

No. CA-07-016
Pascua Yaqui Tribe Court of Appeals

Pilar M. Thomas, Petitioner,

v.

Peter Yucupicio, in his individual capacity, and
Honorable Melvin Stoof, Tribal Court Judge, Respondents.

ORDER

Original Petition for Writs of Prohibition and Mandamus filed with Pascua Yaqui Tribe Court of Appeals, Pilar M. Thomas, Esq., pro se.

This Court reviewed the Petition for Writs of Prohibition and Mandamus that was filed with this Court on Tuesday, August 21, 2007, and finds as follows:

1) The Petition seeks to “prevent the execution of a judgment and order decided on August 17, 2007, and issued on August 20, 2007, in *Yucupicio v. Figueroa*, No. CV-07-116,” Petition at 1, by the Pascua Yaqui Trial Court, the Honorable Melvin Stoof presiding;

2) The subject judgment and order is a declaratory judgment that essentially found Chairwoman Herminia Frias’ suspension constitutionally valid; that when a vacancy occurred in the executive office due to the suspension, Vice-Chairman Peter Yucupicio automatically became the chairman pursuant to the Pascua Yaqui Tribe Constitution; and the Pascua Yaqui Tribal Council’s act of appointing Peter Yucupicio to the office of chairman, per Pascua Yaqui Tribal Council Resolution No. C08-127-07 (Aug. 10, 2007), is legal;

3) Once vested with executive authority, Chairman Yucupicio “could exercise all rights and privileges appertaining to that position of public trust, including the power to terminate key employees,” Trial Court Judgment at 3;

4) The Petitioner alleges in her petition that she is the key employee that Chairman Peter Yucupicio ordered the Tribe's Human Resources Director, Jacinta Figueroa, to terminate and thus she has a direct interest in the case of *Yucupicio v. Figueroa*, No. CV-07-116, and the resulting declaratory judgment;

5) The Petitioner has a separate Complaint for Declaratory and Injunctive Relief, *Thomas v. Yucupicio*, No. CV-07-117, pending before the Pascua Yaqui Trial Court;

6) The Petitioner alleges that she made a motion to consolidate her complaint with the *Yucupicio v. Figueroa* case, which Judge Stoof denied for lack of good cause and as untimely;

7) The Petitioner essentially wants this Court to overrule and vacate the declaratory judgment and order in *Yucupicio v. Figueroa*; or in the alternative prevent the declaratory judgment and order from taking effect for thirty (30) days;

8) The Petitioner was not a party to the *Yucupicio v. Figueroa* case so she does not have standing to contest the validity of the declaratory judgment and order;

9) While this Petition is styled as a request for a special writ, it is essentially an attempt to appeal the decision in *Yucupicio v. Figueroa*, however, the Petitioner lacks standing to appeal that decision; and

10) The Petitioner has a legal remedy available to her through her complaint that is now pending before the Pascua Yaqui Trial Court in case No. CV-07-117.

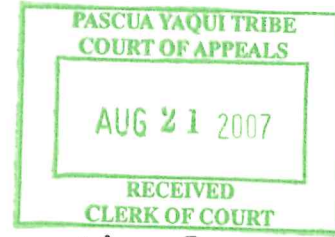
Accordingly, the Petition for Writs of Prohibition and Mandamus is summarily denied pursuant to PYTRAP, Rule 24(C). This order shall be served on both parties or their counsels as soon as possible.

So ORDERED this ____ day of August, 2007.

Chief Justice

Associate Justice

Associate Justice



1 Pilar M. Thomas, Esq.
2 5280 S. Camino de Oeste
3 Tucson, AZ 85746
4 (520) 883-3146
5 *Pro se*

6 **IN THE PASCUA YAQUI TRIBE COURT OF APPEALS**
7 **IN AND FOR THE PASCUA YAQUI RESERVATION**

8 Pilar M. Thomas,) Case No.:
9)
10 Petitioner,)
11 vs.) **Petition for Writs of Prohibition and**
12) **Mandamus**
13) **3 PYTRAP Rule 24**
14)
15 Peter Yucupicio, in his individual capacity)
16 and)
17 Honorable Melvin Stoof, Tribal Court Judge)
18)
19 Respondents)

20 **PETITION FOR WRITS OF PROHIBITION AND MANDAMUS**

21 COMES NOW, Pilar M. Thomas, Petitioner, and hereby requests this Court, pursuant to
22 PYTRAP Rule 24, to issue writs of prohibition and mandamus against the Respondents, Peter
23 Yucupicio, Vice Chairman for the Pascua Yaqui Tribe, and Honorable Melvin Stoof, Associate
24 Judge, Pascua Yaqui Tribal Court to prevent the execution of a judgment and order decided on
25 August 17, 2007, and issued on August 20, 2007, in Yucupicio v. Figueroa, Case No. CV-07-
116. The grounds for this Petition are:

STATEMENT OF FACTS

1. On August 1, 2007, Chairwoman Herminia Frias was suspended by Tribal Council action pursuant to the Tribe's Ethics Ordinance, 2 PYTC § 1-2-90(C). See Frias v. Yucupicio, Case No. CA-07-015.

- 1 2. On August 2, 2007, Yucupicio personally confronted Petitioner and told Petitioner
2 that she was placed on administrative leave without pay effective immediately.
3 Ppetitioner's Exhibit A.
- 4 3. On August 6, 2007 Yucupicio issued an Executive Order No. 08-06-07 which
5 claimed to, among other things, self-authorize Defendant to assume the duties of the
6 Office of the Chairwoman. Ppetitioner's Exhibit B.
- 7 4. On August 6, 2007 Yucupicio issued an Internal Memorandum, addressed to Plaintiff
8 and served on Plaintiff by process server, which stated, in part, "Your services are no
9 longer needed, and your position is terminated effective immediately." Ppetitioner's
10 Exhibit C.
- 11 5. On August 17, 2007, at approximately 8:50am, Yucupicio filed a Petition for
12 Declaratory Relief against Jacinta Figueroa, Director of Human Resources, in the
13 Pascua Yaqui Tribal Court, Case No. CV-07-116, seeking a declaratory judgment
14 directing "Figueroa to immediately comply with his directive of August 7 . . . to
15 process the termination of Chief of Staff Pilar Thomas." Ppetitioner's Exhibit D.
- 16 6. Yucupicio, in his petition, claims the authority of the Chairwoman while she is
17 suspended, and thus claims he has the authority to terminate Petitioner.
- 18 7. Upon information and belief, Figueroa was served through the Tribe's Office of the
19 Attorney General.
- 20 8. Upon receipt of the Petition, the Tribal Court set an expedited hearing for 3:30pm, on
21 the same day the petition was filed. Ppetitioner's Exhibit E.
- 22 9. On August 17, 2007, at approximately 12:30pm, Ppetitioner filed a Complaint for
23 Declaratory and Injunctive Relief against Yucupicio. Ppetitioner's Complaint disputes
24 Yucupicio's claim of authority. Ppetitioner also filed a Request for a Temporary
25 Restraining Order and Preliminary Injunction. Ppetitioner's Exhibit F.

- 1 10. Petitioner attended the expedited hearing in Case No. CV-07-116. In that hearing,
2 Figueroa did not appear, and Respondent Stoof declared her in default.
- 3 11. Interim Attorney General Ruggieri also attended the hearing, and filed a written
4 request to stay the hearing pending his evaluation of any conflict of interest issues.
5 Respondent Stoof denied the motion. Petitioner's Exhibit G.
- 6 12. At the expedited hearing, Petitioner moved to join or consolidate the two cases
7 because the causes of action arise from the same set of facts, the legal issues are the
8 same, and joining the two cases would give Petitioner the opportunity to present her
9 case at a full and fair hearing. Respondent Stoof denied the motion, finding it
10 untimely. Petitioner's Exhibit H, Declaratory Judgment and Opinion.
- 11 13. On August 17, 2007, Respondent Stoof ruled from the bench, issuing a declaratory
12 judgment in favor of Yucupicio. Stoof also issued an order directing Figueroa to
13 comply with Yucupicio's directive to terminate Petitioner's employment.
- 14 14. Respondent Stoof's Judgment, Opinion and Order were issued on August 20, 2007.

15 **STATEMENT OF THE ISSUES**

16 Whether Respondent Stoof committed clear error in issuing his final judgment and order.

17 Whether Respondent Stoof abused his discretion when he wholly failed to follow the Pascua
18 Yaqui Tribe Rules of Civil Procedure in deciding Case No. CV07-116, and such abuse of
19 discretion has prejudiced and harmed Petitioner's interests.

20 Whether the Court of Appeals should issue a writ of prohibition against Respondent Stoof
21 and Respondent Yucupicio to prevent the execution of the final judgment and order.

22 **Standard of Review**

23 Writs of prohibition are an extraordinary measure. Courts generally follow a five
24 factor test to determine whether prohibition relief is appropriate under a given set of
25 circumstances: (1) whether the party seeking the writ has no other adequate means, such as

1 direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or
2 prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is
3 clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated
4 error or manifests persistent disregard for either procedural or substantive law; and (5) whether
5 the lower tribunal's order raises new and important problems or issues of law of first impression.
6 Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir.1977). Although all five
7 factors need not be satisfied in order for mandamus to issue, "it is clear that the third factor, the
8 existence of clear error as a matter of law, is dispositive." Calderon v. United States Dist. Ct. 134
9 F.3d 981, 984 (9th Cir. 1998) (internal quotations omitted).

11 ARGUMENT IN SUPPORT OF PETITION

12 **A. Petitioner Has No Adequate Means to Obtain Relief**

13 Since Petitioner was not a party to the case at issue here, Petitioner cannot appeal the
14 adverse judgment and order against Figueroa. Marino v. Ortiz, 484 U.S. 301, 304 (1988). Yet, it
15 is Petitioner's employment rights that are at risk in this case. Petitioner filed a Complaint against
16 Yucupicio a mere 3 hours after Yucupicio filed his complaint against Figueroa. When, at the
17 expedited hearing conducted that same day, Petitioner moved to consolidate the two cases,
18 attempting to be made a party to the case at issue here, Respondent Stoof denied the motion.
19 Judgment, at 1-2. Because Respondent Stoof denied the motion to join the cases, Petitioner has
20 no other means to obtain relief from his decision.

22 **B. Petitioner's Damage Cannot Be Addressed Through Appeal**

23 The relief sought by Yucupicio was an order from the Tribal Court requiring Figueroa to
24 comply with Yucupicio's directive to terminate Petitioner's employment. Because the order was
25

1 granted, Petitioner's employment termination will be processed immediately, and Petitioner will
2 be without an income. Even if Figueroa seeks to appeal from the adverse judgment and order,
3 and wins, the harm to the Petitioner is obvious: the Petitioner will be without a job and without
4 pay while the appeal is pending.

