Pete SWIMPTKIN, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP80-3255, 3 CTCR 02
1 CCAR 01(1)

[Sheilah Cleveland, Legal Office, Colville Confederated Tribes, Nespelem WA, spokesman for Appellant.
Melanie Romo, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued January 23, 1981. Decided January 23, 1981.
Before Chief Judge Stewart, Judge Schuyler and Judge Turgeon

PER CURIAM

This matter having come on Appeal on January 23, 1981, and the Court having reviewed the trial record, briefs, and arguments of counsel, and the Appellate Court having found, after striking all evidence submitted prior to advising the defendant of his *Miranda* warnings and after striking from the record any presumptions drawn from the defendant's refusal to submit to tests of sobriety, sufficient evidence to support a conviction in the lower Court proceeding,

It is Hereby Ordered that the holding of the Appellate Court that it is able to grant appeals (sic) limited to issues of law based on the record of the Trial Court pursuant to Section 1.9.05 of the Colville Appellate Code be entered into the record;

It is Further Ordered that, based upon the above finding of sufficient evidence in the Trial Court record to support a conviction, the Colville Trial Court decision is therefore Affirmed.

Isaac JACK Jr., Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case No. AP81-4083, 3 CTCR 03
1 CCAR 01(2)

[Isaac Jack Jr., Appellant, pro se.
Melanie Romo, Office of the Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided June 18, 1981.

FRY, C.J.

This matter having come to the attention of the undersigned Judge of the Colville Tribal Court on June 6, 1981, and the defendant having been sentenced upon his plea of guilty on June 3, 1981,

and the defendant having requested a new trial by way of appeal,

and the Court having been apprised of all the facts, and in the interests of justice, it is hereby,

Ordered, Adjudged, and Decreed that the defendant is granted an appeal, which will be a new trial, the date to be determined later.

It Is So Ordered.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

RONALD H. LACOURSE, Appellee.

Case No. AP80-3222, 1 CTCR 05

1 CCAR 2

[Melanie Romo, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Sheilah Cleveland, Legal Office, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Argued May 29, 1981. Decided May 20, 1982.
Before Chief Judge Turgeon, Judge Bowen and Judge Stewart

SUMMARY

Defendant/Appellee was tried before the Colville Tribal Court on the charge of Disorderly Conduct. After all the evidence was presented, the judge dismissed the case, *sua sponte*, on the ground that the Tribal Disorderly Conduct ordinance was unconstitutionally vague, and therefore void. The trial judge noted that had the ordinance been constitutional, she would have had no choice but to find the defendant guilty as charged. The Tribe appealed the dismissal. Briefs were submitted and oral arguments were heard on May 29, 1981, following which the Appellate Court unanimously held: 1) that the Tribe's appeal was not barred by the defendant's protection against double jeopardy; 2) that the Trial Court did not err in reviewing, *sua sponte*, the validity of the Disorderly Conduct ordinance; 3) that the Trial Court erred in finding the Disorderly Conduct ordinance unconstitutionally vague and in declaring it void. The Trial Court was reversed and the case remanded for reinstatement of the general finding of guilty.

Unanimous opinion, BOWEN, J.

The defendant, Ronald H. LaCourse, was charged in the Colville Tribal Court with the offense of Disorderly Conduct. Section 5.5.04 of the Tribal Law and Order Code defines that offense as follows:

> Any person who shall engage in fighting in a public place, or who shall disturb or annoy any public or religious assembly, or who shall appear in a public or private place in an intoxicated or disorderly condition, or who shall make unreasonable noise or offensively coarse utterances, gestures, or displays or who shall engage in any other act of public indecency or immorality, shall be guilty of Disorderly Conduct.

A bench trial was held at which time the Tribe presented evidence proving that the defendant was intoxicated and that he caused a disturbance at his grandmother's residence on the evening of July 21, 1980. There was conflicting testimony presented as to whether the residence in question could also be considered the defendant's residence. After all the evidence was presented, the Trial Court dismissed the charge on its own motion, and held that the Disorderly Conduct ordinance was unconstitutionally vague and, therefore, void because it could be interpreted as applying to persons whose conduct amounts to nothing more than being intoxicated in their own homes. The trial judge explained that had the ordinance been constitutional, the defendant would have been found guilty of Disorderly Conduct.

The issues presented by the Tribe's appeal are:

1) Whether the appeal is barred by the defendant's protection against double jeopardy;

2) Whether the lower court erred in reviewing, *sua sponte*, the validity of the Tribe's Disorderly Conduct

ordinance;

3) Whether the lower court erred in finding the ordinance in question unconstitutional, and therefore void.

In resolving these issues this Court gives effect to and interprets Tribal law, including customary law of the Colville Tribe. As noted below, the Tribe on occasion incorporates federal law. This Court looks to federal and state law for guidance, and finds such law persuasive when consistent with Tribal policies and customs. Of course the United States Constitution is not binding in proceedings in this Court or the Colville Tribal Court. *Talton v. Mayes*, 163 U.S. 376 (1895).

I. Is the Tribes' appeal barred by a protection against double jeopardy?

Defendants in the Colville Tribal Court are protected against being put twice in jeopardy for the same offense. This protection arises from Section 2.6.09 of the Tribe's Law and Order Code which reads that "all accused persons shall be guaranteed all civil rights secured under ... federal laws specifically applicable to Indian Tribal Courts." The "Indian Civil Rights Act" (ICRA), enacted by Congress in 1968, 25 U.S.C. § 1301 *et seq.* is such a federal law. Section 1302(3) of that statute requires that "no Indian Tribe in exercising powers of self government shall ... subject any person for the same offense to be twice put in jeopardy ..."

Although there is a dearth of tribal case law on the issue of double jeopardy, we affirm the Tribe's basic policy precluding multiple prosecutions of a defendant for the same offense. As evidenced below, federal law interpreting double jeopardy *vis-a-vis* the right to appeal a decision is somewhat amorphous and is still evolving. Nonetheless the federal decisions are consistent with the Tribe's policy.

In *Serfass v. United States*, 420 U.S. 377 (1975), the U.S. Supreme Court explained that the purpose of the constitutional prohibition against double jeopardy is to protect an individual from being subjected more than once to the hazards of trial and possible conviction for an alleged offense. As that Court has repeatedly stated, the underlying idea of this protection

> is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188 (1957).

In reversing the case at hand and ordering that a verdict of guilty be reinstated we perceive no violation of the Tribe's policy interests in prohibiting double jeopardy. Counsel for the defendant argues that there was insufficient evidence presented to convict the defendant, and a reversal of the Trial Court's decision would require a new trial. We disagree and hold that the Court below did find the defendant guilty of Disorderly Conduct[1] but dismissed the action as a matter of law. No retrial is necessary.

The U.S. Supreme Court has repeatedly held that where there is no threat of either multiple punishment or successive prosecutions, the protection against double jeopardy is not offended. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-236 (1972).

In *United States v. Wilson*, 420 U.S. 332 (1975), the jury entered a verdict of guilty, but on a post-verdict motion by the defendant the court dismissed the indictment on the ground that preindictment delay had prejudiced the defendant. In discussing whether a government appeal was barred by the double jeopardy clause, the U.S. Supreme Court held that

[1] The trial judge held that had a dismissal not been required as a matter of law, "I would have had no choice but to find the defendant guilty."

> although review at the instance of the government of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. at 345. Thus the Court held that an appeal was not barred because a successful appeal would merely necessitate, on remand, entry of a judgment on the guilty verdict. We hold that the Tribe may appeal any criminal decision which, if successful, would not require a new trial. We do not reach the question of when an appeal by the Tribe may be allowed where, if successful, would not require a new trial. We do not reach the question of when an appeal by the Tribe may be allowed where, if successful, a second trial would be necessitated. See generally *United States v. Scott*, 437 U.S. 82 (1978).

II. Did the Trial Court err in reviewing, *sua sponte the validity of the Tribal Disorderly Conduct ordinance?*

Judges have the solemn duty and power to ensure fairness and promote justice in all proceedings before them. They also have the inherent authority to review the validity of statutes. Whether or not a Tribal ordinance conflicts with another provision of the Tribal Code is an important question, and one that is clearly within the purview of the Tribal Court to consider. Where an ordinance may conflict with one of the civil rights guaranteed by the ICRA, courts should be especially vigilant, as the Trial Court was in the case at bar, to guard against any impingement upon these protections.

Section 1.5.05 of the Tribe's Law and Order Code provides as follows:

> When jurisdiction is vested in the Court, all the means necessary to carry (it) into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding is not specified in this Code, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal Law.

We interpret this provision as giving the Tribal Court authority to determine whether an ordinance violates a defendant's rights.

In this case the trial judge adopted a mode of proceeding consistent with the spirit of the Tribal law in reviewing the validity of an ordinance, although neither party had raised the issue. The Trial Court's decision to review, *sua sponte*, the validity of the Tribal Disorderly Conduct statute was clearly within its power. This authority is consistent with the critical function that tribal courts perform in preserving and furthering tribal sovereignty and independence.

Nor may we say that the Trial Court abused its discretion by the manner in which it reviewed the ordinance; that is, by not allowing the parties an opportunity to brief and argue the issues presented. Either party could have asked the Court for just such an opportunity by requesting a continuance, or by making a Motion for Reconsideration. Neither the defendant nor the Tribe requested a continuance for this purpose. Thus, we hold that the Trial Court did not err in reviewing, *sua sponte*, the validity of the Disorderly Conduct ordinance, nor did the Court abuse its discretion by the manner in which it reviewed the ordinance.

III. Did the Trial Court err in holding the Disorderly Conduct Ordinance unconstitutional?

A. Does the Ordinance Violate a Constitution Binding on the Trial Court?

As we noted above, the United States Constitution is not binding in actions in the Colville Tribal Court. This has been a doctrine of federal Indian law for many years and we affirm it as a matter of Tribal law. Therefore the ordinance can not be invalidated by the court below on the basis that it violated the federal Constitution.

The Constitution of the Colville Confederated Tribes is binding on the court system of the Tribe. We hold

that nothing in that document requires invalidating the ordinance in question under the circumstances presented in the trial of this action. As discussed below the Tribe has a policy of upholding its laws, and we emphasize our view that an ordinance should be declared unconstitutional or otherwise invalid only as a last resort.

B. Does the Ordinance Offense Rights Guaranteed Defendants by the ICRA?[2]

Section 1302 (8) of the ICRA requires that Indian Tribes not deny persons equal protection of the law or due process of law. Only the Tribe can elucidate the meaning of these generic concepts within the context of a proceeding such as the one at hand. For the reasons set forth below we hold that the ordinance in question does not violate the defendant's rights of equal protection or due process.

1. Equal Protection.

This concept does not lend itself to precise definition and we do not propose to break any new ground in that respect. Generally speaking equal protection means that people should be treated the same under similar circumstances.

The record in this case indicates that the defendant was both intoxicated and sufficiently disorderly to cause his ninety year old grandmother to summon the Tribal Police. The Police responded and the defendant was properly charged. At no stage did the Tribe administer the ordinance "with an evil eye and an unequal hand..."[3] From an enforcement point of view, the defendant was not denied equal protection of the law.[4]

2. Due Process and Statutory Construction

At this juncture we consider whether the statute should be declared void on its face and what principles a trial court should employ in construing a statute such as the Tribe's Disorderly Conduct ordinance. We agree with the trial judge's observation that the ordinance could conceivably be enforced against an individual whose conduct amounts to nothing more than being intoxicated in his or her own home. Inasmuch as due process is often equated with "fundamental fairness" such a prosecution may violate a defendant's guarantee of due process. Those are not the facts in this case and to invalidate the ordinance because of an objectionable hypothetical does serious injury to the Tribe's policy of upholding its laws wherever possible.

United States v. Harriss, 347 U.S. 612, 98 L.Ed. 989 (1954) is a U.S. Supreme Court decision on point in emphasizing these holdings. In *Harriss* the government appealed the trial court's dismissal of an action charging defendants with violating the Federal Lobbying Act. As in our case the statute on its face could be directed against activity much broader than what was actually involved. In an opinion by Chief Justice Warren, the Court held that the

> requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principle is that no man shall be held

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[2] We note that Section 1302 of the CIRA is entitled "Constitutional Rights." This was clearly a mistake by Congress inasmuch as the ICRA may provide certain civil rights to individuals in Indian country but these rights were intended to depart in certain particulars from rights under the federal Constitution. They are not "constitutional rights" in any meaningful sense. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[3] *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

[4] In Washington State a defendant must "show deliberate or purposeful discrimination based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Spokane v. Hjort*, 18 Wn.App. 606, 608; 569 P.2d 1230 (1977).

> criminally responsible for conduct which he could not reasonably understand to be proscribed... On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise... And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.

98 L.Ed. 996-97. The Court went on to uphold the statute.

In our case the Trial Court was under a duty to adopt a construction which would uphold the validity of the ordinance as applied to the facts before the Court. The Trial Court should have held that the ordinance is valid when applied against an intoxicated and disorderly defendant who is disturbing another in a residence not clearly his own. Any number of other characterizations would be equally appropriate in upholding the ordinance. To provide guidance for the Tribe's future enforcement, we construe the ordinance as not proscribing conduct in which an individual is intoxicated in his or her home and is not being disorderly.

This approach is consistent with the policy announced in Section 1.1.07 of the Tribe's Law and Order Code that

> [a]ny other issues of construction shall be handled in accordance with generally accepted principles of construction giving due regard for the underlying principles and purposes of this Code.

In *Big Eagle v. Andrea*, 508 F.2d 1293 (8th Cir. 1975), a pre-*Martinez* decision, two tribal members were convicted under a tribal Disorderly Conduct ordinance similar to the one here at issue. The defendant filed *habeas* petitions in federal court arguing that the tribal ordinance was void for vagueness and thus violated their right to due process under the ICRA. The Court of Appeals noted that, if tested by standards applied to communities outside of an Indian reservation, the Tribe's ordinance appeared facially vague and overbroad.

> But we are not prepared to say that a limiting construction of the statute, well-known to the Indian reservation society, would not, if made by the Tribal Court, cure its facial vagueness and overbreadth.

508 F.2d 1296.[5]

Another means by which courts uphold statutes is the rule of severability: if one part of a statute is found to be invalid, but the rest of the statute is valid, and if the invalid part is severable from the rest, the valid portion may stand while that which is void may be rejected.[6] Again the Tribe's Law and Order Code mandates no less by the Trial Court. Section 1.1.07 of the Code reads as follows:

> If any provision of this Code or the application of any provision to any person or circumstance is held invalid, the remainder of this Code shall not be affected thereby and to this end the provision of the Code are declared to be severable.

Thus, before declaring a Tribal ordinance invalid within the context of a pending criminal action, judges of the Colville Tribal Court must attempt a limiting construction or to sever the provisions of an ordinance in order to sustain its validity.

The Trial Court is reversed and the case remanded for reinstatement of the general finding of guilty. It is so

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[5] The court declined to rule on the validity of the statute where the record failed to show if the Tribal Court had properly restricted the meaning of the ordinance. On remand the district court declared the statute void as violating the ICRA.

[6] See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Uniform Statutory Construction Act, 14 Uniform Laws Annotated 513 §16; Severability of Statutory Provisions (1965).

Ordered.

Timothy A. HALL, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP82-5049/50/51/52, 3 CTCR 04

1 CCAR 7

[Sheilah Cleveland, Legal Office, Colville Confederated Tribes, Nespelem WA, spokesman for Appellant.
Melanie Romo, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided January 19, 1983.
Before DUPRIS, C.J.

This matter having come to the attention of the Court and the Court having reviewed the corresponding files and found that there is no basis for appeal, now, therefore

It is Ordered, Adjudged and Decreed that:

1) this matter shall be dismissed upon the grounds that the questions of law appealed are moot as the defendants have entered pleas of guilty to the charges; and

2) the guilty pleas entered were determined to be voluntary on the part of the defendants.

Wayne BOYD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP83-6051, 3 CTCR 12

1 CCAR 8

[Sheilah Cleveland, Legal Office, Colville Confederated Tribes, Nespelem WA, spokesman for Appellant.
Robert Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Argued July 26, 1983. Decided July 26, 1983.
Before Chief Judge Baker, Judge Naff and Judge Stewart

PER CURIAM

This matter come on regularly for trial *de novo* before the undersigned upon the date shown below, pursuant to Rules of Court and defendant's appeal of that certain Trial Court sentence entered the 10th day of May, 1983, in cause No. 83-6051. The defendant personally appeared and by his representative Sheilah Cleveland of the Tribal Legal Office; the Tribe was represented by Tribal Prosecutor Robert Widdifield. The appellate tribunal hearing considered the evidence, including testimony of witness' and exhibits admitted, now, therefore, it is hereby unanimously.

Ordered, Adjudged and Decreed that defendant be and he is hereby found guilty of the crime of Battery in violation of § 5.1.04 of the Tribal Code. It is further

Ordered, Adjudged and Decreed that the terms and conditions of the Chief Judge's order of sentencing of May 10, 1983, be and they are hereby Affirmed.

(1) Non-suspended fine and court costs have already been paid;

(2) The defendant shall be on probation for a period of six (6) months; the defendant shall follow all the rules and regulations of that department as specified by his probation officer;

(3) The defendant shall report 6:00 p.m. on 7/29/83 to the Tribal Jail and may be released 6:00 p.m. on 7/31/83. The defendant is to serve a like period the following weekend.

(4) Defendant shall report to Family Assistance and Mental Health Program on or before 7/29/83.

Lou STONE, Appellant,
vs.
Francis SOMDAY, Appellee.
Case No. APCV82-208, 1 CTCR 14
1 CCAR 9

[David DeWolf, Lukins & Annis, Washington Trust Financial Center, Spokane, WA, counsel for appellant.
Harry Johnsen, Raas & Johnsen, Bellingham, WA counsel for appellee.]

Argued. Decided March 6, 1984.
Before Chief Judge Dupris, Judge Ward and Judge Harding

DUPRIS, C.J.

This matter has come before the Colville Tribal Court of Appeals upon a question of first impression: what kind of immunity does a Colville Tribal official enjoy under Colville Tribal Law and Order Section 1.1.06[7] when acting in his or her official capacity? Based on the reasoning set out below, this Court now holds it is qualified, not absolute, immunity. Secondly, on arguments before the Appeals Court, Appellant argued that the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*[8] was federal law which specifically waived tribal and tribal official's sovereign immunity pursuant to Colville Tribal Law and Order Code § 1.1.06. This Court does not agree. Based on the reasoning set forth below, the Trial Court's decision to dismiss this action is reversed and the case remanded for trial on the merits.

I. SUMMARY OF CASE

On June 17, 1982, Lou Stone and David Alexis filed a civil complaint in the Colville Tribal Court against three tribal officials alleging discrimination in employment practices. On July 26, 1982, defendant filed a Motion to Dismiss and the Trial Court judge, James A. Bowen, ordered briefing in the matter. On November 15, 1982, Judge Bowen dismissed one cause of action as barred by the Statute of Limitations[9] and denied the defendant's Motion to Dismiss on the reasoning that sufficient facts were alleged in the complaint to carry this action forward.

On January 13, 1983, the date set for trial, the parties narrowed down to Lou Stone, plaintiff, against Francis Somday II, defendant. The defendant renewed his Motion to Dismiss on three grounds: 1) failure to state a claim under Tribal law, 2) failure to state a claim under the Indian Civil Rights Act, and 3) the action was barred on the grounds of sovereign immunity. Judge Bowen denied the defendant's Motion on the first ground holding (1) that the Colville Tribal Court had subject matter jurisdiction pursuant to Colville Tribal Law and Order Code § 3.1.01[10]

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[7] Sovereign Immunity. Except as required by a federal law, or the Constitution of the Colville Confederated Tribes, or as specifically waived by a resolution or ordinance of the Council specifically referring to such, the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

[8] Pub. L. 90-284, Title II, § 201, Apr. 11, 1968, 82 STAT. 77.

[9] Colville Tribal Law and Order Code § 3.2.02.

[10] Jurisdiction Generally. The Court shall have jurisdiction of all suits involving persons residing within the tribal jurisdiction as defined by this Code and all other suits in which a party is deemed to have consented to the jurisdiction of the Court, or in which the events giving rise to the action occurred within the tribal jurisdiction as defined by this Code.

and (2) that the Colville Tribal Court is a court of general jurisdiction and as such can entertain this action[11].

Finally, the Trial Court held that pursuant to the Tribal Law and Order Code § 1.1.04, Sovereign Immunity, and the test set forth by the Trial Court[12] there was no genuine issues of fact[13]. The plaintiff appealed the Trial Court's decision to dismiss on the grounds that Sovereign Immunity barred this action.

II. SOVEREIGN IMMUNITY

Both parties argued extensively in their appeals briefs on whether or not the Indian Civil Rights Act created a waiver of tribal sovereign immunity. However enlightening these arguments were, they did not address the real issue in this case, i.e. *official* immunity[14]. In fact neither counsel, either in their oral arguments before the Appeals Court or in their appeals brief, addressed the specific issue of official immunity. Thus, the Appeals court had to look elsewhere for guidance in this area.

A. Tribal Sovereign Immunity

To lay the matter to rest once and for all, this Court's decision in this case does nothing to negate or take away from the Colville Confederated Tribes' sovereign immunity as set out in Section 1.1.06 of the Colville Tribal Law and Order Code. It is well established that Indian Tribes enjoy sovereign immunity from suits absent a clear waiver either by the tribe itself or by Congress[15]. The fact the Colville Confederated Tribes codified this well-established concept in § 1.1.06 of the Code underscores the validity of its application in cases before the Court that deal with suits against the Tribe. However, it is the second part of § 1.1.05, "... and their officers and employees immune from suit for any liability arising from the performance of their official duties," that is before the Court in this case.

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[11] See, Opinion Dismissing Action, at page 6. Because the Trial Court held that it had subject matter jurisdiction pursuant to Colville Tribal Law and Order Code § 3.1.01, it found that it need not address whether or not the Indian Civil Rights Act of 1968 created new causes of action in tribal courts. *Id.* at footnote 8.

[12] "Under the definition of official immunity contained in Code § 1.1.06, unless an officer's acts are unrelated to his official duties or are somehow related but are so egregious that they can be said to be outside of his official capacity, then he is immune from suit." Opinion Dismissing Action, at page 9 (footnote omitted).

