No. CA-06-021
Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Plaintiff/Appellant,

v.

Laura Grijalva, Defendant/Appellee.

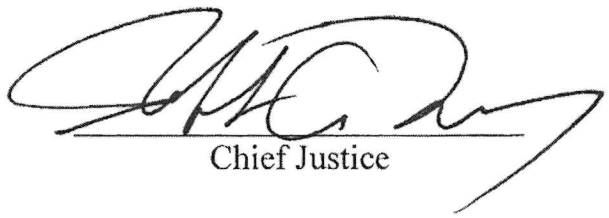
ORDER

Appeal of a decision of the Pascua Yaqui Tribal Court in Case No. CR-06-025, the Honorable Melvin R. Stoof presiding.

Yancy A. Jencsok, Esq., Pascua Yaqui Tribe Office of the Prosecutor, Tucson, Arizona for the Plaintiff/Appellant.
Gilda M. Terrazas, Esq., Tucson, Arizona, for the Defendant/Appellee.

The Court reviewed the Appellee's motion to dismiss the notice of appeal for Appellant's failure to file the trial court record and the motion to strike Appellant's brief for including "unproven allegations" in its brief and finds that both motions should be denied for these reasons: 1) The record, including the transcript, has been filed with this Court through the trial court solicitor after being notified of the appeal; the Appellant's neglect to file notice of appeal with the trial court did not prejudice the Appellee; and 2) The Court is aware that Appellant's "unproven allegations" in its brief are not facts because the case did not proceed to trial and therefore will ignore those allegations. Accordingly, the two motions are denied. It is further ordered that the appeal will be decided on the record.

So ORDERED this 9th day of October, 2007.



Chief Justice

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IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Appellant vs. LAURA GRIJALVA, APPELLEE	APPELLATE CASE NO. CA 06 - 021 PASCUA YAQUI TRIBAL COURT NO. CR 06-025 PYTRAP 10 MOTION TO DISMISS APPEAL

Appellee Laura Grijalva, through undersigned counsel, respectfully moves the Chief Justice of the Pascua Yaqui Court of Appeals to enter an order dismissing the appeal due to the Appellant's failure to comply with Title 3, Rule 9(A)(2) and Rule 7(D) of the Pascua Yaqui Rules of Appellate Court Procedure of the Pascua Yaqui Judicial Titles and Codes (Revised). The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 1 st day of JUNE, 2007.

Gilda M. Terrazas
Attorney for Appellee Laura Grijalva

copy mailed to:

Mr. Micah Schmit
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Pascua Yaqui Tribe Office of the Prosecutor
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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

On February 1, 2007 Appellee Laura Grijalva filed a Motion to Dismiss the Pascua Yaqui Tribe's appeal in this case. At that time, the grounds for Appellee's motion was that the Tribe, as Appellant, failed to perfect the record as required by PRTRAP 9(A)(2). Appellant failed to perfect the record within the 30 day time frame required by the rule. At that time, Appellee assumed that, since the Tribe filed its Notice of Appeal in the Pascua Yaqui Court of Appeals on September 19, 2006, it had filed the requisite Notice of Appeal with the Clerk of the Court for the trial court as well. It has now been discovered that Appellant failed to comply with the rules of procedure on a second, distinct requirement under Rule 7(D): Appellant failed to file a copy of the notice of appeal with the trial court. Compliance with this requirement would have initiated the Clerk of the Court's perfecting the trial record for appeal.

What Appellant did do was to compile a "record" of its own and submitted that as the "record" on which it requested the Court of Appeals decide the issues. Appellee moved to have Appellant's pleadings on Feb. 5, 2007 and also moved to dismiss the appeal on that date by separate motion. Those motions are still pending before the court.

Appellee renews her Motion to Strike Appellant's Brief and her Motion to Dismiss the Appeal and incorporates her arguments herein. Her initial motion was grounded in the fact that Appellant failed to perfect the record. We now discover, as indicated in Mr. Ben Casey's May 25, 2007 Memorandum to the Court of Appeals, that Appellant also failed to file its Notice of Appeal in the Trial Court.

Rule 9(A)(2) mandates that, within thirty (30) days, the trial court clerk is to prepare, index, and transmit the record on appeal to the Court of Appeals, and serve a copy of the index to all parties to the appeal. PYTRAP 9(A)(2). *The burden of perfecting the record on appeal falls to the appellant.* If the appellant requires additional time, the appellant may obtain an extension of time for transmission of the record. PYTRAP 9(A)(3). However, the motion for an extension of time must be made before the expiration of the time for

transmittal. Id.

The Appellant has failed to comply with a single provision of Rule 9, Pascua Yaqui Tribe Rules of Appellate Procedure. There is no record or transcript. that was certified by the trial court clerk, nor any certification of any transmittal of the record to the Court of Appeals. At no time did the Appellant request an extension from the Court of Appeals for transmittal of the record. The Appellant has utterly failed to comply with its obligation to secure a record on appeal for the Court of Appeal's consideration.

Moreover, Rule 7(D) requires the appellant to file a copy of the notice of appeal with the trial court, *for purposes of notification*, on the same day it is filed with the appellate court. Appellant failed to comply with this rule as well.

The Appellee has received no document from the Clerk of the Court of Appeals to indicate it has in fact received a certified record from the trial court. Appellee has no way of knowing whether the exhibits Appellant attached to its Opening Brief are the record received, or accepted, by the Court of Appeals. There is no index of the record which has been served upon Appellee. In short, there is no reliable record on appeal.

On April 4, 2007 Appellant continued to act on its unilaterally conceived rules of appellate procedure by filing a pleading encaptioned "Tribe's Memorandum of Inquiry." Interestingly the Tribe did not serve the Pascua Yaqui Trial Court with a copy of this 'inquiry' even though it related to the trial court's handling of the trial court records. Therein the Tribe claims that "purely in the interests of clarity" it filed the 'Memorandum of Inquiry' to apprise the Court of Appeals of circumstances in numerous cases it had appealed from the trial court. But the Tribe actually goes beyond is self-appointed duty of apprising the Court of Appeals by requesting a "reprieve" or "amnesty" from the Court of Appeals. There is no authority which authorizes a party to seek relief from the Court of Appeals under a "Memorandum of Inquiry." The Tribe's request for 'amnesty' must be denied, particularly in light of Mr. Casey's Memorandum to the Court of Appeals, which brings to light the true reason for the confusion regarding the appeal in Laura Grijalva's case. The reason the Court of Appeals did not receive a certified record from the trial

court was that Appellant failed to file a copy of th Notice of Appeal with the trial court as required under Rule 7(D). Appellant cannot now request "amnesty" for failing to perfect the record.

Should Appellant's filings be accepted by the Court of Appeals, Appellee is placed in the difficult position of trying to construct its own record, and either confirm or disaffirm the accuracy of what she has received from Appellant. The Rules of the Pascua Yaqui Court of Appeals has no provision to require, or direct, such actions. Rule 10 of the PYTRAP does provide a remedy when the Appellant fails to properly file a record as prescribed: dismissal. If the appellant fails to timely file the record, the chief justice of the Pascua Yaqui Court of Appeals may summarily dismiss the appeal. PYTRAP 10(B). That is the appropriate remedy in this case.

WHEREFORE Appellee Laura Grijalva respectfully moves the Honorable Chief Justice Robert Williams to enter an order dismissing the Appellant's appeal.

DATED this 1 st day of June, 2007.

LAW OFFICE OF GILDA M. TERRAZAS

Gilda M. Terrazas
Attorney for Appellee

Copy mailed this ____ day of June, 2007 to:

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IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Appellant vs. LAURA GRIJALVA, APPELLEE	APPELLATE CASE NO. CA 06 - 021 PASCUA YAQUI TRIBAL COURT NO. CR 06-025 MOTION TO SUPPLEMENT APPELLANT'S BRIEF

Appellee Laura Grijalva, through undersigned counsel, respectfully moves the Court for leave to supplement Appellee's brief with submission of the attached Transcript of the trial court's hearing on July 26, 2006. This transcript was identified as Exhibit E to Appellant's brief and labeled ' Transcript (motion hearing) August 21, 2006. In fact it is the transcript of the July 26, 2006 trial court hearing which contains the colloquy by the court and the parties reference Count I of the Complaint. Appellee makes reference to the transcript in her brief. The transcript was not attached to the brief in error.

Respectfully submitted this 6TH day of February, 2007

Gilda M. Terrazas
Attorney for Appellee Laura Grijalva

copy mailed to this 6th day of
February, 2007 to: (without attachment)

Mr. Micah Schmit
Chief Prosecutor
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Appellee's Brief

Appendix A - Transcript

July 26, 2006 Hearing

Pacua Yaqui Trial Court

Pascua Yaqui Tribe .vs. Laura G. Grijalva CR-06-025

JS:	Judge Stoof	YJ:	Yancy Jencsok
MS:	Micah Schmit	GT:	Gilda Terrazas
CC:	Court Clerk		

JS: This is CR-06-025, PYT vs Laura G. Grijalva. If you could please announce who you are for the record?

YJ: Well, I was here for Micah Schmit but he just walked in, so.

JS: Ok

GT: Gilda Terrazas for Laura Grijalva who is present out of custody seated to my right, you honor.

JS: Alright, the court has received a proposed plea however, upon closer look on the file, I had an issue as to count 1 and even though parties can always waive personal jurisdiction, subject matter can never be waived and if there is an issue of subject matter can be raised at any time by the court itself.

GT: Your honor, if I may?

JS: Yes

GT: Mr. Schmit contacted me this morning. The plea agreement has been amended to allow Ms. Grijalva to plea to count 3 and count 10.

JS: Well here's, here's the issue of. It's an issue of do I have authority to (interrupted)

GT: Order the restitution

JS: Order restitution in count 1, because the restitution is basically derivative of the claim in count 1 and under Indian Civil Rights Act as well as the Tribal Constitution in section 128 has to be commenced with in 1 year from the date of the alleged offense so if I don't have jurisdiction criminally over count 1, I wouldn't have jurisdiction over the restitution for count 1, so I don't know whether the proposal was that you're going to be filing a separate civil action for civil restitution and include that because if I don't have jurisdiction over count 1, Fraud, than I wouldn't have jurisdiction to award restitution arising out of that claim, so I mean, in effect it becomes a civil restitution claim and I have a feeling that the drafters of this code because it's a unique statute in that typically when you have you know state or federal statutes it's, my statue says: The court can order restitution arising out of the crime if it's, if you can prove cause injury. Article 7 post verdict proceedings rule 700 sentencing section B and this is in the criminal code now. It says civil restitution, in addition to our incentive penalties provided in subsection A above, the court may require a convicted offender who has inflicted injury upon the person or property of another to make restitution or compensate the injured person by means of the

surrender of property, payment of money, or the performance of other act for the benefit of the injured party which is reasonably related to the offense committed. Testimony of the victim shall be considered determination of appropriate disposition under the section. But again it's derivative of the court having jurisdiction in a finding of guilt or an entry of a plea as to the count, so as far as count 1, I don't know whether I even have jurisdiction at this point over count 1 (interrupted)

GT: It's true your honor.

JS: Because it was filed more than a year. So I don't know how the parties wanted to resolve that, again whether you're going to stipulated to a civil judgment in a separate proceeding but I don't believe under our code that I would be able to take jurisdiction of that because it's a matter of law. Under ICWA, Indian Civil Rights Act, under the tribal constitution which limits claims to 1 year as well as section 128 of the Law and Order code. If it's filed past a year, I don't have it, it's. As I said before it's like being a little pregnant, I'm either am or I'm not and I mean it's, it's beyond a year and I don't think I can maintain subject matter.

GT: If it's not criminal in nature then it would require, I guess a motion to dismiss and the Attorney General's office can than decide to proceed.

JS: For count 1. On count 1. And again by doing that it doesn't waive any right of the tribe to go against Ms. Grijalva civilly. I'm sure you can advise her of the potential exposure civilly. But I, I feel at this point I don't have the subject matter to listen to the proceeding for count 1 for purposes of a criminal proceeding. So as far as this plea then goes and I understood the amount agreed upon was $5759.22 would obviously affect that if it includes count 1, the allegation was $3413.22, again I'm not going to tell the tribe or Ms. Grijalva how to handle potential exposure on a civil claim or what the statutes are for that matter. I'm just saying for the purposes of a criminal proceeding I don't believe I can include that as part of a criminal plea agreement. Any thoughts, any suggestions?

MS: Yes, thank you. The court may recall that you have identified that at the very beginning when the initial hearing or arraignment, one of the very first proceedings occurred and I asked the court to indulge me in a little patience on that pending a retention of counsel either public defenders or private conflicted counsel and it was for this reason that I intended to litigate the statutory affect of the limitations having arguable gone by, by I think it was a few days or a few weeks. With the idea that what would litigated is when the offense occurred. As you know, fraud counts both federally and state side the time lines don't begin until the discovery of the fraud otherwise you would reward a clever thief or embezzler or so forth to simply hide his action until that statue of limitation had run. So for that reason all statues of limitations generally in fraud or concealment kind of cases don't begin not from the offense execution but from the offense discovery. What I intended to preserve for litigation if a plea hadn't been brokered is the argument that the fraud crime is on going and that you can still argue that the statue of limitations doesn't begin because the concealment is still on going until actually discovered by the victim and in that sense you still have the beginning in a sense of offense crime up until the point it is finally discovered and then the concealment, the crime that the necessary part of the embezzlement or fraud or whatever has now truly begun because it's now been discovered by the

victim and in that sense the crime has now ended and it's discovery has occurred and now you have truly begin the statue of limitations, that's what I would have presented. The court may not have bought that or it may have found that in the interest of justice that, that's worth entertaining, regardless of how the outcome by the Tribal Court would of occurred on that argument, I'm sure that either side because it would have contemplated no plea, either side would have then appealed that decision on way or another. What a plea does of course is contemplate for both sides the risks of going to trial and the trade off's involved and what we did here was, you know, was substantially less then the total sum of the 14 counts was negotiated a reasonable financial settlement a long with a very reasonable charging or conviction settlement. And what I would submit to the court is, I'm agreeing with you in part for sure and that is I don't think jurisdiction is something that can necessarily be waived and the court alternatively can raise it on it's own, it's not something that the defendant has to raise or it's waived, so I have no issue with the court raising this and asking it to be defended of it's own. What I'm submitting to the court it that there is a reasonable bases to potentially interpret the statue and to avoid the litigation on that embodied in the plea is that resolution and separate from all of that it's my experience that restitution can be negotiated for things that are maybe not even criminally contemplated so long as it has been bargained on a fair level with the other side (interrupted)

JS: But, but if I... but if I ...

MS: That's a separate one ...

