

Sep 22, 2010

ISSUED  
CLERK OF COURT

CA-09-004; CA-09-005

Pascua Yaqui Tribe Court of Appeals

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MARY LOU BOONE, Evelyn James, Henry Whiskers, Clyde Whiskers,  
Danlyn James, and the SAN JUAN SOUTHERN PAIUTE TRIBE, a  
federally recognized Indian Tribe,

Defendant-Appellants,

AND

LEE CHOE,

Defendant-Appellant,

v.

MAY PRESTON, Natalie Edgewater, Nathaniel King, Edith King, Jack  
Owl, Sr. and Thomas Secody, and the SAN JUANSOUTHERN PAIUTE  
TRIBE, a federally recognized Indian Tribe,

Defendant-Appellees,

AND

The PASCUA YAQUI TRIBE, a federally recognized Indian Tribe,  
Plaintiff-Appellee.

**OPINION AND ORDER**

Appeal of Trial Court case no. CV-08-027, the Hon. Melvin Stoof presiding.

Virginia Sciabarrasi, Esq., 1900 Plaza Drive, Louisville, Co, 80027, for the  
Defendants/Appellants Boone.

Marc Cullen, Esq., 4801 E. Broadway Blvd., Tucson, 85711, for Defendant/Appellant Lee Choe.

Howard M Shanker, Esq., and Laura Berglan, Esq., PO Box 37, Flagstaff, AZ, 86002, for  
Defendants/Appellants May Preston et al.

Robert Gillon, Esq. and Kimberly Van Amburg, Esq., 4725 W. Calle Tetakusim, Tucson, AZ,  
85757, for the Pascua Yaqui Tribe

**REVERSED AND DISMISSED**

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## I. FACTUAL AND PROCEDURAL BACKGROUND

The San Juan Southern Paiute Tribe became a federally recognized Indian Tribe on August 14, 1996. (R.O.A., item 31 at 404). Four years later, the San Juan Southern Paiute Tribe applied for and received a Current Gaming Device Allocation of 475 gaming devices from the Department of Interior. (*Id.*, item 53 at 589). On August 26, 2003, the San Juan Southern Paiute Tribe entered into a Gaming Device Operating Rights Transfer Agreement (the “Transfer Agreement”) with the Pascua Yaqui Tribe to lease their entire allocation to the Pascua Yaqui Tribe. (*Id.* at 578). The Transfer Agreement further obligated the Pascua Yaqui Tribe to make quarterly installment payments to the San Juan Southern Paiute Tribe, to be deposited in an account maintained by Wells Fargo, N.A. (*Id.*)

In August 2007, the Pascua Yaqui Tribe learned from a series of newspaper articles that San Juan Southern Paiute tribal members contested their tribal council elections held that month. (*Id.*, item 53 at 580). In response to the election dispute, the Pascua Yaqui Tribe filed a Complaint in Interpleader in the Pascua Yaqui Tribal Court, requesting the trial court to discharge the Pascua Yaqui Tribe from any and all liabilities or claims resulting from the Transfer Agreement and to further determine the “rightful leaders of the [San Juan Southern Paiute Tribe] to whom the Transfer Agreement Payments should be made” (*Id.* at 583). The Pascua Yaqui Tribal Court granted summary judgment in favor of the Pascua Yaqui Tribe, dismissing the Pascua Yaqui Tribe from the action and requiring May Preston, Natalie Edgewater, Nathaniel King, Edith King, Jack Owl, Sr. and Thomas Cody (collectively the “Preston Defendants”), Mary Lou Boone, Evelyn James, Henry Whiskers, Clyde Whiskers, Danlyn James (collectively the “Boone Defendants”), and Lee Choe to litigate among themselves in

Pascua Yaqui Tribal Court their claims to the Transfer Agreement payments. (Id., item 50 at 552).

The Pascua Yaqui Tribal Court held a bench trial on the matter and issued an order granting summary judgment in favor of the Preston Defendants, recognizing the group as the rightful leaders of the San Juan Southern Paiute Tribe. (Id., item 21 at 170). The Boone Defendants filed motions for reconsideration and a stay of the proceedings. (Id., item 19 at 141). The trial court subsequently denied both motions. (Id., item 4 at 14). The Choe and Boone Defendants filed an appeal in this Court, challenging the Pascua Yaqui Tribal Court's subject matter jurisdiction to issue the Orders of October 17, 2008 and November 12, 2008.