[13] The trial court judge, in determining whether or not a trial was necessary, considered all the oral arguments, briefs, stipulation, affidavits and other pleadings and ruled on Defendant's Motion to Dismiss as if it were a Motion for Summary Judgement. *I.d.* at 8.

[14] In plaintiff's Notice of Appeal filed on February 7, 1983, Mr. DeWolf states the issue for appeal as : "Specifically, Plaintiff appeals from the decision of the trial court, the Honorable James Bowen, Judge Pro Tem, **that sovereign immunity applies to the action of the defendant Francis Somday II**." (emphasis added).

[15] See, generally, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

B. Official Immunity

"...[E]ach sovereign may define the limits of immunity afforded itself and its officers and agents, at least in its own courts..."[16] Appellee was entirely right to state in his appeals brief that this Court should not decide policy for the Tribe. On the other hand, it is well within the purview of a court to interpret the statutes and legislative acts of the Tribal Council absent clear legislative direction.

The Trial Court set the standard for official immunity as "... unless an officer's acts are unrelated to his official duties or are somehow related but are so egregious that they can be said to be outside his official capacity, then he is immune from suit."[17] In setting this standard, the Trial Court judge admitted that this standard was "unusually narrow."[18] We agree. However, it was not an easy task to find a standard which protects all interests involved. This Court reviewed other tribal standards of official immunity[19] as well as federal[20] standards.

After reviewing case law and that Tribal custom law that is known to us, this Court now holds that a Colville Tribal official enjoys a qualified immunity under Tribal Law and Order Code § 1.1.06. If a Tribal official, while performing official duties, exceeds the scope of his authority or, while acting within the scope of authority, exercises a power delegated to him by the Tribe which the Tribe is powerless to delegate, official immunity will not bar actions against the official for such conduct. Implicit in this standard is a sense of reasonableness in that an official should know or could have reasonably ascertained whether or not his conduct was within the bounds of his official duties, explicit or delegated. On the other hand, because of his obligations not only to his employer, the Tribe, but to the individual representatives of the Tribe itself, a Tribal officer has a higher standard of duty to ascertain what his duties and powers are *vis-à-vis* his official capacity than an ordinary person would have. Whether or not an official acted within the scope of his authority or exercised a power he was powerless to exercise and the reasonableness of such action are questions of fact to be decided by triers of facts.

In this action the Trial Court fashioned an extremely narrow standard, i.e. unrelated or egregious actions[21], reviewed all pleadings filed on record, and treated Appellee's Motion to Dismiss as a Motion for Summary Judgment. Implicit with such action the Trial Court found that there was no genuine issue of material fact[22], because under the narrow standard set by the Trial Court the Tribal official is immune from suit. The question of whether or not Mr. Somday is immune from suit under the new standard for review of official immunity is not answered. Therefore, the Trial Court's Order Dismissing this action must be reversed.

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[16] *Defendant's Brief in Support of Motion to Dismiss*, filed on September 2, 1982, at page 3 (cites omitted).

[17] *Opinion Dismissing Action* at page 9 (footnote omitted).

[18] *Id.*, footnote 14.

[19] *Eg.*, *Satiacum v. Sterud*, 10 ILR 6013 (Puyallup Tribal Court, 1982), *Cudmore v. Cheyenne River Sioux Tribal Council*, 10 ILR 6004 (Cheyenne River Sioux Tribal Court, 1981), and *Moses v. Joseph*, 2 T.C.R. A-51, Northwest Tribal Court Reporter at Sauk-Suiattle (Sauk-Suiattle Tribal Court, 1980).

[20] *Eg.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct 1670, 56 L.Ed.2d 106 (1978), *Puyallup Tribe Inc. v. Dept of Game of Washington*, 433 U.S. 165 (1977), *Ex Parte Young*, 209 U.S. 125 (1908) and *Wisconsin v. Baker*, 10 ILR 2077 (10th Cir. 1983).

[21] See no. 6, *supra*.

[22] *cf.* WA CR 56, FCRP 59.

III. INDIAN CIVIL RIGHTS ACT OF 1968

As stated before, extensive arguments were made by both counsel on whether or not the Indian Civil Rights Act of 1968[23] (ICRA) was "a federal law" that waived the Tribes' sovereign immunity. We hold now that it is not. However, the import of this federal legislation cannot be ignored. It is the duty of tribal forums, including Tribal Court, to promote the objectives of the ICRA, i.e. strengthening the position of individual tribal members *vis-à-vis* the Tribe and furthering Tribal self-government.[24] The Colville Tribal Court has long recognized the rights guaranteed in the ICRA in its criminal cases.[25] To disregard all the other civil rights guaranteed in the ICRA would defeat its dual purposes.[26] "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[27] The "substantial and intended effect" of the ICRA on tribal courts is to change the laws we apply[28] in assessing important personal and property rights of individual members *vis-à-vis* their tribe and, at the same time, furthering the Tribes' self-government.

Therefore, although the ICRA does not waive the sovereign immunity of the Colville Tribal Court, it is a substantive law which the Colville Tribal Court cannot disregard in adjudicating rights of its members.

Based on the foregoing, the Trial Court's Order Dismissing this action is hereby reversed and remanded.

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23 Pub. L. 90-284, 25 U.S.C. §§1301 *et seq.*

24 *Santa Clara Pueblo v. Martinez*, *supra* at 64 (1978).

25 Specifically, rights guaranteed under ICRA, 25 U.S.C. §1302 (2), (3), (6), (7), (8), (9), and (10).

26 Eg. 25 U.S.C. §1302(1), (5) and (8).

27 *Santa Clara Pueblo v. Martinez*, *supra* at 66.

28 *Id.*

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Markus K. DAVIS, Appellee.

Case No. AP83-6136, 1 CTCR 15

1 CCAR 13

[Robert F. Widdifield, Office of the Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA , spokesman for Appellant.
Markus K. Davis, Nespelem WA, Appellee, pro se.]

Argued February 1, 1984. Decided March 8, 1984.
Before Chief Judge Dupris, Judge Naff and Judge Wynecoop.

SUMMARY

On December 23, 1983, Markus Davis appeared before the Colville Tribal Court for a judge trial on a Drug Abuse charge. The prosecutor, Robert F. Widdifield, presented evidence concerning the defendant's guilt. The defendant offered evidence refuting the allegations. Closing statements were presented to the Court and the judge entered a verdict of Not Guilty. A Memorandum Opinion was filed supporting the Trial Court's decision. A Notice of Appeal was filed by the Prosecutor requesting the Appellate Court to reverse the Trial Court's decision and remand for sentencing.

DUPRIS, C.J.

I. FACTS

The defendant, Markus Davis, was cited on November 5, 1983 for violation of Colville Tribal Law and Order Code § 5.5.05, Drug Abuse[29]. It was alleged that he was carrying in his pants pocket a pipe which contained marijuana residue. Defendant was arraigned on November 7, 1983, at which time he pleaded not guilty and a judge trial was scheduled.

On December 3, 1983, Markus Davis appeared before the Court for a judge trial. The prosecutor, Robert F. Widdifield, presented evidence alleging that the defendant was carrying a wooden pipe in his pants pocket which, upon subsequent testing, contained marijuana residue. Defendant offered testimony that he didn't know who the pipe belonged to, that his brother sometimes wore his pants and that he had never used the pipe. Closing statements were presented to the Court and the judge entered a verdict of Not Guilty. The prosecutor filed a Notice of Appeal and Memorandum of Authorities requesting that the Appellate Court reverse the Trial Court's decision and remand back for sentencing. The prosecutor stated grounds that the Trial Court erred in finding the not guilty verdict in that the judge entered a verdict in spite of agreeing that the defendant was probably guilty but was charged with the wrong offense.

[29] "Any person who shall engage in activity which violates Chapter 13, Drug Abuse Prevention and Control, of Title 21 of the United States Code, shall be guilty of Drug Abuse. Drug Abuse is a Class A offense."

II. APPLICABLE LAW

This matter came before the Colville Tribal Appellate Court upon a case of first impression: what kinds of cases, if any, can the Colville Confederated Tribes (Tribes) appeal in criminal matters? Based upon the reasoning set forth below, this Court now holds that the Tribe can appeal if (1) double jeopardy does not attach and (2) there has been no acquittal.

The Appellate Court adopts the following definition of acquittal: "An acquittal is a legal determination, made after jeopardy has attached, which is based on facts adduced at trial and relating to the general issue of the case and which terminates the prosecution in favor of the defendant."[30] In the case at hand, the trial proceeded through the usual steps to its conclusion, i.e. prosecution presented evidence, defendant was given an opportunity to refute the allegations, prosecution was given an opportunity to respond and closing arguments were heard. The trial judge based his verdict on the lack of evidence presented, "...[The Tribe] did not prove to me beyond a reasonable doubt that Mr. Davis was guilty of Drug Abuse."[31] The verdict was in favor of the defendant. At no time during the appeal hearing did the appellant argue that the trial did not proceed to its conclusion.

The threshold issue before the Appellate Court is double jeopardy. Double jeopardy is a recognized concept for this Tribal Court. It is mandated that this civil right be recognized in tribal courts exercising powers of self-government through the Indian Civil Rights Act of 1968, 25. U.S.C. §§ 1301, *et seq.*, as it is applied through the Colville Tribal Law and Order Code § 2.6.09.[32] Throughout the appeal hearing, the appellant argued that he did not want to retry the appellee, but only wished to have the Trial Court's decision reversed. It is our holding that this would contradict the double jeopardy doctrine. For authority we look to *Finch v. U.S.*, 433 U.S. 676 (1977).

We now hold that the Tribe may appeal if a Motion to Dismiss is entered for insufficient evidence after the Tribe has presented a prima facie case. This Motion is usually raised by the defendant, but may be raised or determined by the trial judge. The assumption is that this is like a mistrial in that the defendant requested it or that it was done at his consent.[33] This would hold true for a mistrial.

Based on the foregoing, as a matter of law, this Court now finds that:

1. The case Colville Confederated Tribes vs. Markus K. Davis was fully adjudicated to the acquittal stage; and

2. The Tribe's appeal is denied as barred by double jeopardy.

COLVILLE BUSINESS COUNCIL, Appellants,

vs.

Wendell GEORGE, *et al*., Appellees.

Case No. AP84-CV84-402, 1 CTCR 19, 11 ILR 6049

1 CCAR 15

[30] 13. Gon.L.R. 337 at 351 (1978).

[31] Memorandum Opinion Finding Defendant Not Guilty of Drug Abuse, Colville Confederated Tribes vs. Markus Davis, at page 4 (1984).

[32] "*Civil Rights*. All accused persons shall be guaranteed all civil rights secured under Tribal Constitution and federal laws specifically applicable to Indian Courts."

[33] *Lee v. U.S.*, 432 U.S. 23 (1977)

[Michael Taylor, Reservation Attorney's Office, Colville Confederated Tribes, Nespelem WA, counsel for Appellants.
Dale Kohler, Nespelem WA, counsel for Appellees.]

Argued July 31, 1984. Decided November 8, 1984.
Before Chief Judge Baker, Judge Stewart and Judge Ward

BAKER, C.J.

SUMMARY OF PROCEEDINGS

Plaintiff/Respondent, Wendell George, filed a civil complaint on January 9, 1984, alleging violations of his civil rights, and the civil rights of others similarly situated, under the equal protection guarantees of the Indian Civil Rights Act of 1968 (ICRA), 25 USC § 1301(8), which states:

> No tribe in exercising its powers of self-government shall ... (8) deny to any person within its jurisdiction equal protection of its laws or deprive any person of liberty or property without due process of law. ...

Plaintiff alleged that he, and those similarly situated, are at a political disadvantage under the "one-man, one-vote" civil rights principle because of an alleged unequal representation on the Colville Tribal Business Council. On February 8, 1984, Matthew Dick Jr. filed a motion to intervene as co-plaintiff on behalf of himself and other Nespelem district voters similarly situated. On February 13, 1984, the defendant filed a Special Appearance and a Motion to Dismiss on four grounds: (1) that the Court lacked jurisdiction; (2) that the defendants are immune from suit; (3) that the complaint stated no claim upon which relief could be granted; and (4) that the issue raised was a political question. The parties filed memoranda in support of their respective positions, and the Trial Court denied Defendant's Motion to Dismiss on the grounds of lack of jurisdiction, official immunity and failure to state a claim upon which relief can be granted, but granted the Motion to Dismiss on the basis that the issue raised was a political question, said dismissal being without prejudice.

Defendant appeals the Trial Court's ruling on the questions of jurisdiction, official immunity, and failure to state a claim upon which relief can be granted, and neither the plaintiff nor the intervenor filed a cross appeal. The plaintiff/respondent argues that the defendant/appellant is not "an aggrieved party" and that this appeal should be dismissed.

This court holds that the defendant is an "aggrieved party" and that the Trial Court's decision should be reversed and the plaintiff's complaint dismissed, since Appellant/Defendant is protected by the doctrine of sovereign immunity.

ISSUES

The Trial Court's framing of the issues, and those presented on this appeal, result in the following questions before the Court:

1. Is the defendant/appellant an aggrieved party despite the fact that Plaintiff's complaint was dismissed without prejudice below?

2. As a matter of law, does the court lack subject matter jurisdiction to entertain the lawsuit on the grounds of sovereign immunity?

3. As a matter of law, is this lawsuit barred on the grounds of official immunity?

4. As a matter of law, has Plaintiff stated a claim under the ICRA for which relief can be granted?

5. As a matter of law, is this case ready for judicial review in light of the political question doctrine?

Because of the court's rulings on the first two issues, the last three need not be decided.

1. Is the defendant/appellant an aggrieved party despite the fact that plaintiff's complaint was dismissed below?

Generally, courts have recognized the rule that a decision on appeal should be limited to a consideration of and ruling upon those issues necessary to a proper disposition of the appeal and that the court should not ordinarily go further and express an opinion on other matters. See *5 Am.Jur.2d, Appeal and Error,* § 760. The exception to this is where the issue in question is likely to arise again upon a retrial. See, e.g., *Von Herberg v. Seattle*, 147 Wash. 141, 288 P. 646 (1930), 70 ALR 417, 5 *Am.Jur*.2d, Appeal and Error, § 760.

Certainly it is true that appellate courts, like courts generally, are not to give opinions on merely abstract or theoretical matters, but only decide actual controversies injuriously affecting the rights of some party to the litigation, thus giving rise to the doctrine that questions or cases which might have became moot or academic are not a proper subject of review. 5 *Am.Jur* 2d, Appeal and Error, § 761; *Von Herberg v. Seattle*, *supra*. Similarly, the general principle is that an appellate court is concerned with the Trial Court's holding, and not which whether the reasoning of the decision is correct, and generally a correct decision will not be disturbed because it is based on an incorrect ground. 5 *Am.Jur.* 2d, Appeal and Error, § 727. However, it has also been said that the rule that where a correct judgment was rendered on an incorrect ground it will be affirmed does not apply where the incorrect basis of the judgment was an issue on which the court below rendered its judgment. *Id.*

Whether or not a party is "aggrieved" by a ruling turns on whether that party has an interest recognized by law in the subject matter which is injuriously affected by the judgment, or whose property rights or personal interests are directly affected by the operation of the judgment. 4 *Am.Jur.* 2d, Appeal and Error, §183. Mere feelings of grievance to one's sense of propriety or justice, mere disappointment or inconvenience, annoyance, discomfort, or even expense, does not entitle that party to appeal from it so long as the party is not thereby precluded from asserting or defending his claim of personal or property rights in any proper court. *Id.*, notes 10, 11 and 12.

The fact that a judgment may, in a sense, have been in favor of the parties seeking appellate review does not necessarily require the conclusion that he is not an "aggrieved party," and the prevailing party may appeal if the court below has committed error that is prejudicial to him, although he may not appeal from a judgment in favor by which he is not injuriously affected. 4 *Am.Jur.* 2d, Appeal and Error, § 184. Thus, if a party obtains the full relief prayed for, he cannot attack the trial court's reasons or its conclusion of law, attempt to procure relief on other theories or grounds, or obtain modification of the judgment, either as to the extent of the relief granted or in other respects. 4 *Am.Jur.* 2d, Appeal and Error, § 186. However, it has been held that a party can appeal to attack a finding which is made part of the judgment itself, or on which, in the absence of appeal, would operate as *res judicata* or form the basis for a collateral estoppel in a subsequent action. *Id.*; see also, *Partmar Corporation v. Paramount Theatres Corporation*, 347 U.S. 89, 98 O.Ed. 532, 74S.Ct. 414, *reh. den.*, 347 U.S. 931, 98 L.Ed. 1083, 74 S.Ct. 527 (1954); 60 ALR2d 724, 747, §§ 10(c), 19(b).

The defendant/Appellant herein has argued that the Trial Court's ruling that the Tribal Business Council is not protected by sovereign immunity in this Court will operate as *res judicata* or collateral estoppel in this case, should it be refiled after the dismissal without prejudice, or in future cases of any kind brought against the Tribal Business Council. We agree.

The ruling of the Trial Court dismissed the plaintiff/respondent's complaint without prejudice to his right to refile a case bringing allegations which would be sufficient to carry the issue beyond what the Trial Court ruled, on the pleadings, to be a political issue. In other words, the Trial Court ruled that, should Plaintiff's case become "ripe" for resolution within the court system, under the political question doctrine, he might refile his complaint. Moreover, another plaintiff might bring a similar claim, or one completely different, against the Business Council and, if the

Trial Court's ruling were to stand on the issue of sovereign immunity, successfully rely on that decision as *res judicata*. Accordingly, the defendant/respondent is an aggrieved party and entitled to appellate review.

2. As a matter of law, does the Court lack subject matter jurisdiction to entertain this lawsuit?

The parties have fully briefed the issue of sovereign immunity, and the only question is whether there is a distinction between Tribal Business Council as sued herein and the Tribe itself. We find that sovereign immunity bars the plaintiff's action under the Colville Tribal Code § 1.1.06, which states:

> Sovereign Immunity. Except as required by a federal law, or the constitution of the Colville Confederated Tribes, or as specifically waived by a resolution or ordinance of the Council specifically referring to such, the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties.

Defendant/appellant's point is well taken when it analogizes the Tribal Business Council to the Congress of the United States. We see no meaningful distinction between the Business Council as sued herein and the Tribes itself, and the same rules should apply in this case as if the Tribe itself had been named as a defendant. The defendant/appellant is immune from suit under CTC. § 1.1.06, and Plaintiff's complaint should have been dismissed on that ground.

3. As a matter of law, is this lawsuit barred on the grounds of official immunity?

Official immunity is not an issue that is before us, and it was not before the Trial Court because no individual official was named, nor was an individual's official capacity designated or pleaded; moreover, consideration of this issue is unnecessary because of our ruling on the issue of sovereign immunity. Likewise, there is no need to discuss either executive or legislative immunity for this same reason.

4. As a matter of law, has plaintiff stated a claim under the ICRA for which relief can be granted?

Since the defendant as named herein is immune from suit because of the doctrine of sovereign immunity, we do not reach, nor should the Trial Court have reached, the question of whether or not a claim for relief has been stated under the Indian Civil Rights Act.

5. As a matter of law, is this case ready for judicial review in light of the political question doctrine?

The political question doctrine need not have been considered and ruled upon by the Trial Court, since the defendant/appellant is immune from suit under the doctrine of sovereign immunity.

Tommy L. WATERS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP84-7231, AP84-7232, 1 CTCR 20

1 CCAR 18

[Tommy L. Waters, Appellant, pro se.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Initial Hearing January 29, 1985. Decided February 28, 1985.

Before Chief Judge Ward, Judge Bonga and Judge Wynecoop

UNANIMOUS PANEL

An initial hearing on the appeal occurred on January 29, 1985. The Appellate Court considered the Notice of Appeal and applicable law. The Court decided to dismiss the appeal and remand as to the sentence that was imposed for Resisting Arrest.

The basis for this dismissal and remand will be set forth by considering the grounds for appeal contained in the Notice of Appeal.

I. MISCONDUCT OF THE JUDGE

The appellant asserts that the Colville Law and Order Code (hereinafter the Code) at 1.9.02A (2) is a ground for appeal. This section of the Code provides that "Misconduct of the prosecution, judge or jury" may be grounds for an appeal. To substantiate misconduct on grounds for appeal the appellant cites sections of the Code regarding the appointment of a judge, Code at 1.4.02, eligibility requirements, Code at 1.4.03, and his communication with the recording secretary of the Business Council regarding the non-compliance of these sections as to the trial judge.

Misconduct has been defined as follows:

> A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior...

Blacks Law Dictionary, Revised Fourth Edition, West Publishing Company, 1968, at 1150.

These two definitions encompass the function of a person, or the action or inaction of a person in a particular position. They do not encompass questions about how the person was placed or appointed to a particular position. The argument of the appellant that the appointment procedures and eligibility requirements in the Code may constitute misconduct of a judge is misplaced. Appellant's arguments does not directly involve the function or action or inaction of the trial judge. This assertion of the appellant will not be considered a ground for appeal in this case.

II. NEWLY DISCOVERED EVIDENCE

The appellant asserts that the Code at 1.9.02A(3) is a ground for appeal. This section of the Code provides that "Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at trial" may be grounds for an appeal. To substantiate newly discovered evidence on grounds for appeal, the appellant asserts that he was unaware of the requirements for a Tribal Court judge and he "had no way of anything about the judge to make a determination" [sic]. Notice of Appeal, filed December 20, 1984, pg. 1, line 31-32. Presumably the appellant had no way of knowing anything about the judge to make a determination or something to this effect. Material evidence has been described as follows:

> In the Courtroom the terms relevance and materiality are often used interchangeably, but materiality in its now precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue, the evidence is properly said to be immaterial.

McCormicks Handbook of the Law of Evidence, 2d Edition, West Publishing Company, 1972, at p.434.

The appellant has appealed from a determination of guilt. Material evidence would prove an issue in the

case, and during the criminal trial there were issues guilt or innocence. The assertion that the appellant was unaware of the requirements for a Tribal Court judge is immaterial in a criminal trial which deals with issues of guilt or innocence. Further the existence of the facts asserted by the appellant, i.e. requirements of a Tribal Court judge, are not evidence, and cannot be newly discovered evidence. The assertion of the appellant regarding newly discovered evidence will not be considered grounds for an appeal in this case.

