In the Matter of a Minor Child.

SWITCA No. 97-004-HTC
HTC No. JV96-147

Appeal filed February 9, 1997

Appeal from the Hualapai Tribal Court,
Joe Flies Away, Judge
Muriel Scott, Attorney for Appellant
Dallas Quasula, Sr., *pro se*

Allan Toledo, Judge, Southwest
Intertribal Court of Appeals

SUMMARY

Appellant appeals from the Tribal Court's determination that her minor child's surname could not be changed from that of the child's biological father because of traditional law. The decision of the Tribal Court is affirmed.

JUDGMENT AND ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council on behalf of the Hualapai Nation and pursuant to the Appellate Code of the Hualapai Nation, §§ 1.22 through 1.25 as amended by ordinance No. 9 adopted in November 3, 1979, the rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA", as well as the Court's inherent authority to manage its business.

I. Facts

Mother petitioned the Hualapai Tribal (trial) Court for a change of name for her minor child. The trial court held that by tradition, the child assumed the name of his father. Mother appeals on the grounds that:

1. evidence does not support the trial court's decision; and,
2. mother was not represented by counsel.

The Court affirms the Hualapai Tribal Court's decision.

II. Discussion

Natural mother petitioned the Tribal Court for a change of name for her minor son on grounds that she has been the sole provider for the minor child in the absence of the natural father. The father objected to the change of name. Both parents appeared without counsel and each presented testimony.

A. Lack of counsel.

Appellant claims that she was not advised of her right to an attorney or counsel. The Indian Civil Rights Act of 1968, 25 U.S.C. §1302, provides that in a criminal proceeding that a person may have at her own expense the assistance of counsel. A petition for a name change is a civil, not a criminal, matter. The nation has not adopted any law requiring it to provide counsel to any person, whether it be for a civil or criminal proceeding. *Hualapai Nation v. D.N.*, 9 SWITCA Rep. 2 (Hualapai, 1998). Thus, if the petitioner wished to have counsel, she would have had to pay for such assistance herself. Nor is the trial court obliged to advise a civil party that the party can have counsel and appellant does not cite to the record where she was denied her right to counsel by the trial court.

B. Lack of evidence to support the Tribal Court's decision

The court stands in *locus parentis* with respect to a child when determining whether a change of a child's name should be permitted and the best interest of the child should be the controlling consideration. 57 Am. Jur. 2d, §45. Generally, the appellate courts give great weight to decisions of trial courts as to the best interest of a child when it has the opportunity to view the witnesses and hear the testimony. *Hualapai Nation v. D.N.*; *Gleason v. Michlitsch,* 728 P.2d 967 (Or. App. 1986).

> In determining the child's best interests, the trial court may consider, but its consideration is not limited to the following factors: The child's preference; the effect of the changes of the child's surname on the preservation and the development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and the proposed surname, and the difficulties, harassment or embarrassment that the child may experience from bearing the present or proposed surname. (citation omitted) *Daves v. Nastos,* 711 P.2d 314 (Wash. 1985)

The grant or denial of an application to change the name of a child is within the discretion of the court and it should be granted only where to do so is clearly in the child's best interest and no reasonable objection to the proposed change is provided. The court has no discretion to deny the application if there is satisfactory proof that a change of name is for the child's interest and benefit. 75 C.J.S., §11(2). The court saw and heard both parents and determined that it is in the child's best interest to uphold the Hualapai Nation's tradition that the child retain the paternal surname.

Without a strong showing that the Tribal Court abused its discretion, the appellate court will not challenge the lower court's factual decision. The Hualapai Appellate Code requires a sworn statement to be included with a notice of appeal regarding witness testimony, see §1.24 (1)(A), and without the statement, this Court is unable to find that there was any abuse of discretion regarding the testimony provided. *Hualapai Nation v. D.N.*

The decision of the Hualapai Trial Court is hereby affirmed.

IT IS SO ORDERED.

October 28, 1998

Hualapai Nation, Appellee/Plaintiff,
vs.
D. N., a minor, Appellant/Defendant

SWITCA No. 97-005-HTC
HTC No. JV96-019, 020, 022

Appeal filed February 9, 1997

Appeal from the Hualapai Tribal Court
Shirley Nelson, Judge
I.N., *pro se*
Delmar Pablo, Attorney for Appellee

Allan Toledo, Judge, Southwest
Intertribal Court of Appeals

SUMMARY

Appellant, a juvenile, appeals from a determination by juvenile court that appellant committed several alcohol related offenses for the reasons that counsel was not appointed to represent appellant and inadequate witnesses were presented. The appellate court held that appellant is not entitled to appointed counsel under the Indian Civil Rights Act or under tribal law. Further, appellant failed to comply with tribal appellate procedure to submit sworn statements and the claim of inadequate witnesses is not supported by the record which shows two eye witnesses were presented; the appellate court will not substitute its determination about witness credibility for that of trial court which had the opportunity to see and hear the testimony and will not challenge the lower court's factual decisions if they are supported by substantial evidence, unless there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision. The decision of the Tribal Court is affirmed.

JUDGEMENT AND ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95, February 4, 1995 adopted by the Hualapai Tribal Council, the general appellate rules for the Hualapai Nation, sections 1.22 *et seq.*, as amended, the appellate rules for the Hualapai Juvenile Code, section 7.25, and the appellate rules of the Southwest Intertribal Court of Appeals, hereafter referred to as SWITCA.

This Court reviewed the record and recordings of the proceedings in the Hualapai Tribal Court and FINDS:

1. This Court has subject matter jurisdiction in this appeal.

2. Appellant, D.N., is a person under the age of 18 years and is represented by her natural parent.

3. Appellant was charged with driving while under the influence of liquor/drugs, reckless driving, operators & chauffeurs must be licensed, and illegal possession of alcohol.

4. This appeal was filed on the following grounds:
   a. lack of a counselor or attorney for appellant;
   b. inadequate court witnesses.

5. Three witnesses were called by the prosecutor:
   a. an eye witness who called the police dispatcher to report the erratic driving and behavior involving two girls and two boys;
   b. the police dispatcher who relayed the information to the arresting officer;
   c. the arresting officer, Wanda Quasula, who testified that she found the minor behind the wheel of the black pickup truck and who described the intoxicated state and combative actions of the minor.

6. The Hualapai Tribal Court found that the minor and her witness testimony were not credible.

The Court affirms the Hualapai Tribal Court's decision.

I. Discussion

A. No appointed counsel

The Indian Civil Rights Act of 1968 (I.C.R.A.), 25 U.S.C. §1302, requires that a federally recognized Indian

tribe protect the rights of individuals under certain conditions or situations. The wording of this section of the law is patterned after the Bill of Rights of the United States Constitution, but, the Act is not identical to the Bill of Rights. There are important differences between the two, the relevant difference being found in ICRA, section 1302 (6) which reads:

> (No Indian tribe in exercising powers of self-government shall -) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and **at his own expense to have the assistance of counsel for his defense;** (emphasis added).

Congress clearly exempted Indian tribes from the requirement of appointing counsel, attorney or lay counsel, for criminal defendants. The record is silent as to whether the Nation voluntarily provides legal representation, which, as a sovereign government, it could choose to do. However, there is nothing in the Nation's Code to indicate that it has such a requirement, and as stated before, the record of the case does not indicate that the Nation has chosen to provide legal representation to its members. Thus, it makes no difference whether the traffic charges filed against the minor are criminal or civil. She is not entitled to tribally-provided legal representation by federal or tribal law.

B. Inadequate witnesses

The minor also complains of inadequate court witnesses. While it is not entirely clear what the minor means by this claim, the Court believes that it is the minor's claim that the prosecution did not meet its burden of proving beyond a reasonable doubt that the minor committed the illegal acts or violations of the tribe's code. This is the standard burden of proof for proving criminal charges and traffic violations must be proved by the same burden. The minor was charged under the juvenile code which provides that juveniles may be charged with traffic offenses set out in the general code, the only difference being that incarceration and fines are not allowed for juveniles.

Ordinarily, tribal law in the form of statutes, ordinances, customary law, and tribal court opinions rules a tribal appellate court's decision-making process. Where such tribal law is absent, tribal courts may look to sister jurisdictions for guidance. This is not required, but may be helpful to tribal courts. Such sister jurisdictions include other tribal courts, state courts, and federal courts. First, the Hualapai Tribal Code will be reviewed for its requirements regarding appeals and standards of review, and then, if the Tribal Code is silent on any points of law, this Court will look for guidance from other courts.

Section 7.25 of the Hualapai Juvenile Code is silent as to the standard of review regarding appeals, but section 1.24 of the general code regarding appeals clearly sets out the standard of review. Subsection (1)(A) of that section requires that the lower court's findings of fact be presumed to be correct unless the appellate court is presented with a sworn written statement at the time of the filing of the appeal notice showing that a witness was not allowed to testify and that the testimony would have altered the judgement. The fact that a witness testified and the lower court did not find the witness credible does not meet this criteria. No such sworn written statement can be found in the record or attached to the notice of appeal. Even if such statement were in the record, it is still this Court's responsibility to determine if the statement is believable in the face of the evidence and record.

Section 1.24 (1)(A) comports with the general rule adopted by other courts, both tribal and non-tribal. In other words, the lower court determines the facts of the case after hearing and seeing the evidence and appellate courts give great deference to trial court determinations. *McCleskey v. Kemp* 481 U.S. 279, 107 S.Ct. 1756 (U.S. Supreme Ct., 11/22/87), Reh'g den., 482 U.S. 920, 107 S.Ct. 3199 (6/8/87); *Navajo Nation v. Blake,* 24 I.L.R. 6017 (Navajo Sup. Ct., 11/5/96); *MacDonald v. Yazzie*, N.L.R. Supp. 61, 62 (Navajo Sup. Ct., 1989). As the Supreme Court of Arizona stated: "The rule is founded upon the theory that the trial court, having seen and heard the witnesses, is in a better position to determine their honesty and accuracy than the higher court." *Cavazos v. Holmes Tuttle Broadway Ford, Inc.*, 456 P.2d 910, 913 (Ariz. 6/30/69). Further, appellate courts will not challenge the lower court's factual decisions if they are supported by substantial evidence or unless there is a strong showing that the court abused its discretion, acted arbitrarily or capriciously, made a clearly erroneous decision, or made an illegal decision. *McCleskey*, cited above; *United States of America v. Gutierrez,* 116 F.3d 412, 415 (CA. 6/24/97) *Chavez v. Tome*, 5 N.L.R. 94, 96 (Navajo Sup. Ct. 1987); *Zavala v. Arizona State Personnel Board,* 766 P.2d 608 (Ariz. 10/1/87). The provisions of the Hualapai Appellate Code conform with the standards adopted by the vast majority of jurisdictions throughout this country, requiring a very stringent and limited standard of review by the tribe's appellate court.

Here the trial court heard the witnesses provided by the prosecution and defense. There were two eye

witnesses to the alleged acts. Clearly, the lower court found them to be credible and this Court cannot and will not substitute its evaluation of their credibility for that of the trial court. Further, given the cumulative eye witness testimony, the lower court did not abuse its discretion in finding that the strict burden of proof was met. Without the sworn statement required by the Hualapai Code, section 1.24 (1)(A), this Court has no choice except to affirm the lower court decision.

IT IS ORDERED, THEREFORE, THAT the decision of the Hualapai Tribal Court be and hereby is affirmed and this appeal is dismissed.

IT IS SO ORDERED.

March 4, 1998

MARJORIE SOTO, Petitioner,
vs.
RHONDA LANCASTER, Planning Director, Ute Mountain Ute Indian Tribe, in her individual capacity, Respondent.

SWITCA No. 97-006-UMU
UMU CT. IND. OFF. CIVIL No. 96-WY-31

Appeal filed March 26, 1997

Appeal from the Ute Mountain Ute Tribal Court
Eldon M. McCabe, Judge
Eric J. Stein, Attorney for Appellant
Robert Glenn White, Attorney for Appellee

Appellate Panel: Rodgers, Abeita, & James

SUMMARY

Appellant appeals from tribal trial court dismissing appellant's complaint filed pursuant to tribal personnel policies for the reason that tribal personnel director was a non-Indian and CFR code does not permit jurisdiction over a non-Indian. Appellate court holds that CFR court has subject matter jurisdiction over a claim made against a person who is not a member of a federally recognized Indian tribe for actions taken in their official capacity as a tribal employee. Further, an action against an employee in his individual or official capacity for failure to comply with tribal law is not a case against the Tribe. Reversed and remanded.

OPINION AND ORDER

I. Introduction

This is a very complex case. It tests the limits of the Tribal Court's authority, and by extension, the authority of the tribal judicial system over tribal employees. It also requires this Court to focus on the federal role in providing for Courts of Indian Offenses (popularly known as "CFR" Courts). The ultimate issue is whether a CFR court has jurisdiction over claims against a person who is not an Indian [1], but who is an employee of the tribe, for unlawful actions taken in their capacity as a tribal employee. This Court has requested and reviewed briefing on various issues in this case, and the pertinent law. We conclude that a CFR Court has subject matter jurisdiction over a claim made against a person who is not a member of a federally recognized Indian tribe for actions taken in their official capacity as a tribal employee. We also hold that the Tribal Court abused its discretion by dismissing this complaint with prejudice before deciding whether to allow amendment of the complaint. This case is reversed and remanded to the Tribal Court to determine, in the first instance, whether the plaintiff, Ms. Soto, should be permitted to amend the complaint, and if so, for the case to go forward.

II. Background

In 1991, the Ute Mountain Ute Tribal Council decided that the existing Tribal Court was not functioning and was in disarray. (Exhibit A-19 to appellant's opening brief). This led the Tribal Council to adopt Resolution No. 3805, dated October 30, 1991 which stated:

> WHEREAS the Ute Mountain Ute Tribal Council has determined that the current Court System is not providing adequate social and public safety to the Ute Mountain Ute Tribal Members; and
>
> THEREFORE, BE IT RESOLVED, that the Ute Mountain Ute Tribal Council feels that it is in the best interest of the Ute Mountain Ute Tribe to request the Bureau of Indian Affairs to rescind the 93-683 Contract for the operation of the Tribal Court System Immediately.

---

[1] For the purpose of the CFR Court regulations, an Indian is a person who is a member of an Indian tribe which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs, and any other individual who is an "Indian" for purposes of 18 U.S.C.§§ 1152-1153. 25 C.F.R. §11.100 (e).

The Tribal Council concluded that to maintain the integrity of the tribal court system it was necessary to step back and let the Bureau of Indian Affairs operate this branch of government. Pursuant to its federal trust responsibility, the Bureau of Indian Affairs put in place a CFR Court. Counsel for Ms. Soto correctly noted that the CFR Court was established at Ute Mountain Ute to "supplant a Tribal Court system". (Plaintiff's memorandum brief in support of motion for relief from judgment, p. 3.)

CFR courts operate under federal law and regulations, particularly 25 C.F.R. Part 11. These regulations, place a significant limit on the jurisdiction of the court:

> (a) Except as otherwise provided in this title, each Court of Indian Offenses shall have jurisdiction over any civil action within the territorial jurisdiction of the court in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties. 25 C.F.R. §11.103(a) (1993).

The regulation does not give the CFR courts jurisdiction over claims against persons who are not Indians, or claims between two persons who are not Indians unless the persons who are not Indians agree to allow the CFR court to hear the case. On January 18, 1994, the Ute Mountain Ute Tribe passed a resolution attempting to extend the civil jurisdiction of the Tribal Court to claims brought against persons who are not Indians. Pursuant to the Ute Mountain Ute Constitution, this resolution was submitted to the Secretary of the Interior for approval on February 8, 1994. On April 25, 1994, the Director of the Albuquerque Area Office of the Bureau of Indian Affairs informed the tribe that the resolution could not be approved. The letter states:

> Although tribal court jurisdiction over non-Indians has been upheld by the U.S. Supreme Court under certain conditions, Courts of Indian Offenses are not the equivalent of tribal courts, and the Federal Government is not disposed to unnecessarily expand the jurisdiction of its Courts of Indian Offenses.
>
> Indian tribes served by Courts of Indian Offenses are authorized to create their own tribal court systems should they desire to assume additional jurisdiction. (S. Mills, Area Director, to Superintendent of Ute Mountain Ute Agency, dated April 25, 1994, page 1, Exhibit A-3 to appellant's opening brief.)