## II. ANALYSIS

This Court must first resolve preliminary procedural issues that have arisen in this action before addressing the Appellants' substantive issues on appeal.

### Consolidation of Cases

The Defendant-Appellants in this case filed two separate notices of appeal with this Court. Defendant-Appellant Boone filed a Notice of Appeal with this Court on November 19, 2009 while Defendant-Appellant Lee Choe filed a Notice of Appeal on November 21, 2009, each challenging the subject matter jurisdiction of the Pascua Yaqui Tribal courts. The Court Clerk assigned case number CA-09-004 to the Lee Choe filing and case number CA-09-005 to the May Lou Boone filing. There is no rule governing consolidation of cases under the Pascua Yaqui Rules of Civil Procedure. However, Rule 23 permits the tribal courts to apply "like provisions in the ... Arizona

Rules of Civil Procedure in construing” the tribal rules of civil procedure. P.Y.T.C. Rule 23. Accordingly, under the Arizona Rules of Civil Procedure:

When actions involving a common question of law or fact are pending before the court, it may order ... all the actions consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Ariz. R. Civ. P. 42(a). See also Allen v. Superior Court of Maricopa County, 86 Ariz. 205, 344 P.2d 163 (Ariz. 1959) (establishing the rule that the court of its own motion may order consolidation of suits). Furthermore, a consolidation of cases “does not merge the suits into a single cause, or change the rights of the parties.” Yavapai County v. Superior Court In and For Yavapai County, 13 Ariz. App. 368, 476 P.2d 889 (App. Div.1 1970). Because cases CA-09-004 and CA-09-005 are related and arise out of the same dispute, this Court hereby orders that the two cases be consolidated into one. Following Arizona state law, the consolidation of the two cases does not change the rights of the parties nor does the consolidation merge the two suits into a single action.

#### Correct Caption

The assigned caption to this proceeding does not reflect the correct appellants and appellees to this appeal. The notices of appeal filed by the Choe and Boone Defendants names the Pascua Yaqui Tribe as the only Plaintiff-Appellee when the Preston Defendants should also have been listed as Defendant-Appellees. Following a court’s discharge of the plaintiff from an interpleader proceeding, it is often appropriate that the “pleadings between the defendants ... be ordered, making the suit, in effect, a new and independent proceeding among the defendants.” 44B Am. Jur. 2d Interpleader § 20 (2010). The caption to the filings made during the second stage of the interpleader

action should have been changed to reflect a new suit between the Boone, Preston and Choe Defendants. Because the lower trial court granted judgment in favor of the Preston Defendants, the pleadings on appeal should have named the Preston Defendants as Defendant-Appellees. The Pascua Yaqui Rules of Civil Procedure require that the notice of appeal “shall designate the party or parties taking the appeal” P.Y.T.C. R. Civ. P. 7(B). Despite the general rule that the caption *must* be in proper form, Rule 23 only requires that tribal court filings *shall* designate the names of all parties to the appeal. Thus, caption defects may be corrected on the court’s own initiative unless the complaining party can demonstrate prejudice resulting from the failure to comply with the requisites of Rule 23. See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1321 (3d ed. 1990) (explaining that defective caption is “merely a formal error and never should be viewed as a fatal defect” to warrant dismissal for a violation of the rules of civil procedure). We direct the Clerk of the Court to amend the caption to include the Preston Defendants as Appellees.

The Pascua Yaqui Tribe will remain listed as a Defendant-Appellee in this action as the Boone and Choe Defendant-Appellants are challenging the Pascua Yaqui Tribe’s satisfaction of the requirement that the party seeking to bring an interpleader action must first establish the Court’s subject matter and personal jurisdiction. See Mashantucket Pequot Tribal Nation v. Paul Steelman, Ltd., No. CV-GC-2006-185, ¶36 (Mashantucket Pequot 04/08/2008) (ruling that whenever a court’s subject matter jurisdiction is challenged, the party asserting jurisdiction carries the burden of establishing the court’s jurisdiction.). The proper caption is listed above and the parties should take notice of this change.

