IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

In the MATTER of

R.L.W.,
Petitioner-Appellant,

v.

G.N.B.,
Respondent.

No. 91-001-SUTC
(January 22, 1992)
No. 88-CV-112

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Douglas S. Walker, for appellant.
G.N.B., *pro se*.

SUMMARY

Petitioner-appellant, the county child support enforcement unit, appealed a lower court ruling that the putative father was not liable for state benefits paid to the children in question, prior to the determination of the paternity. The Appellate Court remanded the case with directions the lower court determine conclusively paternity as to each child and the amount of support owed to each. The matter of the lower court's ruling regarding the payment of AFDC benefits was taken under advisement pending resolution of paternity.

OPINION

CERNO, Judge.

This is an appeal by the La Plata County Child Support Enforcement Unit (hereinafter referred to as CSE) who brought a paternity and support action on behalf of certain named children allegedly belonging to the Respondent. In addition, the Petitioner (CSE) requested that reimbursement be made to the State Welfare Office for all amounts paid out on behalf of the children. The lower court ruled that repayment of AFDC benefits would not be allowed, and it is from this decision that Petitioner appeals.

FACTS AND PROCEEDINGS BELOW

This matter originally came before the Southern Ute Tribal Court on a Petition for Determination of Father-Child Relationship filed by the La Plata County Child Support Enforcement Unit through R.L.W., on behalf of C.B., a minor. The CSE later amended their Petition to add three (3) other children alleged to be the Respondent's. A request for blood tests was made and granted by the Court. The Respondent failed to appear at the time and date scheduled for such blood test.

The Petitioner later filed a Motion for a Partial Summary Judgment requesting that the Court enter an order declaring the Respondent to be the natural father of the children, which at this time only two (2) children were named, to wit: C.W. and C.B. In addition, the CSE moved the Court for an order entering judgment in its favor for the total amount of support paid out on behalf of the two (2) children by way of AFDC benefits, and that the Respondent be held liable for repayment of such benefits.

At a hearing held on January 25, 1990, the Respondent, in open court, acknowledged the fact that he was the father of C.W. and C.B. At another hearing held on June 20, 1990, the Petitioner (CSE) motioned the court to amend the original petition to allege that the Respondent was the father of two (2) other children: R.B. and L.W. The Respondent had no objection to this motion, but he did deny paternity for the two children.

After hearing the testimony of both parties, the court made the following ruling:

> Taking into consideration the needs of the involved children and the financial resources of the parents, the court orders that the Respondent pay child support in the amount of $50.00 per month per child effective as of January 25, 1990. Said child support is payable through the Tribal Clerk of Court on or before the 30th of every month commencing on June 30, 1990 and continuing until C.W. and C.B. reach the ages of eighteen and are otherwise emancipated. The court also orders that Respondent pay an additional $25.00 per month until the $500.00 owed since January is paid.

The court took under advisement the issue of repayment of AFDC benefits that the State of Colorado paid out on behalf of the children, and ordered that a brief be submitted addressing the equal protection argument raised and providing specific support information in accordance with the criteria set forth in 42 U.S.C.S. § 656 (a)(2)(B).

At the hearing held on February 13, 1991, the court ruled that reimbursement for AFDC payments issued prior to any determination of paternity could not be assessed against the Respondent. As to the equal protection argument, the court ruled that treating a legitimate child differently in the support context than an illegitimate child when addressing the issue of support does not automatically violate equal protection considerations.

DECISION

It appears that the decision by the lower court to impose child support for C.W. and C.B. was based upon the Respondent's own admission that he was their father. However, the CSE indicated in the appeal that as a result of blood tests taken from one of the children, C.W., was not the child of G.B. The CSE thereafter decided not to appeal that portion of the lower court's decision relating to C.W.

The court, in finding that reimbursement for AFDC payments issued prior to any determination of paternity could not be assessed against an alleged father, stated that in the absence of any explicit statutory authority, "paternity must be adjudicated against the putative father before he may be held accountable for child support." *Citing L.K. v. M.E.T.*, 17 Indian L. Rep. 6005, 6007 (S. Ute Tr. Ct. 1989); *see also, Florida Dept. of Health and Rehab. Services v. Wright*, 522 So.2d 838 (Fla. 1988). This proposition of finding paternity first before imposition of support is not disputed. The general principle is that it must first be established that the person upon whom the support obligation is to be imposed is, in truth, the father of the child(ren). *In re the Interest of D.R.B.*, 498 P.2d 1166 (Colo. 1972); *Nye v. District Court*, 450 P.2d 669 (Colo. 1964); *Aguilar v. Holcomb*, 395 P.2d 998 (Colo. 1964).

Thus, the initial and primary question before a court in a paternity action that needs to be answered is whether the Respondent is, in fact, the father of the children in question. There is some confusion as to the establishment of paternity on the part of the Respondent for the children. As stated in the findings, the

Respondent admittedly paternity for two (2) children - C.W. and C.B. It appears that the lower court went on the Respondent's admission and made no further inquiries or requested the results of the blood tests that were conducted. It is not clear as to whether the results of the blood tests were introduced at trial or whether they were even available. The court points this out because it was only at the time of the appeal that any mention of test results was made. It was at this time that the Petitioner-appellant declared that they would not appeal that portion of the lower court's decision relating to C.W., based upon the test results which showed that the Respondent was not her father. The record does reflect that blood tests were also ordered by the court on R.B. and L.W., the other two children alleged to belong to G.B. It was not clear if the tests were conducted and if they were, what the results were. The appeal currently before the court is on the determination made on only two (2) of the children, even though the Petitioner was requesting a determination on all four (4) children. It would be appropriate to have all the necessary information concerning the issue of paternity decided by the lower court first instead of piecemeal.

Wherefore, the court hereby remands this case back to the lower court and directs that a hearing be conducted to determine the issue of paternity as to each child conclusively, as well as the question of any support that is owed to each and in what amounts. The court will take under advisement the issue of whether the lower court made an appropriate ruling on the payment of AFDC benefits requested of the Respondent. Once the information on the paternity status of the children has been resolved, the case shall be submitted back to this court for final determination. IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

Thelma PINNECOOSE,
Petitioner-Appellant,

v.

