ORDER OF THE COURT THAT the conviction of appellant should be and hereby is, AFFIRMED.

IT IS SO ORDERED.

Southern Ute Tribe, Plaintiff-Appellee,
v.
Ronald Williams, Defendant-Appellant.

No. 94-009-SUTC

Appeal Filed June 9, 1995

Under tribal law which takes precedence over SWITCA rules, the filing of briefs is discretionary; absent fundamental error, factual issues not raised before or at trial may not be raised for the first time on appeal; appellee's use of a document entitled "affidavit of probable cause subsequent to warrantless arrest" rather than a complaint to initiate criminal charges is proper where the affidavit meets the tribal law's requirements for a criminal complaint and the affidavit gave adequate notice of the nature of the charges and meets the requirements of the due process section of the Indian Civil Rights Act and Appellant's conviction is affirmed.

Douglas S. Walker for the Appellee.
Ronald Williams, *pro se*.

Appeal from Southern Ute Tribal Court
Appellate Judge Ann Rodgers

Appellant seeks review of his conviction in the Southwest Intertribal Court of Appeals (SWITCA) for disobeying an order of the tribal court in violation of Southern Ute Tribal Law and Order Code (SUTC) §5-1-107(3)(i). Also considered are several motions filed subsequent to the notice of appeal. The Court, having reviewed the record on appeal and the pertinent law, concludes that the tribe's motion to dismiss the appeal for failure to file a brief should be denied; the appellant's motion to amend and restate the notice of appeal should be denied; and appellant's conviction should be affirmed. The Court's reasoning is set out below.

I. Motion to dismiss appeal for failure to file brief.

The appellate court issued an order in this case accepting the appeal on or about January 31, 1995. On or about February 5, 1995 a scheduling order was entered which stated:

> 1. Appellant's opening brief shall be filed within thirty (30) days of the entry of this order, unless a party requests, pursuant to SWITCARA #7, the suspension of time schedules, or the parties submit to the Court a written waiver of briefing requirement signed by both parties. This would allow the Court to proceed with determination of the appeal based upon the existing court file, notice of appeal, response to notice and court transcripts.

As of March 9, 1995, appellant had not filed any opening brief. Appellee filed this motion seeking dismissal of the appeal pursuant to SWITCARA #26(a) which states:

> Within thirty days of notice indicating that the court of appeals has accepted the appeal, the appellant shall file * * * a written brief or statement in support of the appeal and shall serve a copy of the brief on appellee.

If the SWITCARA rule was the primary procedure to be used, the Court would have to agree with appellee. However, in deciding appeals from the tribal court, the Southwest Intertribal Court of Appeals (SWITCA) applies its own procedural rules only where the appellate

procedure set out in the tribal code does not have a set procedure and where application of the SWITCA rules would not be inconsistent with tribal law. *Williams v. Southern Ute Tribe*, SWITCA No. 95-001-SUTC (opinion and order entered February 24, 1995).

Title 3 of the Southern Ute Indian Tribal Code (SUTC) governs appellate practice. SUTC §3-1-104 (1) states "[a]n appeal shall be commenced by filing a notice of appeal * * * [.]". SUTC §3-1-107 describes the record of appeal. The record must contain, among other documents, the notice of appeal, the appellee's response, and motions for oral argument to the appeals judge. Significantly, no legal briefing is required. Paragraph (2) of this section states:

> At any time twenty (20) days after delivery of the above documents to the appeals judge by the court clerk, appellant **may submit** a supplemental memorandum of legal authority supporting his position. A copy of such memorandum shall be mailed to the opposing party who shall have fifteen (15) days in which to reply. (emphasis added).

Under tribal law, the filing of legal briefs is discretionary. While the Court's scheduling order was not contrary to this by permitting the parties to submit a written waiver of the briefing requirement, it would be inconsistent with the tribal code for this court to dismiss an appeal for appellant's failure to do something that is not mandatory under tribal law. Therefore, appellee's motion to dismiss appeal must be denied.

II. Motion to dismiss revision and amendment of appeal.

The notice of appeal was filed on August 31, 1994. On or about December 12, 1994, Appellant filed a revision and amendment of appeal. Neither Title 3 of the SUTC governing appeals, nor the SWITCA rules of appellate procedure permit the filing of a revised and/or amended notice of appeal as a matter of right. SWITCARA #25 does permit a party to file a "motion for an order or other relief during an appeal". Consistent with the overriding goal of the judicial system that cases be determined on the merits and not on procedural technicalities, the Court will treat the appellant's filing as a motion and the appellee's filing as a response to the motion.

The original notice of appeal raised one issue:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint.

The proposed revised and amended notice of appeal has two additional issues:

(1) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the failure of the court to require appellant to make his challenges for cause as to the prospective jurors prior to the appellee making its challenges for cause; and

(2) Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code was denied due to the alleged failure of the tribal prosecutor to provide discovery as requested by defendant.

After reviewing all pertinent tribal court records and tapes of all hearings in this case, and based on existing law, the court concludes that allowing appellant to amend and revise the notice of appeal would be a futile act because the first additional issue could not have been raised in this case because there was no jury trial (tape of hearing, July 25, 1994), and the second new issue was not raised in the trial court. The record is devoid of any attempt by appellant to raise the second new appellate issue in the proceeding below. Prior SWITCA decisions establish that absent fundamental error, an appellate court will only consider issues properly raised in the lower court. See *Burch v. Southern Ute Tribe*, SWITCA No. 93-003-SUTC, citing *Shoshone Business Council v. Skilling, et al*, 20 Ind. L. Rep. 6001 (Shos. and Arap. Ct.App. 1992).