III. ABUSE OF DISCRETION

The appellant asserts that the Code at 1.09.02A(5) is a ground for an appeal. This section of the Code provides that "abuse of discretion, by which the defendant was prevented from having a fair trial" may be grounds for appeal. To substantiate Abuse of Discretion on grounds for an appeal the appellant asserts that the presentence investigation was not given enough consideration. The Code at 2.6.07, Sentencing, provides:

> Before imposing sentence, the judge shall allow a spokesman or the defendant to speak on behalf of the defendant and to present any information which would help the judge in setting punishment.

It is clear that the discretion to impose jail time and or a fine is vested with the trial judge. The presentence investigation is one of a number of factors that can be used by the trial judge in exercising her discretion. It is unclear what enough consideration to a presentence investigation would be, but such an investigation could not be binding upon a trial judge to the extent that all discretion is vacated and the presentence investigation is the controlling factor to be considered and followed in its entirety. For purposes of this case, Abuse of Discretion may be defined as follows:

> 'Abuse of Discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion...And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment - one is that clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; or error of law.

Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, 1968, p.25.

In this case the record (i.e. tape recording of the sentencing) reflects that the trial judge read the presentence investigation, as did the prosecution, defense counsel and the defendant. Further record reflects that court records from the Okanogan County District Court were received after the presentence was complete and submitted. The record does not reflect that the trial judge in this case was clearly erroneous and the weight she gave to the presentence investigation was well within her discretion. The assertion of the appellant that there was an abuse of discretion will not be considered for appeal, in this case.

IV. ABUSE OF DISCRETION

The appellant asserts that a further abuse of discretion occurred when the trial judge stated during the sentencing that “You have never been thumped on.” (Quote from Notice of Appeal.)

The appellant has pulled a phrase from the dialogue of the Court. It is necessary to paraphrase what the trial judge said and then consider the rule in Part III of the Opinion.

After the parties were allowed to make a statement, the trial judge made the following statement:

> What I do notice, Mr. Waters, is that no one has really thumped on you before. No one has said that your driving and your alcohol activities need to have some serious consideration. The most that you've had is AIS. In addition there may be

> conditions on a 1981 DWI from Okanogan County. No one has really gotten you any help for what is an alcohol problem.

When the statement that was alleged to be an abuse of discretion ("You have never been thumped on") is placed in the context, the intent of the trial judge is discernable. The trial judge concluded that the defendant's driving and alcohol activities had not been given serious consideration in prior criminal cases. This conclusion was reasonable in these circumstances, and the statement as quoted by the appellant was not clearly erroneous. The assertion of the appellant that there was an abuse of discretion will not be considered a ground for an appeal in this case.

The record reflects that the trial judge imposed 90 days jail with 90 days suspended and a $500.00 fine with $500.00 suspended for Resisting Arrest. Resisting Arrest is a Class B offense, Code at 5.4.17, which is punishable by 3 months, or a fine not to exceed $250 or both imprisonment and a fine, Code at 5.7.02. It is clear that there was not authority to impose a $500.00 fine for Resisting Arrest and sentencing for Resisting Arrest will be remanded.

Based on the foregoing, the appeal of the appellant, Tommy Waters, is hereby dismissed as there are no grounds upon which to grant an appeal. The sentence for Resisting Arrest is remanded.

It is So Ordered.

Tommy L. WATERS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP85-7231, AP85-7232, 1 CTCR 21

1 CCAR 21

[Tommy L. Waters, Appellant, pro se.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Initial hearing held April 16, 1985. Decided June 24, 1985.
Before Chief Judge Ward, Judge Bonga and Judge Wynecoop

WARD, C.J.

FINDINGS

1. On April 5, 1985, Tommy L. Waters filed a Notice of Appeal in Case No. 84-7231 and 84-7232.

2. A Judgment and Sentence Pursuant to Sentence on Remand in Case No. 84-7231 and 84-7232 was filed March 12, 1985.

3. On April 11, 1985, a letter to Jane Smith [Court Administrator] from Tommy Waters was filed. In the letter Mr. Waters demanded that he be notified when his appeal would be heard and that he be allowed to be present "to present my self as my own attorney."

4. On April 9, 1985 an Order Staying Sentence in Case No. AP84-7231 and AP85-7232 was filed.

5. The Court of Appeals convened for the first time on April 16, 1985 by conference call between Judges Dave Ward, Dave Bonga and Richard Wynecoop. The Court considered the failure of the appellant to file a Notice of Appeal under the Tribal Law and Order Code at Section 1.9.03 and whether the issues raised could be considered. The Court also considered the appellant's demand for a hearing. It was decided that the appellant be given the opportunity to convince the Court of Appeals as to whether this appeal should go forward. Briefs were to be submitted by May 3, 1985 and the appellant was sent a letter to that effect.

6. The appellant did not file a Brief by May 3, 1985.

CONCLUSIONS

1. The appellant has failed to convince the Court that the appeal should be granted.

2. The Notice of Appeal from a Judgment and Sentence Pursuant to Sentence on Remand filed March 12, 1985, which was filed April 5, 1985 is untimely under CTC §1.9.03.

3. The Order Staying Sentence should be lifted.

Based on these Findings and Conclusions,

It is Ordered that the Appeal in this case is dismissed, that the Stay be lifted and that the Order be effective upon filing in the Colville Tribal Court.

Tommy L. WATERS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP85-7231, AP85-7232, 1 CTCR 22

1 CCAR 22

[Tommy L. Waters, Appellant, pro se.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Hearing held August 26, 1985. Decided August 26, 1985.
Before Chief Judge Ward, Judge Bonga and Judge Wynecoop

UNANIMOUS PANEL

The Colville Court of Appeals convened on August 26, 1985 at 10:00 a.m. in the Colville Tribal Courtroom. The appellant, Tommy Waters, was not present. The appellee, Colville Confederated Tribes, was represented by it's prosecutor, Robert Widdifield.

The Court was convened to consider a document captioned "Notice of Appeal" filed on June 28, 1985, in the above captioned cases.

The Colville Code at § 1.9.03 provides that:

> Within ten days of entry of judgment, the aggrieved party may file with the Tribal Court written Notice of Appeal...

In these cases judgment was entered on December 6, 1984 and March 12, 1985. The appellant would have had ten days from these dates to file a Notice of Appeal. The appellant did not comply with the time periods and the document captioned Notice of Appeal and filed June 28, 1985 is untimely.

There is no provision in the Colville Code regarding the finality of decrees of the Colville Court of Appeals. It should be the rule that decisions of the Colville Court of Appeal are final for that case. In other words, a party cannot appeal decisions from the Court of Appeals. It could be asserted that the document captioned Notice of Appeal and filed June 28, 1985 was an appeal from an Order entered by the Appeals Court which was dated June 24, 1985. The Notice of Appeal filed June 28, 1985 is not valid and will not be recognized as a Notice of Appeal. The Order entered by the Court of Appeals on February 28, 1985 is the final decision in this matter. This decision and other orders entered by the Colville Court of Appeals cannot be appealed.

The Court of Appeals has reviewed all allegations put forth by the appellant and finds no merit in the allegations.

The Stay of Sentence will be lifted and the sentences reimposed effective this date.

It is So Ordered.

Tommy L. WATERS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP85-8235, 1 CTCR 24

1 CCAR 23

[Tommy L. Waters, Appellant, pro se.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Initial Hearing held December 18, 1985. Decided February 20, 1986
Before Chief Judge Whitford, Judge Pascal and Judge Miles

WHITFORD, C.J.

SUMMARY

On September 6, 1985, Petitioner filed a Petition for Writ of Habeas Corpus. On that same date, the Writ was denied as the defendant was not in custody at the time. Another Petition for Writ of Habeas Corpus was filed and a hearing held. Judges Dupris, Naff and Stewart recused themselves from this hearing and Judge Jean Vitalis was appointed as Judge Pro Tem.

Judge Vitalis reviewed the record, heard oral arguments and considered briefs filed by both parties. On November 7, 1985, Judge Vitalis entered an Opinion and Order Dismissing Writ of Habeas Corpus. On November 9, 1985, Petitioner filed a Notice of Appeal and a Request to Stay Sentence. The Appellate Panel held a conference call on December 18, 1985 for the purpose of appointing a Chief Judge and determining what was necessary to proceed. It was determined that the Panel had enough facts before them to make a decision.

ISSUE

Should the decision dismissing the Writ for Habeas Corpus be overturned, remanded or denied based on the Notice of Appeal filed by the petitioner Tommy L. Waters.

Mr. Waters based his Writ for Habeas Corpus on the following grounds: A. He was sentenced and tried by an unqualified judge; B. It is a violation of due process to be tried by an unqualified judge; C. There was a gross denial of substantial justice in that the Appellate Panel on the Resisting Arrest and Reckless Driving offenses did not seriously consider the appellant's arguments concerning the qualifications of the trial judge; D. That the Appellate Panel did not expressly affirm the Trial Court's decision therefore the sentence could not be carried out; E. Irregularity in proceedings for unqualified judge to sit; and F. Substantial justice was not done because the defendant did not receive a transcript of his original trial. Petitioner makes his request for Appeal based on four additional grounds: A. The decision of the Trial Court judge was contrary to law and the evidence; B. Substantial justice was not done because the Trial Court judge ignored arguments of the defendant; C. The Trial Court judge felt that there had been no new evidence presented by the defendant; and D. The qualification of Judge Baker had not been addressed except perfunctorily.

It is the opinion of this Appellate Panel that there should not have been more than one appeal in this matter. The grounds presented were frivolous and a waste of the Court's time and money. It was also the opinion of this Panel that the Trial Court and the previous Appellate Panel gave Mr. Waters every opportunity to be heard and to present his arguments.

Pursuant to CTC § 1.5.05, the Tribal Court was granted the authority by the Tribal Council when "...the course of proceeding is not specified in this Code, any suitable process ... may be adopted which appears most

conformable to the spirit of Tribal law."[34] There were no specific qualifications required to sit as a Judge Pro Tempore/Visiting Judge in the Colville Tribal Court. The Tribal Court then had the authority to appoint a judge to sit as Judge Pro Tem through any suitable process which most appeared conformable to the "spirit" of Tribal law. As Judge Baker had been approved previously by the Tribal Council and was the closest available judge to the Reservation, she was the obvious choice. To question the delegated authority of the Tribal Court to appoint Judge Baker[35] is to question the authority of the Tribal Council to delegate its authority in everyday matters that normally need not be brought to the attention of the Council.

Therefore, based on the foregoing

It is Ordered that the appeal on the Writ for Habeas Corpus shall be denied and the decision of the Trial Court shall be affirmed. The Stay of Execution is hereby lifted and the defendant shall begin serving the remainder of his sentence immediately.

John. D. GALLAHER, Appellant,
James H. GALLAHER, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP87-10135-42/74, 1 CTCR 32
1 CCAR 24

[Alfred Kitching, Attorney at Law, Spokane Washington, counsel for Appellants.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellee.]

Motion hearing held November 24, 1987. Decided January 7, 1988.
Before Chief Judge Wynecoop, Judge Bonga and Judge Whitford

WYNECOOP, C.J.

This matter having come before the Colville Tribal Appellate Court for a hearing on the Motion to Dismiss Appeal filed by the Colville Tribe and the Court after reviewing the matter and hearing oral arguments by counsel, makes the following determination:

The Motion to Dismiss filed by the [appellee] in this matter should be granted in that the appeal was not timely perfected and the continuance should not be granted. This matter is referred back to the Trial Court for disposition of the sentence imposed.

It is So Ordered.

James F. PHILLIPS, Appellant,
vs.
Julie A. PHILLIPS, Appellee.
Case No. AP88-CV88-778, 1 CTCR 38

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[34] C.T.C. §1.5.05 Means to Carry Jurisdiction Into Effect.

[35] See Resolution 1985-67, dated 2/7/85, approved by the Commission of Indian Affairs.

1 CCAR 25

[James Phillips, Appellant, pro se.
Julie A. Phillips, Appellee, pro se.]

Decided December 22, 1988
Before Chief Judge Bonga, Judge Hawk and Judge Chenois

PER CURIAM

This matter having come before the Colville Tribal Appellate Court upon filing of an Appeal by petitioner, James F. Phillips, on May 25, 1988. The Appellate Panel reviewed the record and tape of the hearing and makes the following determinations:

1. The Colville Tribal Court has jurisdiction over this matter pursuant to Chapter 1.3, Jurisdiction, of the Colville Tribal Law and Order Code.

2. There were two issues to be considered by the Appellate Panel: a) Was it an error for the Trial Court to set petitioner's child care payments at $175.00; b) Should have the request for attorney's fees by the respondent been denied.

3. The Court record, Findings Of Fact, are to be corrected.

> Paragraph II of Findings Of Fact shall state: "The parties separated on January 15, 1987," in lieu of "The parties separated on January 15, 1988."
> Paragraph IV is to be corrected to state, "Both parties are enrolled members of the Colville Confederated Tribes. At the time of filing of the petition the petitioner resided in Electric City, Washington and was employed by the Tribe, and the respondent resided on the Colville Indian Reservation with the minor child.

Issue Number 1

Was it error to set Petitioner's child care payments at $175.00?

In civil cases the applicable law can be found in Chapter 3, § 3.4.03, of the Colville Tribal Code which states:

> In all civil cases the Court shall apply, in the following order of priority, any applicable laws of the Colville Confederated Tribes, Tribal case law, Tribal customs, state statutes, state common law, federal statutes, and federal common law and international law.

The Colville Tribal Code, Tribal case law and Tribal custom do not provide guidelines for setting child care payments in a divorce action. The Court must therefore look to state law for guidance.

Under Washington state law net income, which is also known as disposable income, is used for the determination of child support payments. Disposable income or net income is determined after deductions for the following are made:

1. Taxes
2. Social Security (FICA)
3. State Industrial Insurance
4. Union Dues
5. Prior support payments

Net income is therefore not what one "brings home" after deductions are made for voluntary expenses incurred by the wage earner (such as rent and loan payments made through automatic deductions). Instead, net income (earnings) are the excess of the gross earnings over the expenditures incurred in producing them.

Thus the Trial Court did not err in using Washington's rule on disposable income for determining child support payments of $175.00 a month. The Appellate Panel therefore finds no basis to disturb the Trial Court's ruling on child support, and the appeal is denied.

Issue Number 2

Should have Respondent's request for attorney's fees been denied?

The Colville Tribal Code has no statutory requirements addressing attorney's fees. The Appellate Court is also unaware of any Tribal case law or Tribal custom which speaks to the issue of attorney's fees. Under CTC § 3.4.03, Applicable Civil Law, the Appellate Court next looks to Washington state statutes. Since there are no state statutes which determines attorney fees awards, state common law must be applied. Under Washington State case law the awarding of attorney fees is a matter of discretion of the trial court. The trial court's determination of attorney fees will not be reversed on appeal unless the trial court's action was untenable or manifestly unreasonable. *Valley v. Selfridge*, 30 Wa. App. 908 (1980).

On March 15, 1988, Chief Judge Anita Dupris issued a Temporary Order of Relief in this matter. The Temporary Order states the attorney fees would be denied at that time, but that the respondent, Ms. Phillips, could raise the request for attorney's fees at the time of trial. On April 28, 1988 this matter went to trial. The Trial Court decreed that the petitioner was required to pay respondent's attorneys fees of $500.00, which is under appeal. The Appellate Panel after reviewing the record and tape does not find the award of attorney fees to be contradicting, untenable or unreasonable. The appeal of attorney's fees is therefore denied.

It is Hereby Ordered that the appeal filed by Mr. James F. Phillips is denied.

Jerome L. MONAGHAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Plaintiff.

Case No. AP88-10623, 1 CTCR 39

1 CCAR 27

[Jerome L. Monaghan, Appellant, pro se.
Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, advocate for Appellee.]

Decided March 8, 1989.
Before Chief Judge Fry, Judge Chenois and Judge Hawk

FRY, C.J.

This matter having come before the Colville Tribal Court of Appeals on notice of the appellant, and the Court having reviewed the files and records herein, then therefore

It is Ordered, Adjudged and Decreed that:

1. The appellant's basis for appeal, which is failure to appoint legal counsel for a person, is insufficient due to the Court's finding that it is an issue which has been widely litigated and found to be valid pursuant to the Indian Civil Rights Act; thus it was not error for failure of the trial judge to appoint counsel for the defendant.

2. The issue of whether the defendant is allowed to exchange jail days for alcohol inpatient days is remanded to the Trial Court judge for clarification and inclusion in the Judgment and Sentence as appropriate; otherwise, and in all other respects, the decision of the Trial Court judge is affirmed.

It Is So Ordered.

Polly PEASLEY, Appellant,

vs.

Arnie HOLT, Appellee.

Case No. AP88-CV88-888, 1 CTCR 40

1 CCAR 28(1)

[Polly Peasley, Appellant, pro se.
Arnie Holt, Appellee, pro se.]

Decided March 15, 1989.
Before Chief Judge Johnson, Judge Bonga and Judge Ward

JOHNSON, C.J.

This matter having come before the Court upon a filing of an Appeal Notice by appellant on September 8, 1988. The appellee then filed a Motion to Dismiss the Appeal as not timely filed. The Court ordered a briefing schedule and duly notified the parties of same. The appellee, Mr. Holt, filed a legal brief in support of his motion. The appellant did not file a legal brief supporting her appeal or opposing the motion to dismiss. Appellant requested a continuance of the briefing schedule which was denied.

The Court has reviewed and its decision is based on the record of this matter, the legal brief submitted, and CTC § 1.9.03, Notice of Appeal.

The judgment from which the appellant appeals was filed on August 23, 1988. In order to comply with CTC § 1.9.03 and file a timely notice of appeal the appellant should have filed no later than September 2, 1988. Her appeal notice is dated September 2, 1988 but was not filed with the clerk until September 6, 1988. The appellant has not assisted the Court by brief or affidavit to clarify this filing delay even though she was given an opportunity to do so. The Court concludes that the appeal is not timely filed as being past the ten (10) day limitation required by CTC § 1.9.03, Notice of Appeal. In accord is the case of *Tommy Waters v. Colville Confederated Tribes* (Colville Court of Appeals [AP85-7231/32, 1 CTCR 21, 1 CCAR 21], decided June 1985).

It is therefore Ordered and Adjudged, that the appeal filed by appellant on September 6, 1988 is dismissed as not timely filed.

Stanley V. McCRAIGIE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP89-11177, 1 CTCR 44

1 CCAR 28(2)

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided September 21, 1989.
Before Chief Judge Miles, Judge Baker and Judge Johnson

MILES, C.J.

This case having come before the Colville Tribal Appellate Court on September 21, 1989 by conference call before Judge Rebecca Baker, Judge Wanda Miles, and Judge William Johnson.

Upon filing of an appeal by the appellant on March 22, 1989, the Court requested written legal briefs and established a schedule for submission. On July 10, 1989 a motion for extension of time was filed by Stephen L. Palmberg, attorney for appellant. An order granting an extension until August 31, 1989 was entered on July 18, 1989 by presiding Chief Judge Wanda L. Miles.

The Court has reviewed the record on appeal which consists of the case file, number AP89-11177 and all documents therein; the cassette tape record of AP89-11177; and applicable Colville Tribal Law. Upon review of the records this Court concludes the following:

1. Although the appellant through legal representation of Stephen L. Palmberg filed a Notice of Appeal stating four issues specifically being: (a) Misconduct of prosecution; (b) accident or surprise; (c) newly discovered evidence; (d) substantial justice not done. The appellant failed to submit a brief, as ordered, to support his claim in these four areas for this Court to consider. The record shows this Court granted an extension to file a response brief, deadline being August 31, 1989.

2. There is no indication on the record of misjustice having been done or evidence or error by the prosecution.

Therefore, in conclusion from our review and analysis, which is based on the case records, Tribal law, and appellant's failure to submit a brief to support his claims stated in the Notice of Appeal, the Appeal is denied.

So Ordered.

Robert A. FREUND, Appellant,

vs.

Judy L. PEARSON, Appellee.

Case No. AP89-CV87-762, 1 CTCR 43, 16 ILR 6150

1 CCAR 29

[Robert A. Freund, Appellant, pro se.
Judy L. Pearson, Appellee, pro se.]

Decided September 28, 1989.
Before Chief Judge Johnson, Judge Ward and Judge Miles

UNANIMOUS PANEL

This case having come before the Court on appeal from a custody order issued January 5, 1989 by the Colville Tribal Court. Appellant appeals on grounds his civil rights were violated. The Court requested written legal briefs and established a schedule for their submission. Specifically, the Court requested briefing on whether the appeal was filed within the statutory ten day time limit; and whether the Notice of Appeal indicated with sufficient particularity the grounds for appeal. The parties without legal counsel submitted legal memoranda as requested. Oral argument was not requested and the Court does not deem it necessary to hear same.

The Court has reviewed the legal memoranda submitted, the record on appeal, and applicable Colville Tribal law. The record on appeal consists of the case file number CV87-762 and all documents therein, and the cassette tape record of the January 4, 1989 custody hearing.

TEN DAY STATUTORY TIME LIMIT

Colville Tribal law requires the written Notice of Appeal to be filed within ten days of the entry of the judgment being appealed. *Colville Tribal Code*, § 1.9.03. "To be filed" usually means to place the paper or document within the official custody of the court clerk. In computing any period of time prescribed by Tribal law, the day of the act or event from which the designated period of time begins, shall not be counted or included. The last day of the period so computed shall be counted or included, unless it is a Saturday, Sunday, or a legal holiday, in which case it runs until the next day. *Colville Tribal Code*, § 1.11.15.

In this case the envelope containing the Notice of Appeal was marked received on January 16, 1989. The written Notice of Appeal was marked filed on January 17, 1989. When a situation like this occurs, and in the absence of a court rule to the contrary, we interpret the official custody of the court clerk to begin on the earliest notation of receipt. Here, court clerk custody would begin on January 16, 1989.

The ten day period ended on a Sunday (January 15) and would by Tribal law extend to the next day, January 16, 1989. It should be noted that Martin Luther King Jr.'s birthday was an official federal legal holiday observed on January 16, 1989. If this holiday was observed by the Colville Tribes the ten day period would be extended to January 17, 1989.