5 Furthermore, it is unclear what relief, if any, Petitioner can obtain from a successful
6 appeal. It is Figueroa's appeal to prosecute. The relief sought may do nothing to address the
7 damages to Petitioner. For example, Figueroa may simply seek to have the judgment overturned
8 and remanded for proceedings consistent with court rules. Or, Figueroa may request that
9 Petitioner be reinstated, but not receive back pay. In either event, a successful appeal won't
10 address Petitioner's damages.
11

12 **C. Respondent Stoof Committed Clear Error and Abused His Discretion in the**
13 **Handling and Decision of the Case Before Him**

14 Respondent Stoof committed clear legal error and abused his discretion by ignoring the
15 most basic, and material, of the Pascua Yaqui Tribe's Rules of Civil Procedure. This Court has
16 found that a trial court abuses its discretion when "the reasons for 'its action are clearly
17 untenable, legally incorrect, or amount to a denial of justice.'" In re TMC, CA-06-001 (Ct. App.
18 2006) (quoting State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 124 n.18 (1983)).
19 When Respondent Stoof decided this case, in an expedited hearing the same day Yucupicio's
20 Petition for Declaratory Relief was filed, he violated, at a minimum, 3 PYT R.Civ. P. Rules 6(C),
21 9, 10, and 11, Title 3, Chapter 3-1 (Declaratory Judgments), and Title 3, Chapter 3-3
22 (Judgments). These violations constitute an abuse of discretion, clear error and a wholesale
23 denial of due process.
24
25

1
2 1. *Expedited Hearing Violated Defendant's Right to 30 Days Response Time.*

3 While Yucupicio's petition sought an expedited hearing, Respondent Stoof set the
4 hearing for a mere 6 hours after the petition was filed. While Figueroa was constructively served
5 with notice, through the Office of the Attorney General, she was not personally served. Figueroa
6 had no opportunity to prepare, no opportunity to respond, and no real opportunity to defend. The
7 issues presented in Yucupicio's petition were important, requiring a careful and thoughtful
8 consideration of constitutional interpretation. But, this unreasonably short time frame did not
9 even allow for any briefing of the merits of Yucupicio's petition.
10

11 When Figueroa did not show at the expedited hearing, Respondent Stoof declared her in
12 default, in clear violation of three rules. 3 PYT R.Civ.P. Rules 6(C), 9, and 11 give the
13 defendant 30 days to respond to a complaint or petition. In this case, Respondent Stoof gave
14 Figueroa 6 hours to respond. Rule 6(C) states that the defendant has 30 days to respond to the
15 complaint. Rule 9 states that a defendant has 30 days to respond to a complaint. And Rule 11
16 states that a defendant can be found in default if he does not respond within 30 days to a lawsuit.
17 It was clear error and an abuse of discretion for Respondent Stoof to give Figueroa only 6 hours,
18 and not the full 30 days, to respond.
19

20 Respondent Stoof gave no reason or rationale for why these very critical rules of civil
21 procedure—rules designed to give the defendant and other interested parties due process and
22 sufficient opportunity to defend and be heard—should have been waived in this case. Yucupicio
23 did not seek such a waiver. In fact, it was Yucupicio's responsibility to request immediate
24 temporary relief, if there was sufficient cause for immediate action. 3 PYT R.Civ.P. 10.
25

1 Respondent Stoof's clear error and abuse of discretion not only violated Figueroa's due process
2 rights, but also prejudiced and harmed Petitioner's rights and interests.

3 **2. *Stoof's Denial of Motion to Consolidate Was an Abuse of Discretion***

4 Respondent Stoof also abused his discretion under 3 PYT R.Civ.P. 14(A) when he denied
5 Petitioner's motion to consolidate Petitioner's Complaint with Yucupicio's petition. Rule 14
6 allows for motions to be made orally as a consequence of what happens at a hearing, or, if the
7 motion is not made as result of what happens at a hearing, then five days notice is required. *Id.*
8 When Figueroa failed to appear and defend, Petitioner moved to consolidate the cases in order
9 that the same legal issues could be heard together. Judgment, at 1. However, Respondent Stoof
10 denied the motion, stating that it was untimely, and there was lack of good cause to grant the
11 motion. *Id.* There was no basis given for the lack of timeliness, other than that the motion had
12 not been served on Yucupicio's counsel. *Id.* Petitioner found out about the hearing 3 hours
13 before it was held. Petitioner made the oral motion at the hearing when Figueroa did not appear.
14 In this case, five days notice was impossible, since the hearing was scheduled a mere 6 hours
15 after Yucupicio's petition was filed.
16
17

18 **3. *Respondent Stoof's Issuance of Final Judgment and Order Was Clear Error***
19 ***Because it Affected and Prejudiced Petitioner's Rights and Interests***

20 With no more than perfunctory questioning of Yucupicio, and no opposing arguments
21 presented, Respondent Stoof issued a final judgment and order, from the bench, in Yucupicio's
22 favor. His order, combined with his refusal to consolidate the Petitioner's Complaint with
23 Yucupicio's petition, violates 3 PYTC § 3-1-100(A). "When declaratory relief is sought, all
24 persons *shall* be made parties who have or claim any interest which would be affected by the
25 declaration and no declaration shall prejudice the rights of persons not parties to the proceeding."

1 Id. (emphasis added). Petitioner has an interest in Yucupicio's petition because it is Petitioner's
2 employment that is the subject of Yucupicio's petition. Yucupicio claims authority to terminate
3 Petitioner, and Yucupicio's petition sought to order Figueroa to complete the termination for
4 Petitioner. Petitioner disputes that Yucupicio has such authority, and that dispute is the basis for
5 Petitioner's Complaint against Yucupicio. However, when Petitioner sought to consolidate the
6 cases so that Petitioner's rights and interests could be protected, Respondent Stoof denied the
7 motion. Respondent Stoof's denial of the motion, and the issuance of the final judgment and
8 order, clearly prejudices Petitioner's interest.

10 Respondent Stoof's judgment and order asserts that Petitioner's rights will not be affected
11 or prejudiced by a declaratory judgment between Yucupicio and Figueroa. Judgment at 2. This
12 is clearly incorrect, as a matter of law and of fact, on its face. The Petitioner's employment has
13 been terminated and the judgment orders Figueroa to complete the termination. Petitioner will
14 lose her position and income. Petitioner's rights are clearly affected by the judgment and order.

16 Furthermore, Respondent Stoof made his order effective immediately. Yucupicio acted
17 upon that order the same day. Declaratory judgments are to be treated as all other judgments. 3
18 PYTC § 3-1-60. But, "no civil judgment shall be enforced sooner than 30 days after judgment is
19 entered in the docket." 3 PYTC § 3-3-10. Respondent Stoof's order cannot take effect for at
20 least 30 days.

21 **D. The Issues Raised in the Lower Court are Important Legal Issues and Issues**
22 **of First Impression.**

23 The issues raised in Yucupicio v. Figueroa are important legal issues of first impression.
24 They entail the determination of whether the Vice Chairman succeeds to the duties and
25 authorities of the Office of the Chairwoman when the Chairwoman has been suspended from

1 office. The issues also entail the determination of whether a suspension is de facto removal from
2 office. Lastly the issues entail a considerable amount of constitutional and statutory
3 interpretations. Yet, Respondent Stoof, without the benefit of briefing or a trial on the merits,
4 issued a judgment about these incredibly important issues based merely on the pleadings.
5 Whether or not the judgment is correct, the issues raised are too important to decide without
6 benefit of briefing the issues. Petitioner's motion to consolidate would have accomplished such
7 a benefit.
8

9 **WHEREFORE**, for the foregoing reasons, Petitioner prays for:

- 10 1) a writ of mandamus to be issued against Respondent Stoof setting aside his judgment
11 and vacating his order in Case No. CV-07-116, or in the alternative, a writ of
12 prohibition preventing the execution of the order and judgment for at least 30 days;
13 2) a writ of prohibition to be issued against Yucupicio to prevent him from taking any
14 further action to execute the order and judgment for at least 30 days;
15 3) a writ of mandamus to be issued to Yucupicio reinstating Petitioner's employment to
16 August 17, 2007, and awarding back pay.
17

18 **RESPECTFULLY SUBMITTED** this 21st day of August, 2007

19
20 By: 
Pilar M. Thomas, Esq.
21
22
23
24
25

PETITIONER'S
EXHIBIT A

PASCUA YAQUI TRIBE

OFFICE OF THE VICE-CHAIRMAN



Memorandum

To: Pilar Thomas, Chairwoman's Chief of Staff
CC: Tribal Council
From: Peter Yucupicio, Vice-Chairman
Date: 8/02/07
Re: Administrative Leave Without Pay

Effective immediately, you have been placed on Administrative Leave without pay until further notice.

Vice-Chairman,
Peter Yucupicio

A handwritten signature in black ink, appearing to be 'Peter Yucupicio', written over a horizontal line.

RECEIVED
ADMINISTRATION

07 JUL 33 AM 11:00

**PETITIONER'S
EXHIBIT B**

PASCUA YAQUI TRIBE

OFFICE OF ACTING CHAIRMAN

EXECUTIVE ORDER NO. 08-06-07

ASSUMPTION OF AUTHORITY OF OFFICE OF CHAIRMAN

WHEREAS, On August 1, 2007, the Tribal Council of the Pascua Yaqui Tribe on motion voted to suspend **Herminia Frias** as Chairwoman of the Pascua Yaqui Tribe pursuant to the Constitution of the Pascua Yaqui Tribe, Article VI, Section 1, Subsections (o) and (p); and

WHEREAS, The Council's action took effect immediately, all powers and authorities previously exercised by **Herminia Frias** as Chairwoman were suspended and set aside, and

WHEREAS, **Heminia Frias** is without authority to exercise the duties and obligations of Chairwoman of the Pascua Yaqui Tribe and she no longer possesses the authority to delegate her duties and responsibilities of her office to anyone else; and

WHEREAS, Executive Order No. 08-01-07 was purportedly drafted and signed by **Chairwoman Frias** on August 1, 2007 at a time when she was facing possible removal from office or a suspension of her executive powers, and said executive order was not published until August 2, 2007, a time after the formal suspension became effective; and

WHEREAS, In said executive order, **Chairwoman Frias** purported to delegate certain executive powers to an administrative staff member, who is not an elected member of tribal council, and purported to delegate certain other enumerated and non-enumerated executive powers to Secretary Alvarez that went beyond the delegation of powers that are allowed by a Chairperson under the Constitution, bylaws, or Directives from Executive Officers, and that being the case, Executive Order No. 08-01-07 is without legal effect and is null and void; and

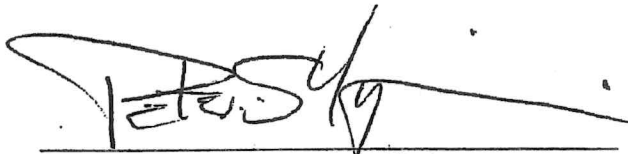
WHEREAS, Pursuant to said suspension action of the Pascua Yaqui Tribal Council, and pursuant to Article XI, Section 2, Constitution of the Pascua Yaqui Tribe, **Peter S. Yucupicio**, is now authorized to act and exercise the powers and authorities of the office of **Chairman** of the Pascua Yaqui Tribe during the period of suspension of the executive powers of the Chairwoman.