The proposed revised and amended notice of appeal shows the wisdom behind this rule. The proposed revised and amended notice of appeal and appellee's response establish a factual issue as to whether appellee in fact complied with discovery. However, in the absence of any objection by appellant **prior to or at trial** that he was denied discovery, there are no factual findings or ruling by the trial court that an appellate court can measure against existing law to determine validity. The Court concludes that appellant's motion to revise and amend the notice of appeal should be denied. The Court will now consider the issue raised in the original Notice of Appeal.

III. Whether appellant's right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) and the Southern Ute Tribal Code were denied due to the failure of the tribal prosecutor to file a separate document denominated as a complaint.

Before or at appellant's arraignment on May 31, 1994, a document was filed with the tribal court entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest." The document begins as follows:

> I, Jake Candelaria, a peace officer with the Southern Ute Police Dept., by signing my name below before the Notary Public or Clerk named below, swear and affirm that the following facts and information establishing probable cause for the warrantless arrest of Ronald Williams, Date of Birth _____, on 28 May, 1994, at 23:36 on the Southern Ute Reservation, for the Crime(s) or offense(s) of:
> 1. Disobedience to Court Order, (Crime) 5-1-107(3)(i) (94 Cr-96) (Tribal Code Section)
>
> are true and correct to the best of my knowledge, information and belief.

The document continues with one handwritten page of facts in support of the charge listed in the beginning of the document. The document concludes with the notarized signature of the affiant.

Appellant correctly states that the Southern Ute Tribal Code requires all criminal prosecutions to be "initiated by complaint". SUTC 4-1-102(1). When a person is arrested without a warrant, as was the case here, the complaint must be filed with the court prior to or at the time of the arraignment. SUTC 4-1-102(5). The issue that must be decided is whether the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" meets the requirements of a criminal complaint under tribal law. SUTC 4-1-102(2) gives the following requirements for a criminal complaint:

(a) The signature of the complaining witness sworn to before a tribal judge or individuals designated by the chief judge;
(b) A written statement by the complaining witness describing in ordinary language the nature of the offense committed including the time and place as nearly as may be ascertained;
(c) The name or description of the person alleged to have committed the offense; and,
(d) The section of the tribal code allegedly violated.

A review of the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that each element is present. Defendant does not assert that the individual before whom the complaining witness took an oath did not, in fact have the power to administer the oath. The written statement by the complaining witness does state, in ordinary language the nature of the offense, and the time and place the offense was committed. There are facts in the affidavit to establish the elements of each charge. Pursuant to a previous order of the Court, appellant was not permitted to be in or near establishments selling or serving alcohol. Appellant was found by tribal police sitting in his truck outside a establishment that sold or served alcoholic beverages. As to identifying appellant, he is described by name. Finally, the section of the tribal code that defendant was charged with violating is set out, as well as the cause number in which the prior court order was issued. Furthermore, it is clear from the record that this document was filed with the court at or before the time of arraignment on May 31, 1994.

The law does not require exactness. While it would be perhaps less confusing for the tribal prosecutor to title the form "Complaint with Affidavit of Probable Cause Subsequent to Warrantless Arrest", the fact that the word "complaint" does not appear in the document does not change the substantive nature of the document. The Court holds that the "Affidavit of Probable Cause Subsequent to Warrantless Arrest" filed in this case meets all requirements of the tribal code for a criminal complaint.

Defendant also asserts as a grounds for appeal that this tribal practice violates the Indian Civil Rights Act, particularly, 25 U.S.C. §1302(8):

> No Indian tribe in exercising powers of self-government shall:
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

For the purposes of due process, a complaint is "the preliminary charge or accusation against an offender before a committing magistrate". 22 C.J.S. §324. The document need only state the essentials of the offense intended to be charged so as to enable a person of average intelligence to understand the nature of the charge. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). No formality is required; substantial compliance is sufficient. *Jaben v. United*

States, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345, *reh'g den.* 382 U.S. 873,86 S.Ct. 19, 15 L.Ed.2d 114 (1965). Here, even a cursory review of the document entitled "Affidavit of Probable Cause Subsequent to Warrantless Arrest" establishes that the requirements of due process concerning the adequacy of a criminal complaint have been met. It is clear that a person of average intelligence could understand the nature of the charge against him based upon these facts and the charged violation on the first page of the document.

V. Conclusion

Appellant has failed to establish any violation of his rights under either the Southern Ute Tribe Law and Order Code or the Indian Civil Rights Act.

THEREFORE, IT IS THE ORDER OF THE COURT THAT the conviction of appellant should be and hereby is, AFFIRMED. The clerk of the court is hereby ordered to enter an order of judgment in this matter consistent with this opinion.

Dorothy Naranjo, on behalf of Angela Vicenti, Petitioner - Appellee,

v.

Treva Watts, Respondent - Appellant

No. 95-003-SUTC

Order Filed October 6, 1995

Appeal from Southern Ute Tribal Court
Appellate Judge Ann B. Rodgers

THIS MATTER comes before the Court on its own motion pursuant to its inherent power to control the Court's docket. The Court, by letter has been informed by respondent/appellant that she no longer wishes to proceed with this appeal.

THEREFORE, IT IS THE ORDER OF THE COURT, that this appeal should be and hereby is, DISMISSED.

Hwal'Bay Ba:J Enterprises, Inc. and Hualapai Tribal Council, Plaintiffs-Appellants,
v.
Charles Vaughn, Defendant-Appellee.