We therefore conclude from our application of law to these facts that the written Notice of Appeal was filed on January 16, 1989 which is within the ten day statutory time limit prescribed by the *Colville Tribal Code*, § 1.9.03.

GROUNDS FOR APPEAL

Colville Tribal Code, § 1.9.03A requires a written Notice of Appeal to indicate with particularity the grounds which are the basis of appeal. The reason for this requirement is to put the opposing party on notice as to what is assigned as legal error. The opposing party or appellee then has an adequate opportunity to prepare for argument.

Appellant's grounds for appeal, according to his written notice, are "denial of civil rights of myself and the children and other factors to be determined at trial." He then in his written legal memorandum indicates his civil rights were violated because the Colville Tribal Court did not have jurisdiction of child custody matters. He also argued the Court did not have jurisdiction of him personally. We will subsequently discuss these arguments.

A general statement that "my civil rights were violated" is not sufficient specificity or particularity. However, we are willing to allow for Appellant's lack of legal training in discerning his grounds for appeal. His legal memorandum, with attachments, clarifies that he means his civil rights are violated because he contends the Court did not have jurisdiction of the custody matter or over him personally. See p.1 paragraph 1, Appellant's brief.

The Court concludes in light of appellant's lack of legal training that his legal memorandum clarified or specified his grounds, and therefore he sufficiently stated his grounds for appeal.

JURISDICTION

The Colville Tribal Court based its jurisdiction on *Colville Tribal Code*, § 13.4.09 which is entitled: "Child custody proceeding -- commencement -- notice -- intervention." This statutory authority is cited in the petition for custody filed originally by Appellee. Personal jurisdiction over all necessary parties, including appellant, was based on the tribal enrollment and domiciles of the appellee and her children, service of the petition for custody on appellant by certified mail, notice to appellant of the January 4, 1989 hearing, appearance by counsel Sloan for appellant, and appellant's appearance in the matter requesting a continuance of the January 4 hearing. This is specified in the cassette recording of the January 4, 1989 hearing and order of custody.

Appellant argues the Court lacked subject matter jurisdiction because it was not authorized to adjudicate

child custody proceedings under the Indian Child Welfare Act. Appellant argues that he has consolidated this appeal with another matter which adds further confusion to the issues. Appellant's brief p.3. We agree.

The statute included in Chapter 13, *Colville Tribal Code* (known as the Domestic Relations Code) is authorized under the constitutional and sovereign power of the Colville Confederated Tribes. See Resolution 1986-645, Colville Business Council, included as preamble to enactment of Domestic Relations Code.

This chapter is not based on the Indian Child Welfare Act and therefore appellant's argument disputing jurisdiction for this reason is not relevant. This chapter specifically authorized the Tribal Court to adjudicate child custody proceedings between parents which is the case here.

Furthermore, any argument that Public Law 280 is a grant of exclusive domestic relations jurisdiction to the state of Washington is not supported by the wording of the Act. Courts have construed Public Law 280 as leaving substantial governmental authority with the tribes, holding that the statute should only be interpreted to delegate to the states that jurisdiction which Congress clearly intended to transfer. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Rosa Band v. Kings County*, 532 F.2d. 655 (9th Circuit 1975), *cert. denied*, 429 U.S. 1938 (1977). Also see Cohen, *Handbook of Federal Indian Law*, p. 344-345, 1982 edition.

Appellant further argues that the Court did not have jurisdiction because of his domicile. He cites *Mississippi Bank of Choctaw Indians v. Holyfield, et al.* (U.S. Sup. Ct., decided April 3, 1989), 16 ILR 1008 (1989), in support of his argument.

Holyfield does not support appellant's argument. Specifically, it dealt with exclusive tribal jurisdiction of Indian children under the Indian Child Welfare Act. The Supreme Court interpreted the meaning of "domicile" to be expressed by the ordinary meaning of the words used, in light of the statute's (Indian Child Welfare Act) object and policy. 16 ILR at p. 1013. The Court indicated that the domicile of minors is usually determined by that of their parents. Although the Indian children involved in *Holyfield* had been deliberately kept from the reservation, the court concluded the Tribe had exclusive jurisdiction because of the on reservation domicile of the mother. The state court adoption proceedings were therefore reversed. The case at hand is not based on the Indian Child Welfare Act and the domicile of the children is on the reservation the same as their mother's. See January 4, 1989 Custody Order, Findings of Fact and Conclusions of Law.

The Colville Tribal Court based its personal jurisdiction in this matter on the hearing notice and petition to appellant by certified mail, his appearance by legal counsel, his appearance in requesting a continuance in the matter, and the tribal enrollment and domiciles of appellee and her children. It could have also considered *Colville Tribal Code*, § 1.13.02 and § 1.13.03, the Tribe's long-arm statute as a basis for jurisdiction but apparently did not find it necessary to do so. State courts utilize long-arm statutes for service of process outside the state or territorial jurisdiction.

This Court concludes from our review of the record and legal memoranda submitted that the Colville Tribal Court had subject matter jurisdiction over the child custody proceedings involved herein by virtue of Tribal law; and that the Court had jurisdiction over all parties, including appellant for the reasons enumerated by the Tribal Court.

In accordance with our review and analysis, which is based on the case record, legal memoranda, and Tribal law, the appeals should be denied.

Accordingly, and for the reasons stated, the appeal in this custody matter is denied.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Peter P. GEORGE, Appellee.

Case No. AP85-8054, 3 CTCR 01

1 CCAR 32

[Robert F. Widdifield, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, spokesman for Appellant.
Peter P. George, Appellee, pro se.]

Initial Hearing held June 3, 1985. Decided January 18, 1990.
Before Chief Judge Baker, Judge Chenois and Judge Naff

BAKER, C.J.

This matter came before the Colville Tribal Court of Appeals upon a filing of a Notice of Appeal by Robert F. Widdifield, counsel for plaintiff. On June 3, 1985, the Appellate Panel reconvened to determine what further proceedings were needed in this matter. The Appellate Panel determined that the Order of Briefing and Scheduling of April 14, 1985 was complied with by plaintiff/appellant; the Panel received no response from the defendant/appellee. The Panel having received and reviewed all plaintiff's case citations, plaintiff's memorandum, and the in-court tape recording of the Trial Court proceedings in this matter, the ruling is made that the Trial Court should be affirmed.

STATEMENT OF FACTS

The relevant facts in this matter as disclosed from the taped record of the arraignment are:

1. The arresting officer was on routine patrol on 3/5/85 at 4:00 p.m in East Omak in an area believed by the officer to be a high crime area.
2. No crimes had been reported in the recent past in the area in question.
3. The officer observed a young male walking.
4. The officer did not recognize the young male as local.
5. The officer stopped the defendant and asked him to identify himself.
6. Upon stopping defendant, the officer noticed the defendant was slightly unsteady, had disheveled clothing and had an odor of intoxicants about him.

The issue at bar is: Was the "stop" permissible?

In analyzing the issue, the Court addresses each citation of authority given by plaintiff.

First, plaintiff, in his discussion, cites Colville Tribal Code § 4.1.11, Applicable Law.[36] Since a "stop" is a seizure, federal and state criminal law are looked to for authority.

Plaintiff argues that the facts in the case at bar justified a *Terry* stop. A *Terry* stop is justified by "reasonable suspicion" (less than probable cause but more than a hunch). *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the officer had observed defendants go through a series of acts, each of them perhaps innocent in itself, but which taken together and along with the officer's training, raised a reasonable suspicion that criminal activity was afoot

[36] Applicable Law. In all cases the Court shall apply, in the following order of priority unless superceded by a specific section of Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

and thus the situation warranted further investigation and a limited intrusion whereby the officer properly conducted a "stop and identify", i.e. he stopped the defendants and required them to identify themselves and state their business. Chief Justice Warren, speaking for the Court in *Terry*, and laying down the requirement for articulable facts, said, "This demand for specificity in the information upon which police action is predicated is the central teaching of this court's Fourth Amendment jurisprudence". *Id.* at 21, n. 18.

Plaintiff then cites *United States v. Villamonte-Marques and Hamparian*, 77 L.Ed.2d 22, 103 S.Ct. 2573 (1973). This opinion deals with stops of water vessels in channels leading to open seas for the purpose of examining documents and involves the unique and compelling governmental interest of the enforcement of U.S. customs laws. Since the case at bar involves an individual walking in East Omak, an inland city, where no customs law violation could be occurring, the *Villamonte-Marques* case is inapposite.

Plaintiff also relies on *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Once again, this is search and seizure law applied in the customs arena but moreover demands that two elements be present before a stop is permissible: (1) Assessment must be based upon all of the circumstances with various objective observations, such as police reports of modes or patterns of operations of certain kinds of lawbreakers, and (2) Assessment of the whole picture must yield a suspicion that the particular individual being stopped is engaged in wrongdoing. Neither of these elements exists in the case at bar.

Next Plaintiff argues that *United States v. Hensley*, 83 L.Ed.2d 604 (1985), should control. In that case an investigative stop was made pursuant to a "wanted flyer" issued by a neighboring police department. The Supreme Court upheld the stop as justified even in the absence of a warrant of arrest or actual probably cause. Since there was no flyer placing suspicion on the defendant in the case at bar, the key element of the *Hensley* holding is absent. Thus *Hensley* does not control.

Plaintiff lastly cites *State v. Belanger*, 36 Wn.App. 818 (Div. II, 1984), a case in which the officer based the stop on the prior activity of Huddleson, a known transient, who upon seeing police approaching, hurriedly handed over a sleeping bag to the defendant and walked away. This activity, coupled with the officer's prior acquaintance with Huddleson, alerted the officer to further inquiry. This case is readily distinguishable from the case at bar, since the officer here had no prior acquaintance with the defendant.

We see no justification for the officer's intrusion upon the defendant in stopping him on the public street. Accordingly, we find that the Trial Court correctly dismissed the case, and it is now, therefore

Ordered that the decision of the Trial Court be, and it hereby is, Affirmed.

WYNNE, Jeffrey, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP89-12291, 1 CTCR 46

1 CCAR 34

[Jeffrey Wynne, Appellant, pro se.
Maureen Byers, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided June 29, 1990.
Before Chief Judge Bonga, Judge Baker and Judge Chenois

BONGA, C.J.

The Appellate Panel by telephonic conference call on June 29, 1990 decided that based on the recent U.S.

Supreme Court ruling in the case *Duro v. Reina*, that the Colville Tribal Court does not have jurisdiction in this mater. The Court also concluded that the appellant was never officially represented by counsel during the appeal and admonishes the attorney Tulee for representing that at this time he is able to defend parties before the Colville Tribal Court.

It is Ordered that the case of Wynne v. CCT is dismissed.

OVERTURNED IN PART Randy L. THOMAS, Appellant,

See 3 CCAR 01 vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP90-12425, AP90-12426,

AP90-12427, AP90-12428, 1 CTCR 48, 18 ILR 6126

1 CCAR 35

[Owen M. Gardner, Attorney at Law, Okanogan WA, counsel for Appellant.
Maureen Byers, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued September 14, 1990. Decided October 29, 1990.
Before Chief Judge Bonga, Judge Roe and Judge Chenois

UNANIMOUS PANEL

The Appellate Panel of Chief Judge Bonga, Appellate Judge Roe and Appellate Judge Chenois heard oral arguments in the consolidated appeal of Colville Confederated Tribes v. Randy L. Thomas, case numbers AP90-12425 Abduction, AP90-12426 Rape, AP90-12427 Attempted Criminal Homicide and AP90-12428 Reckless Endangerment at the Colville Confederated Tribes (CCT) courthouse in Nespelem, Washington on September 14, 1990.

After reviewing the written file and hearing oral arguments of counsel the Appellate Panel dismisses with prejudice the charges AP90-12425 Abduction, AP90-12426 Rape and AP90-12427 Attempted Criminal Homicide. The Panel also dismisses without prejudice charge AP90-12428 Reckless Endangerment.

DISCUSSION

Issue 1

Was the Defendant Denied Due Process and Substantial Justice in That an Attorney Was Not Appointed to Represent Him in this Tribal Court Proceeding?

The Appellate Panel felt that counsel for the appellant amply presented his argument that defendant Thomas was denied due process in that an attorney was not appointed to represent him. The Panel however disagrees with counsel's view that the Colville Confederated Tribal (CCT) Court was in such a situation that lawyers could be made available to represent indigent defendants. The Panel believes that situation did not exist when this case came to bar, and without the current Tribal Public Defender's office the Panel believes that current defendants would still be forced to proceed without attorney services.

The Panel however believes that the CCT failed to provide due process and substantial justice to defendant Thomas. The Panel feels that the Court should have exercised greater latitude in providing the pro se defendant with pre-trial and in-court advice in light of the defendant's personal history and the ramifications of the alleged charges.

Issue 2

Was the Defendant Denied Due Process and Substantial Justice When, Though He Had Requested a Jury Trial, His Request Was Deemed "Waived" with No Notice to Him.

The Appellate Panel found that Randy Thomas' demand for a jury trial was well known to the Court and Court personnel. The Panel acknowledges the fact that at Mr. Thomas' arraignment he was informed orally, but not in an explicit manner, that if he failed to notify the Court 10 days prior to his scheduled jury trial that a jury trial was still requested, the request would be considered waived. The Panel was unable to locate documentation that the defendant was further advised of the ramifications of his failure to give notice that a jury trial was still requested.

There is no written record in the clerk's papers or the Court file indicating affirmatively that Randy Thomas understood and agreed to the waiver of his right to a jury trial.

In addition, the Panel feels that the Tribal Code is not clear on this issue. There is no indication that Randy Thomas was advised of the CTC provision 4.1.05 which addresses the 10 day waiver rule. CTC 4.1.05 states:

> "The court must be notified by the defendant 10 days prior to a scheduled jury trial that a jury trial is still requested, or the right to a jury trial is waived."

This provision appears in a chapter called "General Rules" and not in that portion devoted to criminal procedure wherein provision CTC 2.6.05 is found which states:

> "Any person accused of an offense punishable by imprisonment may demand a jury trial. The demand may be made by oral demand in open court or by filing a written demand with the clerk. In any case, the demand must be made at least 14 days before the date set for trial, or the right shall be deemed waived..."

The Panel concludes that the waiver provision should also be found in the criminal procedure section of the Tribal Code, to insure that defendants, especially pro se defendants, have the opportunity to receive notice of an important waiver of rights guaranteed by the Indian Civil Rights Act. In addition, the Panel believes that in order for the waiver to be fair the defendant needs to receive some type of written notice.

Issue III.

Was the Defendant Denied Due Process and Substantial Justice by Way of Judicial Misconduct and Irregularities in the Proceeding Both Before and During Trial?

The Appellate Panel found that the Court denied the defendant due process by discouraging the attempt to subpoena Dr. Vicki Black. The Panel believes that clarification regarding subpoenas needs to be added to the Tribal Code. At this time a pro se defendant may read the Code and conclude that all that is needed for the defendant to have witnesses testify is to identify to the Court who they are. There is no indication that the defendant may be responsible to provide for their costs. Similarly there is no explanation as to what an indigent without financial resources is supposed to do, in regards to those expenses. In this case it appears that the testimony of Dr. Black was crucial to the rape charge. The Doctor's report which was filed with the Defendant/Appellant's Reply Brief to Plaintiff/Appellee Brief raised questions that needed to be answered before the Trial Court entered a finding of guilty beyond a reasonable doubt.

The Appellate Panel found that the Trial Court judge's direct statements regarding his assessment of the alleged victim's credibility and veracity before the victim had testified did deny the defendant due process and substantial justice. In addition the defendant was further denied due process in not being afforded sufficient time to review documents and prepare for the testimony of the complaining witness. The Panel found that the Trial Court judge should have given the defendant more than approximately 15 minutes of time to review the discovery documents in light of the seriousness of the charges against him. The Panel believes the defendant was precluded from reviewing documents which might have been useful in examination of witnesses against him and particularly the alleged victim. The Panel believes that the seriousness of the offenses charged should have had some bearing on the Court's actions with regard to trial procedure. The Panel holds that defendant Thomas, acting pro se, with limited education and understanding, was entitled to more deference than was accorded him by the Court in this proceeding to the final result that not only was substantial justice impaired, but that he was denied due process by the Court's conduct.

Issue IV.

Was Defendant Denied Due Process in That the Court Erred in Finding the Defendant Guilty of All Charges When There Was No Substantial Evidence of Record That All Elements of All the Offenses Charged Had Been Proved Beyond Reasonable Doubt?

The Panel finds that the defendant was denied due process in that the Court found the defendant guilty of all charges when there was insufficient evidence of record that all elements of all the offenses had been proved beyond a reasonable doubt.

General principles of law require that if there is any reasonable doubt as to any element of an offense then the trier of fact has a duty to return a verdict of not guilty. The only evidence before the Trial Court with respect to the actions of the defendant on the night in question was the testimony of Ms. Nanpuya. The Appellate Panel found her testimony insufficient to establish each and every element of each of these offenses.

In closing, the Appellate Panel was surprised that there was no record of declination to prosecute these charges under the Indian Major Crimes Act by the federal government. If the charges had been substantiated the Panel questions whether or not the penalties, which are limited by federal law, would have been severe enough to punish the offender.

For the above reasons the Colville Tribal Court of Appeals dismisses with prejudice the charges 89-12425 Abduction, 89-12426 Rape and 89-12427 Attempted Criminal Homicide. The Court of Appeals also dismissed without prejudice the charge 89-12428 Reckless Endangerment.

REVERSED IN PART Melvin R. LaCOURSE, Appellant,

See 1 CCAR 46 vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP90-13206,AP90-13207, AP90-13208, 1 CTCR 49

1 CCAR 38

[Frank S. LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA , counsel for Appellant . Maureen Byers, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem, counsel for Appellee.]

Argued January 16, 1991. Decided January 21, 1991.

Before Chief Judge Bonga, Judge Miles and Judge Ward

BONGA, C.J.

After reviewing the record and applicable law, the Colville Tribal Court, in a judge trial on August 20, 1990 found the defendant guilty of the charges Reckless Driving 90-13206, Driving While Intoxicated 90-13207 and Driving While Suspended 90-13208. An appeal was timely taken and the Colville Tribal Appellate Court after reviewing the tapes, Court record and hearing oral arguments on the appeal Affirms the Colville Tribal Trial Court in part and Remands for further determination the Order for Restitution.

DISCUSSION

I. Did the Trial Court Err by Denying Defendant/Appellant's Motion to Dismiss on the Grounds That the Charged Offenses Did Not Occur on "The Roads of the Colville Indian Reservation" or on a "Public Highway"?

The incident forming the basis for the above charges occurred in the driveway of HUD house 1021 in Nespelem, Washington, adjacent and connected to a public road within the Colville Reservation. The defendant argued that the charged traffic offenses should be dismissed as the offenses did not occur on the "roads of the Colville Indian Reservation" as required by Colville Tribal Code (CTC) 9.1.03 or a "public highway" as required by CTC 9.1.05. The Appellate Court disagrees with the defendant's position.

Under the definitions provided in section 9.1.06 of the Code, "public highways" are construed to mean "all roads, public **and private** (emphasis added), within the jurisdiction of the Colville Confederated Tribes." A driveway, according to Webster's dictionary, 1970 Ed. is "a short private road leading from a street to a house, garage or parking lot." The Appellate Panel finds that the driveway at issue in this matter is a "private road" within the meaning of a public highway as defined at CCT 9.1.06, and therefore satisfies the requirements of CTC 9.1.05, Driving While Suspended. Section 9.1.03 of the Colville Tribal Code specifies that it is unlawful to operate a motor vehicle **on the roads of the Colville Indian Reservation** (emphasis added) in violation of Chapter 9.1.01. Further, section 9.1.01 incorporates the substantive portions of several chapters of the Revised Code of Washington, among them chapter 46.61. That chapter, in section 46.61.005 states that its provisions refer exclusively to the operation of vehicles upon highways except: "(2) The provisions of ... RCW 46.61.500 through 46.61.520 shall apply upon highways **and elsewhere throughout the state**" (emphasis added). Sections 46.61.500, Reckless Driving and 46.61.502, Driving While Intoxicated are therefore not limited to driving on highways but may be applied to locations "elsewhere throughout the state" including public and private roads on the Colville Reservation.

The Colville Tribal Appellate Court therefore affirms the Trial Court's finding that the defendant is guilty of Driving While Suspended a violation of CTC 9.1.05; Reckless Driving, a violation of CTC 9.1.01 (RCW 46.61.500); and Driving While Intoxicated a violation of CTC 9.1.01 (RCW 46.61.502).

Ii. Did the Trial Court Err by Allowing Officer Hall to Testify as to What Was Told to Him by Julie Wiley?

Defendant asserts that Officer Hall's testimony as to what Julie Wiley told him was hearsay and therefore inadmissible. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). The Court finds that Officer Hall's testimony as to Ms. Wiley's statement to him was offered not to prove the guilt of the defendant but instead to provide the basis for Officer Hall's decision to seek out the defendant for investigation of the incident. Thus Officer Hall's testimony was not hearsay.

Defense counsel asserts that the defendant was denied the right to be confronted by the witness against him. The Appellate Court dismisses the claim as Julie Wiley was present at trial, was called as a witness for the prosecution, was available for cross-examination, and indeed could have been called as a witness by the defense had Counsel so desired.

Since Officer Hall's testimony regarding statements of Ms. Wiley did not constitute hearsay, and since Ms. Wiley was fully available for examination by Defense Counsel, there was no error by the Trial Court in permitting Officer Hall's testimony.

III. Did the Trial Court Err by Failing to Make Specific Findings Regarding the Defendant's Ability to Pay Before Including in the Judgment and Sentence a Financial Obligation to Make Restitution?

The Appellate Panel finds merit to the defendant's position that the Trial Court did err in entering a sentence of restitution without first finding that the defendant had the present resources to comply with the final court order. The Appeals Court believes that under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act due process requires the Trial Court to determine the defendant's ability to pay the restitution before imposing the monetary obligation. The Appellate Panel reverses that part of the sentence imposing financial obligations and, once a determination has been made regarding the amount of damages to the garage, remands the decision for specific findings. If the record supports a conclusion that LaCourse has a present or likely future ability to repay, the Court may reinstate the obligation.