JS: Yeah, but the question I have is if I don't have jurisdiction over 1 presuming that to be the case, I wouldn't be able to include it as part of a plea so in effect what it might create an ethical dilemma of, you know saying, I'm going to buy my way out of a potential criminal proceeding, which I know that's not happening because if I don't have jurisdiction, I don't have jurisdiction. But the question is, but it's only if it's not part of a criminal proceeding in effect, wouldn't it be left as a civil restitution as the remedy. If I don't have jurisdiction in the criminal court here and the tribe wishes to proceed against Ms. Grijalva I mean wouldn't it in effect be a civil remedy, if you were to exercise that.

MS: It could. What I'm saying is simply in my experience in other circumstances and I've handled hundreds and hundreds of restitution cases, you can negotiate restitution for things that aren't even provided for under criminal restitution so long as it was equally bargained for. Criminal restitution doesn't provide for pain and suffering, for example. And routinely (interrupted)

JS: Wouldn't it have to arise out of the criminal act for which the court has jurisdiction?

MS: Not necessarily if it's part of a resolution and in this case it's a guaranteed non pursuit, that's part of what's contemplated here. It won't be pursued it won't be litigated. I mean if you want we can simply amend the indictment and do counts 2 through 14. I will charge count 1 separately and we'll continue litigating this for two years, through you, through the appellant courts and there will be no silence or rest or conclusion from the defendant's stand point. I don't think that's what they want. I can certainly bifurcate that which the courts has problems with but I think really what's happened here is the defendant and counsel have really thought about this and in the interest of everybody, this is a way to close it out. It's affordably both from the

government stand point as far as convictions and resolutions goes and from the defendant's stand point in the way of payment. So I would propose that as an alternative but I don't want the court to lose sight of the very first point and that is; there is a reasonable bases to litigate the viability of the charge initially by virtue of if it's still hidden is not the crime still on going. It hasn't been ended and therefore there is a beginning time of the statue of limitations. The crime is still continued.

GT: Your honor, if we can recess for five minutes, we can maybe; I mean he is discussing bifurcation of that count. I'm sitting here listening to his argument; I don't know if Mr. Schmit would be amenable to addressing the courts concerns for five minutes with counsel or whether he just wish to proceed with argument.

JS: Do you mind a recess?

MS: No, I don't mind a recess.

JS: Any objection? Take a brief recess? Let's take about a five minute break.

GT: Ok, thank you your honor.

JS: Pascua Yaqui Tribe –vs- Laura G. Grijalva. We had a brief recess. Any resolution, any suggestions?

MS: Sure judge, if the court is willing to embrace the plea anyway, that would be our first option. If the court has listened to the arguments made and decided that none of those would be acceptable then what we would suggest is at defense counsel's leisure and the court's calendar of course, is reset this so we can redraft it according to, I think it was the third option, which is segregating count 1 out into a separate proceeding, separate case and having 2 through 14 be the resolved plea and of course we would want to clean up the documents to reflect that. So depending (interrupted)

JS: Well, are you asking me to rule on the issue of the jurisdiction today as far as count 1, or?

MS: Yes, because I think it would be determined if the court would accept that it's potentially in good faith litigatable and there is a bases to possibly still find jurisdiction because of concealment, the on going concealment makes for a potentially ongoing crime, our first choice is to just go forward with the plea as we bargained for.

JS: Any response?

GT: Your honor, our discussion was, let the court make its decision on the issue of jurisdiction to order a civil restitution amount and based on Mr. Schmit's arguments and now judge the defendant and I signed the plea agreement and, you know, in good faith that's all I'm going to submit to the courts is that we negotiated and we signed it. If the court does not decline jurisdiction to honor that restitution than Mr. Schmit and I said bifurcate count 1 for a different

proceeding and then let us come back with the plea agreement on the remaining counts that the court feels it does have jurisdiction over for which to decide.

JS: I'm going to go ahead and, and grant the request to both continue this but I'm going to go ahead and grant a bifurcation, because again the issue comes of count 1 just how do you proceed on this and I'm just thinking also I guess in terms of both civil and criminal as far as allegations of bank fraud and you look at UCC and it provides civil remedies of 30 days in which an account holder has a duty to look at their bank accounts but even there up to 1 year is permitted under Federal statutes for at least National Banking Associations and that's considered a generally accepted business practice that within 1 year an audit function is done to determine if there has been any alleged fraud or any alleged problem with accounting, an account so that raises the issue of discovery rule of just how far would that toll the statute if, if it can be tolled for a fraud. And again this is an issue, don't come up quite often in tribal court because we often don't have a lot of UCC codes in the tribal courts at least in which I've practiced. There is not a whole lot to do that as far as setting but for purposes of the criminal prosecution often times that language is very similar to those provisions in the UCC code in bank fraud issues. So those are applied, those civil arguments are generally applied for purposes of arguing why the statute should be tolled for purposes of a discovery of fraud. So these same issues have been, so those are sort of instructive to this issue of whether it proceeds. But 128 of the code, the only way that it can be tolled is either if the defendant is outside of the jurisdiction beyond that time frame or two, was avoiding prosecution. So those it appears under 128 seem to be the explicit reasons why a court can go beyond 1 year for a filing. And again I don't know, I'm certainly open to hearing arguments as far on count 1 why I can retain the jurisdiction if I'm going to reserve on any ruling of the jurisdiction on count 1 whether the court has jurisdiction over the matter for purposes of a fraud based on some argument of a discovery rule. So what I'll go ahead and do is separate out then counts 2 through 14 and I'll reset that matter for a plea, a proposed plea. Now how long do you think this would take to, as far as briefing the count 1 issue, as far as, do you want me to set this for the same time and day; or do you want to hold off on any plea, proposed plea to be submitted until we resolve count 1.

MS: Would it be practically possible to separate them out even to the extent that they are carrying separate case numbers. If only by sub set A and sub set B or something.

JS: Under provisions here, under our procedure you have to have a separately filed … and I'm just bifurcating, what I'm doing right now is keeping the same case number. I'm just separating these out for purposes of proceedings. One is, you know I'm basically setting aside, my ruling would be to have count 1 set for a jurisdictional hearing solely as to the jurisdiction over count 1. But my … (Interrupted)

MS: Right, fine.

GT: Your inclination is to set a legal hearing on... (Interrupted)

JS: Yeah, yeah, just for the legal arguments on 1 only

GT: Ok, so

MS: What I think would be in the defendant's interest though is to have finality… (Interrupted)

GT: Thank you Micah

MS: Finality on 2 through 14

GT: (laughing)

MS: What?

GT: Never mind

JS: If there's no objection, I'll just set 2-14 for a proposed plea hearing. If that is what the parties…

GT: I don't mind arguing the _____ phrase _____ extension of the jurisdictional issues in count 1 for legal hearing and I don't mind at that date notifying the court whether we've reached a plea agreement on 2 through 14.

MS: We've already reached an agreement on 2 through 14, so we can set that tomorrow or next week. I think briefing the motions on the first issue is going to be much more time consuming.

GT: We'll I'm _____ judge, if I can have a legal hearing and then he going to fax me the plea agreement. That would be fine with me.

JS: Okay. Let's go ahead and set count 1 for a hearing, again on the issue of the statutes for the _____

MS: I may object to all of this then so, the current plea agreement is not being accepted by the courts so we are at square one and in theory we can litigate all 14 counts or plea all 14 or bifurcate or do whatever, I mean that's the up shot. Is this plea hearing is being continued or vacated?

JS: Any, any, either party can withdraw a plea at anytime.

MS: Correct.

JS: Again I have to raise issues of jurisdiction because the court you know has its own concerns about; I understand that parties have agreed. I understand what they have agreed to… (Interrupted)

GT: I understand your honor.

JS: But the point is I've got to preserve my ability to maintain authority over a case and again I'm raising subject matter because it sets, it sets a precedent also opens up the potential of having even a writ of habeas corpus filed or federal tort claims filed for violation of someone's rights under the Indian Civil Rights Act, in, in light of the fact that I'm a 63800 BIA ____ BIA,

exposing the court to potential exposure under federal tort claims. If I act ultra veres beyond the course and scope of my authority and I can also be individually sued for not up holding the laws of the tribe. So again I raise issue because the court is in a position to determine its jurisdiction and under numerous US Supreme Court cases the court must establish whether it has jurisdiction over a particular matter. Now the other issue we have a notice law here. In which, if there's ever a question about whether court has existing jurisdiction over a particular claim whether it be criminal or civil or any other matter. I can notify the Attorney General to assist the court to determine whether I still can maintain jurisdiction over this matter or not. Again I'm just raising the issues of jurisdiction. I haven't made a ruling on them yet. So if there is no objection what the court can do under the notice provision which was passed very recently in 2005 for situations like this, where the court does not have a solicitor general in the sense of having being able to talk to the solicitor to advise the court about whether it had the jurisdiction to permit the Attorney General an opportunity to give them notice of the briefing and perhaps they can file an amicus curie brief or briefs for the court to make recommendations as to whether I have continuing jurisdiction over count 1.

GT: Your honor the defendant has no objection to setting a hearing on that issue, the jurisdiction issue, allow time for briefing and we can, Mr. Schmit said he wanted to clean it up and fax me the plea agreement and we can set that for the same date and time. That makes sense. I have no problem with that.

JS: Whether there's a plea to go forward or not I think that's probably appropriate. We'll set it for a legal hearing as to count 1 on the jurisdiction and we'll set it also for, whether there may or not be a proposed plea as to count 2 through 14, we'll need to proceed as a plea hearing or as a status conference depending on whether the plea goes through. So I'm going to go ahead and set count 1 for, again a legal jurisdiction and just to notify the parties, I'll be sending a notice to the Attorney General's office under the this notice law. I'll provide you the sections of that so you can both look at that notice law. This was recently enacted in 2005 to ensure that the court in, when it has questions of jurisdiction, whether it be personal or subject matter jurisdiction that it can have the assistance of the Attorney General, or input from the Attorney General on whether it can exercise continuing jurisdiction over a particular case. So that's specifically what the notice law is designed to, to resolve. So we'll go ahead and address that and we'll hear all other legal arguments. How much time do you think we will need to do briefing and responses?

GT: Your honor, I have a trial that I'm preparing for on August 3rd, so if I could have anywhere from seven days after August 3rd to brief on that issue.

JS: How much time do you need to?

MS: I don't mind if she takes another week on top of that to file her opening motion. If the same consideration is given to the tribe, you know, instead of ten days, twenty days, I'm just offering it.

GT: The court has framed the issue; can't we just file simultaneous briefings on that issue?

JS: Can you both get in by August 10th? Again the issue is pretty straight forward is do I have, do I have jurisdiction over the case

MS: Yeah

GT: Yeah, you framed the issue and we are briefing the court on that issue.

MS: There is a reason why it's sequential and that is so that the responding party has an opportunity to address case law, novel, arguments of policy, that kind of thing in its response.

GT: That's fine your honor. I will file my brief on August 10th.

JS: I'm going to just order that both briefs be filed at that time, both be submitted to the court on August 10th. So we'll go ahead and set this matter for hearing at a later date beyond that time and I going to also send a notice to the Attorney General providing them an opportunity to respond by August 10th, so that both of you can have an opportunity to look at the Attorney General's response to this whether they respond at all.

CC: (setting date and time) Monday, August 21st, 3:00.

JS: Ok we'll go ahead and set count 1 for legal arguments as well as Status Conference as to count 2 through 14. And the court will issue an order to AG's under the tribal notice law to see whether they want to give any recommendations or file any friends of the court briefs. Okay, see you back here on August 21st.

All rise.

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Deputy Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. GRIJALVA, LAURA, Defendant/Appellee,	Trial Court case number: CR-06-025 **Appeals Court case number: CA-06-021** **APPELLANT'S REPLY BRIEF**

Tribe/Appellant ("Appellant"), through counsel, hereby responds to Defendant/ Appellee's ("Appellee") Responsive Brief as follows:

ARGUMENT

A. The standard of review is *de novo*.

Appellee claims that the standard of review should be abuse of discretion. However, generally the standard of review with questions of law is *de novo*. More specifically, federal courts have held that jurisdiction is a question of law to be reviewed *de novo*.[1] Since the basis for the Judge Stoof's dismissal order was jurisdiction, the standard of review should be *de novo*.

///

[1] See for example ***U.S. v. Neil***, 312 F.3d 419, 421 (9th Cir. 2002).

B. The cases cited by Appellee continue to be point with respect to applicability of a statute of limitations defense in a plea agreement context.

Appellee states that there is a split of opinion regarding how state courts view the statute of limitations only. One case Appellee cites, ***People v. Ware***,[2] holds that the statute of limitations is a jurisdictional bar to prosecution. But ***Ware*** is distinguishable on several grounds, the most important of which is that ***Ware*** does not involve a mutual plea agreement. All of the cases cited by the Tribe involve plea agreements, as that was the circumstance at bar. As the Appellant's hearing transcript evidences, the primary issue in this case involves whether a statute of limitations can be waived in the context of a plea agreement or *must* the trial court reject it.

Appellee cites two other cases in support of her claim of a split of decision among state courts, ***People v. Simon***,[3] and ***Hall v. State***.[4] However, once again, neither case examines the plea-agreement circumstance. ***Simon*** deals with venue, not a statute of limitations. The single reference to statute of limitations is in a footnote and is not the basis of the decision. And ultimately, the court overrules the defendant's venue challenge. It is unclear even why Appellee cited this case.

The decision in ***Hall*** does involve a statute of limitations. But the issue was whether a defendant could be convicted of a lesser included offense when the statute of limitations on that offense had expired, but the statute of limitations on a greater offense (which included the lesser included offense) had not expired. The court reversed the conviction on the lesser included offense without addressing whether the statute of limitations was a jurisdictional bar or an affirmative defense. And as in the above cases, ***Hall*** involved a contested trial, not a plea agreement.

Appellee next questions whether a statute of limitations defense can be waived. Appellee again cites ***Hall*** and two additional cases, ***Padie v. State***,[5] and ***Tucker v. State***,[6] which support the proposition that the statute of limitations can be waived – exactly the argument that the Tribe made to the trial court and the argument that it has made to this Court. Although the

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[2] 39 P.3d 1277 (Colo.App. 2001).
[3] 25 P.3d 598 (Cal. 2001).
[4] 497 So.2d 1145 (Ala.App. 1986).
[5] 594 P.2d 50 (Alaska 1979).
[6] 459 So.2d 306 (Fla. 1984).

case law cited by Defendant/Appellee supports Appellant's argument, Appellant must point out that ***Hall*** does not involve a plea agreement. Neither does ***Tucker***. The one case that does involve a plea agreement, ***Padie***, *upheld* the waiver of the statute of limitations after it was challenged by the defendant. It therefore remains puzzling why Appellee cited these cases to address the issue posed today.