No. 95-004-HTC

Appeal Filed November 15, 1995

Appellants, a tribally-created Enterprise, entered into a loan commitment agreement with a bank without approval of the membership through a special election. The agreement waived the Enterprise's sovereign immunity, not the Tribe's immunity; therefore, the Tribe's constitution's requirements that a special tribal election be held for express waivers of tribal sovereign immunity or for encumbering any tribal assets is not applicable: the Enterprise is a distinct, separate entity from the Tribe; the letter does not expose tribal lands to foreclosure or encumbrance; the agreement does not contemplate any lease of tribal property or require the sale or exchange of any natural resources or other tribal asset or require the development on a commercial or industrial basis of tribal natural resources involving more than $50,000 since land, alone, is not a natural resource and the tribal constitution distinguishes between land and natural resources. Appellee's counsel is sanctioned for filing a second jurisdictional motion with a former tribal appellate judge after the first was denied by this Court and it appears that the second was filed to delay this appeal. Appellants's motion to enjoin further challenges against the Enterprise is denied, since future action by Tribe or Enterprise may not be in constitutional compliance.

Judith M. Dworkin, for Appellant Hwal'bay Ba:j Enterprise, Inc.
Lee Bergen, B. Reid Haltom and Melanie P. Baise for Appellant Hualapai Tribal Council
Edward Roybal for Appellee Charles Vaughn

Appeal from Hualapai Tribal Court
Appellate Judge Ann Rodgers

INTRODUCTION

This is an appeal of the final judgment of the tribal court denying appellants' request for declaratory relief. Oral argument took place on September 1, 1995. Appellants are the Hualapai Tribal Council (hereafter referred to as the "Council") and Hwal'Bay Ba:j Enterprises, Inc., (hereafter referred to as the "Enterprise") a corporation created by the Tribal Council. Appellants seek reversal of a tribal court judgment (1) that the Enterprise, by accepting the terms of a loan commitment letter violated Article XVI, Section (2)(b) of the Hualapai Constitution and Article V(n) of the Hualapai Constitution; (2) that a special election be held for the purpose of approving the loan; and (3) that appellants inform tribal members of the purpose and the liability of this loan agreement. The tribal trial court also held that the declaratory judgment ordinance enacted by the Tribal Council was void because it unconstitutionally infringed on the power of the tribal judiciary under the tribal constitution.

After reviewing the entire record in the case below, legal briefs submitted by the parties, pertinent law and after hearing the oral arguments of the parties, this Court concludes that the judgment of the tribal trial court should be reversed as to the constitutionality of the action of the Enterprise in entering into the loan commitment letter.

As to the issue of the validity of the declaratory judgment ordinance, the Court finds that it is not an unconstitutional infringement on the powers of the judiciary because the Tribal Council was setting out a remedy.[1] Also, to the extent that the ordinance sets out a procedure, Article VI, Section 3(d) at least acknowledges the power of the Tribal Council to act as to matters of procedure.[2] Under the terms of this section of the tribal constitution any limit on the Tribal Council's power must be based on some other constitutional limit on its powers. No such limit was raised by the parties in this appeal.[3] Unlike some state courts, the Hualapai court is not given

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[1] The trial court found that the Declaratory Judgment Ordinance violated the doctrine of separation of powers in the Hualapai constitution. It also found that it had the power to hear declaratory judgment actions under the federal Declaratory Judgment Act of 1934. The Declaratory Judgment Act of 1934 only applies to Courts of the United States. This means federal courts. The Hualapai Tribal Court is not a federal court; it is created by and exercises the power of the Tribe, not that of the federal government. Therefore, the 1934 Act does not, absent adoption of it by the Hualapai Tribe, authorize the Hualapai courts to hear Declaratory Judgments. The trial court's finding concerning the Declaratory Judgment Act of 1934 allowed the Court to go forward and hear this action on the merits. Since it was heard on the merits, this legal error was harmless.

[2] Article VI, §3 states: The Hualapai Judiciary shall have the power to:

(d) establish court procedures for the Hualapai judiciary, except that the Tribal Council may by ordinance alter such procedures consistent with this constitution.

[3] In the trial court appellee presented arguments that the procedures adopted with the creation of the declaratory judgment remedy violated due process because the time frame prevented a party from fully presenting their case. That issue is not before this Court because the Appellee did not pursue that issue on appeal.

exclusive power over court procedure. In this sense it is more akin to the federal separation of powers doctrine which gives the legislative branch some power in the area of court procedure. However, the error below was harmless because the action was heard on the merits by the trial court and not dismissed due to the trial court's determination that the declaratory judgment ordinance was void.

PRELIMINARY PROCEEDINGS BEFORE THIS COURT

Appellants listed several issues in the notice of appeal. However, after briefing by the parties, only five issues were argued in the Court:

1) Whether the Tribal Council had the power under the tribal constitution to enact the declaratory judgment ordinance;
2) Whether the Enterprise's action in entering into the loan commitment letter without approval of the tribal membership in a special election violates the tribal constitution's limits on explicit waivers of the Tribe's sovereign immunity;
3) Whether the Enterprise's action in entering into the loan commitment letter without approval of the tribal membership in a special election violates the tribal constitution's limits on the power of the Tribal Council to enter into leases of tribal assets.
4) Whether the Enterprise's action in entering into the loan commitment letter without approval of the tribal membership in a special election violates the tribal constitution's limits on the power of the Tribal Council to sell or exchange tribal lands or assets.
5) Whether the Enterprise's action in entering into the loan commitment letter without approval of the tribal membership in a special election violates the tribal constitution's limits on the power of the Tribal Council to develop tribal natural resources.