It Is So Ordered that the guilty verdicts in CCT case numbers Reckless Driving 90-13206, Driving While - Intoxicated 90-13207 and Driving While Suspended 90-13208 are affirmed with their respective sentences, with the exception: that the Order for Restitution is Remanded to the Trial Court to determine the defendant's capability to make restitution.

CAVENHAM FOREST PRODUCTS, INC., dba Omak Wood Products, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP87-CV87-751, 1 CTCR 50, 18 ILR 6037

1 CCAR 39

[Grant Degginger, Lane, Powell, Moss & Miller, Seattle WA, counsel for Appellant.
Bruce Didesch, Office of Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued March 20, 1990. Decided February 22, 1991.
Before Chief Judge Bonga, Judge Stewart and Judge Chenois

BONGA, C.J.

The Appellate Panel of Judge Howard Stewart, Judge Edythe Chenois and Chief Judge David Bonga, following meetings and discussions has made the following decision that is based on all materials referred to by both parties: Court

cases, evidence, oral arguments, and volumes of references regardless of how trivial. It has taken days, weeks, months and yes, years to come to this decision. The Appellate Panel hereby affirms the Colville Tribal Court's findings, conclusions of law and issuance of a Temporary Injunction against Cavenham Forest Industries. Inc.

DISCUSSION

On August 14, 1978, the Confederated Tribes of the Colville Reservation (Tribes) enacted the Colville Interim Land Use Development Ordinance (CILDO). The CILDO was developed by the Colville Business Council in recognition of problems associated with uncontrolled development and the negative impacts that such development was having on Reservation resources. CILDO 1.1. The CILDO froze all existing land uses on the Reservation until a zoning code and comprehensive plan could be completed CILDO 1.2., 4.1.

Any property owner or user proposing to change or expand an existing use, engage in new construction or subdivide, plat or partition any property within the Reservation is required to obtain a "development permit." CILDO 5.2., 5.3., 5.4., 7.1. It further directed the Planning Department to develop regulations to implement the Ordinance's intent. CILDO 6.4. In November1978, regulations were adopted by the Colville Business Council.

Cavenham Forest Industries (d.b.a. Omak Wood Products. Inc.) is a Delaware Corporation which harvests and manufactures timber into finished wood products at numerous facilities throughout the United States. At the Omak Wood Products mill on the Colville Indian Reservation, dimensional lumber and plywood are manufactured from logs Omak Wood Products, Inc. (Omak) purchases from the Confederated Tribes and the U.S. Forest Service. Omak also cuts timber from its own lands located on the Colville Indian Reservation.

In October, 1986, Omak applied to the Okanogan County Board of Adjustment to obtain a Conditional Use Permit for an existing waste dump on its Reservation property. Okanogan County approved the application with certain conditions. As an attachment to the County permit, the County Board recommended that Omak apply for the permit required by the Tribe's Ordinance.

In December 1986, after becoming aware of Omak's Conditional Use Permit application for the waste dump and the recommendation by the County Board that Omak comply with the CILDO, the Tribal Planning Department notified Omak by certified mail of the applicability of the CILDO. The Tribes' letter advised Omak to comply with the Ordinance. Omak failed to respond to the letter and continued operating the dump without complying with the CILDO or having been issued a Tribal development permit. The Tribes brought an action in Tribal Court to enjoin Omak from using the dump until it complied with CILDO. The Trial Court issued an Order directing Omak to comply with CILDO by making an initial application and providing supporting documentation to the Tribal Planning Department in accordance with the procedures of the CILDO regarding its activities at its landfill site within thirty days of entry of the Court's order. If Omak failed to comply with the Court's order within the time period specified Omak would be enjoined from using the dump. Omak took exception to the Trial Court's actions and timely appealed the matter to this Court.

I. Indian Tribes Have the Authority to Regulate Activities Within Their Territory as Part of Their Inherent Sovereignty

In *United States v. Wheeler*, 435 U.S. 313, 322 (1978), the United States Supreme Court described the powers of Indian tribes as "...inherent powers of a limited sovereignty which has never been extinguished." F. Cohen. *Handbook of Federal Indian Law 122* (1945). The Confederated Tribes has the sovereign authority to control activities occurring within its territory. As the Solicitor of the Department of Interior wrote in 1934:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the Reservation. whether owned by the tribe, by members thereof or by outsiders, the tribe has the sovereign power of determining the conditions upon which a person shall be permitted to enter its domain, reside therein and to do business, provided only such determination is

> consistent with applicable federal laws and does not infringe any vested rights of persons now occupying reservation land under lawful authority. "Powers of Indian Tribes." 55 Interior Decisions 14, 50 (1934).

The Solicitor concluded that:

> In its capacity as a sovereign, and in the exercise of local self government, [a tribe] may exercise powers similar to those exercised by any state or nation in regulating the use or disposition of private property, save insofar as it is restricted by specific statutes of Congress. *Id.* at 55.

The Supreme Court has consistently reaffirmed the Solicitor's opinion. See *e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) "... Indian tribes retained attributes of sovereignty over both their members and their territories." See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

Land within the exterior boundaries of the Colville Reservation held in fee by a non-Indian, such as Omak's land, is still considered part of the Reservation. *Seymour v. Superintendent*, 368 U.S. 351 (1962). See also, *Confederated Salish and Kootenai Tribes v. Moe*, 425 U. S. 463, 478-79 (1976); *United States v. Mazurie*, 419 U.S. 544, 553-56 (1974). All lands within an Indian reservation, including fee patented lands, are part of "Indian country." 18 U.S.C. 1151. *DeCoteau v. District Court* , 420 U.S. 425, 427 n.1 (1975). See also, *Washington v. EPA*, 752 F.2d 1465, 1467 n.1 (9th Cir. 1985).

GENERAL TRIBAL LAND USE AUTHORITY OVER ALL THE LAND OF THE RESERVATION

"It is beyond question that land-use regulation is within the Tribes legitimate sovereign authority over its lands." *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987) (citations omitted). See, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975). *cert. denied*, 429 U.S. 1038 (1977); accord. *United States v. County of Humboldt*, 615 F.2d 1260 (9th Cir. 1980): *Snohomish County v. Seattle Disposal Co.*, 70 Wn.2d 668 (1967): *cert. denied*, 389 U.S. 1016 (1967); 25 C.F.R. 1.4.

The ability of the Colville Tribes to utilize the reservation land base and other Indian lands is critical to the Tribes' ability to develop and prosper economically. Moreover, one of the most basic incidents of sovereignty is the government's power to regulate land-use in order to protect the health and welfare of the community. See *Village of Euclid v. Ambler Realty Co*, 272 U.S. 365 (1926).

In 1976, the Solicitor of the Department of Interior recommended approval of tribal zoning codes regulating the use of fee lands by Indians and non-Indians, based on the conclusion that power to regulate land use is among the powers retained by Indian tribes (Oct.13. 1976 letter to Secretary of interior).

II. The Tribes Authority Extends to Non-Indian Activities on Fee Land Within the Reservation

Scope of Tribal Regulatory Jurisdiction

Congress and the courts have recognized that tribal authority includes the ability to regulate activities on all land within the tribes border. In *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), the Supreme Court discussed the extent of a tribe's jurisdiction.

> Tribal authority over the activities of non-Indians, on reservation lands is an important part of tribal sovereignty. (citations omitted). Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. *Id.* at 977.

The Supreme Court's view in *LaPlante* is consistent with the long standing federal policy of fostering tribal self-government. See. *e.g.*, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986); *Merrion v. Jicarilla Apache Tribes*, 455 U.S. 130, 138 n.5; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 and n. 10; *Williams v. Lee*, 358 U.S. 217, 220-21.

The Supreme Court Has Developed a Test to Determine When an Indian Tribe Can Assert Jurisdiction over Non-Indian Activities

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court upheld the authority of the State of Montana to regulate non-Indian trout fishing on fee land on the Crow Reservation. The Court, however, reaffirmed the importance of tribal sovereignty and the fact that Indian tribes retain authority over the activities of non-members in certain cases.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. (citations omitted). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe. *Id*. at 565-66: accord *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 n.12 (1983).

The Court's statement is a reaffirmation of the principle long recognized by the government that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservations lands in which the tribes have significant interests. 17 Op. Atty. Gen. 134 (1881), cited with approval in *Washington v. Confederated Tribes*, 447 U.S. 134, 152-53 (1980).

A number of cases have relied on the *Montana* principle in upholding the applicability of tribal laws and the assertion of tribal civil regulatory jurisdiction over activities on fee lands by non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 43, 52 (9th Cir. 1981) (tribe has exclusive right to regulate and control use of water of No Name Creek Basin; *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 963-64 (9th Cir. 1982) (tribe has authority to regulate riparian fee land owners): *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982), *cert. denied* 459 U.S. 967 (1982) (recognizing applicability of tribal building code to non-Indian business on fee land within boundaries of the reservation): *Knight v. Shoshone and Arapaho Tribes*, 670 F.2d 900, 902 (10th Cir. 1982) (recognizing inherent zoning power of tribal government to control use of fee lands by non-Indians within reservation boundaries).

The Supreme Court has clearly established and the lower courts have applied its test that if a non-Indian has entered into a "consensual relationship" with the tribe or the non-Indian activity "affects the economic security or health and welfare of the tribes and its members," the Indian tribe can regulate the non-Indian even if the activity occurs on fee land on the reservation.

The Courts Have Consistently Recognized the Authority of Tribes to Regulate Land Use Activities on Fee Land Within Reservation Boundaries

In *Knight v. Shoshone and Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) the Tenth Circuit upheld the jurisdiction of the Indian tribes to enforce zoning regulations against non-Indian owners of fee land on the Wind River Reservation stating, "the power to control use of non-Indian owned land located within the reservation flows from the inherent sovereign right of self-government and territorial management." *Id*. at 903. The court found that the activities of the developers who wanted to sub-divide fee land on the reservation directly affected tribal and allotted lands.

In *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982), the Court of Appeals for the Ninth Circuit upheld the authority of the Quinault Tribe under its "inherent sovereign power to impose its building, health and safety regulations on appellee's business notwithstanding appellee's ownership in fee of the land on which the store stands". (Footnote omitted). In that case. Mr. Cardin owned and operated a grocery store in the village of Queets, on the Quinault Reservation. He was directed by the Tribe to remedy the store's violations of tribal health and safety regulations. When Mr. Cardin refused to comply with the ordinance, the Tribe obtained an injunction from the Tribal Court closing down the business until he complied with the Tribes' regulations. The District Court enjoined the tribal government from enforcing its regulations

against Mr. Cardin. The Court of Appeals reversed holding that the tribe's regulations were applicable.

In *Sechrist v. Quinault Indian Nation*, 9 ILR 3064 (W.D. Wa. 1982) plaintiffs Sechrist were non-Indian residents of California who owned fee land on the Quinault Reservation near the village of Queets. Sechrist wished to construct and operate a recreational vehicle park and campground and submitted a rezone proposal to the Quinault Land Use Planning Commission in order to be able to develop the park. When Mr. Sechrist lost his bid to have the land rezoned from wilderness to commercial he elected not to exhaust the tribal remedies available to him and filed a separate action in federal district court.

In the Order granting the Quinault Nation's Motion to Dismiss and for Summary Judgment, Chief Judge McGovern framed the issue this way: "The question presented is whether the Quinault Nation retains the power to impose its zoning regulations on the activities of a non-member on that non-member's fee title lands within its reservation." *Id.* at 3065. Judge McGovern relied on the decision of the Ninth Circuit in *Cardin* in finding that the Quinault Nation had the requisite authority to enforce its zoning code.

Under the Facts of this Case the Tribes Satisfies the Tests Articulated in *Montana*

It is clear from a close reading of the cases that the several prongs of the test expressed in *Montana* are independent. If the facts of the case support any one, an Indian tribe may regulate the conduct of non-Indian on fee land within the reservation. The courts have upheld tribal authority based solely on the establishment of a consensual relationship between the tribe and the individual over whom the jurisdiction is sought. *Williams v. Lee*, 358 U.S. 217 (1959); *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 141-143 (1982), or solely on the basis that the conduct of the non-Indian threatened or had some direct effect on either the (1) political integrity, the (2) economic security or (3) health and welfare of the tribe. *Yakima Indian Nation v. Whiteside*, 109 S.Ct. 2994 (1989).

Omak has entered into numerous consensual relationships with the Tribes and on that basis alone the Tribes has the authority to regulate it. Omak's activities at the dump, however, directly affect both the economic security of the Tribes and its members and the health and welfare of those tribal members who live near the dump. These facts provide two additional, independent bases of tribal regulatory jurisdiction.

Omak's Activities and Proposed Expansion Affects the Health and Welfare

The CILDO certainly was intended to protect the health and welfare of not only the Tribes, but all reservation residents. CILDO 1.1. The purpose of the Colville Reservation as a homeland where members of the Tribes can maintain their tribal ties, culture, religion and economy - in short, the Indian way of life also supports the applicability of the CILDO to this particular activity. The Tribal ordinance requires developers to consider and protect Tribal interests that may not be important to the County as reflected in its regulatory scheme. "The power of local government to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Burrough of Mt. Ephram*, 452 U.S. 61, 68 (1981).

Omak's use and alleged expansion of its dump affects the health, safety and welfare of the Tribes and its members. On a number of occasions fires have spread from the dump damaging Tribal trust land and threatening the lives of those individual Tribal members who reside nearby.

Tribal members Juliann Dick, Alberta Carson, and Eileen Sanchez each indicated that the smoke from the trash burning affects their health, and the odors emitting from the dump are extremely unpleasant and noxious. The activities at the dump also create anxiety and fear in them that their homes, property or worse individual family members may be consumed by another fire. The noise associated with the activities of the dump creates an additional strain on the families residing nearby.

The potential effect of the dump on the ground water supplies in the area has not been completely explored. Based upon recommendations of the County Health Department and the Washington Department of Ecology, the Okanogan County

Board of Adjustment is considering requiring Omak to drill wells to monitor the effect of the dump on subsurface waters.

It is beyond question that this open dump affects the Tribes and its members and under the facts presented the Tribes has the authority to regulate the activities associated with it.

Omak's Activities Associated with the Proposed Expansion Affect the Economic Security of the Tribes

The impact of the dump does not end with its effect to health and welfare. The costs of fire control and the destruction of property from fires have imposed a direct economic burden on the Tribes and those individuals residing in the path of runaway fires. The fires, whether controlled or uncontrolled, the noxious odors, smoke and noise all diminish the use and value of the surrounding Indian trust allotments.

In adopting the CILDO, the Tribes created the mechanism to assert its authority to mitigate the effects of developments such as Omak's dump expansion on the Tribes, Tribal members and reservation residents generally. Assertion of the Tribes' jurisdiction over Omak pursuant to the CILDO is authorized by established case law and is consistent with the Courts' recognition of Tribal authority to regulate such activities on fee lands within its reservation to protect the economic interests of Indians.

Omak's Consensual Relationship with the Tribes and its Members Subject it to the Jurisdiction of the Tribal Court

When a non-member has entered into a consensual relationship with a tribe, or its members, the tribe retains "inherent powers to exercise civil authority over the conduct of [the non-member] on fee lands within the reservation". *Hardin v. White Mountain Apache Tribe*, 761 F.2d 1285 (9th Cir. 1985).

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) the Supreme Court explained that when non-Indians enter into consensual relationships with a tribe or its members, tribal jurisdiction may be lawfully asserted over those non-Indians. "We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a non-member until the non-member enters tribal lands or conducts business with the tribe." *Id*. at 142.

Omak has entered into numerous contracts, obtained permits from various Tribal departments, and engaged in other relationships with the Confederated Tribes and it's members. Omak employs 51 Native Americans, 397 [sic] of whom are either enrolled members of the Tribes or direct descendants. Omak accepted an assignment of Crown Zellerbach's Tribal permit to divert and use water from the lands of the Indian Reservation.

Omak has entered into numerous contracts with Colville Indian Precision Pine Company to purchase logs from the tribal pine mill to be delivered to Omak on the Reservation. Omak has also entered into agreements with the Colville Tribal Enterprise Corporation to cut and deliver logs from Tribal lands to Omak's mill. In a recent contract with Omak, Colville Forest Enterprises cut and delivered 1015 truck loads of wood to the mill. Omak has also purchased timber directly from the Tribes. Omak and its predecessor, Crown Zellerbach, have obtained road usage permits and permanent easements over and across the Indian lands and roads of the Colville Reservation in order to access their land holdings on the Reservation.

"Indian sovereignty is not conditioned on the assent of a non-member: to the contrary, the non-member's presence and conduct on Indian lands are conditioned by the limitations the Tribes may choose to impose." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 130, 147 (1982). Omak's extensive business dealings with the Tribes and its members have created the type of consensual relationship that the courts have found an appropriate basis for tribal jurisdiction. Omak has recognized the authority of the Tribes in its commercial dealings, sought permits from the Tribes in order to effectively conduct business on the Reservation and is now subject to the Tribes regulatory authority over the activities associated with its dump.

III. Statutory Law of the Colville Tribes Vests this Court with Jurisdiction

The Colville Tribal Code defines this Court's jurisdiction and states that it "shall include all territory within the Reservation boundaries ... and it shall be over all persons therein..." CTC 1.3.01. It cannot be disputed that Omak's Mill is

located wholly within the exterior boundaries of the Reservation. Besides its plant facilities, Omak owns parcels of timber lands which lie within the boundaries as well. By virtue of that land ownership, and its location alone, this Court has jurisdiction over Omak.

Section 2 of the CILDO also supports the Court's power to hear this case. Section 2.1 of the Ordinance outlines the scope of the Ordinance, and Section 2.2 outlines the authority upon which the Colville Business Council adopted the Ordinance. Both sections indicate that the Ordinance was enacted to protect and benefit all individuals owning or using property or residing, or doing business on the Reservation and applies to all of them.

Chapter 3 of the Colville Tribal Code governs civil actions and grants the Courts jurisdiction of "all suits involving persons residing within the Tribal jurisdiction as defined by this Code and all other suits in which a party is deemed to have consented to the jurisdiction of the Court, or in which the events giving rise to the action occurred within the Tribal jurisdiction as defined by this Code." CTC 3.1.01. Even if Omak cannot be deemed to be a "resident" there is no doubt that all of the events related to the development of the wood waste and ash dump occurred on the Reservation, and within the Tribal Court's jurisdiction as defined in CTC 1.3.01 and CILDO 2.1.

STANDARD OF REVIEW FOR INJUNCTIVE RELIEF

The Appellant's argument that had the lower court applied CTC 4.1.11 the appropriate standard for injunctive relief would have been the Washington standard rather than a federal standard is incorrect. The Appellant cites the case of *Federation of State Employees v. State*, 99 Wn.2d 878 (1982) as delineating the Washington standard. While the *Federation* case does define the standard which Appellant desires to be applied a clear reading of the case reveals that the standard is based on the injunction statute. RCW 7.40.020.

CTC 4.1.11 states

> "In all cases the Court shall apply in the following order of priority unless superseded by a specific section of the Law and Order, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law."

Therefore, Washington statutes are not applicable to cases before the Colville Tribal Court, unless a specific section of the Law and Order Code explicitly directs the Court to follow State statutes. As the Appellant points out in his brief the Tribal Code sets no standards for injunctive relief and the Trial Court judge correctly used her discretion in choosing the appropriate federal Standard of review for guidance.

CONCLUSION

The courts and Congress have consistently recognized the necessity and authority of Indian tribes to regulate activities within their respective reservation. Such a presumption of authority is consistent with the federal policies of encouraging tribal self-government and avoiding the problems associated with checker-board jurisdiction within Indian reservations. The presumption that the Tribes has the authority to regulate land-use activities on the Colville Reservation under the CILDO, and the Tribal Court's authority to determine the extent of that presumption is unquestionable. Absent express abrogation by Congress or treaty, the law is valid.

All of the above cited cases recognize the Tribe's inherent authority to regulate non-Indian activities under specific instances. The Tribes' authority in this case falls under those cases. The Tribes has the authority to regulate Omak's activity in this instance because of its retained sovereignty, its interest in protecting the health and welfare of Reservation residents, the federal policy regarding Indian self-government as well as the need to properly control development on the Colville Indian Reservation. For these reasons, the Court will affirm the issuance of the preliminary injunction preventing Omak from

expanding the use or size of its dump until it has applied and complied with the requirements of the CILDO.

Melvin R. LaCOURSE, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP90-13206-08, 1 CTCR 51
1 CCAR 46

[Frank S. LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Maureen L. Byers, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court case number 90-13206, 93-13207, 93-13208]

Hearing held February 26, 1991. Decided April 16, 1991.
Before Chief Judge Bonga, Judge Miles and Judge Ward

BONGA, C.J.

In response to Appellant's Motion for Clarification of Decision on Assignment of Error 5 of Appellant's Appeal the Appellate Court, of Chief Judge Dave Bonga, Judge Dave Ward and Judge Wanda Miles, at a hearing on February 26, 1991, found that there was cause to reconsider the guilty decision that was affirmed by this Court on January 16, 1991 for the charge of Driving While Suspended/Revoked, case number 90-13208. The Appellate Panel ordered briefs to be filed, and a telephonic hearing was held on April 8, 1991 to further consider the case.

The Panel adopts the requirements found under Washington state law in regards to this issue. The Washington State Supreme Court in *State v. Monson*, 113 Wn.2d 833 (1989) set forth a procedure for establishing that a defendant's driver's license was suspended or revoked. In that case the Court allowed, as competent evidence, a certified copy of the defendant's driving record rather than requiring an official from the Department of Licensing to testify as to the suspended or revoked status of the defendant's driver's license.

In this matter the Tribe failed to introduce a certified copy of the defendant's driving record. The Panel therefore finds that an oral statement of a police dispatcher to a police officer is not competent proof that the defendant's privilege to drive was revoked or suspended by a judicial tribunal or administrative body. Without the certified copy of the defendant's driving record the evidence fails to support a conviction.

The Appellate Panel reverses it's earlier decision which affirmed the guilty verdict of the Colville Tribal Court and dismisses the charge, Driving While Suspended/Revoked, Case Number 90-13208.

Dennis STENSGAR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP90-11551, AP90-11552, AP90-11554, 1 CTCR 52

1 CCAR 47

[Steve Aycock, Legal Office, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Maureen Byers, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided April 19, 1991
Before Chief Judge Bonga, Judge Chenois and Judge Miles

BONGA, C.J.

