

No. CA-13-004

Pascua Yaqui Court of Appeals

ENEIDA AGUILAR, Appellant,

vs.

PASCUA YAQUI TRIBE, dba CASINO DEL SOL/CASINO OF THE SUN, JOHN and JANE DOES I-10, Appellee,

Appeal of a decision of the Pascua Yaqui Trial Court in Case No. CV-13-028, the Honorable Melvin Stoof presiding.

Kimberly Van Amburg, General Counsel Sol Casinos, 5655 W. Valencia Road, Tucson AZ 85757.

G. Todd Jackson, Jackson & Ogden, P.C., 3573 East Sunrise Drive, Suite 125, Tucson AZ 85718.

Rebecca A. Reed, Jackson & Ogden, P.C., 3573 East Sunrise Drive, Suite 125, Tucson AZ 85718.

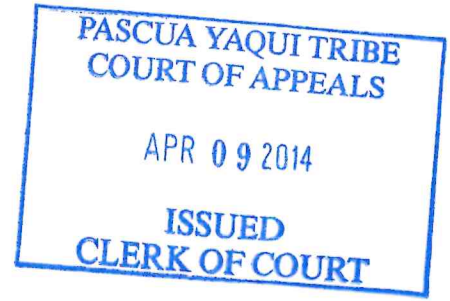
John G. Stompoly, Law Offices of John G. Stompoly, 2850 North Swan Road, Suite 120, Tucson AZ 85712.

I. Opinion

Appellant seeks review of the Tribal Court’s order granting Appellee’s motion to dismiss the case based on improper service. Appellant’s Complaint alleges she suffered injuries when she slipped and fell on butter that was on the floor in Casino del Sol’s buffet area. The Pascua Yaqui Tribal Code provides that the Tribe will forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit if the claim is filed with the casino’s Chief Executive Officer. The issue before this Court is whether Appellant complied with the Tribe’s service statute, 2 PYTC § 3-1-250(G), when she addressed the Notice of Claim to the casino’s General Counsel and the Tribe’s Attorney General instead of the Chief Executive Officer. We hold that Appellant did not and affirm the Tribal Court’s judgment.

II. Background

Appellant’s Complaint alleges she suffered injuries to her back, thighs, and hips when she slipped and fell on butter that was on the floor in the Casino del Sol’s buffet area. The Complaint is addressed to the casino’s General Counsel, Kimberly Van Amburg c/o Pascua Yaqui Enterprises and Pascua Yaqui Tribe Casino del Sol/Casino of the Sun. Appellee’s Answer alleged that Appellant failed “to state a claim upon which relief may be granted, contributory negligence and assumption of risk.” Appellee reserved the right to set forth any additional affirmative defenses that were revealed during discovery. On June 24, 2013, Appellee filed a Motion to Dismiss alleging Appellant did not comply with the notice requirements



found in 2 PYTC § 3-1-250 (G) by both failing to file the Notice of Claim with the Chief Executive Officer (hereafter CEO) of the Tribe's Gaming Enterprise Division and to present the Notice to the CEO by certified mail, proof of delivery requested.

On October 11, 2013, the Tribal Court judge granted the motion to dismiss, reasoning that the statute containing the prerequisites for a civil tort lawsuit is "unambiguous as to the proper person to whom service must be made, the Chief Executive Officer." Appellant filed a Notice of Appeal with this Court on October 29, 2013.

III. Issues

The lower court's decision regarding the sufficiency of service of process is reviewed for an abuse of discretion. *Rio Prop., Inc. v. Rio Int. Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002).

The main issue before this Court is whether Appellant complied with 2 PYTC § 3-1-250(G) by addressing the Notice of Claim to Casino Del Sol's General Counsel and the Tribe's Attorney General. The Pascua Yaqui Tribe has specific procedures for disposing of personal injury claims occurring at Class III Gaming Facilities. Casino of the Sun and Casino del Sol are Class III Gaming Facilities. Code Section 2 PYTC § 3-1-250(B) states that the Tribe would "forgo, on a limited basis, from asserting the subject matter defense of sovereign immunity from suit against a civil tort lawsuit that complies *strictly* with the claims procedures stated in this Code Section..." (emphasis added). Section G provides the pertinent claims procedures:

The Tribe will forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit for personal injury to a Patron or Invitee ..., but only if a claim for that injury or property loss is filed with the Chief Executive Officer of the Tribe's Gaming Enterprise Division that satisfies each and every one of the following prerequisites:

- (1) the claimant has first presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, a written administrative claim not later than 180 calendar days after the date of the alleged personal injury or property loss,

Generally, when service of process is contested, the burden is on the party asserting the validity of service to show that proper service was made. See *Cranford v. United States*, 359 F.Supp.2d 981, 984 (E.D. Cal. 2005); *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993). Unambiguous words must be given their plain and commonly understood meaning in construction. *Kantor v. U.S.*, 205 Ct.Cl 1, 3, 1974; *Selman v. U.S.*, 204 Ct.Cl 675, 498 F.2d 1354 (1974).

In the instant case, the Notice of Claim was addressed to the Casino's General Counsel "Kimberly Van Amburg c/o Pascua Yaqui Enterprises Casino Del Sol" and "Pascua Yaqui Tribe Casino Del Sol/Casino of the Sun." A copy of the Notice of Claim was also sent to the Tribe's Attorney General's office. At no point was a Notice of Claim presented "directly to the Chief Executive Officer" of the casino. An affidavit from Diana Dillinger, a paralegal for Appellant's counsel, states that she

personally called Casino del Sol and spoke to a woman in the administrative office of the casino's hotel to verify who was authorized to accept service for the casino. Ms. Dillinger was told that the Tribe's legal counsel, Kimberly Van Amburg, was authorized to accept service. The Notice of Claim was then addressed and sent to Kimberly Van Amburg. Ms. Dillinger's also sent a copy of the Notice of Claim to the Tribe's Attorney General office in an "abundance of caution".

The Code's language is clear. It tells the serving party who to serve, the CEO; how to serve, by certified mail, proof of delivery requested in a written administrative claim; and when to serve, within 180 days of the alleged injury. This means that the Notice must be addressed and mailed to the casino's CEO. It is true that if Appellant had presented the notice directly to the CEO, another individual could have signed for or accepted the Notice. Nonetheless, Appellant would have complied with the statute by addressing the Notice to the CEO. Instead, Appellant relied on incorrect information and addressed the Notice to incorrect entities. There is no indication Appellant served the correct party, the CEO, within 180 days of the alleged injury at the casino.

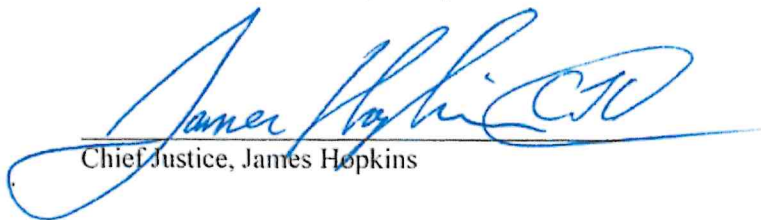
Despite Appellant's assertions and the paralegal's efforts, Appellant did not comply with the statute. The Tribe has clear and specific requirements for filing a civil tort lawsuit when someone is injured in the casino. A quick simple search of the Pascua Yaqui Tribal Code, available online and for free, reveals the information needed to file a civil tort lawsuit involving the Tribe's casino.

Appellants did not serve the CEO with notice as required by statute, thus failing to comply with the requirements needed to proceed with this lawsuit.

IV. Conclusion

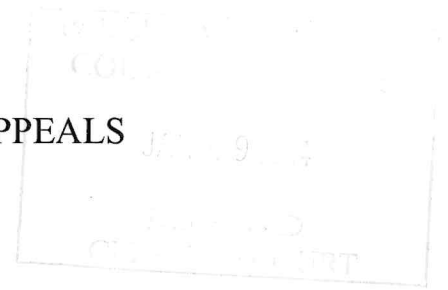
For the foregoing reasons, the Tribal Court's judgment is affirmed.

So ordered on this 9th day of April 2014.



Chief Justice, James Hopkins

PASCUA YAQUI TRIBAL COURT OF APPEALS



ENEIDA AGUILAR,

Appellant/Plaintiff

vs.

No. CA-13-0004

PASCUA YAQUI TRIBE dba CASINO DEL
SOL/CASINO OF THE SUN; JOHN AND
JANE DOES 1-10,

Pascua Yaqui Tribal Court No.
CV-13-028

Appellee/Defendant

REPLY BRIEF OF
APPELLANT

LAW OFFICES OF JOHN G. STOMPOLY, PLLC

johnstompoly@stompoly.com

2850 North Swan Road, Suite 120

Tucson, AZ 85712

Attorney for Plaintiff/Appellant

ARGUMENT

In the Opening Brief, we said that when Appellant filed her Notice of Claim, she complied with the clear language of the statute which requires that a claim be “filed with the Chief Executive Officer”, then, somewhat redundantly, repeats the requirement that a claimant “has first presented directly to the Chief Executive Officer . . . by certified mail, proof of delivery requested, a written administrative claim . . .”. The statute does not say the Notice of Claim must be addressed personally to the Chief Executive Officer, does not say the envelope containing the Notice of Claim must be addressed personally to the Chief Executive Officer, does not say the Notice of Claim must be personally served on the Chief Executive Officer and does not say the certified mail receipt must be personally signed by the Chief Executive Officer.

The Answering Brief never addresses the above analysis. Rather, defense counsel states that when Appellant filed her Notice of Claim, she did not comply with the clear language of the statute because:

“The ordinance clearly states, twice, that the CEO and only the CEO of the gaming facility must be served with such a

notice of claim.”. (Page 11) (emphasis added)

Defense counsel is just wrong. The statute does not say the Notice of Claim must be served on anyone. The word “service” is a word of art, as is the phrase “service of process”, the meaning of which is well known to not only lawyers, but legislators. Requiring that a document be served is much more formal and has well established, much clearer legal implications than a statutory requirement that a document be “presented directly” to someone.

Appellant would never suggest that the Court re-write the statute or ignore the legislative intent. We are suggesting that the Court assume, as it must, that the legislature meant what it said and understood what it did not say. If it did not want the Notice of Claim to be effective unless it was personally handed to the Chief Executive Officer or, at least, that the Chief Executive Officer had to personally (not his secretary) sign the certified mail receipt, the statute would say so.

On the other hand, if the statute is ambiguous, it should be interpreted to favor a decision on the merits.

The other arguments in the Answering Brief flow from the erroneous major premise and are considered in the Opening Brief.

The Order granting the motion to dismiss should be reversed and the case remanded for a decision on the merits.

Respectfully submitted this 8th day of January, 2014.

LAW OFFICES OF JOHN G. STOMPOLY, PLLC

By



JOHN G. STOMPOLY
Attorney for Appellant

PASCUA YAQUI TRIBE

COURT OF APPEALS

ENEIDA AGUILAR,

No. CA-13-0004

Appellant/ Appellant,

vs.

Pascua Yaqui Trial Court

No. CV-13-028

PASCUA YAQUI TRIBE dba CASINO
DEL SOL/CASINO OF THE SUN,
JOHN and JANE DOES 1-10,

Appellee / Defendant.

ANSWERING BRIEF OF THE APPELLEE

G. Todd Jackson (SBN 012202)

tjackson@jacksonodenlaw.com

Rebecca A. Reed (SBN 023419)

rreed@jacksonodenlaw.com

Jackson & Oden, P.C.

3573 East Sunrise Drive, Suite 125

Tucson, Arizona 85718

(520) 884-0024

Attorneys for Appellee Pascua Yaqui Tribe

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STATEMENT OF THE CASE

The Pascua Yaqui Tribal Code's gaming ordinances specifically and unequivocally require anyone seeking money for injury allegedly sustained at the Tribe's Class III Gaming Facilities to submit a notice of claim to the Chief Executive Officer of the gaming facility. 2 PYTC §3-1-250(G)(1),(3). Appellant did not comply with that requirement, which she admitted repeatedly in the trial court proceedings. *Index at 10 p.2 l.6; 4 at p.1 l.21.*

Tribal Code dictates that the Pascua Yaqui Tribe (the "Tribe") waives its sovereign immunity to tort claims only as set forth in the gaming enterprise ordinances. 2 PYTC §3-1-250. Because Appellant failed to comply with the ordinances in noticing her claim, the Tribe did not waive, and thus retains, sovereign immunity against her claims, which tribal ordinances now bar as a matter of law. 2 PYTC §3-1-250(B),(E),(F),(G). The trial court thus lacked subject matter jurisdiction over the claim, and correctly dismissed Appellant's lawsuit for non-compliance with Tribal law. For the same reason, this Court should affirm the dismissal.