Appellee did not file a cross-appeal, choosing instead to defend the trial court's decision and challenge the jurisdiction of this Court to hear the appeal. Appellee's jurisdictional challenge was initially determined in a separate opinion and order entered by this Court when it accepted jurisdiction over the appeal. Less than a week before the date set for oral argument, Appellee again filed a motion attacking the jurisdiction of this Court before a former appellate court judge which stated almost identical grounds as were in his first challenge. Appellee asked the former judge to enjoin the oral hearing. No such injunction was issued. At oral argument this Court permitted Appellee to come forth with any additional objections to this Court's jurisdiction, none were raised, although the Court addressed an additional ground which had been raised in the brief. The Court found that it had jurisdiction over the appeal.(Transcript of Hearing at pages 12-14).

Appellant Tribal Council, at oral argument, sought sanctions against Appellee for making the second jurisdictional challenge, and for the allegedly reckless and false allegations made by Appellee in the second jurisdictional challenge. (Transcript of Hearing at pages 8-11). Appellant Enterprise asked this Court to enjoin appellee from "taking any further action to obstruct the Enterprise's efforts to fund this loan before September 30, 1995". (Transcript of Hearing at page 29). These motions are addressed at the end of this opinion and order.

THE CONSTITUTIONALITY OF THE ENTERPRISE AGREEING TO THE TERMS OF THE LOAN COMMITMENT LETTER.

The narrow issue on appeal is whether the trial court's conclusion that the Enterprise, by agreeing to the terms of the loan commitment letter, violated certain provisions of the Hualapai Constitution is arbitrary, capricious, or incorrect as a matter of law.[4] The first point to be considered is what, in fact, are the terms of the loan commitment letter.

The Commitment Letter

The documents presented to this Court as exhibits to briefs by the parties establish that there was first a loan commitment letter dated May 10, 1994, which expired. This was followed by a second (superseding) loan commitment letter dated September 30, 1994. The September commitment letter was further modified in June of 1995, to be effective as of March 31, 1995. (Addendum to Reply Brief of Enterprise on Appeal). This change was suggested in a letter from the bank's attorney to counsel for the Enterprise dated January 10, 1995.(Exhibit E to legal memorandum on corporate status, February 22, 1995).

[4] The right to appeal is set out at Article VI, Section 12 of the Hualapai Constitution; this section also describes the appropriate standard of review to be used. It states: "All matters of law and procedure may be decided by the Court of Appeals, Findings of fact shall be made by the Trial Court and shall be reviewable only when arbitrary or capricious".

When the trial court entered its ruling on April 18, 1995, the letter from the bank's attorney was in the record as an exhibit to the Enterprise's Legal Memorandum on Corporate Status, however, at that time the proposed modification of the September commitment letter had not been executed by appellants. These facts raise the question of whether this Court can consider the June 1995 modification when reviewing the decision of the Court below rather than remand the case for further fact finding.

Whether this Court must remand this case for further fact finding in light of the June 1995 modification?

The Hualapai Constitution gives this Court the power to determine all matters of law or procedure. *Article VI, §12.* Where an issue is a matter of law, this Court has the authority to make an initial determination; no remand is necessary. The September, 1994 commitment letter directs this Court to New Mexico law as governing interpretation of the document.[5] New Mexico contracts law provides that interpretation of a contract is usually a matter of fact, except where the contract is unambiguous. *Kirkpatrick v. Introspect Healthcare Corp.*, 114 N.M. 706, 845 P.2d 800 (1992). The issue of whether a contract is or is not ambiguous is a matter of law. *Teton Exploration Drilling, Inc. v. Bokum Resources Corp.*, 818 F.2d 1521 (10th Cir. 1987). A contract is ambiguous only if it is fairly susceptible to different constructions. *Kirkpatrick, supra.* The Court cannot blindly apply these rules however, because the asserted ambiguity concerns a waiver of sovereign immunity of a federally recognized Indian Tribe. Under those circumstances, a waiver can only be found to exist if it is unambiguous. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

The September, 1994 commitment letter explicitly allows the parties to modify the agreement in writing, and a written modification will be valid if acknowledged or accepted by the signatories to the September, 1994 commitment letter. The June, 1995 modification was in writing and was accepted or acknowledged by the signatories to the September, 1994 commitment letter. (Addendum to Enterprise Reply Brief on Appeal). All parties to the first agreement intended that the June, 1995 commitment letter modify certain terms of the September, 1994 letter to determine the intent of the parties. Therefore, absent any ambiguity in the June 1995 commitment letter, this Court can, as a matter of law, consider the June 1995 modification of the commitment letter as part of the agreement entered into by the parties to the September, 1994 commitment letter.

The June, 1995 commitment letter explicitly states that it "amends the Commitment Letter ("Commitment") dated September 30, 1994". It explicitly modifies four paragraphs of the commitment letter. The only modification pertinent to this appeal is to Paragraph 47.

> The Loan Documents and the Environmental Certification and Indemnity Agreement shall include provisions whereby HBBE [the Enterprise] shall (i) give to the Bank and the BIA a limited waiver of any right or claim HBBE may have to immunity from suit and (ii) consent to suit in courts with proper jurisdiction; and as evidence thereof, HBBE shall execute and deliver to the Bank and the BIA a limited waiver of any sovereign immunity that it may have, a consent to suit, and a consent to jurisdiction, Neither the Bank or the BIA are requesting that the Nation shall execute or deliver a waiver of the Nation's sovereign immunity, consent to suit or consent to jurisdiction.