After reviewing the case file and listening to the tapes of the earlier proceedings the Appellate Panel of Chief Judge Dave Bonga, Judge Wanda Miles and Judge Edythe Chenois find no merit in the appellant's position. The Appellate Panel finds that the lower court was clear and unmistakable in sentencing the appellant, and informing the appellant that it was his duty to initiate contact between the county probation office and the Tribes to determine if he would receive credit for the state sentence. The Panel also finds that there is nothing in the record to indicate that the sentences would run concurrently.

The appellant's Appeal is therefore Denied.

It is so Ordered.

E.S., Appellant,

vs.

COLVILLE CONFEDERATED TRIBES ADMINISTRATIVE
LAW COURT, and ADMINISTRATIVE LAW JUDGE HOWARD STEWART

Case No. AP90-CV89-952, 1 CTCR 54

1 CCAR 48

[Steve Aycock, Legal Office, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Bruce Didesch, Office of Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued December 7, 1990. Decided June 17, 1991.
Before Chief Judge Bonga, Judge Baker and Judge Miles

This matter came before the Colville Court of Appeals for a hearing on Notice of Appeal on October 1, 1990. Oral arguments were held on December 7, 1990. The Appellant was represented by Steve Aycock, Tribal Legal Office with Bruce Didesch representing the Appellee.

The Court after reviewing the arguments of counsel, the record, and applicable law, made the following finding and decision in this matter.

ISSUE 1

Did the Tribe Perfect a Cross-appeal?

Relying on Colville Tribal Code section 1.9.03A and *Wolfe v. Industrial Commission of Illinois*, 138 Ill.App.3d 680, dec. 179, 486 N.E.2d 280, 284 (1985), we find that even though the argument as to jurisdiction can normally be raised at anytime, the fact that it was litigated below is dispositive and that disposition is reviewable only by a properly filed appeal. In this case we find this not to be true.

If the Tribe had perfected a cross-appeal, we feel it would be necessary to address the issue, as it would be properly before the Court.

A. According to *I.J. Jr. v. Colville Confederated Tribes, Colville Tribal Ambulance Department*, Case No. A88-018, the Colville Tribal Court allows extra ordinary writs in personnel matters as supervisory review of Administrative Law Judges' personnel decisions in limited circumstances.

B. The remedy of Mandamus does lie in cases where, as here, the Administrative tribunal has incorrectly performed a ministerial act.

1) Is the Administrative Law Judge a part of the Judicial Branch? Or is it an Administrative Hearing tribunal and a part of the Executive Branch? We conclude it is an Administrative Appeals Tribunal, based on 7.11e of the Policies and Procedures Manual for the Colville Confederated Tribes, which states "the decision is final without further administrative appeal."

2) There is a discrepancy between the Plan of Operations for the Colville Confederated Tribes and the Policy and Procedures Manual for the Colville Confederated Tribes. Within the Plan of Operations titled: Determination by Administrative Law Judge it states, "The appeal form is to be filed with the Administrative Law Judge. The Administrative Law Judge makes a determination as to whether number (1) above has not been complied with, and if it has been, an appeal is granted. If the requirements of number (1) above have not been complied with, the appeal is denied, and the decision of the Administrative Law Judge is final. The determination must be made either on the day of filing or the day after filing", yet the Colville Tribal Court Administrative policies take the position that direct filing with the Administrative Law Judge is not generally allowed. Their policy is that all papers must be filed with

the Office of the Clerk. To further complicate matters the Policies and Procedures Manual section 7.11 states, " appeals must be submitted to the Administrative Court." Due to this discrepancy between the Policy and Procedures Manual and Plan of Operations Manual it is our recommendation that the two complement each other rather than off-set each other as this will avoid confusion in the future.

ISSUE 2

Did the Administrative Law Judge Act Arbitrarily or Did He Abuse His Discretion in Dismissing Ms. S's Appeal for Lack of Timely Filing?

Yes, we conclude that filing actually occurred on March 22, 1989, based on the following facts:

On March 22, 1989, E.S. attempted to file her appeal with the Tribal Court. The clerk on duty at the time declined to accept the appeal because the clerk did not understand the proper procedures in filing an employment appeal. E.S. then attempted to get the Clerk to keep the original copy of the appeal. This the clerk also declined to do.

E.S. then took her appeal to the office of the Acting Executive Director, Harvey Moses Jr. on March 22, 1989. Mr. Moses asked if it would be okay for him to come over to the Courthouse and file the appeal. He was told by Chief Judge Anita Dupris that he could not, since the appeal had to be filed in person by E.S.

Mr. Moses was not able to contact E.S. until late afternoon of March 24, 1989. There was insufficient time for E.S. to find transportation and make it to the Tribal Courthouse by 4:00 that afternoon. The appeal was filed on March 28, 1989 at 9:55 a.m. with Judge Howard Stewart.

We must also note that Judge Stewart made no discretionary determination as to whether there was good cause for a late filing under the circumstances, a decision which may have been an abuse of discretion. We, however, did not consider this an issue since we find as a matter of law that the filing was timely and, that, therefore, the dismissal of the appeal by Judge Stewart was arbitrary and capricious and an error of law for which the remedy of Mandamus does lie.

The Colville Court of Appeals, therefore, reverses the decision of the Colville Tribal Court and remands this to the Administrative Law Judge with instructions to proceed with Ms. S.'s hearing on the merits of her appeal.

In Re The Welfare of R./W./W.
J. L. R., Appellant
Case No. AP91-J91-10008/09, 1 CTCR 55
1 CCAR 49

[Frank S. LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Owen Gardner, Attorney at Law, Okanogan WA, counsel for father.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Connie Desautel, Legal Office, Colville Confederated Tribes, Nespelem WA, spokesman for minors.]

Decided September 10, 1991.
Before Chief Judge Bonga, Judge Chenois and Judge Miles

BONGA, C.J.

The Appellate Court, of Chief Judge David Bonga, Judge Edythe Chenois and Judge Wanda Miles held a telephonic hearing on August 29, 1991 regarding this matter. After reviewing the case files and applicable law the Appellate Panel finds that this matter is not ripe for consideration by this Court.

Under the Tribal Code at Chapter 1.9.01,

"A panel of three judges shall sit ... to hear appeals from the final judgments, sentences

and other final order of the Tribal Court."

In this matter the mother is requesting an appeal of the decision of the Children's Court of granting the Tribal Prosecuting Attorney's motion for a three-day extension of time to file a Minor-in-need-of-care Petition.

Under the Tribal Code Chapter 12.7.21,

> "A finding of a minor being a minor-in-need-of-care constitutes a final order for purpose of appeal."

In this matter that finding has not been determined. The Appellate Court therefore rejects the mother's appeal as being untimely.

It is Ordered that the mother's appeal is herein Denied.

James G. STANGER, Appellant,

vs.

Myrna J. STANGER, Appellee.

Case No. AP91-CV90-1221, 1 CTCR 56

1 CCAR 50

[James G. Stanger, Appellant, pro se.
Myrna J. Stanger, Appellee, pro se.]

Decided September 20, 1991.
Before Chief Judge Bonga, Judge Chenois and Judge Miles

BONGA, C.J.

This matter came before the Court of Appeals by telephonic hearing on August 29, 1991. The Appellate Panel of Judge Edythe Chenois, Judge Wanda Miles and Chief Judge David Bonga after reviewing the Court records in this matter finds that the dissolution decree was filed with the Colville Tribal Court on April 2, 1991. Under CCT 1.9.03 a written Notice of Appeal must be filed within ten (10) days of entry of a judgment of the Court. CCT 1.1.15 would allow the Appellant until April 12, 1991 to file a written appeal in this matter. The Court record indicates that Mr. Stanger's alleged Notice of Appeal was filed on May 9, 1991. The Appellate Panel therefore finds that the appeal was not timely filed.

It is Ordered, Adjudged and Decreed that this appeal is denied for untimeliness.

Shane C. INNES, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP91-14180, 1 CTCR 57

1 CCAR 51

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued February 28, 1992. Decided March 18, 1992.
Before Chief Judge Bonga, Judge Collins and Judge Miles

BONGA, C.J.

The Appellate Panel of Judge Wanda Miles, Judge Brian Collins and Chief Judge David Bonga finds that, after reviewing the file, listening to the trial tapes and hearing oral arguments on February 28, 1992, the Appellant failed to meet the burden of proof needed to overturn the jury decision of the Colville Trial Court, which found him guilty of Intoxication. CTC 5.5.10.

DISCUSSION

The Appellate Panel finds that Assignment of Error 1 of appellant's Notice of Appeal is without merit. The Panel agrees with appellee's argument that the Intoxication statute is an offense of *malum prohibitum*. Such statutes are designed to protect and preserve the peace of the citizenry. Intent, or a specific *mens rea*, is not an element of such an offense, nor does the law require such an element for validity. *Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988). The prohibited act itself is the crime. *Seattle v. Hill*, 72 Wn.2d 786, 794-798, *cert. den.*, 393 U.S. 872 (1967).

The Panel further agrees with the appellee position that when a person voluntarily consumes intoxicating beverages, that volitional consumption makes the actor liable for the consequences that may occur as a result of his intoxication. *Id.*, at 797-798. The evidence found in the court record support the jury's finding of guilty.

The Appellate Panel also finds that appellant's Assignment of Error 2 is also without merit. The Panel does not find that the Intoxication statute is impermissibly vague as to its language provides sufficient definiteness which ordinary people can understand. *State v. Dixon*, 76 Wn.2d 795 (1971). The fact that there are some areas of disagreement amongst readers of a statute does not make said statute wanting in certainty. As long as a general area of prohibited conduct is made plain, the statute is not too vague. *State v. Maciolek*, 101 Wn.2d 259 (1984). The Panel finds that the Intoxication statute is understandable by ordinary people.

The language of the Tribes' Intoxication statute contains terms that appellant claims are vague and undefined. The Panel holds that terms which are not particularly defined, are given their ordinary, everyday meaning. *Dixon*, *supra*, at 804. The Panel also finds that the Tribes' Intoxication statute contains ascertainable standards of conduct and does not encourage arbitrary enforcement. Therefore the Panel finds no reason to overturn the jury decision which considered all pertinent facts and found that the facts did meet the requirements of the Intoxication statute.

The Panel believes that the Intoxication statute was adopted by the Tribes legislative body to protect Colville Reservation residents from uncontrolled behaviors of persons under the influence of intoxicants. The Panel was not presented with any evidence that the Intoxication statute proscribed any constitutionally protected behavior. Therefore, the Panel does not find the Intoxication statute as overbroad.

After reviewing appellant's Reply Brief the Panel finds no need to grant appellee's Motion to Strike, as the Panel finds that the arguments raised by the Brief are either irrelevant or nonpersuasive.

It is hereby Ordered and Adjudged that the jury decision in this matter is Affirmed.

Reginald GEORGE, Appellant,
vs.
Virginia GEORGE, Appellee.
Case No. AP90-CV90-1184, 1 CTCR 53
1 CCAR 52

[Reginald George, Appellant, pro se.
Virginia George, Appellee, pro se.]

Argued April 29, 1991. Decided May 31, 1991.
Before Chief Judge Baker, Judge Bonga and Judge Miles.

BAKER, C.J.

This matter came on regularly for oral argument on April 29, 1991, on the appeal of the respondent, Reginald A. George, Sr., on the Decree of Dissolution entered by the Court on November 14, 1990, awarding custody of the parties four (4) minor children to the petitioner, Virginia George.

The Notice of Appeal presents two issues: (1) whether the Trial Court properly applied the factors set forth in CTC 13.4.10 in making its custody determination; and (2) whether the Trial Court's Findings of Facts were supported by the evidence. In determining whether the Trial Court properly applied the statutory factors of CTC 13.4.10 to its child custody determination, we are required to decide two preliminary procedural issues. The first of these was whether the Colville Tribal Code gives ordinary litigants adequate notice of the Court's requirement that the hearing on permanent custody is the one and only opportunity for that litigant to present the testimony of his witnesses, and that the witnesses' testimony must be live and not by affidavit. The second procedural issue was whether the absence of a verbatim record of the trial judge's chamber conference with the parties' oldest child, Kelly, effectively prevents the Appellate Court from reviewing the substantive issue presented on appeal. For the reasons discussed below, we conclude that an inadequate record on appeal prevents the Appellate Court from making a determination as to whether the Trial Court properly applied the factors set forth in CTC 13.4.10 in making its custody determination. We reverse and remand on that basis alone and thus need not make a determination as to whether the Trial Court's findings of fact were supported by the evidence introduced at trial.

The questions presented, then, in outline form, are as follows:

1. Does the Colville Tribal Code (CTC) give litigants adequate notice of the Court's requirement that the hearing on permanent custody is the one and only opportunity for presenting the testimony of their witnesses, and that the witnesses' testimony must be live and not by affidavit?
2. Does section 13.4.03 of the CTC make it mandatory for the Court to make a verbatim record, by tape recording or otherwise, of the Court's conference in chambers with a child in a custody proceeding?
3. Given the record on appeal, can the Appellate Court make a determination whether the Trial Court properly applied the factors listed in CTC 13.4.10 in making its custody determination?

1. The Court of Appeals holds as follows as to each of these issues. The Colville Tribal Code gives inadequate notice to litigants of the Court's requirements that the hearing on permanent custody is the one and only opportunity for presentation by the litigants of testimony of their witnesses, and of the requirements for live testimony. In the absence of an

amendment to the Code, the Trial Court's notice to the parties setting the hearing should advise the litigants of those requirements.

2. CTC 13.4.13 requires a verbatim record to be made of interviews by the trial judge of a child in chambers during a child custody proceeding.

3. The Court of Appeals has an inadequate record upon which to review the question of whether or not the Trial Court properly considered the factors set forth in CTC 13.4.10(2), (3), (4), and (5).

Therefore, we reverse and remand for a trial *de novo.*

DISCUSSION I.

Neither the Colville Tribal Code nor the Tribal Court in its notice to the parties setting the hearing on permanent custody gave adequate notice to the litigants of the parameters of the hearing and of the evidence to be required in this child custody proceeding.

Mr. George has raised the issue that, had he had an opportunity to do so, and if he had known that he was required to, he would have had a number of other witnesses appear at the hearing on permanent custody to testify as to various factors which should be or should have been taken into account in the child custody determination which was made a part of the Decree of Dissolution of the parties' marriage. Although to those of us trained in the law, it is practically axiomatic that a trial is a litigant's one and only chance to prove his case by calling any and all witnesses whose testimony might bear on the issues to be decided, in most jurisdictions this proposition is firmly worded in statute and court rule. However, after a careful search through the Tribal Code, including Titles 1, 3, 4 and 13, it becomes apparent that the person whose training in basic civil procedure law is non-existent would have no guidelines whatsoever upon which to base a conclusion either that (1) the trial is his last opportunity to present relevant evidence or that (2) evidence must be brought in by the live testimony of witnesses, sworn in open court and subject to cross-examination by the opposite party.

First, an examination of Title 13, Domestic Relations Code, reveals the following fleeting references to fact findings, hearings, and testimony by affidavit:

> CTC 13.4.07 Pleadings; Findings; Decree
> The petition for dissolution shall be in writing.
> No decree of dissolution shall be granted upon default or otherwise, except upon legal evidence taken in the cause by the Court who shall make and file its findings and decree upon the evidence. . . .

Nowhere in Title 13 is the term "legal evidence" defined. An oblique reference to witnesses appearing in person reads:

> CTC 13. 4.14 Child Custody - Priority Status Proceedings Hearings - Record - Expenses of Witnesses.
> ***
> (2) Either party may petition the court to authorize the payment of necessary travel and other expenses incurred by any witnesses whose presence at the hearing the court deems necessary to determine the best interest of the child.
> (3) The court without a jury shall determine questions of law and fact. . . .
> ***

In another part of the Domestic Relations Code, a litigant might actually receive the impression that the custody determination might remain open for an indefinite period of time. For example, not only are there repeated references to the continuing jurisdiction of the Court and modification of decrees under certain circumstances, but CTC 13.4.13(2) provides as follows:

> The court may seek the advice of professional personnel or persons knowledgeable in the welfare of Indian children whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross examination of any persons consulted

by the court.

For a lay person, the belief that the Court will actually undertake investigations of its own to make a full-fledged determination of custody is reinforced by the above provision. Nowhere in the Domestic Relation Code is it stated that the litigant has the responsibility, as well as the right, to present all evidence at his disposal on his own behalf.

Nor is there any guidance elsewhere in the Code which might clarify the procedure. To the contrary, provisions such as CTC 3.4.06 might well lead a lay person to believe, as Mr. George evidently did, that evidence by affidavit is perfectly appropriate. That section reads:

> "Evidence. The Court shall not be bound by common law rules of evidence, but shall use its own discretion as to what evidence it deems necessary and relevant to the action. "

Chapter 4.2 of the Tribal Code, entitled "Trial Procedure," gives some guidance as to the conduct of the trial. To a person participating in a custody proceeding, however, the terminology used in, for example, section 4.2.03 is not helpful. That section reads as follows:

> Conduct of Trial
> Plaintiff shall make the opening statement setting forth the charge or claim for relief against the defendant. The defendant shall have an opportunity to make a statement of his position. Upon the conclusion of such statement, the plaintiff shall call such witnesses and produce such exhibits as he may see fit. The plaintiff shall thereafter, in rebuttal, have an opportunity to call such witnesses and produce such evidence as he may see fit to rebut the evidence by the defendant. Both the plaintiff and defendant shall have the right to cross examine witnesses.

Interestingly, nowhere in that section is there an indication that the defendant has the right to call witnesses. Also, the term "producing such exhibits as he may see fit" may well mean, to a lay person, a sworn affidavit. Nowhere is the importance of cross-examination emphasized as the reasoning behind mandatory attendance of witnesses and live testimony.

Nor this there much substantive help from outside the Code, given the contradictory provisions of CTC 3.4.03 and CTC 4.1.11, each entitled "Applicable Law," and passed by the Tribal Council at separate times.

In CTC 3.4.0-0, passed and amended in 1982, we are directed as follows; Applicable Law

> In all civil cases the Court shall apply, in the following order of priority, any applicable laws of the Colville Confederated Tribes, tribal case law, tribal customs, state statute, state common law, federal statues [sic], and federal custom [sic.] law, and international law.

By contrast, CTC 4.1.11, adopted in 1983 advises us:

> Applicable Law
> In all cases the court shall apply, in the follow order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

Since 1983, then, these two code sections have stood in direct contradiction of one another, and there appears to be no rational way for an appellate court to harmonize them. The solution to the contradiction is obviously legislative and not judicial. Be all of that as it may, the average litigant would certainly be more likely to be confused than enlightened by those two conflicting code provisions.

Given the lack of guidance by the Tribal Code, it is incumbent upon the Court, pursuant to its general jurisdiction, to protect the due process rights of litigants. We note that in this case the clerk issued a "Court Date/Time Set" notice which, at best, was ambiguous with respect to the scope of the hearing planned. It labeled it a hearing for "Dissolution," perhaps confusing the average litigant into the belief that only the question of the marriage being dissolved would be decided at the

hearing. It did carefully advise the litigants that they had only three days to object to the date and time set. But nowhere in the notice is there any sort of advice to the parties that this is their trial date, at which they are expected to present their cases on the child custody issue. Our direction to the Trial Court is, absent a statutory framework which properly notifies the parties of their obligations in this respect, that the Court and its notice of the date and time set for the trial, include a notification that the parties are at this hearing being given the opportunity to call any witnesses whose testimony bears upon the issues for the Court, including the child custody determination, and a notification that affidavits are generally not accepted as evidence, so that witnesses whose testimony is considered are subject to cross-examination by the opposing party. This could be accomplished by a simple addition to the existing "Court Date/Time Set" notice.

II.

Given the Tribal Court's routine practice of tape recording all other aspects of civil proceedings, CTC 13.4.13(1) makes a verbatim record mandatory with respect to the Court's interview in chambers of a child in a child custody proceeding.

Again we note, with chagrin, that nowhere in the Colville Tribal Code is there a requirement that any of the Court's hearings, whether civil or criminal, be tape recorded, nor that a verbatim record of the proceedings be made, such as with a court reporter or a shorthand stenographer present in the court. However, the custom and practice developed over the years in the Tribal Court of tape recording hearings is a good one, which undoubtedly has arisen from Court's general authority to do what needs to be done to run an orderly court system. See, *e.g.*, CTC 1.5.05, which reads as follows:

> Means To Carry Jurisdiction Into Effect
> When jurisdiction is vested in the Court, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course Of Proceeding is not specified in this Code, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of Tribal Law. See, also, CTC section 1.5.03.

Interestingly, the Tribal Council itself, recognizing the longstanding practice by the Tribal Court of using electronic means of preserving its court proceedings, in 1984 passed a resolution which resulted in CTC 4.1.12, which provides as follows:

> Criminal-Civil Recording Tape Retention:
> Tapes used in the recording of criminal and/or civil matters shall be retained by the Colville Tribal Court for a period of not less than three (3) years f rom the date of the last recorded matter on the tape.

In the instant case, the only record of Judge Fry's interview of the parties' oldest child, Kelly, in chambers, as authorized in CTC 13.4.13(1), was the judge's handwritten notes, obviously not a verbatim record. The notes seem to indicate an expression by the child of her wish and that of the oldest son to live with their father. Other notes seem to indicate problems between the children and the mother's boyfriend, and that the father's intentional conduct may have contributed to bad feelings between Kelly and her mother. Additionally, there is some indication of a lack of contact from the mother over the months, of the parties' separation.

With the sketchy notes provided, it is impossible for this Appellate Court to tell whether and how the interview of the child in chambers affected the Trial Court's decision.

III.

The record on appeal is inadequate to enable the Appellate Court to make a proper determination as to whether the factors required by the Tribal Code to be considered in a child custody determination were in fact applied.

With the lack of a verbatim record of the interview with Kelly in chambers, and in spite of the trial judge's handwritten notes, it is impossible for this reviewing court to determine whether the Trial Court properly applied CTC

13.4.10(2), (3), (4), and (5), particularly given the absence of Findings of Fact or Conclusions of Law as to each of these factors. It is, therefore, not possible for this Court to review the adequacy of the Findings of Fact and Conclusions of Law as they relate to the statutory factors required to be taken into consideration an custody determinations such as this one.