STATEMENT OF THE PROCEEDINGS AND DISPOSITION

Appellant filed her complaint on February 19, 2013, in which she sought money damages for personal injuries she alleged incurred at Casino del Sol. *Index*¹ at 28. The Tribe filed its Answer on March 27, 2013, and Amended Answer on April 3, 2013. *Index* at 25, 26.

The Tribe filed a Motion to Dismiss on June 24, 2013, based on the fact that Appellant did not comply with the Tribal Code requirements for noticing such a claim. *Index* at 15. Appellant opposed the Motion, *Index* at 10, to which the Tribe replied. *Index* at 9.

Due to the late appearance of an affidavit from Appellant's initial attorney's paralegal in support of her opposition, first submitted on September 12, 2013, *Index* at 5, after the usual briefing concluded, *Index* at 9, 10, 15, the parties filed supplemental briefs on the Motion before oral argument. *Index* at 3, 4.

The trial court heard oral argument on October 1, 2013, and granted the Motion to Dismiss. *Index* at 2. This appeal timely followed. *Index* at 1.

¹ "Index" refers to the Index Listing of items in the Trial Court Record filed by Rene Garcia, Chief Court Clerk.

STATEMENT OF FACTS

Appellant alleges that she incurred injuries when she slipped and nearly fell at the buffet in Casino del Sol on March 1, 2012. *Index at 15, Exhibit 1; Index at 28.* Appellant and her attorney at the time, John P. Leader, Esq., attempted to submit a notice of claim to the Tribe for \$500,000 in damages. *Index at 15, Ex. 1.*

In doing so, however, they did not comply with Tribal Code prerequisites for making such a tort claim. *Index at 15, Exhibit 1; Index at 5.* The applicable ordinance dictates that a claim must be filed with the “Chief Executive Officer of the Tribe’s Gaming Enterprise Division” or presented directly to the “Chief Executive Officer of the Class III Gaming Facility.” 2 PYTC §3-1-250(G). Instead, Appellant directed her claim to “Kimberly Van Amburg,² c/o Pascua Yaqui Enterprises, Casino Del Sol” and to “Pascua Yaqui Tribe, Casino Del Sol/ Casino of the Sun.” *Index at 15, Ex. 1 at 1.* Appellant also made her claim under an Arizona statute, not pursuant to Tribal Code. *Index at 15, Ex. 1 at 1.*

After the usual briefing on the Tribe’s Motion to Dismiss was complete, Appellant filed an affidavit of Diana Dillinger, a paralegal for Mr. Leader. *Index at 5.* Ms. Dillinger stated that she mailed Appellant’s claim to the Tribe, the Tribe’s Attorney General’s office, and to Ms. Van Amburg. *Id.* She also stated that “in an abundance of caution” she had Appellant’s claim personally served by process server to the Tribe’s counsel, and spoke over the phone with one of the Tribe’s administrative staff. *Id.*

² Ms. Van Amburg is an attorney with the Tribe’s gaming division.

Mr. Leader's office's actions, however, did not include actually reading (or following) the relevant Tribal Code ordinances, which are available free to the public online.³ Nor did their actions include contacting Ms. Van Amburg herself with any questions, even though her direct telephone number is also readily available online. There is no evidence or assertion that any Tribal staff member (administrative staff or otherwise) intentionally misled Appellant or her prior attorney or his staff about Tribal law or its gaming facility notice of claim requirements.

ISSUE PRESENTED FOR REVIEW

Tribal Code requires anyone seeking compensation for injury allegedly sustained at the Tribe's Class III Gaming Facilities to submit a notice of claim to the CEO of the gaming enterprise. Appellant admitted that she did not direct a claim to the CEO before filing her lawsuit seeking money for injuries allegedly incurred at Casino del Sol. Did the trial court correctly dismiss her claim?

SUMMARY OF ARGUMENT

Contrary to Appellant's assertions, this case is not about alleged substantial compliance or actual notice, or the discretionary application of equitable defenses. This appeal concerns actual compliance with Tribal law, Appellant's failure to do so, and the Tribe's sovereign immunity that thus bars Appellant's claim.

³ See http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/index.php.

The Tribe's notice of claim gaming ordinance clearly states, twice, that the CEO, and only the CEO, of the gaming facility must be served with notice of a claim for damages allegedly incurred at a gaming facility. 2 PYTC §3-1-250(G). That information is not secret – it is available free to anyone on the Tribe's website. Appellant and her previous attorney simply did not comply.

Nevertheless, to try to support the notions that she substantially, if not actually, complied and that the Tribe should be estopped from asserting that she did not, Appellant belatedly submitted an affidavit from her prior attorney's office. But the reported actions of the attorney's paralegal and alleged verbal statements of Tribal administrative staff do not and cannot change written, duly-enacted Tribal Code or the result dictated by Tribal law. Appellant's claim is barred by the Tribe's sovereign immunity because she did not comply with explicit notice requirements that were available to Appellant, her attorney and his staff, had they merely read the Tribal Code.

The Tribe agreed not to assert sovereign immunity to tort claims only as set forth in the gaming enterprise ordinances. 2 PYTC §3-1-250. Appellant's failure to comply with the ordinances means that the Tribe retains its sovereign immunity to her claim. 2 PYTC §3-1-250(B). The Tribal Courts thus lack subject matter jurisdiction over the claim. Appellant failed to state a claim on which the Tribal Courts could grant relief, and her claim is barred as a matter of Tribal law. The dismissal should be affirmed.

ARGUMENT

I. The Tribe retains its defense of immunity to tort claims that do not strictly comply with the explicit prerequisites spelled out in its gaming ordinances.

The Tribe has sovereign immunity against lawsuits under Article XXIV of its Constitution. The Tribe cannot be sued without its consent. Tribal Enterprises, including gaming facilities, are an integral part of the Tribe and perform an essential governmental function. 2 PYTC §3-1-20. Any Tribal Enterprise, including any casino or resort, has the full measure of the Tribe's sovereign immunity. *Id.*

Tribal Code dictates that the Tribe retains its entitled defense of sovereign immunity to any civil tort lawsuit for personal injury when the injury claim fails to "strictly comply" with the Code's express prerequisites to a lawsuit against one of the Tribe's Class III Gaming Facilities. 2 PYTC §3-1-250(F)(5), 2 PYTC §3-1-250(G). *See also* 2 PYTC §3-1-250(B),(C),(E). Any claims that do not strictly comply with the gaming ordinances are barred by sovereign immunity.

The ordinances are specific about the procedures required for noticing a claim against the Tribe that seeks compensation for injury allegedly sustained at a gaming facility. *See* 2 PYTC §3-1-250(D)(2). The Tribe will "forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit for personal injury to a Patron or Invitee" "only if a claim for that injury or property loss is filed with the Chief Executive Officer of the Tribe's Gaming Enterprise Division that satisfies each and every one" of several prerequisites, including the first on the list:

(1) the claimant has first presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, a written administrative claim not later than 180 calendar days after the date of the alleged personal injury or property loss, ...”

2 PYTC §3-1-250(G) (emphasis added). The ordinance clearly states, twice, that the CEO and only the CEO of the gaming facility must be served with such a notice of claim.⁴

II. Appellant did not comply with the explicit, unequivocal service of notice requirements clearly written in Tribal gaming ordinances.

Appellant admitted repeatedly that she did not direct her claim to the CEO as required and did not comply with the applicable gaming ordinances. *Index at 10 p.2 l.6; 4 at p.1 l.21*. On appeal, however, she attempts to argue that she “fully complied” with the notice ordinance by submitting her claim to persons other than the CEO of the gaming facility, that the ordinance’s explicit specification of “directly to the CEO” doesn’t really mean that, and that her non-compliance should be excused because she is allowed to assume actual notice even if she did not direct her claim to the right person. Such arguments are unpersuasive. The unambiguous directives written into the Tribal Code cannot be met by submitting a notice of claim to other Tribal representatives. And service authority purported by a U.S. Mail certified mail receipt form, or a process server’s affidavit, or well-intentioned administrative staff, is not sufficient and cannot change, override, or

⁴ Appellant’s speculation about definitions of “directly” and “personally” and whether one means the other are merely attempted misdirection. Such arguments do not rewrite the ordinance in Appellant’s favor or excuse her non-compliance.

excuse non-compliance with Tribal law. Whatever non-compliant measures Appellant or her prior attorney may have taken to attempt to file her claim are legally irrelevant.⁵

Appellant's claim is against the Tribe as a sovereign government, not against a private person or entity. As a sovereign, the Tribe is immune by default. While the Tribe has elected to forgo its immunity under limited circumstances, that consideration is only available if the injury happens in a gaming establishment, and only if the claimant "strictly complies" with specified claim procedures. The identical claim against the Tribe outside one of the casino-resorts would be barred entirely. Because Appellant happened to nearly fall in one of the gaming facilities, she had a potential tort remedy, if she followed the rules under Tribal Code. But she did not; thus her claims are barred. Dismissal of her lawsuit should be affirmed.

III. Tribal and federal law have strong presumptions against waiver of a Tribe's sovereign immunity.

Appellant argues that the Tribe's notice of claim defense is merely a procedural statute of limitation subject to waiver by conduct or estoppel. That is incorrect. Tribal sovereignty is stronger than that. In Tribal Court, sovereign immunity is a jurisdictional (not procedural) issue that may be asserted at any stage

⁵ Appellant notes that the Tribe did not offer an affidavit from Ms. Van Amburg or the applicable CEO or such CEO's assistant to demonstrate that the Tribe did not have actual notice of her claims. Such allegations of "missing" evidence are not evidence, however. Such immaterial argument from the Appellant is merely an attempt to obfuscate the fact that Appellant did not comply with Tribal Code.

of the proceedings. *Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir 1982); *US v. Sherwood*, 312 US 584, 586-87 (1941). The Tribal Court has no subject matter jurisdiction over claims that are barred by sovereign immunity. *See Herminia Frias v. Peter Yucupicio and Pascua Yaqui Tribal Council*, No. CA-08-006, Pascua Yaqui Tribe Court of Appeals, at 2, ¶1 (September 4, 2008).

There is a strong presumption against waiver of tribal sovereign immunity. *Demontiney v. US*, 255 F.3d 801, 812-13 (9th Cir. 2001). Any waivers are interpreted liberally in favor of the Tribe and restrictively against the claimant. *See Maryland Casualty Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 721 (5th Cir. 1966). Sovereign immunity of an Indian nation may not be waived by implication; any waiver must be express.⁶ *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509 (1991); *American Indian Agricultural Credit Union Consortium, Inc. v. Standing Rock Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). Applying equitable defenses taken from Arizona law to this circumstance would contradict these long-standing precedents. *See id.*

⁶ Even if the Tribe's notice of claim defense could be waived by conduct if the Tribe did not assert the defense promptly or substantially litigated the claim before pursuing the defense, that did not happen here. *See, e.g., Jones v. Cochise County*, 218 Ariz. 372, 379, ¶22, 187 P.3d 97, 104 (App. 2008), *City of Phoenix v. Fields*, 219 Ariz. 568, 574, ¶29, 201 P.3d 529, 535 (2009). The Tribe asserted "failure to comply with prerequisites to a lawsuit under 2 PYTC §3-1-250(G)" as an affirmative defense in its Amended Answer. *Index at 25.*

IV. Contrary to Appellant’s assertion, her claim would also be barred under principles of Arizona law.

Appellant cites to Arizona law to assert her view that this Court has the “authority and obligation” to avoid strictly enforcing Tribal ordinances and permit her claim. Such a result is questionable in Arizona, however. Arizona’s case law regarding its notice of claim statute aligns with Tribal law. Like the Tribal Code, Arizona statutes require a person with a claim against a public entity to file the claim with the person authorized to accept service for the entity within 180 days after the cause of action accrues. A.R.S. §12–821.01(A). Claims for damages against an Arizona governmental entity, as against the Tribe, are barred if notice of such claims is not properly and timely filed. Actual notice or substantial compliance, including service on the wrong government official, no matter how high ranking, does not excuse failure to comply with the statutory notice requirements. *See, e.g., Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, ¶10, 144 P.3d 1254, 1256 (2006) (service on one member of a county board of supervisors was insufficient to comply with notice of claim statute and rule); *Fields*, 219 Ariz. at 574, ¶29, 201 P.3d at 535. *See also Slaughter v. Maricopa Cnty.*, 227 Ariz. 323, 325, ¶8, 258 P.3d 141, 143 (App. 2011); *Salerno v. Espinoza*, 210 Ariz. 586, 587–88, ¶7, 115 P.3d 626, 627–28 (App. 2005).