### Standard of Review

The jurisdiction of the Yaqui Tribal Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. See Pascua Yaqui Const., art. VIII, § 5 (stating that the Court of Appeals “shall have the power of judicial review of all civil and criminal matters appealed from the Pascua Yaqui Tribal Court.”). The Pascua Yaqui Tribal Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. See Id. (stating that appellate review shall not include trial de novo in any civil matter.).

### Subject Matter Jurisdiction

Both the Choe and Boone Defendant-Appellants challenge the Pascua Yaqui Tribal Court’s Orders dated October 17, 2008 and November 12, 2008 for lack of subject matter jurisdiction. (R.O.A., item 1, at 1). This Court may decide whether it has subject matter jurisdiction to hear an appeal involving an interpleader action brought before its tribal courts. See State v. Buckley, 153 Ariz. 91, 93, 734 P.2d 1047, 1049 (App.1987) (holding that “subject matter jurisdiction is never waived and may be raised at any time, including on appeal.”). An interpleader is “only a procedural device; the rule does not convey jurisdiction on the courts. Accordingly, a party who brings an interpleader action must first establish jurisdiction.” Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030 (9th Cir. 2000). Whether our tribal court may exercise subject matter jurisdiction over an appeal is a question of law requiring de novo review. See Wolf Point Organization v. Investment Centers of America, Inc., No. 324, ¶136 (Fort Peck 02/06/2001) (requiring de novo review of appeal challenging tribal court’s subject matter and personal jurisdictions).

If an indispensable party to an action possesses sovereign immunity, the Pascua Yaqui Tribal Courts are deprived of subject matter jurisdiction. “Sovereign immunity is shorthand for the common-law concept that a sovereign cannot be sued without its consent” One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians, 2001 Crow 10, ¶39 (Crow 11/21/2001) and thus serves as a “defense to an action.” Bethel v. Mohegan Tribal Gaming Authority, No. GDCA-T-98-500, ¶60 (Mohegan Gaming 06/15/2000). Indian tribal governments have long been recognized as possessing common-law immunity from suit traditionally enjoyed by western sovereigns. See Martin v. Hopi Tribe, No. AP-004-95, ¶46 (Hopi 03/29/1996) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). An Indian tribal government’s immunity extends to its tribal officers “acting within the scope of his or her valid authority.” Youvella v. Dallas, No. 96-AP-00002, ¶46 (Hopi 11/23/1998). An Indian tribal government is “subject to suit only when Congress has authorized the suit or the tribe has waived its immunity.” Crow Tribe of Indians at ¶45 (quoting Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)). The waiver of tribal sovereign immunity may not be implied, but must be *expressed unequivocally*. Id. (emphasis added). The Pascua Yaqui Tribe has failed to prove that the San Juan Southern Paiute Tribe expressly and unequivocally waived its immunity for purposes of this suit. See Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989) (stating the fundamental principle of tribal sovereign immunity remains intact unless surrendered in express and unequivocal terms). The interpleader action that forms the basis of this appeal clearly requires rightful and disputed tribal officials from a federally-recognized Indian tribal government to appear in Pascua Yaqui Tribal Court to litigate

the tribal government's claim to payments under the Transfer Agreement. We find no waiver of the San Juan Southern Paiute Tribe's immunity here and for this reason, Pascua Yaqui Tribal Courts do not have subject matter jurisdiction to hear this matter.

### Exhaustion of Tribal Remedies

The San Juan Southern Paiute Tribal Court System is the appropriate forum to address the underlying question of tribal immunity involved in this action. See San Juan So. Paiute Tribe Const., art. VI, § 2 (establishing the jurisdiction of the Tribe's court system). The common law exhaustion doctrine favors party exhaustion of available remedies before a collateral or parallel court action may proceed. See Gillette v. Marcellais, No. TMAC 04-006, ¶11 (Turtle Mountain 07/16/2004) (applying the rule in the context of federal courts). The tribal exhaustion doctrine is "in essence, a forum provision" and, as a matter of comity, requires mutual sovereigns to respect the law-making authority of the other. Melissa L. Koehn, Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts, 29 Ariz. St. L.J. 705, 731 (1997); See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) (explaining that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite.").