C. The parties did not withdraw from the plea agreement.

Appellee argues that the parties withdrew from the plea agreement via their request to separate the issue of the statute of limitations. She claims that this request, and the subsequent briefing and oral argument on the issue imply a withdrawal. Appellant wishes to make clear that at no time did it withdraw from the plea. In addition, Appellee never formally withdrew from the plea, and even in her brief, does not explicitly state that she withdrew from the plea. At any rate, this appeal is from Judge Stoof's order of August 21, 2006, wherein *he* (not Defendant) refused to accept the plea on statute of limitations grounds. To emphasize if not reiterate, it was the trial judge who had exclaimed he was under the impression that statute of limitations in general bar even a mutually bargained for plea agreement over the same offense.

D. Appellee's claim that the facts do not support a lengthening of the statute of limitations is premature.

Appellee argues that the record does not support a conclusion that the fraud offenses were continuing. That is correct. There was no evidence taken on this issue. However, this is exactly Appellant's point. Count 1 should not have been dismissed out of hand by the trial court. Had the trial gone forward, the Tribe would have presented evidence that Defendant's conduct was of an ongoing nature, thus justifying an "extension" of the statute of limitations. That absence doesn't change the opportunity for this Court to examine the law, *de novo*, and determine the unique starting and ending points for a fraud or deception-based tribal offense.

CONCLUSION

Defendant/Appellee has presented no on-point legal authority, and scant logical argumentation, addressing bargained-for plea agreements and the insulating effect that action has on an offense's statute of limitations. Therefore, judgment should be for the Appellant.

RESPECTFULLY SUBMITTED this 20th day of February, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR

YANCY A. JENCSOK
Deputy Prosecutor
Counsel for Appellant

Original delivered to:

Clerk, Pascua Yaqui Tribe Court of Appeals

Copy mailed/delivered to:

Gilda M. Terrazas
Attorney for Defendant/Appellee

On February 20, 2007 by: _____

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Yancy A. Jencsok
Deputy Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. GRIJALVA, LAURA, Defendant/Appellee,	Trial Court case number: CR-06-025 Appeals Court case number: CA-06-021 **RESPONSE TO DEFENDANT/APPELLEE'S MOTION TO DISMISS**

Plaintiff/Appellant ("Appellant"), through counsel, hereby responds to Defendant/Appellee's ("Appellee") Motion to Dismiss Appeal as follows:

ARGUMENT

A. It is not an appellant's burden to insure that the record on appeal is transmitted to the appellate court.

Appellee insists that it is the duty of the Appellant to prepare and transmit the record on appeal. This argument is not supported by the Appellate Rules, by practices in any other jurisdiction around the country, nor is it supported by logic.

PYTRAP Rule 10(B) states that "[i]f the appellant fails to timely file the record, the chief justice *may* summarily dismiss the appeal." (emphasis added) However, as discussed below, other portions of the Rules place the burden of actually preparing and transmitting the record squarely upon the shoulders of the trial court clerk.

PYTRAP Rule 9(A) is titled "Composition of Record on Appeal; Transmission of Record" and discusses in detail the record on appeal. Section (A)(1) describes what

makes up the record. The record is "the original papers, exhibits, and other objects filed with the trial court clerk, a reporter's transcript, transcription of an electronic recording or narrative or agreed statement, and copies of all entries." Section (A)(2) directs how the record shall be prepared. In a relatively short section comprising 73 words, the phrase "the trial court clerk shall" is used three times: The trial court clerk shall number the items comprising the record. The trial court clerk shall transmit the record. The trial court clerk shall serve the index. All of these are duties given to the trial court clerk. Nowhere in Section (A)(2), nor anywhere else in Section (A) does it state that "the appellant shall." Section (A)(3) does give the appellant *permission* to motion for an extension of time. But there is no accompanying duty or responsibility mentioned, and again, there is no mandatory language used anywhere in Section (A) in reference to the appellant.

In addition to the explicit language of Rule 9(A), logic indicates that the trial court clerk should be the one to prepare and transmit the record. A trial court clerk has possession of all the elements of the record, most importantly the original pleadings and the exhibits. Indeed, the trial court clerk is the only one most likely to have a complete and unbiased record of the proceedings. Other jurisdictions commonly require the trial court clerk to prepare and transmit the record when there is an appeal. Both the Arizona criminal and civil rules of procedure mandate that the trial court clerk assemble and transmit the record.[1]

B. A "certified" transcript is not required.

Rule 9(B) addresses transcripts. It does not require that a transcript be certified. It does not require the ordering of a transcript at all. Rather, it simply requires that a transcript "of such parts of the proceedings necessary for inclusion of the record" be ordered by the appellant. If Appellee thinks that the proceedings were transcribed incorrectly, or that parts of the proceedings should have been transcribed that were not, there is a procedure set forth in the rules allowing an appellee to request that some, or all, of the proceedings be transcribed. Those procedures are found at Rule 9(B)(2)(i) and (ii).

[1] Arizona Rules of Criminal Procedure, Rule 31.9 and Arizona Rules of Civil Procedure, Rule 11.

Appellee's argument regarding the transcript is therefore unclear. She acknowledges that a transcript was attached to Appellant's Opening Brief; however, she then complains that the transcript was not "certified" by the trial court clerk. In a separate motion, she then moves to supplement her brief with the very (uncertified) transcript that she complains about. Lastly, and perhaps more substantively relevant, nowhere in any of her pleadings does Appellee claim that there were any errors in the transcript submitted by the Tribe.

CONCLUSION

While Rule 10(B) appears to be inconsistent with Rule 9(A) as to who has the duty to file a record on appeal, these two rules should not be given equal weight. Rule 10(B) merely provides for a discretionary consequences when an appellant fails to timely file a record, but it does not state that an appellant actually has such a duty. Rule 9(A) on the other hand, has very explicit language regarding the record and indicating that it is the trial court clerk's duty to prepare and file the record.[2]

As for "certification" of a transcript, Rule 9(B) does not require a "certified" transcript.

These appellate rules are new and have not yet been interpreted by this court. If the court wishes Appellant to prepare and file the record and "certify" a transcript, Appellant will certainly do so. However, Appellant would prefer that not be the result in all circumstances. But dismissal of the appeal would not be an appropriate remedy under the circumstances. For these reasons, Appellee's motion should be denied.

RESPECTFULLY SUBMITTED this 20th day of February, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR

YANCY A. JENCSOK
Deputy Prosecutor
Counsel for Appellant

[2] This is both the common practice and the rational assignment of duty.

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On February 20, 2007 by: 

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IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. GRIJALVA, LAURA, Defendant/Appellee,	Trial Court case number: CR-06-025 **Appeals Court case number: CA-06-021** **RESPONSE TO DEFENDANT/APPELLEE'S MOTION TO STRIKE**

Plaintiff/Appellant ("Appellant"), through counsel, hereby responds to Defendant/Appellee's ("Appellee") Motion to Strike Opening Brief as follows:

ARGUMENT

Appellee argues that Appellant should not have included an "unproven allegation" in the statement of facts; specifically, the statement that Appellee embezzled or defrauded the Tribe on over a dozen occasions. Appellee is correct that the allegation is so far unproven. This case has neither gone to trial nor plead yet. However, that statement was properly included in the Appellant's opening brief – if only for the characterization of the government's good-faith belief for the sake of argument. It was also specifically relevant to the underlying proceedings. One of the tribe's arguments is that for a crime of deceit, such as fraud, the statute of limitations should run from the completion of the offense rather than the initial commission of the offense. Therefore it was necessary to include the nature and number of the charges. Also, the statement properly cited to the criminal

complaint, which was attached to the brief, thereby satisfying the requirements of Rule 11(A)(4).

Appellee next argues that the information inserted into footnotes 1 and 2 of Appellant's brief are not supported by the record. The factual allegations in both footnotes were based not on the record, but on the Chief Prosecutor's personal knowledge of the case. As regards footnote 1, the information was not provided to explain the tribe's delay in filing as Appellee claims. It is not offered as a legal basis upon which to extend any decision regarding the statute of limitations. Indeed, at no time in these proceedings has the tribe attempted to excuse or defend when the complaint was filed. No defense is necessary. The information was provided merely to complete the record. It is worth pointing out that incidental background information, such as this, may be routinely provided during oral argument anyway.

As regards footnote 2, that information is also based on the Chief Prosecutor's knowledge of the case. Although it is not part of the record, it does have some pertinence to the Tribe's argument regarding the statute of limitations. Appellant submits that it is information that can be included in oral argumentation and therefore should also be permissible to include as part of the brief. Should this Court feel that either bit of information may not be considered because it is actually prejudicial to the Appellee, than Appellant understands the information may be stricken in the interests of this Court's justice.

CONCLUSION

The Tribe believes that all of the statements in its brief were properly included. However, should the Court feel otherwise, the tribe recommends that any offending statements merely be stricken from the brief. Striking the entire brief is overwhelmingly not the appropriately recognized remedy, nor is it a remedy provided for in the PYT appellate rules.

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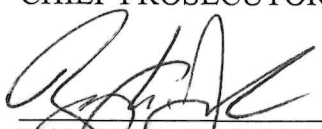
RESPECTFULLY SUBMITTED this 20th day of February, 2007.

MICAH SCHMIT
CHIEF PROSECUTOR



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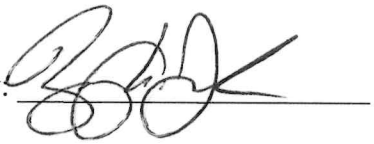
On February 20, 2007 by: 

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IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Appellant vs. LAURA GRIJALVA, APPELLEE	APPELLATE CASE NO. CA 06 - 021 PASCUA YAQUI TRIBAL COURT NO. CR 06-025

ON APPEAL FROM THE PASCUA YAQUI TRIBAL COURT

APPELLEE'S RESPONSIVE BRIEF

GILDA M. TERRAZAS
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Tucson, Arizona 85754

COUNSEL FOR APPELLEE

STATEMENT OF THE CASE

This appeal addresses the question whether the trial court abused its discretion in dismissing Count One of the Criminal Complaint filed in Pascua Yaqui Tribal Court No. CR 06-025. The court held it did not have jurisdiction over Count I of the Complaint, since the offensive conduct alleged in Count I was outside of the one year statute of limitations under Section 1.28 of the Pascua Yaqui Law and Order Code. The court rejected the parties' plea agreement that included restitution for Count I.

This Court has jurisdiction to hear the appeal pursuant to PYT Code, Title 3, Chapter 2 - 3.

STATEMENT OF FACTS AND PROCEEDINGS

The Pascua Yaqui Tribe's prosecutor filed a fourteen (14) count Complaint against Appellee Laura Grijalva on October 31, 2005. Count 1 alleged fraudulent conduct on or about October 4, 2004.

The remaining counts alleged different fraudulent acts from November 1, 2004 through December 4, 2004. As indicated by Appellant no later than three months after the October 4, 2004 date alleged in Count I; nonetheless the Complaint was not filed until one year and three weeks after the October 4, 2004 incident date in Count I. At a hearing on July 26, 2006 the Hon. Melvin Stoof questioned the issue of subject matter jurisdiction on Count I and consequently his authority to order restitution arising out of a inactionable offense. The colloquy by the parties subsequent to the trial court's discussion, the parties agreed to bifurcate Count I and the remaining counts for a separate plea agreement. On August 21, 2006 the trial court had a hearing on Count I, on which there was no longer a plea agreement by the parties and considered one issue: "Whether the court could maintain subject matter jurisdiction over a claim beyond the one year statute of limitations set forth in Pascua Yaqui Law and order Code, Section 1.28.

STATEMENT OF ISSUES

(1) What is the standard of review for the Order by the trial court's dismissal of Count I of the Complaint.

(2) Did the trial court abuse its discretion in dismissing Count I of the Criminal Complaint filed against Appellee on October 31, 2004 for violation of the one-year statute of limitations PYC Sec. 1.28?

(3) Is the one-year statute of limitations on a charge of fraud tolled until discovery of the fraudulent act?

ARGUMENT

I. The trial court did not abuse its discretion in questioning whether it could maintain subject matter jurisdiction over Count I.

The threshold consideration by the appellate court is whether the trial court abused its discretion in questioning whether it had subject matter jurisdiction on a restitution amount arising out of Count I of the Complaint, a charge that was void for reaching beyond the one-year statute of limitations. Action by a trial court on dismissal of an indictment or criminal charges is reviewed for abuse of discretion. US. V. Quiala 19 F.2d 569, 570 (11th Cir. 1994). See also U.S. v. Villasenor 2005 WL 32877, C.A. 10 (Utah) January 7, 2005 (where court denied a government motion to dismiss charges to allow state prosecution); U.S. v. Pelago 135 F.3d 703, 707 (11th Cir. 1998).

The Tribe cites absolutely no authority for its argument in Section I urging that the trial court is required to accept a plea agreement in all circumstances where the terms are agreed upon by the parties. No legal authority supports the Tribe's declaration "that a court is not engaging in subject matter jurisdiction when it merely agrees to enforce a legal restitutionary promise." This argument by the Tribe simply begs the question: Can the trial court question a term in a plea agreement that is in fact not legal due to its violation of the statute of limitations?" Appellee submits the trial court properly exercised its discretion in doing so, and its decision should be affirmed absent an abuse of discretion.

II. The facts of this case do not demonstrate a 'waiver' of the statute of limitations. Any waiver ended when the parties withdrew from the plea agreement submitted to the court and asked that Count I be bifurcated.

Contrary to the Tribe's assertions, The state and federal decisions do not uniformly see the statute of limitations as an affirmative defense which a defendant can waive. Where the statute of limitations is seen as an affirmative defense, courts further split on whether the statute of limitations can be expressly or impliedly waived. As recently as 2001, state courts have held that the statute of limitations in criminal matters operates as a jurisdictional bar to prosecution that cannot be waived. See People v. Ware 39 P.3d 1277 (Colo. Ct. App. 2001); People v. Simon 25 Cal. 4th 1082, 108 Cal. Rptr. 2d 385 (2001). Other courts require that the waiver be expressly given by the defendant. Hall v. State 497 So.2d 11rt (Ala App. 1986). The court in Hall held that an accused may waive a criminal statute of limitations if such waiver is express. While stating that an accused who believes waiver to be to his advantage should be allowed to waive the statute, the court reasoned that because the right not to be prosecuted for an offense barred by the statute of limitations is fundamental, a waiver of the statute must meet the same strict standards which are applied to waivers of other fundamental rights. Several other state court have held that an accused may waive a criminal statute of limitations if such waiver does not hinder his defense or contravene public policy. See Padie v. State 594 P.2d 50 (Alaska 1979); Tucker v. State 459 So.2d 306 (Fla. 1984.

Appellee concedes that the federal line of cases deems the statute of limitations as an affirmative defense that may be waived.

