
IN THE CROW COURT OF APPEALS

**IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA**

CIV. APP. DKT. NO. 02-01

IN RE. MATTER OF CLB 0201:

**ALBERT L. GROS-VENTRE, THOMAS MEDICINE HORSE, AND TIMOTHY
SMELLS, as the duly elected Judges of the Crow Tribal Court;**

and

**BENJAMIN CLOUD, III, and J.D. STONE, as Speaker of the House and Secretary,
respectively,
of the Crow Tribal Legislature;**

and

**CLIFFORD BIRDINGROUND and VINCENT GOES AHEAD, JR., as the
Chairperson and Vice-Chairperson, respectively, of the Tribal Executive Branch;**

Respondents.

Entered March 5, 2002

[Cite as 2002 CROW 3]

Before Watt, J.

**PRELIMINARY FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

In support of this Court's Order Initiating Original Mandamus Proceeding and Order to Show Cause issued this same date, and based on the public record and matters of which this Court may take judicial notice, the Court enters the following:

PRELIMINARY FINDINGS OF FACT

1. This proceeding has been initiated by this Court, on its own motion, in order to preserve and protect the independence and integrity of the Crow Tribal Judiciary, and in furtherance of the principle of "separation of powers." The issues in this proceeding are limited to whether or not Act No. CLB 0201 of the Crow Tribal Legislature, and the Tribal Chairman's certification and order implementing that Act on February 21, 2002, purporting to immediately remove all three of the sitting elected

Tribal Court judges and eliminate the election process for Tribal Court Judges, are contrary to the 2001 Tribal Constitution and Federal law and therefore void and without effect.

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A. Respondents

2. Albert L. Gros-Ventre, Thomas Medicine Horse, and Timothy Smells are members of the Crow Tribe who were duly elected Chief Judge and Associate Judges, respectively, of the Crow Tribal Court on October 26, 2001. They assumed their official duties on November 26, 2001. Chief Judge Gros-Ventre was previously elected and served a 4-year term as Associate Judge of the Crow Tribal Court. Among their duties, the elected Tribal Court Judges also serve as Judges of the Crow Court of Appeals, and have been duly designated to sit on 3-judge appellate panels to hear and decide various appeals pending before this Court.

3. Benjamin Cloud, III, and J.D. Stone were duly elected to the Crow Tribal Legislative Branch on October 26, 2001. Mr. Cloud has been designated Speaker of the House, and presided over the proceedings that resulted in the enactment of CLB 0201 on or about February 21, 2002. Mr. Stone has been designated Secretary of the Legislature, in which capacity he is responsible for keeping minutes of all meetings and official records of Legislative Branch proceedings.

4. Clifford Birdinground and Vincent Goes Ahead, Jr., were duly elected Chairman and Vice-Chairman, respectively, of the Crow Tribal Council in May, 2000. They have assumed the positions of Chairperson and Vice-Chairperson, respectively, of the Crow Tribal Executive Branch under the 2001 Tribal Constitution. Chairman Birdinground approved CLB 0201 on June 21, 2002, pursuant to his authority to implement Acts of the Legislature, and ordered that the three elected Tribal Court judges be removed effective immediately.

B. The 1978 Law and Order Code

5. Prior to the enactment of CLB 0201, Title 3 of the 1978 Crow Law and Order Code (the "Code") provided that the Chief Judge and two Associate Judges of the Crow Tribal Court were elected by the Crow Tribal Council to serve 4-year terms (Crow Tribal Code §§ 3-3-302 and -303). Qualifications for the elected judges were that they be 25 years old, enrolled members of the Crow Tribe, fluent in both the Crow and English languages, and never convicted of a felony (or a misdemeanor within one year preceding their election).

6. The 1978 Code provided that Tribal judges may be removed for abuse of office, habitual intemperance or conviction of a criminal offense, by vote of the Tribal Council on a resolution for removal submitted by the Law and Order Commission. A judge was afforded the right to "answer the charges against him before both the Commission and the Council." Crow Tribal Code § 3-3-305.

7. The Code further provided that Crow Court of Appeals was composed of three (3) appellate judges, including the two Tribal Court judges who did not preside over the action being appealed and a professional attorney (or visiting judge from a Tribal judge exchange program) whose selection was at the sole discretion of the Chief Judge (Crow Tribal Code § 3-3-331).