V. Estoppel or waiver is not a valid defense to the Tribe’s right to immunity.

Appellant argues that the Tribe should be estopped from asserting, or has waived, its notice of claim defense. Neither principle applies here.

As an initial matter, the trial court correctly noted that such equitable remedies have been applied in other jurisdictions because it can be difficult elsewhere to figure out who to serve with a claim. For example, a Federal Tort Claims Act claim against the United States requires “first present[ing] the claim to the appropriate Federal agency,” 28 U.S.C. §2675(a). That prerequisite likely involves navigating a morass of forms and an extensive bureaucratic hierarchy of Federal agencies, laws, rules, and employees to identify which officials must be served.⁷ Here, however, the gaming ordinance specifies explicitly the one person to whom a claim must be directed – the CEO of the gaming facility.

Further, estoppel may not be asserted against a government entity when it is engaged in governmental rather than proprietary functions. *See, e.g., Fed. Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984); *New Mexico v. Aamodt*, 537 F.2d 1102, 1110 (10th Cir.1976) (actions affecting Indian lands); *Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc.*, 174 Ariz. 269, 848 P.2d 848 (App. 1992), vacated on other grounds, 177 Ariz. 526, 869 P.2d 500. A Tribal government employee answering the phone or accepting service for the Tribe is a governmental function. The Tribe cannot be estopped from enforcing its laws if an employee performed his or her governmental function incorrectly.

⁷ Making a claim against an Arizona governmental agency can be similarly difficult. The Arizona statute requires a claimant to “file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure.” A.R.S. §12-821.01(A). Determining how to comply also involves navigating varying state agencies, officials, and rules.

Moreover, estoppel may succeed against the government only when its application would promote rather than frustrate the basic intent of the statute. *See, e.g., Canon School Dist. No. 50*, 174 Ariz. at 272, 848 P.2d at 851. Here, applying estoppel against the Tribe in direct contradiction of Tribal Code would frustrate the ordinance's intent of foregoing the Tribe's sovereign immunity defense from tort claims only under strictly specified circumstances. The rule forbidding the application of estoppel against the government is a logical corollary to the doctrine of sovereign immunity.

In addition, to assert estoppel as a defense, Appellant had to demonstrate that (1) the Tribe committed affirmative acts inconsistent with a position it later adopts; (2) she acted in reasonable reliance on such conduct; and (3) she is injured as a result of the Tribe's repudiating its prior conduct. *Valencia Energy Co. v. Arizona Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256 (1998); *McBride v. Kieckhefer Associates, Inc.*, 228 Ariz. 262, 265 P.3d 1061 (App. 2011). Here, the Tribe did not act affirmatively in an inconsistent way. It enacted a very specific ordinance and a requirement for strict compliance with that ordinance, and then denied a claim based on the claimant's non-compliance with that ordinance. Its staff cannot effectively waive compliance with Tribal law by actions inadvertently contrary to the law. The Tribe has a right to enforce its law as written.

In addition, Appellant and her counsel did not reasonably rely on verbal information from Tribal administrative staff, when they could have read the Tribal Code to learn the correct requirements. Appellant has not been injured by any

conduct of the Tribe concerning her claim. Her claim is barred only by her and her prior attorney's actions.

VI. Appellant's counsel's failure to comply with notice of claim prerequisites does not change the fact that her claim is barred.

The fact that it appears from Ms. Dillinger's affidavit that mistakes leading to improper service of Appellant's notice of claim may have originated in her prior attorney's office do not change the result. For example, an attorney's inadvertence does not qualify as good cause under the Federal Rules of Civil Procedure for failure to comply with the requirements for service of process, nor can an attorney's mistaken application of the Federal Rules excuse compliance with time limitations. *See, e.g., Kyle v. Campbell Soup Co.*, 28 F.3d 928, 931 (9th Cir. 1994); *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985). A claimant's attorney's apparent mistake cannot save an untimely or non-compliant notice of claim from barring the claimant's personal injury suit. *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 145 (2nd Cir. 2011).

Inadvertence, ignorance of the rules, or mistakes construing them does not provide persuasive justification for misconstruction of non-ambiguous rules. *Kyle* at 931-32 (general rule is that a mistake of law does not constitute excusable neglect). The Tribal ordinance here is an unambiguous written rule. If Appellant's prior attorney had researched and examined Tribal law material to this issue, then his office would have, or should have, known that only service on the gaming facility CEO complies with Tribal law. The unfortunate result of ineffective

service in this instance may be an issue between Appellant and her prior counsel, but it is not a result for which the Tribe should be liable.

VII. Strict enforcement is consistent with the policy embodied in the Tribal Code.

Enforcing the claims ordinance in accordance with its plain language is not inequitable or an absurd result. The fact that the ordinance allows claims only under very limited circumstances comports with established principles of Tribal sovereign immunity principles. It also comports with the policy of limited tort recovery embodied in Tribal ordinances, as demonstrated by the limitations on available damages.

For example, the ordinance directs the Tribal Court to apply “strict comparative negligence principles” to claims and “only award the Patron or Invitee the percentage of the total proven damages that represents the Tribe’s percentage of fault.” 2 PYTC §3-1-250(F)(6). In addition, the Court may award a claimant only compensatory damages, which include “specifically proven medical expenses that are not paid or payable by another payor.” 2 PYTC §3-1-250(F)(7). A claimant cannot recover for any medical bills that are covered by health insurance, Medicare, or IHS. In addition, the Court may award a claimant pain and suffering damages only in “an amount equal to the Patron’s or Invitee’s specifically proven medical expenses.” 2 PYTC §3-1-250(F)(8). In addition, punitive or exemplary damages are not permitted at all. 2 PYTC §3-1-250(F)(9). Given these restrictions on potential recovery, the total damages available to a tort claimant may be quite low, which is the Tribe’s choice to make.

Strict enforcement here is the practical construction of the law. Otherwise the Court would open its doors to a slippery-slope of non-compliant tort claims, introducing untold variations of ambiguities into Tribal law and interpretation of tribal ordinances by the Tribe and third-parties. Such a result does not serve the legitimate purpose to strictly limit the circumstances under which the Tribe will forego its immunity defense.

Enforcement in compliance with the ordinance's plain language, is not "form over substance," does not lead to "absurd results," is not "a mockery of their expressed purposes," or "deprive claimants of the justice they deserve," that "the Tribe promised when it waived immunity," as Appellant variously complains. Non-enforcement, as Appellant suggests, would go against fundamental concepts of Tribal law and policy and prejudice the Tribe's sovereignty greatly.

The trial court mentioned that principles of estoppel and waiver have been applied by the Tribal Courts in contract matters. Negotiated contract-specific waivers of immunity may be a necessary cost of doing business for the Tribe to engage in international commerce for goods, services, or other business matters. In the tort context, however, by Tribal ordinance immunity stands in full force against claims with no waiver. The Tribe may agree not to assert that defense under strictly-defined circumstances to comply with the Tribal-State Gaming Compact, 2 PYTC §3-1-250(A),(B), but there is no wiggle room in the tort remedy ordinance to waive any of those strictly-defined claims procedures.

VIII. This Court should not rewrite the Tribal Code as enacted by the Tribal Council and by Tribal members through initiative and referendum.

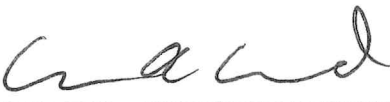
With her arguments about technicalities, actual notice and substantial compliance, Appellant is essentially asking this Court to rewrite the Tribal Code by newly introducing such concepts into Tribal law through judicial action and analysis.⁸ Imposing such interpretations onto the Tribal Code, however, would be ill-advised and contrary to Pascua Yaqui legal precedent. Such action would undermine the language, purpose, and intent of the Code as enacted by the Tribal Council and members. *See Herminia Frias, supra*, at 6, ¶8.

CONCLUSION

The Tribe asks the Court to affirm the trial court's dismissal of this case and dismiss this appeal.

RESPECTFULLY SUBMITTED on December 30, 2013.

Jackson & Oden, PC

By: 

G. Todd Jackson

Rebecca A. Reed

Attorneys for Appellee Pascua Yaqui Tribe

⁸ As described above, such concepts have been rejected by Arizona courts interpreting and applying the state's analogous notice of claim requirement, and do not excuse notice compliance for claims against Arizona. *See Falcon ex rel. Sandoval and Fields, supra*.

CERTIFICATE OF SERVICE

I, Rebecca A. Reed, certify that:

I caused an electronic (text-readable .pdf) copy of the foregoing Answering Brief of the Appellee to be e-mailed to the Clerk of the Court of Appeals on December 30 2013 at: clerks.office.pyca@gmail.com

I caused the Original plus five copies of the foregoing Answering Brief of the Appellee to be filed with the appellate court clerk on December 30, 2013 at:

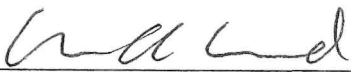
The Clerk of the Court of Appeals
Pascua Yaqui Tribe Court of Appeals
7474 South Camino De Oeste
Tucson, Arizona 85757

I caused a copy of the foregoing to be e-mailed, and mailed first class mail, postage prepaid, on December 30 2013 to:

John G. Stompoly
John G. Stompoly, PLLC
698 East Wetmore Road, Suite 330
Tucson, Arizona 85705
johnstompoly@stompoly.com

RESPECTFULLY SUBMITTED on December 30 2013.

Jackson & Oden, PC

By: 
Rebecca A. Reed
Attorney for Appellee Pascua Yaqui Tribe

PASCUA YAQUI TRIBE

COURT OF APPEALS

ENEIDA AGUILAR,

No. CA-13-0004

Appellant/ Appellant,

vs.

Pascua Yaqui Trial Court

No. CV-13-028

PASCUA YAQUI TRIBE dba CASINO
DEL SOL/CASINO OF THE SUN,
JOHN and JANE DOES 1-10,

Appellee / Defendant.

**APPENDIX TO
ANSWERING BRIEF OF THE APPELLEE**

G. Todd Jackson (SBN 012202)
tjackson@jacksonodenlaw.com

Rebecca A. Reed (SBN 023419)
rreed@jacksonodenlaw.com

Jackson & Oden, P.C.
3573 East Sunrise Drive, Suite 125
Tucson, Arizona 85718
(520) 884-0024
Attorneys for Appellee Pascua Yaqui Tribe

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CONSTITUTION OF THE PASCUA YAQUI TRIBE

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- (3) Title 17, Section 1706(L) shall now read:
Gaming contracts exceeding \$300,000. All proposed gaming contracts with a total value greater than \$300,000 must be approved by Tribal Council resolution.

Section 5 Title 7 Amendments (2 PYTC § 3-1-5)

The Gaming Enterprise Division Ordinance is hereby amended to read as follows:

SUBCHAPTER A ESTABLISHMENT OF THE DIVISION

Section 10 Establishment (2 PYTC § 3-1-10)

There is established a Division of the Pascua Yaqui Tribe to be known as the Gaming Enterprise Division.

Section 20 Essential Function; Sovereign Immunity (2 PYTC § 3-1-20)

The Division is an integral part of the Pascua Yaqui Tribe ("Tribe"), organized to perform an essential governmental function of the Tribe subject to ultimate financial and management control by the Tribal Council of the Tribe. The Division accordingly has, in the exercise of the powers delegated to it by the Council, the full measure of the Tribe's sovereign immunity, the Tribe's exemption from federal and state taxation and the Tribe's right to be treated as a state government for the purposes of Section 7871(a) of the Internal Revenue Code of 1986, as amended or recodified.

Section 30 Purpose (2 PYTC § 3-1-30)

The purpose of the Division is to manage and operate the Tribe's Anselmo Valencia Amphitheater, Casino of the Sun, Casino del Sol, and additional gaming-related enterprises and to undertake such other responsibilities as may be assigned to it by Tribal Council resolution or ordinance. The Division shall be managed and operated in accordance with all applicable laws for the primary purposes of: (1) maximizing the distribution of net revenues to the Tribe to perform essential governmental functions; (2) employing enrolled members of the Tribe in all levels of the Division; (3) developing work skills for enrolled members of the Tribe; and (4) creating a premier gaming destination.