No. 90-002-SUTC
(January 23, 1992)
No. 88-CV-145

BOARD OF COMMISSIONERS OF THE SOUTHERN UTE HOUSING AUTHORITY (SUPHA), namely Avel A. VELASQUEZ, Carl BAKER, Martha MYONE, John WASHINGTON and Kelly L. WINLOCK, all in their official capacities as members of the Board of Commissioners and including Abel A. Velasquez, Carl Baker and Martha Myone in their individual capacities,
Respondents.

Appeal from the Southern Ute Tribal Court, David L. West, Judge.
Tim LaFrance, for appellant.
Sam W. Maynes, for respondents.

SUMMARY

Petitioner-appellant appealed the lower court denial of Petitioner's claim that the Board of Commissions termination of employment was unjust, without legal authority, and in violation of Petitioner's due process and equal protection rights. The Appellate Court affirmed the lower court (1) ruling that sovereign immunity barred suits against the tribe, the Housing Authority, the Board of Commissions and its members in their official and individual capacities and (2) dismissal of Petitioner's cause of action in its entirety, noting Petitioner-appellant's remedy for any perceived inequity is through the legislature.

OPINION

CERNO, Judge

This is an appeal by the Petitioner-appellant (hereinafter Appellant) of the Southern Ute Tribal Court's Order dismissing the Appellant's cause of action against the Respondents (hereinafter Respondents or SUPHA) based upon sovereign immunity grounds. The Appellant also contends that the following errors were committed by the lower court in arriving at its decisions: 1) the lower court misinterpreted the by-law and ordinance provisions pertaining to the number of votes required for Board action to terminate Appellant; 2) finding that a contract is required to waive immunity from suit pursuant to Ordinance 19, setting up the Housing Authority; 3) failing to find that the SUPHA Employment Policies and Procedures pertaining to discipline and dismissal of employees and employee grievance procedures constituted a contract between Appellant and Respondent; 4) finding that certain individual Respondents were also immune from suit; and, 5) ignoring Appellant's statutory rights under the Indian Civil Rights Act.

FACTS AND PROCEEDINGS BELOW

The facts as set out in the Respondent's Response to Notice of Appeal give a clear and concise overview of the case below, and such statement of facts will be relied upon for purposes of this portion of the appellate court's opinion.

The Appellant in this case is Thelma Pinnecoose, a former executive director of the Southern Ute Public Housing Authority. Named in her complaint were four Respondents: 1) the Board of Commissioners of the Southern Ute Public Housing Authority; and 2) three members of the Board in their individual capacity. Two primary claims were made in the Complaint: a) Appellant's termination as Executive Director of SUPHA constituted "an abusive discharge and unjust termination" that was "willful, wanton and without legal authority", and b) Appellant's termination violated her due process and equal protection rights.

The Respondents moved to dismiss the Complaint on the ground that SUPHA and its individual members are protected by tribal sovereign immunity. The Southern Ute Indian Tribe filed an Amicus Brief in support of the Respondent's Motion to Dismiss. Mrs. Pinnecoose's Response Brief stated that her due process and equal protection claims were being brought pursuant to the Indian Civil Rights Act, and that SUPHA's immunity had been waived by a "sue and be sued" clause in the ordinance which created SUPHA. The sue and be sued clause cited by Ms. Pinnecoose provides that:

> The Council hereby gives its irrevocable consent to the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this Ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority. Southern Ute Indian Tribe Ordinance 19, Art. V, sec. 2.

In the Respondents' Reply Brief it was argued that the sue and be sued clause is not a waiver of immunity, but is a grant of power to contractually waive immunity, and that because there is not contract between Mrs. Pinnecoose and SUPHA which specifically waives immunity, sovereign immunity exists, and her claims are barred.

Following oral argument on the Respondents' Motion to Dismiss the tribal judge set the matter for evidentiary hearing to consider: 1) whether certain individual Respondents were *de facto* SUPHA board members at the meeting when Ms. Pinnecoose was fired, despite the fact that their terms had technically expired; and 2) what the vote was at the meeting at which the employment of Ms. Pinnecoose was terminated. By its Amended Order of March 31, 1989, the lower court granted Respondents' Motion to Dismiss and ordered that "all claims against all Respondents are hereby dismissed." In dismissing the Complaint, the lower court drew the following conclusions: a) two of the individual Respondents were *de facto* board members at the meeting at which Ms. Pinnecoose's employment was terminated; b) a valid quorum existed at the Board meeting at which Ms. Pinnecoose was fired; c) sovereign immunity exists as to the Southern Ute Indian Tribe as well as the SUPHA; and, d) Because members of the SUPHA Board acted in their official capacity in terminating Ms. Pinnecoose's employment, they too are immune from suit.

On March 20, 1989, Ms. Pinnecoose filed her Notice of Appeal.

DECISION

That after a very thorough and in-depth review of the case files, briefs, transcript of proceedings, and the case law, this Court finds that the lower court made an appropriate ruling based upon the information presented and the particular circumstances surrounding the case.

This Court is well aware of the obvious split in decisions from the various lower courts and federal courts as to how the issue of tribal sovereign immunity is handled. However, it must be reiterated that based upon the particular circumstances of this case, the lower court made a correct ruling to dismiss the cause of action.

It is totally unfortunate that litigants such as the Appellant are met with what seems to be an insurmountable obstacle as that of "tribal sovereign immunity." However, the doctrine of tribal sovereign immunity has long been recognized and upheld by tribal, state and the federal court systems. If, however, there is a feeling by any party involved that any inequities exist as a result of this ruling, then the best place to resolve the issue is with the legislative body of the Tribe.

WHEREFORE, the Southern Ute Tribal Court Order dismissing the action of the Petitioner-appellant is upheld in its entirety. IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE COCOPAH INDIAN TRIBE

COCOPAH INDIAN TRIBE
Plaintiff-Respondent,

v.

Arnold VALENZUELA,
Defendant-Appellant.

No. 92-002-CTC
(March 31, 1992)
No. CR-91-R-2654

Appeal from the Cocopah Tribal Court, Jay Irwin, Judge.
Verley Valenzuela, for appellant.

SUMMARY

The Appellate Court accepted Defendant's appeal and ordered the Defendant-appellant prepare a statement of the evidence and proceedings.