C. Constitutional Reform Process

8. On or about December 9, 2000, certain amendments to the 1948 Crow Constitution (the “2000 Amendments”) were passed by a majority of the voters who voted in a special election called for that purpose. One of the amendments added Article X which, among other things: declared the government of the Apsaalooke Nation to be divided into three distinct and separate branches (Section 1); provided that the Judicial power of the Apsaalooke Nation be vested in one Appellate Court and such other courts as the Apsaalooke General Council may establish; and further provided that Judges of the Tribal courts shall hold their offices during good behavior, and that their compensation not be diminished during their terms in office (Section 2).

9. On or about July 14, 2001, a resolution repealing the 1948 Constitution and replacing it with a new Constitution and Bylaws of the Crow Tribe (the “2001 Constitution”) was passed by a majority of the voters who voted in the Quarterly Tribal Council Meeting. Article X of the 2001 Constitution provides, in pertinent part:

The Judicial Branch shall be a separate and distinct branch of government from the Legislative and Executive Branches of the Crow Tribal Government. The election process for the Judicial Branch judges shall be in accordance with the Crow Law and Order Code. Qualifications for the Judicial Branch shall be established by the Crow Law and Order Code. The Judicial Branch shall have no power to review Executive Branch decisions made within the scope of the enumerated powers of the Executive Branch. The Judicial Branch shall have a limited review of legislation passed by the Legislative Branch to determine whether the subject legislation is consistent with or in conflict with this Constitution.

D. Legislative Act CLB 0201

10. Eighteen members of the Crow Tribal Legislature were elected pursuant to the 2001 Constitution on October 26, 2001. This was the same election in which the Judges of the Crow Tribal Court were elected pursuant to the 1978 Law and Order Code and the 2001 Constitution.

11. Bill No. 4, providing for the repeal and replacement of Title 3 of the 1978 Crow Law and Order Code, was submitted to the Crow Tribal Legislative Branch by or on behalf of Chairman Birdinground pursuant to Article V, Section 7 of the 2001 Constitution.

12. On February 19, 2002, officers of the Tribal Judiciary were invited to testify on Bill No. 4. The elected Tribal Court Judges testified in opposition to the Bill.

13. On or about February 21, 2002, the Crow Tribal Legislature enacted Bill No. 4 as “CLB 0201” with a bare quorum of 13 members present, 9 voting in favor and 4 against.

14. Among other things, CLB 0201 provides that: (a) the Tribal Courts’ jurisdiction shall be essentially identical to that authorized under the 1978 Law and Order Code; (b) the Tribal Court shall consist of a Chief Judge and a minimum of one Associate Judge; (c) the qualifications for the Chief Judge require a law degree, and for Associate Judge require a law degree, completion of a course of study in Indian justice systems, or at least 5 years experience as a lay advocate in a Tribal justice system; (d) the Chief Judge and Associate Judge be appointed by the Tribal Chairman and approved by majority vote of the Tribal Legislature at its next quarterly session; and (e) the Court of Appeals consist of one licensed attorney selected through a recommendation of the Chief Judge, appointment by the Tribal Chairperson, and approval by majority vote of the Tribal Legislature.

15. CLB 0201 provides the same causes for removal of Tribal Judges as the 1978 Law and Order Code, except that “abuse of office” is governed by the standards of the ABA Model Code of Judicial Conduct. Under CLB 0201, a petition for removal of a Tribal Judge is decided by majority vote of three Tribal officials: the “Chief Executive Officer of the Crow Tribe” (appointed by the Chairman pursuant to Article IV, Section 5 of the 2001 Constitution), the Speaker of the Tribal Legislature, and the Chief Judge (or the Appellate Judge if the latter has a conflict of interest). No hearing procedure is specified.

E. Implementation of CLB 0201 and Physical Ouster of Elected Judges

16. On February 21, 2002, Chairman Birdinground signed and issued a Certification approving CLB 0201 pursuant to Article V, Section 8 of the 2001 Constitution.

17. In the same document with his Certification, Chairman Birdinground, acting pursuant to Article IV, Section 4(a) of the 2001 Constitution, ordered on February 21, 2002 that the positions of Chief Judge and Associate Judges of the Crow Tribal Court “are immediately vacant[.]” The Chairman’s order further directed that the Special Judge “preside on all matters until the search and hiring process [for newly created judicial positions] is completed by the Executive and Legislative Branches[.]”