SUBCHAPTER B GENERAL AUTHORITIES, POWERS, OBLIGATIONS

Section 40 General Powers (2 PYTC § 3-1-40)

The Division shall have the power to manage and operate business enterprises and tribal assets assigned to the Division. The Division's general powers, except those powers limited by or reserved to Tribal Council, include the power to:

- (A) Appoint officers and employees, define their duties, and fix their compensation
- (B) Implement policies related to personnel, employment, compensation, and operations practices;
- (C) Create business, operations, and human resource development plans to meet the strategic goals set for the Division;
- (D) Incur debt for the lease or purchase of equipment and give a security interest in the leased or purchased equipment or assets as collateral for such debt, provided however, that the power to create a security interest shall only be for a security interest in the equipment for which the debt was incurred;
- (E) Acquire or dispose of equipment and other Division assets;

SUBCHAPTER G TORT REMEDIES

Section 250 Tort Remedies for Tribe's Class III Gaming Facilities (2 PYTC § 3-1-250)

- (A) Purpose: The Tribe has enacted this Code Section for the sole purpose of complying with the applicable provisions of its Tribal-State Gaming Compact requiring it to establish written procedures for the disposition of civil tort lawsuits arising from personal injury or property damage alleged to have been suffered by a patron or invitee in its Class III Gaming Facilities. It is not the Tribe's intent to, nor shall these procedures be interpreted to, grant any authority for a civil tort lawsuit that is not required by the Tribal-State Gaming Compact. Notwithstanding any change in the Tribal-State Gaming Compact, this Code Section shall remain in effect until changed by Tribal Council Resolution or Ordinance.
- (B) No Waiver of Sovereign Immunity: This Section is not a waiver of the Tribe's sovereign immunity. It is an authorization agreeing not to assert the defense of sovereign immunity in claims otherwise authorized under this section. It implements the Tribe's agreement in its Tribal-State Gaming Compact to forgo, on a limited basis, from asserting the subject matter defense of sovereign immunity from suit against a civil tort lawsuit that complies strictly with the claims procedures stated in this Code Section, and only to the extent that the insurance coverage stated in subparagraph (C) of this Code Section exists to pay the claim in whole. In its Tribal-State Gaming Compact, the Tribe expressly retained, and did not waive, the defense of sovereign immunity. Nothing in this Code Section shall be deemed to constitute a waiver of the Tribe's sovereign immunity from a particular lawsuit or from any lawsuit.
- (C) Policy of Insurance as Sole Source for Payment of Damages: Solely for the purpose of complying with its Tribal-State Gaming Compact, the Tribe will maintain a policy of commercial general liability insurance with a coverage limit of combined single limit for personal injury and property damage of not less than two million dollars (\$2,000,000) per occurrence and in the aggregate. The insurance policy shall include all claims made by a Patron or Invitee of the Gaming Facility for personal injury or property damage and shall include an endorsement providing that neither the insurer nor the Gaming Facility Operator will assert the subject matter defense of sovereign immunity from suit against a civil tort lawsuit that claims damages of less than the coverage limits of the commercial general liability insurance policy, is covered under the insurance policy, and complies strictly with the tort claims procedures stated in this Code Section.
- (D) Definitions of Terms in this Code Section:
- (1) Gaming Facility Operator shall be defined as it is defined in the Tribal-State Compact.
 - (2) Class III Gaming Facility shall be defined as the Casino of the Sun and the Casino del Sol and shall include the designated and marked parking areas that are west of the Casino del Sol main entrance road and contiguous to the Casino del Sol but shall exclude the AVA entertainment facility and all parking areas that are east of Casino del Sol main entrance road and contiguous to the AVA entertainment facility, and it shall include all designated and marked parking areas that are contiguous to the Casino of the Sun but not marked as restricted parking areas.
 - (3) Invitee shall be defined as a person who is in the Tribe's Class III Gaming Facility as a customer of one of the Tribe's Class III Gaming Facilities or their food or beverage facilities.
 - (4) Patron shall be defined as a person who is in the Tribe's Class III Gaming Facility as a customer of one of the Tribe's Class III Gaming Facilities or their food or beverage facilities.

- (5) A tort shall be defined as a negligent or intentional breach of the Tribe's duty to exercise reasonable care to protect a patron or invitee from a dangerous condition the Tribe knew or should have known existed in its Class III Gaming Facility and that proximately caused the patron to suffer personal injury or property damage.
- (E) Authority: Patrons or Invitees of the Pascua Yaqui Tribe's Class III Gaming Facilities who claim to have suffered personal injury or property damage while present at one of the Tribe's Class III Gaming Facilities are hereby authorized to file a claim, and if that claim is not paid in accordance with the Gaming Operator's Claims Policies established in accordance with the Tribal – State Gaming Compact, to file suit in a civil tort lawsuit in the Pascua Yaqui Tribal Court naming the Pascua Yaqui Tribe as defendant to recover money damages for their personal injury or property damage, but only provided that such Patron or Invitee complies strictly with the provisions of this Section.
- (1) The Gaming Facility Operator shall maintain a policy of commercial general liability insurance with a combined single limit for personal injury and property damage of not less than two million dollars (\$2,000,000) per occurrence and in the aggregate to cover Patron or Invitee claims under this section.
 - (2) The insurance policy shall include an endorsement providing that neither the insurer nor the Gaming Facility Operator may invoke Tribal sovereign immunity up to the limits of the policy set forth in subsection (1) above with respect to any claim covered under the policy and disposed of in accordance with the Tribe's tort claim procedures and this section.
 - (3) The insurance policy provided for in subsection (1) above shall not exclude all claims made by a patron or invitee for personal injury or property damage.
 - (4) Neither the insurer nor the Gaming Facility Operator shall be precluded from asserting any other statutory or common law defense.
 - (5) Any award or judgment rendered in favor of the patron or invitee shall be satisfied solely from insurance proceeds, and said judgment may not be enforced by levy, writ of attachment, judgment attachment or the like against property of the Gaming Facility Operator or the Pascua Yaqui Tribe.
- (F) Venue, Jurisdiction, Applicable Law and Limitations for Civil Tort Lawsuit:
- (1) Venue for any civil tort lawsuit filed under the authority of this Code Section shall be in the Pascua Yaqui Court exclusively.
 - (2) The Pascua Yaqui Tribal Court shall have sole and exclusive jurisdiction for any civil tort lawsuit filed under the authority of this Code Section.
 - (3) The governing law for determining all substantive and procedural issues arising in any civil tort lawsuit filed under the authority of this Code Section shall be the law of the Pascua Yaqui Tribe, including the Tribe's conflict of laws principles.
 - (4) No civil tort lawsuit filed under the authority of this Code Section may be filed on a date that is more one year after the event that caused the alleged personal injury or property damage.
 - (5) Notwithstanding the Tribe's agreement to forgo assertion of the subject matter defense of sovereign immunity from suit against a civil tort lawsuit that complies strictly with the claims procedures stated in this Code Section under the limited conditions set forth in this

section, neither the insurer nor the Gaming Facility Operator shall be precluded from asserting any other statutory or common law defense.

- (6) In determining the parties' degrees of fault and percentages of liability, the Pascua Yaqui Tribal Court shall apply strict comparative negligence principles and only award the Patron or Invitee the percentage of the total proven damages that represents the Tribe's percentage of fault.
 - (7) The Tribal Court shall award the patron compensatory damages only. Compensatory damages shall include specifically proven medical expenses that are not paid or payable by another payor.
 - (8) The Tribal Court may award the Patron or Invitee damages for the Patron's or Invitee's pain and suffering, but not more than an amount equal to the Patron's or Invitee's specifically proven medical expenses.
 - (9) The Tribal Court shall not have jurisdiction to award a Patron or Invitee punitive or exemplary damages of any kind.
 - (10) Any award or judgment rendered in favor of a Patron or Invitee shall be satisfied solely from the insurance proceeds from the policy of insurance described in subparagraph C of this Code Section.
 - (11) Upon request, the patron or the patron's designated representative shall be provided with a copy of this Code Section and any Class III Gaming Facility pertaining to tort claims procedures as well as the name, address and telephone number of the Gaming Facility Operator and the mailing address and telephone number of the clerk of the Tribal Court.
- (G) Prerequisites for an Actionable Civil Tort Lawsuit: The Tribe will forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit for personal injury to a Patron or Invitee or property damage to the property of a Patron or Invitee, but only if a claim for that injury or property loss is filed with the Chief Executive Officer of the Tribe's Gaming Enterprise Division that satisfies each and every one of the following prerequisites:
- (1) the claimant has first presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, a written administrative claim not later than 180 calendar days after the date of the alleged personal injury or property loss, and
 - (2) the administrative claim contains the facts that support the claim, facts sufficient to reasonably describe the basis upon which liability is claimed, and a specific statement of the amount of the claim, and
 - (3) no less than 60 calendar days have passed since the date the administrative claim was presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, and
 - (4) the civil tort lawsuit is filed in the Pascua Yaqui Tribal Court, which shall be the sole and exclusive venue for civil tort lawsuits filed by authority of this Code Section, and the Pascua Yaqui Tribal Court shall have sole and exclusive jurisdiction over the civil tort lawsuit filed by authority of this Code Section, and
 - (5) the civil tort lawsuit is filed in the Pascua Yaqui Tribal Court not later than one year after the event that caused the alleged personal injury or property damage, and

- (6) the policy of insurance described in Subsection (C) of this Code Section covers the personal injury or property damage alleged in the civil tort lawsuit, and
- (7) the plaintiff in the civil tort lawsuit shall be only a Patron or Invitee who allegedly suffered injury in the Class III Gaming Facility, and
- (8) the civil tort lawsuit does not claim damages for personal injury or property loss of any person other than the Patron or Invitee, and makes no claim of derivative liability by a spouse, other family member or other person or party claiming indirect injury, and
- (9) the civil tort lawsuit claims damages for an alleged personal injury sustained by, or loss to property owned by, a Patron or Invitee of the Tribe's Class III Gaming Facility during the Patron's or Invitee's use of the Tribe's Class III Gaming Facility, and
- (10) the civil tort lawsuit seeks relief only in the form of monetary damages, and
- (11) the civil tort lawsuit states a specific amount of damages claimed, and
- (12) the damages claimed in the civil tort lawsuit do not exceed the insurance coverage amount stated in Subsection (C) of this Code Section."

CONSTITUTION OF THE PASCUA YAQUI TRIBE

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CONSTITUTION OF THE PASCUA YAQUI TRIBE

PREAMBLE

We, the Pascua Yaqui Tribe of Arizona, in order to exercise more fully our privileges and duties as American citizens and promote the general welfare of our people, to cooperate more fully with the Government of the United States for our benefit, to establish a self-supporting economy offering education and opportunity for all, and to preserve and promote the spiritual, cultural and social values of the Yaqui people, do hereby adopt this constitution, under Divine Guidance and pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended.

ARTICLE I - BILL OF RIGHTS

- Section 1.** Consistent with the provisions of this Constitution, the Pascua Yaqui Tribe in exercising its powers of self-government shall not:
- a. Make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition for redress of grievances.
 - b. Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.
 - c. Subject any person for the same offense to be twice put in jeopardy.
 - d. Compel any person in any criminal case to be a witness against himself/herself.
 - e. Take any private property for public use without just compensation.
 - f. Deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against them, to have compulsory process for obtaining witnesses in their favor, and at their own expense to have the assistance of counsel for their defense.
 - g. Require excessive bail, impose excessive fines, inflict cruel and unusual punishment, and in no event impose for conviction of one (1) offense any penalty or punishment greater than imprisonment for a term of one (1) year or a fine of \$5,000 or both.
 - h. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.
 - i. Pass any bill of attainder or *ex post facto* law.
 - j. Deny to any person accused of any offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.
- Section 2.** The privilege of the writ of habeas corpus shall be available to any person in a court of the United States to test the legality of their detention by order of the Pascua Yaqui Tribe.

ARTICLE II – JURISDICTION

The jurisdiction of the Pascua Yaqui Tribe and of the Pascua Yaqui Tribal Council shall extend to all lands within the boundaries of the Pascua Yaqui Indian Reservation, established pursuant to the Act of September 18, 1978 (Public Law 95-375; 92 Stat. 712). Such jurisdiction shall also extend to such other lands as may in the future be added thereto, and to all land which from time to time may be owned by or held in trust for the Pascua Yaqui Tribe provided the state, county, city or other political subdivision where such land is located has retroceded to the United States Federal Government all civil and criminal jurisdiction. The jurisdiction of the Pascua Yaqui Tribe shall include also that jurisdiction granted to Indian tribes pursuant to the Indian Child Welfare Act of 1978 (Public Law 95-608; 92 Stat 3069).