None of the parties have argued that this modification creates any ambiguity, and this Court can find none.[6] There is no ambiguity as to whether the parties intended a modification, or what was intended with the wording of the modification. Therefore, the existence of the June, 1995 modification of the commitment letter can be considered for the first time by

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[5] The commitment letter contains a choice of law provision:

> 48. Choice of Law
> This Commitment, all Loan Documents, the Environmental Certification and Indemnity Agreement and any issue arising therefrom or related thereto shall be governed by federal law and the laws of the State of New Mexico, as applicable.

Interpretation of a contract is a matter guided by common law, and this section directs the Court to the law of the State of New Mexico unless that law would be inconsistent with or conflict with federal law.

[6] Counsel for appellee did suggest that the modification contradicted the terms of paragraph 37 of the September, 1994 agreement. (Transcript at p. 54, lines 11-12). Paragraph 37 of the September, 1994 commitment letter merely states that the Hualapai Nation "shall deliver, or cause to be delivered to the Bank copies of all balance sheets, income statements, statements of cash flow or other financial statements that it delivers to BIA from time to time". There is no portion of the June, 1995 modification that touches on this section. To the extent that counsel intended to refer to Paragraph 47, the June, 1995 commitment letter explicitly intended to modify that section. To the extent that it conflicts with the original paragraph 47, it is unambiguous that the parties clearly intended to rewrite and modify that section. That does not, in and of itself, create ambiguity.

this Court.

The effect of the June, 1995 modification

The record below establishes that prior to the September 30, 1994 commitment letter the Enterprise and the Tribe entered into a commitment letter which required the Tribe to guarantee 100% of the loan, to lease land to the Enterprise and to grant the bank a limited waiver of sovereign immunity to allow it to enforce any future loan agreement. Several tribal members were concerned about the constitutionality of these provisions and filed a case in tribal court challenging the ability of the Tribe to agree to such terms. Before the case could be decided the initial loan commitment letter expired. The September, 1994 loan commitment letter was then created, by rewriting the initial letter. Paragraph 47 of the September loan commitment was somewhat ambiguous as to whether the Tribe was required to waive sovereign immunity and consent to suit.[7] The June, 1995 modification of paragraph 47 essentially removed any ambiguity that the Enterprise and only the Enterprise was required to waive any sovereign immunity that it may have. Thus the effect of the June, 1995 modification was to make paragraph 47 unambiguously clear that no waiver, consent to suit, or consent to jurisdiction would be required from the Tribe.

The trial court, in construing the September 30, 1994 loan commitment letter correctly applied the legal principle that any waiver of sovereign immunity must be explicit, and only found that the Enterprise had waived sovereign immunity, and that the waiver did not violate any tribal laws. The June, 1995 modification does not require this Court to modify or reject the trial court's finding on this issue.

The Trial Court's findings

The trial court made the following findings concerning the September 30, 1994 commitment letter and the Enterprise's action in entering into the commitment letter:

a. "[T]he Enterprise is an entity, distinct and separate from the Tribe, it has the authority to waive sovereign immunity".

b. "The Enterprise has waived its sovereign immunity to the Bank."

c. In waiving sovereign immunity, "the Enterprise, with the Tribal Council's approval has not legally violated any law(s)."

d. "The Commitment Letter states that 'the loan of 5.5 million dollars,' is guaranteed under certain obligations of the Enterprise: a.) Pledge of Enterprise's bank accounts, b.) assignment of a management agreement between Enterprise and Tribe. c.) lien on Enterprise's personal property. d.) assignment of certain contracts and account receivable." [8]

Based on these findings, the Court concluded:

> The loan agreement dated September 30, 1994 is in violation of the Hualapai Constitution, for it places the Tribe in liability of over $250,000 dollars. The Enterprise's assets are within the jurisdiction of the Tribe, the loan agreement purposes to renovate, expand and construct commercial business, Which will no doubt involve land and money in excess of $50,000 dollars.

Appellants argue that this conclusion is arbitrary and capricious because it is not supported by the findings made by the tribal court, or by the evidence presented below. This Court must agree.

LEGAL ANALYSIS OF CONSTITUTIONAL CHALLENGES TO LOAN COMMITMENT LETTER.

Pertinent Provisions of Hualapai Constitution

Article XVI, section (2)(b) of the Hualapai Constitution states:

Section 2. Waivers of Sovereign Immunity.

[7] Paragraph 47 of the September, 1994 loan commitment letter stated:

> The Loan Documents and the Environmental Certification and Indemnity Agreements shall include provisions whereby HBBE shall (i) give to the Bank and the BIA a limited waiver of any right or claim either may have to immunity from suit and (ii) consent to suit in courts with proper jurisdiction; and as evidence thereof each shall execute and deliver to the Bank and BIA a limited waiver of sovereign immunity, consent to suit and consent to jurisdiction.

[8] No party to this appeal explicitly attacked these findings of the trial court. Appellant Tribe suggested in appellate briefing that the assignment of contracts concerns only contracts of the Enterprise.

(b) Express waivers of sovereign immunity shall required the approval of at least thirty (30) percent of the total number of eligible voters of the Tribe voting in a special election if the waiver may:

(1) expose the Tribe to liability in excess of $250,000 dollars, or its equivalent, or

(2) expose more than one-hundred (100) acres of land to possible foreclosure or encumbrance.