We note in passing that the Trial Court is under no obligation to conduct a chamber conference with any of the children. The language in CTC 10-.4.13(1) is permissive rather than mandatory as to a court's interview of a child in chambers. However, the language is mandatory when the Code provides that "[t]he court shall cause a record of the interview to be made and to be made part of the record in the case."

We interpret the term "record" to mean the identical kind of record made for other proceedings in open court, namely, a verbatim or electronic recording, such as made by a court reporter or audio tape recorder. This verbatim record, then, according to the Code, is to be made and retained as a part of the record of the case, just as the tape recording of the testimony and the court pleadings filed constitute other parts of the record.

Hence, it is our ruling that, in the absence of a verbatim record of Kelly's interview by the Trial Court in chambers, the record is inadequate for review purposes. Basic due process concepts dictate that the only remedy for an inadequate record is reversal and remand for a trial *de novo* to give the Trial Court an opportunity to make a reviewable record.

We also note in passing that many other parts of the tape recorded testimony were poorly captured on the tape recording, making review difficult if not impossible in other respects. In many instances entire answers were inaudible, either due to a nod or shake of the head, or due to softness of voice. We emphasize that it is the Trial Court's duty to insure that a proper and audible record of all proceedings, including every syllable of oral testimony, is made so that the inevitable expense and inefficiency of a retrial is avoided in future cases.

CONCLUSION

The Tribal Code and the notice provided the parties in setting the trial date provided inadequate notice to the litigants of the scope and type of evidence which is required at the dissolution hearing, at which permanent custody was determined. Lack of a verbatim record of the interview by the Court of the child in chambers, coupled with the absence of Findings of Fact and Conclusions of Law touching upon the factors enumerated in CTC 13.4.10(2), (3), (4), and (5), makes it impossible for this reviewing court to determine the propriety of the Trial Court's conclusion that custody be awarded the Appellee.

Accordingly, those portions of the Findings of Fact, Conclusions of Law and Decree of Dissolution which awarded custody to the appellee, set visitation schedules with respect to the appellant, and made provision as to child support and other financial matters surrounding the children's financial security, are hereby reversed and the cause remanded to the Trial Court for a new trial on the issues of custody, visitation and support.

Danny Joe STENSGAR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP91-A91-11043, 1 CTCR 60

1 CCAR 57

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued July 24, 1992. Decided August 2, 1992.
Before Chief Judge Bonga, Judge Chenois and Judge Baker

BONGA, C.J.

The Appellate Panel of Chief Judge David Bonga, Judge Edythe Chenois, and Judge Rebecca Baker, after reviewing the court file and hearing oral arguments on August 24, 1992, has reached a decision to overrule the Trial Court's suspension of Appellant's drivers license within the boundaries of the Colville Indian Reservation.

FACTS

Colville Tribal Police arrested Defendant in early October 1991 on the charge of Physical Control. Upon arrest of the defendant, Colville Tribal Police Sergeant M. Whitney transported Defendant to the Tribal jail, where he advised Defendant of his *Miranda* rights, which Defendant acknowledged.

Sergeant Whitney also gave Defendant the Tribes' "Implied Consent Warning" before asking Defendant to submit to an analysis of his breath for blood-alcohol using the BAC Verifier instrument. The last phrase of the Warning reads:

> "... and that you have the right to additional tests administered by a qualified person of your own choosing and at your own expense."

Defendant acknowledged receiving the warning. Defendant then refused to submit to the test.

On October 12, 1991, Police Sergeant Whitney filed with the Tribal Court a Report of Refusal to Submit to Breath Test. On October 15, 1991 Chief Judge Anita Dupris mailed the Appellant a Notice of Suspension, which notified the Appellant of the suspension of his driving privileges and his due process rights. On October 16, 1991, the Appellant appealed his suspension and requested a hearing to contest his suspension.

On October 21, 1991, the Tribal Court appointed the public defender to represent the defendant because he was indigent and unable to afford an attorney to represent him.

On November 12, 1991 a hearing was held in Tribal Court and Associate Judge E. Fry upheld the suspension of Defendant's driving privilege.

The defendant timely appealed the decision to this Court.

DISCUSSION

The Colville Tribal Appellate Court may not arbitrarily follow any set of laws, unless the laws have been authorized by the General Rules of Court for the Colville Confederated Tribes Law and Order Code (CTC) at CTC 4.1.11, Applicable Law, which states:

> In all cases the Court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.

The Colville Tribal Court is therefore mandated to follow a specific priority of laws in judging cases.

The Colville Tribal Court has incorporated by reference certain traffic laws of the State of Washington in CTC 9.1.01. It reads:

> The substantive provisions of the following parts of the Revised Code of Washington as presently constituted or hereafter amended are incorporated herein as provisions of this Code and shall apply to all persons subject to the jurisdiction of the Colville Tribal Court:
>
> RCW Chapters 46.04, 46.37, 46.44, 46.61 and RCW 46.20.343, 46.52.010, 46.52.020, 46.52.030, 46.52.035, 46.523.040.

The CTC at 9.5.02 defines which motor vehicle violations will be traffic infractions and are therefore not considered criminal offenses. Washington State's Implied Consent Law which is found at RCW 46.61.506 is not listed as a criminal offense in CTC 9.5.02.

The Appellate Panel finds that no specific provision of the Tribal Code delineates whether the suspension hearing in CTC 9.3 is to be criminal or civil in nature. Under CTC 3.4.03 the Appellate Panel must look next to Tribal case law. In the Colville Appeals Court case *Lewis S. Martin vs. Colville Confederated Tribes*, APA91-11042 [1 CTCR 63, 1 CCAR 60], the Court decided that the suspension hearing was civil in nature and not a criminal procedure.

The Appellate Panel denies Appellee's Motion, that was made at the hearing on July 24, 1992, to strike Appellant's Response Brief as the appellant's argument that criminal procedures must be followed in implementing section CTC 9.3.01 is incorrect and is therefore not an issue before the Court.

II.

The Appellate Panel holds that the language found in the Colville Tribal Code at Chapter 9.3.01 Implied Consent does not authorize the phrase "at your own expense" in the implied consent warning that is given to defendants who are suspected of driving while intoxicated by the Tribal police.

The Panel believes that the language has a chilling effect on the ability of a defendant to make a knowing and intelligent decision of whether or not to take the breathalyser test.

The Panel further believes that the Tribe has the authority and ability to establish a law which does contain the phrase in the Implied Consent Warning of having additional tests taken by the defendant "at your own expense". However, that ability is one for the legislative body to implement, and it is therefore inappropriate for the Tribal police to arbitrarily include that language in the Implied Consent Warning the Tribal police use.

III.

The Appellate Panel is not bound by previous holdings in cases that were decided in jurisdictions beyond the areas that are subject to Colville Tribal Court's jurisdiction. However, the Panel may look to other decisions for guidance and support. The holding in the Washington State case of *Gonzales v. Dept. of Licensing*, 112 Wn.2d 890 (1989), held that the language "at your own expense" was not harmful to a defendant's action as long as that defendant was not indigent. In this case the Court made a finding that defendant Martin [sic] was not indigent at the time the Implied Consent request to take the breathalyser test was made. The Appellate Court may not disturb a finding for which substantial evidence exists.

The Appellate Panel is perplexed by the fact that Public Defender Frank LaFountaine was involved with this case. It is the Panel's understanding that his office was established by Colville Tribal Resolution 1990-88. The Resolution provided that it was the public policy of the Colville Tribe to provide indigents legal service and incidentals for their legal defense in criminal cases. The Colville Tribal Court of Appeals held in *Martin v. Colville Confederated Tribes*, APA91-11042 [1 CTCR 63, 1 CCAR 60], that the suspension hearing was civil in nature and not a criminal procedure. It appears to the Panel that the Resolution was not followed.

It is Hereby Ordered that Defendant Stensgar's driver's license suspension is reversed.

Danny Joe STENSGAR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-15068, 1 CTCR 62

1 CCAR 59

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15068]

Decided October 27, 1992.
Before Chief Judge Baker, Judge Bonga and Judge Chenois

BAKER, C.J.

This matter came on regularly by conference telephone call on October 16, 1992, with the Appellate Panel, consisting of Judges Dave Bonga, Edythe Chenois and Rebecca Baker, in attendance. The Appellate Panel elected Rebecca Baker as Chief Judge and proceeded with deliberation of the sole issue raised on appeal, namely, whether the Tribal Court properly denied Defendant's Motion to Dismiss after the Court had failed to sentence the defendant within 60 days of entry of the finding of guilty. The Panel having reviewed the file and records herein and CTC Section 2.4.04, and finding that the Tribal Court lost jurisdiction on the 61st day following entry of the finding of guilty of Defendant, and being otherwise fully advised in the premises, now therefore, it is hereby

Ordered, Adjudged and Decreed that the Tribal Court's order denying Defendant's Motion to Dismiss is hereby reversed; it is further

Ordered, Adjudged and Decreed that the charge of Driving While Intoxicated in this cause shall be, and hereby is, dismissed with prejudice.

Lewis S. MARTIN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP91-A91-11042, 1 CTCR 63

1 CCAR 60

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued July 23, 1992. Decided October 28, 1992.
Before Chief Judge Baker, Judge Bonga and Judge Chenois

BAKER, C.J.

FACTS

Colville Tribal Police Officer Lyn Cox arrested Lewis S. Martin Jr., the appellant, on October 12, 1991, on the charge of Driving While Under the Influence of Intoxicating Liquor, CTC 9.1.01. Officer Cox transported Mr. Martin to the Tribal Jail, where he read some implied consent warnings relating to CTC 9.3.01, referred to in the record only as the "tribal form." The record is silent as to what the exact content of this so-called "Tribal form" was, although Mr. Martin recalls signing "some papers." No *Miranda* warnings were given Mr. Martin. It was undisputed that Mr. Martin then refused to take the breath test for alcohol requested by Officer Cox.

The officer, following procedure established in CTC 9.3.01(b), notified the Tribal Court that Defendant had refused to submit to the breath alcohol test after being advised of his right to refuse and the consequences of a refusal. The Tribal Court then, following CTC 9.3.01(b), sent Mr. Martin a Notice of Suspension of his driving privilege within the exterior boundaries of the Reservation and of his timely right to a hearing. Mr. Martin filed a notice of appeal of the suspension, and the case proceeded to hearing before the Colville Tribal Court.

Finding only that Officer Cox had used the so-called "tribal form" for warning Mr. Martin of his implied consent rights and the consequences of a refusal, the Tribal Court upheld the suspension of Mr. Martins driver's license.

ISSUES PRESENTED

The questions on this appeal are as follows:

1. Whether the fact that Appellant was not advised of his rights under *Miranda*, prior to the request to submit to a breath alcohol test, is grounds to avoid the suspension of his driving privilege under CTC 9.3.01; and

2. Whether there was substantial evidence introduced at the CTC 9.3.01(c) hearing before the Colville Tribal Court that Appellant had been advised of his rights and the consequences of a refusal to take the breath alcohol test under CTC 9.3.01(a).

SUMMARY OF DECISION

1. The officer's failure to give appellant his *Miranda* warning prior to requesting a breath alcohol test under 9.3.01 is not fatal to the Tribe's effort to suspend his driving privilege through the civil procedures for such suspensions.

2. However, the Tribal Court's decision to uphold the suspension must be reversed because the evidence introduced at the hearing was inadequate to establish that Appellant was advised of his rights and the consequences of a refusal to submit to the breath test under CTC 9.3.01(a).

A. *MIRANDA*

The appellant argues that CTC 9.3's license suspension provisions are criminal in nature and that therefore CTC

9.2.02 requires the application of criminal procedures elsewhere in the Code (See Title 2). This argument, however, fails for the reasons which follow.

First, the only penalty attaching to an individual's refusal to submit to the breath alcohol test under CTC 9.3.01 is that of a six-month suspension of the driving privilege (See CTC 9.3.0(b) [sic]). Not only is there no imprisonment imposed, but there is not even so much as a monetary penalty which attaches. In short, there is no criminal jeopardy into which the individual is placed when refusing to submit.

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966), held that a defendant in custody for possible criminal charges is entitled to be advised of, among other things, his right to counsel under the Sixth Amendment to the United States Constitution. *Miranda* does not apply where, as here, the sole consequence of a defendant's actions is the suspension of his driver's license. See, e.g., *Keefe v. Department of Licensing*, 46 Wn.App. 627 (Div. I, 1987); *Haas v. Department of Licensing*, 31 Wn.App. 334 (Div. I, 1982); *Wolf v. Department of Motor Vehicles*, 27 Wn.App. 214 (Div. I, 1980); and *Gonzales v. Department of Licensing*, 112 Wn.2d 890 (1989).

We hold that the license suspension procedures set forth in CTC 9.3.01 are civil in nature and thus the appellant is not deprived of a civil or constitutional right in not being advised of his *Miranda* rights.

B. IMPLIED CONSENT WARNINGS

The real issue in the case at bar is whether the defendant was advised of his rights under the implied consent law and of the consequences of a refusal to submit to a breath test under CTC 9.3.01(a).

The sole testimony on the issue of the giving of the implied consent warnings was that something repeatedly referred to as "the Tribal [police] form" was used by the police officer in advising Mr. Martin. While there is no requirement in the Code for a written acknowledgment or even of a written record of the advise given, in this case the officer never testified as to the <u>content</u> of the implied consent warning, nor was even a facsimile of "the Tribal form" introduced into evidence. Thus there is not evidence in the record of whether the officer informed Appellant "of his right to refuse the test, and of his right to have additional tests administered by any person of his choosing as provided in RCW 46.61.506." CTC 9.3.01(a). Nor did the officer "warn the driver that this privilege to drive within the exterior boundaries of the Colville Reservation [would] be suspended or denied if he refuse[d] to submit to the test." CTC 9.3.01(a).

This Court emphasizes that the conflict in the testimony in regard to whether or not "the Tribal form" was used by the officer is of no consequence, and thus the Trial Court's factual determination that "the Tribal form" was used is immaterial to our ruling. Instead, the dispositive factor is that no evidence was introduced as to the substantive <u>content</u> of "the Tribal form" and thus there was no evidence in the record that the substantive requirements of CTC 9.3.01(a) were met in the warnings given by the officer.

CONCLUSION

Although Mr. Martin's driving privilege could be suspended under CTC 9.3.01's civil proceedings when no *Miranda* warnings are given in advance of the implied consent warnings, the Tribes failed to establish at the hearing before the Colville Tribal Court that complete and correct warnings required under CTC 9.3.01(a) were in fact given to Mr. Martin before he was requested to submit to a breath alcohol test. Accordingly, the Tribal Court's decision is reversed, and Mr. Martin's privilege to drive within the exterior boundaries of the Colville Reservation shall not be suspended.

In Re J.
COEUR D'ALENE TRIBE, Appellant
Case No. AP91-J90-1016, 1 CTCR 61
1 CCAR 62

[Fred W. Gabourie Sr., Attorney at Law, Coeur d'Alene Tribe, Plummer ID, counsel for Appellant.
Connie Desautel, Legal Services, Colville Confederated Tribes, Nespelem WA, spokesman for the minor.
Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for mother.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Argued August 21, 1992. Decided September 22, 1992.
Before Chief Judge Bonga, Judge Baker and Judge Chenois

BONGA, C.J.

The Appellate Panel of Chief Judge David Bonga, Judge Edythe Chenois and Judge Rebecca Baker, after reviewing the court file and hearing oral arguments on August 21, 1992 affirms the Colville Trial Court decision denying Appellant Coeur d'Alene Tribe of Indians' (CDA) Motion for Declination and Transfer of Jurisdiction.

FACTS

The subject minor is an enrolled member of the CDA Tribe, as are her biological parents. The minor's father who resides on the CDA Reservation, has not been involved in the minor's life.

In March, 1990, the Colville Tribes notified the minor's father of a pending Minor In Need of Care (MINOC) adjudication. The minor's father received notification, but has never responded nor appeared at any of the proceedings.

The Colville Tribes also notified the CDA Tribe of the pending MINOC adjudication. By written letter dated 5 March 1990, CDA Tribal Court Judge J. E. Whitford responded that the CDA Tribe intended not to intervene in the matter.

The subject minor and her mother have resided the majority of the minor's life on the Colville Reservation. In 1986, the minor's mother rented a home ("HUD" No. 4002) through the Colville Indian Housing Authority and represented to the Colville Tribal Court that year that her physical residence was "HUD" No. 4002 in Nespelem, Washington.

While residing on the Colville Reservation, the minor's mother established a relationship with a Colville Tribal member and bore two daughters by him. These two half-sisters have resided all their lives with the subject minor, all three being cared for the majority of the time by the father of the two half-sisters and his grandmother in Nespelem, Washington, on the Colville Reservation. All three have resided within this home since at least 1989. Significant bonding has occurred amongst the minor, her half-sisters and her "step-father" and "step-great-grandmother."

Both the subject minor and her mother were residing within the boundaries of the Colville Reservation when the Court took custody of the subject minor. The mother was served notice on the Colville Reservation and was present at both the Temporary Custody and Adjudicatory hearings. From the evidence adduced at the March 1990 hearing, the Court found the minor to be a MINOC as the minor's mother abused alcohol and did not provide continuing and adequate care for the minor.

In November 1990, the Colville Tribes received notice that a Guardianship Petition for the subject minor had been filed in the CDA Tribal Court. The Colville Tribes moved to dismiss said proceedings on the basis that the subject minor was a dependent of the Colville Tribes Children's Court. CDA Tribal Judge J. E. Whitford granted the motion.

The mother failed to appear at the January 1991 Review hearing. She did not appear at the April and June 1991 review hearings and the Court ordered Colville Tribal Children and Family Services to consider the termination of parental rights.

In July 1991, the CDA Tribe moved to continue the next Review hearing, which motion the Court granted. In August 1991, the CDA Tribe moved for transfer of jurisdiction of the matter to the CDA Tribal Court, or in the alternative, for a change in placement of the subject minor. After some continuances, the Court heard testimony on the motion in Fall 1991, and filed a written opinion in January 1992 denying both motions. The CDA Tribe timely filed a Notice of Appeal in the Colville Tribal Appellate Court.

DISCUSSION

Under Colville Tribal Code (CTC) Title 12, the Colville Tribal Children's Court has exclusive, original jurisdiction over all proceedings in which an Indian minor who resides or is domiciled withing the Colville Reservation is alleged to be a Minor In Need Of Care (MINOC). CTC 12.5.01(a). The Court also has concurrent jurisdiction over all other proceedings under Title 12. CTC 12.5.01.

CTC Title 12 Section 5.08. entitled Indian Child Welfare Act states as follows:

> It is intended that the provisions of this title be consistent with and carry out the purposes of the Indian Child Welfare Act (ICWA), 25 USC 1901, *et seq.* to be incorporated by reference in this title and in the event of conflict between provisions of that act and this title provisions of that act shall apply.

It seems clear that the governing body of the Colville Confederated Tribes by legislative actions intended that the Indian Child Welfare Act of 1978 should apply to the acts of the Colville Confederated Tribal Court. In the case at bar the provisions of CTC Title 12 do not conflict with the ICWA. The Appellate Panel therefore does not believe the applicability of the ICWA is an issue before the Court as Colville Tribal statutes are the appropriate set of laws.

The issue of the appropriateness of placing the minor with her step-father and step-great-grandmother was also raised during the appeal. The appellant's position was that placing the minor in a home that did not have "blood" relatives was not in the minor's best interest as the placement was not "with an extended family member." However, the ICWA at 25 USC 1903 (2) defines stepparent as a member of the "extended family." The Panel therefore believes that the placement of the minor was appropriate.

The Appellate Court believes that the appellant's arguments on domicile and residence are somewhat correct but superfluous to this appeal, as the Colville Children's Court, upon its March 1990 finding that the minor was a MINOC, has exclusive jurisdiction. However, this ruling does not preclude appellant CDA Tribe from moving to intervene in this matter if the appellant so chooses.

In conclusion, both the subject minor and her mother resided on the Colville Reservation when the Court exercised its jurisdiction in February 1990. The minor's mother consented to this exercise of jurisdiction by the Court through her presence on the Colville Reservation, and the CDA Tribe consented to the Court's jurisdiction in writing. The jurisdiction exercised by the Court was rightfully taken. Having been rightfully instituted, the Court's exercise of its jurisdiction rightfully continues.

Appellant's appeal is denied.

Genevieve FRIEDLANDER-CURRY, Appellant,

vs.

CCT ENROLLMENT OFFICE, Appellee.

Case No. AP92-CV88-8195, 1 CTCR 64, 3 CTCR 13

1 CCAR 64

[R. John Sloan Jr., Attorney at Law, Omak WA, counsel for Appellant.
Mike Taylor, Office of the Reservation Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided October 28, 1992.
Before Chief Judge Nelson, Judge Miles and Judge Vitalis

NELSON, C.J.

The Court, having convened telephonically on October 21, 1992, reviewed the file herein; and, in particular, reviewed the Notice of Appeal, filed May 1, 1992, and the Amended Notice of Appeal, filed June 9, 1992.

Section 1.9.03A(3) of the Colville Tribal Code (Appellate Proceedings) requires the Notice of Appeal to include the grounds for the appeal, the relief or order sought, and the governing rules and/or laws of the Colville Tribe.

Neither of the appellant's Notices of Appeal included the information required by CTC 1.9.03A(3). The incorporation by reference of the order which is being appealed is insufficient to satisfy CTC 1.9.03A(3).

It is the opinion of the Court that the appellant has not perfected her appeal and

Therefore it is Ordered that:

1. The appeal in the above captioned matter is Dismissed.

Cora L. PAKOOTAS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-15148, 1 CTCR 67

1 CCAR 65

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15148]

Arguments heard February 26, 1993. Decided March 19, 1993.
Before Chief Judge Collins, Judge Baker and Judge Bonga

COLLINS, C.J.

Cora L. Pakootas appeals her conviction at bench trial in Tribal Court, Fry, J. presiding, for Distributing Alcohol To a Person Under 21, Colville Tribal Code Number 5.3.04. The appellant has brought this case before us to determine whether sufficient evidence was presented at trial to support her conviction. After viewing the evidence and all inferences in the light most favorable to the Tribes, the Appellate Panel does not believe there was sufficient evidence presented at trial to support the conviction. We now reverse.