ARTICLE III - MEMBERSHIP IN THE PASCUA YAQUI TRIBE

- Section 1.** The membership of the Pascua Yaqui Indian Tribe shall consist of the following:
- a. The base membership of the Pascua Yaqui Tribe shall be all eligible persons listed on the base membership roll of the Pascua Yaqui Tribe dated September 18, 1980, which was approved by the Phoenix Area Director on December 1, 1983, and published in the Federal Register on May 17, 1984. Corrections to the base roll may be made at any time by the tribal council subject to the approval of the Secretary of the Interior; provided that the names of additional persons may not be added to the base membership roll; and
 - b. All children born to members listed in Section 1(a) of this Article who are at least one-quarter ($\frac{1}{4}$) degree Pascua Yaqui Indian Blood.
- Section 2.** The Pascua Yaqui Tribal Council shall have the power to enact ordinances, subject to the approval of the Secretary of the Interior, governing future membership and loss of membership.
- Section 3.** Any member of the Pascua Yaqui Tribe may relinquish membership by making written request to the Chairman of the Pascua Yaqui Tribe that his or her name be stricken from the tribal roll. No person who voluntarily relinquishes membership shall be reinstated to the Pascua Yaqui Tribe except by a majority vote of the Pascua Yaqui Tribal Council.
- Section 4.** No person otherwise eligible for membership in the Pascua Yaqui Tribe may be enrolled as a member of the tribe who, at the same time, is on the roll of any other tribe of Indians.

ARTICLE IV – ORGANIZATION OF GOVERNMENT

The powers of the Government of the Pascua Yaqui Tribe shall be divided into three separate branches: the Legislative, the Executive and the Judicial and no person or group of persons charged with the exercise of powers properly belonging to one of these branches, shall exercise any powers properly belonging to the others, except as this constitution may otherwise expressly direct or permit.

ARTICLE V - LEGISLATIVE BRANCH

- Section 1.** The legislative powers of the Pascua Yaqui Tribe shall rest in the Pascua Yaqui Tribal Council hereinafter referred to as the tribal council, provided the registered voters retain the power to legislate through the initiative and referendum.

Section 2. The tribal council shall consist of eleven (11) members elected at large from the membership of the Pascua Yaqui Tribe. The first tribal council election under this constitution shall be held within one hundred and twenty (120) days following approval by the Secretary of the Interior as provided in Article XXIII of this constitution. The council members elected to the tribal council shall serve for a term of four (4) years.

Section 3. Within thirty (30) days of the date of the election of tribal council members, a chairman and vice-chairman shall be chosen from among the tribal council members by vote of the members of the tribal council. The tribal council member receiving the most tribal council votes shall serve as chairman, and the tribal council member receiving the second most tribal council votes shall serve as vice-chairman. In the event of a tie, a run-off election shall be held, with all tribal council members voting except the two candidates. The candidate receiving a majority of the remaining nine (9) votes shall serve as chairman and the other candidate as vice-chairman.

The chairman and vice-chairman shall serve to that capacity for a term of four (4) years provided, however, that the tribal council may select a different chairman or vice-chairman at any time but only upon a vote of no confidence of at least two-thirds of the tribal council. The no confidence vote by the tribal council is solely for the purpose of removal of such tribal council member in their capacity as chairman or vice-chairman. Nor is the two-thirds vote required in this election related to the complete removal of a tribal council member as contemplated in Article X, Section 1. A chairman or vice-chairman removed from his post in this manner shall continue to serve as a member of the tribal council.

Section 4. Membership on the tribal council shall be limited to enrolled members of the Pascua Yaqui Tribe, as defined in Article III of this constitution, who are twenty-five (25) years of age or more at the time of election or appointment.

Section 5. No person who has been convicted in any federal or state court of a felony, or of any crime involving deceit, fraud or misappropriation of funds, shall be eligible to be a member of the tribal council unless, in the event of a felony conviction, his or her voting rights have been legally restored, or unless the criminal conviction has been expunged.

Section 6. The tribal council shall be the sole judge in determining eligibility of candidates for office. The tribal council shall have the authority to enact such ordinances as are necessary to regulate eligibility of candidates for office consistent with this constitution and the Indian Civil Rights Act of 1968.

Section 7. No person shall serve as a member of the tribal council while holding any other elective office, or holding any policy making position with the tribe, or while in the employ of the tribe or any tribal enterprise.

ARTICLE VI - POWERS OF THE TRIBAL COUNCIL

Section 1. The Pascua Yaqui Tribal Council shall have the following powers including those conferred by Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987), as amended, subject to any limitations imposed upon such powers by Federal law and this constitution:

- a. To negotiate and to execute contracts and agreements with federal, state and local governments as well as any person, association, partnership, corporation or other private entity.

- b. To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.
- c. To authorize employment of any agent, community manager, representative, business manager, advisor, or other employee upon such terms as it deems advisable in the best interest of the Pascua Yaqui Tribe.
- d. To appropriate available tribal funds for public, governmental and business purposes serving the general welfare of the Pascua Yaqui Tribe.
- e. To borrow money and to pledge or assign future tribal income as security for such loans.
- f. To levy and collect dues and fees upon any person residing within the jurisdiction of the Pascua Yaqui Tribe consistent with the provisions of Article II of this constitution and any applicable Federal laws or regulations.
- g. To sell and convey, lease, and grant interests in tribal lands and property, subject to the laws and regulations of the United States Government or any branches thereof.
- h. To make loans to members of the Pascua Yaqui Tribe provided such loans are made in accordance with ordinances adopted by the tribal council and provided that such loans are secured by sufficient collateral.
- i. To establish rates of compensation to be paid to officers, council members, tribal employees and members of boards, commissions and committees, and to create and provide compensation for any other tribal officer deemed necessary for the proper conduct of tribal business, including sergeant-at-arms.
- j. To incorporate or authorize the organization of any profit or non-profit corporation or association, to subscribe to the purchase of stock, and to participate in the ownership or management of any corporation or association in such forms as the tribal council deems appropriate to serve the best interests of the Pascua Yaqui Tribe.
- k. To acquire for public purposes of the Pascua Yaqui Tribe consistent with Federal law, by direct purchase any property or interest therein held by any member or non-member of the Pascua Yaqui Tribe within the area of the Pascua Yaqui Reservation and to acquire by purchase or donation any property outside of the reservation. Any such acquisitions are subject to the due process requirements set out in Article I of this constitution.
- l. To regulate all business, scientific and missionary activities, and the granting of licenses and permits therefore to members and non-members of the tribe.
- m. To bar for cause any person from entering the reservation, and to exclude and remove any such person from the reservation, consistent with the provisions of Article I of this constitution; except that this provision does not apply to certain Federal and state officials who must enter onto the reservation in performance of official duty.
- n. To create offices, committees, boards, and associations, and to define their powers and duties and to make any provisions that may be deemed necessary in exercising this power.

- o. To develop and adopt ordinances, resolutions, rules and regulations to protect and promote the peace, health, safety and general welfare of the Pascua Yaqui people and to facilitate the conduct and operation of the tribal government. The council may establish a tribal police agency.
- p. To establish rules and regulations governing its proceedings including removal of council members consistent with this constitution.
- q. To protect all historic, religious, sacred, archeological and other sites of scenic or scientific or cultural interest on the Pascua Yaqui Reservation and on land where the title or an interest therein is owned by or held in trust for the tribe.
- r. To regulate ceremonies and other Yaqui customs and traditional activities in order to ensure the preservation of Yaqui cultural values, and to encourage and foster the arts, crafts, traditions, language and culture of the tribe.
- s. To seek, apply for and accept grants, aid/gifts, of donations from any source.
- t. To enact ordinances, subject to applicable federal law and this constitution, regulating activities including, but not limited to, civil actions, crimes, law enforcement, gambling and gaming, zoning, business, signs, land use, environmental quality, housing development and improvement, uniform building codes and enforcement, protection of minors and mental incompetents, including the appointment of guardians and custodial care and adoptions, and sale and use of alcoholic beverages.
- u. To manage, protect and preserve all lands, minerals, water, wildlife and other natural resources on the reservation and other land subject to the jurisdiction of the tribe.
- v. To issue bonds or other debt instruments in accordance with the tribal law and the laws of the United States.
- w. To conduct, on or off the reservation, any and all activities or businesses not otherwise prohibited by law.

Section 2.

All ordinances, resolutions, rules and regulations shall be enacted by a majority vote of the tribal council unless otherwise provided herein. Each tribal council member, including the chairman and vice-chairman shall be entitled to cast one vote. The foregoing enumeration of powers shall not be construed to limit the powers of the Pascua Yaqui Tribe, but all powers not expressly entrusted to the tribal council by this constitution shall be reserved to the people of the Pascua Yaqui Tribe, and such powers may be exercised by the people through appropriate action. Those powers specifically set forth in Article VI, Section 1 of this constitution are expressly and solely entrusted to the tribal council and any action, sale, lease, conveyance, enactment, acquisition, contract obligation, incorporation, purchase, removal of lawmaker, appropriation or loan entered into on behalf of the Pascua Yaqui Tribe by any other entity or individual shall be considered void or voidable.

ARTICLE VII - THE EXECUTIVE BRANCH

Section 1.

The executive branch of the Pascua Yaqui Tribe shall consist of the chairman, and vice-chairman referred to in Article V, a secretary and treasurer and such other officers as the tribal council may find necessary for the proper administration of the tribal business. A "tribal officer" shall be the designated head of an agency created by the tribal council to regulate and attend to a defined area of tribal government. The secretary, treasurer and

all non-elective tribal officers shall report to and serve at the will of the chairman subject to the provisions of Section 4 of this article. All other persons employed by the tribe shall be considered "tribal employees" and are exempt from Section 4 of this article. The terms of employment for all tribal employees shall be set forth in a personnel policy manual prepared by the tribal administrator and approved by the tribal council.

The executive power of the Pascua Tribe shall be vested in the chairman, vice-chairman, secretary, treasurer and tribal officers subject to the paramount authority of the tribal council.

- Section 2.** The chairman and vice-chairman shall be selected as provided in Article V, Section 3 of this constitution.
- Section 3.** The secretary, treasurer and tribal officers shall be nominated by the chairman subject to the approval of a two-thirds majority vote of the tribal council. Only one person may fill each executive post provided for herein. The secretary and treasurer shall be selected from within the tribal council.
- Section 4.** All non-elective tribal officers shall be responsible to the chairman and may be removed from office by the chairman of the tribal council, with the consent of a two-thirds majority vote of the tribal council.
- Section 5.** No person shall be eligible to hold an elective tribal office or the position of secretary or treasurer unless he or she is an enrolled member of the Pascua Yaqui Tribe, as defined in Article III of this constitution, and has reached the age of twenty-five (25) years.
- Section 6.** No person who has been convicted in any Federal or state court of a felony, or of any crime involving deceit, fraud or misappropriation of funds shall be eligible to serve as a tribal officer unless, in the case of a felony conviction, his or her voting rights have been restored, or unless the criminal conviction has been expunged.

ARTICLE VIII - THE JUDICIARY

- Section 1.** The judicial powers of the Pascua Yaqui Tribe shall be vested in such tribal courts as the tribal council may establish but shall include a trial and appellate court.
- Section 2.** The jurisdiction of the courts shall extend to all cases in law and equity arising under, this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe consistent with the provisions of this constitution. The tribal courts shall exercise jurisdiction over all civil and criminal matters wherein members or non-members of the Pascua Yaqui Tribe are parties, unless otherwise expressly prohibited by Federal or tribal laws.
- Section 3.** The duties and procedures of the tribal courts shall be established by ordinance of the tribal council.
- Section 4.** The judges of the Pascua Yaqui Tribe shall be nominated by the chairman subject to the approval of a two-thirds majority vote of the tribal council. The number, salary, qualifications of tribal judges and a system of staggered three-year terms shall be fixed by ordinance of the tribal council and no person appointed to the office of tribal Judge shall hold at the same time any other tribal office or position. The chairman shall nominate, subject to approval of a two-thirds majority vote of the tribal council, a chief judge who shall be responsible for the administration of judicial business and for providing assistance to the tribal council in establishing the duties of tribal Judges and in

formulating Rules of Court and Rules of Procedure for adoption by ordinance as provided in Section 3 of this article.