18. Chairman Birdinground’s order was served on Associate Judges Medicine Horse and Smells by Bureau of Indian Affairs police officers at the Tribal Courthouse on the morning of February 22, 2002, who were compelled to clean out their desks and leave the Courthouse immediately that morning. The locks on the doors of all three elected judges’ offices were changed on or before Monday, February 25. Officials of the Tribal administration have instructed Tribal and Federal law enforcement and the Special Judge not to allow the elected Judges to resume their duties at the Tribal Courthouse.

19. Since at least February 25, 2002, and pursuant to the Chairman’s order implementing CLB 0201, all proceedings in the Crow Tribal Court have been conducted, and the activities of the Court administered by, Special Judge Robert E. LaFountain. Judge LaFountain previously served as court advisor and Special Judge on particular assigned cases under appointment by Chief Judge Gros-Ventre pursuant to Section 3-3-304 of the 1978 Law and Order Code.

20. No question has been raised about the competence or integrity of Special Judge LaFountain. However, Section 3-3-304 of the 1978 Law and Order Code as well as CLB 0201 provide that a Special Judge may only sit on a particular matter by appointment of the Chief Judge. Subsection 3-3-304(2) of the 1978 Law and Order Code further provides that a Special Judge may not be appointed to any divorce, adoption, guardianship, or juvenile proceeding, or any prosecution for violation of the Crow Criminal Code or Fish & Game Code prior to arraignment and plea of not guilty.

F. Disruption of the Crow Court of Appeals

21. The undersigned is an enrolled member of the Crow Tribe, and was duly appointed as attorney-judge of the Crow Court of Appeals by Chief Judge Gros-Ventre in December 2001 pursuant to Section 3-3-331 of the 1978 Crow Law and Order Code. Judge Watt has previously served as Judge of the Crow Court of Appeals since 1995 under successive appointments by Chief Judge Victoria White, Chief Judge Glen Birdinground, Acting Chief Judge Donald Stewart, and Chief Judge Dennis Big Hair.

22. As part of his duties, Judge Watt has acted as Docket Judge for the Crow Court of Appeals, which includes setting briefing schedules and scheduling oral arguments in pending appeals. By orders issued in January, 2002, the Crow Court of Appeals scheduled oral arguments on three (3) pending appeals for February 27-28,

2002.¹⁴ Pursuant to Section 3-3-331 of the Code, each of the three of the elected Tribal Court Judges was designated to sit on two of the 3-judge panels to hear argument and decide those appeals.

23. In light of the Chairman's order purporting to immediately remove the elected Tribal Court Judges, and physically barring them from resuming their judicial duties at the Tribal Courthouse, the undersigned issued orders on February 27, 2002 vacating all three of the scheduled oral arguments.

24. The undersigned is not aware of any formal action under CLB 0201 to remove him from office, and he has not been barred from the Tribal Courthouse. Accordingly, and of necessity, Judge Watt has continued to act as Docket Judge of the Court of Appeals by, *inter alia*, issuing the orders vacating oral argument described above. *See also, Dorma Takes Enemy, et al. v. Crow Tribe*, Nos. 04-168, 012-233 (Feb. 25, 2002)(order granting enlargement of time for Tribe's counsel to file response brief).

25. Notwithstanding Judge Watt continuing to act as Docket Judge on procedural matters, CLB 0201 has disrupted the essential functions of the Crow Court of Appeals by preventing the sitting elected Tribal Court Judges from sitting on appellate panels as provided in the 1978 Law and Order Code.

26. In light of the fundamental legal questions concerning the validity and effectiveness of CLB 0201 and its implementation by the Chairman, it would be improvident and for the Court of Appeals to attempt to decide important issues of Tribal law in after it has been reconstituted pursuant to CLB 0201 itself. In the absence of judicial review in this proceeding, legal questions on the validity of CLB 0201 could only be heard and decided by Judges who hold their appointments by virtue of Executive and Legislative Branch appointments under CLB 0201.

G. Effect on Practice Before the Tribal Court

27. CLB 0201 also purports to immediately change the requirements for admission of all attorneys and lay counselors to practice before the Crow Tribal Court by requiring, among other things, affidavits of good character from 2 other persons licensed to practice law in the Tribal Court and approval of their applications by the Chief Judge (*see* Sections 3-7-701, *et seq.* of CLB 0201).