I.

The appellant, Cora L. Pakootas, was employed as a bartender at the Warbonnet Tavern in Nespelem, Washington on the Colville Indian Reservation. On April 8, 1992, while working at the tavern, the appellant served alcoholic beverages and chicken to several adult women who were seated at a table. At trial the appellant testified that she was acquainted with these patrons and knew all of them to be at least 21 years of age.

Just after 11:00 a.m., Sergeant Michael Whitney of the Colville Tribal Police contacted a minor in the parking lot of the Warbonnet Tavern to tell her to leave the premises. According to Sergeant Whitney's testimony, the minor was waiting for her cousin, Regina Pakootas, who was inside the tavern. Sergeant Whitney is related to Regina Pakootas and believed her to be under age 21. Afterward, Sergeant Whitney looked through a window in the tavern and observed Regina Pakootas sitting at a table with several other women.

After confirming with the police dispatcher that Regina Pakootas was under age 21, Sergeant Whitney entered the tavern and instructed the appellant to verify the age of Regina Pakootas and each of the women seated at the table with her. After the appellant confirmed that Regina Pakootas was underage, she was asked to leave the tavern.

At trial Sergeant Whitney testified that several containers of beer were on the table where Regina Pakootas was seated. Sergeant Whitney did not testify that he observed Regina consume any alcoholic beverages, nor did he testify that he observed Regina touching any containers containing alcohol. Sergeant Whitney did not offer any evidence that Regina had been drinking, i.e., he testified to no observations such as noting an odor of alcohol on her breath, bloodshot eyes, slurred speech or the like. Regina apparently left the premises before Sergeant Whitney had an opportunity to interview her.

The appellant testified that she did not see Regina Pakootas enter the tavern and that she apparently entered the tavern while the appellant was in the rear of the building peeling potatoes. The appellant also testified that the adult women were at the table for approximately one hour and did not notice that Regina Pakootas was at the table until this was pointed out by Sergeant Whitney. The appellant testified that she observed Regina Pakootas eating chicken and that there were no alcoholic beverages in front of her on the table. On cross examination that Appellant testified that although she did not serve

alcohol to Regina Pakootas, she probably could have had access to alcohol.

A subpoena was issued for Regina Pakootas to appear at trial, but it evidently was not served upon her. The prosecutor moved the court for a continuance of the case but the court denied the motion, observing that two telephone calls to the witness' mother was not a diligent effort to produce the witness for trial. None of the women who were seated with Regina Pakootas in the Warbonnet Tavern testified at trial.

II.

The appellant contends that the Court erred by finding her guilty of Distributing Alcohol To A Person Under 21. She contends there was insufficient evidence introduced at trial to support a finding of guilty beyond a reasonable doubt. CTC 2.6.03.

For the appellant to be found guilty of the offense, the Court was required to find beyond a reasonable doubt that the appellant "did sell, barter or give an alcoholic beverage to a person under 21 within the exterior boundaries of the Colville Indian Reservation."

Our first inquiry is what standard should be applied by the Appellate Panel to a claim that a criminal defendant was convicted in Tribal Court upon insufficient evidence. A reviewing court does not have the same opportunity to view and weigh the evidence as did the trial court. Therefore, we must look to standards adopted by other reviewing courts to resolve this question.

The standard of review adopted by the United States Supreme Court in criminal cases to determine whether to affirm a finding of guilt beyond a reasonable doubt, based upon record evidence, was addressed in the case of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In that case, the court observed that the reasonable doubt standard applied by the trial court to support a finding of guilt is one of substantive constitutional significance. In order to comply with constitutional principles the court held that a trial court must rationally apply the reasonable doubt standard to the facts in evidence.

A reviewing court is not required to retry a case or to ask itself whether it believes the evidence at trial established guilt beyond a reasonable doubt. Rather, the relevant inquiry is,

> "[w]hether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt."

Jackson v. Virginia, 443 U.S. at 319.

The standard for reviewing sufficiency of evidence to support a criminal conviction set forth in *Jackson* has been adopted by the Washington Supreme Court. *State v. Green*, 940 Wash.2d 216, 616 P. 2d 628 (1980). Moreover, the Washington Supreme Court has recently held that when reviewing the sufficiency of evidence in a criminal conviction, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

We adopt the principles set forth in *Jackson v. Virginia, State v. Green*, and *State v. Salinas* in reviewing the sufficiency of evidence used to support a criminal conviction in Tribal Court.

III.

In order to uphold the appellant's conviction, we must find from the record evidence introduced at trial, viewed most favorably to the prosecution and against the appellant, that any rational trier of fact could have found guilt beyond a reasonable doubt. This reviewing standard must be applied to all essential elements of the crime with which the appellant was charged. The Tribes have established at trial that Regina Pakootas was sitting at a table in the Warbonnet Tavern with several

adults. The Tribes have also established that the appellant placed alcoholic beverages on the same table and that those beverages were on the table while Regina Pakootas was seated at the table. However, the Tribes have not shown that the appellant served alcoholic beverages to anyone at the table while Regina Pakootas was present.

Significantly, the appellant testified that when she served several cans of Coors Light beer to the women seated at the table Regina Pakootas was not present. The appellant also testified that she did not see Regina Pakootas enter the tavern and was not aware of her presence until it was pointed out by Sergeant Whitney.

In addition, there is no record evidence at trial that Regina Pakootas was in possession of alcoholic beverages while in the Warbonnet Tavern or that she had consumed any alcohol. The appellant testified that when she observed Regina Pakootas there was chicken sitting on the table in front of her and that she was eating chicken.

There was no evidence presented at trial to show that the appellant "sold, bartered or gave" alcoholic beverages directly to Regina Pakootas. Without evidence to show that Regina Pakootas was in physical possession of alcoholic beverages, that she was drinking alcohol, or that she had consumed alcohol while in the tavern, we do not believe that it is reasonable to infer that the appellant delivered alcohol to her. Construing the record evidence and all inferences in a light most favorable to the prosecution and against the appellant does not act as a substitute for basic facts from which a reasonable inference can be drawn that the appellant gave alcohol to Regina Pakootas.

The Tribes cite no authority in support of its theory that, under the facts of this case, Cora L. Pakootas constructively delivered alcohol to a person under 21. Although there was evidence that Regina Pakootas could have consumed alcohol which was served to adult customers, there is no evidence that she did so. We do not believe this theory is viable without evidence that the appellant knew or should have known that Regina Pakootas was in the tavern and failed to make her leave the premises, and the underage person was in actual possession of alcohol or under the influence of alcohol.

It is Ordered that the Judgment entered against Cora L. Pakootas is Hereby Reversed and the case is Dismissed.

Danny Joe STENSGAR, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-15068, 3 CTCR 19

1 CCAR 68(1)

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15068]

Decided April 19, 1993.
Before Chief Judge Baker, Judge Bonga and Judge Chenois

BAKER, C.J.

This matter came on regularly by telephone conference call on April 6, 1993, with the Appellate Panel, consisting of Judges Dave Bonga, Edythe Chenois and Rebecca Baker, in attendance along with the Court Administrator. The Court considered the appellee's Motion and Affidavit to vacate order and set for briefing and hearing. Finding that CTC Section 1.9.05 requires at least oral argument, and further finding that oral argument on this issue would be to no avail without further briefing, now, therefore, it is hereby

Ordered, Adjudged and Decreed as follows:

1. It is hereby determined that the Appellate Court has already received the relevant portions of the record, namely, the Court file in its entirety. Therefore, no tapes or transcripts of tapes of hearings will be ordered to assist in the Appellate Court's review.

2. The appellant, if he so desires, shall submit his opening brief on or before April 30, 1993, by serving counsel for appellee with a copy and filing the original and three (3) copies additional with the Appellate Court Clerk.

3. Appellee, if [he] so desires, shall submit [his] brief on or before May 14, 1993, by serving opposing counsel and filing an original and three (3) copies with the Appellate Court Clerk.

4. The appellant shall submit a reply brief, if any, on or before May 21, 1993, by serving opposing counsel and filing the original and three (3) copies with the Appellate Court Clerk.

5. The parties' attorneys shall appear for oral argument on May 28, 1993 at 1:00 p.m., at the Colville Tribal Courthouse in Nespelem, Washington.

INCHELIUM WATER DISTRICT, Appellants,

vs.

George & Constance WILLIAMSON, Appellees.

Case No. AP92-CV91-11159, 1 CTCR 68

1 CCAR 68(2)

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Steven Aycock, Legal Services, Colville Confederated Tribes, Nespelem WA, counsel for Appellees.]

Decided April 21, 1993.
Before Chief Judge Bonga, Judge Chenois and Judge Collins

BONGA, C.J.

This matter came before the Appellate Panel of Chief Judge David Bonga, Judge Edythe Chenois and Judge Brian Collins for a status haring on April 16, 1993. After reviewing the file and discussing the matter the Appellate Panel feels that this matter is not ripe for review.

CTC Chapter 1.09, Appellate Procedure, controls appeals to this Court. CTC 1.09.01 indicates that this Court can hear appeals "from final judgments, sentences and other final orders of the Trial Court." The Appellate Panel finds that neither the November 17, 1992 order nor the February 26, 1993 order are final judgments, sentences or final orders. It is therefore Ordered that Appellant Inchelium Water District's Appeal is hereby Dismissed.

The Appellate Panel therefore finds no need to impose a Stay which is hereby Denied.

The Appellate Panel also finds that the Tribal law in this area is not "clear" and that the appeal is not frivolous. The Panel therefore denies the respondent's request for attorney fees.

Theresa BESSETTE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP91-14082, 1 CTCR 69

1 CCAR 69

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Decided May 17, 1993.
Before Chief Judge Miles, Judge Bonga and Judge Chenois

MILES, C.J.

This matter having come before the Colville Tribal Appellate Court on December 4, 1991 and the Court having reviewed the applicable records makes the following

FINDINGS: There was sufficient evidence entered at trial to uphold the conviction of the defendant of the charge of Dogs at Large; and

That there was no error in imposing the mandatory one day jail term for the conviction; and

That CTC 11.3.02 is not overbroad and vague;

Now, therefore, it is hereby ordered that this appeal is dismissed and the stay pending the appeal is lifted.

Deborah L. CONDON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP92-15313, 1 CTCR 71, 20 ILR 6107

1 CCAR 69

[Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.

Tim Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.
Trial Court Case Number 92-15313]

Arguments heard April 16, 1993. Decided May 28, 1993.
Before Chief Judge Collins, Judge Bonga and Judge Chenois

COLLINS, C.J.

The Appellant, Deborah L. Condon, has brought this matter before the Appellate Panel on an appeal from the Tribal Court, Dupris, J. presiding. Upon entry of a guilty plea to Driving While Suspended or Revoked, CTC 9.1.05, and sentencing, the appellant appeals the Tribal Court's denial of her request to withdraw her guilty plea and the sentence imposed.

I.

On October 9, 1992, the appellant entered into a negotiated plea agreement with the prosecution, the terms of which were as follows: In exchange for the appellant pleading guilty to the charge of Driving While License Suspended or Revoked in the 3rd Degree, the prosecutor would recommend to the Trial Court that the appellant pay a fine of $100.00. Appellant's Opening Brief at 1.

At a change of plea hearing held on the above date, the Trial Judge advised the appellant that she was not bound to accept the terms of the negotiated plea agreement with the prosecutor. The trial judge also advised the appellant that even if she accepted a guilty plea and did not accept the recommended sentence, the appellant would not be allowed to withdraw her plea. The Court then reviewed the allegations made in the case and asked the appellant whether the allegations were true. The appellant responded that they were true. The Court then accepted the appellant's guilty plea to the charge of Driving While Licence Suspended or Revoked in the Third Degree.

The record below shows that the trial judge reviewed the appellant's criminal record and found that there had been three convictions for Driving Under The Influence Of Alcohol in State Court, the last of which was a deferred prosecution which had not yet been completed. The appellant advised the Court that the latter case was a plea bargain because there were other charges involved.

The trial judge, having advised appellant that the recommended sentence of $100 was too lenient, expressed concern about the appellant's driving record, especially the last DUI which involved an uncompleted deferred prosecution. Although the appellant showed the Court that her driving license had been reinstated, the trial judge indicated that the appellant must stop abusing traffic laws.

The Court then sentenced the appellant to a jail sentence of 60 days, with no time suspended, a fine of $600.00, and $5.00 in court costs. The jail sentence and fine were to be served and paid one year from that date. In lieu of that sentence, the Court ordered that the appellant could submit one teddy bear per month for twelve months to the Court Clerk for the Police Department's Teddy Bear Program, serve 40 hours of community service, and refrain from violating any traffic laws for a period of one year. All teddy bears were to be donated and community service fully performed within one year.

As the Court explained on the record, the Teddy Bear Program involves donation of stuffed teddy bears valued between $20 and $40 to the Tribal Police Department. These bears are given to children who are undergoing extreme emotional distress due to emergency circumstances which include harm, neglect, or loss. The conditions imposed by the Court, in lieu of serving jail time, required that the appellant comply with three requirements. Thus, according to the Trial Judge's cost estimate per teddy bear, the value which the appellant would be required to pay for the donated teddy bears to avoid serving jail time ranged from $240 to $480.

II.

The appellant alleges that the Tribal Court erred in refusing to allow her to withdraw her guilty plea after the Court

imposed its sentence. Further, the appellant contends that the Tribal Court should have followed the Federal Rules Of Criminal Procedure, Rule 11 (e)(4) which requires the court to advise criminal defendants that the terms of a negotiated plea are unacceptable and provide the defendant with an opportunity to withdraw the guilty plea before accepting it.

The Colville Confederated Tribes have not adopted FRCrP 11 as a guiding principle of criminal procedure to be followed by the Tribal Court. Because the Colville Tribal Council has not expressly adopted the Federal Rules of Criminal Procedure, the only inference to be drawn is that the Tribal Court has been delegated the authority to adopt such procedural court rules as are required to provide necessary safeguards to criminal defendants in criminal proceedings.

Although the Tribal Court has not adopted FRCrP 11, it has adopted procedural standards for accepting guilty pleas resulting from plea bargains, as shown by the proceedings in this case. Upon being advised that the defendant wished to plead guilty in exchange for the prosecutor's recommended sentence, the Trial Judge clearly put the defendant on notice that she was not required to accept the terms of the plea bargain. The defendant was advised that the Trial Judge was not required to accept the prosecutor's sentencing recommendations. Further, the defendant was advised that after the Court accepted the guilty plea, the defendant would not be allowed to withdraw her plea. The defendant responded that she understood each of these points and still desired to plead guilty before the Trial Judge accepted the plea.

From the procedure followed by the Tribal Court, we believe that the appellant was provided with an ample opportunity to make a reasoned decision whether to plead guilty and accept the sentence imposed by the Court or withdraw her plea and go to trial. Moreover, the appellant was represented by Counsel who was quite familiar with Tribal Court procedure involving negotiated pleas. Although the Court rejected the prosecutor's recommended sentence in this case, clearer notice could not have been given to the appellant that the recommended sentence might be rejected by the Court.

Because neither the Tribal Council nor the Tribal Court has adopted the FRCrP 11, the Panel cannot accept Appellant's argument that she has been denied due process. *Randall v. Yakima Nation Tribal Court*, 841F.2d 897 (9th Cir. 1988). The Tribal Court has developed a procedure different from federal law in providing due process to criminal defendants in accepting guilty pleas arising from plea bargains. Yet, the Panel believes the procedure adopted by the Court provides adequate constitutional safeguards to fair process within the framework of the Indian Civil Rights Act, 25 U.S.C. sec. 1301 *et seq*. and the Colville Tribal Civil Rights Act, Title 56.02.

III.

The appellant contends that the Tribal Court imposed upon her an excessive sentence and fine for the crime committed which violated her rights under the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.* and the Colville Tribal Civil Rights Act, Title 56.02. In order to determine whether the sentence imposed by Tribal Court was so excessive as to violate the appellant's due process rights and right to be free from cruel and unusual punishment under the Indian Civil Rights Act, 25 U.S.C. sec. 1302 (7) and (8), we must examine the statutory penalty for the proscribed act and the sentence imposed by the Tribal Court.

The crime of Driving While License Suspended Or Revoked is a misdemeanor which, upon conviction carries a maximum penalty of "imprisonment for a period not to exceed 360 days or a fine not to exceed $2,500, or both imprisonment and the fine." CTC 9.2.01 (b). This penalty structure also applies to the misdemeanor convictions for Driving Under The Influence Of Intoxicating Liquor Or Of Any Drug, Reckless Driving, and Failure To Stop At The Command Of A Police Officer. *Id*.

On October 9, 1992, the Trial Judge imposed the following sentence: A fine of $600, with none of the fine suspended, payable on October 9, 1993, a jail sentence in the Colville Tribal Jail, with none of the time suspended. The jail term was set to begin on October 9, 1993. Court costs of $5.00. In lieu of the jail sentence and fine, the appellant was given an opportunity to submit one teddy bear per month for twelve consecutive months to the Colville Tribal Police for its Teddy Bear Program. In addition, the appellant was ordered to complete 40 hours of community service with a children's program or

with Child Welfare Services by October 9, 1993, and to commit no further traffic offenses until October 9, 1993.

It appears to the Panel that the Trial Judge, in effect, placed the appellant on probation for a period of one year, with conditions of her probation being that she submit 12 teddy bears to the police department, perform 40 hours of community service, and commit no further traffic offenses during the probationary period. If the appellant failed to comply with the terms of her probation, the original sentence would be imposed. Thus, the appellant could avoid going to jail by fully complying with the three conditions imposed as part of her probation. As stated by the Trial Judge, the value of teddy bear to be donated to the Colville Police Department ranged from $20 to $40. Thus, the total amount the appellant would be required to pay for twelve such bears would range from $240 to $480.

The Panel fails to see how the sentence imposed by the Trial Judge was in any way excessive, cruel and unusual, or amounted to a deprivation of the appellant's liberty or property interests without due process of law. In the first instance, the sentence of 60 days in jail and a fine of $600 imposed by the Court was well below the maximum possible sentence which could have been imposed for the offense. Secondly, the fact that the Court imposed probation with certain conditions means that the appellant could avoid the original sentence, which was set to commence one year from the date of her guilty plea. The jail sentence would be served only if the appellant failed to comply with the conditions of her probation.

Although requiring as a condition of probation that the appellant donate twelve teddy bears to the Teddy Bear Program seems unusual, the Panel views this practice as constructive alternative to incarceration. For that matter, performing community service is also a constructive alternative to serving time in jail that also carries some deterrent effect.

For the reasons stated above, the decision of the Tribal Court is Affirmed.

In Re S.M.C.
Eva M. PAUL, Appellant.
Case No. AP91-J91-10013, 1 CTCR 70
1 CCAR 73(1)

[Stephen L. Palmberg, Attorney at Law, Grand Coulee WA, counsel for Appellant.
Frank LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for father.
R. John Sloan Jr., Attorney at Law, Omak WA, counsel for minor.
Lin Sonnenberg, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Tribes.]

Decided May 28, 1993
Before Chief Judge Miles, Judge Baker and Judge Bonga

MILES, C.J.

This case having come before the Colville Tribal Appellate Court on April 8, 1993, by conference call before Judge Rebecca Baker, Judge David Bonga and Judge Wanda L. Miles.

The Court has reviewed the record on appeal which consists of the case file, Number AP91-J91-10013, and all documents therein; the cassette tape recording of AP91-J91-10013; and applicable Colville Tribal Law. Upon review and analysis of the record, this Court finds the issues of the above entitled matter are moot.

Therefore, the Appeal is Denied.

Danny Joe STENSGAR, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP92-15068, 1 CTCR 73
1 CCAR 73(2)

David L. ST. PETER, Appellant,
vs.
COLVILLE CONFEDERATED TRIBES, Appellee.
Case Number AP92-15400/507-10, 1 CTCR 72
1 CCAR 73(2)

[Frank S. LaFountaine, Office of Public Defender, Colville Confederated Tribes, Nespelem WA, counsel for Appellant.
Timothy Liesenfelder, Office of Prosecuting Attorney, Colville Confederated Tribes, Nespelem WA, counsel for Appellee.]

Arguments heard May 28, 1993. Decided May 28, 1993.
Before Acting Chief Judge Collins, Judge Bonga and Judge Chenois

COLLINS, A.C.J.

This matter came before the Appellate Panel, consisting of David Bonga, Edythe Chenois, and Brian Collins, for hearing on the appellant's Affidavit of Prejudice filed against Judge Rebecca M. Baker. The appellant was represented by Frank S. LaFountaine, Public Defender and Timothy Liesenfelder, Deputy Prosecutor appeared for the Tribes.

The appellant argues that because Judge Baker has entered into a contract to provide legal services to Colville Tribal Credit, an agency of the Colville Confederated Tribes, she should be disqualified from sitting on the Appellate Panel. The appellant contends CTC 1.5.04, which concerns disqualification of judges, makes recusal mandatory upon filing an Affidavit of Prejudice. Moreover, the appellant contends that he cannot receive a fair hearing, that Judge Baker has a conflict of interest, and that her continuing involvement on the Panel gives the appearance of impropriety.

The Appellate Panel, having reviewed the file herein and heard oral argument of both parties to this appeal finds that CTC 1.5.04 does not automatically require that a presiding judge be disqualified upon filing of an Affidavit of Prejudice. The clear language of CTC 1.5.04 shows that disqualification of a judge is discretionary, requiring that satisfactory reasons for disqualification are stated in the affidavit, which are evaluated by the judge. The Panel also finds that any decision to disqualify a judge under the Colville Tribal Code requires a careful review of the affidavit filed and a particularized inquiry into the fact alleged in each case.

The Panel also finds that the Washington Court Rules, including Rule 8.9(b) of the Criminal Rules of Limited Jurisdiction, are not binding on the Colville Tribal Court at the trial court or appellate levels.

The Panel finds that the appellant has not presented convincing evidence that the appellant will be prejudiced or that other appellants will be prejudiced by Judge Baker's continued service on the Appellate Panel, even if she is performing legal services for Colville Tribal Credit. We find that disqualification will depend on a particularized inquiry into the facts of the case at bar.

Accordingly, the appellant's Affidavit of Prejudice, which moves for disqualification of Judge Baker is denied.