- Section 5.** The Court of Appeals of the Pascua Yaqui Tribe shall be created by the tribal council pursuant to Article VIII, Section 1. This court shall have the power of judicial review of all civil and criminal matters appealed from the Pascua Yaqui Tribal Court. Such appellate review shall not include trial de novo in any civil matter but trial de novo shall be provided in any criminal matter upon the request of any defendant.
- Section 6.** No person shall be appointed to the office of judge who has been convicted of a felony or of any crime involving deceit, fraud or misappropriation, of funds, unless in the event of a felony conviction, his or her voting rights have been restored; or unless the conviction has been expunged. Any member of the judiciary who is charged with any felony or a misdemeanor involving deceit, fraud or misappropriation of funds during his or her term in office may be suspended by a two-thirds majority vote of the tribal council during the pendency of the criminal investigation in order to preserve the dignity and integrity of the tribal court system; provided that the accused judge is first given a written statement of the charges pending at least ten (10) days before the meeting of the tribal council at which the action against him or her is to be taken and providing that he or she is given an opportunity to answer all pending charges. Upon conviction of a felony or any crime involving deceit, fraud or misappropriation of funds, a judicial officer shall automatically be removed from office effective the date of conviction.
- Section 7.** The Chief Judge of the Pascua Yaqui Tribal Court shall be an enrolled member of the Pascua Yaqui Tribe as defined in Article III; however, it shall not be a qualification that any other judge be an enrolled member of the Pascua Yaqui Tribe so long as he or she is a properly enrolled member of any recognized Indian tribe and, (1) has had at least five (5) years experience as a tribal court Judge, or (2) is a graduate of an accredited law school and has had at least one year of experience as either a tribal court advocate or tribal judge.

ARTICLE IX - TRIBAL ELECTIONS

- Section 1.** Within thirty (30) days of the effective date of this constitution, the incumbent tribal council shall adopt an election ordinance governing the conduct of all tribal elections. Such ordinance shall provide for, but not be limited to, provisions for voter registration, secret balloting, establishment of polling locations, proof of voting eligibility, nomination of candidates, and a procedure for resolving election disputes. This ordinance shall be made public no less than sixty (60) days prior to the first set of tribal elections. Provisions shall also be included regarding the conduct of recall, initiative and referendum elections and a uniform procedure for submitting petitions. Elections to amend this constitution shall be conducted in accordance with Article XXIII of this constitution.
- Section 2.** All enrolled members of the Pascua Yaqui Tribe, as defined in Article III of this constitution, who have reached the age of eighteen (18) years and have complied with the tribal voter registration ordinance shall be eligible to vote in tribal elections.

ARTICLE X - REMOVAL, RECALL AND RESIGNATION FROM OFFICE

- Section 1.** Any elected official, which includes tribal council members, chairman and vice-chairman or any appointed tribal official and as defined in Article VII, Section 1 of this constitution, or any judge of the tribal courts, who, during the term for which he or she has been elected or appointed to serve in tribal government is convicted of a felony or

of any crime involving deceit, fraud or misappropriation of funds, or who engages in gross neglect of duty or misconduct in office may be removed from office by a two-thirds majority vote of the tribal council. The two-thirds vote required in this section does not abridge the council's right to select a different chairman or vice-chairmen as provided for in Article V, Section 3. Before any vote for removal is taken, the accused shall be given a written statement of the charges against him or her at least ten days before the meeting of the tribal council called to consider the removal action. No removal action may be taken pursuant to this article until appeals of convictions, if any, are exhausted. No member of the tribal council shall preside over the meeting considering his or her removal; nor may any tribal council member participate in any vote considering his or her removal. The elected or appointed official whose removal is sought shall have the opportunity at the designated council meeting to answer any and all charges, to present documentation and to call witnesses on his or her behalf.

- Section 2.** The registered voters of the Pascua Yaqui Tribe shall have the right to recall any elected officer of the Pascua Yaqui Tribe by filing a petition with the secretary of the tribe signed by at least thirty percent (30%) of the registered voters. Upon receipt of a valid petition it shall be the duty of the tribal council to call a special election within thirty (30) days. In the event that a majority of those voting in such election, vote to recall the elected official, the office shall be immediately declared vacant.
- Section 3.** Upon the death or resignation of an elected or appointed tribal officer, his or her seat shall automatically be declared vacant.
- Section 4.** The Pascua Yaqui Tribal Council shall adopt such ordinances as are necessary to implement this article consistent with Article IX of this constitution.

ARTICLE XI – VACANCIES

- Section 1.** All vacancies which occur on the Pascua Yaqui Tribal Council, the office of the chairman or vice-chairman or with the judiciary as a result of recall, removal, death or resignation shall be filled within 45 days in the manner provided in sections two (2) through four (4) of this article.
- Section 2.** In the event of a vacancy, for any cause, in the office of the chairman, the vice-chairman shall assume the duties of the chairman for the remainder of the unexpired term or until a successor has been chosen by the tribal council. In the 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.
- Section 3.** In the event of vacancy in the tribal council, that office shall be filled by special election provided that, should the vacancy occur within six (6) months of the next election, the council shall have the discretion to decline to hold a special election and to leave the office vacant. If more than six months remain in the unexpired term, a special election shall be held within forty-five (45) days of the date upon which the vacancy occurs. The candidate elected in the special election shall serve only for the remainder of the unexpired term.
- Section 4.** Any vacant judge's position in the tribal courts shall be filled as set out in Article VIII of this constitution. A judge selected to fill any vacancy in the tribal courts shall serve for the remainder of the unexpired term.

ARTICLE XII - INITIATIVE OR REFERENDUM

- Section 1.** The members of the Pascua Yaqui Tribe reserve to themselves the power of initiative and referendum.
- Section 2.** Upon receipt by the secretary of the tribe of a petition signed by at least thirty percent (30%) of the number of registered voters requesting an election on any initiative or referendum issue, the tribal council shall call and conduct an election within thirty (30) days of the petition's receipt pursuant to the procedures set forth in the election ordinance.
- Section 3.** Any measures referred to the tribe by the initiative or referendum procedure shall be placed on the ballot for approval or rejection by the voters. If the measure is approved by majority vote of the registered members of the tribe voting in that election, it shall become law provided that the measure does not conflict with any portion of this constitution; and further provided that at least 30% of the registered voters of the tribe vote in that election. Disputes concerning the constitutionality of such a measure shall be resolved by the Court of Appeals of the Pascua Yaqui Tribe.

ARTICLE XIII - TRIBAL LANDS

The Pascua Yaqui Reservation shall remain tribal property and shall not be granted or divided by allotment in whole or in part to individual members or groups of individual members as private property. The Pascua Yaqui Tribal Council shall enact an assignment ordinance subject to Secretarial approval governing the assignment of tribal land to tribal members for their private use.

ARTICLE XIV - LOCAL YAQUI COMMUNITIES

In order to encourage and facilitate the greatest possible participation in the affairs of the Pascua Yaqui Tribe on the part of all local Yaqui communities recognized as such by the Pascua Yaqui Tribal Council, local community organizations may be established subject to the provisions of this constitution and applicable federal law.

ARTICLE XV - DUTIES OF EXECUTIVE OFFICERS

- Section 1.** The Chairman of the Pascua Yaqui Tribe shall report to the Pascua Yaqui Tribal Council at each regular session thereof regarding the status of tribal matters and make such recommendations to the tribal council as he or she may deem advisable in the best interests of the tribe.
- Section 2.** The Chairman of the Pascua Yaqui Tribe shall act to carry out, or cause to be carried out, the provisions of any resolution which has been duly adopted by the Pascua Yaqui Tribal Council and he or she shall act in an executive capacity on behalf of the tribe in connection with all other tribal affairs, subject to any limitations provided in the resolution of the tribal council and this constitution. The chairman shall have no veto power over the ordinances and resolutions adopted by the tribal council.
- Section 3.** When so authorized under the terms of this constitution or by resolution of the Pascua Yaqui Council, the chairman of the Pascua Yaqui Tribe shall sign any and all documents, agreements, contracts and commitments for and on behalf of the Pascua Yaqui Tribe. The chairman may delegate the authority to sign such documents to either the vice-chairman, the secretary or the treasurer. Such delegation shall be in writing, shall specify to whom such authority is delegated, the purpose therefore and effective dates thereof and be approved by the tribal council.

- Section 4.** In the absence of the chairman, the vice-chairman shall perform such functions as the chairman shall direct subject to this constitution.
- Section 5.** The chairman shall direct the preparation of an annual tribal budget and present such budget for the approval of the Pascua Yaqui Tribal Council at the regular council meeting next preceding the close of any fiscal year.
- Section 6.** Both the chairman and vice-chairman of the Pascua Yaqui Tribe shall maintain offices on the Pascua Yaqui Reservation and the vice-chairman shall assist the chairman in the discharge of the tribal duties and business as the chairman may direct subject to this constitution.

ARTICLE XVI - DUTIES OF SECRETARY AND TREASURER

- Section 1.** The secretary and treasurer shall be appointed from within the tribal council in accordance with Article VII, Section 3 of this constitution.
- Section 2.** The duties of the secretary and treasurer shall be established by ordinance of the tribal council.
- Section 3.** The books and records of the treasurer shall be audited annually by a competent independent auditor and at such other times as the tribal council or the Secretary of the Interior may direct. Any person, firm, organization or subsidiary thereof having financial business dealings with the Pascua Yaqui Tribe shall not be permitted to conduct the annual audit.
- Section 4.** The books and records of the secretary and treasurer shall be available to inspection by any person during normal business hours according to procedures established by the tribal council.
- Section 5.** At the expiration of the terms of their appointment, all the records and papers in the possession of the secretary and treasurer shall be stored and filed in an orderly fashion in the appropriate administrative office.

ARTICLE XVII - OATH OF OFFICE

Each person elected to tribal office shall take the following oath of office prior to assuming the duties thereof:

"I, _____do solemnly swear that I will support and defend the Constitution and Laws of the United States, that I will support and carry out, insofar as is within my power, the Constitution of the Pascua Yaqui Tribe and the ordinances adopted pursuant thereto, and that I will faithfully and impartially discharge the duties of my office to the best interest of the Pascua Yaqui Tribe."

ARTICLE XVIII - MEETINGS AND VOTES

- Section 1.** Regular meetings of the tribal council shall be held at least once a month. The time, date and place shall be determined by the tribal council. All tribal council meetings shall be announced publicly and shall be open to the public. The tribal council may adjourn to executive session and such proceedings shall be closed to the public. The tribal council shall adopt ordinances establishing the procedures necessary to comply with this section.

- Section 2.** Special meetings of the tribal council may be held for any reason but only upon the written request of a majority of the tribal council. Vacant tribal council seats shall not be counted towards the establishment of a majority.
- Section 3.** A majority of the tribal council members shall constitute a quorum for the official transaction of business. Vacant council seats shall not be counted towards the establishment of a majority.
- Section 4.** In all instances in this constitution wherein a majority vote or a two-thirds majority vote of the tribal council is required, a vacant council position shall not be counted towards the establishment of a majority, but in no event may a tribal council with five (5) or more vacancies enact any ordinance or conduct any other business in the name of the Pascua Yaqui Tribe except to fill vacancies on the tribal council consistent with Article XI of this constitution.

ARTICLE XIX - ORDINANCES AND RESOLUTIONS

- Section 1.** Ordinances. All final decisions of the tribal council on matters of general and permanent interest to the members of the tribe shall be embodied in ordinances. Such ordinances shall be collected and made available for inspection and copying by an enrolled tribal member.
- Section 2.** Resolutions. All final decisions of the tribal council on matters of temporary interest, such as the establishment of a committee, action taken on the tribal budget for a single year, or rules of order, shall be embodied in resolutions which shall be duly executed and recorded in a special book which shall be open to inspection by tribal members during regular business hours.

ARTICLE XX – AMENDMENTS

The constitution may be amended by a majority vote of the registered voters of the tribe voting at an election called for that purpose by the Secretary of the Interior and conducted pursuant to federal regulations, provided that at least thirty percent (30%) of those entitled to vote shall vote in such election, but no amendment shall become effective until approved by the Secretary of the Interior or his authorized representative.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment at the request of a majority of the tribal council or upon receipt of a petition signed by at least thirty percent (30%) of the registered voters of the tribe.

ARTICLE XXI - SAVINGS CLAUSE

Any resolution or ordinance adopted by the Pascua Yaqui Interim Tribal Council shall continue in full force and effect unless inconsistent with this constitution or revoked.