IT IS HEREBY ORDERED THAT:

1. The Executive Order No. 08-01-07 regarding a purported delegation of executive authority is hereby revoked, declared null and void, and is hereby superceded;
2. All Key Employers, Directors and Appointed Employees will report directly to **Acting Chairperson, Peter Yucupicio;**
3. All PTO requests granted to Key Employees, Directors or Appointed Employees that were signed/granted after July 20, 2007 are hereby revoked and all future requests for PTO or a leave of absence from said employees must be signed by the acting chairman or his designated agent.

BE IT FINALLY ORDERED that this Executive Order is effective immediately and shall remain in effect until revoked.

Dated this 6th day of August, 2007.

A handwritten signature in black ink, appearing to read 'Peter S. Yucupicio', written over a horizontal line.

Peter S. Yucupicio, Acting Chairman
Pascua Yaqui Tribe

**PETITIONER'S
EXHIBIT C**

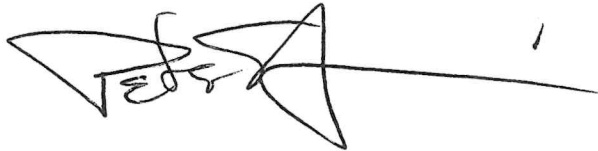
INTERNAL MEMORANDUM

Confidential

DATE : August 6, 2007
TO : Pilar Thomas, Chief of Staff
Office of the Chairman
FROM : Peter S. Yucupicio,
Vice Chairman
Acting Chairman
SUBJECT : Termination

Given your status as an appointed employee, your employment status is "at will employment." See Section II (B), Pascua Yaqui Tribe Employee Handbook. Your services are no longer are needed, and your position is terminated effective immediately. Please turn in keys, equipment, and other property of the Pascua Yaqui Tribe that has been assigned to you to Jacinta Figerora, Director, Human Relations.

cc Jacinta Figerora

A handwritten signature in black ink, appearing to read "Peter S. Yucupicio", with a long horizontal line extending to the right.

PETITIONER'S
EXHIBIT D

KATHLEEN N. CAREY, Bar No. 019695
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PASCUA YAQUI TRIBAL COURT
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FILED CR

Attorney for Petitioner

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PETER YUCUPICIO, an individual, Vice-
Chairman and Member of the Tribal Council of
the Pascua Yaqui Tribe,

Petitioner,

vs.

JACINTA FIGUEROA, an individual and
Director of the Human Resources Division for
the Pascua Yaqui Tribe,

Respondent.

Case No.: CV-07-116

**PETITION FOR DECLARATORY
JUDGEMENT**

Expedited Hearing Requested

COMES NOW the Petitioner, Vice-Chairman Peter Yucupicio, through counsel and pursuant to 3 P.Y.T.C. § 3-1-10 *et seq.*, and respectfully moves this Court to enter an order directing Respondent Jacinta Figueroa, Director of the Human Resources Division for the Pascua Yaqui Tribe, to comply with his executive directive instructing her to process the termination of Chief of Staff Pilar Thomas.

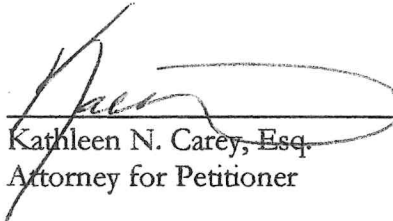
The grounds for this petition are set forth in the accompanying Memorandum of Points and Authorities.

///

///

DATED this 17th day of August, 2007.

LAW OFFICE OF KATHLEEN N. CAREY


Kathleen N. Carey, Esq.
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS.

Respondent Jacinta Figueroa, a non-Indian, is employed by the Pascua Yaqui Tribe as the Director of the Human Resources Division. In this capacity, Ms. Figueroa is obligated to comply with the executive directives issued by the Executive branch of the Pascua Yaqui Tribe such as undertaking employment actions against tribal employees, including termination from employment. [Exhibit 1].

On July 11, 2007, a member of the Pascua Yaqui Tribal Council personally served Petitioner Yucupicio with a complaint against Chairwoman Herminia Frias pursuant to the Tribal Code of Ethics Ordinance of 2006, 2 P.Y.T.C. § 1-2-10 *et seq.* [Exhibit 2]. On July 20, 2007, Petitioner Yucupicio and seven other members of the Pascua Yaqui Tribal Council served Chairwoman Herminia Frias with a formal complaint regarding the allegations of unethical or improper conduct. [Exhibit 3].

The Pascua Yaqui Tribal Council met in executive session on July 21, 2007, to conduct an initial review of the allegations contained in the complaint. [Exhibit 4]. At the conclusion of the executive session, the Tribal Council voted to forego an investigation of the complaint and to set the matter for a hearing before the Tribal Council as required by the Tribal Council Code of Ethics Ordinance of 2006. [Id.].

1
2
3 A special meeting of the Pascua Yaqui Tribal Council to conduct a hearing on the ethics
4 complaint was scheduled for August 1, 2007, and Chairwoman Frias was served with notice of the
5 special Council meeting on July 21 and July 24, 2007. [Exhibit 5]. Chairwoman Frias appeared at
6 the special council meeting on August 1, 2007. [Exhibit 6]. At the conclusion of special meeting,
7 the Tribal Council voted to suspend Chairwoman Frias for a period of twelve months. [Exhibit 7].

8 On August 6, 2007, Petitioner Yucupicio sent a memo to Chief of Staff Pilar Thomas
9 informing her that her position was terminated effective immediately. [Exhibit 8]. Ms. Thomas is
10 employed by the Pascua Yaqui Tribe and serves as the Chair's Chief of Staff. [Id.]. The termination
11 memo was personally served on Ms. Thomas. [Exhibit 9].

12 On August 7, 2007, Petitioner Yucupicio personally delivered a letter to Respondent
13 Figueroa directing her to take all steps necessary to process Ms. Thomas' termination. [Exhibit 10].
14 Respondent Figueroa responded with a memorandum respectfully declining to process Ms. Thomas'
15 termination without a court order or legal determination of official tribal authority. [Exhibit 11]. It
16 appears that Respondent Figueroa's refusal to comply with the Petitioner Yucupicio's directive was
17 the result of two legal opinions issued by the Office of the Attorney General. In the first opinion,
18 issued on August 2, 2007, Interim Attorney General Justin Ruggieri opined that the Council's
19 suspension of Chairwoman Frias was unconstitutional and would likely be overturned by the Pascua
20 Yaqui Court of Appeals. [Exhibit 12]. The opinion concluded that despite the Council's action, the
21 Chairwoman retained executive authority. [Id.]. The second opinion was generated in response to
22 an inquiry from Respondent Figueroa. In second opinion, issued on August 6, 2007, the Office of
23 the Attorney General concluded that "it is unclear at this time who may exercise the executive
24 authority of the Office of the Chair of the Pascua Yaqui Tribe." [Exhibit 13].
25

1 On August 10, 2007, the Pascua Yaqui Tribal Council conducted a special council meeting to
2 consider an ordinance suspending Chairwoman Frias without pay and appointing Vice-Chairman
3 Peter Yucupicio, the Petitioner, to assume the duties of Chairman for the remainder of the
4 unexpired term. [Exhibit 14]. Eight members of the Tribal Council were present for the special
5 meeting. [Exhibit 15]. By a vote of six to zero, with two abstentions, the Tribal Council passed a
6 resolution suspending Chairwoman Frias without pay effective August 1, 2007. [Exhibit 16]. The
7 ordinance also required Petitioner Yucupicio to assume the duties of Chairman for the remainder of
8 the unexpired term. [Id].

9 II. STATEMENT OF JURISDICTION

10 The jurisdiction of this Court extends to all cases in law and equity arising under the
11 Constitution of the Pascua Yaqui Tribe and the laws, traditions, customs or enactments of the
12 Pascua Yaqui Tribe. Article VIII, § 2, Constitution of the Pascua Yaqui Tribe; 3 P.Y.T.C. § 1-1-
13 10(C); 3 P.Y.T.C. § 3-1-10(A). The Pascua Yaqui Tribal Code expressly vests this Court with the
14 power to declare rights, status, and other legal relations, provided that the Court does not award
15 damages or any other form of monetary relief. 3 P.Y.T.C. § 3-1-10(A). Any person whose status is
16 affected by a law, ordinance, or resolution may petition the Court to determine any question of
17 construction or validity of the law, ordinance, or resolution and may seek declaratory relief from the
18 Court. 3 P.Y.T.C. § 3-1-20.

19 Pursuant to the Tribe Council resolution passed on August 10, 2007, Petitioner Yucupicio is
20 now vested with the all of the powers of the Executive branch of the Pascua Yaqui Tribal
21 government, including the power to terminate “key” employees. [Exhibit 16]. The Chief of Staff
22 position is designated as a “key” employee. [Exhibit 17]. A “key” employee is hired/appointed by
23 the Chairman and/or Chief Administrative Officer. PASCUA YAQUI EMPLOYEE
24 HANDBOOK, Appendix “C”, adopted by Resolution No. C04-42-04, effective 5/17/04. The
25

1 Chairperson of the Pascua Yaqui Tribe has the authority to terminate the person serving as the
2 Chief of Staff. *Id.* Respondent Figueroa has declined to comply with his directive and Petitioner
3 Yucupicio is entitled to seek declaratory relief pursuant to the provisions of the Pascua Yaqui Tribal
4 Code to determine the validity of the ordinance appointing him to serve as Chairman.

5 The Court has subject matter jurisdiction over all civil actions, regardless of whether the
6 parties are Indian or non-Indian. 3 P.Y.T.C. § 1-2-20(B). Any person entering the boundaries of the
7 Pascua Yaqui Indian Reservation is subject to the laws and regulations of the Tribe. 3 P.Y.T.C. § 1-
8 1-30(A). Basis for personal jurisdiction include, but are not limited to, presence on the Reservation,
9 membership in the Tribe, consent, doing business on the Reservation, or engaging in an act on the
10 Reservation. 3 P.Y.T.C. § 1-1-30(B). At the time she issued the memorandum declining to comply
11 with the Petitioner Yucupicio's directive to process Ms. Thomas's termination, Respondent Figueroa
12 was within the boundaries of the Pascua Yaqui Indian Reservation and was acting in her official
13 capacity as an employee. This Court clearly has both subject matter and personal jurisdiction.

14 **III. PETITIONER YUCUPICIO IS LAWFULLY VESTED WITH THE LEGAL**
15 **AUTHORITY TO DIRECT RESPONDENT FIGUEROA TO PROCESS**
16 **TERMINATIONS OF "KEY" EMPLOYEES.**

17 At the conclusion of the special meeting of the Pascua Yaqui Tribal Council on August 1,
18 2007, the Tribal Council voted to suspend Chairwoman Frias for a period of twelve months.