ORDER

SMITH, Judge

The above entitled matter came before the Southwest Intertribal Court of Appeals on Appellant's request for appeal filed with the Cocopah Indian Tribe on November 19, 1991 and transmitted to this Court on February 20, 1992.

The Southwest Intertribal Court of Appeals has appellate jurisdiction over the issues and individuals involved in this appeal by virtue of Resolution No. CT-91-50 enacted on December 13, 1992 authorizing the Southwest Intertribal Court of Appeals to review decisions of the Cocopah Tribal Court as defined by the Cocopah Law and Order Code. After reviewing Appellant's petition it appears that the petition may have merit, in accordance with Chapter B, Section 210 of the Cocopah Indian Tribe's Law and Order Code. Appellant's petition is, therefore, granted.

The information provided this Court, as part of the lower court record, reflects that there is no audio recording or transcript of the lower court proceedings relating to the matters on appeal. Nothing in the Cocopah Law and Order Code addresses circumstances where a lower court record is not available for purposes of appeal. This Court will, therefore, follow the Southwest Intertribal Court of Appeals Rules of Appellate Procedure in providing direction to the involved parties.

Under Rule 15 of the Appellate Rules, "[i]f no audio recording or transcript of the proceedings is available, the appellant shall prepare a statement of the evidence and proceedings within twenty days of the filing of the notice of appeal." Appellant, Arnold Valenzuela, is, therefore, directed to prepare a written statement of the evidence was presented and significant testimony given in connection with the lower court proceedings. Appellant must serve a copy of the above statement upon the Respondent, Cocopah Indian tribe, within twenty days of receipt of this order, and file proof of said service the Cocopah Tribal Court. Respondent will have ten days from receipt of the statement to file objections and amendments to Appellant's statement. Both Appellant's and Respondent's statements shall be reviewed subsequently by the judge presiding over the original proceedings. The presiding judge shall evaluate the statement for accuracy and certify the statement to this Court within ten days of receipt of the parties' statement.

Any extension of time for the preparation of the record must be approved by this Court. Upon receipt of the certified record this matter will be set for hearing within forty-five (45) days, as required by the Cocopah Indian Tribe's Law and Order Code.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE
Plaintiff-Respondent,

v.

No. 91-002-SUTC
(April 21, 1992)
No. 91-CR-49

Nelson NARANJO,
Defendant-Appellant.

Appeal from the Southern Ute Tribal Court, Elaine Newton, Judge.
Jeffrey R. Wilson, for appellant.

SUMMARY

Defendant appealed a conviction of escape claiming the offense was improperly charged, the lower court was without jurisdiction because the alleged offense occurred outside the exterior boundaries of the reservation, and the complaint was invalid. The Appellate Court affirmed Defendant's conviction of escape. The Appellate Court ruled that although Defendant-appellant did not challenge the validity of the complaint at trial, the subject matter jurisdiction of the court which was dependent upon the complaint could be challenged at any time. The Appellate Court found the complaint did not comply with tribal code requirements but the technical error did not divest the lower court of subject matter jurisdiction. The Appellate Court then addressed the sufficiency of the complaint and found Defendant-appellant did not establish (1) the technical error resulted in prejudice to Defendant nor (2) the complaint failed to charge an offense. The Appellate Court, citing *Southern Ute Indian Tribe* v. *Scott*, ruled Defendant's failure to challenge the sufficiency of the complaint at trial resulted in a waiver on appeal. The Appellate Court also found Defendant's failure to return to a treatment facility, a designated place of custody or confinement, and subsequent apprehension within the exterior boundaries of the tribe's reservation, despite the fact the offense began outside the boundaries of the reservation, constituted a proper charge of escape and exercise of tribal jurisdiction.

OPINION

ZUNI, Judge

BACKGROUND

On May 8, 1991, the Defendant-appellant, Nelson M. Naranjo, was charged by complaint with escape in violation of Title V, Section 5-1-107(3)(f) for failing to return to the Southern Ute Jail. On May 9, 1991, a sworn Affidavit for Arrest Warrant was filed with the Southern Ute Tribal Court. The Affiant was LuLu Pezeshk. The record shows no issuance or return of an arrest warrant. According to the arresting officer, the Defendant was arrested on June 5, 1991, "on a warrant for escape and disorderly conduct." Trial Transcript, p. 7. On the same day, the Defendant plead not guilty to the charges of escape and disorderly conduct before Judge Elaine Newton. A trial on the escape charge was subsequently held and the Defendant-appellant (hereinafter Appellant) was found guilty and a sentencing order entered July 10, 1991.

ISSUES

Appellant appeals from his conviction of escape and raises three issues in his Notice of Appeal; first that the case was improperly charged; second, even if properly charged, that the tribal court had no jurisdiction because the

escape occurred outside the exterior boundaries of the reservation; third, that the unsworn criminal complaint was invalid, and as such no valid complaint existed to initiate prosecution, thereby divesting the court of subject matter jurisdiction. The conviction is affirmed.

DISCUSSION

The Appellant has raised two separate issues regarding the Southern Ute Tribal Court's jurisdiction over the crime charged. The Appellate Court will deal with the issue regarding subject matter jurisdiction first because, absent subject matter jurisdiction, the Appellant would not be subject to the Court's action in a criminal proceeding even if the Court possessed territorial jurisdiction over the offense and the Appellant was properly charged.

I. Subject Matter Jurisdiction

Appellant argues that the Court lacked subject matter jurisdiction to enter a valid conviction against him because the criminal complaint filed in this case was not sworn to by the complainant. Appellant, in his supplemental brief identifies the complainant as the tribal prosecutor, Douglas Walker. Included in the record, and filed on June 13, 1991, is a verification of the complaint filed against Nelson Naranjo signed by Elwood Kent as "complainant" and subscribed and worn to by Sherrie Prairie Chief, Tribal Court Clerk and Notary. The Court agrees with the Appellant that this would not operate to verify the complaint. The Southern Ute Code requires that the complaint be sworn to by the complainant. The complainant was Douglas Walker, not Elwood Kent. The complaint is not sworn under oath by the complainant.