Article V(n) of the Hualapai Constitution states:

The Tribal Council shall have all of the legislative powers vested in the Hualapai Tribe through its inherent sovereignty and Federal law and shall, in accordance with established custom of the Hualapai Tribe and subject to the express limitations contained in this constitution and the applicable laws of the United States, have the following powers:

* * *

(n) to lease tribal lands, natural resources, or other tribal assets within the jurisdiction of the Tribe, Provided, That leases involving more than one thousand (1000) acres or fifty thousand ($50,000.00) dollars shall also need the approval of the eligible voters of the Tribe voting in a special election; and Provided, That development of natural resources shall be done in accordance with Article XI, Section 4 of this Constitution.

Article XI, Section 4 of the Hualapai Constitution states:

Limited Power to Develop Natural Resources. The Tribal Council shall not develop on a commercial or industrial basis any natural resources of the Tribe without the consent of the majority of the total number of eligible voters of the Tribe. Small scale development of natural resources involving less than $50,000.00 may be approved by the Tribal Council without the approval of the voters so long as the intent of this provision is not violated. Any tribal member may enforce this section in Tribal Court which shall have jurisdiction over these matters.

No violation of Article XVI, section (2)(b) of the Hualapai Constitution exists by virtue of execution of the loan commitment letter because there is no waiver of the Tribe's sovereign immunity.

The trial court explicitly found that the Enterprise was a distinct and separate entity from the Tribe. It further found that the Enterprise, not the Tribe, had waived sovereign immunity that it might have. Under the terms of the first portion of Article XVI, section (2)(b) of the Hualapai Constitution, an explicit waiver of sovereign immunity must be approved by thirty percent of the eligible tribal members in a special election only where the waiver could expose the Tribe to liability in excess of $250,000 dollars, or its equivalent. In the loan commitment letter, it is unambiguous that the Enterprise is only waiving sovereign immunity; not the Tribe. Thus, it is not possible that the Tribe would be exposed to liability in any amount, much less that in excess of $250,000.00.

This Court is further convinced that there is no waiver of the Tribe's sovereign immunity by its review of the other documents in the record, particularly, the Articles of Incorporation for the Enterprise, the tribal resolutions creating and empowering the Enterprise, and the document known as the Plan of Operation. These documents clearly support the trial court's finding that the Enterprise is a distinct entity from the Tribe, and as such, does not have the power to waive sovereign immunity except as to the potential liability of the Enterprise itself.

The resolutions establish that the primary purpose for the creation of the Enterprise was to avoid political influence in the active management of the certain business ventures. *Resolutions No. 11-94, 12-94 and 13-94.* The Articles of Incorporation empower the Enterprise to sue and be sued, however, that power is limited in that the Enterprise cannot consent to the attachment of any interest except that owned by the corporation itself. (Article V, §11). Control of the Enterprise is vested in the board of directors, (Article VI). Under Article VII, §E, the board cannot incur contractual obligations unless it first determines that the Enterprise (as distinct from the Tribe) "has the ability to make payments when done." The "Plan of Operation" establishes that except for minor control over the annual budgets for the Enterprise, the Tribal Council intended that control of the corporation be removed from the Tribal Council and vested in the Board of Directors for the Enterprise. Section C of the Plan governs capitalization of the Enterprise. After an initial investment of tribal funds, anything subsequently acquired by the Enterprise would be the property of the Enterprise, not the Tribe. This initial investment of tribal funds is reflected as the operating account on the accounting records of the Enterprise. Any additional advances of tribal funds to the Enterprise must either be a loan that generates interest income to the Tribe or be on

the basis of additional capital investment in the Enterprise.

These documents establish an intent on the part of the Tribe to create an entirely separate entity to operate businesses on behalf of the Tribe. It does not reflect an intent that the Tribe operate these businesses through a corporate shell. While the initial funding which created the operating account could conceivably be taken if the Enterprise defaulted on the loan, there is no evidence in the record to establish that this amounts to $250,000.00 or more. This Court cannot presume that the Tribal Council has acted in an illegal manner. Instead, the presumption is that it has acted in accordance with all laws. Appellee did not present any evidence to rebut this presumption except the amount of the loan that the bank was willing to make to the Enterprise. Based upon the amount of the loan, appellee would have the Court imply that the initial investment exceeded $250,000.00. Contrary to appellee's position, the Court cannot make the implication that the Council is violating tribal law. It is clear that the Enterprise is not empowered to waive sovereign immunity so as to expose the Tribe to liability in any amount, much less that in excess of $250,000.00. Therefore, the fact that the loan commitment letter shows that the Enterprise will be borrowing $5.5 million dollars, does not establish a violation of Article XVI, §2(b).

No violation of Article XVI, section (2)(b) of the Hualapai Constitution exists by virtue of execution of the loan commitment letter because the letter does not expose any lands of the Tribe to possible foreclosure or encumbrance.

The second part of Article XVI, section (2)(b) requires a special election where an explicit waiver of sovereign immunity would expose any lands of the Tribe to possible foreclosure or encumbrance. The trial court did not make any finding that tribal lands could possibly be exposed to foreclosure or encumbrance under the terms of the loan commitment letter. The finding of the tribal court as to what constituted security for the loan shows that no interest in land is given as security. Therefore, execution of the commitment letter by the Enterprise could not violate this section of the Constitution.

No violation of Article V, section (n) of the Hualapai Constitution exists by virtue of execution of the loan commitment letter.