Ms. Soto is a member of the Ute Mountain Ute Tribe. Ms. Lancaster is the planning director for the tribe and is not an Indian. In 1993, Ms. Soto responded to a job announcement seeking applicants for the position of public relations assistant. Across the bottom of the flyer were the following words: "TRIBAL MEMBERS GIVEN FIRST PREFERENCE". This statement was made pursuant to a written policy of the tribe:

> It is the policy of Ute Mountain Ute Tribe to give preference to American Indians in all phases of employment and training which includes, but is not limited to: hiring, * * *[.] Implementation of this policy shall be in the following manner:
>
> For the purposes of recruitment the concept of Native Preferences shall apply and be clearly stated on every job announcement. The process of selection shall be as follows:
>
> 1. Applications from Ute Mountain Ute and American Indians shall be considered first and exclusively; and if a suitable qualified applicant from this group is found, he/she will be selected for the position.
> 2. If no suitable qualified applicants are to be found in the above specified group then applications submitted by all other persons shall be considered and an appropriate selection made therefrom.

Ms. Lancaster did not hire Ms. Soto. Instead, a person who is not an Indian was hired for the position.

III. Procedural History

Ms. Soto filed this case against Ms. Lancaster in her individual capacity, alleging that the failure to hire her for the position and the hiring of a person who was not an Indian violated tribal law, particularly the tribal member and Indian preference policy of the tribe. The tribe's legal counsel entered an appearance for Ms. Lancaster and filed a motion to dismiss the complaint arguing that (1) the Tribal Court, as a CFR court, did not have jurisdiction (the authority) to hear a civil claim filed against a person who is not an Indian unless the parties stipulated to it; (2) that even if it did have jurisdiction to hear the claim, the complaint failed to state a claim for which relief could be granted. The memorandum brief filed in support of that motion admitted that all possible claims would be against Ms. Lancaster in her official capacity, not her individual capacity. Ms. Soto then filed a motion to amend the complaint alleging claims against several persons in both their individual and official capacities. Several of these persons were tribal members who were also tribal officials. It is undisputed that the CFR court's jurisdiction was not limited by this regulation as to these people.

Before briefing was complete on the motion to amend the complaint, the trial court granted the motion to dismiss the complaint. The trial court did not address the pending amendment. Rather, it granted the motion for the following reasons:

(1) Pursuant to the Code of Federal Regulations, as a CFR court, the Tribal Court did not have subject matter jurisdiction over an action against a non-Indian defendant who had not stipulated to the exercise of jurisdiction by the Tribal Court; and

(2) To the extent that an action was brought against Ms. Lancaster in her official capacity, there was no waiver of sovereign immunity by the real party in interest, the Ute Mountain Ute Tribe.

Marjorie Soto appeals the dismissal with prejudice of her complaint alleging that Ms. Lancaster, as the planning director of the tribe denied her employment through unlawful hiring practices. Ms. Soto also appeals the trial court's denial of her motion to amend her complaint and the denial of her motion for relief from that order.

IV. Legal Issues Discussion

Can the Ute Mountain Ute Tribal Court exercise jurisdiction over a claim made by a tribal member against an employee of the tribe who is not an Indian for actions taken as a tribal employee?

A. Did the Ute Mountain Ute resolution effectively reinstate civil jurisdiction over persons who are not Indians?

It is undisputed that the Ute Mountain Ute Tribal Court is a CFR court and that federal regulations do not permit a CFR court to exercise subject matter jurisdiction over a claim against a defendant who is not an Indian absent their agreement to tribal court jurisdiction. The tribe, on behalf of Ms. Lancaster, asserts that these two facts are dispositive - as a CFR court, the Ute Mountain Ute Tribal Court cannot exercise jurisdiction over claims made against her. Ms. Soto argues first that the Tribal Council's resolution reinstating the CFR court's civil jurisdiction over persons who are not Indians effectively supersedes the federal regulations. She argues that the resolution is valid because the Secretary of the Interior's designee did not disapprove the resolution within the strict time limits for his action.

The Code of Federal Regulations permits tribes to determine the laws that will be applied by a CFR Court established for a tribe. 25 C.F.R. §11.100 (e) & (f) states:

> (e) The governing body of each tribe occupying the Indian country over which a Court of Indian Offenses has jurisdiction may enact ordinances which, when approved by the Assistant Secretary - Indian Affairs or his or her designees, shall be enforceable in the Court of Indian Offenses having jurisdiction over the Indian country occupied by that tribe, and shall supersede any conflicting regulation in this part.
>
> (f) Each Court of Indian Offenses shall apply the customs of the tribe occupying the Indian country over which it has jurisdiction to the extent that they are consistent with the regulations of this part.

The Ute Mountain Ute Tribal Council by a resolution dated January 18, 1994, attempted to amend the language set out in 25 C.F.R. §11.103(a) which prohibits a C.F.R. court from exercising jurisdiction over claims brought against persons who are not Indians when they have not stipulated to tribal court jurisdiction. The Ute Mountain Ute Constitution, in addition to the language of 25 C.F.R. §11.100(e), requires secretarial approval before certain laws are effective. The Code of Federal Regulations does not set out a time limit for secretarial approval. Article V, §3 of the Ute Mountain Ute Constitution states:

> **Manner of Review.** Any resolution or ordinance which by the terms of this Constitution is subject to review by the Secretary of the Interior shall be presented to the Superintendent of the reservation, who shall, within two weeks thereafter, approve or disapprove the same, If he approves an ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement to the Secretary of the Interior, who may, within 90 days from the date of enactment, rescind the said ordinance or resolution for any cause by notifying the Tribal Council of his action.

Does this constitutional provision concerning timeliness govern secretarial review of the resolution? Not all resolutions are subject to secretarial review. Section 3 only applies to Tribal council actions which, by the terms of the Constitution, are subject to review by the Secretary of the Interior. The Ute Mountain Ute Constitution does not explicitly state that secretarial approval is required for resolutions of the Tribal council concerning the Tribal Court. In fact, it does not even state that the Tribal council has the authority to determine the Tribal Court's jurisdiction. The Constitution's sections with a secretarial approval requirement are quite specific. For example, Article V, Powers of the Council, §1(j) states that the Tribal council shall have the power "to pass ordinances, subject to review by the Secretary of the

Interior, covering the activities of voluntary associations consisting of members of the Tribe organized for the purpose of cooperation or for other purposes, and to enforce the observance of such ordinances." Likewise, §1(k) states: "to provide by ordinance, subject to review by the Secretary of the Interior, for the removal or exclusion from the reservation of any non-members whose presence may be injurious to members of the tribe." The broadest provision, §1(n) states "to regulate the conduct of members of the Tribe and to protect the public peace, safety, morals and welfare of the reservation through the promulgation and enforcement of ordinances, subject to review by the Secretary of the Interior, to effectuate these purposes." On the other hand, §1(e) gives the Tribal council the power to "promulgate ordinances regulating the domestic relations of members of the Tribe". It does not require secretarial approval. §2 of Article V states, in part: "The Council . . . may exercise any rights and powers heretofore vested in the Ute Mountain Tribe of the Ute Mountain Reservation but not expressly referred to in this Constitution."

In deciding how to interpret these constitutional provisions, we are mindful, as made clear by §2, that the Constitution did not cut off any inherent power of the tribe. Requiring secretarial approval is in derogation of the inherent sovereign powers this section protects. It is a giving up of some autonomy to a federal official. Canons of construction require that any waiver of sovereign power must be explicit and be narrowly construed so as not to expand it beyond the limits envisioned by the law-making body, here the tribe. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[2]

In the absence of any explicit statement concerning the tribal council's authority over tribal court jurisdiction, much less a statement that such authority is shared with the Secretary of the Interior, we conclude that the timeliness constraints on secretarial approval power, set out in Article V, §3 of the Tribal Constitution, do not apply to the January 18, 1994 tribal council resolution.[3] Time limits, if any, must come from another source.

Under the Code of Federal Regulations, the Assistant Secretary or his or her designee must approve the resolution insofar as it will supersede inconsistent provisions of the federal regulations The Tribal council resolution was clearly inconsistent with the federal regulations' limits on the CFR court's civil jurisdiction. No party has argued that there is any basis other than the Ute Mountain Ute Constitution for a time limit on when a resolution would be deemed approved if the Secretary did not act, and this Court's review of federal statutes and regulations does not provide any such limit. However, even if it is assumed that a time limit exists, it should run from the date the resolution is received by the Assistant Secretary or his designee. Until then, the Assistant Secretary has no notice that any time period is running. Here, the Ute Mountain Ute agency superintendent did not forward the resolution to the Assistant Secretary until February 8, 1994. If there is a 90 day time limit, the time did not run until May 9, 1994. The designee of the Assistant Secretary disapproved the resolution on April 24, 1994, well within any 90 day time period.[4]

We conclude that disapproval of the tribal council resolution by the Assistant Secretary's designee was effective. The tribal council's resolution attempting to expand the jurisdiction of the CFR court to include all civil actions brought against all persons was never effective, so it could not be the basis for the Tribal Court asserting subject matter jurisdiction over Ms. Soto's claims against Ms. Lancaster.

---

[2] "Canons of construction" are rules that courts apply to interpret the written words. These rules developed over a long period of time to guide courts. Special canons of construction apply in the area of federal Indian law. For example, any ambiguity in a law must be interpreted to favor the tribe.

[3] In concluding that the time limit set forth in the Ute Constitution is not applicable here, the Court need not decide whether a CFR Court is solely a federal creation or has additional powers derived from the tribe it serves. Authorities are divided on this issue. Compare Department of the Interior Solicitor's Opinion of October 25, 1934 "Powers of Indian Tribes" (55 I.D. 14) (derived from inherent powers of tribes); Department of the Interior Solicitor's Opinion of April 27, 1939 "Law and Order - Dual Sovereignty - Powers of Indian Tribes and the United States"(CFR Courts are federal instrumentalities).

[4] To decide otherwise would create a means of evading federal review simply by not providing the proposed revision to the Assistant Secretary within 90 days after adoption by the Tribal council. Following such an approach is inconsistent with notions of fairness, and would be contrary to the ends of justice.

B. Does the Code of Federal Regulations permit the CFR Court to exercise jurisdiction over tribal actors without regard to the actor's political status?

Little attention, if any, was given to this issue by the parties. The amended complaint's claims against Ms. Lancaster were made in her official and individual capacities. The relief sought by Ms. Soto includes damages and injunctive relief. The Tribal Court concluded that the complaint only alleged actions against Ms. Lancaster in her official capacity, and therefore was actually an action against the tribe. The Tribal Court stated that there is no tribal law authorizing the Tribal Court to hear actions brought against the tribe and dismissed the complaint.

We cannot agree with the Tribal Court's reasoning on this issue. First, federal regulations only prohibit a CFR court from exercising jurisdiction over a tribe absent a written waiver. There is no indication in the regulations that this prohibition extends to tribal employees and officials with regard to unlawful actions they take under color of tribal law. When a tribal official or employee acts contrary to the tribe's law, it cannot be an action of the tribe; rather it is the action of the individual. See *Ex Parte Young*, 209 U.S. 123 (1908). In *Green v. Mansour*, 474 U.S. 64, 68 (1985), Chief Justice Rehnquist described the logic behind the *Ex Parte Young* case:

> The landmark case of *Ex Parte Young*... created an exception to this general principle [of state immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law in not one against the State. The theory of *Young* was that an unconstitutional statute is void ... and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States.

Next, we must distinguish cases that interpret the effect of the Eleventh Amendment of the United States Constitution from other cases concerning the extent of common law sovereign immunity. Generally, the Eleventh Amendment prohibits any entity other than the federal government from bringing a lawsuit against a state in federal court. *Seminole Tribe of Florida v. State of Florida*, ____ U.S. ____, 116 S.Ct.1114 (1996). Cases interpreting the Eleventh Amendment do not address inherent sovereign immunity, but an immunity to federal court actions given to the states in this amendment to the United States Constitution. Concepts of federalism, the constitutional relationship between state and federal governments, and comity, the respect given to the courts and governments of one sovereign by another sovereign, must also be considered under the Eleventh Amendment. Federal courts have held that actions cannot be brought in federal court against a state official in their official capacity for violations of state law because of the Eleventh Amendment absent a waiver of sovereign immunity. The reasoning is that when an official acts within their official capacity, they are acting on behalf of the state. Since state, not federal law is involved, there is no compelling federal law for the federal courts to enforce. *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984). This however, does not preclude actions against a state official to obtain prospective relief for violation of federal law- usually a court order prohibiting the state official from continuing to act in a specific manner because it violates federal law. *Id.* (Citing to *Ex Parte Young*, supra. See also, *Ramirez v. Puerto Rico Fire Svc.*, 715 F.2d 694 (1st Cir. 1984)). Also, it does not prohibit an action in state court against the state official for a violation of state law.

Similarly, many federal court cases addressing the scope of a tribe's sovereign immunity from federal court actions under the Indian Civil Rights Act are not automatically applicable when an action is brought in tribal court. As with the state immunity conferred by the Eleventh Amendment, the Indian Civil Rights Act cases deal with a very limited congressional waiver of tribal sovereign immunity for actions in federal court and involve comity considerations and the significant federal interest in promoting self-governance. Cases addressing the Indian Civil Rights Act make it clear that a different standard may be applied in tribal courts. See, *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984).

Tribal sovereign immunity is not conferred by Congress and it is not limited to the federal courts. It is inherent in a tribe's governmental status. Thus, the issue before the Tribal Court was to what extent does the inherent sovereign immunity of a tribe completely shield tribal officials from being sued in tribal court for actions alleged to be contrary to law? There is no written statement in Ute Mountain Ute law concerning the immunity of tribal employees and officials so we must look to the common law. Inherent sovereign immunity is a common law doctrine, and the limits on that immunity also come from the common law. In the common law, absolute immunity does not exist merely because an official is being sued for actions taken in their official capacity. Even if the United States has not waived its sovereign immunity, where a federal official violates the United States Constitution, the official can be sued for both injunctive and monetary relief. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The common law limits absolute immunity to persons performing legislative and judicial functions: tribal council members when deliberating and acting on resolutions and tribal judges when deciding cases. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Tenny v. Brandhove*, 341 U.S. 367, 379 (1951). As for other officials, absolute immunity applies only if the act complained of is essentially a judicial or legislative act. Governors and cabinet level executives do not have absolute immunity for official actions. *Butz v. Economou*, 438 U.S. 478 (1978); *England v. Rockefeller*, 739 F.2d 141 (4th Cir. 1984). Some examples may be helpful to understand this general principle. When a judge is sued for actions taken as a supervisor of other court employees - administrative rather than judicial activity - a judge is not entitled to absolute immunity. *Forrester v. White*, 481 U.S. 1046 (1988). On the other hand, a court-appointed receiver, when performing functions under direction of the court, is absolutely immune. *Property Management and Investments, Inc. v. Lewis*, 752 F.2d 999 (11th Cir. 1985). Where attorneys were members of a state bar committee investigating and judging claims that persons engaged in the unauthorized practice of law, they were acting in a judicial capacity and were absolutely immune. *Ashbrook v. Hoffman*, 617 F.2d 474 (7th Cir. 1980). Here, Ms. Soto's claims against Ms. Lancaster, and the claims set forth in the proposed amended complaint do not allege that any of the defendants were performing legislative or judicial functions. No absolute immunity exists to support the Tribal Court's dismissal of this action.