In the recent ruling in *Scott v. Southern Ute Indian Tribe*, 90-TR-105-106, 90 AP-03 (1991) this Court ruled that where a Defendant's Motion to Dismiss a criminal complaint not sworn to was not filed prior to trial, the Defendant waived any irregularities or defects in the complaint not clearly prejudicial to the Defendant or that otherwise resulted in the failure of the complaint to charge an offense. In this case, the Appellant raises the issue of an invalid complaint for the first time on appeal; nothing in the record indicates it was raised at trial or previous thereto. The Appellant raises this issue for the first time on appeal by challenging the Court's lack of subject matter jurisdiction. Subject matter jurisdiction is an issue which can be raised at any time, and for the first time on appeal. It is for this reason the Court will examine whether the unsworn complaint was an insufficient and invalid accusation which would divest the court of the power to hear the case. Appellant argues the defect to be so fundamental that the "complaint" was not a complaint at all, and therefore any action taken thereafter by the court was void because no valid complaint was filed to initiate the action. Appellant relies on *Albrecht v. United States*, 273 U.S. 1, 8, 47 S.Ct. 250, 71 L.Ed. 505 (1927), which stated "[a] person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits himself to the Court.

If a formal and sufficient accusation does not exist because a complaint is not sworn, then a court may be deprived of jurisdiction. It is therefore important in this case for the Court to consider the Appellant's precise question of whether the failure of the complainant to swear to the complaint prevents the complaint from serving as a formal and sufficient accusation to give the Court subject matter jurisdiction. If it does not affect subject matter jurisdiction, then the general rule pronounced in *Scott v. Southern Ute Indian Tribe*, 90-TR-105-106, 90 AP-03 (1991), would apply.

II. Purpose of Complaint Generally

Generally, the complaint is the initial step in a prosecution and the pleading which charges the accused. The instrument performing this function is also known as an information. 22 C.J.S. "Criminal Law" Section 324, p. 389. "The lack of a sufficient...complaint...goes to the jurisdiction of the court, which must take notice thereof *ex mero motu*, and renders all proceedings prior to the filing of a proper complaint *void ab initio*." 22 C.J.S. Section 324, p. 390.

The function of the complaint is to initiate prosecution; in addition, a complaint can authorize an arrest, inform the accused of the charge to prepare a defense and allow a Judge to determine whether there is probable cause for the accused to be bound over to stand trial on the charge.

III. Southern Ute Indian Tribal Code Provisions

Under the Southern Ute Tribal Code a complaint is defined as "a written statement sworn to by the complaining witness and charging that a named individual has committed a particular criminal offense and it initiates all criminal prosecutions." Section 4-1-101(3), SUITC (1989). The complaint, under Southern Ute criminal procedure, is the sole document required for prosecution and is not followed by indictment or information.

Under Section 4-1-102(2), SUITC (1989), the four particulars required of the complaint are set forth as (a) signature of the complaining witness sworn to before a tribal judge or individual designated by the chief judge; (b) written statement by complaining witness describing in ordinary language the nature of the offense committed including the time and place as nearly as may be ascertained; (c) name or description of the person alleged to have committed the offense; and (d) the section of the tribal code allegedly violated.

IV. The Oath

By statutory authority the complaint is required to be sworn, Section 4-1-102(2)(a) SUITC (1989). Appellant argues the lack of an oath on a complaint is a jurisdictional defect. Generally, the oath required is of the facts set forth in the complaint. Olfield, *Federal Criminal Rules*, Section 3:4, p. 53. The criminal complaint under the Federal Rules and Southern Ute Indian Tribal Code are similar, with the exception that under the Code, the complaint is also the principal written accusation. Where the issuance of an arrest warrant is sought on the basis of a complaint alone, which is allowed for under the Code, Sections 4-1-102 (3) and (4), SUITC (1989), the oath requirement guards the federally protected civil right of the accused to be secure against unreasonable seizure and to protect against the issuance of warrants without probable cause supported by oath or affirmation. Indian Civil Rights Act, 25 U.S.C. Section 1302 (2). This provision is the same protection otherwise afforded under the Fourth Amendment of the United States Constitution.

The lack of an oath has resulted in the dismissal of the complaint by the trial court on its own action or by motion of the Defendant prior to trial. *United States v. Asdrubal-Herrera*, 470 F.Supp. 939, 941 (N.D. Ill., 1979) citing *Brown v. Duggan*, 329 F. Supp. 207 (W.D. Pa., 1971); *Pugach v. Klien*, 193 F.Supp. 630 (S.D.N.Y., 1961). (NOTE: *Asdrubal-Herrera* was later disapproved in *United States v. Ruth*, 777 F.2d 1200 (7th Cir. 1985)).

The Appellant argues that *Albrecht.* 273 U.S. 1, supports the contention that lack of oath on a charging instrument renders it incapable of conferring jurisdiction on the Court. However, careful reading of the case fails to convince this Court of this contention. The Supreme Court distinguished between the validity of warrants

issued on improperly sworn affidavits and the validity of an unsworn information and rendered the *warrants* invalid due to their failure to comply with the Fourth Amendment requirement for issuance of warrants on probable cause established on oath or affirmation. The Court considered separately the issue of whether the unsworn information made it invalid to confer jurisdiction. The Court concluded that probable cause to file the complaint existed apart from the *invalid affidavits*, which were found to have been filed to support probable cause for the issuance of warrants and were not used to support probable cause for the unverified information. The Supreme Court recognized that there were other means besides verifying the information and attaching affidavits thereto to satisfy a Court that probable cause for the prosecution existed, whereupon it stated that "[t]he United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information." *Albrecht, supra* at 6. The Court then cited *Weeks v. United States*, 216 F.292, 302 (2nd Cir., 1914), and later stated that the lower court had subject matter jurisdiction. In *Weeks, supra*, the Defendant demurred to an information which was signed by the United States Attorney, but was not verified and to which no affidavits were filed or submitted to the Court. The question before the Court was whether the United States Attorney could proceed in Court to prosecute one alleged to have committed a misdemeanor, where the information was not verified *or* supported by an affidavit showing personal knowledge of probable cause. In *Albrecht*, 273 U.S. 1, and *Weeks*, 216 F.292, the information was filed by leave of Court, and before granting leave, the Court was required to satisfy itself that there was probable cause for prosecution. The Second Circuit Court at the onset stated,

> There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of a particular offense and charged in the particular form and mode required by law. If that is wanting, his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. *Weeks, supra* at 293.

The Court stated further,

> And as at common law an information could be filed by the Attorney General simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary, unless required by some constitutional or statutory provision. *Weeks, supra* at 298.