Article V of the Hualapai Constitution sets out the powers of the Tribal Council pertaining to the leasing of "tribal lands, natural resources, or other tribal assets within the jurisdiction of the Tribe" and sets out explicit limits on those powers. Leases involving more than one thousand (1000) acres or fifty thousand ($50,000.00) dollars must be approved by the eligible voters of the Tribe voting in a special election. Section (n) also limits the Tribal Council's power to sell or exchange tribal lands, natural resources or other tribal assets. This cannot be done without approval of the eligible voters in a special election.

Finally, Section (n) only permits the Tribal Council to allow development of tribal resources if development is done in accordance with the provisions of Article XI, Section 4. This section prohibits the Tribal Council from developing on a commercial or industrial basis any natural resources of the Tribe without the consent of a majority of the eligible voters of the Tribe. Small scale development involving less than $50,000.00 need not be submitted to the voters.

No violation of Article V, section (n), part one, of the Hualapai Constitution exists by virtue of execution of the loan commitment letter because the commitment letter does not contemplate any lease of tribal property.

The commitment letter does not require any leasing of tribal lands, natural resources or other assets of the Tribe. The trial court made no findings concerning the existence of any lease of tribal lands, natural resources or other assets. At best, the Court implied the existence of a lease of tribal lands, natural resources or other assets when it found that collateral for the loan consisted, in part, of the "assignment of a management agreement between Enterprise and Tribe."

Counsel for all parties agree that no written management agreement has been produced in these proceedings. Counsel for the appellants acknowledged at oral argument that no written management agreement exists at this time, but that the agreement to be put in writing would be substantially similar to the existing plan of operation. Thus, there was no evidence in the record, except for the amount of the loan sought, the loan commitment letter and the plan of operation, from which one could even imply that the September 30, 1994 commitment letter involved a lease requiring approval in a special election under Article V(n). None of these documents require a lease of tribal lands, natural resources or other assets. This constitutional provision is not violated by the terms of the loan commitment letter or the plan of operation.

No violation of Article V, section (n), part two of the Hualapai Constitution exists by virtue of

execution of the loan commitment letter because the commitment letter does not require the sale or exchange of any natural resources or other assets.

At most, the only incident of ownership that is in any way transferred to another entity is the Tribe's right to manage certain businesses and the unlimited right to take the profit from those Enterprises. No tribal businesses are transferred to or exchanged under the existing plan of operation of the loan commitment letter. Even in the case of default by the Enterprise, the Bureau of Indian Affairs is to step in and manage tribal businesses in place of the Enterprise until the loan in paid off. Ownership of tribal businesses stays with the Tribe. The trial court made no finding of what asset of the Tribe, if any, was to be sold or exchanged by virtue of the loan commitment letter and this Court can find none. Therefore, no violation of this part of section (n) has been shown or proven.

No violation of Article V, section (n), part three, or Article XI, Section 4 of the Hualapai Constitution exists by virtue of execution of the loan commitment letter because the commitment letter does not require the development on a commercial or industrial basis of natural resources of the tribe involving more than $50,000.00.

The tribal court found a violation of Article V(n) in that "the loan agreement purposes to renovate, expand and construct commercial business, Which will no doubt involve land and money in excess of $50,000 dollars". This Court agrees that under the plan of operation the activities of the Enterprise may involve land and money in excess of $50,000.00. That fact, in and of itself, does not trigger the constitutional limit on the power of the Tribal Council to develop on a commercial or industrial basis any natural resources of the Tribe.

The issue is whether land itself is to be considered a natural resource under the Hualapai Constitution. The term "natural resources" has been defined by a legal dictionary to mean "[a]ny material in its native state which when extracted has economic value" *Black's Law Dictionary 925 (5th ed.)*. The definition of the term outside its use as a legal term, its standard definition, is: materials (as mineral deposits and water power) supplied by nature." *Webster's Third New International Dictionary, 1507 (1961)*. The definition of "land" is much broader: "the natural environment and its attributes within which production takes place: the surface of the earth and all its natural resources" or "any ground, soil, or earth, whatsoever regarded as the subject of ownership (as meadows, pastures, woods) and everything annexed to it whether by nature (as trees, water) or by man (as buildings fences) extending indefinitely vertically upwards and downwards". *Webster's at 1268.* Therefore, in the english language, whether used as a legal term of art by lawyers, or in passing by people in general, the term "land" includes natural resources associated with the land, but the land, itself is not a "natural resource".

Appellee argues correctly that this Court should not blindly apply dictionary definitions of terms when construing a tribal constitution. This Court generally agrees with that principle. Here, however, appellee did not produce any evidence in the court below of a different tribal interpretation. The best evidence before this Court as to how the Hualapai Tribe interprets these words is the tribal constitution, itself. A review of the use of these terms in the document establishes that tribal use of the term reflects the standard English definition. For example, in Article I - Jurisdiction, the Constitution distinguishes between lands and resources ("the Hualapai Tribe shall have jurisdiction over all persons, property, lands, water, air space, resources* * *[.]").

The distinction between "land" and "natural resources" is also evident in the article addressing the powers of the Tribal Council. Article V(e) gives the Council the power to prevent or veto the sale, disposition, lease or encumbrance of tribal lands, tribal funds of other assets. V(i) gives the Council the power to purchase or accept any land or property for the Tribe. V(j) gives the Council the power to regulate the use and disposition of all land in conformity with Article XI. V(k) gives the Council the power to request the Secretary of the Interior to confer trust or reservation status on lands reserved for, granted to or purchased by the Tribe. V(n), the provision in question, distinguishes between lands and natural resources itself concerning Tribal Council power to "lease tribal lands, natural resources or other tribal assets". V(f) gives the Council the power to protect and preserve the wildlife and natural resources of the Tribe.