The common law also recognizes that officials can have qualified immunity. A government official has no qualified immunity if the official knew or should have known that the actions violated the law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). That a governmental official believed, in good faith, that what was done did not violate the law is not a basis for granting qualified immunity. *Owen v. City of Independence*, 445 U.S. 622 (1980). A defendant must assert a qualified immunity defense. Unlike sovereign immunity, a court does not presume that a tribal official has qualified immunity. Even courts that do require special pleading requirements to overcome a qualified immunity defense do not require much, and these courts permit amendment of the complaint to allege such facts. *Jeter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988). In evaluating a complaint, the plaintiff need only allege a violation of clearly established law in order to defeat a motion to dismiss the complaint on the ground that an official has qualified immunity. *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). Finally, qualified immunity is only a defense to damages claims; it does not prohibit a court from ordering equitable relief. *Hoohuili v. Ariyochi*, 741 F.2d 1169 (9th Cir. 1984); *Paxman v. Campbell*, 612 F.2d 848 (4th Cir. 1980) (equitable remedy of reinstatement ordered for two teachers even if they could not collect back pay or damages as a result of illegal firing because of school board's qualified immunity).

Ms. Soto's claims against Ms. Lancaster come about because of the alleged authority of Ms. Lancaster as a tribal employee. The complaint says that Ms. Lancaster violated clearly established law in not applying the tribal employment preference policy. This is a written and published policy of the tribe. Even if we were to follow those courts which require a plaintiff to plead facts tending to show that qualified immunity is not at issue, the Tribal Court should have permitted the filing of the amended complaint because its allegations, if true, would establish no reason to recognize a qualified immunity defense. Amendment cannot be considered a futile effort due to qualified immunity. The Tribal Court's initial dismissal of the complaint and its refusal to reconsider its order of dismissal based upon the pending motion to amend the complaint is the result of legal error and must be reversed.

C. Is Ms. Soto precluded from bringing claims against Ms. Lancaster for actions taken as a tribal official merely because she is not an Indian?

Legal counsel argues that since Ms. Lancaster is not an Indian, this court cannot exercise jurisdiction over this case. This issue requires a very hard examination of the reasons behind the limitation on CFR court jurisdiction over defendants who are not Indians and other federal laws concerning tribal employees. The rules that govern the interpretation of federal statutes also apply to interpretation of federal regulations. *Baldridge v. Hadley*, 491 F.2d 859, (10th Cir. 1974) *cert. denied*, 419 U.S. 886 (1975). Federal regulations must be interpreted in a manner which is consistent with pertinent federal law. *Morton v. Ruiz*, 415 U.S. 199 (1974). They must be read in the context of the entire body of applicable federal law, not in isolation. *Morton v. Mancari*, 417 U.S. 535 (1974); *Mescalero Apache Tribe v. Rhoades*, 755 F.Supp. 1484 (D.N.M. 1990). In *Mescalero*, the Indian Health Service (IHS) argued that its general conflict of interest regulation prohibited IHS employees from serving as tribal officials. The court, based on the specific federal statutes governing Indian preference in employment (25 U.S.C. §472) and the Indian Self Determination and Education Act, (25 U.S.C. §§450, et seq.) insisted the IHS's application of the general regulation must be done in a manner that was consistent with these other federal laws. See also, *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979) (Bureau of Indian Affairs reliance on general conflict on interest regulations

in order to "remove" an employee whose brother had been elected tribal president violated the Indian Preference Act).

Ms. Lancaster is not being sued for some action that she took as a private individual; rather, this case is based solely on actions taken by Ms. Lancaster as the director of tribal planning. We must apply this regulation in light of that fact, and in light of the federal statutes concerning tribal self-government and hiring preferences for tribal members.

If taken to its logical conclusion, the argument presented on behalf of Ms. Lancaster could lead to some very curious results. First, while tribal employees who are Indians could be held accountable for their actions in the Tribal Court, including the most egregious abuses of tribal power, non-Indians under the same circumstances could not be held accountable based solely on their personal political status. This is absolutely contrary to any notions of fairness. Such a curious result could lead to actions that are contrary to prevailing, specific, federal laws. It could easily lead to an implicit tribal preference for hiring persons who are not Indians, even for positions funded through P.L. 638 contracts. P.L. 638 contracts and necessary compliance with federal law is one of the reasons explicitly given by the tribe for having a tribal preference in employment policy. (Policy in court record.) P.L. 638 contracts put into effect the provisions of the Indian Self Determination and Education Act, 25 U.S.C. §450, et seq. The explicit purpose of that federal act is very informative:

> (a) The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that -
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.
>
> (b) The Congress further finds that -
>
> (1) true self-determination in any society of people is dependent upon an education process which will insure the development of qualified people to fulfill meaningful leadership roles; 25 U.S.C. §450 (a) and (b)(1).

To assert that federal regulations promulgated pursuant to the federal trust responsibility would prevent a tribe or tribal member from bringing an action against a tribal employee for an illegal act done while on the job except in state or federal court solely because the person is not an Indian is absolutely contrary to the strong congressional purpose in enacting this legislation as well as the Indian Preference Act. Other federal legislation also favors retention of tribal authority, even through a CFR court, in this case. One of the earliest statutes enacted by Congress pursuant to its trust responsibilities concerns tribal supervision of employees. 25 U.S.C.A. §48 (Act of June 30, 1834, c. 162 §9, 4 Stat. 737) states:

> Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmith, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

These federal statutes establish a consistent trend throughout the history of federal-tribal relationships to cede to tribes some measure of control over persons in their employ or those employed by the federal government for the benefit of the tribe, without regard to their political status.

Interpretation of jurisdictional rules cannot be done in a vacuum. "[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions". *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985). United States Supreme Court decisions establish that a tribe's interest in asserting jurisdiction over a person is an important factor. In *Montana v. United States*, 450 U.S. 544 (1981), the United States Supreme Court stated that, absent a different direction from Congress, tribal courts only have civil jurisdiction over nonmembers' activities on fee land where the tribe had an interest in the nonmember's activities. Tribal interest was characterized by the two situations where a tribe would have jurisdiction over nonmembers even when the nonmembers were not

on tribal land: (1) nonmembers who enter into consensual relationships with the tribe or its members and (2) nonmembers whose conduct threatens or directly affects the tribe's political integrity, economic security, health or welfare. This is consistent with the general approach of the Department of the Interior to view tribal jurisdiction as personal rather than solely territorial.[5] Department of the Interior Solicitor's Opinion of April 27, 1939 "Law and Order - Dual Sovereignty - Powers of Indian Tribes and the United States". A primary question, then, is whether the CFR regulation should be applied without looking at the type of claim asserted, and whether it arises out of any situation where a tribe has an interest in asserting authority over this person?

The recent decision of the United States Supreme Court in *Strate v. A-1 Contractors*, _____ U.S. ____, 24 Ind.L.Rptr. 1015 (1997) concurs in the fact-intensive approach to tribal jurisdiction taken in *Montana*, supra. In that case the United States Supreme Court concluded that a tribal court did not have jurisdiction over a case concerning a traffic accident on a state right of way where none of the parties were Indians because it did not meet the *Montana* test. The dispute was described as "distinctly non-tribal in nature". ____ U.S. at ____, 24 Ind.L.Rptr. at 1019. However, the Supreme Court also stated that *Montana* is the controlling principle, and that its cases in this area are consistent on the point that where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts. 24 Ind.L.Rptr. 1018. It is beyond dispute that a tribe had the authority to regulate the activities of employees while on the job without regard to their political status.

The comments published with the final version of the regulations in question acknowledged that the regulation was narrower than the jurisdiction set forth in the *Montana* test. The comments did not, however, discuss this regulation in any detail. Given the presumption that a tribal court would generally have jurisdiction over claims involving acts of tribal employees while on the job, there is nothing in this regulation that destroys that presumption. The regulation appears to relate only to actions brought against non-Indians where there is no significant relationship to the tribe or specific tribal interests.[6] The regulation and the proposed comments do not suggest any intent to alter federally recognized laws and policies applicable to tribal employees, and the presumption this creates in favor of a tribal court having jurisdiction over an action challenging the conduct of a tribal employee.

This Court cannot read this regulation in a manner that is inconsistent with and contrary to federal law. To be consistent with federal statutes, this regulation must be read as not intending to require the consent of non-member employees before an action can be brought against them in tribal court concerning their conduct as tribal employees. The tribe invites us to accept an interpretation of this regulation that exalts form over substance, and we respectfully decline the invitation.

Therefore, we conclude that the Tribal Court committed legal error when it dismissed this complaint on jurisdictional grounds based upon the political status of the defendant. We reverse the Tribal Court and remand this case to it for further action consistent with this opinion.

IT IS SO ORDERED.

April 28, 1998

In the Matter of R. W., A Minor Child

SWITCA No. 97-007-HTC
HTC No. JV96-147

Appeal filed March 24, 1997

Appeal from the Hualapai Tribal Court,
Joe Flies Away, Judge
Charmaine A. Cordova, Court Advocate for the Appellant
Muriel Scott, *pro se*

Allan R. Toledo, Judge, Southwest

---

[5] This appears to be based on the approach first put forward in the Restatement Second of Conflicts. The First Restatement viewed tribes as having territorial jurisdiction as well as personal jurisdiction. By referring to this, the Court is merely attempting to ascertain Department of the Interior intent in drafting these regulations; the Court is not asserting that it follows the Restatement Second of Conflicts or that the Restatement Second's approach is consistent with tribal law.

[6] The fact situation in *Strate*, supra is a prime example of nothing more than a generalized tribal interest in providing a judicial forum for torts taking place within the exterior boundaries of a reservation. In *Strate*, persons who were not Indians were involved in an accident on a state highway right-of-way across Indian lands.

Intertribal Court of Appeals

SUMMARY

Appellant appeals from determination that she failed to comply with trial court's order, complaining that she was denied due process because a new petition had not been filed for the allegations that she failed to comply with the order, her right to remain silent had been disallowed, and because witnesses did not have direct knowledge of the issues. This Court finds that these allegations are without merit and Tribal Court's order is affirmed.

JUDGMENT AND ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (February 4, 1995) of the Hualapai Tribal Council on behalf of the Hualapai Nation and pursuant to the Appellate Code of the Hualapai Nation, §§ 1.22 through 1.25 as amended by ordinance No. 9 adopted in November 3, 1979, the rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA", as well as the Court's inherent authority to manage its business.

This appeal originally was dismissed for failure to comply with the Hualapai Nation's Appellate Code, but was reinstated after it was determined that the appeal did in fact comply with the Hualapai Juvenile Code's appellate provisions which supersedes the Appellate Code. The appellant cites numerous instances where the trial court erred in its proceedings. However, she does not state with specificity why or how the trial court erred in its findings or conclusions. Unfortunately, counsel for appellant wrongfully withdrew from representing her and was not available to assist this Court with her sometimes confusing claims in her notice of appeal. After reviewing the appellate record, this Court affirms the trial court's judgment.

Discussion

On October 10, 1996, the Hualapai trial court ordered the minor to obtain a SASSI for an evaluation for alcohol abuse, and that the appellant, the minor child's parent, enroll in parenting classes and obtain counseling. On February 20, 1997, the court held a judicial review hearing and found that the minor and appellant had not substantially complied with its order. The mother appeals the trial court's order.

This Court found it very difficult to determine from appellant's notice of appeal or from the record what specific errors the trial court committed.

One issue this Court was able to glean from the notice of appeal was:

> "A party is allowed to present a witness (only party to be sworn) despite an objection of double jeopardy, and the alleged actions should be brought in a petition pursuant to the Juvenile Code sec. 7.11(d) and disposition (if warranted) under that petition."

In Hualapai juvenile proceedings, where the court has not dismissed the case, but rather requires certain actions on the part of the minor and other parties subject to the court's continuing jurisdiction, the court has continuing jurisdiction to ensure compliance with its orders. A court may periodically review its orders and a "new" petition" is not required. Hualapai Tribal Code §7.22 (a). Appellant's contention is without merit.

Further, the notice claimed that the parent and child had the right to remain silent. However, that right under the Indian Civil Rights Act, 25 U.S.C. §1302, states that "No Indian tribe in exercising powers of self-government shall . . . (4) compel any person **in any criminal case** to be a witness against himself; . . ." (emphasis added) This matter is not a criminal case. Hualapai Tribal Code,§7.12 (c). However, if the appellant feared that criminal charges against her arising from the facts in this case would be made, she could have claimed her right to be silent at the time of the hearing in the trial court, but apparently she did not. Issues raised for the first time on appeal, except for a claim of lack of jurisdiction, will not be considered. *Southern Ute Tribe* v. *Williams*, 6 SWITCA 10 (1995).

The counsel for the appellant also claimed that she and her child were not accorded due process under the Indian Civil Rights Act, stating that persons with direct personal knowledge should have been present at the second hearing and the report was not sufficient.

In the judicial review hearing, the court heard testimony from Muriel Scott, Hualapai Children and Families Program Manager; Mary Kihega, social worker with B.I.A. Social Services, and Theodore McCauley, B.I.A. Law Enforcement. The trial court heard the witnesses and found them to be credible. An appellate court will not substitute its evaluation of witnesses' credibility for that of the lower or trial court unless it appears that there has been a serious abuse of discretion. *Hualapai Nation* v. *D.N.*, 9 SWITCA Rep. 2 (Hualapai, 1998).

The notice of appeal is deficient because it does not contain a sworn statement as required by the Hualapai

Code, section 1.24 (1)(A). As this Court stated in *Hualapai Nation v. D.N*:

> Section 7.25 of the Hualapai Juvenile Code is silent as to the standard of review regarding appeals, but section 1.24 of the general code regarding appeals clearly sets out the standard of review. Subsection (1)(A) of that section requires that the lower court's findings of fact be presumed to be correct unless the appellate court is presented with a sworn written statement at the time of the filing of the appeal notice showing that a witness was not allowed to testify and that the testimony would have altered the judgement. The fact that a witness testified and the lower court did not find the witness credible does not meet this criteria. No such sworn written statement can be found in the record or attached to the notice of appeal. Even if such statement were in the record, it is still this Court's responsibility to determine if the statement is believable in the face of the evidence and record.

Without this sworn statement, this Court cannot determine that there was a serious abuse by the lower court in its evaluation of the evidence and its final determination.

The trial court's judgment is hereby affirmed.

IT IS SO ORDERED.

October 28, 1999

THOMAS REA, Petitioner - Appellant,
vs.
WILFRED MADRID, Executive Director, Ute Mountain Ute Tribe, in his individual capacity; VELMA MILLS, Personnel Director, Ute Mountain Ute Tribe, in her individual capacity; JUDY KNIGHT-FRANK, Chairperson, Ute Mountain Ute Tribe, in her individual capacity; RUDY HAMMOND, Vice-Chairman, Ute Mountain Ute Tribe, in his individual capacity; MICHAEL ELKRIVER, Treasurer, Ute Mountain Ute Tribe, in his individual capacity; PHILIP LANER, EDDIE DUTCHIE, JR., CHARLES ROOT, and BENJAMIN LEHI, Councilmen, Ute Mountain Ute Tribe, in their individual capacities; GERALD PEABODY, former Councilman, Ute Mountain Ute Tribe, in his individual capacity; NORA BEHAN, ROBERT ROYBAL, and ELLEN MELSNESS, as members of the Personnel Committee, Ute Mountain Ute Tribe, in their individual capacities, Respondents-Appellees.

SWITCA No. 97-009-UMU
UMU CT. IND. OFF. No. CV94-0022

Appeal filed April 3, 1997

Appeal from the Ute Mountain Ute Tribal Court
Eldon M. McCabe, Judge,
Eric J. Stein, Attorney for Appellant,
Robert Glenn White, Attorney for Appellee.

Appellate Panel: Rodgers, Abeita and James.