19 [Exhibit 7]. Notwithstanding the legal opinions issued by the Office of the Attorney General,
20 legislative acts are presumed valid. *Navajo Nation v. MacDonald*, No. WR-CV-99, <
21 <http://www.tribal-institute.org/opinions/1989.NANN.0000030.htm> >, ¶ 47, (Navajo 5/17/89).

22 The presumption of validity attaches the moment legislation is passed and remains until rebutted.

23 *Benally v. Gorman*, 5 Nav.R. 273, 275 (W.R.D.C., 1987); *Damon v. MacDonald*, 4 Nav.R. 138, 140
24 (W.R.D.C., 1983); *Kelly v. Johnson*, 425 U.S. 238, 247 (1976).

1 As a form of censure or discipline, to "suspend" is "to forbid a public officer, attorney,
2 employee or ecclesiastical person from performing his duties or exercising his functions for a more
3 or less definite interval of time." BLACK'S LAW DICTIONARY 1446 (6th Ed. 1991). As a result
4 of the legislative action suspending her for twelve months, Chairwoman Frias was rendered
5 incapable of performing her official functions as Chairperson of the Pascua Yaqui Tribe. The
6 position of Chairperson of the Pascua Yaqui Tribe essentially became vacant after the Tribal Council
7 imposed the suspension.

8 The Constitution of the Pascua Yaqui Tribe provides that:

9 [i]n the event of a vacancy, *for any cause*, in the office of chairman, the vice-
10 chairman shall assume the duties of the chairman for the remainder of the unexpired
11 term or until a successor has been chosen by the tribal counsel.

12 Article XI, § 2 (emphasis added). Immediately following the Tribal Council vote to suspend
13 Chairwoman Frias, Petitioner Yucupicio was immediately constitutionally vested with all of the
14 powers of the Chairperson of the Pascua Yaqui Tribe, including the power to terminate "key"
15 employees and to direct Respondent Figueroa to process the Chief of Staff's termination. The
16 resolution passed by the Tribal Council on August 10, 2007, documents the Tribal Council's intent
17 to suspend Chairwoman Frias and require that Petitioner Yucupicio assume the duties of Chairman
18 for the remainder of her unexpired term. [Exhibit 16].

19 IV. RESPONDENT FIGUEROA IS LEGALLY OBLIGATED TO COMPLY WITH THE
20 LAWFUL DIRECTIVES OF PETITIONER YUCUPICIO.

21 The Pascua Yaqui Tribe Employee Handbook defines a "key position" as an:

22 authorized position hired/appointed and serving under the direction of the
23 Chairman or assigned Chief Administrative Office. These positions are generally
24 "Department Directors" and serve "at will." The Human Resources Department
25 maintains a listing of all Key Positions.

26 PASCUA YAQUI TRIBE EMPLOYEE HANDBOOK § III(A)(2). According to the list
27 maintained by the Human Resources Department, Respondent Figueroa is a "key" employee and

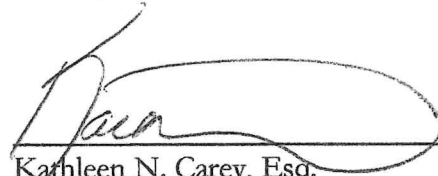
1 therefore subject to the supervision of the Chair of the Pascua Yaqui Tribe. [Exhibit 18]. It is an
2 essential function of her position to implement discipline and termination procedures. [Exhibit 1].
3 By refusing to comply with Petitioner Yucupicio's directive to process the termination of Chief of
4 Staff Pilar Thomas, Respondent Figueroa has failed to comply with a lawful directive from her
5 immediate supervisor to carry out a duty that is required by the terms of her job description. As a
6 result of her failure to comply with Petitioner Yucupicio's directive, Chief of Staff Pilar Thomas
7 continues to serve as an employee of the Pascua Yaqui Tribe despite the Petitioner Yucupicio's
8 directive that she be terminated from her position.

9 V. RELIEF REQUESTED.

10 For all of the above and foregoing reasons, Petitioner Peter Yucupicio respectfully moves
11 this Court to enter a declaratory judgment directing Respondent Jacinta Figueroa to immediately
12 comply with his directive of August 7, 2007, instructing her to process the termination of Chief of
13 Staff Pilar Thomas.

14 DATED this 17th day of August, 2007.

15 LAW OFFICE OF KATHLEEN N. CAREY

16
17 
18 Kathleen N. Carey, Esq.
19 Attorney for Petitioner
20
21
22
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24
25

PETITIONER'S
EXHIBIT E

Served
9:53 a.m.
8-17-07
LH

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PETER YUCUPICIO, an individual, Vice-)
Chairman and Member of the Tribal Council of)
the Pascua Yaqui Tribe,)
Plaintiffs)
vs)
JACINTA FIGUEROA, an individual and)
Director of the Human Resources Division for)
the Pascua Yaqui Tribe,)
Respondent)

NOTICE OF
HEARING
CV-07-116

TO: Attorney General as Representative of Jacinta Figueroa
Office of the Attorney General

This is to notify that a hearing has been set in the PASCUA YAQUI TRIBAL COURT on Friday, August 17, 2007 at 3:30 pm. A hearing has been set to hear the following matter(s):

Hearing on Petition for Declaratory Judgement

If this is unsatisfactory, please submit a written request to the Court immediately.

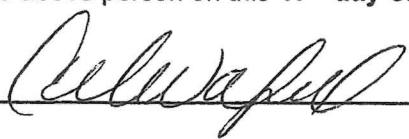
FAILURE TO APPEAR MAY RESULT IN A DEFAULT JUDGMENT BEING ISSUED AGAINST YOU.

NOTICE: ALL HEARINGS ARE CONDUCTED IN ENGLISH. IF YOU REQUIRE AN INTERPRETER YOU WILL NEED TO MAKE ARRANGEMENTS AT YOUR OWN EXPENSE TO HAVE ONE PRESENT AT THE TIME OF HEARING. PLEASE ARRIVE BY SCHEDULED TIME AS HEARINGS START PROMPTLY!

DATED THIS 17th DAY OF August, 2007

Celina M. Valenzuela
Clerk, Pascua Yaqui Tribal Court
4781 W. Calle Torim
Tucson, AZ 85757 (520) 879-6278

I, Celina M. Valenzuela, upon oath swear that this notice was sent out within 24 hrs. by
() Certified Mail / (x) ROS/ () In Box to the above person on this 17th day of August 2007 @ 9:29
am

Signed: 

**PETITIONER'S
EXHIBIT F**

07 AUG 17 PM 12: 27

DOCKET NO. CV-07-117

CLERK CW

1 Pilar M. Thomas, Esq.
2 5280 S. Camino de Oeste
3 Tucson, AZ 85746
4 (520) 883-3146
5 *Pro se*

6
7 **IN THE PASCUA YAQUI TRIBAL COURT**
8 **IN AND FOR THE PASCUA YAQUI RESERVATION**

9 Pilar M. Thomas, *on behalf of herself and*
10 *other similarly situated key employees*

11 Plaintiff,

12 vs.

13 Peter Yucupicio, Vice Chairman, Pascua
14 Yaqui Tribe, in his individual capacity

15 Defendant

16 Case No.: CV-07-117

17 **Complaint for Declaratory and Injunctive**
18 **Relief, 3 PYTC § 3-1-10 et seq.**

19
20 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

21 COMES NOW, Pilar M. Thomas, Petitioner, on behalf of herself and similarly situated
22 Key Employees and hereby files this Complaint for Declaratory and Injunctive Relief against
23 Peter Yucupicio, Vice Chairman of the Pascua Yaqui Tribe, in his individual capacity
24 (“Defendant”) because the Defendant is acting unlawfully and outside the scope of his authority
25 by assuming the authorities and duties of the Chairwoman for the Pascua Yaqui Tribe
 (“Chairwoman”) while she is suspended from her duties.

JURISDICTION

1. The Pascua Yaqui Tribal Court has subject matter jurisdiction pursuant to Pascua Yaqui Tribe Constitution, Article VIII, Section 2, 3 PYTC §§ 1-1-10(C), 20(B), and 3 PYTC § 3-1-10.
2. The Pascua Yaqui Tribal Court has personal jurisdiction pursuant to 3 PYTC § 1-1-30.

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PARTIES

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3. Plaintiff Pilar Thomas is Chief of Staff to Chairwoman Herminia Frias, a Key Employee of the Pascua Yaqui Tribe government, and an enrolled tribal member.
 4. Defendant Peter Yucupicio is the Vice Chairman for the Pascua Yaqui Tribe, an elected official and executive officer of the Tribe, and an enrolled tribal member.

ALLEGATIONS

5. Chairwoman Herminia Frias is the head of the Executive Branch of the Pascua Yaqui Tribe government, and is vested with certain constitutional authorities and duties.
6. On August 1, 2007, Chairwoman Frias duly executed an Executive Order No. 08-01-07, which delegated to Plaintiff executive supervisory authorities over Key Employees and certain procurement authorities. Plaintiff's Exhibit A.
7. Key Employees are those employees that are hired by, report to, supervised by, and serve at the will of the Chairwoman. Plaintiff's Exhibit B.
8. The Chairwoman has not delegated any executive duties or authorities, including supervisory or employment authorities over Key Employees, to the Defendant.
9. After executing Executive Order No. 08-01-07, Chairwoman Frias was suspended by Tribal Council action pursuant to the Tribe's Ethics Ordinance, 2 PYTC § 1-2-90(C). Plaintiff's Exhibit C.
10. On August 2, 2007, Defendant personally confronted Plaintiff and told Plaintiff that she was placed on administrative leave without pay effective immediately. Plaintiff's Exhibit D.
11. Plaintiff refused to be placed on administrative leave without pay, and told the Defendant that Plaintiff reported to the Chairwoman and that Defendant did not have the authority to take any employment action against Plaintiff.

- 1 12. Plaintiff provided Defendant and Tribal Council with a copy of the Chairwoman's
2 Executive Order No. 08-01-07.
- 3 13. On August 6, 2007 Defendant executed an Executive Order No. 08-06-07 which
4 claimed to, among other things, self-authorize Defendant to assume the duties of the
5 Office of the Chairwoman. Plaintiff's Exhibit E.
- 6 14. On August 6, 2007 Defendant issued an Internal Memorandum, addressed to Plaintiff
7 and served on Plaintiff by process server, which stated, in part, "Your services are no
8 longer needed, and your position is terminated effective immediately." Plaintiff's
9 Exhibit F.
- 10 15. On August 10, 2007, at a Special Tribal Council Meeting, the Pascua Yaqui Tribal
11 Council approved by majority vote Resolution Number C08-127-07 entitled
12 "Resolution of the Tribal Council of the Pascua Yaqui Tribe suspending Chairwoman
13 Herminia Frias without pay and appointing Vice-Chairman Peter Yucupicio to
14 assume the duties of Chairman for the remainder of the unexpired term." Plaintiff's
15 Exhibit G.
- 16 16. Upon information and belief, there is no formal written resolution as required by the
17 Tribal Council Bylaws, Article VII, Section 3. Plaintiff's Exhibit H.
- 18 17. There has been no further communication between the Plaintiff and the Defendant
19 since August 6, 2007 regarding the Plaintiff's employment status.
- 20 18. There has been no further communication between the Plaintiff and Tribal Council
21 regarding the Plaintiff's employment status.
- 22 19. Upon information and belief, there is a great amount of confusion among the Key
23 Employees about the effects of the Tribal Council resolution and the lawful
24 authorities of the Defendant, including supervisory authorities and the authority to
25 take employment action against Key Employees.