V. Verification by Constitutional Provision

In reviewing the constitutional protection of the Fourth Amendment and its relation to the oath requirement of the complaint, the Second Circuit in *Weeks, supra* at 302, said,

> If the fourth amendment makes it necessary that, under all circumstances, an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government or to have

> it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except 'upon probable cause supported by oath or affirmation', and naming the person against whom it is to issue. If the application of the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe the party against whom it is issued has committed the crime which he is charged.

The Court in *Weeks*, 216 F. 292, found no other constitutional or statutory provision which would require verification of the complaint. In citing *Weeks*, *supra*, the Supreme Court in *Albrecht*, 273 U.S. 1, cited the language above which strongly states that the constitutional protection of the Fourth Amendment is not the Defendant's right to have the accusing instrument verified, it is the Defendant's right to be protected against the issuance of warrants but upon probable cause, supported by oath or affirmation. The same is true under the Indian Civil Rights Act, 25 U.S.C. Section 1302 (2). Likewise, under 25 U.S.C. 1302 (6), which is similar to the Sixth Amendment to the United States Constitution, the Defendant has a right "to be informed of the nature and cause of the accusation" and there is no constitutional right under this provision that the accusation be sworn.

IV. Verification by Statutory Provision

As was stated earlier, the SUITC requires the filing of complaints under oath. The Defendant in his Notice of Appeal asserts that by requiring judicial review of *sworn* complaints, the Tribal Council created the *same* safeguards as that required by the Fourth Amendment of the United States Constitution. This assertion is drawn from Section 4-1-102, SUITC (1989). If the same Fourth Amendment protection was applied to the judicial review of sworn complaints, this would mean, in essence, that the complaint itself would need to show probable cause by oath or affirmation before the Judge could allow the further prosecution of an action.

The only judicial review requirement of Section 4-1-102 (2), (3) and (5) is that prior to issuance of an arrest warrant or summons and upon a warrantless arrest probable cause for *arrest* be found by the Judge. The probable cause review prior to issuance of an arrest warrant required by Subsection 3 is the probable cause review required to provide ICRA protection similar to the Fourth Amendment protection that no warrant be issued but upon a showing of probable cause supported by oath or affirmation. 25 U.S.C. Section 1302 (2). Subsection 3 also provides that such probable cause may be found based on the complaint *or* on separate affidavits. Under Subsection 5, the Code requires that upon a warrantless arrest, a complaint shall be submitted to the court upon which the Judge can determine whether probable cause for arrest exists. The trial court, upon reviewing the complaint when a warrantless arrest is involved, or upon reviewing the complaint *and* other sworn documents when an arrest warrant or a summons is requested, shall allow the action to proceed further only if probable cause for arrest is shown. Under subsection 3, the Code specifically allows the Court to find probable cause on the complaint *or* on other sworn documents, which certainly contemplates situations where the complaint itself may not contain probable cause to arrest. Therefore, the Court cannot adopt Appellant's assertion that by requiring judicial review of *sworn* complaints, the Tribal Council created the same safeguards actions as that required by the Fourth Amendment of the United States Constitution, whereby the Court would need to find probable cause based upon oath or affirmation in the complaint before allowing the prosecution of a criminal action.

Under SUITC Section 4-1-102(3), the Court must find probable cause that the crime has been committed by the person charged based on oath or affirmation, whether it is contained in the complaint itself or in supporting sworn documents prior to the issuance of an arrest warrant or a summons to allow the criminal action initiated by the complaint to proceed further. Under SUITC Section 4-4-102(5), the Court must also find probable cause for arrest upon the complaint when the Defendant has been arrested without a warrant to allow the criminal action initiated by the complaint to go forward. While the complaint may contain sworn information which provides probable cause for arrest under subsection 3 and is required to contain probable cause for arrest under subsection 5, under Subsection 3, other documents may provide the sworn information which provides probable cause for arrest; therefore, the complaint is not required in all circumstances to contain sworn probable cause for arrest. The sworn complaint, therefore, cannot be said to be subject to the same judicial review as required by the Fourth Amendment, because it is not always the document relied upon to show probable cause for arrest.

While the Code requires that a complaint be sworn, Sections 4-1-101(3) and 4-1-102 (2)(a) SUITC (1989), the complaint need only include a written statement describing in ordinary language the nature of the offense committed, including time and place, the name or description of the person alleged to have committed the offense, and the section of the code violated to initiate prosecution. Probable cause for arrest *may* be included in the complaint, and if the complaint does not show probable cause other sworn documents must show probable cause for the issuance of an arrest warrant or a summons. The *complaint* is required to show probable cause for arrest where the Defendant has been arrested without a warrant. Section 4-1-102(5) SUITC (1989). It is the finding of probable cause for arrest by the Court which is required before the prosecution may proceed, and that probable cause may be found outside the complaint. Therefore, the judicial review of the sworn complaint, is not the determinative factor of whether the prosecution may proceed, a finding of probable cause of arrest is, and that may be found outside the complaint.

Because a complaint is required by the Code to be sworn, an unsworn complaint is defective and does not comply with the procedural requirements of the Code and may be challenged for its defect by the Defendant. However, a complaint initiates a prosecution and the Court is to allow prosecution to proceed where it finds probable cause to arrest. Probable cause to arrest may be found in the complaint or in a separate sworn statement. The lack of a sworn complaint affects only the ability of the complaint to be used as the sole basis to support a finding of probable cause for issuance of an arrest warrant. It does not impact the ability of the complaint to serve as an accusation. Therefore, the lack of an oath does not impact the subject matter jurisdiction of the Court. Here, the lower Court was not without *subject matter jurisdiction* because the complaint was not sworn to by the complainant.

In *Brynes v. United States*, 327 F.2d 825, 834 (9th Cir. 1964), in speaking of jurisdiction conferred by a complaint the Court states the complaint need only charge the crime, and need not show probable cause, on its face, *to give jurisdiction* to the United States Commissioner, and that "...the face of the complaint gives him jurisdiction if it follows the statutory language and if it relates the essential facts constituting the offense charged." *Id.*, at 834. The Court then found the complaint not to be defective. While the Court considered the failure of the complaint to give jurisdiction, a complaint which on its face identifies the Defendant, the charge and the nature of the offense is sufficient to give the Court subject matter jurisdiction. "This is not like an affidavit for a warrant of arrest. That must show probable cause." *Brynes*, supra at 834.