SUMMARY

Appellant appeals from the trial court's dismissal for lack of subject matter jurisdiction of his complaint challenging his termination from tribal employment and alleging denial of due process because tribal employees failed to comply with the Tribe's personnel policies. This is not an action against the Tribe, but against individual employees in their individual and official capacities, both Indian and non-Indian, for failure to comply with tribal law, however appellant failed to complete or exhaust his administrative process. The dismissal for lack of subject matter jurisdiction is reversed and the matter is remanded for entry of dismissal without prejudice.

OPINION AND ORDER

I. Introduction

This appeal is a companion case to *Soto v. Lancaster*, 9 SWITCA Rep. 4 (Ute Mountain Ute1998), SWITCA No. 97-006; the complaint's subject matter is the

personnel policies and practices of the Ute Mountain Ute Tribe. There are additional issues presented in this case. The Tribe discharged the plaintiff - appellant, Thomas Rea, from his position as a youth counselor for the Tribe's alcoholism department. At the time of his discharge, the probationary period for employment was over. Mr. Rea brought this action challenging his discharge, and also brought a claim under the Indian Civil Rights Act alleging that he was denied due process because the defendants, several employees and officials of the Ute Mountain Ute Tribe, failed to follow the grievance procedures set out in the Tribe's personnel policies and manual. The complaint states that all individuals are sued in their individual capacity.

The Tribe's general legal counsel appeared for all of the defendants, and sought dismissal of the action on the following grounds:

1. The court lacked subject matter jurisdiction because:
   a. Mr. Rea was not an Indian;
   b. Some of the defendants were not Indians;
   c. All of the defendants were being sued for actions taken in their official capacity as tribal employees, therefore it was really an action against the Tribe and the Tribe had not waived its immunity from suit;

2. The complaint should be dismissed without prejudice because it is not ripe for review - all administrative remedies have not been exhausted first; and

3. The complaint should be dismissed without prejudice because Susan Horne is an indispensable party, she was not named as a defendant, and cannot be named because the court does not have personal jurisdiction over her.

This Court reviewed the entire record in this case, and numerous briefs. Being apprised of the applicable law, we conclude that the trial court erred in dismissing the complaint for lack of subject matter jurisdiction. To the extent that the trial court's order could be considered a dismissal with prejudice, thereby preventing the plaintiff from refiling his complaint, it is reversed. However, the Court also concludes that Mr. Rea did not exhaust the final steps in his administrative remedies, and therefore the complaint should be dismissed without prejudice. The case is remanded to the trial court to enter an order dismissing the complaint without prejudice. Furthermore, the allegations of a denial of due process should initially be addressed in the grievance process. This should be done if and when Mr. Rea continues to appeal his termination in the administrative process. Our reasoning is set out below.

II. Standard of Review

As we are reviewing the trial court's dismissal of the complaint for lack of subject matter jurisdiction, and failure to state a claim, we apply the same standard that a trial court does - the facts alleged in the complaint and any attachments are taken as true, and all inferences and ambiguities are construed in favor of the person filing the complaint, here Mr. Rea. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1168-69 (10th Cir. 1992).

III. Factual Background

Ute Mountain Ute Tribe hired Mr. Rea in October of 1992. On January 28, 1993, he completed the applicable probationary employment period. The personnel polices and procedures for the Ute Mountain Ute Tribe became applicable to his employment with the Tribe.

Mr. Rea filed several grievances with his supervisor, Susan Horne, director of tribal social services, and with another employee who was appointed to the director's position after Ms. Horne left that position. No action was taken to proceed with the grievances so Mr. Rea sent a memo to the grievance committee on January 13, 1993 informing them that the grievances had not been addressed. No action took place. On April 12, 1993 Mr. Rea filed yet another grievance. Thereafter he was immediately removed from the child protection team by the second director. Mr. Rea filed a grievance on that action on April 22, 1993.

Finally, on May 14, 1993, the executive director sent Mr. Rea a memo stating "There will be a hearing concerning your personnel differences on Wednesday, May 19, 1993 with a personnel committee. This hearing will be for the purpose to clear all differences by the committee." Thereafter a meeting was held. It is unclear from the record exactly what type of meeting was called. However, the result of the meeting was a document entitled a "memorandum of decision" issued by the grievance committee. The "recommendation" given in the "memorandum of decision" was adopted by the tribal chairman on June 3, 1993. On June 10, 1993 Mr. Rea wrote to the tribal chairman, noting that he did not receive the second sheet intended for him, that his "infractions" were not described with enough specificity, and generally challenging the action taken against him. On the same date he filed a grievance against the executive director because he did not give Mr. Rea any notice that the "personnel committee" was, in fact, the "grievance committee". Mr. Rea noted that he had never had a "valid grievance committee hearing, a right afforded to me under the Ute Mountain Ute Tribal Personnel Policies and Procedures Manual".

Six days later, on June 16, 1993, Mr. Rea was dismissed from his employment by the executive director, Mr. Madrid. On June 24, 1993, the general legal counsel for the Ute Mountain Ute Tribe sent Mr. Rea a letter setting out the appeal procedure. He was directed to file his appeal directly with the personnel director. He did so. The personnel director affirmed the dismissal. Mr. Rea appealed that decision, consistent with the appeal procedure set out in the June 24, 1993 letter, to the executive director, again, Mr. Madrid. Mr. Madrid upheld his prior decision to end Mr. Rea's employment with the Tribe. Mr. Madrid states in this second of his decisions concerning Mr. Rea's dismissal that it was the Tribal Council's decision to dismiss Mr. Rea. The letter also states that Mr. Rea can take the action one step further to the grievance committee.

Before Mr. Rea's dismissal, the grievance committee's membership changed. While previously it had been apparently three tribal employees, the membership now was statutorily mandated: the Agency Superintendent of the Bureau of Indian Affairs, the director of the Indian Health Service or the director's designee and one department head. Therefore, this grievance committee would not be the same one that had sat as a "personnel committee" during his first round of grievances.

Mr. Rea did not appeal to the grievance committee. He filed this action in Tribal Court. On July 19, 1994, legal counsel for the Ute Mountain Ute Tribe filed a motion to dismiss the complaint as for all defendants. On July 12, 1995, counsel for the tribe filed documents in Tribal Court entitled "notice of motion and motion to dismiss" and "memorandum of points and authorities in support of motion to dismiss". While acknowledging that defendants already had a dismissal motion pending, this notice of motion contained additional new arguments to support the dismissal, including the argument that the Tribe was the real party in interest, and that the complaint contained no allegations that any defendant acted outside the scope of their authority. On that same date, without any opportunity for plaintiff to be heard in response to the new arguments presented in defendants' brief, the Tribal Court entered an order dismissing the complaint because "the real party in interest is the Ute Mountain Ute Indian Tribe and its officials or employees acting in their official capacities". The court also concluded that the dispute was one internal to the tribal government, and that the court lacked jurisdiction over any non-Indian defendants. Although no motion to amend the complaint had been filed, the court *sua sponte* ruled that no amendments could be filed that would cure the defects in the original complaint.

IV. Legal Analysis

A. The Court erred in dismissing this action with prejudice for lack of subject matter jurisdiction.

In *Soto v. Lancaster*, this Court determined that the trial court had subject matter jurisdiction over actions against employees, whether Indians or not Indians, for actions taken in their roles as tribal employees which do not comply with the applicable laws. The Court also concluded that where an action is alleged not to comply with applicable law, it is not, actually, an action against the Tribe. The legal analysis set forth in that opinion and order is hereby adopted in this case. Consistent with that opinion and order, the Court concludes that the complaint should not have been dismissed for lack of subject matter jurisdiction due to tribal immunity or the political status of employees who do not meet the federal regulatory definition of Indians. See 25 C.F.R. §11.100(d). Rather, but for an additional exhaustion of remedies problem, the trial court should have informed defendant that amendment would be permitted to allege claims to be brought against the defendants in their individual and official capacities. Thereafter, the Tribal Court could determine whether any of the individuals was entitled to common law immunity as discussed in *Soto v. Lancaster*.

We also find that this action does not fit within the exception to jurisdiction for an internal tribal government dispute. See 25 C.F.R. §11.104(b). Exceptions to jurisdiction must be read narrowly, and consistently with the intent of Congress in enacting the legislation that the regulation interprets. *Tillett v. Hodel*, 730 F.Supp. 381, 383 (D.C. W.D.Okla 1990) *affirmed sub nom Tillett v. Lujan*, 931 F.2d 636, 639-640 (10th Cir. 1991) ("the creation of the Courts of Indian Offenses is a valid exercise of the power of the Secretary of the Interior as delegated to him by the Congress which holds plenary power over Indian Tribes."). The Federal Tenth Circuit Court of Appeals affirmed the application of this exception in *Tillett*, *supra*, an action where a tribal member challenged not only the validity of the tribal court, but also challenged the authority of the tribal business committee (the tribal government) due to alleged re-calls. 931 F.2d at 638-639. Similarly, in *Parker v. Saupitty*, et al., 1 OKLA TRIB.1 (Comanche CIO 1979), 1979 W.L. 50343 (Comanche CIO), the exception was applied where the tribal administrator sought an injunction against the Comanche Business Committee, the governing body of the tribe, again challenging the authority of an entity to act as a tribal government. Here, although Mr. Rea named tribal council members as defendants, the majority of the defendants are individual tribal administrators or officials who allegedly acted directly

with respect to his termination of employment.[1] There is no dispute here where a tribal member is challenging the validity, and hence the authority of the tribal government to act. This is merely an action protesting a termination of employment by a non-supervising employee and failure of some supervising employees to follow the Tribe's personnel policies and procedures.

B. Exhaustion of administrative remedies

Mr. Rea did not complete the last step of the administrative process. This is clear from the documents submitted by him with his complaint. He does not suggest that exhaustion is required. Rather, he argues that, under the facts of this case, exhaustion of administrative remedies is futile, and violates due process. Plaintiff relies on *Bowen v. City of New York*, 476 U.S. 467, 482 (1986) for the proposition that where a party is not given any notice of an administrative action exhaustion is not required. The facts in that case are not completely identical to the facts of this case. In *Bowen*, supra, the Court concluded that exhaustion should not be required where the limitation on challenging an administrative action had passed and there was no tolling of the time period. Here, the general legal counsel for the Tribe has explicitly stated that the passage of time since the last use of the administrative process will not bar Mr. Rea from completing his administrative remedies. (memorandum of points and authorities in support of motion to dismiss at p. 7: "Because there may be some reason outside the control of the Tribe which caused Mr. Rea to not receive the July 9, memorandum, upon request the Tribe would consider holding a grievance committee hearing to address the matter").

Exhaustion of administrative remedies, in some instances is mandated by statute. See, 42 U.S.C. §§ 2001, *et seq*. (Action cannot be maintained under Title VII of the Civil Rights Act of 1964 as amended without first exhausting federal administrative remedies). However, the doctrine has its roots in common sense. Until the administrative remedies are exhausted, there is a possibility that the defendants may act so as to remove any basis for a legal claim. In one sense there is no final action for a trial court to review. The Supreme Court's reasoning in *National Farmers Union Ins.. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) supporting the requirement of exhaustion of tribal remedies before a federal court handles a complaint challenging the jurisdiction of a tribe contains a rationale that supports requiring the exhaustion of tribal administrative remedies before a trial court should act. While *National Farmers Union* concerned principles of comity (respect) as among the courts of different sovereigns, Mr. Rea's complaint requires this court to take into consideration principles of respect among coordinate branches of government. This principle of respect gives shape to the analysis courts use to determine the validity of agency action. In *Aquavella v. Richardson*, 437 F.2d 397 (2nd Cir. 1971) the court stated that the purpose of exhaustion of administrative remedies is to make sure that there is a balance between the judicial functions of courts and the administrative functions of the executive who enforces the law.

The Court of Indian Offenses and this appellate tribunal are federally created courts, and in one sense arms of the federal government. At the same time, these courts "also function as tribal courts: they constitute the judicial forum through which the tribe can exercise its jurisdiction . . . ." 931 F.2d at 640. Therefore, we must respect the administrative functions of the Tribe, including the application of its personnel policies and procedures. We cannot presume that the Tribe's final step in the grievance procedure will not be done properly.

Respect for the administrative function is not the only factor. We must arrive at a "careful balancing of the need for effective judicial protection and the need for efficient and responsible administrative action." *Aquavella*, supra at 403. Need for effective judicial protection requires us to look at whether exhaustion will unduly burden the Plaintiff. In this particular case, Mr. Rea completed all but the last step of the process set out in the personnel policies and procedures. Furthermore, based upon the complaint and its attachments, at least two members of the three person grievance committee that would hear the grievance are not tribal employees but federal employees who have not been involved in any of the prior proceedings involving Mr. Rea. Under the facts of this case, the balance is best maintained by requiring Mr. Rea to exhaust the final step in the grievance process before filing any court action related to the his termination and the grievance process. We must presume that this grievance committee will comply with the laws and policies of the Tribe. Therefore, it is the decision of this Court that this matter should be remanded to the lower court with instructions to dismiss the complaint without prejudice to allow for exhaustion of administrative remedies.

[1] The panel, by noting that some tribal council members are named as defendants, does not intend to preclude further proceedings to determine if these parties are proper defendants, or whether the complaint states a claim against them.

C. The indispensable parties argument.

Defendants argued below that Susan Horne, as one of Mr. Rea's supervisors, was an indispensable party who could not be joined since she was not a member of the tribe and no longer was employed by the tribe. The lower court did not address this argument. The opinion of this Court in *Soto v. Lancaster*, *supra*, substantially changes the legal arguments for and against this proposition. Therefore, we will not address this argument at this time.

V. Order

THEREFORE, IT IS THE ORDER OF THIS COURT THAT the dismissal of this action for lack of subject matter jurisdiction is reversed; and

IT IS FURTHER ORDERED THAT this action is remanded to the Court of Indian Offenses of the Ute Mountain Ute Agency for entry of dismissal without prejudice for failure to exhaust administrative remedies.

IT IS SO ORDERED.

May 14, 1998

In the Matter of the Estate Of:
Adrian Weaver, Deceased.

Switca No. 97-011-SUTC
SUTC No. 97-PR-06

Appeal filed June 23, 1997

Appeal from the Southern Ute Tribal Court,
Mike J. Stancampiano, Judge

Linda L. Boulder, Attorney for Appellant La Plata County Child Support Enforcement Unit.
Gary T. White Wolf, Attorney for Appellees Adrianna Weaver and Imogene White.

Violet Lui-Frank, Judge, Southwest Intertribal Court of Appeals.

SUMMARY

The trial court's finding that a child support order was not a judgment and the tribal statute of limitations barred the La Plata County Child Support Enforcement Unit's claim for reimbursement for child support is erroneous and reversed. On its own motion, the appellate court reversed and remanded for the trial court's determination whether, in fact, certain insurance proceeds were part of the estate proceeds. Reversed and remanded.

OPINION

This is an appeal by the La Plata County Child Support Enforcement Unit (CSE), State of Colorado, calling for reversal of the judgement below, denying CSE's claim against the estate for $19,750.00 because it was barred by the two year statute of limitations for actions, SUTC section 1-2-110. The appellees are the daughters of the deceased.

Appellant contends that its claim for child support is based upon the decree of dissolution of marriage issued by the Southern Ute Tribal Court in *Weaver v. Weaver*, No. 170.17 (7805). CSE argues that the child support order is a judgment at law, and therefore is not barred by the statute of limitations.

We find that oral argument in this case is not necessary.

I. Child Support Orders Under Sections 6-1-126(1) And 7-1-124

Appellees argue that the child support involved herein was awarded under SUTC § 7-1-124. The code

section that refers to child support orders having the effect of a simple judgment at law is SUTC §6-1-126(1). They vigorously assert that child support orders under §126(1) are distinct from child support orders in dissolution proceedings under §7-1-124, because of the absence of the reference to the child support orders being judgments at law. Appellees cite *Matter of Selena N. Jim*, SUTC No. 96-CV-47, in support of their argument.