- 1 20. An actual controversy has arisen and now exists between Plaintiff and Defendant
2 concerning their respective rights and authorities.
- 3 21. Plaintiff has suffered and will suffer irreparable harm from any continuation of the
4 adverse employment action taken against the Plaintiff by the Defendant.
- 5 22. A judicial declaration is necessary and appropriate at this time under the
6 circumstances in order that Plaintiff, and other similarly situated Key Employees,
7 may ascertain lawful supervisory authority over them, their employment rights and
8 other various responsibilities. Plaintiff, and similarly situated Key Employees are
9 confused, unclear, and apprehensive about the current unsettled state of affairs. It is
10 not clear to Plaintiff and other Key Employees who has the lawful authority to
11 approve the many actions that only the Chairwoman can approve, including, but not
12 limited to, employment actions against Key Employees.

13
14 **FIRST CAUSE OF ACTION**
EXERCISE OF UNLAWFUL AUTHORITY

- 15
16 23. Paragraphs 1 – 22 are hereby incorporated.
- 17 24. Plaintiff contends that the Defendant acted unlawfully and outside the scope of
18 Defendant's authority when Defendant issued Executive Order No. 08-06-07 because
19 there is no basis in the Pascua Yaqui Tribe Constitution ("Constitution") or in the
20 Tribe's law for the Defendant to assume the Chairwoman's executive authorities
21 absent the Chairwoman's delegation those authorities to the Defendant.
- 22 25. Pursuant to the Constitution, in the absence of the Chairwoman, the Defendant may
23 only exercise those duties *as the Chairman shall direct*. Constitution, Article XV,
24 Sections 4, 6. The Chairwoman did not direct the Defendant to exercise any of the
25 Chairwoman's executive duties or authorities in her absence.

1 26. Also pursuant to the Constitution, the Defendant only succeeds to the Chairwoman's
2 authorities when the Office of the Chair becomes vacant. Constitution, Article XI,
3 Section 2. The Office only becomes vacant upon recall, removal, resignation or
4 death. Constitution, Article X and Article XI, Section 1. Because suspension from
5 duties is not one of the four causes of a vacancy in the Office of the Chairwoman,
6 suspension does not constitute a vacancy.

7 27. Because the Defendant cannot lawfully assume the Chairwoman's executive
8 authorities while she is suspended, the Defendant acted outside the scope of his
9 authority when the Defendant took adverse employment action against the Plaintiff.

10 **SECOND CAUSE OF ACTION**
11 **TRIBAL COUNCIL RESOLUTION C08-127-07 IS UNCONSTITUTIONAL**

12 28. Paragraphs 1 – 27 are hereby incorporated.

13 29. Plaintiff further contends that the authority to delegate the Chairwoman's Executive
14 Branch authorities lies solely with the Chairwoman.

15 30. Tribal Council does not have the constitutional authority to appoint the Defendant to
16 assume the Chairwoman's duties.

17 31. Resolution No. C08-127-07 is unconstitutional because it violates the Constitution's
18 separations of powers provision. Constitution, Article IV.

19 32. Tribal Council may only appoint a new Chair when the Office of the Chairwoman
20 becomes vacant. Constitution, Article XI, Section 2. Since the Office is not vacant,
21 see Paragraph 26, the Tribal Council cannot make any appointments to assume the
22 Chairwoman's authorities and duties.

23 33. Plaintiff further contends that the Defendant does not have the authority to implement
24 or act upon the unconstitutional resolution passed by Tribal Council.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant, as follows:

34. For a declaration that the Chairwoman's Executive Order No. 08-01-07 did validly grant certain executive supervisory and procurement authorities to Plaintiff;
35. For a declaration that Defendant acted unlawfully and outside the scope of his authority when he issued Executive Order No. 08-06-07, that Executive Order No. 08-06-07 is invalid *ab initio*, and that Defendant acted unlawfully and outside the scope of his authority when the Defendant took adverse employment action against the Plaintiff;
36. For a declaration that Tribal Council Resolution No. C08-127-07 is unconstitutional in its entirety;
37. For an injunction preventing Defendant from exercising any of the Chairwoman's duties and authorities, including, but not limited to, signature authorities, supervisory authorities, employment authorities, procurement authorities, budget authorities and all other constitutional and statutory authorities;
38. For such other and further relief as the court deems proper.

Dated this 17th day of August, 2007

By: 

Pilar M. Thomas, Esq.

07 AUG 17 PM 3:27

DOCKET NO. CV-07-118
CLERK Cr

1 Pilar M. Thomas, Esq.
2 5280 S. Camino de Oeste
3 Tucson, AZ 85746
4 (520) 883-3146
5 Pro se

6
7 **IN THE PASCUA YAQUI TRIBAL COURT**
8 **IN AND FOR THE PASCUA YAQUI RESERVATION**

9 Pilar M. Thomas, *on behalf of herself and*
10 *other similarly situated employees*

11 Plaintiff,

12 vs.

13 Peter Yucupicio, Vice Chairman, Pascua
14 Yaqui Tribe, in his individual capacity

15 Defendant

16 Case No.: CV-07-118

17 **Request for Temporary Restraining Order,**
18 **and Preliminary Injunction, 3 PYT R.Civ.P**
19 **Rule 10**

20 **REQUEST FOR TEMPORARY RESTRAINING ORDER**
21 **AND FOR PRELIMINARY INJUNCTION**

22 COMES NOW, Pilar M. Thomas, Petitioner, and hereby requests this Court to issue a
23 Temporary Restraining Order ("TRO") and a Preliminary Injunction, pursuant to 3 PYT R.Civ.P
24 Rule 10, to prevent Defendant from unlawfully exercising any of the executive duties and
25 authorities of Chairwoman Herminia Frias. This TRO is necessary because the Defendant has
unlawfully taken adverse employment action against the Plaintiff which has resulted and will
continue to result in irreparable harm to the Plaintiff. Defendant took this unlawful action
pursuant to an Executive Order that claims to give himself the authority to exercise the
Chairwoman's executive duties and authorities while she is suspended. Furthermore, Tribal
Council has passed an unconstitutional resolution that also purports to assign the Chairwoman's
duties to the Defendant. The Defendant, in exercising these authorities either pursuant to his
own executive order or the Tribal Council resolution, is acting outside his lawful authority.

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BACKGROUND

On August 1, 2007, the Tribal Council suspended Chairwoman Frias from her duties. Complaint, ¶ 9. The next day, on August 2, 2007, the Defendant attempted to place Plaintiff on administrative leave without pay. Complaint, ¶¶ 10-11. In a wholly unlawful way, the Defendant then signed an Executive Order 08-06-07 in which he gave himself the authority to assume the Chairwoman's duties and authorities while she is suspended. Complaint, ¶13. Acting based upon this illegal executive order, the Defendant then served the Plaintiff with an Internal Memorandum advising her that her employment had been terminated. Complaint, ¶14. The Tribal Council then passed an unconstitutional resolution purporting to assign the Chairwoman's authorities and duties to the Defendant for the remainder of the Chairwoman's term—June 2008. Complaint ¶ 15.

ARGUMENT

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The purpose of a temporary restraining order or preliminary injunction is to protect the status quo before a final decision can be rendered. 3 PYT R.Civ.P.10(A); See Firchau v. Barringer Crater Co., 86 Ariz. 215, 219, 344 P.2d 486 (1959) (explaining that one of the purposes of injunctions is to preserve the "status quo" of the parties pending consideration before the Court). The court should grant a motion for a temporary restraining order, or a motion for preliminary injunction, when the moving party can show a likelihood of success on the merits and that the moving party will suffer irreparable harm if the order is not granted. 3 PYT R.Civ.P. 10(A). A temporary restraining order should be granted if the moving party can show risk of permanent loss or injury before the enjoined party can be notified. 3 PYT R.Civ.P. 10(D).

1 **A. The Plaintiff Can Show Likelihood of Success on the Merits.**

2 **1. The Defendant's Executive Order was Unlawful and Unconstitutional and**
3 **His Subsequent Actions Taken Pursuant to that Order Are Invalid and Outside**
4 **the Scope of His Authority**

5 There are only three mechanisms under the Pascua Yaqui Tribe Constitution
6 ("Constitution") by which the Defendant may exercise the executive duties and authorities of the
7 Chairwoman: 1) a delegation of signature authority for contracts, agreements and other
8 commitments on behalf of the Tribe, Article XV, Section 3; 2) in the absence of the
9 Chairwoman, the Defendant shall exercise duties as directed by the Chairwoman, Article XV,
10 Sections 4, 6; and 3) in the event of a vacancy in the Office of the Chairwoman, the Defendant
11 shall assume the duties for the remainder of the term, Article XI, Section 2. The Defendant's
12 executive order, purporting to assume the authorities of the Chairwoman and calling himself the
13 "Acting Chairman," *see* Executive Order No. 08-06-07, Assumption of Authority of Office of
14 Chairman (Pl. Ex. E) is an unconstitutional and unlawful assumption of the Chairwoman's
15 executive authorities because it does not comply with any of these three mechanisms.

16 The Chairwoman has the sole authority to "sign any and all documents, agreements,
17 contracts and commitments for and on behalf of the Pascua Yaqui Tribe." Article XV, Section 3.
18 However, the Chairwoman also has the sole and discretionary authority to delegate this signature
19 authority to any one of the three executive Officers of the Tribe: the Vice Chairman, the
20 Secretary, and the Treasurer. *Id.* The Chairwoman has not delegated this signature authority to
21 the Defendant.

22 In the absence of the Chairwoman, the Defendant may only exercise those duties *as the*
23 *Chairwoman shall direct.* Article XV, Section 4 (emphasis added). The language of this section
24 is a clear limitation on the authority of the Defendant to act in the absence of the Chairwoman. It
25 only allows the Defendant to exercise duties that the Chairwoman directs him to exercise in her

1 absence. The Chairwoman did not direct the Defendant to exercise any duties or authorities in
2 her absence.

3 The third constitutional mechanism for the Defendant to exercise the executive
4 authorities and duties of the Chairwoman is when the Office of the Chairwoman is vacant.
5 Article XI, Section 2. The Office is not vacant. In his Executive Order, the Defendant claimed
6 authority, under this vacancy clause, to assume the Chairwoman's authorities. This provision in
7 the Constitution provides no such support for the Defendant's actions. The section reads:

8 "In the event of a *vacancy*, for any cause, in the office of the chairman, the vice-
9 chairman shall assume the duties of the chairman for the remainder of the
10 unexpired term or until a successor has been chosen by the tribal council. In the
11 event of a vacancy in the office of vice-chairman, a successor shall be chosen by
majority vote of the tribal council from among those members then sitting on the
council."