Even if this court were to find the statute of limitations is an affirmative defense which can be waived by an accused, the record before the court demonstrates that the defendant, if not both parties, withdrew from the plea agreement submitted to the court on July 20, 2006 to allow briefing on whether the statute of limitations is defined by the principal of discovery. The prosecution argued to the court: "...we can simply amend the indictment to do counts 2 through 14. I will charge count 1 separately and we'll continue litigating this for two years..." MS at TR 7/26/06, page 3, last paragraph, lines 2 - 3. The court granted the parties a recess to allow try to resolve the impasse. JS at TR 7/26/06 at

page 4, lines 11 and 12. Upon his return the judge queried: "Any resolution, any suggestions?" JS at TR lines 15 and 16. The Prosecutor responds....."we would suggest segregating count 1 out into a separate proceeding, separate case and having 2 through 14 be the resolved plea and of course we would want to clean up the documents to reflect that." MS at TR, 7/26/06 at lines 13-19.

Defense counsel clearly requested that the court set a hearing on the issue of the statute of limitations being tolled by the discovery rule, an issue raised by the State. The defense clearly intended to have the court consider a new plea agreement on Counts 2 through 14. GT at TR, 7/27/06, page 4, last paragraph, line 29 to page 5, line 2. The Prosecutor confirms the court's observation: Either party can withdraw a plea at any time. JS at TR 7/26/06 page 6, line 19 and MS at TR 7/26/06, page 6, line 20. The record makes clear that after the court voiced concerns regarding the statute of limitations, BOTH parties agreed to bifurcate Count I to set it for legal hearing and proceed on a new plea agreement for Counts 2 through 14. As noted in the Court's ruling of August 21, 2006 the Defendant had requested a trial on Counts 2 through 14. If anything at that point it was clear that the Defendant had withdrawn from the plea agreement.

Given the extended colloquy between the parties and the court, given that the court recessed for the parties to engage in further plea negotiations, the record demonstrates clearly that defendant, if not both parties, withdrew from the initial plea with an agreement to brief and argue the issue of the discovery rule tolling the statute of limitations on Count I. The court confirms by stating "Whether we have a plea agreement to go forward or not...." JS at TR, page 7 paragraph 3, line 1.

Whatever waiver was implied by the plea agreement expired when the parties agreed to proceed with a new plea agreement on Counts 2 through 14. The court's ruling on August 21, 2006 addressed only the one issue raised by the Tribe itself: Whether the discovery rule tolls the Statute of Limitations in Sec. 1.28 of the Pascua Yaqui Law and Order Code so as to permit Count I to proceed.

SECTION 1.28 OF THE PASCUA YAQUI LAW AND ORDER CODE REQUIRES THE STATUTE OF LIMITATIONS TO RUN FROM THE DATE OF THE OFFENSE NOT SUBJECT TO AMENDMENT THROUGH APPELLATE REVIEW.

The Tribe's own argument demonstrates why it must fail: "The crimes are also continuing so long as the offender remains engaged in the necessary conduct. There is nothing in the record to indicate that the allegations in Count I of the Complaint filed against Appellee on October 31, 2005 were of a "continuing" nature or that Appellee 'remained engaged in the necessary conduct." Even under the tax cases cited by the Tribe, the evidentiary foundation required is a showing that there was an "affirmative act of evasion." The trial court squarely addressed these arguments in its August 21, 2006 order. The conduct alleged in Count I of the complaint alleged one discrete act. Indeed the Community began its investigation into the matter approximately one month after the incident, but did not file criminal charges until over a year after the incident. The discovery rule simply does not apply in this case.

Nor is it the province of the trial court, or this court, to do as the Tribe urges, to usurp a legislative function by judicially amending the Tribe's statute of limitations. The trial court noted "If the Tribe were to have established tolling provisions, allowing for filings afer a one-year time frame it could have done so. The conclusion of the trial court correctly notes and respects the distinct roles of the legislative body (the Tribal Council) and the judiciary. That ruling must be affirmed with a statement from this court that the Tribe's desired result in Sec. 1.28 can be sought with a legislative enactment.

CONCLUSION

The trial court properly acted within its scope of discretion in questioning whether it had subject matter jurisdiction to consider Count I of the Complaint. The record demonstrates the parties withdrew from the initial plea agreement and agreed to brief the court on the issue of whether the discovery rule tolls the statute of limitations. The record does not show a permissible waiver of the statute of limitations by Defendant. The

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trial court's ruling of August 21, 2006 should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of February, 2007.

Gilda M. Terrazas
Attorney for Appellee

Original delivered this 5th
day of February, 2007 to
Clerk of the PYT Court of Appeals (and 5 copies)

A copy mailed this 5th day of February, 2007 to
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Attorney for Appellee

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Appellant vs. LAURA GRIJALVA, APPELLEE	APPELLATE CASE NO. CA 06 - 021 PASCUA YAQUI TRIBAL COURT NO. CR 06-025 PYTRAP 11 MOTION TO STRIKE APPELLANT'S BRIEF

Appellee Laura Grijalva, through undersigned counsel, respectfully moves the Chief Justice of the Pascua Yaqui Court of Appeals to enter an order dismissing the appeal due to the Appellant's failure to comply with Rule 11(A)(4) Pascua Yaqui Judicial Titles and Codes (Revised). The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 5TH day of February, 2007

Gilda M. Terrazas
Attorney for Appellee Laura Grijalva

copy mailed to this 5th day of February, 2007 to:

Mr. Micah Schmit
Chief Prosecutor
Pascua Yaqui Tribe Office of the Prosecutor
7474 S. Camino de Oeste
Tucson, Arizona 85757

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

Appellant filed a timely Notice of Appeal on September 19, 2006 appealing the order entered by the trial court on August 22, 2006 dismissing Count One of the Criminal Complaint filed against Appellee. Appellant filed its Opening Brief on January 5, 2007. Attached to its Opening Brief are five exhibits, the following: A) The trial court's order of August 21, 2006; B) Appellant's Notice of Appeal; C) an Affidavit; D) a Complaint; E) a Transcript, purportedly that of the hearing relating to the trial court's order dated August 21, 2006.

The Appellant has failed to comply with a single provision of Rule 11, Pascua Yaqui Tribe Rules of Appellate Procedure. Rule 11(A)(4) provides, in pertinent part: "The statement shall not contain evidentiary matters unless material to a proper consideration of the issues presented, in which instance **reference shall be made to the record of page of the transcript where such evidence appears.**"

Appellant has blatantly inserted unsubstantiated facts in its Brief which are not part of ANY record whether or not certified by the Clerk of the Court. These appear as follows:

1) Page 1 of the Appellant's Brief: Appellant submits an unproven allegation as a statement of fact to the court under 'Statement of Facts and Proceedings': "In that capacity she embezzled or defrauded the Tribe on over a dozen occasions." This statement, along with the Affidavit included with Appellant's brief, is not in any way material to the **legal** issues Appellant presents to the Court of Appeals in this case. Insertion of this material in the Brief is a transparent attempt to bias the Court.

2) Similarly, the information inserted in footnotes 1 and 2 on page of the Appellant's brief are gratuitious inclusions of information that appear no where in the trial court record. The statement "A few additional months were necessary....." is again a transparent effort by the Appellant to excuse its own delay in prosecution of the charges.

It is a gratuitous reference unsupported by the record.

These statements demonstrate even more clearly why it is essential for the parties to be able to proceed to litigate issues on appeal on the basis of a **certified record** on appeal.

For these reasons Appellee moves this court to Strike Appellant's Brief on Appeal.

DATED this 5th day of February, 2007..

LAW OFFICE OF GILDA M. TERRAZAS

Gilda M. Terrazas
Attorney for Appellee

Copy mailed this ____ day of February, 2007 to:

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IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Appellant vs. LAURA GRIJALVA, APPELLEE	APPELLATE CASE NO. CA 06 - 021 PASCUA YAQUI TRIBAL COURT NO. CR 06-025 PYTRAP 10 MOTION TO DISMISS APPEAL

Appellee Laura Grijalva, through undersigned counsel, respectfully moves the Chief Justice of the Pascua Yaqui Court of Appeals to enter an order dismissing the appeal due to the Appellant's failure to comply with Title 3, Rule 9, Pascua Yaqui Judicial Titles and Codes (Revised). The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 1 st day of February, 2007

Gilda M. Terrazas
Attorney for Appellee Laura Grijalva

copy mailed to:

Mr. Micah Schmit
Chief Prosecutor
Pascua Yaqui Tribe Office of the Prosecutor
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Tucson, Arizona 85757

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

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Rule 9(A)(2) mandates that, within thirty (30) days, the trial court clerk is to prepare, index, and transmit the record on appeal to the Court of Appeals, and serve a copy of the index to all parties to the appeal. PYTRAP 9(A)(2). *The burden of perfecting the record on appeal falls to the appellant.* If the appellant requires additional time, the appellant may obtain an extension of time for transmission of the record. PYTRAP 9(A)(3). However, the motion for an extension of time must be made before the expiration of the time for transmittal. Id.

The Appellant has failed to comply with a single provision of Rule 9, Pascua Yaqui Tribe Rules of Appellate Procedure. There is no record or transcript. that was certified by the trial court clerk, nor any certification of any transmittal of the record to the Court of Appeals. At no time did the Appellant request an extension from the Court of Appeals for transmittal of the record. The Appellant has utterly failed to comply with its obligation to secure a record on appeal for the Court of Appeal's consideration.

The Appellee has received no document from the Clerk of the Court of Appeals to indicate it has in fact received a certified record from the trial court. Appellee has no way of knowing whether the exhibits Appellant attached to its Opening Brief are the record received, or accepted, by the Court of Appeals. There is no index of the record which has been served upon Appellee. In short, there is no reliable record on appeal.

Appellee has received no notice that the Court of Appeals has accepted the case on appeal. Should Appellant's filings be accepted by the Court of Appeals, Appellee is placed

in the difficult position of trying to construct its own record, and either confirm or disaffirm the accuracy of what she has received from Appellant. The Rules of the Pascua Yaqui Court of Appeals has no provision to require, or direct, such actions. Rule 10 of the PYTRAP does provide a remedy when the Appellant fails to properly file a record as prescribed: dismissal. If the appellant fails to timely file the record, the chief justice of the Pascua Yaqui Court of Appeals may summarily dismiss the appeal. PYTRAP 10(B). That is the appropriate remedy in this case.

WHEREFORE Appellee Laura Grijalva respectfully moves the Honorable Chief Justice Robert Williams to enter an order dismissing the Appellant's appeal.

DATED this 1 st day of February, 2007..

LAW OFFICE OF GILDA M. TERRAZAS

Gilda M. Terrazas
Attorney for Appellee

Copy mailed this 1st day of February, 2007 to:

Micah Schmit
Chief Prosecutor
Pascua Yaqui Tribe
7474 S. Camino de Oeste
Tucson, Arizona 85757

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	Trial Court case no.: CR 06-025
	)	
Plaintiff/Appellant,	)	Appeals Court case no: CA-06-021
	)	
vs.	)	
	)	
GRIJALVA, Laura,	)	
	)	
Defendant/Appellee,	)	
_____	)	

ON APPEAL FROM THE PASCUA YAQUI TRIBAL COURT

APPELLANT'S OPENING BRIEF

MICAH SCHMIT
CHIEF PROSECUTOR

7474 S. Camino de Oeste
Tucson, Arizona 85757
Phone: (520) 879-6251
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COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an order which dismissed a criminal count and rejected a proposed plea agreement. The criminal count was dismissed by Judge Melvin Stoof, in an order dated August 21, 2006 (Appendix A), for the reason that the offense had taken place more than one year prior to the filing of the criminal complaint. The court held that it did not have subject matter jurisdiction over the count. The perceived lack of jurisdiction over the count, led the court to reject the proposed plea agreement, which included restitution for the count dismissed. A notice of appeal was timely filed on September 19, 2006. Appendix B. This Court has jurisdiction to hear the appeal pursuant to PYT Code, Title 3, Chapter 2-3.

The opening brief is timely filed. The deadline for filing an opening brief is triggered by the mailing of a notice by the appellate court clerk to the Appellant that the record was satisfactorily forwarded ("filed") with the Appellate Court. 3 PYTRAP Rules 10(A) and 12(A). When the appellate court clerk sends notice of having received the lower court record, an appellant then has thirty days to file his/her opening brief. Rule 12(A). To date, Appellant has not received any notice from the appellate court clerk regarding receipt of the full record on this case. However, in recognition that all clerical procedures may not yet be fully mechanized, and in the interest of maintaining diligent progress in the appeal, Appellant hereby files its opening brief. The Tribe merely raises this issue to pre-address any objection to the brief by Appellee. Indeed, this Court has the discretion to accommodate this very circumstance, via Rule 3, enabling application or suspension of any of their rules, as necessary to ensure justice.

STATEMENT OF FACTS AND PROCEEDINGS

Defendant/Appellee Grijalva was employed as an assistant to the Pascua Yaqui Tribe (PYT) Council Treasurer. In that capacity she embezzled or defrauded the Tribe on over a dozen occasions (see Affidavit and Complaint, Exhibits B & C, for specifics).

The allegations came to light on November 26, 2004, when the Chief of Police, Councilman Valencia and Detective Garcia all met to discuss what appeared to be unauthorized expenditures made by Appellee. Following that initial meeting, substantially more information was gathered.

Eleven months later, on October 28, **2005**,[1] a criminal affidavit was signed and delivered to the PYT Prosecutor's Office for review. Three days later, a 14 count Complaint was filed in Tribal Court, on October 31st, 2005.

Counts two through fourteen began within a year of this charging date (i.e., after October 31st, **2004**) and, therefore, are not in question as part of this appeal. Count One, however, was the oldest and began on October 4, 2004. As such it was charged one year and three weeks after later. The incident involved the largest misappropriation of funds by Defendant/Appellee when she used a Councilman's business-only credit card, without permission, to pay for repairs to her personal automobile:

> **COUNT 1: FRAUD, 1 PYTC. SEC. 3.37**
>
> On or about October 4th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $3,113.22 to pay for repairs to her personal vehicle, to wit: a 1998 Honda Civic, without permission from Mr. Valencia.

All of Defendant's fraudulent conduct came to be discovered two or more months after that this October 4th date, following labor-intensive examination of financial records. Ultimately, the event that led to the discovery that embezzlement was going on occurred in mid-late November, when an unrelated claimant ("the flag lady") came to PYT administration wondering where her reimbursement check was. Financial records showed that her check from PYT was drafted on November 1, 2004 and presumed to have been delivered by Defendant/Appellee Grijalva shortly afterwards. But the "flag lady" never received her check. In a later interview,[2] Defendant claimed that it must have been her boyfriend who took the check and converted it illegally. Regardless, when that flag-lady's check never arrived, she approached Councilman Valencia regarding

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[1] It took several months to track down Defendant's boyfriend (whom Defendant blamed for some of these allegations) and interview him on tape. Then several more months (approximately 5) for PYT Finance to pour through all of the financial transactions in which Defendant was involved in – revealing the majority of the 14 allegations of funds misuse by Defendant for the first time. Thereafter, a few additional months were necessary to transcribe the multiple interviews for presentation to prosecutors. In all, the investigation produced hundreds of pages of evidentiary documents over the 11-month long investigation.