The *Jim* decision is not on point. That decision explains that "[t]he Southern Ute Indian Tribal Council apparently wished to distinguish between the methods by which the Court orders child support paid to agencies as opposed to natural persons." *Jim* does not address the specific issue of the present case. The court in *Jim* correctly found that actions for child support under §7-1-124 are founded on the underlying right and duty of the custodial parents or guardian to enforce the child's right to receive support. If an agency has custody, then the action for child support is under §6-1-126. The central issue of *Jim* was whether retroactive child support could be ordered. The court there concluded that retroactive support was required in the case, paternity having been established. Retroactive child support was justified because the parties had not lived together as a family, and requiring the father to contribute to the past support needs of the child was justified. Whether a child is in the custody of an agency or an individual, the right to child support is that of the child.

This court can find no reason in the *Jim* decision to conclude that the child support order in this case is not a judgment at law. To decide otherwise would be to treat one group of children differently from another group of children without legal justification. We hold that there is no distinction between child support orders under §§ 6-1-126(1) and 7-1-124 of the Southern Ute Tribal Code for purposes of determining that such orders are judgments at law. Therefore, the appellant's claim is not barred by the statute of limitations.

II. The Insurance Proceeds

Although neither party raised the issue, this court cannot ignore a major question regarding the Southern Ute tribal life insurance policy for the deceased. The probate court listed the policy proceeds as an asset of the estate. This may have been quite proper. However, in the absence of an explanation why the policy proceeds are part of the estate assets, this court raises the question whether plain error has occurred under § 3-1-109 of the Appellate Code, whereby the proceeds are subject to probate. If the insurance policy contains a designated beneficiary, then the proceeds pass by contract and cannot be an asset of the estate. If the policy does not have a beneficiary designated by the deceased, there may be a provision of the policy that established that the surviving relatives are entitled to the proceeds. In either case the proceeds pass by contract. These concerns can be addressed by the probate court reviewing the terms of the Southern Ute tribal life insurance policy for the deceased, and determining if the proceeds are subject to probate or pass by the terms of the insurance policy.

The decision of the lower court is reversed; CSE's claim is not barred by the statute of limitations; these matters are remanded to the probate court for action and the issuance of orders consistent with this opinion.

IT IS SO ORDERED.

January 6, 1998

VALLEY WELL DRILLING, Plaintiff-Appellee,
vs.
MOJAVE VALLEY RACEWAY, Defendant-Appellant.

SWITCA No. 97-012 FMTC
FMTC No. C1 3355-93.10

Appeal filed August 1, 1997

Appeal from the Fort Mojave Tribal Court
Wilbert Naranjo, Judge
Mojave Valley Raceway, *pro se*
Chuck D. Kluge, Attorney for Appellee.

Appellate Panel: Judges Cochran, Rodgers, and Talayumptewa

SUMMARY

Appellant appeals from a judgment granting damages and interest to appellee. The appellate court finds that the award of damages is based on substantial evidence, but the award of interest cannot be sustained because the original contract did not provide for interest to be charged, the Tribal Code does not provide for awards of interest on judgments nor does it regulate interest on a contract, and the trial court did not make findings of fact that would support an award of interest. The judgment awarding damages is affirmed, the award of interest is reversed and the matter is remanded for further proceedings consistent with this opinion.

OPINION AND ORDER

THIS MATTER comes before the appellate court on a petition for appeal filed by defendant-appellant, Mojave Valley Raceway, concerning whether evidence presented below supports the determination of damages by the trial court as a matter of law. On the 20th day of March 1998, this Court, having reviewed the trial record, the petition for appeal, and all supporting briefs for appeal, concluded that the decision of the lower court should be affirmed for all damage awards except the interest award. The court's award of interest is reversed and remanded to the Tribal Court for further proceedings consistent with this opinion.

A trial was held on or about January 7, 1994 and judgment was entered for plaintiff, Valley Well Drilling, in the amount on one thousand six hundred eighty-nine and 30/100 dollars ($1,689.30) on September 5, 1996. On May 12, 1997, Fort Mojave Tribal Court granted defendant's, Mojave Valley Raceway, petition for a new trial. A new trial was held before a different judge on June 9, 1997. Judgment was again entered for plaintiff, Valley Well Drilling, but for a different damage amount. Defendant-appellant filed a letter of appeal on July 11, 1997, seeking review of the decision of the trial court.

The court, in an order dated February 4, 1998, and based on preliminary findings, certified two (2) issues for review, to wit: "(a) whether the June 20, 1997 decision of the trial court is supported by any evidence, and (b) whether the trial court abused its discretion when it increased the damages award without any findings as to the basis for the increased award." This Court concludes the evidence presented below and the findings of the trial judge reasonably and sufficiently support the June 20, 1997 order with respect to the damage award (characterized in the order as "balance owed") and taxes. The evidence presented below could also reasonably support the June 20, 1997 order as to an interest award under equitable principles. However, the Fort Mojave Tribe Law and Order Code does not provide specifically for contractual interest awards and the lower court did not make findings to support an award of interest in this case. Therefore, the trial court's findings do not support an award of interest award in the amount of $2,392.89[1]. No appeal was taken as to the award of attorney's fees.

Discussion

The lower court in both trials found an oral contract existed between the parties by a preponderance of evidence. See September 5, 1996 order, at 3; June 20, 1997 order, at 2. There is no written documentation evidencing the contract. Taped proceedings, supporting briefs, and exhibits sufficiently and reasonably support this decision and the amount of damages awarded. This Court will not disturb the damage award in this respect.

The lower court also awarded "advanced interest." It appears the lower court presumed an interest penalty provision as part of the contractual obligation.[2] *Id.* The only evidence supporting the award of advanced interest consists of a notation on written invoice statements imposing interest. These invoice statements were prepared after the initial contractual agreement. Nothing in the record is evidence that interest was a term of the initial oral agreement. The written invoice statements were presented at the rehearing on June 9, 1997, and are contained within the trial record.[3] However, the lower court's decision is deficient in clearly setting forth findings of fact and conclusions of law supporting its award of interest.

The Fort Mojave Law and Order Code contains no provision regulating contractual interest amounts or the award of interest on judgments. Equitable principles require consideration of all facts presented below and the public policy of the Tribe in the first instance. Most state statutes provide some guidance as to whether a party is entitled to and the type of an interest award such as pre-judgment or post-judgment. Federal law provides only for post-judgment interest awards. Courts may look to the prevailing interest rates charged by financial institutions

---

[1] This Court finds that the June 20, 1997 order transposed the outstanding balance and the interest awards. In the opinion of this Court, such awards are misclassified and should read "$2,392.89/for advanced interest and $1,939.30/for balanced owed."

[2] The lower court provides no definition or interpretation as to the meaning of the term "advanced interest."

[3] According to invoices contained within the trial record, "An interest charge of 1 ½% per month will be applied to past due accounts."

in the local area as evidence of an appropriate amount. Without more, this Court shall not superimpose its judgment upon the Tribal Court as to how to calculate an interest award or when to award it. That should be decided by the Tribal Court in the first instance.

THEREFORE, the decision of the lower court regarding the damage award (balance owed) and taxes is hereby affirmed and the decision of the lower court regarding the advanced interest award is reversed and remanded to the Tribal Court for further proceedings consistent with this opinion and order.

IT IS SO ORDERED.

April 28, 1998

IN THE MATTER OF THE EXPULSION OF KENNETH HIGH, SR., VICTORIA JENKINS, Petitioner-Appellant
vs.
FORT MOJAVE TRIBE, Respondent-Appellee

Switca No. 97-013-FMTC
FMTC No. CI 87-019

Appeal filed September 16, 1997.

Appeal from the Fort Mojave Tribal Court
Wilbert Naranjo, Judge
Victoria Jenkins, pro se
Orville L. Burshia, for the Appellee

Ann B. Rodgers, Judge, Southwest Intertribal Court of Appeals.

ORDER OF DISMISSAL

THIS MATTER comes before the appellate court on the petition for appeal filed by Victoria Jenkins concerning the expulsion of Kenneth High, Sr., and the response of the Fort Mojave Indian Tribe. The Fort Mojave Indian Tribe's response establishes that the expulsion of Kenneth High, Sr. did not conform to tribal law, and requests this Court to dismiss the petition for appeal and vacate the order of expulsion. The appellate panel appreciates the candor of the Tribe.

THEREFORE, it is the order of this court that the order of expulsion entered by the Fort Mojave Indian Reservation Tribal Court on January 4, 1996, and subsequent orders of the Tribal Court upholding that order should be, and hereby are, vacated and the appeal, having been rendered moot by the response of the Fort Mojave Indian Tribe, is hereby dismissed.

IT IS SO ORDERED.

February 5, 1998

SAM SANTISTEVAN, Plaintiff-Appellant,
vs.
KLINE MYORE, Defendant-Appellee.

SWITCA No. 97-014-SUTC
SUTC No. 96-CV-133, 97-AP-03

Appeal filed November 18, 1997

Appeal from the Southern Ute Tribal Court
Elizabeth Callard, Judge,
Gary White Wolf, representative for Defendant-Appellant
Michael Mortland, Colorado Rural Legal Services, Inc., attorney for the Plaintiff-Appellee.

Steffani A. Cochran, Chief Judge, Southwest Intertribal Court of Appeals

SUMMARY
The appeal is dismissed on appellee's motion for appellant's failure to file an opening brief.

JUDGEMENT AND ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 90-86, July 10, 1990, adopted by the Southern Ute Tribe, the general appellate laws for the Southern Ute Tribe, sections 3-1-101 et seq., as amended, and the appellate rules of the Southwest Intertribal Court of Appeals, hereinafter referred to as "SWITCA". This Court finds that the matter should be dismissed, with prejudice, for the reasons set out below.

I. Proceedings Below

Plaintiff-appellant, Sam Santistevan, appeals from a decision of the Southern Ute Indian Tribal Court. Final judgment and order was entered for the defendant-appellee, Kline Myore, on October 21, 1997 by Associate Judge Elizabeth C. Callard. Appellant filed a notice of appeal and motion for stay on November 5, 1997 seeking review of the trial court's decision. The record

and case were certified to SWITCA on December 3, 1997. After finding the appellant complied with the requirements of the Southern Ute Appellate Code for filing an appeal, this Court issued a scheduling order on March 18, 1998. This Court granted the appellant 30 days, after receipt of the order, to submit an opening brief on this matter. Neither this Court nor the clerk of the Southern Ute Indian Tribal Court has received any documentation, oral or otherwise, from the appellant since the original notice of appeal.

II. Discussion

SWITCA rules require that this Court abide by the Tribe's appellate law and rules; SWITCA rules apply only in the absence of tribal rules, but may be used to supplement existing rules. If the Southern Ute Code does not provide guidance, this Court will look only then to the SWITCA rules. The Southern Ute Code allows, as a matter of right, an appeal from a civil decision of the Tribal Court awarding damages in excess of $500.00. SUTC §3-1-102. An appeal is commenced when a notice of appeal is filed within 15 days after entry of the final judgment. SUTC §3-1-104. The appellant met these requirements. The Southern Ute Code, however, provides no further procedural guidance to resolve this matter. This Court, therefore, shall look to the SWITCA rules.

This Court issued a scheduling order on March 18, 1998. The order provides, in relevant part, that "Appellant's opening brief... shall be filed with the clerk ... within 30 days after being served with a copy of this order." A certificate of service establishes that the Southern Ute Indian Tribal Court mailed a copy of the scheduling order to the plaintiff-appellant on March 19, 1998. To date, this Court is without any further filing by the appellant or his representative with regard to this matter. Under Rule 26(g) of the SWITCA rules of appellate procedure, the appellee may file a motion for dismissal of the appeal if the appellant fails to file a brief within the time provided by the rule. The defendant-appellee properly filed a motion to dismiss on May 12, 1998. The certificate of mailing for this motion indicates the defendant-appellee provided proper notice to the plaintiff-appellant and his representative on or about May 7, 1998. Still no further filings were made by the appellant. The defendant-appellee correctly points out that neither appellant nor his representative has sought an extension or provided any explanation as to his failure to comply with the scheduling order. This Court, therefore, finds no good or justifiable cause to grant further consideration of this matter and finds any additional delay is highly prejudicial to the interests of the appellee.

THEREFORE, defendant-appellee's motion to dismiss is granted and plaintiff-appellant's notice of appeal and motion for stay of judgment of November 7, 1997 shall be dismissed with prejudice.

IT IS SO ORDERED.

September 28, 1998

Hualapai Nation, Appellee-Plaintiff
vs.
M.J.M and T.W, Appellants-Defendants

SWITCA No. 97-016-HTC
HTC No. JV97-004

Appeal filed November 17, 1997

Appeal from the Hualapai Tribal Court
Shirley Nelson, Judge
Charmaine A. Cordova, Court Advocate for the Appellant,
Delmar Pablo, Tribal Prosecutor for the Appellee.

Steffani A. Cochran, Chief Judge, Southwest Intertribal Court of Appeals

ORDER OF DISMISSAL

Appellant M.J.M having filed a motion to dismiss this appeal on behalf of herself and her minor child T.W., and the appellee Tribe having not filed any objection, this matter is hereby dismissed.

December 29, 1998

THE HUALAPAI INDIAN NATION, a tribal government; THE HUALAPAI INDIAN TRIBAL COUNCIL, the governing body of the Nation; EARL HAVATONE, Chairman of the Nation; EDGAR WALEMA, Vice Chairman of the Nation; ALEX CABILLO, Council member; CISNEY HAVATONE, Council member; RONNIE QUASULA, Council member; WAYLON HONGA, Council member; PHILBERT WHATHOMOGIE, Council member, LINDA HAVATONE, Director of Health, Education, and Wellness; RONNYE ETCITTY, Director of Human Resources; COMMUNITY OFFICERS 1-10; COMMUNITY OFFICES 1-10,
Appellants/Defendants,
vs.
SERAPHINE MUKECHE, Appellee/Plaintiff

SWITCA No. 97-019
No 97-0051-HTC

Appeal filed December 19, 1997

Appeal from the Hualapai Tribal Court
Shirley Nelson, Associate Judge
Cynthia Kiersnowski, Nordhaus, Haltom, Taylor, Taradash & Frye, L.L.P., Attorney for Appellants
Richard J. Perry, Attorney for Appellee

Melvin Stoof, Judge, Southwest Intertribal Court of Appeals

SUMMARY

Defendants appealed from an order denying their motion for reconsideration of the court's order denying defendant's motion to dismiss. The trial court ruled the Hualapai Nation and its employees are immune from suit and sovereign immunity had not been waived. Notwithstanding its ruling that the Nation and its officers were immune from suit, the trial court denied a motion to dismiss the claim against the Nation, its Council members, officers, and offices, and the court held the plaintiff has a right to due process to a hearing to prosecute her employment dispute. The trial court requested certification of the case. The appellate court affirms the judgment of the Tribal Court insofar as it holds the Hualapai Nation and its officers immune from suit.

OPINION

This opinion addresses whether plaintiff's suit against the Hualapai Nation and its employee is barred by sovereign immunity.

This action arose out of an on-reservation employment dispute between the Nation and Mukeche. The Hualapai Nation asserts sovereign immunity bars the employment suit filed against it, while the Plaintiff argues that the Hualapai Constitution, the Bill of Rights, and the Indian Civil Rights Act read together imply a waiver of sovereign immunity in Tribal Court.

The Hualapai Revised Constitution vests the Hualapai Nation Tribal Council, subject to the Secretary of Interior's approval, with the authority to enact ordinances to promote the peace, safety, property, health and general welfare of the people of the reservation. Additionally, the Tribal Council shall prescribe the powers, rules, and procedures of the Tribal Courts in the adjudication of cases involving civil actions.

