

FILED

MAY 16 2024

QUINAULT TRIBAL COURT

**IN THE QUINAULT INDIAN NATION COURT OF APPEALS
QUINAULT INDIAN NATION
TAHOLAH, WASHINGTON**

**BRYAN TARABOCHIA and JOSEPH
TARABOCHIA,**

Plaintiffs,

v.

QUINAULT INDIAN NATION, et al.,

Defendants.

CASE NO. CV23-015

**ORDER DISMISSING
INTERLOCUTORY APPEAL**

Per the Presiding Judge, Matthew L.M. Fletcher, the court declines the interlocutory appeal apparently certified by the Tribal Court under Section 31.02.010(b) of the Quinault Court of Appeals Procedures.

This matter comes to the appellate court in an unusual manner, as an order dated April 11, 2024 certifying an interlocutory appeal from the Tribal Court, invoking § 31.02.010(b). *See* Declaratory Judgment Order and Order Certifying Interlocutory Appeal (“Tribal Court Order”) at 13. We are not aware of any party to the trial court matter who has initiated an appeal from the Tribal Court Order. *Cf.* § 31.09.010(a) (“Any party who is entitled to appeal under this Title must begin the appeal by filing a notice of appeal within 20 judicial days of the order or judgment.”).¹

It is our understanding that whether the appellate court can accept the Trial Court Order as a valid notice of appeal is a question of first impression for this court.

We begin our analysis with the code. Section 31.02.010(b) provides:

The Court of Appeals shall have jurisdiction to hear and determine appeals from any interlocutory order in a civil case if the Tribal Court judge, in making the order, states in writing that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. Review of interlocutory orders shall be at the discretion of the Court of Appeals.

¹ By our count, the 20 days to appeal the April 11 order expired on May 9, 2024.

We learn several important points of law from this section. Whether to accept an interlocutory appeal is reserved to the discretion of the Court of Appeals. Three factors must be included in the relevant Tribal Court order: (1) the order involves a “controlling question of law,” (2) there is a “substantial ground for difference of opinion,” and (3) an “immediate” appeal “may materially advance the ultimate termination of litigation.” One critical ambiguity remains: whether the Tribal Court may initiate an interlocutory appeal merely by certifying that a question fulfills the three factors in § 31.02.010(b).

In this case, we conclude that the Tribal Court cannot initiate an interlocutory appeal on this legal question. We have before us a Tribal Court order that states in relevant part:

The Court holds that in the absence of Quinault law establishing when a Quinault Constitutional Amendment becomes operational different from that enacting the Constitution, amendments to the Constitution are likewise effective upon passage.

* * *

[T]he Court certifies there is a controlling issue of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. Because the issue is a matter of constitutional construction, the Appeals Court will review the matter de novo should it accept an interlocutory appeal. This will allow the Nation to have the matter settled, and afford the trial court the opportunity to adjudicate the case going forward with certainty on this issue.

Tribal Court Order at 12, 13.

We conclude that the Tribal Court on its own motion is not authorized to initiate an appeal on this question. First, we find that the Tribal Court’s holding – that a Quinault constitutional amendment is effective upon passage – will potentially resolve the matter below. Since the record we have before us consists solely of the Tribal Court Order’s statement that this case involves tribal membership, we cannot be absolutely certain. Had the Tribal Court issued a final order, the parties then court have filed an appeal in due course under § 31.09.010(a).

Second, it is doubtful that we should conclude the Tribal Court Order actually initiated an interlocutory appeal. The Tribal Court Order certifies that the question is one ripe for an interlocutory appeal, but does not take the final step of stating an intention to initiate an appeal. That said, we note that no party has filed a notice of appeal, perhaps assuming that the Tribal Court Order itself did the work of initiating an appeal. There really is no way for this court to know for certain. We think the better procedural path for the Tribal Court and the parties to follow is to reach a final order and allow the parties to decide whether to appeal at that point.

Going forward, we tentatively conclude that § 31.02.010(b) could allow for the Tribal Court to initiate an interlocutory appeal. Likely, such an order would come in a situation where

the legal question meets the three factors of § 31.02.010(b) in case where substantial fact-finding remains to be conducted that would be wasted if this court later reverses the Tribal Court on the legal question. As we noted earlier, that situation does not appear to this situation.

In a typical interlocutory appeal situation in federal, state, and tribal courts, a party, not the court, initiates an application for an interlocutory appeal. *E.g.*, 28 U.S.C. § 1292(b) (“The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken”); Wash. Rule App. Proc. 3.2(a) (“[A] party may seek discretionary review of any act of the superior court not appealable as a matter of right”); *Hoopa Valley Tribal Council v. Marshall*, 10 NICS App. 1, 2 (Hoopa Valley Tribal Ct. App. 2011) (“On May 12, 2010, the defendant timely filed an interlocutory Notice of Appeal to this Court.”). *E.g.*, Quinault Tribal Court of Appeals, Administrative Order – Procedures for Certified Questions of Law § 2 (“[A] tribal judge . . . may certify an issue for decision to the Court of Appeals.”).² Here it appears we have a kind of mixture of the two procedural paths chosen by the Tribal Court. The Quinault rule does not bar a tribal judge from “certifying” (as the Tribal Court here did) that its order should be reviewed by this court via an interlocutory appeal. We leave for another day what circumstances might justify the initiation of an interlocutory appeal by the Tribal Court.

It is so Ordered, this 16th day of May, 2024, for the panel:

Jeremy Brave-Heart, Associate Judge
Patricia Davis, Associate Judge



Matthew L.M. Fletcher, Presiding Judge

² Conversely, in a certified question situation, it is the court, not the parties, that typically initiate the process. On March 27, 2024, in anticipation of the Tribal Court certifying a question to this court, we issued an Administrative Order governing Certified Questions of Law. That order established procedures for the certification of a question of law to this court. We drew inspiration from cases such as *Hopi Tribe v. Sahmea*, 1 Am. Tribal Law 373 (Hopi Tribe Ct. App. 1998); *Reynolds v. Skaggs*, 4 Okla. Trib. 51 (Muscogee (Creek) Nation S. Ct. 1994); and numerous Navajo Nation Supreme Court cases such as *In re Two Initiative Petitions Filed by Shirley*, 7 Am. Tribal Law 629 (Navajo Nation S. Ct. 2008), all of which accepted certified questions of law from their lower courts.