[2] This interview took place on November 30th and, in the Tribe's view is the last affirmative step in furtherance of the fraud or cover-up she was committing (*see* U.S. vs. Dandy, discussed *infra*). As such, this should be when the crime was concluded and the statute of limitations would begin.

non-payment for her services. Mr. Valencia's inquiries then triggered the November 26th, 2004 reporting and investigation by PYT law-enforcement, as mentioned above.

From November, 2005 to May, 2006, multiple pretrial continuances were requested and granted, at Defendant's request, for the purpose of obtaining counsel. Attorney Gilda Terrazas entered her notice of appearance on this matter, May 18th, 2006. In less than a month the parties had amicably worked out the general terms of a plea agreement. After a few modifications and two short continuances, the final draft of the plea was signed and submitted to the lower court on July 26th, 2006. The plea included restitution for Count 1 but, importantly, no conviction for the incident in Count 1.[3]

Nonetheless, the lower court, Judge Stoof, *sua sponte*, objected to the plea on the grounds that he could not accept jurisdiction even over just the restitution from Count 1, because he felt the court wouldn't have had jurisdiction over Count 1 substantively. The parties initially attempted to persuade Judge Stoof that this was a mutually bargained for plea agreement between consenting parties and that the court was not going to enter an actual *judgment* regarding Count 1 - as that was being dismissed as part of the plea.

Indeed, the lower court would only be obligated to enforce the *sentencing terms* including the total agreed-upon restitution figure (no actual subject matter jurisdiction over count 1 at all). Judge Stoof, however, reiterated that he had reservations about his ability to accept such a plea, even where count 1 was excised from among the plead-to charges, because the restitution was still "derivative" of the conduct arising out of Count One. Transcript at 1. Appendix E.

DISPOSITION BY THE LOWER COURT

The Trial Court dismissed Count 1 of the complaint and rejected the plea agreement by order dated August 21, 2006.

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[3] The original plea submitted to the lower court included Count 1. However, through its solicitor Ben Casey, the court advised the parties that it would not be inclined to accept the plea since it was of the opinion that the statute of limitations had run and therefore the court lacked jurisdiction to adjudicate Count 1, even by mutual plea agreement. The parties submitted a modified plea the very morning of the change-of-plea hearing which substituted Count 3 for Count 1, but left restitution for Count 1 largely in place. Notwithstanding that remedy, Judge Stoof (JS) *sua sponte* expressed unwillingness to receive the plea (See Transcript at page 1, Exhibit D).

STATEMENT OF ISSUES

(1) May parties to a plea agreement mutually bargain-for a restitution amount without interference from the court as to that amount?

(2) When submitting a plea agreement to the court, must restitution actually be related to a charge that is, for argument's sake, beyond the statute of limitations for charging purposes?

(3) Finally, when does the statute of limitations for a PYT fraud offense reasonably begin?

ARGUMENT

I.

A FREELY BARGAINED-FOR PLEA AGREEMENT, URGED BY BOTH PARTIES, IS ENFORCEABLE BY A TRIAL COURT.

A. Introduction.

The government's position was, and remains, that a clearly bargained-for restitution sum, regardless of how that sum was arrived at - whether the same-as, less-than, or even double-than whatever the original Charge suggests - not only can be, but should be, enforced by the Court in the interests of perpetuating justice. It is the terms themselves, not their origin in relation to any previous indictment or complaint, that is the subject or domain of post-conviction enforcement. Put another way, issues regarding subject matter jurisdiction evaporate with the dismissal of the offense in question and/or by party-waiver through a mutually binding agreement. Restitutionary agreements, like counseling obligations or community service commitments or fines or letters of apology or no-contact orders, do not, by their very collateral and independently bargained-for nature, carry any jurisdictional concerns in themselves.[4] The reason being is that a court is not engaging in subject matter jurisdiction when it merely agrees to enforce a legal restitutionary promise. Plea agreements frequently carry tangential safe-guards which only become evident through discussions between the parties. It is therefore no different than enforcing a sobriety agreement, or no-contact agreement, or educational (GED) or

[4] For example, in a sex-abuse case where the defendant alleges it was alcohol that 'caused him' to misuse his judgment, a sentencing judge could impose the DUI MADD victim-impact class on him even though there wasn't a DUI charge.

employment (seek a job) obligations... many of which have no origin in the actual crime charged. Such additional terms or agreements are actually *customary* in plea agreements and they are overwhelmingly embraced by courts around the land because they endorse amicable resolution that formally and strategically targets the best (bargained-for) outcome for all the people involved, particularly the victim and his offender.

Even where a fine or reimbursement is sought by a victim (and those reimbursements have no immediate connection with the "criminal" injury from the original complaint or indictment) that reimbursement or restitution-total can still be agreed to, and enforced, by any trial court if it was bargained for. The key is merely whether or not it was assented to by the defendant.

By contrast, and the government concedes, in a contested sentencing (e.g., following a trial on the case) the judge may *only* impose restitution directly related to a convicted offense because, there, the defendant is not agreeing to anything but the minimum with a nexus to the conviction. This is evident from both the reading of statutes[5] discussing restitution as well as mountains of case-law. However, this nexus is entirely absent, when the parties have agreed to restorative (financial) and punitive (probationary/jail) terms *freely and mutually*. Indeed, it would be the Tribe's position that the lower court would be fundamentally frustrating the efficient and prudent pursuit of justice by the parties by practicing otherwise.

For these reasons, the Tribe would first ask that this Court compel the trial court to not reject negotiated agreement, originally just before the July 26th, 2006 change of plea hearing and which included Count 1. Alternatively, the Tribe would ask that the lower court be compelled to accept the back-up plea which excised Count 1, but still included a portion of restitution relating to Count 1 (i.e., the plea that was actually submitted in court on July 26th). If neither of these options is appealing, the Tribe would argue that the statute of limitations for Count 1 had not lapsed when originally charged.

In almost every crime the start and end occur within moments of each other. This is not so for crimes of deception. When dealing with crimes of deceit, such as fraud or embezzlement, the crime is on-going during the period of that the offender maintains

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[5] See for example A.R.S. §13-804 *et seq.*

successful deception of its commission. As such, the statutory "clock" should not actually start until the crime was discovered by either the victim or law-enforcement. Indeed, to hold otherwise would simply operate to reward and encourage the best cheaters of the world for they could routinely outlast a criminal statute of limitations.

Following this reasoning, the eventual discovery of the fraud finally marks the conclusion of the deception-crime and, therefore, reasonably the conclusion of the offense. A statute of limitations should only begin at this discovery point as the crime, the deceiving, has now terminated. Since the lower court first expressed reservation over the original plea based upon jurisdictional grounds, the government will respond to that concern first.

B. A Statute Of Limitations Is Actually Not "Jurisdictional" And, Therefore, Can Be Entirely Waived.

In his opening discussion Judge Stoof laments the lack of both personal and subject matter jurisdiction over an expired offense (Transcript at 1, JS middle and bottom paragraphs). However, there is a long line of federal and state cases which have held that criminal statutes of limitations are not even jurisdictional in nature. Rather, they are merely bars to prosecution which must be raised by the defendant like any other defense.

In federal case law, the United States Supreme Court has held that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." ***Biddinger v. Commissioner of Police***.[6] ***Biddinger*** was decided in 1917. More recently, the First Circuit of the United States Court of Appeals sternly observed that "*every circuit* that has addressed it has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar." ***Acevedo-Ramos v. U.S.***,[7] (*emphasis added*). Just like this case, ***Acevedo-Ramos*** was addressing waivability in the context of a plea agreement and went on to hold that a waiver does not even have to be explicit. *Id.* at 308. In the case at bar, Defendant Grijalva and the Tribe not only implicitly waived

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[6] 245 U.S. 128 (1917), citing as authority an 1872 Supreme Court case. ***U.S. v. Cooke***, 84 U.S. 168.

[7] 961 F.2d 305, 307 (2nd Cir. 1992).

statute of limitations (by submitting a signed plea agreement) but explicitly urged the lower court to accept the bargained-for plea.

State case law is just as compelling and universal as federal. For example, "[i]n Florida, statutes of limitations on crimes are not jurisdictional and the defendant may waive the statute of limitations defense." ***Morris v. State***.[8] Another excellent case that discusses in great detail the ability to waive a statute of limitations in the context of plea agreements is ***Adams v. State***.[9] In ***Adams***, the defendant had pled no contest to five counts of sexual assault of a child. A sixth count was dismissed as part of the plea agreement. On appeal, the defendant argued that he had received ineffective assistance of counsel because some of the counts were filed past the statutes of limitations. The Hawaii Supreme Court found that the plea agreement was knowingly and voluntarily entered into and therefore any statute of limitations defense was waived, explicitly or implicitly. Further, the court found that the defendant had received a great benefit from the plea agreement because even with the counts that were not past the statutes of limitations, defendant faced the possibility of a much longer sentence than was provided for under the plea agreement. Id. at 407. This clearly reinforces the concept that plea agreements are mutually bargained for and, therefore, join considerations that are in each side's best interests.[10]

In the instant case, Defendant/Appellee's plea was entirely knowing and voluntary. With the advice of counsel, her bargaining was fair and at arms-length and the issue of statute of limitations had been implicitly, if not explicitly, addressed.[11] She was not being forced to enter into the agreement and she had ample time to review and consider it. Appellee would receive a reasonable benefit in exchange for assenting to the

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[8] 909 So.2d 428, 431 (Fla.App. 2005).

[9] 81 P.2d 394 (Hawai'i 2003).

[10] As for the consideration exchanged by the parties, in this case it was rather evident that the Tribe would relinquish convictions in 12 out of the 14 counts – a great windfall for Appellee. In return, however, Defendant would still pay nearly all of the restitution from all 14 counts of fraud. Both sides strongly viewed this as a mutually agreeable (and again, bargained-for) resolution to the case.

[11] Indeed, notwithstanding universal practice and authority to the contrary, the parties accommodated this Court's objection to "subject matter jurisdiction" articulated weeks earlier, by removing the first count altogether just so that the overall wish of the parties was not frustrated – but to no avail.

plea. Out of the 14 counts that have been charged, she is pleading guilty to two and is facing no mandated incarceration as a recommendation from the Tribe. Were this case to go to trial, even if count one was dismissed, Defendant faces the theoretical possibility of one year of incarceration and a $5,000 fine for *each count*.

II.

THE STATUTE OF LIMITATIONS FOR DECEPTION-BASED OFFENSES SHOULD BEGIN ONLY UPON DISCOVERY OF SAID OFFENSE.

A. Introduction.

The "flag lady's" check from the PYT government was drafted on November 1, 2004 and a couple weeks later, when that check never arrived, she approached Councilman Valencia regarding non-payment. Mr. Valencia's inquiries then triggered the November 26th, 2004 reporting to law-enforcement, mentioned above. The significance of this is that, through the nature of deceptive practices employed by Defendant Grijalva (forging checks and/or using someone else's business credit card for personal needs) none of these fraudulent purchases would have surfaced until or unless someone were to review either the account(s), the monthly statements or a complaint regarding non-payment. In other words, with the Tribe or Councilman Valencia not even being aware of this fraud until some time in November, it is likewise impossible that law-enforcement could have become aware of it prior to November (2004). If the first report to law enforcement took place in mid-late November, 2004, then filing charges in October, 2005 (11 months later) can be viewed as within the PYT one year statute of limitations.

B. Offenses Such As Fraud Should Not Be Deemed Completed As Long As The Act Or Conduct Of Sequestration Remains In Operation.

Under the Code, the statute of limitations reads as follows:

> **Sec. 1-40 STATUTE OF LIMITATIONS**
>
> No criminal prosecution shall be maintained under this ordinance unless the action shall have been commenced within one (1) year after the commission of the offense.

The crucial part relating to the issue at bar relates to the phrase "after the commission of the offense" – and more specifically, the term "commission." An offense is not committed until it is actually completed. For example, an intended assault (e.g. thoughts regarding injury to someone) is not a completed assault until actually communicated (threats) or injury is inflicted. A potential DUI (e.g. sitting in a parked car) is not a completed DUI until "actual physical control" is achieved by having had the car running. In each of these hypotheticals, the crimes are also *continuing* so long as the offender remains engaged in the necessary conduct – communicating threats or remaining in physical control of a running automobile while under the influence. The crime of fraud is similar.

Fraud requires "willful misrepresentation or deceit" in the course of obtaining something of value. By the same reasoning as above, the misrepresentation or deceit can be ongoing while the victim is being deprived of the item of value that the offender took. The irony is that the better the criminal, the better likelihood there is criminal deceit operating. One of the more common venues for fraud is in the field of tax law. There, it is not uncommon for offenders to try and deceive the government from taxes duly owed. In ***U.S. vs. Dandy***,[12] the 6th Circuit Court of Appeals held that "it is the date of the latest affirmative *act of evasion* that triggers the statute of limitations (citations omitted)." (Emphasis added). In ***Dandy***, the federal tax code provided for a six-year statute of limitations. The defendant had filed his fraudulent returns in 1982 and 1983, but the federal government did not discover the fraud and then file its criminal indictments until 1990. The defendant attempted to argue that the crime essentially occurred when he filed those fraudulent returns (7-8 yrs prior to the federal indictment). In adopting what other federal circuit courts[13] of appeals have held, the Sixth Circuit rejected the defendant's clock-starting point and forewarned "to hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of 6 years..." *Id.*

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12 Id., 998, F.2d, 1344 (6th Cir. 1993), at 1355.

13 Including the First and Eleventh Circuits.

Similarly, the only way the provisions of the PYT Code, the pursuit of justice, the recognition of victim's rights, and Yaqui ideals of honesty, integrity and accountability all be preserved and harmonized is to fairly read Defendant's act of misrepresentation or deceit as something that continually operated until discovery by either the victim or by the government. In other words, the commission of a fraudulent crime, by its essence, remains deceptively ongoing and criminal until finally discovered and, thereby, "completed." As the Federal Courts of Appeals have recognized, to hold otherwise would only reward the defrauder. To further view it from the victim's perspective, because of the offender's deception involved, a victim may not even be aware of the "injury" (the deprivation of his "thing of value") until the deceit has been uncovered and the theft revealed. One could reasonably argue that unearthing the fraud not only ends the deception but, at that moment, causes the infliction of the (financial) injury upon the victim. It is then at that moment that the conclusion of the commission of the fraudulent crime has finally occurred and the statute of limitations should fairly begin to count down.

III.

APPELLEE'S MEMORANDUM TO THE TRIAL COURT CITES NO LEGITIMATELY SUPPORTING AUTHORITY.