In a case which considered the importance of the oath to the complaint, and where the oath was found to have been made to erroneous facts, while the Court considered the oath of great significance and importance, it held "[t]his event standing alone however, would not call for the dismissal of the indictment, since the complaint had been made after a valid arrest, and was not the means used to place the defendant in custody." *Asdrubal-Herrera*, 470 F. Supp. 939, 942 (1979).

In a case in which no information was filed and the Defendant raised the issue of subject matter jurisdiction, the court found the lack of filing an information raised a question of the Court's subject matter jurisdiction, but stated that where an information has been filed, "[a]n attack on an already filed information is made on the basis of its insufficiency or on a technical defect in its contents, and is not based on the lack of the court's subject matter jurisdiction." *State v. Buckley*, 734 P.2d 1047, 1049 (Ariz. Ct. App. 1987). Here, the Court believes that a sufficient accusation to give the Court subject matter jurisdiction against the Defendant existed, although the complaint was lacking an oath. The complaint identified the Defendant, and contained a statement of the nature of the offense, the time and place of the offense, and the section of the code violated. No warrant or summons issued on the complaint. The Defendant appeared before the Court pursuant to an arrest on an unrelated charge. A separate statement which would support probable cause for arrest was filed (Pezeshk affidavit) and was available to the Court at the time the Defendant appeared before the Court for an arraignment. The complaint was signed by the tribal prosecutor, an officer of the Court subject to the American Bar Association Rules of Professional Conduct, Section 1-1-116, SUITC (1989), which include a provision governing the ethical duty of a government attorney not to knowingly institute criminal charges without probable cause or not to institute criminal charges which are obviously not supported by probable cause. DR 1-703. The Court had subject matter jurisdiction on the face of the complaint.

Although the complaint itself did not comply with the statutory requirements of Section 4-1-102 (2)(a), the Court finds this was a technical error and because it did not divest the Court of subject matter jurisdiction, and the Appellant did not show that the complaint was otherwise clearly prejudicial to him or resulted in the failure of the complaint to charge an offense, the defect was waived, not having been raised prior to trial under *Scott v. Southern Ute Indian Tribe*, 90 TR-105-106, 90-AP-03, 1 (1991). The Court's jurisdiction is not based on strict application of rules of pleading. Defendant was sufficiently informed of the charge against him, the nature of the offense, and was not otherwise prejudiced by the failure of the complaint to be sworn. The cases cited by Appellant fail to convince the Court otherwise. In this case, the lack of a oath on the complaint, raises only the question of the sufficiency of the complaint as a pleading, and as such, it is too late to raise the question of the complaint's irregularities or sufficiency for the first time on appeal.

The Southern Ute Indian Tribal Code clearly requires an oath as part of the complaint, and although its failure to appear on the complaint in this case was deemed a technical error, subject to waiver because it was not timely raised, the oath requirement is not be taken lightly and the obvious inattention to this requirement is of concern. The Code sets forth a mechanism for review of probable cause for issuance of an arrest warrant based on the complaint alone, and the *sworn* complaint is the crux of that mechanism. In rendering this opinion, the Court does not mean to condone the practice of filing complaints which do not comply with the Criminal Procedure provisions of the Southern Ute Indian Tribal Code. The matter if raised at or before trial, as is appropriate, could possibly have been remedied and could have avoided grounds for the protracted appeal, as occurred in this case.

V. Escape and Territorial Jurisdiction

The second jurisdictional issue is raised in a compound argument. The Appellant argues first that the charge of escape was improper, and even if properly charged, that the Tribe did not have jurisdiction to prosecute the Appellant for escape because the escape occurred outside its jurisdictional boundaries. The Court will examine the arguments in the order raised by the Appellant. The argument necessitates an examination of whether the crime of escape was properly charged, and, then an examination of the territorial limitations of the Court's jurisdiction over that crime.

A. Escape

The record shows Appellant was serving originally a 160 day sentence which began September 18, 1990, and was given additional time in December, 1990, which would have kept him incarcerated until June 4, 1991. Appellant was allowed to leave the Southern Ute Tribal Jail to enter the Red Pines Treatment facility located in Utah, under court sentence on March 5. On April 17, 1991, he was "kicked out" of the Red Pines Alcohol Treatment facility, and did not return to the Southern Ute Jail. He was subsequently arrested on June 5, 1991, as testified by Officer Gomez, "on a warrant for escape and disorderly conduct". Trial transcript, p.7.

Appellant argues that because he was not in any jail facility and had been released from custody to attend residential treatment at Red Pines, he was not actually in custody or confinement. He argues further that even if he could be found to be in "custody", he did not escape from custody, because he was released from Red Pines by the staff who allowed him to go wherever he desired. Appellant argues that the element of custody or confinement was not met, either because he was not in custody or he was released from custody; therefore, he was improperly charged with escape under Section 5-1-107 (3)(f), which provides, "A person commits a crime of escape if, *while in custody or confinement* and held for or charged with, or convicted of a crime, he escapes *from said custody or confinement*, and upon conviction shall be sentenced to a term of imprisonment not to exceed six (6) months and a fine not to exceed Five Hundred Dollars ($500.00)." [Emphasis added].

The Appellate Court does not agree with Appellant's argument. The Appellant was released from the Southern Ute Tribal jail facility to Red Pines, a specific treatment facility, for the successful completion of residential treatment. Just because the Appellant was not in the Southern Ute Tribal Jail facility does not mean he was not "in custody". Escapes from facilities besides jails, including hospitals, have nonetheless been found to be escapes from custody and "[e]scape has often been characterized as an offense against the authority which designated the place of confinement, even though actual or physical detention is the immediate responsibility of others authorities." *United States v. Howard*, 654 F.2d 522, 526 (8th Cir. 1981) citing *United States v. Cluck*, 542 F. 2d 728, 735 (8th Cir. 1976) (escape from county hospital designated as place of federal confinement was escaped from federal custody); *Frazier v. United States*, 339 F. 2d 745 (D.C. Cir. 1964) (escape from hospital); *Tucker v. United States*, 251 F. 2d 794 (9th Cir. 1958) (escape from county hospital), among others. See also *United States v. Tapio*, 634 F.2d 1092 (8th Cir. 1980) (escape from halfway house).