ARTICLE XXII – SEVERABILITY

In the event that any provision of this constitution shall be determined invalid, illegal or unconstitutional by a court of competent jurisdiction, that portion shall be severed and the remaining provisions of this constitution shall continue in full force and effect.

ARTICLE XXIII – ADOPTION

This constitution, when adopted by a majority vote of the registered voters of the Pascua Yaqui Tribe voting in an election called for that purpose by the Secretary of the Interior as provided by the Act of September 18, 1978 (92 Stat. 712), conducted pursuant to federal regulations, and when approved by the Secretary of the Interior, shall become effective from the date of such Secretarial approval; provided, that at least thirty percent (30%) of those registered to vote in such election shall vote.

ARTICLE XXIV - SOVEREIGN IMMUNITY

The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, unless the tribal council enacts an ordinance expressly consenting to suit.

ARTICLE XXV - CERTIFICATE OF RESULTS OF ELECTIONS

Pursuant to an order issued on October 15, 1987, by /S/ Ross O. Swimmer Assistant Secretary - Indian Affairs, the foregoing Constitution of the Pascua Yaqui Tribe was submitted to the qualified voters of the Pascua Yaqui Tribe and on January 26, 1988, duly adopted/rejected by a vote of 247 for, and 161 against, and 2 cast ballots found separated or mutilated, in an election in which at least thirty percent (30%) of the 660 members entitled to vote, cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984) as amended.

Date: January 26, 1988

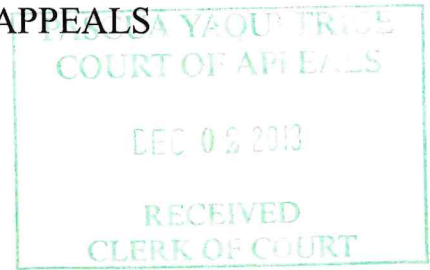
I, /S/ Ross Swimmer, Assistant Secretary - Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934, (48 Stat. 984), as amended, and delegated to me by 209 D. M. 8.3, do hereby approve the Constitution of the Pascua Yaqui Tribe,

Assistant Secretary - Indian Affairs

Washington, DC

Date: February 8, 1988

PASCUA YAQUI TRIBAL COURT OF APPEALS



ENEIDA AGUILAR,

Appellant/Plaintiff

vs.

No. CA-13-0004

PASCUA YAQUI TRIBE dba CASINO DEL
SOL/CASINO OF THE SUN; JOHN AND
JANE DOES 1-10,

Pascua Yaqui Tribal Court No.
CV-13-028

Appellee/Defendant

OPENING BRIEF OF
APPELLANT

LAW OFFICES OF JOHN G. STOMPOLY, PLLC

johnstompoly@stompoly.com

698 East Wetmore Road, Suite 330

Tucson, AZ 85705

Attorney for Plaintiff/Appellant

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STATEMENT OF THE CASE

Appellant/Plaintiff appeals the Trial Court's Order granting Appellee/Defendant's Motion to Dismiss because of Appellant/Plaintiff's failure to comply with 2PYTC §3-1-250(G)(1) which states in pertinent part:

“Prerequisites for an Actionable Civil Tort Lawsuit: The Tribe will forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit for personal injury to a Patron or Invitee . . . , but only if a claim for that injury . . . is filed with the Chief Executive Officer of the Tribe's Gaming Enterprise Division that satisfies each and every one of the following prerequisites:

(1) the claimant has first presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, a written administrative claim not later than 180 calendar days after the date of the alleged personal injury . . .”. (emphasis added)

The Trial Court's interpretation of the emphasized language necessarily implies that even though the Notice of Claim fully complied with the statute in all respects and was timely delivered to the Casino executive officers and the Tribe's Attorney General, the envelope in which the Notice of Claim is mailed and perhaps the Notice of Claim itself must be addressed personally to the Chief Executive Officer. The

October 1, 2013, Order is attached to the Notice of Appeal and is No. 2 of the Index on Appeal.

STATEMENT OF FACTS

Appellant/Plaintiff's Notice of Claim dated August 17, 2012, (not part of the record) states that on March 1, 2012, she was injured at the Casino del Sol restaurant when she slipped on butter on the floor inside the buffet area. She claims the Casino was negligent because its employees knew about the butter, said they would clean the floor, had time to clean the floor, but failed to do so.

The Affidavit of Diana Dillinger, (No.5 of the Index) a paralegal working for the attorney who was assisting Appellant/Plaintiff with the Notice of Claim, states she personally called Casino del Sol to verify who was authorized to accept service of the Notice of Claim for the casino and was told by a woman in the administrative office of the casino hotel that Ms. Kimberly Van Amburg, the Tribe's legal counsel, was authorized to accept service and that Ms. Van Amburg was located at Casino del Sol.

On August 20, 2012, 172 days after the incident when Appellant/Plaintiff slipped on butter in the buffet area of the Casino, Mrs. Dillinger served the Notice of Claim by certified mail on the Pascua Yaqui Tribe at the Casino del Sol, 5655 West Valencia Road, Tucson, Arizona and on Ms. Van Amburg c/o Pascua Yaqui Enterprises, Casino del Sol, 5655 West Valencia Road, Tucson, Arizona.

On August 21, 2012, Mrs. Dillinger gave the Notice of Claim to a process

server with instructions to serve the Pascua Yaqui Tribe's Attorney General's office at 7777 South Camino Huivisim, Building C, Tucson, Arizona and Pascua Yaqui Enterprises' authorized agent, Tribal Attorney General, Kimberly Van Amburg, at the Attorney General's Office, Pascua Yaqui Tribe at 7777 South Camino Huivisim, Building C, Tucson, Arizona.

On August 24, 2012, the law firm where Mrs. Dillinger was working received an Affidavit of Service verifying that the Attorney General's Office of the Pascua Yaqui Tribe was served August 23, 2012, with both the Notice of Claim addressed to the Pascua Yaqui Tribe dba Casino del Sol and the Notice of Claim addressed to Pascua Yaqui Enterprises, service upon its agent, Kimberly Van Amburg. The Affidavit of Service states that Kimberly Van Amburg was the authorized agent to accept service for Pascua Yaqui Enterprises.

Also on August 24, 2012, Mrs. Dillinger called the Pascua Yaqui Tribe's Attorney General's office, phone number 883-5106, to confirm that they had received the Notice of Claim and that they were indeed the correct entity to be served. Mrs. Dillinger spoke to Ms. Norena Valencia who told Mrs. Dillinger that she, Ms. Valencia, had received the Notice of Claim and they were the correct entity to be served with the Notice of Claim.

On August 28, 2012, Mrs. Dillinger received a certified mail receipt indicating that “Juanita E.” signed for Pascua Yaqui Enterprises, Kimberly Van Amburg, Pascua Yaqui Tribe and Casino Del Sol.

On February 19, 2013, Appellant/Plaintiff filed a Civil Complaint, dated February 18, 2013, (No. 28 of the Index) naming the Pascua Yaqui Tribe dba Casino del Sol/Casino of the Sun and John and Jane Does 1-10 as Defendants and alleging, as stated in the Notice of Claim, that on March 1, 2012, Appellant/Plaintiff was a business invitee when she slipped and fell on butter that was on the floor in front of the buffet area of the restaurant, claiming she suffered injury due to the Tribe’s negligence.

On March 27, 2013, attorneys filed an Answer (No. 26 of the Index) on behalf of the Pascua Yaqui Tribe Gaming Enterprise Division. The Answer admitted the Tribe operated the restaurant, generally denied the other allegations and listed three affirmative defenses which did not include failure to comply with the Notice of Claim law, but did reserve the right to state other affirmative defenses “that become known during discovery.”

On April 3, 2013, the same attorneys filed an Amended Answer (No. 25 of the Index) with the same general denials, but adding as an affirmative defense the failure

to comply with 2PYTC §3-1-250(G) as well as any other defenses available under 2PYTC §3-1-250(F).

On April 18, 2013, the undersigned filed a Notice of Appearance on behalf of Appellant/Plaintiff (No. 20 of the Index).

On June 24, 2013, defense counsel filed a Motion to Dismiss (No. 15 of the Index) alleging Appellant/Plaintiff's failed to comply with 2PYTC §3-1-250(G) because Appellant/Plaintiff did not serve the Notice of Claim on the Casino's Chief Executive Officer. The issue was briefed, argued before Associate Judge Stoof October 1, 2013, who, on that same date, signed and filed an Order granting the Motion to Dismiss. This timely appeal followed.

ISSUES PRESENTED

1. Did the Trial Court erroneously fail to apply the clear language of 2PYTC §3-1-250(G)(1)?
2. If 2PYTC §3-1-250(G) is ambiguous, did the Trial Court erroneously interpret the law to defeat a decision on the merits?
3. Did the Trial Court's interpretation of 2PYTC §3-1-250(G) erroneously fail to serve the legitimate purposes of the statute?
4. Did the Trial Court err by refusing to find that the Tribe is estopped from arguing Appellant/Plaintiff failed to comply with 2 PYTC §3-1-250(G)(1)?

ARGUMENT

PRELIMINARY STATEMENT

It is important to remind the Court what this appeal is not about.

It is not about whether the Chief Executive Officer timely received the Notice of Claim. If he/she had not, defense counsel would have provided an affidavit so stating.

It is not about whether the Chief Executive Officer or the Tribe's Attorney General would have done something different if Appellant/Plaintiff had addressed the Notice of Claim or the envelope it was mailed in to the Chief Executive Officer personally. If they would have done something differently, defense counsel would have provided an affidavit so stating.

It is not about whether the Notice of Claim is defective or deficient in any way. Defense counsel have not made that argument.

(1) 2 PYTC §3-1-250(G)(1) is not ambiguous and Appellant/Plaintiff fully complied.

The pertinent part of the law provides that a claimant must file a Notice of Claim "with the Chief Executive Officer of the Tribe's Gaming Enterprise Division" by presenting the Notice of Claim "directly to the Chief Executive Officer of the

Class III Gaming Facility by certified mail, proof of delivery requested”.

The statute could have said the Notice of Claim must be addressed personally to the Chief Executive Officer. It does not.

The statute could have said the envelope containing the Notice of Claim must be addressed personally to the Chief Executive Officer. It does not.

The statute could have said a process server must personally serve the Notice of Claim on the Chief Executive Officer. It does not.

As this Court knows, the printed certified mail receipt form provides that any one at the address can sign or, alternatively, that a particular person must sign. 2PYTC §3-1-250(G)(1) could have said the claim had to be presented “by certified mail, proof of delivery requested” with the added language that the certified mail receipt “must be signed by the Chief Executive Officer.”. It does not.

The incontrovertible fact is that the Notice of Claim can be presented “directly to the Chief Executive Officer . . . by certified mail, proof of delivery requested” without putting his/her name on the envelope containing the Notice of Claim or the Notice of Claim itself or the certified mail form or the certified mail receipt.

The clear language of the statute is perfectly reasonable. To require the Chief Executive Officer to personally sign for certified mail would be unreasonably

burdensome on him/her or any busy executive and could lead to the absurd result that notice would be defective even if the Tribal employee who signed for the certified mail (in this case, Juanita E.) promptly opened the envelope and delivered the Notice of Claim to the Chief Executive Officer who read the Notice of Claim and took whatever action he/she deemed appropriate.

Even if the statute were to clearly state that the Notice of Claim, the envelope and the certified mail form must be addressed personally to the Chief Executive Officer and the certified mail receipt must be signed by him/her personally, this Court has the authority and the obligation to avoid such an absurd result.

In *Pennell v. Industrial Commission of Arizona*, 152 Ariz. 276, 731 P.2d 641 (1987), the Court said:

“In general, we interpret a statute to mean what it plainly states. (citation omitted) One exception to this general rule applies if this interpretation is absurd.”. 152 Ariz. at p. 279.

In *Valley National Bank of Arizona v. Kohlhase*, 182 Ariz. 436, 897 P.2d 738 (1995), the Court held:

“We will not interpret statutes to require a vain or useless act.”. 182 Ariz. at p. 439.

The Arizona Supreme Court said it best in *State v. LeMatty*, 121 Ariz. 333, 590

P.2d 449 (1979), when it held:

“A practical construction is preferred to one which is absurd, and a practical construction is required if a technical construction would lead to mischief or absurdity.”. 121 Ariz. at p. 337.

(2) If this Court thinks the statute is ambiguous, it should be interpreted, like all statutes of limitations, to maximize the likelihood of decisions on the merits.