The Hualapai Nation Constitution established the judicial powers of the Tribal Court in all civil matters involving disputes, and it adopted by tribal resolution personnel policies and procedures. Resolution No. 43-85 (Oct. 5, 1985). The Tribal Council has authority to implement personnel policies and to modify, change, or amend such policies.Id. The Council also prescribes the means by which aggrieved employees may appeal a personnel action. Id., at Section 17.02.

The Hualapai Nation retains all attributes of sovereignty which have not been taken away by Congress or ceded by treaties between the Hualapai Nation and the United States. The power to raise a defense of sovereign immunity, and to waive the doctrine of sovereign immunity, is still within the inherent powers of the Hualapai Nation.

Because sovereign immunity is a jurisdictional question, the Hualapai Nation's defense of sovereign immunity automatically raises questions concerning the Tribal Court's jurisdiction over the Hualapai Nation and its agents, representatives, and employees.

As a general rule, in state and federal courts, an Indian tribe is immune from suit, unless Congress has explicitly authorized suit against a tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies,* ___S.Ct.___, 66 USLW 4384, 4387 (May, 1998), See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877, 890, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506, 512, (1940). An Indian tribe may consent to be sued. *U.S. v. Oregon,*657 F2d 1009 (9th Cir. 1981); See *Puyallup I and II,* 433 U.S. 165 (1977), *Morgan v. Colorado River Indian Tribe,* 103 Ariz., 425, 443 P.d. 421 (1968). This case addresses whether the Hualapai Nation waived its immunity from suits in Tribal Court.

I. Congress May Waive a Tribe's Immunity From Lawsuit

Title 25, United States Code, §450f(c)(3) provides that an insurance company may not assert a defense of sovereign immunity if the agency or program is insured and funded through certain federal contracts and sued in Federal district court. 25 U.S.C. § 450f(c)(3)(A)(B). In that regard, the court in *Evans v. McKay,* 869 F.d. 1341 [Ind.L.Rptr.2122] (9th Cir. 1989) observed:

> A third party who is injured by a BIA agent could bring action against the government under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1949, 29 L.Ed2d 619 (1971), or

> the Federal Tort Claims Act. The government could then bring a claim against the Tribe, pursuant to the Tribe-BIA contract seeking indemnification. The tribe, in turn, would call upon its insurer to indemnify the Tribe for its liability to the government. At that juncture the insurance company would be precluded from asserting that it has no duty to indemnify the government because of tribal immunity.

Congress has plenary power over tribes to limit, modify or eliminate the powers of local self government which the tribes otherwise possess, *U.S. v Kagama,* 118 U.S. 375 (1886); *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 305-307 (1902). It may waive a tribe's sovereign immunity pursuant to its plenary power. See *e.g.* 25 U.S.C. §2710(d)(7)(A)(ii) (restriction of tribe's sovereign immunity in gaming activities).

II. Tribes May Waive Their Immunity From Lawsuits

Tribes may waive sovereign immunity in tribal court. For example, the Navajo Nation adopted a law which states that the Navajo Nation may be sued in the courts of the Navajo Nation with respect to any claim for which the Navajo Nation carries liability insurance. 7 N.T.C. §854(c) (1980). Additionally, the Navajo Nation Supreme Court has held that the Navajo Nation Bill of Rights coupled with its Navajo Nation Sovereign Immunity Act permits persons who have property interests affected by tribal agencies to try their cases again the tribe and its agencies in tribal court. *Atcitty v. District Court for the Judicial District of Window Rock,* 245 Ind. L. Rep.6013 (Nav. Sup. Ct. 1996) (Right of due process is one protected in Navajo Bill of Rights which permits individuals with property interest affected by housing authority to file in tribal court against Navajo agency).

In several cases where tribal courts have permitted waivers of sovereign immunity, such waiver was allowed when the tribe took some action subjecting themselves to suit, see *White v. Pueblo of San Juan,* 728 F.2d 1307 (10th Cir. 1984) (where tribal code permits waiver of immunity, tribe may be sued in tribal court), *Wells v. Fort Berthold Community College,* 24 Ind. L. Rep. 6157 (Fort Berthold Tr. Ct. 1997) ("sue and be sued" clause in charter of tribal community college was a valid waiver of sovereign immunity), *Tomahawk Enterprises v. Fort Totten Housing Authority,* 24 Ind. L. Rep. 6091 (Spirit Lake Sx. Tr. Ct. 1997) ("sue and be sued" clause in statute establishing housing authority and contract language effected waiver of immunity), or where they waived the defense, *Navajo Nation v. Crockett,* 24 Ind. L. Rep. 6027 (Nav. Sup. Ct. 1996) (no sovereign immunity from actions for claims of civil rights covered by the Nation's insurance policy or qualified immunity when not properly raised as an affirmative defense).

III. The Hualapai Nation Has Not Expressly Waived its Sovereign Immunity

The Hualapai Nation Tribal Council has specifically limited suits against the Hualapai Nation. The Hualapai Nation Constitution provides in pertinent part as follows:

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

Hualapai Constitution, Art. XVI, § 1(a).

Under Hualapai Nation law, the Nation is immune from suit unless it consents to the claim.

IV. There Is No Implied Waiver of Tribal Sovereign Immunity under ICRA.

Because the tribes are not subject to the U.S. Constitution, *Talton v. Mayes,* 163 U.S. 376 (1896), Congress passed the Indian Civil Rights Act (ICRA) to afford litigants in tribal courts constitutional like protections. 25 U.S.C. § 1301 et seq. (1968). The U.S. Supreme Court in *Santa Clara v. Martinez* instructs this court that Indian tribes should provide forums to "vindicate rights created by the ICRA." 436 U.S. at 65. Indian tribes may be required to conform their laws to the rights created by Congress under the ICRA, because the ICRA has "the substantial and intended effect of changing law which [tribes] are obliged to apply." 436 U.S. at 65.

Absent an explicit prohibition against suits, Indian Tribes are generally considered immune from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara v. Martinez,* 436 U.S. 49, 58 (1978). This aspect of tribal sovereignty is subject to Congressional plenary power. But without Congressional authorization, the "Indian Nations are exempt from suit." Id. At 58. In *United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940), the U.S. Supreme Court held: "These Indian Nations are exempt from suit without Congressional authorization." 309 U.S. at 512.

The U.S. Supreme Court has addressed the issue of whether ICRA implies a waiver of tribal sovereign

immunity in federal court. A congressional waiver of an Indian tribe's sovereign immunity must be unequivocally expressed and not implied. *Santa Clara v. Martinez,* 436 U.S. 49, 58 (1978), *Paul v. Southern Ute Indian Tribe,* 24 Ind. L. Rep. 6038, 6040 (S.W. Intert. Ct. App. 1997). The U.S. Supreme Court decided:

> the provisions of [25 U.S.C.] Section 1303 can hardly be read as a general waiver of the tribe's sovereign immunity.

In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under ICRA are barred by its sovereign immunity from suit.

436 at 59.

V. Plaintiff's Claim Against the Tribe Is Barred by Sovereign Immunity.

ICRA does not expressly waive the sovereign immunity of Indian tribes in federal court actions, including the Hualapai Nation. See *Santa Clara* above. There are no implied waivers of sovereign immunity in state courts, even where an Indian tribe undertakes off-reservation commercial activities. See *Kiowa* above. Similarly, if the ICRA does not waive tribal sovereignty in federal and state courts, then under the same application, it does not waive the sovereign immunity of the Hualapai Nation in tribal courts, unless the Hualapai Nation has expressed its consent to be sued under ICRA. The court concludes that absent an express waiver of sovereign immunity by the Hualapai Nation, neither the Constitution nor the Bill of Rights authorize suit against the Hualapai Nation in tribal court. Absent express congressional waiver of tribal sovereign immunity, the decision to waive the immunity of the Hualapai Nation rests entirely with the Tribal Council. A decision to waive immunity is an exercise of sovereignty by the Hualapai Nation Council for the benefit of its citizens and for the good of the Hualapai government.

The Hualapai Nation Council may act to protect their constituents. The Hualapai Nation members are entitled to a representative and accountable government. Decisions on whether the Hualapai treasury will be maintained for governmental services or for payment of claims to aggrieved and injured parties lie entirely with the elected Hualapai Council representatives after consultation with their constituents.

VI. Claims Against Hualapai Officers Are Barred by Sovereign Immunity.

Plaintiff Mukeche asserts that Defendants "were at all times officers of Hualapai Nation and acting on behalf of the Hualapai Nation and acting on behalf of the Hualapai Nation or in furtherance of their office or employment with the Hualapai Nation." Complaint Para. III. In other words, the defendants were acting within the scope of their delegated authority and in the performance of their official duties on behalf of the Hualapai Nation. Tribal immunity extends to tribal officers while "acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe,* 779 F.d.. 476, 479 (9th Cir. 1985), (citing affirmatively to *U.S. v. Oregon,* 657 F.d.. 1009, 1012 n.8 (9th Cir. 1981)). Plaintiff's suit against Council members and officers, acting within the scope of their delegated authority, is also barred by the Tribe's sovereign immunity. *Id.* At 479-80; See also *Imperial Granite v. Pala Tribe of Mission Indians,* 950 F.d. 1269, 1271 (9th Cir. 1991).

Although this Court upholds the sovereign immunity of the Hualapai Nation, it also cautions the Hualapai Nation's legislative body of recent trends by anti-sovereignty advocates who have assaulted the court established doctrine. In *Kiowa* , the U.S. Supreme Court stated the doctrine of sovereign immunity is "founded upon an anachronistic fiction." ____S. Ct.____, 66 U.S.L.W. 4384, at 4385 (1998). The Supreme Court in *Kiowa,* a 6 to 3 decision, stated:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of sovereign immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. . .immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.
>
> . . .[t]hese considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule.

____S.Ct.____,66 USLW 4384, at 4386.

The *Kiowa* Supreme Court majority opinion concludes:

> Congress has occasionally authorized limited classes of suits against Indian Tribes and has always been at liberty to dispense with such tribal immunity or to limit it. . .[i]t has not yet done so.

The dissenting opinion in *Kiowa* stated three compelling reasons for Congress to waive tribal sovereign immunity. The dissent notes the "United States has waived its immunity from tort liability and from liability arising out of its commercial activities." 66 USLW 4384, P.8. See Federal Tort Claims Act and Tucker Act. The dissent articulated the doctrine as unfair to tort victims:

> . . .the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

The Supreme Court's dissenting opinion in *Kiowa* reflects a growing cry in Congress to abolish tribal sovereign immunity as a doctrine and allow lawsuits against tribes, just as most states and the U.S. government are now defending claims. The capacity of the Hualapai Nation Council to address this pressing issue counsels some caution by this Court in this area.

The Court remands this matter to the trial court with instructions to grant defendant's motion to dismiss all of plaintiff's claims based on the absolute bar of sovereign immunity.

IT IS SO ORDERED. August 10, 1998

ANN L. FIELDING, Appellant
vs.
ARCADIA FINANCIAL LTD., Appellee

SWITCA No. 97-020-HTC
HTC No. CV97-0145

Appeal filed December 29, 1997

Appeal from the Hualapai Tribal Court,
Joe Flies Away, Judge
Ann L. Fielding, *pro se*
Charles E. Martinez, Attorney for Appellee

Melvin Stoof, Judge, Southwest
Intertribal Court of Appeals

SUMMARY
Barney Fielding, parent of appellant who is an adult, filed a notice of appeal directly with SWITCA, by-passing the Tribal Court and before a final judgment was issued in this matter. The appeal is dismissed for failure to comply with tribal law or rule or with SWITCA rules. Further, the record is not clear that Barney Fielding had the right to represent appellant because appellant did not consent in writing to the appeal and this is a matter of law for the Tribal Court to determine. The matter is dismissed.

ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to resolution 07-95 (2/4/95) of the Hualapai Tribal Council on behalf of the Hualapai Nation and pursuant to the Appellate Code of the Hualapai Nation, section 1.22 through 1.25 as amended by ordinance No. 9 adopted in November 3, 1979, the rules of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA", as well as the Court's inherent authority to manage its business.

This matter was appealed directly to this Court from several orders of the Hualapai Tribal Court (referred to as the lower court) entered in the tribal case # CV 97-145. Two orders were issued by the lower court: the first, entered on November 10th, 1997, ordered that the vehicle in question be parked at the Tribal Court or other secure location pending the November 19th, 1997 hearing and that the defendant show cause on November 19th why the plaintiff should not take immediate possession of the vehicle; the second order, entered on December 5th, 1997, allowed the plaintiff to take possession of the vehicle, but also set up conditions for a third hearing to be set at a future date so that the defendant Ann Fielding could reclaim the vehicle or the lower court could determine further relief. No other order or a final judgment has been filed with this Court. Rather, the matter is still in litigation and another hearing in the matter is scheduled before the lower court. Barney Fielding, not the named defendant, filed a notice of appeal by facsimile directly with this Court on December 29, 1997, bypassing the lower court. Mr. Fielding is the father of defendant who is an adult. Nothing in the very limited record before this Court shows that the defendant agreed to the attempt to appeal the lower court's orders or that Mr. Fielding is the defendant's legal representative.

For the reasons discussed below, the appeal should be dismissed.

Discussion

SWITCA rules require that this Court abide by a tribe's appellate law and rules; SWITCA rules apply only in the absence of tribal rules, but may be used to supplement existing rules. In other words, SWITCA

rules may fill in gaps in a tribe's appellate law or rules. SWITCARA #1(b). If the Hualapai Code does not provide guidance, this Court will look to the SWITCA rules. Hualapai law allows appeals only for specific reasons, see sections 1.24 and 1.25 of the Hualapai Appeals Code. Therefore, this Court will look to the Hualapai Code first.

Section 1.23 of the Hualapai Appellate Code states that: Any part(y) aggrieved by the verdict or **judgment** in a civil action . . . may appeal . . . in accordance with the procedure provided in this Code. (emphasis added) The word "judgment" has a specific meaning in law. According to Black's Law Dictionary, 6th ed., (1990), it is "the law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties." at p. 842. The standard appellate rule throughout this country and in most tribal courts is that appeals may be taken only from final judgments with rare exception. Therefore, the use of the term "judgment" in the Hualapai Appellate Code can only be interpreted to mean that the Nation intended that only final decisions can be appealed.

SWITCA rules follow this standard appellate rule. SWITCA rule 3(d) states, in part, "The court of appeals may review any final judgment, order, or commitment having the effect of ending litigation and requiring nothing more than execution of the judgment. . . ." SWITCARA #3(d). Subsection (f) of the same rule 3 allows review of an action which is not final only if a request for permission to appeal complying with SWITCARA #13 is filed and only if the appellate court determines that the lower court committed an obvious error which would make further proceedings useless. The Hualapai Appellate Code does not refer to appeals of non-final orders, so the SWITCA rules will be used to assist this Court in making its determination.

Because the matter was not final before the notice of appeal was filed, it must be dismissed unless the notice complies with SWITCARA # 13. A request complying with SWITCARA ## 3(f) or 13 has not been filed with the lower court or with this Court. Barney Fielding stated in the notice of appeal he submitted that he had been informed that the hearing on November 19, 1997 was a preliminary hearing. While Mr. Fielding did not believe that it was preliminary hearing, in fact it was. Further, in his notice of appeal, he claimed that "no court order has been sent. . . ", but the return of service noted on the bottom of the Court's copy of the first order shows that a copy of the order was personally served on the defendant Ann Fielding on November 12th by the deputy court clerk.

Under Hualapai law, the procedure for filing an appeal is the filing of the notice of appeal either by the appellant or the appellant's legal representative with the clerk of the Hualapai Appellate Division which for the Hualapai Nation is the clerk of lower court. Under SWITCA rules, after the notice is filed with the lower court, the clerk of that court transmits a copy of the notice to this Court Throughout the appellate process, every original appellate document is filed with the Tribal Court clerk's office which then transmits copies to this Court. There are sound reasons for this procedure: it ensures that the lower court is informed about the status of the case, original documents remain with the Tribe, and, most importantly, this Court is assured of getting an accurate record from the lower court which we have not received in this case.