After reviewing the cases cited by Defendant/Appellee in her memorandum to the trial court, it is important to realize that none are on point. Troublingly, every single case fails to address the issue of *mutually bargained-for terms*. They all involve circumstances in which the State attempted to get restitution beyond the bounds of a conviction after trial (i.e., a *contested* resolution) or the State attempted to go *beyond* the parameters of a previously accepted plea agreement. Not one case involves the circumstances at bar where all the parties completely agree with the restitution terms. Indeed, the Tribe could not find a single case where mutually agreed to restitution terms had to be barred, even where they involved expired (statute of limitations) offenses or where the amount was disproportional to the damage. All cases appear to support the conflict-resolution that was mutually pursued in this case. So long as terms were

bargained for at arms-length, so to speak, any restitution amount may be assented to by the parties. This is logical as it facilitates a primary judicial objective, the expedient and jointly amicable resolution of disputes.

CONCLUSION

For these reasons, the Tribe urges this Court to (1) affirm that statutes of limitations are not impediments to parties assenting to a freely bargained for plea agreement, and/or (2) find that the inherent nature of deceptive crimes such as fraud, along with the interests of justice, require that the statute of limitations not actually begin until the crime has been completed through the discovery of, and thereby termination of, the acts of deception or misrepresentation.

RESPECTFULLY SUBMITTED this 5th day of January, 2007.

OFFICE OF THE PROSECUTOR
PASCUA YAQUI TRIBE

Micah Schmit
Chief Prosecutor

ORIGINAL delivered 5th January, 2007 to:

Clerk of the PYT Court of Appeals (and 5 copies)

Pascua Yaqui Tribal Court

A copy mailed this 5th day of January, 2007 to:
Defendant c/o Gilda Terrazas, defense counsel.
PO Box 86505
Tucson, AZ 85754

By: _____

Appendix A

ORDER DISMISSING COUNT ONE DUE TO LACK OF SUBJECT MATTER JURISDICTION AND SETTING TRIAL

August 21, 2006

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. GRIJALVA, LAURA G., Defendant.	)	Case No. CR-06-025 ORDER DISMISSING COUNT ONE DUE TO LACK OF SUBJECT MATTER JURISDICTION AND SETTING TRIAL

On August 21, 2006, this matter came before the court for hearing on a question of whether the court could maintain jurisdiction over one count pursuant to the Pascua Yaqui Tribal code, and for a status conference. Appearing was the defendant Laura Grijalva and her attorney Gilda M. Terrazas, and Yancy Jencsok for the Tribe.

The question framed by the court on July 26, 2006, was whether it could maintain subject matter jurisdiction over a claim, which was filed by the prosecutor on October 31, 2005, for an alleged offense, which occurred on October 4, 2004. Section 1.28 of the Pascua Yaqui Law and Order Code provides that all actions shall be brought within one year of the date of the alleged offense. The statute further provides:

> The one (1) year time limit does not include time spent outside of the jurisdiction of the Tribal Courts for the purpose of avoiding prosecution. The burden of proving the reason for absence from the jurisdiction shall be upon the accused.

The Tribe has not established that the defendant was outside of the court's jurisdiction or that she had been avoiding prosecution, which are the two exceptions which toll the one year statute of limitations.

The court finds that like many federal statutes, the Pascua Yaqui Statute of Limitations was enacted to promote prompt and timely filing of complaints. If the Tribe were to have established tolling provisions, allowing for filings after a one year time frame it could have done so. An example of such an enactment is the speedy trial act in the Pascua Yaqui Rules of Criminal Procedure which provides in pertinent part:

> The calculation of time limits prescribed by this rule shall not include any delays caused by or on behalf of the defendant, including but not limited to, dealy caused by an examination and hearing to determine competency, the defendant's absence or

incompetence, or his or her inability to be arrested or taken into custody on the reservation.

This provision is similar to the federal limitations statutes, for example:

> No statute of limitations shall extend to any persons fleeing from justice.

18 U.S.C. Sec. 3290.

Similarly, if there is an ongoing concealment or fraud under federal law, as in tax evasion matters, the federal law provides that a person who has violated internal revenue laws and who is outside the United States shall be considered a fugitive from justice within the meaning of section 3290, and such time outside of the country "shall not be taken as any part of the time limited by the law for the commencements of such proceedings." 26 U.S.C. Sec. 6531.

The Pascua Yaqui statute of limitations is similar to the federal statute of limitations as to criminal contempt, which provides:

> No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of: nor shall any such proceeding be a bar to any criminal prosecution for the same act.

18 U.S.C. Sec. 3285.

The Tribe's Council could have provided a caveat, or exception in the rule, to allow tolling of the criminal statute of limitations beyond one year, but it chose not to do so. In the absence of such a provision allowing tolling of the one year limitations, the court does not find that a "discovery" rule is applicable to allowing tolling.

The Tribe argued that under the rule of discovery, a criminal statute may be tolled to such time as the date of the discovery that a fraud has been committed based on a concealment of an offender of the fraudulent act. However, such a scheme would entail a crime of ongoing concealment, rather that as in this case, one discreet act taking place on a particular day and time. Although the State of Arizona's time limitations statutes provides that misdemeanor offenses must be commences "following periods of actual discovery by the state" or "discovery by the state. . .that should have occurred with the exercise of reasonable diligence." A.R.S. Sec. 13-107, Time Limitations, the Tribal statute has no such "discovery" provision, but rather simply states that the actions must be brought within one year of the date

of the alleged offense. Because Count One alleges an offense that occurred on October 4 2004 was filed on October 31, 2005, the filing was more than one year past the date of th alleged offense, and the court lacks subject matter jurisdiction over Count One, based on th filing past the one year statute of limitations.

The court finds that it has jurisdiction over Counts Two through Fourteen, an therefore any proposed plea which dismissed any of the counts Two through Fourteen coul be accepted, because a court which has continuing jurisdiction over such criminal claim would also have jurisdiction to approve a civil restitution agreement arising out of th criminal claims over which it maintains jurisdiction.

The defendant has requested a bench trial as to the remaining counts, and the cour should set this matter for trial and the defendant should be released under prior conditions. The defendant has waived time limitations for the trial setting in order to obtain additional disclosure from the Tribe.

IT IS ORDERED that the Count One, Fraud, shall be dismissed, for lack of subject matter jurisdiction, because the alleged offense took place on October 4, 2004, the Tribe filed its complaint on October 31, 2005, and the Tribe did not establish that the defendant was either outside of the jurisdiction of the Tribe or that she was avoiding prosecution.

IT IS FURTHER ORDERED that the defendant has waived time limitations for setting the matter for trial in order to obtain additional disclosure from the Tribe, and **this matter shall be set for a bench trial on Counts Two through Fourteen on October 17, 2006 at 2:00 p.m..** Laura Grijalva shall be released on her own recognizance, she shall appear for all future hearings, and she shall obey all laws.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 21st DAY OF AUGUST, 2006.

Judge, Pascua Yaqui Tribal Court

CC: Date 08.22.06
X Tribe X Defendant
Clerk

Appendix B

NOTICE OF APPEAL

September 19, 2006

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, AZ 85757
(520) 879-6251

Micah Schmit
Chief Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. GRIJALVA, Laura G., Defendant/Appellee.	Trial Court Case No. CR-06-025 Appeals Court Case No. CA-06-021 NOTICE OF APPEAL (Oral argument requested before the full appellate panel).

NOTICE IS HEREBY GIVEN, under PYTRAP, Rule 7, that the Pascua Yaqui Tribe is filing an interlocutory appeal from an order by the trial court, dated August 21, 2006 (attached) wherein Judge Melvin Stoof rejected a written plea, agreed-to by both parties, on the grounds that the trial court lacked subject matter jurisdiction over one of the counts.[1]

It is the Tribe's position that, where the litigants mutually ascent to a resolution of the case, even where one of the counts was filed beyond the statute of limitations, that count may, nonetheless, be compensated for and/or even plead to, in a mutually bargained for plea. It is

[1] The Tribe feels that it is important to respectfully note that the attached August 21st order does not accurately frame the issue litigated by the parties. The preceding order, dated July 26th, will bear this out and will be included in the Tribe's opening brief. The August 21st hearing was supposed to address the following issue, as framed on July 26th: If the court were to dismiss Count One of the Complaint, then could the court accept a proposed plea which includes the payment of civil restitution arising out of the conduct alleged as a crime in count one when the court may lack subject matter over that underlying count? In other words, if count one was dismissed, would the court's authority to order restitution arising out of count one (in a plea agreement) be lost?

Interestingly, *both* parties briefed just that issue. But clearly, the ruling and order from Judge Stoof on August 21st answered a distinctly different question (one not briefed by the parties) namely: Does the lower court had jurisdiction over a *contested* charge where that charge was filed days after the statute of limitations had run. This is a critical distinction in federal and state case law, which universally hold that litigants may liberally bargain towards mutually agreeable terms when resolving any case, even including pleading to charges normally barred by a statute of limitations. The Tribe submits that the order from August 21st altered the framed (and briefed) question to such a degree that the true issue at hand (acceptability of a jointly submitted plea) went unanswered and/or rejected.

precisely through the act of such mutual agreement (as opposed to trial litigation) that the lower court's jurisdiction is not contingent.

Accordingly, the Tribe asks that time-limits in this pending matter be deemed suspended, while this Court's ruling on the request to reverse the lower court's rejection of the plea and setting of matter for trial, is awaited.

The Tribe would request oral argument before a three Justice panel.

RESPECTFULLY SUBMITTED THIS 19 day of September, 2006.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

Micah Schmit
Chief Prosecutor, PYT

Original and copies delivered to:
Clerk of Court, Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribal Court

Pascua Yaqui Tribe, Office of the Attorney General

Defendant/Appellee, through her attorney,
Gilda M. Terrazas
PO Box 86505,
Tucson, AZ 85754

By _____

Appendix C

AFFIDAVIT

October 31, 2005

PASCUA YAQUI TRIBAL COURT
FILED: DATE AND TIME

05 OCT 31 PM 4:14

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

DOCKET NO. CR06-025

CLERK

PASCUA YAQUI TRIBE, **Plaintiff,** **Vs.** **LAURA G. GRIJALVA,** **Defendant**	**COURT USE ONLY**
	Case Number: 041130-4461
PROBABLE CAUSE AFFIDAVIT	

AFFIDAVIT

1. I, Jacob Garcia, being a duly authorized law enforcement officer of the Pascua Yaqui Indian Tribe and for the Pascua Yaqui Indian Reservation, do hereby swear and affirm as follows:

   A. ☐ I am the arresting officer in this case; OR
   ☒ I am a law enforcement officer and make this statement on information and belief.

2. SUSPECTED PARTY (Defendant)

   Name: Laura G. Grijalva
   Driver's license number: 601035818
   PY Enrollment number: 2694U00233
   Date of Birth: 08/04/75

   ☒ is ☐ is not an enrolled member of the Pascua Yaqui Tribe.

3. The defendant was ☐ arrested ☐ cited ☒ long formed without a warrant on 10/28/05 at 11:19 ☐ A.M. ☐ P.M.

4. I have probable cause to believe that the defendant committed the following offense(s) at 7474 S. Camino De Oeste, Tucson, Arizona 85757 (address) which is within the exterior boundaries of the Pascua Yaqui Indian Reservation:

   ☒ PYC / ☐ ARS , Title 1, Chapter 3, Section 3.37, Fraud

   ☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

☐ PYC / ☐ ARS , Title , Chapter , Section ,

5. I believe that the defendant committed the above-listed offense(s) because: (Summarize facts to support probable cause claim)

At the above-stated date and time and at the above-referenced location within the exterior boundaries of the Pascua Yaqui Indian Reservation I did witness the following:

Laura G. Grijalva is charged with fourteen counts (14) counts of Fraud.

The Pascua Yaqui Tribe had employed Laura G. Grijalva in the capacity as Administrative Assistant to the Travel Treasurer, Francisco Valencia. In Laura's capacity, Laura had access to Elected Tribal Council Member's corporate credit card and had access to request for Payable Checks through Tribal Finance. Laura used the following Tribal Councilman's corporate credit cards and/or Checks for personal gain and without any of their individual permission. The following are as follows

Date	Card Holder	Amount	Description
10/04/04	Francisco Valencia	$3,113.22	1998 Honda Civic
11/08/04	Francisco Valencia	$ 468.40	Enterprise Rent-a-car
11/10/04	David Ramirez	$ 76.94	Throop Florist
11/10/04	David Ramirez	$ 113.37	Inglis Florist
11/08/04	Francisco Valencia	$ 35.94	Domino Pizza
11/08/04	Francisco Valencia	$ 98.75	Qwest
11/25/04	Francisco Valencia	$ 120.00	Cox Phoenix
11/24/04	Francisco Valencia	$ 167.63	Qwest
11/24/04	Francisco Valencia	$ 183.72	Comcast
11/24/04	Francisco Valencia	$ 263.53	Qwest
11/24/04	Francisco Valencia	$ 500.00	Enterprise Rent a Car-Tucson
12/04/04	Francisco Valencia	$ 113.14	Enterprise Rent a Car-Tucson
11/15/04	Robert Valencia	$ 546.57	Holiday Inn Airport-Tucson
11/01/04	Accounts Payable Check Posted 11/01/04	$2,080.00	The Flag Lady
Total		$7,386.48	

Each of the private business were interviewed and each confirmed having had telephone conversations with a female identifying herself as Laura Grijalva, employed by the Pascua Yaqui Tribal and each account was paid by a Tribal corporate credit card.

In Laura's first interview she denied having any knowledge of how her ex-boyfriend, Cisco Castillo Jr. (Father to her children) obtained and cashed the check made out to "The Flag Lady" in the amount of $2,080.00.

An audit by the Pascua Yaqui Tribe discovered the above activities of Laura Grijalva.

In final interview with Laura, per Miranda she denied any wrongdoing or illegal activity with any of the corporate credit cards. She states it was along time ago and it was all work related. Laura ended the interview and advised will be attaining an attorney.

The information contained herein is true and accurate to the best of my knowledge and belief.

6. I request that the Court make a probable cause determination and, if the defendant is in custody, that he be continued in custody, pending further proceedings.

Signature of Officer

10/31/05
Date

SONIA G. LAVENTURE
Notary Public - Arizona
Pima County
My Commission Expires
March 27, 2009

SUBSCRIBED AND SWORN BEFORE ME ON October 31, 2005

Notary Signature

My Commission expires: 03/27/2009

Appendix D

COMPLAINT

October 31, 2005

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME
05 OCT 31 PM 4:14

IN AND FOR THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

DOCKET NO. CR06.025
CLERK

Pascua Yaqui Tribe, Plaintiff, vs. **GRIJALVA, Laura, G.** Defendant.	Case No. CR-06-025 CRIMINAL COMPLAINT

The PASCUA YAQUI TRIBE, hereby complains and alleges, upon information and belief, that the above named defendant, an Indian, while employed as an administrative assistant to the Travel Treasurer (Councilman Francisco Valencia), with an incident effectuation location of 7474 S. Camino De Oeste, Tucson, Az 85757, which is within the boundaries of the Pascua Yaqui Reservation, did commit the following offenses:

COUNT 1: FRAUD, 1 PYTC. SEC. 3.37

On or about October 4th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $3,113.22 to pay for repairs to her personal vehicle, to wit: a 1998 Honda Civic, without permission from Mr. Valencia.