12 Id. (emphasis added).

13 In the plain words of the Constitution, the Chairwoman's office becomes vacant in only
14 one of four ways: removal, recall, resignation, or death. Article X, Sections 1 – 3; Article XI,
15 Section 1 (listing the four actions that result in a vacancy). Because suspension is not one of the
16 four actions that result in a vacancy, suspension from duties does not constitute a vacancy. *See*
17 Nixon v. United States, 506 U.S. 224, 229 (1993) (applying a plain language interpretation to a
18 constitutional provision); *see also* Lamie v. United States Trustee, 540 U.S. 526, 528 (2004)
19 (refusing to read additional words into a statute to avoid enlarging the scope).

21 Even if the Defendant could arguably assert that the Chairwoman has been de facto
22 removed because she has been suspended for the rest of her term, and thus the position is vacant,
23 this removal action too would suffer from a constitutional defect. The only constitutional way to
24 remove the Chairwoman is through a vote of no-confidence, with a 2/3 majority vote of Tribal
25

1 Council. Article X, Section 1. No such vote or action has occurred. Therefore, the
2 Chairwoman's suspension cannot be interpreted as a removal, as that term is used in the
3 Constitution, which would result in the vacancy of the Office of the Chair.

4 The Defendant does not have the authority to assume the Chairwoman's executive
5 authorities, by executive order or otherwise, without the Chairwoman's delegation. By issuing
6 the invalid executive order, the Defendant acted outside the scope of his executive authority in an
7 unlawful and unconstitutional manner. Thus, all executive actions taken by the Defendant as a
8 result of his order are also invalid, unlawful, and outside the scope of his authority, including the
9 adverse employment action of termination taken against the Plaintiff.
10

11 **2. The Tribal Council Does Not Have the Constitutional Authority to Appoint**
12 **the Defendant to Assume the Duties of the Chairwoman**

13 Tribal Council does not have the authority to assign or delegate the authorities and duties
14 of the Chairwoman because that authority lies in the Chairwoman alone. The Constitution
15 establishes three branches of government: the Legislative, the Executive, and the Judicial. Article
16 IV. Tribal Council is the Legislative Branch. Article V. The Chairwoman, Vice Chairman,
17 Treasurer, Secretary, and other tribal officers are the Executive Branch. Article VII. And the
18 Tribal Courts are the Judicial Branch. Article VIII. Article IV also establishes a separation of
19 powers provision between the branches. This provision admonishes that:
20

21 "[n]o person or group of persons charged with the exercise of powers properly belonging
22 to one of these branches, shall exercise any powers properly belonging to the others,
23 except as this constitution may otherwise expressly direct or permit."

24 Id.
25

1 The Constitution assigns many executive and legislative authorities and duties to the
2 Chairwoman. As the head of the Executive Branch, the Chairwoman is responsible for
3 executing, implementing, and enforcing the provisions of Tribal Council resolutions, ordinances,
4 and other rules and regulations. Article XV, Section 2. The Chair acts in an executive capacity
5 in all tribal matters. Id. The exercise of this executive authority can be limited by Tribal Council
6 resolution or the Constitution itself. Id. The Chairwoman is also the only one responsible for
7 signing certain documents, agreements, and commitments on behalf of the Tribe. Article XV,
8 Section 3. However, the Chair can delegate this authority to one of the other executive officers,
9 subject to the approval of Tribal Council. Id. In addition, when absent, the Chairwoman has the
10 sole discretion and authority to delegate certain duties to the Vice Chairman. Article XV,
11 Section 4. Further, the Chairwoman is responsible for preparing and presenting a budget to
12 Tribal Council. Article XV, Section 5. Other constitutional authorities and duties assigned to
13 the Chairwoman include receiving requests for relinquishment of tribal membership, Article III,
14 Section 3, the right to vote on Tribal Council, Article VI, Section 2, and the ability to nominate
15 tribal officers and judges, Article VII, Sections 3 – 4 and Article VIII, Section 4.
16
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18 Unlike the delegation of the Chairwoman's signature authority, the Constitution does not
19 allow Tribal Council to approve the Chairwoman's delegation of authorities and duties to the
20 Vice Chairman when the Chairwoman is absent. Nor does the Constitution allow Tribal Council
21 to approve the delegation of any of the Chairwoman's other constitutional executive authorities.
22 While Tribal Council has many constitutional authorities, they are limited to those specifically
23 identified in the Constitution. *See e.g.* Articles III, V, VI, VII, and VIII. Authority to delegate the
24 Chairwoman's executive authorities is not one of them.
25

1 Tribal Council cannot exercise or delegate constitutional authorities it does not have.

2 Since the Constitution's executive authorities lie in the Chairwoman, and the Chairwoman alone,
3 only the Chairwoman can constitutionally delegate those authorities. For Tribal Council to
4 delegate authorities it does not have is a clear violation of the separation of powers provision.

5 Therefore, the Tribal Council resolution, which purports to assign the Chairwoman's authorities
6 and duties to the Defendant, is unconstitutional.

7
8 Because Tribal Council Resolution No C08-127-07 is unconstitutional, any actions taken
9 by the Defendant as a result of this resolution are also invalid, unlawful, and outside the scope of
10 his authority. The Defendant does not have the authority assume the Chairwoman's authorities
11 and duties, nor can the Defendant implement or act upon the unconstitutional resolution passed
12 by Tribal Council, including taking adverse employment action against the Plaintiff.

13 **B. Plaintiff Will Suffer Irreparable Harm if the Court Does Not Issue the**
14 **Temporary Restraining Order**

15 The Defendant has already taken two adverse employment actions against the Plaintiff,
16 both of which were unlawful and outside the scope of his authority. The Defendant first tried to
17 place Plaintiff on administrative leave without pay. After issuing the invalid Executive Order,
18 Defendant then terminated Plaintiff's employment and position. Plaintiff should not be required
19 to financially suffer the consequences of Defendant's unlawful and invalid actions.
20

21 The termination was effective August 6, 2007. It is unclear, however, whether the
22 termination has been effectuated, since the Plaintiff has not had any further contact with the
23 Defendant. However, even if the termination has not been effectuated, a practical consequence
24 of the invalid Tribal Council resolution can include the mistaken belief by the Defendant, and
25

1 other government employees, that he now has the authority to complete the adverse employment
2 action against the Plaintiff. If so, the termination may be effectuated immediately.

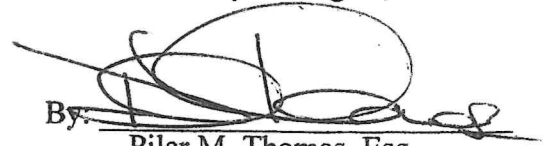
3 A temporary restraining order is the only appropriate remedy to immediately protect the
4 Plaintiff from suffering irreparable financial harm. A temporary restraining order is necessary
5 because the Defendant can take immediate action to effectuate the Plaintiff's termination before
6 there is an opportunity for notice and hearing on a preliminary injunction. A temporary
7 restraining order will "keep things as they are [an inchoate termination] pending a final decision
8 in the case," 3 PYT R.Civ.P. 10(D).
9

10 A preliminary injunction is also in order to protect other similarly situated employees. If
11 the Defendant unlawfully acts with the Chairwoman's executive authorities, then other key
12 employees may be at risk for adverse employment actions. In addition, key employees who
13 report directly to the Chairwoman get direction, guidance and approval from the Chairwoman on
14 many matters, including employment matters. If the Defendant unlawfully acts with the
15 Chairwoman's executive authorities, the Defendant may direct certain employment actions that
16 can cause harm to other employees.
17

18 CONCLUSION

19 For the reasons stated above, the Plaintiff respectfully requests the Court enter a
20 Temporary Restraining Order preventing the Defendant from taking any adverse employment
21 action against the Plaintiff pending this Court's decision in this case. In addition, Plaintiff
22 requests the Court schedule a preliminary injunction hearing within ten days to determine if the
23 Defendant should be enjoined from assuming the executive authorities and duties of the
24 Chairwoman and taking any other unlawful actions or giving unlawful directions.
25

RESPECTFULLY SUBMITTED this 17th day of August, 2007

By: 
Pilar M. Thomas, Esq.

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**PETITIONER'S
EXHIBIT G**

1 Office of the Attorney General
2 Pascua Yaqui Tribe
3 4725 W. Calle Tetakusim
4 Tucson, Arizona 85757
5 Telephone 520-883-5106
6 Justin M. Ruggieri, Interim Attorney General
7 Justin.Ruggieri@pascuayaqui-nsn.gov
8 State Bar No. 023437

9 Appearing on behalf of the Pascua Yaqui Tribe

10 **IN THE PASCUA YAQUI TRIBAL COURT**
11 **IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION**

12 **PETER YUCUPICIO, an individual, Vice-**
13 **Chairman and Member of the Tribal**
14 **Council of the Pascua Yaqui Tribe,**
15 **Petitioner**

16 vs.

17 **JACINTA FIGUEROA, an individual and**
18 **Director of the Human Resources Division**
19 **for the Pascua Yaqui Tribe,**
20 **Respondent**

Case No.: CV-07-116

WRITTEN REQUEST TO STAY

HEARING ON PETITIONER'S

PETITION FOR DECLARATORY

JUDGEMENT

21 The Interim Attorney General for the Pascua Yaqui Tribe, on behalf of the Pascua Yaqui
22 Tribe, hereby submits a written request to stay the scheduled expedited hearing, pursuant to the
23 instructions appearing on the face of this Court's Notice Of Hearing issued in the above-
24 captioned matter on the instant date (August 17, 2007), set for 3:30 p.m. on August 17, 2007, for
25 the following good cause:

- 26 1. This Office received service of a Notice of Hearing in the above-captioned matter
at approximately 10:00 a.m. on the instant date for a hearing scheduled for 3:30 p.m. this

1 very afternoon.

2
3 2. Pursuant to 2 PYTC §2-1-30, the Office of the Attorney General is required to
4 represent “the Tribe, its officials, departments, agencies, offices, [etc.]” in all legal
5 proceedings “that affect the legal interests of the Tribe.”

6
7 3. The Office of the Attorney General, as counsel for the Pascua Yaqui Tribe, is
8 presumed by the Petitioner’s Petition and the Notice from this Honorable Court, to be
9 acting as the attorney-of-record for Respondent FIGUEROA who is being sued in her
10 official capacity as Director of the Human Resources Division.

11
12 4. The Petitioner, PETER YUCUPICIO, as Vice-Chairman of the Pascua Yaqui
13 Tribal Council, is a constituent of the Pascua Yaqui Tribe Government, the client of the
14 Office of the Attorney General, in both his executive capacity as Vice-Chairman, and in
15 his legislative capacity as an Honorable Member of the Tribal Council.