After reviewing the record, such as it is, this Court sees nothing stated in the notice of appeal that compels it to bypass the lower court process and allow this Court to take jurisdiction over the matter. The Hualapai Appellate Code clearly and narrowly states which issues may be considered on appeal and the appellant's statements in the notice do not comply with section 1.24 of that code. The record is insufficient to allow this Court to make determinations regarding an appeal not based on a final judgment. There is nothing in the record before this Court to show that the lower court committed an obvious error. An appellate court will not substitute its opinions for that of the lower court without compelling reasons. *Hualapai Nation v. D.N.*, 9 SWITCA Rep. 2 (Hualapai, 1998).

For the above reasons alone, there is sufficient reason to dismiss this matter. But there are additional issues for concern that must be addressed to provide guidance for the appellant.

First, no proof is filed with this Court showing that a copy of the notice of appeal was served on the plaintiff below, allowing it the opportunity to respond to the allegations stated in the notice. It is the obligation of the appealing party to serve copies of all documents on the other parties, especially where, as in this case, the lower court was omitted from the process. Sec. 1.25, Hualapai Appellate Code. Ordinarily, the lower court will ensure that service on all parties is made properly and, apparently, Mr. Fielding did not avail himself of this assistance.

Secondly, it is not clear from the abbreviated record before this Court that Mr. Fielding is the legal representative of the named defendant. If he is not, he does not have the power or standing to file a notice of appeal. The determination that a parent of an adult has the right to represent the adult is a matter of tribal law best

made by the Tribe's court which is in a better position to determine statutory or customary tribal law. Should there be an appeal of this matter after a final judgment is issued, it is the obligation of the defendant to file the appeal according to the tribal appellate code. Any person other than the named party who files a notice of appeal on the party's behalf must show that he or she has the right to represent the party. Being a relative is not sufficient, alone, to show that a person has the right to represent a party unless tribal law specifically allows this.

It is the order of this Court that this matter be dismissed and remanded so that the Hualapai Tribal Court may proceed to final judgment.

IT IS SO ORDERED.

March 11, 1998

JAMES ARCHULETA, Plaintiff-Appellant,
vs.
LORETTA ARCHULETA, Defendant-Appellee.

SWITCA No. 98-001-SJP
SJP No. 03-97-0003

Appeal filed January 6, 1998

Appeal from the San Juan Pueblo Court
Stanley A. Bird, Judge
Sharon Pomeranz, Attorney for Appellant
James Archuleta, *pro se*

Violet Lui-Frank, Judge, Southwest Intertribal Court of Appeals

SUMMARY

This appeal is dismissed because the appellant failed to comply with the Pueblo's Appellate Code in meeting the time requirement for filing.

JUDGEMENT AND ORDER

This matter comes before the Southwest Intertribal Court of Appeals by resolution 90-98 of the San Juan Pueblo Council adopted July 12, 1990, appointing the Southwest Intertribal Court of Appeals as the intermediate appellate court for the San Juan Pueblo. This matter is governed by the appellate laws and rules of the San Juan Pueblo and those of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA," when the San Juan rules require supplementation. For the reasons discussed hereafter, this appeal is dismissed for being untimely filed.

Appellant, father, was the respondent on a motion for revised visitation plan and child support filed by appellee, mother, on or about July 24, 1997. The appellant filed his response to the motion on the same day, along with a chronology of events involving the two parties and their divorce. The court below entered its decision on July 25, 1997. This matter had been the subject of a number of motions and rulings prior to this motion. Appellant's notice of appeal also raised issues from the earlier decisions.

Appellant filed his appeal on August 8, 1997. Section IX (e), chapter I of the Code of Law and Order for the People of San Juan Pueblo states that appeals must be filed within ten days after the judgment is rendered by the San Juan Pueblo Tribal Court. As this Court stated in *Baker v. Southern Ute Indian Tribe*: compliance with the legal requirements for filing of an appeal is a jurisdictional prerequisite. 5 SWITCA Rep. 1 (Southern Ute, 1993). An appellate court has no power and cannot act on an appeal unless a timely notice of appeal is filed. The San Juan Pueblo Council set forth in its Code the requirement for filing an appeal and appellant has not met the Pueblo's requirement.

If this appeal had been filed in a timely manner, the only matter which would be subject to review is the July 25, 1997 order revising visitation and requiring the appellant to pay $150.00 per month in child support for the three children. All other matters raised in appellant's notice expired ten days after each of the earlier court decisions because the time to appeal under Pueblo law would have been within ten days after each of the rulings.

Notwithstanding the fact that this Court must dismiss the appeal for the untimely filing of the appeal, the Court wishes to provide the appellant guidance about appeals. The only reasons raised by appellant for his appeal is that he disagrees with the decision and believes that he was not treated fairly. He provided no specific reasons to support his disagreement and belief and they are not sufficient, alone, to support a reversal of the order changing the visitation and ordering child support.

The purpose of an appeal is not to rehear the case in its entirety. As this court said in *Hualapai Nation. v. D.N*, 9 SWITCA Rep. 2 (Hualapai, 1998), an appellate court will review the lower court's decision and determine whether the lower court's determination of the facts and its decision is supported by substantial evidence. If it is so supported, the appellate court will affirm the trial court's decision. Appellate courts should and do give great deference to trial court decisions for the simple reason that the trial court, having seen and heard the witnesses, is in a better position to determine their honesty

and accuracy than is a higher court. Further, if an appellant believes that an appeal can be taken at any time without having to meet minimum standards requiring proof of something more specific than allegations of "disagreement and belief", every person who does not prevail at trial will file an appeal even if the evidence is clearly against the appellant's claims. What would the appellant have to lose? Not only would this practice undercut the trial court, it would subject the appellate courts to frivolous appeals and a case load that would be as active as that of trial courts. It would be poor policy. This appeal is dismissed.

IT IS SO ORDERED.

July 10, 1998

Bobby R. SHACK, Plaintiff/Appellant,
vs.
Hayes LEWIS, Andrew L. Othole, Arlen P. Quetawki, Sr., Rueben Ghahate, Augustine A. Panteah, Harry Chimoni, Jobeth Mayes, Pamela Chimoni, Robert Leekya, Arlene Bobelu, Verna Chavez, Alberta P. Kallestewa, the Zuni Tribal Council, the Zuni Election Board, and the Zuni Special Election Board, Defendants/Appellees.

SWITCA 98-004
ZUNI CV-R0-97-08
CV-97-65

Appeal filed March 4, 1998

Appeal from the Zuni Pueblo Court
William Riordan, Judge
Robert W. Ionta, attorney for appellant
David F. Cunningham, attorney for appellees.

SWITCA Appellate Panel: James, McCulley & Toledo

SUMMARY
Appellant apparently resigned as lieutenant governor of the Pueblo and the Pueblo Council appointed appellee Othole to fill the office and ordered a special election to fill appellee's position. Appellant at some point before the Council's action withdrew his resignation, but the Council proceeded and appellant filed this action to halt the special election alleging that the appellees violated the Zuni Constitution and laws, including traditional or customary law. Trial court granted appellees' motion for summary judgment and this appeal followed. The appellate court reversed and remanded finding that summary judgment was improper and the trial court should have held an evidentiary hearing to determine the role customary or traditional law plays in the resignation of an elected official. Reversed and remanded.

JUDGMENT AND ORDER

This matter comes before the Southwest Intertribal Court of Appeals by resolution M70-97-E-075 of the Zuni Pueblo Council, adopted December 30, 1997, by reason of the appellate laws and rules of the Zuni Pueblo and those of the Southwest Intertribal Court of Appeals, hereafter referred to as "SWITCA". This Court finds that the matter should be remanded to the trial court for the reasons set out below.

I. Finding of Jurisdiction

This matter is an appeal from the decision of the Zuni Pueblo court made in its final judgment filed on November 4, 1997. The notice of appeal was filed on November 19, 1997 with the Zuni court and the appellant met the requirements in a timely appeal pursuant to the Zuni Appellate Code. Thereafter, the Council, the governing body of the Zuni Pueblo referred the appeal to SWITCA by resolution M70-97-E-075. The record and case, then, were certified by the Zuni court clerk to SWITCA on March 4, 1998. Having reviewed the petition and record and for the reasons set out in this section, the Court finds that it has jurisdiction to hear this appeal.

II. Scheduling

The briefs of the parties were submitted to the Zuni trial court prior to referral to this court to comply with the requirements for timeliness of the Pueblo's Appellate Code. Pursuant to this Court's inherent power to seek assistance from the parties when it is deemed just or necessary to assist the Court and SWITCARA ##26 and 29, the parties were notified by letter on April 15, 1998, of the opportunity to submit additional briefs and requests for oral argument by filing short memoranda. No additional pleadings have been received by this Court.

After reviewing the extensive briefs already filed, this Court finds that no additional briefing is required. The Court also finds that oral argument is not required.

It is the decision of this Court to remand the matter to the trial court for supplemental findings and an evidentiary hearing on the relationship between the religious society and the government and the significance and impact of that relationship on the process of resignation and swearing in of governmental officers. Since there is no statutory provision regarding resignation from office, do tradition and custom define a resignation in the absence of such statutory authority? Does the electoral process as required by Zuni Code supersede traditional requirements for installation of officers, if any? And if it does, what specific laws determine this? If there

is no credible proof of customary law proffered at the evidentiary hearing, it is within the Tribal Court's power to determine that it does not exist.

III. The Facts

At what was described by the parties as an emotional and raucous public meeting called by several members of the Tribal Council, plaintiff, then the recognized lieutenant governor of the Pueblo, orally resigned from his office. According to plaintiff Shack's representations, the oral resignation was given only because he was forced to act under duress because he and members of his family were verbally attacked and humiliated, and he was subjected to insults and intimidation. The trial court either rejected this characterization or deemed it immaterial to the issue of whether the resignation was legally binding, and upheld the validity of his resignation. At some point after the meeting, Mr. Shack withdrew his oral resignation. In the meantime, acting upon the belief that Mr. Shack had resigned, the Council allowed Head Councilman Andrew L. Othole to assume the lieutenant-governor's position and a special election was set to fill the position of head councilman. This election was called pursuant to article 17, section 3 of the Zuni Constitution.

Plaintiff/appellant Bobby R. Shack then filed suit in June, 1997, against named members of the Zuni Pueblo Council, the tribal administrator, named members of the election board and special election board, the Council, and the election and special election board, claiming that the defendants violated the Constitution and laws of the Pueblo and were unlawfully attempting to exclude plaintiff from his office as lieutenant-governor of the Pueblo. The petition alleged that actions taken by the Council were illegal under Zuni written and traditional law and sought an injunction against the named defendants from proceeding with the election and an order requiring the named defendants to recognize plaintiff as the lawful lieutenant governor. The trial court refused to halt the special election, and later ruled, pursuant to a motion filed by defendants for summary judgment under Rule 28 of the Zuni rules of civil procedure, Title II of the Zuni Pueblo code, and after a telephone hearing on the motion was conducted, that plaintiff had orally resigned from the office of lieutenant governor of the Pueblo of Zuni, and that his oral resignation was effective and legally binding. The court then dismissed the petition after dismissing certain named defendants and granting immunity from monetary damages to defendants. The plaintiff-appellant filed his appeal from the Zuni trial court's determination on the summary judgment motion.

The plaintiff-appellant alleges the following errors:

1. The trial court erred in granting summary judgement because there were genuine issues of material fact especially as to what constitutes a legal resignation under Zuni law, which includes custom and tradition.

2. The trial court erred in determining that the election was not protested.

3. The trial court erred in not dealing with the issues of the legality of the election and installation of Andrew Othole as lieutenant governor.

4. The trial court erred in holding that the installation of Andrew Othole was lawful and the actions undertaken by the Bow Priest and Head Cacique in August, 1997, were proper under Zuni custom.

5. The trial court erred in dismissing his damage claims for the reason that the defendants were protected by sovereign immunity.

The appellant requests that the case be remanded for the trial judge to determine the issues raised above.

While a tribal court will look to its own laws and is not bound by the law of another jurisdiction, unless the tribal government has formally adopted a differing policy, tribal courts may look for guidance from decisions of courts from other jurisdictions where it may be helpful. Summary judgment is patterned after non-tribal court procedure. The federal courts and essentially every state court has such a procedure and there is well-developed case law that can assist this Court in its determination. The case law on summary judgement, both federal and state, is consistent and the following summarizes it:

> It is a method to determine whether a genuine claim for relief or defense exists and whether there is a genuine issue of fact requiring submission to a trier of fact. It is a drastic remedy to be used only with caution and in limited circumstances and is not a substitute for trial on the merits. It should be granted only when the moving party is entitled to a judgment as a matter of law upon clear and undisputed facts. All documents and pleadings must be viewed in a light that is most favorable to the party resisting the motion. When material facts are in dispute, the trial judge should not summarily substitute his or her determination for a trial on those factual issues. Neither lawyers' arguments nor affidavits should take the place of an examination before a fact finder when there is a genuine issue for trial. Summary judgement is proper if material facts are not disputed, and the judge can apply the known law to the undisputed facts and make a determination. *Thomas v. Succo,* N.L.R. Supp. 339, 340 (Nav. Sup. Ct.

1993); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505) (1986); *Wolferd v. Lasaterm*, 78 F.3d 484 (CA 10, N.M. 1996); *Puerto Rico Aqueduct & Sewer Authority v. U.S. E.P.A.*, 35 F.3d 600 (CA 1, 1994) *cert. den.* 513 U.S 1148, 115 S.C.1096; *Gardner-Zemke Co., v. State*, 109 N.M. 729, 790 P.2d 1010 (1990); *Holliday v. Talk of Town, Inc.*, 98 N.M. 354, 648 P.2d 812 (Ct. App. 1982); *Cebolleta Land Grant ex.rel. Board of Trustees v. Romero*, 98 N.M. 1, 644 P.2d 515 (1982).

In this matter, the law is being disputed. In the non-tribal context, discovering the law is a matter of going to statutes and cases, all of which are easily located because they are in writing. However, the law is not so easily discoverable here; there are no written statutes and certainly no written case law setting out the traditional law. It must be told to us by the traditional people and the religious leaders. The pleadings and affidavits make it clear that there is disagreement about the law; therefore, the law must be found the same as if the court were to determine facts, by taking evidence about it.

The standard procedure is for the party filing a motion for summary judgement to make a "prima facie" case properly supported by written evidence such as sworn affidavits, depositions, or other admissible evidence, although all of these are not necessarily required. A prima facie case is one that would support a decision in the moving party's favor if the other party does not counter with opposing affidavits, depositions, or admissible evidence. Once the opposing party submits proper written documents in opposition to the summary judgment motion and it appears that material facts are in contention, the court should not grant the motion for summary judgment and a full evidentiary hearing is required. *Hutcherson v. Dawn Trucking Co.*, 107 N.M. 358, 758 P.2d 308 (Ct.App. 1988); *Quintana v. Univ. of Cal.*, 111 N.M. 679, 808 P.2d 964 (Ct.App. 1991); *Toulouse v. Armendariz*, 74 N.M. 507, 395 P.2d 231 (1964)

There were a number of affidavits submitted by both parties; however, the two pertinent affidavits were made by Elder Bow Priest Perry Tsadiasi and Governor Donald F. Eriacho. The affidavit by the Bow Priest did not address the issue in contention, rather he stated that he performed certain actions and understood certain things because of the directions of the Head Cacique and the Zuni Council, not including the Governor. There was no affidavit from the Head Cacique about Zuni traditional law. The affidavit of the Governor stated his understanding regarding tradition which differed from that of the Bow Priest. Certain facts regarding traditional law were directly contradicted by opposing affidavits from non-parties.