The Appellant was allowed time to be credited against his sentence for successful completion of treatment; otherwise, his sentence was to be served in the Southern Ute Jail facility. As such, placement at a treatment facility is constructive confinement. The Appellant was released from the jail facility for the specific purpose of receiving treatment and once that treatment was concluded on April 17, through successful completion or otherwise, it remains that he was not free of his sentence until June 4. Furthermore, there is a question whether

any credit would be granted against the sentence since credit for participation in an alcohol program specified successful completion. Whether Appellant actually successfully completed the treatment or was dismissed from treatment, on April 17, he was still under a sentence of the Court which ran until June 4, and that sentence, upon release from treatment, was to be served in the Southern Ute Jail.

The Appellant's failure to return to the designated place of confinement, the Southern Ute Jail, upon his departure from Red Pines, the facility he had been released to, cannot be premised on a release from Red Pines. Red Pines was not the sentencing authority, in the sense that Appellant argues he was released. It matters not that his departure was required by the staff of Red Pines; once he left the facility, a period of his sentence remained to be completed at the Southern Ute jail facility. His departure from Red Pines did not allow him to remain at large. Red Pines may have sent him from their facility, but this could not constitute a release from the sentencing authority, from the sentence which remained to be served, or from the Southern Ute Jail.

Appellant was released from Southern Ute Jail to the constructive custody of Red Pines. When Red Pines subsequently discharged Appellant, Appellant was still subject to the custody of the Southern Ute Jail until he concluded his remaining sentence. Appellant failed to return from his constructive custodian to his original custodian. Appellant remained at large, not reporting to the jail to conclude his sentence from April 17 to June 5, the day he was arrested. His premature release from Red Pines prior to a successful completion of the program, while ordered by the staff and perhaps involuntary in some respects, nonetheless required Appellant's completion of the remaining days of his sentence at the facility he was originally released from - the Southern Ute Jail. The period of time the Appellant remained at large, when he was neither at Red Pines, the facility he had been released to, nor in the Southern Ute Jail, the facility he was sentenced to, could be charged as escape from the custody of the Southern Ute Jail. Because Appellant was serving a jail sentence and serving of that sentence was allowed by the sentencing authority at an in-patient alcohol program, for which credit would be given against the jail sentence, the Red Pines placement was constructive custody. From the date he was dismissed by Red Pines on April 17, to the date he was arrested on June 5, 1991, the Appellant did not return himself to the Southern Ute Tribal Jail, where he had been sentenced until June 4. The subsequent leaving of the constructive custody of Red Pines, *and* the failure to return to the Southern Ute Jail, the original custodian, to serve the remainder of an imposed sentence, would support a charge of escape "from custody or confinement while in custody or confinement" under Section 5-1-107(3)(f).

B. Territorial Jurisdiction

Now we reach the question of the Southern Ute Tribal Court's authority to exercise jurisdiction over the criminal charge of escape against the Appellant. As was stated in *United States v. Howard*, 654 F. 2d 522, 526 (8th Cir. 1981), escape is characterized as an offense against the authority which designated the place of confinement, even though actual or physical detention is the immediate responsibility of others. Thus, the escape was an offense against the Southern Ute Tribe, and as such, the Tribe had jurisdiction over the offense, no matter where the offense "began". Where the Appellant returned to the jurisdiction of the Southern Ute Tribe, and was subsequently apprehended within the territorial jurisdiction, the Tribal Court obtained personal jurisdiction over the Appellant, and had jurisdiction to try the Defendant for the charge of escape.

It has also been held that the crime of escape is a continuous act. *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L. Ed 2d 575 (1980). When the Appellant returned to the Southern Ute Reservation and remained at

large, up and until his apprehension on June 5, the act of escape was occurring within the territorial jurisdiction of the Southern Ute Tribe. Section 1-1-109 (1) SUITC (1989) states, "The Southern Ute Indian Tribe shall have criminal jurisdiction over any Indian who commits a criminal offense prohibited by this code or other ordinance of the Tribe by his own conduct or the conduct of another for which he is legally accountable, if the conduct occurs either wholly or in part within the exterior boundaries of the Southern Ute Indian Reservation." No challenge that the Appellant was apprehended without the exterior boundaries of the Southern Ute Indian Reservation has been raised.

CONCLUSION

It is this Court's opinion, that the Appellant was properly charged with escape and that the lower Court had subject matter, personal, and territorial jurisdiction over the escape charge; accordingly the trial Court's judgment is affirmed.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS FOR THE SOUTHERN UTE INDIAN TRIBE

SOUTHERN UTE INDIAN TRIBE
Plaintiff-Respondent,

v.

Richard S. HERRERA,
Defendant-Appellant.

No. 92-001-SUTC
(April 22, 1992)
No. 90-CR-81-82-104-111

Appeal from the Southern Ute Tribal Court, Maylinn Smith, Judge.
Jim Salvator, for appellant.
James D. DeVaney, for respondent.

SUMMARY

Defendant appealed the lower court's denial of parole. The Appellate Court granted Defendant-appellant's subsequent motion to dismiss the appeal and directed Defendant pay court costs of $163.23 to the Southern Ute Tribal Court.

OPINION

CERNO, Judge

This matter is currently pending before the Southwest Intertribal Court of Appeals upon the appeal of the Defendant-appellant, Richard Herrera, from the Southern Ute Tribal Court's decision to deny him parole from a sentence that was imposed by such court.

That on or about January 28, 1992, the Defendant-appellant appeared before the Southern Ute Tribal Court upon a Motion for New Parole Hearing. At such time, the Defendant also made an oral motion for a stay of

proceedings pending appeal of the lower court's decision of January 13, 1992, denying his request for parole. This hearing took place in light of the fact that Defendant had filed a Notice of Appeal. The Southern Ute Tribal Court ruled that "... given the discretionary nature of parole under the Southern Ute Tribal Code, the Court does not find that any type of stay in this Court's sentencing order is appropriate or required when parole has been denied." Thereafter, the Defendant made a motion to reconsider the denial of parole. The Court set March 2, 1992, as the hearing date on such motion.