COUNT 2: FRAUD, 1 PYTC. SEC. 3.37

On or about November 8th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $468.40 for a personal purchase, to wit: an automobile rental at Enterprise Rent-a-car, without permission from Mr. Valencia.

COUNT 3: FRAUD, 1 PYTC. SEC. 3.37

On or about November 10th, 2004 Defendant used Councilman David Ramirez's business credit-card in the amount of $76.94 to make a personal purchase at Throop Florist, without permission from Mr. Ramirez.

COUNT 4: FRAUD, 1 PYTC. SEC. 3.37

On or about November 10th, 2004 Defendant used Councilman David Ramirez's business credit-card in the amount of $113.37 to make a personal purchase at Inglis Florist, without permission from Mr. Ramirez.

COUNT 5: FRAUD, 1 PYTC. SEC. 3.37

On or about November 8th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $35.94 to make a personal purchase from Domino's Pizza, without permission from Mr. Valencia.

COUNT 6: FRAUD, 1 PYTC. SEC. 3.37

On or about November 8th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $98.75 to pay for her personal Qwest bill, without permission from Mr. Valencia.

COUNT 7: FRAUD, 1 PYTC. SEC. 3.37

On or about November 25th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $120.00 to pay for a Cox Cable bill, without permission from Mr. Valencia.

COUNT 8: FRAUD, 1 PYTC. SEC. 3.37

On or about November 24th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $167.63 to pay for her Qwest bill, without permission from Mr. Valencia.

COUNT 9: FRAUD, 1 PYTC. SEC. 3.37

On or about November 24th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $183.27 to pay for her Comcast bill, without permission from Mr. Valencia.

COUNT 10: FRAUD, 1 PYTC. SEC. 3.37

On or about November 24th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $263.53 to pay for her Qwest bill, without permission from Mr. Valencia.

COUNT 11: FRAUD, 1 PYTC. SEC. 3.37

On or about November 24th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $500 to make a personal purchase at Enterprise Rent a Car, without permission from Mr. Valencia.

COUNT 12: FRAUD, 1 PYTC. SEC. 3.37

On or about December 4th, 2004 Defendant used Councilman Francisco Valencia's business credit-card in the amount of $113.14 to make/complete a purchase at Enterprise Rent a Car, without permission from Mr. Valencia.

COUNT 13: FRAUD, 1 PYTC. SEC. 3.37

On or about November 15th, 2004 Defendant used Councilman Robert Valencia's business credit-card in the amount of $546.57 to pay for a personal bill at the Holiday Inn, Tucson Airport, without permission from Mr. R. Valencia.

COUNT 14: FRAUD, 1 PYTC. SEC. 3.37

On or about November 1, 2004 a check posted that Defendant drafted on a PYT government account, without permission and for personal use, to wit: to pay $2,080.00 to "The Flag Lady," without permission from Mr. Valencia.

And such violations, upon conviction, are punishable under the Pascua Yaqui Tribal Codes.

DATED this 31st day of October, 2005.

The undersigned hereby swears and affirms that this complaint is based upon information and belief, and the attached Affidavit and Verification.

Complainant/Deputy Prosecutor

DEFENDANT: Laura G. Grijalva
ADDRESS: 4931 W. Neokae
DOB: 08/04/75 SSN: ----- ORIGIN: Pascua Yaqui:2694U00233 Az Driv Lic # 601035818
SEX: Female

Note: Accused persons may obtain disclosure information about their case ten days <u>after</u> arraignment by contacting the Prosecutor's Office at 4725 West Tetakusim Bldg C, Tucson AZ 85746. [PYTC Title 10 Rule 5.1]

Appendix E

TRANSCRIPT (motion hearing)

August 21, 2006

Pascua Yaqui Tribe .vs. Laura G. Grijalva CR-06-025

JS:	Judge Stoof	YJ:	Yancy Jencsok
MS:	Micah Schmit	GT:	Gilda Terrazas
CC:	Court Clerk		

JS: This is CR-06-025, PYT vs Laura G. Grijalva. If you could please announce who you are for the record?

YJ: Well, I was here for Micah Schmit but he just walked in, so.

JS: Ok

GT: Gilda Terrazas for Laura Grijalva who is present out of custody seated to my right, you honor.

JS: Alright, the court has received a proposed plea however, upon closer look on the file, I had an issue as to count 1 and even though parties can always waive personal jurisdiction, subject matter can never be waived and if there is an issue of subject matter can be raised at any time by the court itself.

GT: Your honor, if I may?

JS: Yes

GT: Mr. Schmit contacted me this morning. The plea agreement has been amended to allow Ms. Grijalva to plea to count 3 and count 10.

JS: Well here's, here's the issue of. It's an issue of do I have authority to (interrupted)

GT: Order the restitution

JS: Order restitution in count 1, because the restitution is basically derivative of the claim in count 1 and under Indian Civil Rights Act as well as the Tribal Constitution in section 128 has to be commenced with in 1 year from the date of the alleged offense so if I don't have jurisdiction criminally over count 1, I wouldn't have jurisdiction over the restitution for count 1, so I don't know whether the proposal was that you're going to be filing a separate civil action for civil restitution and include that because if I don't have jurisdiction over count 1, Fraud, than I wouldn't have jurisdiction to award restitution arising out of that claim, so I mean, in effect it becomes a civil restitution claim and I have a feeling that the drafters of this code because it's a unique statute in that typically when you have you know state or federal statutes it's, my statue says: The court can order restitution arising out of the crime if it's, if you can prove cause injury. Article 7 post verdict proceedings rule 700 sentencing section B and this is in the criminal code now. It says civil restitution, in addition to our incentive penalties provided in subsection A above, the court may require a convicted offender who has inflicted injury upon the person or property of another to make restitution or compensate the injured person by means of the

surrender of property, payment of money, or the performance of other act for the benefit of the injured party which is reasonably related to the offense committed. Testimony of the victim shall be considered determination of appropriate disposition under the section. But again it's derivative of the court having jurisdiction in a finding of guilt or an entry of a plea as to the count, so as far as count 1, I don't know whether I even have jurisdiction at this point over count 1 (interrupted)

GT: It's true your honor.

JS: Because it was filed more than a year. So I don't know how the parties wanted to resolve that, again whether you're going to stipulated to a civil judgment in a separate proceeding but I don't believe under our code that I would be able to take jurisdiction of that because it's a matter of law. Under ICWA, Indian Civil Rights Act, under the tribal constitution which limits claims to 1 year as well as section 128 of the Law and Order code. If it's filed past a year, I don't have it, it's. As I said before it's like being a little pregnant, I'm either am or I'm not and I mean it's, it's beyond a year and I don't think I can maintain subject matter.

GT: If it's not criminal in nature then it would require, I guess a motion to dismiss and the Attorney General's office can than decide to proceed.

JS: For count 1. On count 1. And again by doing that it doesn't waive any right of the tribe to go against Ms. Grijalva civilly. I'm sure you can advise her of the potential exposure civilly. But I, I feel at this point I don't have the subject matter to listen to the proceeding for count 1 for purposes of a criminal proceeding. So as far as this plea then goes and I understood the amount agreed upon was $5759.22 would obviously affect that if it includes count 1, the allegation was $3413.22, again I'm not going to tell the tribe or Ms. Grijalva how to handle potential exposure on a civil claim or what the statutes are for that matter. I'm just saying for the purposes of a criminal proceeding I don't believe I can include that as part of a criminal plea agreement. Any thoughts, any suggestions?

MS: Yes, thank you. The court may recall that you have identified that at the very beginning when the initial hearing or arraignment, one of the very first proceedings occurred and I asked the court to indulge me in a little patience on that pending a retention of counsel either public defenders or private conflicted counsel and it was for this reason that I intended to litigate the statutory affect of the limitations having arguable gone by, by I think it was a few days or a few weeks. With the idea that what would litigated is when the offense occurred. As you know, fraud counts both federally and state side the time lines don't begin until the discovery of the fraud otherwise you would reward a clever thief or embezzler or so forth to simply hide his action until that statue of limitation had run. So for that reason all statues of limitations generally in fraud or concealment kind of cases don't begin not from the offense execution but from the offense discovery. What I intended to preserve for litigation if a plea hadn't been brokered is the argument that the fraud crime is on going and that you can still argue that the statue of limitations doesn't begin because the concealment is still on going until actually discovered by the victim and in that sense you still have the beginning in a sense of offense crime up until the point it is finally discovered and then the concealment, the crime that the necessary part of the embezzlement or fraud or whatever has now truly begun because it's now been discovered by the

victim and in that sense the crime has now ended and it's discovery has occurred and now you have truly begin the statue of limitations, that's what I would have presented. The court may not have bought that or it may have found that in the interest of justice that, that's worth entertaining, regardless of how the outcome by the Tribal Court would of occurred on that argument, I'm sure that either side because it would have contemplated no plea, either side would have then appealed that decision on way or another. What a plea does of course is contemplate for both sides the risks of going to trial and the trade off's involved and what we did here was, you know, was substantially less then the total sum of the 14 counts was negotiated a reasonable financial settlement a long with a very reasonable charging or conviction settlement. And what I would submit to the court is, I'm agreeing with you in part for sure and that is I don't think jurisdiction is something that can necessarily be waived and the court alternatively can raise it on it's own, it's not something that the defendant has to raise or it's waived, so I have no issue with the court raising this and asking it to be defended of it's own. What I'm submitting to the court it that there is a reasonable bases to potentially interpret the statue and to avoid the litigation on that embodied in the plea is that resolution and separate from all of that it's my experience that restitution can be negotiated for things that are maybe not even criminally contemplated so long as it has been bargained on a fair level with the other side (interrupted)

JS: But, but if I... but if I ...

MS: That's a separate one ...

JS: Yeah, but the question I have is if I don't have jurisdiction over 1 presuming that to be the case, I wouldn't be able to include it as part of a plea so in effect what it might create an ethical dilemma of, you know saying, I'm going to buy my way out of a potential criminal proceeding, which I know that's not happening because if I don't have jurisdiction, I don't have jurisdiction. But the question is, but it's only if it's not part of a criminal proceeding in effect, wouldn't it be left as a civil restitution as the remedy. If I don't have jurisdiction in the criminal court here and the tribe wishes to proceed against Ms. Grijalva I mean wouldn't it in effect be a civil remedy, if you were to exercise that.

MS: It could. What I'm saying is simply in my experience in other circumstances and I've handled hundreds and hundreds of restitution cases, you can negotiate restitution for things that aren't even provided for under criminal restitution so long as it was equally bargained for. Criminal restitution doesn't provide for pain and suffering, for example. And routinely (interrupted)

JS: Wouldn't it have to arise out of the criminal act for which the court has jurisdiction?

MS: Not necessarily if it's part of a resolution and in this case it's a guaranteed non pursuit, that's part of what's contemplated here. It won't be pursued it won't be litigated. I mean if you want we can simply amend the indictment and do counts 2 through 14. I will charge count 1 separately and we'll continue litigating this for two years, through you, through the appellant courts and there will be no silence or rest or conclusion from the defendant's stand point. I don't think that's what they want. I can certainly bifurcate that which the courts has problems with but I think really what's happened here is the defendant and counsel have really thought about this and in the interest of everybody, this is a way to close it out. It's affordably both from the

government stand point as far as convictions and resolutions goes and from the defendant's stand point in the way of payment. So I would propose that as an alternative but I don't want the court to lose sight of the very first point and that is; there is a reasonable bases to litigate the viability of the charge initially by virtue of if it's still hidden is not the crime still on going. It hasn't been ended and therefore there is a beginning time of the statue of limitations. The crime is still continued.

GT: Your honor, if we can recess for five minutes, we can maybe; I mean he is discussing bifurcation of that count. I'm sitting here listening to his argument; I don't know if Mr. Schmit would be amenable to addressing the courts concerns for five minutes with counsel or whether he just wish to proceed with argument.

JS: Do you mind a recess?

MS: No, I don't mind a recess.

JS: Any objection? Take a brief recess? Let's take about a five minute break.

GT: Ok, thank you your honor.

JS: Pascua Yaqui Tribe –vs- Laura G. Grijalva. We had a brief recess. Any resolution, any suggestions?

MS: Sure judge, if the court is willing to embrace the plea anyway, that would be our first option. If the court has listened to the arguments made and decided that none of those would be acceptable then what we would suggest is at defense counsel's leisure and the court's calendar of course, is reset this so we can redraft it according to, I think it was the third option, which is segregating count 1 out into a separate proceeding, separate case and having 2 through 14 be the resolved plea and of course we would want to clean up the documents to reflect that. So depending (interrupted)

JS: Well, are you asking me to rule on the issue of the jurisdiction today as far as count 1, or?

MS: Yes, because I think it would be determined if the court would accept that it's potentially in good faith litigatable and there is a bases to possibly still find jurisdiction because of concealment, the on going concealment makes for a potentially ongoing crime, our first choice is to just go forward with the plea as we bargained for.

JS: Any response?

GT: Your honor, our discussion was, let the court make its decision on the issue of jurisdiction to order a civil restitution amount and based on Mr. Schmit's arguments and now judge the defendant and I signed the plea agreement and, you know, in good faith that's all I'm going to submit to the courts is that we negotiated and we signed it. If the court does not decline jurisdiction to honor that restitution than Mr. Schmit and I said bifurcate count 1 for a different

proceeding and then let us come back with the plea agreement on the remaining counts that the court feels it does have jurisdiction over for which to decide.