The trial court decided the matter on the defendants' motion for summary judgment after conducting a telephone hearing on the motion. An evidentiary hearing was never held since the trial court determined that such a hearing was not required as to the issue of whether there was any tribal customary law which would determine the definition of "resignation" although the order and judgment entered on November 4, 1997, states in its ruling that there is no definition of "resignation" in the Constitution or Tribal Code. Rather than looking to customary law, the trial court utilized a recognized, but non-tribal source, Black's Law Dictionary, to give "plain meaning" to the term "resignation". This in spite of the fact that Zuni law does provide that Zuni customs and tradition should be used by the Pueblo court in making decisions. The trial court chose to ignore that portion of the Pueblo's code notwithstanding the specificity of the provision set out in §1-3-8 of the Zuni code.

Perhaps the trial court relied on the pleadings or representations of the defendants in their response to plaintiff's allegations that there is no Zuni custom or tradition that defines resignation. However, this is a question of fact which should have been determined in an evidentiary hearing since the plaintiff has raised this issue and it was not answered in the summary judgment procedure. This Court cannot speculate as to facts or law undetermined. The plaintiff should be provided the opportunity to present evidence on this issue. Perhaps defendants are correct and there is no customary law that would assist the trial court in determining the issue, but summary judgment was not the correct procedure to follow when, as here, there is a question of law which could impact the court's determination.

Zuni Pueblo is famous and well-respected for its tradition and culture. It is critical that the courts of the Pueblo, whether they be internal or, as here, appointed from an outside agency, respect that tradition and culture. If there is any such customary law, it should be heard by the trial court and given due respect and consideration. And as we stated above, it is within the trial court's power to determine that it does not exist after allowing the parties an evidentiary hearing.

Once the trial court determines the issues discussed in this opinion, depending upon the outcome, the other issues that plaintiff-appellant has raised may be clarified. However, that is not necessary for this Court to determine at this time.

We wish to assist the parties in determining the process upon remand. Once the trial court holds its hearing in response to this remand and issues its opinion, if either party still wishes to appeal, it will be considered a new appeal. Therefore, the Zuni Appellate Code requirements must be met: a proper notice of appeal timely filed, bond when required, certification of the record of the new matter, and any other applicable requirements.

We therefore order that this matter be remanded to the Zuni Pueblo trial court for a hearing and additional findings in conformance with this opinion.

IT IS SO ORDERED.

July 22, 1998

ELLEN R. HEART, Petitioner-Appellee,
v.
MANUEL HEART, Respondent-Appellant.

SWITCA No. 98-005-UMU
UMU CT.IND.OFF. No.DR94-0002

Appeal filedJune 1, 1998

Appeal from the Ute Mountain Ute Court of Indian Offenses
Eldon M. McCabe, Chief Magistrate
Patricia A. Hall, Attorney for Appellant
Ellen R. Heart, *pro se*

SWITCA Appellate Panel: Rodgers, Abeita & James

SUMMARY

In this action for modification of child support, the funds given to each tribal council member for the purpose of aiding tribal members in emergencies cannot be automatically considered to be income to the council member and only those funds retained by the council member will be considered as income. The order modifying child support may be made retroactive to the date the petition for modification is filed. Reversed in part and remanded.

OPINION AND ORDER

I. Introduction

This case arises out of a dispute concerning support for the parties' daughter. Respondent-appellant Manuel Heart ("Manuel") argues that the trial court erred as a matter of law in including a yearly bonus as regular income in calculating the amount Manuel should pay to petitioner-appellee Ellen R. Heart ("Ellen"). Manuel also argues that the trial court erred when it made the award of increased child support retroactive to the date that petitioner filed the request for modification of the underlying child support order. Pursuant to 25 C.F.R. §11.500, this Court can review all issues of law presented to us. However, we cannot reverse the trial court unless legal error affected a substantial right of a party or the outcome of the case. For the reasons set out in this opinion, the appellate panel reverses in part, remanding for further fact-finding, and affirms in part. The trial court erred in including the entire bonus as regular income based upon testimony that the bonus was not a regular part of the salary of Manuel, and, in fact, is given to him for distribution to other tribal members. As to making the amount due retroactive to when Ellen requested modification, the decision of the trial court is affirmed.

II. Pertinent Facts

Ellen and Manuel are the parents of a daughter who is nine years old. Ellen and Manuel were divorced on May 26, 1994. The divorce decree requires Manuel to pay child support in the amount of one hundred dollars ($100) per month. This was to be made by payroll deduction and submission to the registry of the court (order of October 3, 1994). In February of 1995, Ellen filed a request to increase the amount of child support from one hundred dollars ($100) a month to two hundred and fifty dollars ($250) per month, but this was resolved by the parties. The request that is at issue in this appeal was filed on August 18, 1997. Ellen requested a modification of child support because she was losing her job the next week (Affidavit filed in trial court on August 18, 1997.) Ellen was seeking employment in Albuquerque, but was anticipating a decrease in salary of, at a minimum, sixty percent (60%). (Affidavit filed in trial court on August 18, 1997.) At the same time, Manuel's salary increased. A hearing was set for September 2, 1997. At that hearing, the trial court ordered Manuel to provide evidence of his total income to the court.

III. Proceedings Below

The record establishes that Manuel failed to comply with the court order to present his pay check stub to the court. This prevented the court from reevaluating his child support obligation pursuant to the applicable child support guidelines. The trial court considered this failure to be a "knowing, wanton refusal to comply with this Court's order." (Judge McCabe to D. Penry, October 31, 1997.) On December 5, 1997, the court entered an order to show cause why Manuel should not be held in contempt of court for "failure to submit most recent payroll check stub as ordered." The hearing was December 19, 1997,

four months after Ellen lost her job. Ultimately, the court had to issue a subpoena to the Ute Mountain Ute Tribe's payroll department to obtain the necessary information *(Subpoena duces tecum* issued December 5, 1997).

The documents provided by the payroll department state that Manuel received a "Onetime Counc. Bonus" in the amount of fifteen thousand dollars ($15,000) in 1997. This was in addition to salary as a tribal councilman and as an employee at the "Public Works/Clinic." (Report of finance director filed with court on December 19, 1997.) Other documents refer to this as an "annual bonus". In total, Manuel's monthly gross income, including the bonus, was $4,947.00. Ellen's was $824.00 (Child Support Worksheet A, filed January 14, 1998).

On January 14, 1998, the court entered an order entitled "Deadline for Objections: Child Support Modification." The court concluded that Manuel's monthly child support obligation was six hundred twenty four dollars and ninety cents ($624.00). The court informed the parties that:

> The court will enter a final order for child support modification on January 29, 1998, which relates back to the date of the request for modification: August 18, 1997 UNLESS you inform the court in writing of your objections prior to January 29, 1998. (Order filed January 14, 1998.)

Manuel retained an attorney who filed objections to the court's proposed conclusions concerning the amount owed, asserting that there was a miscalculation. Counsel did not, at that time, raise any objection to the court's determination that the final order would relate back to August 18, 1997. (Objection to child support modification order and request for hearing filed January 23, 1998).

After continuances and the recusal of one judge and appointment of another, the court issued an order entitled "Child Support Modification Order" on March 10. 1998. The court's pertinent findings were:

> (1) the Court's past practice was to "calculate child support based upon the guidelines found in Colorado Revised Statute §14-10-115";
> (2) Manuel's tax records indicate his income at $56,768.89 in 1997, of which $54,018.89 was income as a tribal council member;
>
> (3) "[Manuel] testified that his salaried income as a council member should be reduced by the sum of $15,000 he received as a lump sum payment which has been traditionally utilized for personal expenses and as gifts to tribal members. Testimony indicated that in the current fiscal year, the $15,000 represents a change in that past payments to council members were made as 'discretionary' monies, as opposed to the lump-sum payment for the same purposes made during the current fiscal year which ends on September 30, 1998. Although the intention of the tribal council is to eliminate the lump-sum payment in the future no evidence was presented that an actual budgetary change has yet occurred to match the intention. As the court's practice has been to utilize Colorado statutory law for purposes of calculating child support, Colorado case law interpreting same indicates that a court is bound by the facts and circumstances of the parents and children as they exist at the time of the hearing. See, *In re the Marriage of Serfoss*, 642 P.2d 44 (Colo.App. 1981). Therefore, the court rejects the argument of respondent that the $15,000.00 lump sum payment should not be included in his gross income;" and
>
> (4) "Based upon the above, [Manuel's] gross monthly income for purposes of calculating child support is $4616.00." (Order of March 10, 1998 at p. 2).

As with its previous order, the court ordered "that [Manuel's] child support obligation of $474.96 per month begins on August 18, 1997, the date of the request for modification." (Order of March 10, 1998 at p. 2).

Manuel thereafter filed a motion for reconsideration on March 17, 1998, arguing that the court made errors of law and fact. He asserted that the court's treatment of the $15,000 annual bonus was not supported by the testimony. Reciting the testimony of Wilfred Madrid, Executive Director of the Ute Mountain Ute Tribe, in the past certain funds were held by the tribe and paid directly to needy tribal members. This had the unintended result of some of tribal members losing public benefits because these monies were considered as income. The Tribal Council decided to give each member a $15,000 bonus. Members were to use the money to assist needy tribal members. Manuel also pointed out that the bonus was paid after the request for modification had been filed. For the first time, Manuel also sought reconsideration of the issue of retroactive application. (Motion for reconsideration, page 2). The court denied any change as to these two points. (Amended child support modification order filed March 23, 1998). There was an additional modification so that the final order relative to this request for modification of child support was entered on April 13, 1998. The notice of appeal was filed April 29, 1998, with certification of the record by the trial court

on May 20, 1998. This court accepted jurisdiction over the appeal on August 6, 1998.

IV. Analysis of Issues

A. Whether the bonus should be considered as income for the purpose of determining child support payments?

Federal regulations that apply to this appellate tribunal set out the appropriate choice of law analysis. See 25 C.F.R. §11.500. We first look to federal law and regulations of the Department of the Interior and tribal law, both written and customary law. Customary law, if in doubt or disputed, **allows the Court** to request the advice of counselors familiar with tribal customs and usages (emphasis added), Where a matter is not covered by these regulations, we are to apply the law of the state in which the matter in dispute lies. Tribal law is no different. The calculation of child support is a matter that is not fully addressed in federal law or Bureau of Indian Affairs regulations. (See 25 C.F.R. §11.608 *Final decree; disposition of property; maintenance; child support*). Tribal law follows state law.

"Colorado statutory law specifically includes bonuses and commissions in the definition of gross income used to calculate child support.§14-10-115(7)(a)(I)(A), C.R.S. (1995 Supp.)" *In re Marriage of Finer*, 920 P.2d 324 (Colo. App. 1996). It is clear that this "bonus" was treated as tribal council income for tax purposes. However, there was testimony presented to the trial court as to two reasons why this should not be treated as income for the purposes of determining child support. The first reason given was that the "bonus" was not really income to Manuel, but money he was to hold in a fiduciary capacity for needy tribal members and disburse as needed in lieu of direct payments from the tribe to the needy tribal member. [1] The second reason given was that there was no guarantee that this bonus would be paid in the future. Where there is no certainty about the payment of a bonus in the future, Colorado courts do not automatically include a bonus in gross income for purposes of determining child support. Here the court found that it was in fact an annual bonus, and there is evidence to support that determination.

This does not answer the question of whether this annual payment should be considered gross income for the purpose of determining child support obligations. To the extent that this "bonus" was not intended to compensate Manuel, or even to be used for his personal benefit, it is generally not part of gross income for determining child support. Making support payments for this child is a personal responsibility, not an official responsibility. Indeed, use of these monies for personal expenses such as child support could violate tribal law in light of the legislative purpose in distributing these funds to tribal councilmen solely for the benefit of needy tribal members. However, if Manuel did use the money for personal expenses or needs, thereby treating it as personal income, it should be considered as gross income for the purpose of determining child support obligations. This analysis requires additional fact-finding by the trial court. This matter is remanded to the trial court for a new determination of the amount owing to Ellen for the care and support of their daughter. Given the uncertainty as to whether the monies were in fact distributed to needy tribal members, whether Manuel returned any excess to the tribe, or whether the practice was continued, the trial court may wish to consider an alternative remedy not unlike that applied in *In re Marriage of Finer*, supra:

> Because of a lack of certainty of future bonuses, the court direct the parties to exchange copies of their W-2 tax information on an annual basis. Thus, if [one party] receives a future bonus of significance, that information will be available to [the other party] as the basis for a modified child support order.

In this particular case, Manuel would document all disbursements to needy tribal members and all monies returned to the tribe. Any excess would be a yearly bonus that could be considered as gross income for purposes of determining adequate child support.

B. Whether the court erred in applying its order retroactively?

Manuel argues that the trial court's retroactive application of its order was error because it was inconsistent with tribal customary law. As a basis for determining what is customary law, Manuel's brief refers to the second-hand interpretations by a person who allegedly practices often in the trial court as to what is the customary law. Manuel relies on 25 C.F.R. §11.500(b), *supra*, as support for using this type of evidence. There is no showing that this testimonial evidence was submitted to the trial court. Manuel also states that "former Judge McCabe ordered child support applied from the date of the hearing on modification." This is not supported by the

[1] The Court recognizes that this was done for the purposes of evading regulations to determine eligibility for public welfare benefits. The legality of the practice is not before the Court at this time, and the Court does not make any decision concerning that practice at this time.

record before the trial court. Judge McCabe entered the initial divorce decree, not a modification order. Prior to the divorce, there was no issue of child support. The requested modification at issue in this case was initially proposed to be applied retroactively by Judge Meigs in an order stating how she intended to rule and providing a deadline for any objections. Manuel did not object at that time. Rather, he first objected in a motion for reconsideration of the order entered by Judge Shanor after Judge Meigs' recusal.

As noted above in the discussion of what law should be applied, in the absence of any federal or tribal law, Colorado law can be applied by the trial court in making child support determinations. Counsel for Manuel acknowledged to the court below that Colorado law allows for retroactive application of child support modification orders. ("Although Colorado law allows for a retroactive application of child support modification to the date of filing, this is not required, particularly in a situation where it is not even required that Colorado law be applied." Respondent's motion for reconsideration, page 2, filed March 17, 1998.) The general rule is that domestic relations' modification orders are applied from the date of filing. Although tribal law does not command the application of this Colorado law, there is nothing in either federal or tribal law that expressly prohibits retroactive application.

The evidence that counsel for Manuel relies upon to establish a purportedly different customary law of the tribe, first presented to this Court on appeal, cannot be the basis for any legal conclusion as to what the customary law of the Tribe actually is. Where law is written down, there is merely a legal issue as to what the law is. A court can take judicial notice of the written law of another jurisdiction. The same method cannot be used for law that exists as oral tradition. The legal issue of what is the proper law to apply becomes an evidentiary issue subject to dispute when one party relies on the testimony of an individual to establish what the tradition is. In contrast, a trial court can seek counsel from its own advisors or appoint its own witness on the issue of customary law. This appears to be the procedure called for in the federal regulations. Where a court appoints its own witness, the parties can each attempt to show that the witness is wrong at trial. Even where one party presents testimony at trial, the other party has the right to cross-examine the witness and present rebuttal witnesses. Allowing Manuel to use allegations first raised on appeal to reverse the decision of the trial court would effectively deny Ellen her right to a fair trial on this issue.

In this situation, other than the unsubstantiated statements of one individual which were not presented to the trial court, there is no evidence tending to show that an award should not be applied retroactively to the date that Ellen filed the request for modification. The trial court is affirmed on this issue.

THEREFORE, IT IS THE ORDER OF THE COURT that the decision of the trial court to consider the entire bonus as gross income for the purposes of determining Manuel's child support obligation for the minor daughter of he and Ellen should be, and hereby is REVERSED and REMANDED to the trial court for further proceedings consistent with this opinion; and

IT IS FURTHER ORDERED that the decision of the trial court to retroactively apply the judgment to the date that Ellen filed the Request for Modification should be, and hereby is AFFIRMED.

IT IS SO ORDERED.

November 10, 1998