That at the hearings on March 2, 1992, the Court indicated to the parties that it lacked jurisdiction to proceed on Defendant's motion due to the fact that its decision denying parole was currently before this court on appeal. The lower court pointed out that unlike issues pertaining to stays of judgments which are specifically reserved for determination by the trial court, the Southern Ute Tribal Code does not vest the lower court with the power or authority to hear motions for hearing while the case is on appeal. In light of the pending appeal, and relying upon the general rule that once an appeal has "been perfected the jurisdiction of the trial court ceases and that of the appellate court attaches", 4A C.J.S. §606, the lower court ruled that it did not have the necessary jurisdiction to address the motion for new hearing.

Thereafter, on March 3, 1992, the Defendant via his counsel of record filed a Motion to Dismiss his appeal. This motion was received by this Court on March 13, 1992. The Defendant stated in his motion that in light of the fact that the trial court could not entertain his motion for a new parole hearing pending the outcome of his appeal, Defendant opted to forego his appeal thereby allowing a new motion for parole hearing to be filed with the lower court.

That Rule 33(b) of the Southwest Intertribal Court of Appeals states that the Appellate Court "...may cause to issue an order dismissing the appeal on the motion of the appellant and upon such terms as may be agreed upon by the parties *or fixed by the Court*." [Emphasis added]. In accordance with Rule 33, the Court hereby dismisses the Appellant's appeal. The Court also imposes court costs of $163.23 upon the Defendant-appellant, and such costs shall be paid directly to the Southern Ute Tribal Court. IT IS SO ORDERED.

IN THE SOUTHWEST INTERTRIBAL COURT OF APPEALS
FOR THE PUEBLO OF SAN JUAN

Alejandrina ABEYTA,
Petitioner-Respondent,

v.

No. 90-008-PSJ
(May 12, 1991)
No. 87-08-AA-0042

ALL INDIAN PUEBLO HOUSING AUTHORITY,
Defendant-Appellant.

Appeal from the San Juan Tribal Court, Stanley A. Bird, Judge.
Alejandrina Abeyta, *pro se*.
All Indian Pueblo Housing Authority, *pro se*.

SUMMARY

The Appellate Court ruled the court could not consider the issues raised by Defendant-appellant without a stipulated record of the lower court proceedings. The Appellate Court remanded the matter to the lower court with directions the record be certified and transmitted within ninety days. The Appellate Court affirmed the lower court order upon finding the lower court record supported its findings of fact and conclusions of law.

OPINION

SMITH, Judge.

The above entitled matter came before the Southwest Intertribal Court of Appeals on the All Indian Pueblo Housing Authority's appeal filed on or about March 18, 1988, with the Pueblo of San Juan Council/Governor. This appeal was subsequently transmitted to the Southwest Intertribal Court of Appeals on October 25, 1990; with this Court assuming jurisdiction on January 8, 1991, and issuing a directive order on that date, as well as another directive order on February 25, 1992.

In response to the directive order of January 8, 1991, instructing that a record be constructed for purposes of addressing the issues raised by this appeal, the parties to this action submitted copies of their case files. There does not appear, however, to be any stipulation from the parties regarding what transpired during the September 2, 1987 hearing; making it difficult to assess the substance of the All Indian Pueblo Housing Authorities' grounds for appeal.

Upon reviewing the information provided this Court, it appears the following facts and circumstances are significant to this case. During a hearing held on September 2, 1987, as a result of Appellant's complaint alleging Respondent was delinquent in her house payments, Respondent apparently indicated to the lower court that she was not paying the amounts allegedly owed because repairs needed to be done to her residence and that the Housing Authority had promised they would make these repairs. The lower court record reflects that on or about January 26, 1988, Respondent in fact filed a complaint against the All Indian Pueblo Housing Authority alleging neglect for failure to perform the repairs on unit #31-32, as promised during the September 2, 1987 hearing, and for failing to keep Respondent informed of her status with the CIAP Rehabilitation Program.

In connection with the March 8, 1988 hearing on Respondent's complaint, the lower court judge indicated on the record that representations had been made at the September 2, 1987 hearing by Mr. Baca and Ms. Chico to the effect that certain repairs would be made to Respondent's resident by the Housing Authority. Although the lower court was unable to provide any recording or transcript of the September 2, 1987 hearing, it does appear Ms. Salcido, the attorney appearing on behalf of the Housing Authority, committed the Housing Authority to making the repairs enumerated by the lower court at the time of the March 1988 hearing when she reportedly stated "No, it's been on the court of record and I just made an open statement, a public statement they will make it good." *Transcript of March 8, 1988 hearing, page three.*

The filed notice of appeal indicated that both Mr. Baca and Ms. Chico denied making any guarantee of assistance in regards to repairing problem with Respondent's residence. Nothing provided this Court, however, reflects that the Housing Authority took any affirmative action, subsequent to either of the above hearings, which would negate the promise made by Ms. Salcido that repairs would be made by the Housing Authority.

Because of the added burden the lack of a complete lower court record places on appellate courts when reviewing lower court proceedings, it is extremely disconcerting that the lower court did not maintain any type of permanent record regarding the September 2, 1987 hearing. The lack of record in this case is further aggravated by the lengthy period of time between filing of the appeal and its transmittal to the appellate court. However, given the opportunities afforded the parties to provide this Court with a stipulated record for purposes of appeal, this Court must base its decision on the limited information submitted in response to its directive order. Based on this Court's review of the record provided, it FINDS that in the absence of anything contradicting the March 8, 1987 statement of Ms. Salcido, as set forth in the provided transcript, the Housing Authority was committed to making the repairs enumerated by the lower court upon Ms. Salcido's oral representation to the lower court that they would make it good; implying the repairs to Respondent's residence would be taken care of by the Housing Authority.

Based on the very limited information available, this Court FINDS that the lower court record does minimally support its order directing the All Indian Pueblo Housing Authority to make repairs. The lower court's decision ordering the All Indian Pueblo Housing Authority to make repairs to Respondent's, Alejandrina Abeyta, residence, unit number 31-32, is therefore AFFIRMED. The issue of bias raised in the appeal is moot in light of the fact that nothing is being remanded to the lower court. In addition this Court notes that the lower court judge would now be required to disqualify himself from any cases involving Housing Authority due to the conflict created by the fact he is also acting as Commissioner of the All Indian Pueblo Housing Authority.