JS: I'm going to go ahead and, and grant the request to both continue this but I'm going to go ahead and grant a bifurcation, because again the issue comes of count 1 just how do you proceed on this and I'm just thinking also I guess in terms of both civil and criminal as far as allegations of bank fraud and you look at UCC and it provides civil remedies of 30 days in which an account holder has a duty to look at their bank accounts but even there up to 1 year is permitted under Federal statutes for at least National Banking Associations and that's considered a generally accepted business practice that within 1 year an audit function is done to determine if there has been any alleged fraud or any alleged problem with accounting, an account so that raises the issue of discovery rule of just how far would that toll the statute if, if it can be tolled for a fraud. And again this is an issue, don't come up quite often in tribal court because we often don't have a lot of UCC codes in the tribal courts at least in which I've practiced. There is not a whole lot to do that as far as setting but for purposes of the criminal prosecution often times that language is very similar to those provisions in the UCC code in bank fraud issues. So those are applied, those civil arguments are generally applied for purposes of arguing why the statute should be tolled for purposes of a discovery of fraud. So these same issues have been, so those are sort of instructive to this issue of whether it proceeds. But 128 of the code, the only way that it can be tolled is either if the defendant is outside of the jurisdiction beyond that time frame or two, was avoiding prosecution. So those it appears under 128 seem to be the explicit reasons why a court can go beyond 1 year for a filing. And again I don't know, I'm certainly open to hearing arguments as far on count 1 why I can retain the jurisdiction if I'm going to reserve on any ruling of the jurisdiction on count 1 whether the court has jurisdiction over the matter for purposes of a fraud based on some argument of a discovery rule. So what I'll go ahead and do is separate out then counts 2 through 14 and I'll reset that matter for a plea, a proposed plea. Now how long do you think this would take to, as far as briefing the count 1 issue, as far as, do you want me to set this for the same time and day; or do you want to hold off on any plea, proposed plea to be submitted until we resolve count 1.

MS: Would it be practically possible to separate them out even to the extent that they are carrying separate case numbers. If only by sub set A and sub set B or something.

JS: Under provisions here, under our procedure you have to have a separately filed … and I'm just bifurcating, what I'm doing right now is keeping the same case number. I'm just separating these out for purposes of proceedings. One is, you know I'm basically setting aside, my ruling would be to have count 1 set for a jurisdictional hearing solely as to the jurisdiction over count 1. But my … (Interrupted)

MS: Right, fine.

GT: Your inclination is to set a legal hearing on... (Interrupted)

JS: Yeah, yeah, just for the legal arguments on 1 only

GT: Ok, so

MS: What I think would be in the defendant's interest though is to have finality… (Interrupted)

GT: Thank you Micah

MS: Finality on 2 through 14

GT: (laughing)

MS: What?

GT: Never mind

JS: If there's no objection, I'll just set 2-14 for a proposed plea hearing. If that is what the parties…

GT: I don't mind arguing the _____ phrase _____ extension of the jurisdictional issues in count 1 for legal hearing and I don't mind at that date notifying the court whether we've reached a plea agreement on 2 through 14.

MS: We've already reached an agreement on 2 through 14, so we can set that tomorrow or next week. I think briefing the motions on the first issue is going to be much more time consuming.

GT: We'll I'm _____ judge, if I can have a legal hearing and then he going to fax me the plea agreement. That would be fine with me.

JS: Okay. Let's go ahead and set count 1 for a hearing, again on the issue of the statutes for the _____

MS: I may object to all of this then so, the current plea agreement is not being accepted by the courts so we are at square one and in theory we can litigate all 14 counts or plea all 14 or bifurcate or do whatever, I mean that's the up shot. Is this plea hearing is being continued or vacated?

JS: Any, any, either party can withdraw a plea at anytime.

MS: Correct.

JS: Again I have to raise issues of jurisdiction because the court you know has its own concerns about; I understand that parties have agreed. I understand what they have agreed to… (Interrupted)

GT: I understand your honor.

JS: But the point is I've got to preserve my ability to maintain authority over a case and again I'm raising subject matter because it sets, it sets a precedent also opens up the potential of having even a writ of habeas corpus filed or federal tort claims filed for violation of someone's rights under the Indian Civil Rights Act, in, in light of the fact that I'm a 63800 BIA ____ BIA,

exposing the court to potential exposure under federal tort claims. If I act ultra veres beyond the course and scope of my authority and I can also be individually sued for not up holding the laws of the tribe. So again I raise issue because the court is in a position to determine its jurisdiction and under numerous US Supreme Court cases the court must establish whether it has jurisdiction over a particular matter. Now the other issue we have a notice law here. In which, if there's ever a question about whether court has existing jurisdiction over a particular claim whether it be criminal or civil or any other matter. I can notify the Attorney General to assist the court to determine whether I still can maintain jurisdiction over this matter or not. Again I'm just raising the issues of jurisdiction. I haven't made a ruling on them yet. So if there is no objection what the court can do under the notice provision which was passed very recently in 2005 for situations like this, where the court does not have a solicitor general in the sense of having being able to talk to the solicitor to advise the court about whether it had the jurisdiction to permit the Attorney General an opportunity to give them notice of the briefing and perhaps they can file an amicus curie brief or briefs for the court to make recommendations as to whether I have continuing jurisdiction over count 1.

GT: Your honor the defendant has no objection to setting a hearing on that issue, the jurisdiction issue, allow time for briefing and we can, Mr. Schmit said he wanted to clean it up and fax me the plea agreement and we can set that for the same date and time. That makes sense. I have no problem with that.

JS: Whether there's a plea to go forward or not I think that's probably appropriate. We'll set it for a legal hearing as to count 1 on the jurisdiction and we'll set it also for, whether there may or not be a proposed plea as to count 2 through 14, we'll need to proceed as a plea hearing or as a status conference depending on whether the plea goes through. So I'm going to go ahead and set count 1 for, again a legal jurisdiction and just to notify the parties, I'll be sending a notice to the Attorney General's office under the this notice law. I'll provide you the sections of that so you can both look at that notice law. This was recently enacted in 2005 to ensure that the court in, when it has questions of jurisdiction, whether it be personal or subject matter jurisdiction that it can have the assistance of the Attorney General, or input from the Attorney General on whether it can exercise continuing jurisdiction over a particular case. So that's specifically what the notice law is designed to, to resolve. So we'll go ahead and address that and we'll hear all other legal arguments. How much time do you think we will need to do briefing and responses?

GT: Your honor, I have a trial that I'm preparing for on August 3rd, so if I could have anywhere from seven days after August 3rd to brief on that issue.

JS: How much time do you need to?

MS: I don't mind if she takes another week on top of that to file her opening motion. If the same consideration is given to the tribe, you know, instead of ten days, twenty days, I'm just offering it.

GT: The court has framed the issue; can't we just file simultaneous briefings on that issue?

JS: Can you both get in by August 10th? Again the issue is pretty straight forward is do I have, do I have jurisdiction over the case

MS: Yeah

GT: Yeah, you framed the issue and we are briefing the court on that issue.

MS: There is a reason why it's sequential and that is so that the responding party has an opportunity to address case law, novel, arguments of policy, that kind of thing in its response.

GT: That's fine your honor. I will file my brief on August 10th.

JS: I'm going to just order that both briefs be filed at that time, both be submitted to the court on August 10th. So we'll go ahead and set this matter for hearing at a later date beyond that time and I going to also send a notice to the Attorney General providing them an opportunity to respond by August 10th, so that both of you can have an opportunity to look at the Attorney General's response to this whether they respond at all.

CC: (setting date and time) Monday, August 21st, 3:00.

JS: Ok we'll go ahead and set count 1 for legal arguments as well as Status Conference as to count 2 through 14. And the court will issue an order to AG's under the tribal notice law to see whether they want to give any recommendations or file any friends of the court briefs. Okay, see you back here on August 21st.

All rise.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
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Micah Schmit
Chief Prosecutor

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellant, vs. GRIJALVA, Laura G., Defendant/Appellee.	Trial Court Case No. CR-06-025 Appeals Court Case No. CA-06-02/ NOTICE OF APPEAL (Oral argument requested before the full appellate panel).

NOTICE IS HEREBY GIVEN, under PYTRAP, Rule 7, that the Pascua Yaqui Tribe is filing an interlocutory appeal from an order by the trial court, dated August 21, 2006 (attached) wherein Judge Melvin Stoof rejected a written plea, agreed-to by both parties, on the grounds that the trial court lacked subject matter jurisdiction over one of the counts.[1]

It is the Tribe's position that, where the litigants mutually ascent to a resolution of the case, even where one of the counts was filed beyond the statute of limitations, that count may, nonetheless, be compensated for and/or even plead to, in a mutually bargained for plea. It is

[1] The Tribe feels that it is important to respectfully note that the attached August 21st order does not accurately frame the issue litigated by the parties. The preceding order, dated July 26th, will bear this out and will be included in the Tribe's opening brief. The August 21st hearing was supposed to address the following issue, as framed on July 26th: If the court were to dismiss Count One of the Complaint, then could the court accept a proposed plea which includes the payment of civil restitution arising out of the conduct alleged as a crime in count one when the court may lack subject matter over that underlying count? In other words, if count one was dismissed, would the court's authority to order restitution arising out of count one (in a plea agreement) be lost?

Interestingly, *both* parties briefed just that issue. But clearly, the ruling and order from Judge Stoof on August 21st answered a distinctly different question (one not briefed by the parties) namely: Does the lower court had jurisdiction over a *contested* charge where that charge was filed days after the statute of limitations had run. This is a critical distinction in federal and state case law, which universally hold that litigants may liberally bargain towards mutually agreeable terms when resolving any case, even including pleading to charges normally barred by a statute of limitations. The Tribe submits that the order from August 21st altered the framed (and briefed) question to such a degree that the true issue at hand (acceptability of a jointly submitted plea) went unanswered and/or rejected.

precisely through the act of such mutual agreement (as opposed to trial litigation) that the lower court's jurisdiction is not contingent.

Accordingly, the Tribe asks that time-limits in this pending matter be deemed suspended, while this Court's ruling on the request to reverse the lower court's rejection of the plea and setting of matter for trial, is awaited.

The Tribe would request oral argument before a three Justice panel.

RESPECTFULLY SUBMITTED THIS 19 day of September, 2006.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

Micah Schmit
Chief Prosecutor, PYT

Original and copies delivered to:
Clerk of Court, Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribal Court

Pascua Yaqui Tribe, Office of the Attorney General

Defendant/Appellee, through her attorney,
Gilda M. Terrazas
PO Box 86505,
Tucson, AZ 85754

By

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff, Vs. GRIJALVA, LAURA G., Defendant.	)	Case No. CR-06-025 ORDER DISMISSING COUNT ONE DUE TO LACK OF SUBJECT MATTER JURISDICTION AND SETTING TRIAL

On August 21, 2006, this matter came before the court for hearing on a question of whether the court could maintain jurisdiction over one count pursuant to the Pascua Yaqui Tribal code, and for a status conference. Appearing was the defendant Laura Grijalva and her attorney Gilda M. Terrazas, and Yancy Jencsok for the Tribe.

The question framed by the court on July 26, 2006, was whether it could maintain subject matter jurisdiction over a claim, which was filed by the prosecutor on October 31, 2005, for an alleged offense, which occurred on October 4, 2004. Section 1.28 of the Pascua Yaqui Law and Order Code provides that all actions shall be brought within one year of the date of the alleged offense. The statute further provides:

> The one (1) year time limit does not include time spent outside of the jurisdiction of the Tribal Courts for the purpose of avoiding prosecution. The burden of proving the reason for absence from the jurisdiction shall be upon the accused.

The Tribe has not established that the defendant was outside of the court's jurisdiction or that she had been avoiding prosecution, which are the two exceptions which toll the one year statute of limitations.

The court finds that like many federal statutes, the Pascua Yaqui Statute of Limitations was enacted to promote prompt and timely filing of complaints. If the Tribe were to have established tolling provisions, allowing for filings after a one year time frame it could have done so. An example of such an enactment is the speedy trial act in the Pascua Yaqui Rules of Criminal Procedure which provides in pertinent part:

> The calculation of time limits prescribed by this rule shall not include any delays caused by or on behalf of the defendant, including but not limited to, dealy caused by an examination and hearing to determine competency, the defendant's absence or

> incompetence, or his or her inability to be arrested or taken into custody on the reservation.

This provision is similar to the federal limitations statutes, for example:

> No statute of limitations shall extend to any persons fleeing from justice.

18 U.S.C. Sec. 3290.

Similarly, if there is an ongoing concealment or fraud under federal law, as in tax evasion matters, the federal law provides that a person who has violated internal revenue laws and who is outside the United States shall be considered a fugitive from justice within the meaning of section 3290, and such time outside of the country "shall not be taken as any part of the time limited by the law for the commencements of such proceedings." 26 U.S.C. Sec. 6531.

The Pascua Yaqui statute of limitations is similar to the federal statute of limitations as to criminal contempt, which provides:

> No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of: nor shall any such proceeding be a bar to any criminal prosecution for the same act.

18 U.S.C. Sec. 3285.

The Tribe's Council could have provided a caveat, or exception in the rule, to allow tolling of the criminal statute of limitations beyond one year, but it chose not to do so. In the absence of such a provision allowing tolling of the one year limitations, the court does not find that a "discovery" rule is applicable to allowing tolling.

The Tribe argued that under the rule of discovery, a criminal statute may be tolled to such time as the date of the discovery that a fraud has been committed based on a concealment of an offender of the fraudulent act. However, such a scheme would entail a crime of ongoing concealment, rather that as in this case, one discreet act taking place on a particular day and time. Although the State of Arizona's time limitations statutes provides that misdemeanor offenses must be commences "following periods of actual discovery by the state" or "discovery by the state. . .that should have occurred with the exercise of reasonable diligence." A.R.S. Sec. 13-107, Time Limitations, the Tribal statute has no such "discovery" provision, but rather simply states that the actions must be brought within one year of the date

of the alleged offense. Because Count One alleges an offense that occurred on October 4, 2004 was filed on October 31, 2005, the filing was more than one year past the date of the alleged offense, and the court lacks subject matter jurisdiction over Count One, based on the filing past the one year statute of limitations.

The court finds that it has jurisdiction over Counts Two through Fourteen, and therefore any proposed plea which dismissed any of the counts Two through Fourteen could be accepted, because a court which has continuing jurisdiction over such criminal claims would also have jurisdiction to approve a civil restitution agreement arising out of the criminal claims over which it maintains jurisdiction.

The defendant has requested a bench trial as to the remaining counts, and the court should set this matter for trial and the defendant should be released under prior conditions. The defendant has waived time limitations for the trial setting in order to obtain additional disclosure from the Tribe.

IT IS ORDERED that the Count One, Fraud, shall be dismissed, for lack of subject matter jurisdiction, because the alleged offense took place on October 4, 2004, the Tribe filed its complaint on October 31, 2005, and the Tribe did not establish that the defendant was either outside of the jurisdiction of the Tribe or that she was avoiding prosecution.

IT IS FURTHER ORDERED that the defendant has waived time limitations for setting the matter for trial in order to obtain additional disclosure from the Tribe, and **this matter shall be set for a bench trial on Counts Two through Fourteen on October 17, 2006 at 2:00 p.m..** Laura Grijalva shall be released on her own recognizance, she shall appear for all future hearings, and she shall obey all laws.

THIS IS THE ONLY NOTICE OF HEARING YOU WILL RECEIVE.

SO ORDERED THIS 21st DAY OF AUGUST, 2006.

Judge, Pascua Yaqui Tribal Court

CC: Date 08.22.06
X Tribe X Defendant
Clerk