Allstate Insurance Company v. O’Toole, 182 Ariz. 284, 287, 896 P.2d 254 (1995); *Premium Cigars Intern. v. Farmer-Butler*, 208 Ariz. 557, 570, 96 P.3d 55 (2004); *City of Tucson v. Clear Channel Outdoor*, 218 Ariz. 172, 178, 181 P.3d 219 (2008).

The statute says the Notice of Claim must be presented “directly” to the Chief Executive Officer. The definition of “directly”, particularly when compared to the definition of “personally”, does not help decide this case. The definition of “directly” is “without changing direction or stopping” (no help) or “with nothing or no one in between” which seems helpful except for the fact that the definition of “personally” is “without the help of others” (no help) or “in person”. If this Court decides “directly” means “personally”, that is, in person, it nullifies the certified mail language of the statute. Lawmakers know the difference between certified mail and

personal service. As already noted, if they wanted personal service, they would have said the Notice of Claim must be presented “personally” to the Chief Executive Officer or served on him/her.

(3) All legitimate purposes of 2PYTC §3-1-250(G) will be served if Appellant/Plaintiff is permitted to proceed.

What is the purpose of a statute of limitations, whether the 180 day period to file a Notice of Claim, 2 PYTC §3-1-250(G)(1), or the two year period permitted to file a tort lawsuit (3 PYTC §2-1-50(A)(1))? The courts hold there are two purposes. First, statutes of limitations protect defendants from “stale” claims, that is, witnesses die, information gets lost, etc., *City of Tucson v. Clear Channel Outdoor*, supra, 218 Ariz. at p. 178. Without timely notice to the defendant, a claimant could delay proceeding until adverse witnesses die or disappear, etc. Second, statutes of limitations allow the public entity to investigate, assess liability, permit settlement before litigation and assist in financial planning. *Havasupai Tribe of Havasupai Reservation v. Arizona Board of Regents*, 220 Ariz. 214, 204 P.3d 1063 (2008); *Falcon ex rel Sandoval v. Maricopa County*, 213 Ariz. 525, 527, 144 P.3d 1254 (2006).

In our case, both legitimate purposes of 2PYTC §3-1-250(G)(1) were fully

served because both the Tribe and the Tribe's attorney received timely notice of Appellant/Plaintiff's claim. Defense counsel's only argument, which we have already addressed, is that the Notice of Claim and the envelope were not addressed to the Chief Executive Officer. That argument unfairly places form over substance and leads to absurd results.

A recent decision pertinent to this issue is *State v. Galvez*, 214 Ariz. 154, 150 P.3d 241 (2006). The Court had to decide whether substantial compliance satisfied the procedural requirements of a statute. The Court held:

“Substantial compliance generally means that the information provided has satisfied the purpose of the relevant statute. (citation omitted) For example, when a statute is designed to protect a party, a relevant inquiry is whether the failure to comply strictly with the statute prejudiced that party.”. 214 Ariz. at p. 157, ¶19.

Defense counsel did not even attempt to argue the Tribe will be prejudiced if Appellant/Plaintiff is permitted to proceed.

Finally, we ask this Court's permission to incorporate herein all of the arguments and authority we presented to the Trial Court. The estoppel argument is particularly pertinent. Mrs. Dillinger, paralegal to Appellant/Plaintiff's then attorney, was told on two separate occasions, first by an “administrative office representative”,

then by “Ms. Norena Valencia” of the Tribal Attorney General’s office, that the Notice of Claim had been properly served,. Since the statute does not say the Notice of Claim and the envelope it was mailed in had to be addressed to the Chief Executive Officer, Mrs. Dillinger had a right to rely on what she was told. The Tribe waived its right to argue the Notice of Claim was not properly served. *Jones v. Cochise County*, 218 Ariz. 372, 187 P.3d 97 (2008).

CONCLUSION

The Tribe did not have to waive its immunity against lawsuits. It voluntarily did so. One reason it did so was because the Tribe decided it is just to pay reasonable compensation (insurance money) to people, including Tribal members, who can prove they suffer personal injuries due to the negligence of a tribal employee. That is fair

The Tribe also enacted procedural laws and rules, universal to all sovereign jurisdictions, for the legitimate purposes of insuring that the government is promptly notified of claims so they don't become "stale" and so that the government can investigate, assess liability, try to settle before litigation and arrange financial planning. That is fair.

If a claim cannot be settled, a judge or jury decides the case on its merits requiring the plaintiff to prove that the government employee was negligent and caused the plaintiff to suffer injuries. That is fair.

What is not fair is to interpret the applicable law and rules so narrowly and artificially as to make a mockery of their expressed purposes and deprive claimants of the justice they deserve, justice the Tribe promised when it waived immunity in the first place.

Unfortunately, we know that governments, Arizona included, do it all the time.

The law and rules are interpreted to place form over substance. The only explanation is that Arizona wants to defeat legitimate claims on technical grounds, even if the claimant substantively satisfies the expressed purposes of the law and rules.

Our request is that the Pascua Yaqui Tribe, this Court, not follow suit. The fact that the Notice of Claim and the envelope it was mailed in were not addressed to the Chief Executive Officer makes absolutely no difference in how the Tribe responds to the merits of the claim. In the Motion to Dismiss, defense counsel did not even suggest that the Tribal Attorney failed to do something because the Notice of Claim was not addressed to the Chief Executive Officer which the Tribal Attorney would have done if the Notice had been addressed to the Chief Executive Officer.

If Appellant/Plaintiff has no case, a jury will tell her so. The Trial Court's decision should be reversed and the case remanded for further proceedings consistent with this Opinion.

Respectfully submitted this 2nd day of December, 2013.

LAW OFFICES OF JOHN G. STOMPOLY, PLLC

By



JOHN G. STOMPOLY
Attorney for Appellant/Plaintiff

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)

) ss.

County of Pima)

John G. Stompoly, being first duly sworn, upon his oath, deposes and says:

That an original and 5 copies of the foregoing Appellant/Plaintiff's Opening Brief were delivered this 2nd day of December, 2013, to:

Clerk, Pascua Yaqui Tribal Court Appeals Division
7777 S. Camino Huivisim
Tucson, AZ 85757

and two copies of the Appellant/Plaintiff's Opening Brief were mailed this 2nd day of December, 2013, to:

Kimberly Van Amburg, Senior VP/General Counsel Sol Casinos
5655 W. Valencia Road
Tucson, AZ 85757

Rebecca Reed, c/o Jackson & Oden, PC
3573 E. Sunrise Drive, Suite 125
Tucson, AZ 85718
Attorney for Appellee/Defendant.

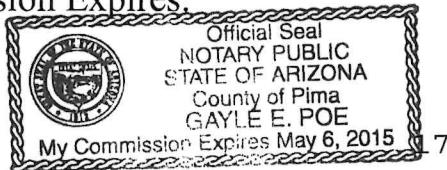
John G. Stompoly

SUBSCRIBED AND SWORN to before me this 2nd day of December, 2013.

Gayle E. Po

Notary Public

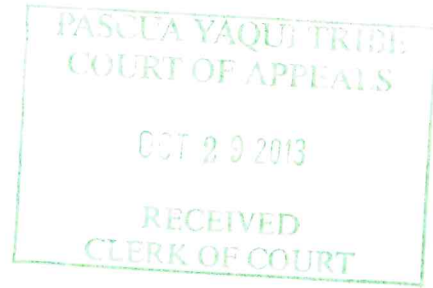
My Commission Expires:



1 Law offices of
2 John G. Stompoly, PLLC
3 698 E. Wetmore Road,
4 Suite 330
5 Tucson, AZ 85705

(520) 628-8300

6 JOHN G. STOMPOLY
7 PCC 55460\State Bar 1850
8 e-mail: johnstompoly@stompoly.com
9 Attorney for Plaintiff



PASCUA YAQUI TRIBAL COURT OF APPEALS

8 ENEIDA AGUILAR,

9 Appellant/Plaintiff

10 vs.

11 PASCUA YAQUI TRIBE dba CASINO DEL
12 SOL/CASINO OF THE SUN; JOHN AND
13 JANE DOES 1-10),

14 Appellees/Defendants

) No.

) APPELLANT/PLAINTIFF'S
) NOTICE OF APPEAL

) Pascua Yaqui Tribal Court
) Case No. CV-13-028

15
16 Appellant/Plaintiff appeals the October 1, 2013, Order Granting Respondent's
17 Motion to Dismiss. A copy of the Order is attached.

18 Dated this 28th day of October, 2013.

19 LAW OFFICES OF JOHN G. STOMPOLY, PLLC

20
21 By 
22 JOHN G. STOMPOLY
23 Attorney for Appellant/Plaintiff

24 Original and 5 copies of the foregoing Notice of Appeal
25 hand delivered October 28, 2013, to:

26 Clerk of Court
Pascua Yaqui Tribal Court
Court of Appeals
7777 S. Camino Huivisim
Tucson, AZ 85757

Law Offices of John G.
Stompoly, PLLC
698 E. Wetmore Rd
#330
Tucson, AZ 85705
520-628-8300

1 Copy of the foregoing Notice of Appeal
2 served by mailing October 28, 2013, to:

3 Lee Allen
4 Chief Executive Officer
5 Casino Del Sol
6 5655 W. Valencia road
7 Tucson, AZ 85757

8 Kimberly Van Amburg
9 Senior VP/General Counsel
10 Sol Casinos
11 5655 W. Valencia Road
12 Tucson, AZ 85757

13 Hon. Melvin Stooft
14 Pascua Yaqui Tribal Court
15 7777 S. Camino Huivisim
16 Tucson, AZ 85757

17 Clerk of Court
18 Pascua Yaqui Tribal Court
19 7777 S. Camino Huivisim
20 Tucson, AZ 85757

21 Rebecca Reed
22 c/o Jackson & Oden, PC
23 3573 E. Sunrise Drive, Suite 125
24 Tucson, AZ 85718
25 Attorney for Defendants
26

Law Offices of John G.
Stompoly, PLLC
698 E. Wetmore Rd
#330
Tucson, AZ 85705
520-628-8300

RECEIVED

OCT - 3 2013 IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
JOHN G. STOMPOLY, P.L.L.C.

ENEIDA AGUILAR,
Plaintiff,

CASE NO. CV-13-028

VS.
Pascua Yaqui Tribe, dba Casino del Sol
Casino of the Sun, John and Jane Does,
1-10,
Defendant.

ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

On October 1, 2013, the court held a hearing on the defendant's motion to dismiss. Appearing were John Stompoly for the Plaintiff and Rebecca Reed for the defendant.

The Court has continuing personal and subject matter jurisdiction.

The Court heard argument and reviewed the parties' briefs and authorities, and it finds that the defendant's motion to dismiss should be granted, due to improper notice of claims filed by the plaintiff. The gaming statute sets out the procedure for filing a tort claim against the Casino, and the statute provides in pertinent part as follows:

Prerequisites for an Actionable Civil Tort Lawsuit: The Tribe will forgo assertion of the subject matter defense of sovereign immunity in a civil tort lawsuit for personal injury to a Patron or Invitee or property damage to the property of a Patron or Invitee, but only if a claim for that injury or property loss is filed with the Chief Executive Office of the Tribe's Gaming Enterprise Division that satisfies each and every one of the following prerequisites:

- (1) The claimant has first presented directly to the Chief Executive Officer of the Class III Gaming Facility by certified mail, proof of delivery requested, a written administrative claim not later than 180 calendar days after the date of the alleged personal injury or property loss, and .

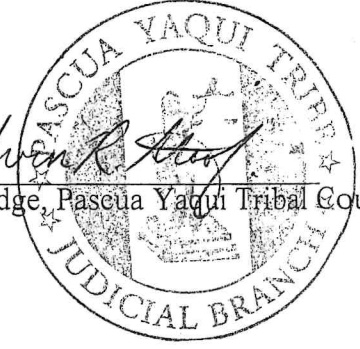
2 PYTC § 3-1-250(G)(1).

The statute is unambiguous as to the proper person to whom service must be made, the Chief Executive Officer. Because the plaintiff did not serve the Chief Executive Officer with notice of the claim as required by the statute, she has failed to prove all prerequisites for an actionable tort lawsuit have been met. The motion to dismiss should be granted for good cause shown.

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IT IS ORDERED the Defendant's Motion to Dismiss shall be granted for good cause shown.

SO ORDERED THIS 1st DAY OF OCTOBER, 2013.



Melvin A. Alvarado
Associate Judge, Pascua Yaqui Tribal Court

cc: Date: 10/01/13
 Plaintiff/Counsel PYT/Counsel

Celina D. Pineda
Clerk