Finally, an entire article of the tribal constitution is devoted to Land, Article XI. In addition to Section 4 which specifically addresses "natural resources" of the Tribe, Section 3, Land Use Ordinance, states:

> A comprehensive land use ordinance shall be adopted as soon as possible after the adoption of this constitution. The ordinance shall include sections on timber management and fuel wood cutting, zoning, wildlife management, cattle management and other natural resources management.

Contrary to the contention of appellee's counsel, the tribal belief as evidenced in the written constitution is that land is much broader than the term "natural resource", essentially natural resources are components of the land. The tribal constitution does not imply that land, itself is meant to be considered a natural resource. The best example of this interpretation is in Section 3 of Article XI which requires the natural resources associated with a tract of land to be taken into consideration in determining the best use for the land. This is perfectly consistent with the definitions of the terms "land" and "natural resource" in **Webster's** as set out above.

Based on the foregoing this Court concludes that the trial court erred when it concluded as a matter of law that development of land under the loan commitment letter would necessarily involve development of natural resources valued at more than $50,000. Since this error is the basis for concluding that the loan commitment letter was a violation of Article V(n) of the tribal constitution, that conclusion is also legally erroneous and must be REVERSED.

THE MOTION FOR SANCTIONS

Appellant Hualapai Tribe requested this Court to sanction counsel for appellee due to the frivolous nature of the motion to enjoin this Court from proceeding on the basis of lack of jurisdiction after this Court had previously ruled on the same issue in an earlier motion. This Court has reviewed the two jurisdictional motions and the loose allegations made in the second to possibly create an appearance of impropriety, or perhaps raise a second ground for challenge.[9]

After much consideration of all of the factors, I cannot escape the conclusion that the second jurisdictional motion was frivolous and filed solely with the intention to delay any determination of this appeal. Such conduct violates ethical rules that all attorneys must adhere to in their representation of clients. Thus, the conduct of Counsel for appellee in filing the second motion is such that appellant Tribal Council's motion for sanctions should be GRANTED.

The Court disagrees, however, with the sanction suggested by counsel for the Tribal Council. Counsel made the argument that the appropriate sanction should be the costs to the Appellant Tribal Council of having an additional attorney attend the appeal to address this motion. In a prior pre-trial conference on the first challenge to this Court's jurisdiction, the attorney for the Tribal Council who appeared in the oral argument on the merits successfully defended against appellee's motion. Since no new arguments were raised in the hearing on the second jurisdictional challenge, that same attorney could have adequately defended the second challenge. Therefore, an appropriate sanction would only involve the costs and fees of one attorney to respond at the hearing on the motion on September 1, 1995, exclusive from other costs such as travel, and attorney fees and costs in appearing for at oral argument on the merits.

THE MOTION TO ENJOIN APPELLEE FROM FURTHER ACTION TO OBSTRUCT ENTERPRISES'S EFFORTS TO FUND THIS LOAN.

Appellant Enterprise made a motion at oral argument for the Court to enjoin appellee from further action to obstruct the Enterprise's efforts to fund this loan prior to September 30, 1995. This would seem to be premised upon the belief that once this decision was issued there would be no other possible objection to the actions of the Enterprise in obtaining the loan. At this time, this Court does not share that assessment of the facts.

By its existing terms, and by the terms set out in the plan of operation, and the representations made by Enterprise's counsel to this Court, the Court has found no constitutional infirmity in the Enterprise's action in entering into the loan commitment as it is now formulated. Under principles of res judicata or collateral estoppel, appellee can not raise these arguments again. However, an integral part of the projects proposed by the Enterprise is the Written Management Agreement to be created between the Hualapai Tribe and the Enterprise. Since the agreement is not in writing at this time, the Court cannot determine whether the written version will comply with the Hualapai Constitution at this time.

The record in this case establishes that appellee and other tribal members have used the tribal court to require appellants to bring their actions within the spirit of the Hualapai Constitution. Although he is not the prevailing party, the record shows that appellee's efforts, with one exception noted above, have not been frivolous. This is the process that is allowed by the Hualapai Constitution. This Court will not enter an order enjoining appellee from challenging the actions of the Enterprise when, as here, an essential aspect of its proposed projects has yet to be put in writing. Careful draftsmanship of the written

9 Counsel for Appellee did not provide this Court with an original copy of this second motion, having provided it to one of the former appellate judges for the Tribe, who is no longer in that position.

agreement in conformity with this opinion would make any further interference frivolous. Appellant Enterprise's motion is DENIED.

THEREFORE, IT IS THE ORDER OF THIS COURT THAT the order of the trial court should be and hereby is, REVERSED.

IT IS FURTHER ORDERED that appellant Enterprise's motion to enjoin appellee from further interference with the Enterprise's efforts to fund this loan is DENIED; and

IT IS FURTHER ORDERED that the Court shall schedule a telephonic hearing to consider the amount of the award of sanctions against Edward Roybal, Counsel for Appellee after presentation of a proposed award and opposition to the proposed award to the Court in writing. Counsel for Appellant Tribal Council shall submit a proposed award to this Court and to Mr. Roybal no later than September 30, 1995 for review. Mr. Roybal shall file any opposition to the proposed award with the Court no later than October 15, 1995.

IT IS FURTHER ORDERED, that due to the expedited nature of this appeal, Counsel shall have five calendar days from receipt of this Order to file any motions for other relief.

Appellant's motion for reconsideration of the above opinion and order was denied on October 2, 1996.

IT IS SO ORDERED.