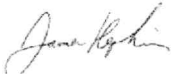
The United States Supreme Court created the tribal exhaustion doctrine to promote the principles of tribal self-government and self-determination by permitting tribal courts to exercise "the first opportunity to evaluate the factual and legal bases for [a] challenge" to its jurisdiction. Gillette at ¶11 (quoting Iowa Mut. Ins. Co., at 13). Comity concerns regarding federal court-tribal court jurisdiction equally apply to tribal court-tribal court jurisdiction. See San Juan So. Paiute Tribe v Choe, No. TC-FC-373-2007, ¶11 (Navajo Family Ct. 08/29/2007) (dismissing action involving same parties on

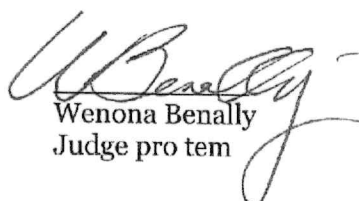
grounds that the "San Juan Southern Paiute Tribe has a court to hear this matter and thus a ruling by this Court would violate the sovereignty of the Tribe."). Given the heightened importance of promoting tribal sovereignty in these comity cases, the San Juan Southern Paiute Tribal Court system must have the first opportunity to determine the extent and reach of its jurisdiction over legal matters involving its tribal governmental affairs.


### CONCLUSION

1. The cases captioned Pascua Yaqui Tribe v. San Juan Southern Paiute Tribe and Lee Choe, CA-09-004, and Pascua Yaqui Tribe v. Mary Lou Boone, et al., CA-09-005, are hereby CONSOLIDATED. The case Pascua Yaqui Tribe v. San Juan Southern Paiute Tribe and Lee Choe, CA-09-004, is hereby CLOSED.
2. All other issues pending before this Court in CA-09-004 and CA-09-005 and not addressed in this opinion are DISMISSED as moot.
3. We REVERSE and REMAND this case to the Pascua Yaqui Tribal Court with instructions to dismiss this action.

Dated this 22 day of September, 2010.

  
James Hopkins  
Chief Justice

  
Wenona Benally  
Judge pro tem

  
Mark McMillan  
Judge pro tem

No. CA-09-004

**Pascua Yaqui Tribe Court of Appeals**

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**San Juan Southern Paiute, a federally recognized Indian Tribe and Lee Choe,  
Defendants/Appellants**

v.

**Pascua Yaqui Tribe, a federally recognized Indian Tribe, Plaintiff/Appellee.**

**ORDER**

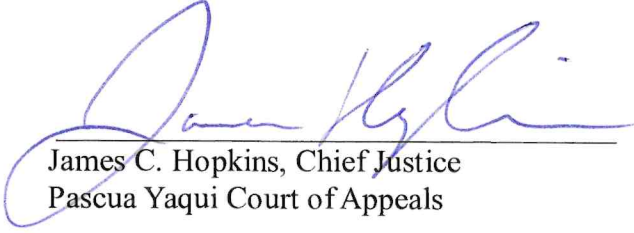
Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CV-08-027, the Honorable Melvin Stoof presiding.

Marc Goldsen, Esq., THE UDALL LAW FIRM, 4801 E. Broadway, Tucson, AZ, 85711, for Defendant/Appellant Lee Choe and the San Juan Southern Paiute Tribe.

Robert Gillon, Esq., Kimberly Van Amburg, Esq., Pascua Yaqui Office of the Attorney General, Tucson, AZ for the Plaintiff/Appellee.

Having reviewed Lee Choe's appeal of the Tribal Court orders dated October 17<sup>th</sup>, 2008 and November 12<sup>th</sup>, 2008, in CV-08-027, this court finds that this appeal is duplicating an already pending appeal filed by the San Juan Southern Paiute Tribe, et al., docketed as CA-09-005, and to which Lee Choe is a party. Accordingly, this appeal is dismissed and Lee Choe must proceed under CA-09-05.

So **ORDERED** this 27<sup>th</sup> day of **October**, 2009.

  
James C. Hopkins, Chief Justice  
Pascua Yaqui Court of Appeals