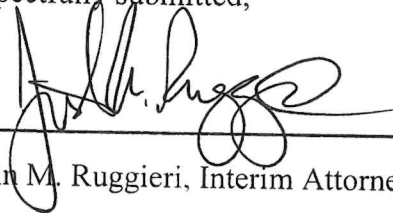
16
17 5. The above-captioned matter requires the Office of the Attorney General, pursuant
18 to 2 PYTC §2-1-30 to make an assessment regarding its ethical duties to the client Pascua
19 Yaqui Tribe, specifically as to whether its representation of the Respondent FIGUEROA,
20 an official of the Tribe, poses a conflict of interest that requires the recusal of this Office
21 as legal counsel for the Respondent FIGUEROA.

22
23 6. In the likely event that this Office determines that a conflict exists which requires
24 this Office to recuse itself from representing Respondent FIGUEROA, the Respondent
25 will require additional time prior to the Hearing on the Petitioner’s Petition for
26 Declaratory Judgment so that she may seek qualified legal representation to defend her
actions before the Court.

1
2 For the reasons cited above, the undersigned respectfully submit this written request to
3 the Court to stay the proceedings until such time as this Office may make a formal determination
4 as to whether or not it may represent the Respondent FIGUEROA in the above-captioned matter,
5 and if upon such determination, to allow Respondent FIGUEROA sufficient time to retain legal
6 counsel.

7 Dated: August 17, 2007

8 Respectfully submitted,

9
10 
11 _____

12 Justin M. Ruggieri, Interim Attorney General

13 Pascua Yaqui Tribe

14
15 Copies hand-delivered to
16 the following parties:

17 Peter Yucupicio, Petitioner

18 Jacinta Figueroa, Respondent

**PETITIONER'S
EXHIBIT H**

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

2
3
4 PETER YUCUPICIO, an individual,)
5 Vice-Chairman, and member of the Tribal)
6 Council of the Pascua Yaqui Tribe,)
7 Petitioner,)
8 Vs.)
9 JACINTA FIGUEROA, an individual,)
10 And Director of Human Resource Division,)
11 For the Pascua Yaqui Tribe,)
12 Respondent.)
13

Case No. CV-07-116

DECLARATORY JUDGMENT
AND OPINION

14 This matter came before the Court for an expedited hearing on August 17, 2007, on
15 the petition for declaratory judgment. Appearing were Kathleen N. Carey, for petitioner,
16 Peter Yucupicio, and Justin M. Ruggieri, Interim Attorney General, and the Respondent,
17 Jacinta Figueroa, although duly served with notice to appear, filed a written statement
18 advising the Court that she would not be appearing for the hearing, she failed to appear, and
19 Ms. Figueroa is wholly in default. Mr. Ruggieri made a motion to stay hearing on behalf of
20 the Tribe's employee, that should be denied for lack of good cause shown, and also based on
21 the Tribe's employee, respondent Figueroa's failure to appear.

22 The Court finds that it has personal jurisdiction over the parties, pursuant to 3 PYTC §
23 1-2-20(B) and 1-30(A), and over the transactions that occurred on the reservation. 3 PYTC §
24 1-1-30(B). The Court has subject matter over the issue, because the matter involves an
25 existing conflict between actions taken by the legislative branch and that of the attorney
26 general involving a justifiable controversy between parties. 3 PYTC § 3-1-10(B).

27 Appearing on a preliminary matter was Pilar Thomas, who has filed a separate action
28 pending in which she has requested a temporary restraining order, an injunction order, and for
declaratory relief. She requested that this matter be consolidated with this case, and although
the facts in her allegations are similar to and may overlap with some of the issues involved in
this case, the Court should sustain the objection of Mr. Yucupicio's counsel, that the motion is
not a timely one, and that the motion had not been served on Ms. Carey. The two parties
involved in this controversy are Mr. Yucupicio and Ms. Figueroa. Other parties not named in

1 this suit would not have their rights affected by a declaratory judgment as between the parties
2 in this action. 3 PYTC § 3-1-100, Declaratory Judgments; Parties.

3 The Court finds the motion of Ms. Thomas is not timely, and it should be denied.
4 Because the Court has discretion to not render a declaratory judgment or decree when such
5 judgment or decree if rendered would not terminate the uncertainty or controversy giving rise
6 to the proceeding, the Court does not exercise its discretion to do so, because the narrow issue
7 in this case involves the refusal of a tribal employee to carry out a command of the Tribe's
8 appointed Chairman. 3 PYTC § 3-1-50. The Court stated on the record that no declaration
9 made in this matter shall prejudice the rights of persons not parties to the proceedings. 3
PYTC § 3-1-100(A). Ms. Thomas has not been named as a party in this action.

10 The Court is asked to enter a declaratory judgment based on a controversy involving
11 the refusal of the Pascua Yaqui Tribe's Human Resources' Director, Jacinta Figueroa, to
12 honor the request to terminate a tribal key employee made by Peter Yucupicio, who was
13 appointed as Chairman by the Pascua Yaqui Tribal Council after a vacancy was created based
14 on the suspension of Herminia Frias as chairwoman, and the request was in conflict with two
15 statements made by the Interim Attorney General, Justin Ruggieri, who rendered one opinion
16 that the removal of the Chairwoman may have been unconstitutional, and he represented in a
17 second Attorney General statement to a tribal executive director that based on the
chairwoman's removal "it was unclear at this time who may exercise the executive authority."

18 To determine whether the declaratory judgment should be granted, the Court should
19 determine the valid authority of each of the parties and actions taken by the attorney general.

20 **The Council's Actions as to Ms. Frias**

21 The Council suspended the chairwoman, Herminia Frias, and it took an action of
22 appointing Mr. Yucupicio as chairman. The general rule of construction is that legislative
23 acts are presumed valid, and the presumption of validity attaches at the moment legislation is
24 passed and remains until rebutted. *Navajo Nation v. McDonald*, No. WR.-CV-99, (Navajo
25 Nation Supreme Court, 1989); *Benally v. Gorman*, 5 Nav. R. 273, 275 (W.R. D.C., 1987);
26 *Damon v. McDonald*, 4 Nav. R. 138, 150 (W.R. D.C., 1983); *Kelly v. Johnson*, 425 U.S. 238,
27 247 (1976). In determining whether the Chairman Yucupicio's directive to Ms. Figueroa
28 should have been followed, the Court must determine the source of the Chairman's authority
to issue the directive.

1 The Pascua Yaqui Tribal Constitution vests in the Council the power to remove and
2 recall Council members, Art. X. The Constitution, however, is silent regarding the power to
3 discipline Council members who violate ethics standards. It is within the Constitutional
4 purview of the tribal council to enact such provisions. The Tribe's interest in governing the
5 ethical conduct of its own council members is a compelling one, as a concomitant power of its
6 right to exercise sovereignty and self-government. If the Council has authority to remove a
7 council member from office, it must also have the authority to develop rules of ethics for
8 officials who govern. The Council enacted the Tribal Council Code of Ethics and Standards
9 of Conduct Ordinance of 2006 to address how such rules were to be applied. 2 PYTC § 1-2-
10 1.

11 The Pascua Yaqui Tribal Council clearly has the authority to withdraw, limit, or
12 supervise the exercise of power it gives to the offices of Chairman and Vice-Chairman. The
13 power to create an office and delegate authority to that office includes the right to abolish,
14 withdraw, limit, or supervise the exercising of those powers by the office holder. The Pascua
15 Yaqui Tribe can prevent a Chairman or Chairwoman from exercising certain powers it has
16 delegated to the offices of Chariman and Vice-Chairman, and the Council can specify how
17 those powers can be exercised. As indicated by Mr. Yucupicio's legal counsel, similar issues
18 have arisen in the past, resulting in the Council taking actions against one of it members, and
19 the Council's authority was upheld in those matters.

20 The Council voted to suspend the Chairwoman from her position of trust, and it
21 exercised its rights to do so properly under the Pascua Yaqui Constitution and the ethics
22 statute. Based on the vacancy created by her suspension, the Vice-Chairman Yucupicio,
23 automatically assumed the duties of the former chairwoman, pursuant to Pascua Yaqui Tribe
24 Const. Art. XI, § 2. Once vested with the chairman's authority, Mr. Yucupicio could
25 exercise all rights and privileges appertaining to that position of public trust, including the
26 power to terminate key employees.

27 **Council's Action to Authorize Mr. Yucupicio's Assumption of Chairman's Duties**

28 On August 10, 2007, the Tribal Council, through resolution C08-127-07,
memorialized its clear intent to suspend Chairwoman Frias and to appoint Mr. Peter
Yucupicio to assume the duties of Chairman for the remainder of the unexpired term. Such

1 resolution was a valid exercise of power by the Council. The Pascua Yaqui Constitution Art.
2 XVIII, § 3, defines Quorum, as:

3 A majority of the tribal Council members shall constitute a quorum for the
4 official transaction of business. Vacant council seats shall not be counted toward the
5 establishment of a majority.

6 Once the chairwoman's position became vacant as a result of her suspension from that office
7 of public trust, the vacant position of Ms. Frias' would not have been counted in determining
8 whether a majority existed, because Article XVIII, Section 4, of the Pascua Yaqui
9 Constitution provides:

10 In all instances in this constitution wherein a majority vote or a two-thirds majority
11 vote of the tribal council is required, a vacant council position shall not be counted
12 toward the establishment of a majority.

13 P.Y. Const. Art. X, § 1 prohibits "any tribal council member from participating in any vote
14 considering his or her removal." As to the initial suspension, there were 10 members of
15 council qualified to vote, one was not at the vote, and of the nine remaining, six of the nine
16 voted to suspend Ms. Frias, and therefore effectively creating a vacancy in the position of
17 chairperson, and the vacant council seat not being counted for establishing the two-thirds
18 majority. The vote was 6 out of 9, or two thirds, and not 6 out of 10. The constitutional
19 requirement of 2/3 was satisfied when the council members authorized the chairwoman's
20 suspension, and effective removal, from her office.

21 The August 10, 2007 resolution simply formalized the acts of August 1, 2007 which
22 was an effective removal of Ms. Frias as chair based on her suspension due to ethics violation,
23 and the resolution makes clear the Council's intent to suspend Ms. Frias without pay and to
24 clarify that Mr. Yucupicio assumes the duties of Chair for the remainder of the unexpired
25 term or until a successor is chosen by the Tribal Council. The vote of 6 to 0 and one
26 abstaining met the requirements that the resolution was a valid exercise of the Council's
27 powers to authorize Mr. Yucupicio to act as Chair. Based on his valid authority to do so, Mr.
28 Yucupicio has a right to authorize the termination of key employers and to order Ms. Figueroa
to carry out his request.

1 **The Attorney General's Impropriety of Rendering a Legal Opinion Related to the**
2 **Relative Rights of the Parties Frias, Yucupicio and Pascua Yaqui Tribal Council, Where**
3 **the Interim Attorney General for the Tribe had A Personal Conflict of Interest in Doing**
4 **So**

5 The Court finds it intriguing that the Interim Attorney General, Justin Ruggieri,
6 asserted that he has a conflict in this case, he has asked for a stay of this proceeding based on
7 that conflict of interest, yet he previously decided to render an Attorney General opinion
8 resulting in the necessity of filing the declaratory judgment by Mr. Yucupicio, in spite of Mr.
9 Ruggieri's announced conflict of interest in representing interest of various persons in this
10 and other matters. The Attorney General rendered two opinions involving his perceived
11 relative rights of Ms. Frias and that of the Council and Mr. Yucupicio, despite the fact that he
12 indicated in the written opinion that he had a personal conflict of interest in doing so.

13 The effect of Mr. Ruggieri's first written opinion was to place into turmoil the day to
14 day operations of the Tribe, because executive directors were confused as to who had actual
15 or ostensible authority to direct the key employees of the Tribe. The Attorney General when
16 asked by the Court to state whether he had advised both Ms. Frias, whom he had advised in
17 the past, and Mr. Yucupicio (and the Council) as to Mr. Ruggieri's personal conflict of
18 interest, before he rendered his written opinion that the Council's actions may have been
19 unconstitutional and therefore void, he did not respond clearly to the Court's inquiry, although
20 asked several times to do so. Mr. Ruggieri indicated to the Court that he has a conflict now,
21 and that is why he had given advice to the Council and Mr. Yucupicio to find independent
22 legal counsel to assist them, because Mr. Ruggieri said he could not advise them on what
23 legal action to take, based on a personal conflict, having advised Ms. Frias on a related matter
24 in dispute, that of her suspension from office.

25 A review of Mr. Ruggieri's actions are in order for the Court to determine the
26 legitimacy and propriety of his rendering the Attorney General opinions as to the controversy
27 between Ms. Frias and Mr. Yucupicio and among Ms. Frias and the Tribal Council.

28 The Court indicated that all attorneys who practice before the Court are subject to the
American Bar Association's Rules of Professional Conduct 3 PYTC § 1-4-40(C) ("Dignity
and Ethics"). The American Bar Association Rules as to Conflicts of Interests provides that
an attorney must inform both clients involved in a potential conflict and he must obtain a

1 signed written waiver of the conflict before he proceeds in taking any actions that may
2 adversely affect the other. ABA Model Rules of Professional Conduct Rule 1.7, Conflict of
3 Interest: Current Clients.

4 The Conflict of Interest Rule provides as follows:

5 (a) . . . A lawyer shall not represent a client if the representation involves a concurrent
6 conflict of interest. A concurrent conflict of interest exists if:

- 7 (1) the representation of one client will be directly adverse to another client;
8 or,
9 (2) there is a significant risk that the representation of one or more clients will
be materially limited by the lawyer's responsibilities to another client, a
former client, or a third person or by personal interest of the lawyer.

10 Section (b) of the Conflict of Interest Rules provides for exceptions to the rule above:

11 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph
12 (a), a lawyer may represent a client if:

- 13 (1) the lawyer reasonably believes that the lawyer will be able to provide
14 competent and diligent representation to each affected client;
15 (2) the representation is not prohibited by law;
16 (3) the representation does not involve the assertion of a claim by one client
against another client represented by the lawyer in the same litigation or
other proceeding before a tribunal; and,
17 (4) *each affected client gives informed consent, confirmed in writing.*

18 ABA Model Rules of Professional Responsibility, Rule 1.7 Conflicts of Interests; Current
19 Clients, (emphasis added).

20 The comments to the Professional Responsibility Rule 1.7 make clear that "Loyalty
21 and Independent judgment are essential elements in the lawyer's relationship to a client.
22 Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client,
23 former client, or a third person or from the lawyer's own interest."

24 The ABA Conflict of Interest rules provide in pertinent part as follows:

25 (2) Resolution of the conflict of interest problem under this rule requires the lawyer to:

- 26 1) clearly identify the client or clients;
27 2) determine whether a conflict of interest exists;
28 3) decide whether the representation may be undertaken despite the existence
of a conflict, i.e. whether the conflict is consentable; and,
4) if so, consult with the clients affected under paragraph (a) and obtain
informed consent in writing. . .

1 ABA Model Rules of Professional Responsibility, Rule 1.7 Conflicts of Interests; Current
2 Clients, Comment, General Principles.

3 Part of an Attorney General's ethical duties is to render legal opinions for the Tribal
4 Council, chairperson, department heads, and employees. The import of a nonpartisan
5 Attorney General opinion is essential to day-to-day operations to promote legal activities
6 under the Pascua Yaqui Constitution and statutes. Many persons seek the tutelary legal
7 guidance that the Attorney General has to offer, and his legal advice should be respected
8 throughout the Pascua Yaqui Tribe. With such legal authority of the Attorney General's
9 office comes a fiduciary duty, an honor most high that an attorney undertakes fair dealings
10 with all whom he advises. The Attorney General has a duty to act ethically and with dignity as
11 required by the Pascua Yaqui Rules of Court that adopts the American Bar Association's
12 Standards of Conduct.

13 Under the ABA Model Rules of Professional Responsibility, there is a rule of Conflict
14 of Interest as to attorneys who work for the government, in that a lawyer serving as a public
15 officer or employee is subject to rule 1.7 above. ABA Model Rule of Professional Conduct R.
16 1.10(d)(1) provides that a lawyer shall not participate in any "matter" in which the lawyer
17 participated personally and substantially in advising an individual in any action against the
18 government unless the lawyer obtains an "informed consent, confirmed in writing" before he
19 addresses any such defined matter, including a "request for a ruling or other determination,"
20 or any other matter covered by the conflict of interest rules of the appropriate government
21 agency.

22 Notwithstanding the fact he did not obtain such written consents as mandated by the
23 Professional Rules of Conduct, based on his inappropriate perception of a tacit waiver or at
24 least his perceived acquiescence by the chairman Yucupicio and the Council, Mr. Ruggieri
25 rendered his legal opinion, as he personally saw it was his legal right to do so, as to the
26 relative rights of Ms. Frias, Mr. Yucupicio and the Council, and notwithstanding the statement
27 that Mr. Ruggieri had personal and professional conflicts in doing so, Mr. Ruggieri in his
28 August 2, 2007 legal opinion to the Tribal Council members prefaces his opinion as follows:

Although this Office has previously recused itself from representing anyone party with
regard to the proceedings against Chairwoman Frias under 2 PYTC Chapter 1-2
("Ethics Ordinance"), the magnitude of the issue presented by the Vice-Chairman's

1 question, in the discretion of the Interim Attorney General pursuant to 2 PYTC § 2-1-
2 30(O), requires that the issuance of this advisory Opinion to the Tribal Council.

3 Despite the fact he had not obtained informed consents and written express waivers from all
4 of the parties for whom a potential conflict existed, and in the absence of proof that he had so
5 advised all of them that he was about to write a legal opinion affecting the rights of all parties,
6 Mr. Ruggieri continued to render his opinion and stated he believed the Tribal Council's
7 actions involving Ms. Frias to be "unconstitutional." The result was, as Mr. Yucupicio's
8 counsel noted, that tribal operations came to a "standstill." The ABA professional
9 Responsibility rules comments provide guidance as to what action should have been taken in
10 the matter:

11 ". . . [a]bsent consent, a lawyer may not act as an advocate in one matter against a
12 person the lawyer represents in some other matter, even when the merits are wholly
13 unrelated. The client as to whom the representation is directed is likely to feel
14 betrayed, and the resulting damage to the client-lawyer relationship is likely to impair
15 the lawyer's ability to represent the client effectively. In addition the client on whose
16 behalf the adverse representation is undertaken reasonably may fear that the lawyer
17 will pursue that client's case less effectively out of deference to the other client, i.e.
18 that the representation may be materially limited by the lawyer's interest in retaining
19 the current client.

20 ABA Model Rules of Professional Responsibility, Rule 1.7, Conflict of Interest; Current
21 Clients, Comment, par. 6.

22 The saving grace in this matter was that Mr. Ruggieri decided to not continue with
23 advising any parties in the matter. In the meanwhile, as a direct result of Mr. Ruggieri's
24 Attorney General opinion, the damage had been done to the Tribe's employees who were
25 confused about who was in charge. The Attorney General overstepped the boundaries of
26 ethical conduct in rendering his legal opinion, without first obtaining the informed written
27 consent from all parties affected, that he would be taking an action, that of rendering a legal
28 opinion, that the opinion if rendered may have an impact of affecting the rights of his clients,
vis-à-vis third parties, including tribal employees whose jobs may be affected by the Attorney
General's opinions. At no time did Mr. Ruggieri indicate to the Court that he obtained the
requisite written waivers of conflicts informed consents from all of the clients whom he had
advised before undertaking a matter and rendering a written opinion affecting those whom he
had previously given legal advice on the same issue.

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In deciding whether declaratory relief should be granted, the Pascua Yaqui code requires that the Court follow the practical rule of law: “[r]elief shall be based upon an existing set of facts, not those that may or may not arise in the future.” 3 PYTC § 3-1-10. The Court is asked to chose between whose authority should carry as to whether Mr. Yucupcio may order Ms. Figueroa to terminate a key employee. Based on a valid enactment of the tribal council vesting Mr. Yucupcio with authority to act as Chairman, and the Council’s resolution is presumed valid, versus an Attorney General’s opinions rendered under some rather questionable procedures, issued without written informed consents of his former and present clients, and based on unsupported legal authority that speculates on what possible outcomes may occur if the Court of Appeals decides in Ms. Frias’ favor, the Court will apply the “existing set of facts” as established by a valid enactment of the legislature rather than rely on the unsupported speculation contained in the Attorney General’s opinion.

The Court should grant the petitioner his relief as requested, and the Court should order that the Director of Human Resources shall carry out her duties of office to effectuate the termination of any key employees as requested by the Chairman Peter Yucupcio who has valid authority to make such employment termination requests.

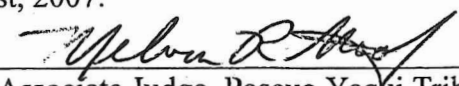
IT IS ORDERED that the Court shall grant the petition for declaratory judgment and Jacinta Figueroa shall carry out the directive of Chairman Peter Yucupcio to terminate any key employee whom the Chairman may deem fit to terminate.


IT IS FURTHER ORDERED that the Court denies the request to stay proceedings for lack of good cause shown, and based on the failure to appear by the party in interest, Ms. Figueroa, for whom the request to stay was made.

IT IS FURTHER ORDERED that the request to consolidate by Ms. Thomas is denied, for lack of good cause shown, and because it is not a timely motion.

Nothing in this declaratory judgment shall prejudice the rights of persons not party to this proceeding. 3 PYTC § 3-1-100.

SO ORDERED this 17th day of August, 2007.


Associate Judge, Pascua Yaqui Tribal Court

cc: Date 08-20-07
 Petitioner Respondent J. Ruggieri P. Thomas

Clerk