28. There is no "grandfather clause" to recognize the admissions of current Tribal Court practitioners, so it is not clear how any applicant may obtain affidavits from two other licensed persons.

H. Criminal Background Checks

29. The Indian Child Protection and Family Violence Prevention Act requires Tribes who receive Federal self-determination contract funds to conduct criminal background checks on each individual who is employed "in a position that involves regular contact with, or control over, Indian children." 25 U.S.C. § 3207. An individual may not be employed in such a position "if he/she has been found guilty of or entered a plea of *nolo contendere* or guilty to any offense under Federal, state, or tribal law involving crimes of violence, sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution, or crimes against persons." 25 CFR §§ 63.12 and 63.13(b).

30. The Bureau of Indian Affairs, through the Rocky Mountain Region Director, has asserted that the Tribe's failure to perform criminal background checks on Tribal Court judge candidates before the October, 2001 election has resulted in a "compliance issue" with respect to the Tribal Court's PL 93-638 funding contract with the Bureau (*see* Letter dated January 22, 2002 from Keith Beartusk to Chairman Birdinground).

31. Pursuant to Bureau of Indian Affairs regulations promulgated under the Indian Child Protection Act, an employee under investigation for removal “must be provided an opportunity to explain, deny, or refute unfavorable and incorrect information gathered in an investigation, before the adjudication is final.” 25 CFR § 63.23(a). Investigative reports “contain information of a highly personal nature and should be maintained confidentially.” 25 CFR § 63.23(e).

32. During the Tribal Legislature’s deliberations on CLB 0201, allegations were raised that one or more of the elected Tribal Court Judges may have committed past offenses that would disqualify them from serving as Judges under the self-determination contract and the Indian Child Protection Act. It is not clear at this time what allegations were made, by whom, and what information was provided. It is apparent, however, that concerns with this contract compliance issue, and for the safety of Crow children, was a substantial consideration in the Legislature’s decision to immediately remove the three elected Judges.

I. Other Self-Determination Contract Compliance Issues

33. Since at least February 2000, the BIA Regional Director and the Indian Services Officer of the Bureau of Indian Affairs in Billings have asserted that the election of Tribal Court Judges “is a *basic structural problem* that impacts the total court system.” Because the Judges “were elected by their families, friends, etc., there is probably very little chance these same families would vote them out of office if a resolution was brought to the council floor.” (Letter dated February 25, 2000 from Keith Beartusk to Chairperson Nomee)(emphasis added).

34. Since early 2002, Bureau of Indian Affairs officials have asserted several contract compliance issues relating to the Tribal Court’s lack of responsiveness to orders and dispositions sought by BIA Social Services, including 22 proceedings for termination of parental rights in order to allow permanent adoptions of Crow children. (Letters dated February 11, 2002 from Marshall Lefthand to Chief Judge Gros-Ventre; *see also* Beartusk letter dated January 22, 2002, *supra*).

35. It is apparent that concerns with these contract compliance issues raised by BIA Social Services was another reason that some members of the Tribal Legislature felt compelled to vote in favor of CLB 0201 in order to re-structure the Tribal Court and provide more stringent professional qualifications for Tribal Judges.

Based on the foregoing Preliminary Findings of Fact, and subject to reconsideration following the Show Cause Hearing, the Court enters the following:

PRELIMINARY CONCLUSIONS OF LAW

1. The disposition of this proceeding does not require this Court to decide any questions relating to the validity and effectiveness of the 2000 Amendments to the 1948 Constitution, or the 2001 Constitution. Any such issues involving the constitutional reform process have not yet been presented to the Court of Appeals for a final determination of Tribal law, *see, e.g., One Hundred Eight Employees of the Crow Tribe*, Civ. App. Dkt. No. 89-320 slip op. at 10-11 (Crow Ct. App. 2001); 2001 CROW 10 ¶¶ 22-24² and should only be decided by Tribal Court Judges whose authority is clear and undisputable under Tribal law. Nevertheless, because CLB 0201 was predicated upon the authorities set forth in the 2001 Constitution, the issues in this proceeding may be determined with reference to the 2001 Constitution and applicable Federal law.

A. Jurisdiction

2. The Crow Tribal Court is a “court of general civil jurisdiction,” with subject matter jurisdiction over “all civil causes of action arising within the exterior

boundaries of the Crow Indian Reservation.” (1978 Code §§ 3-2-201 and -205; *see also* the essentially identical provisions in CLB 0201 Sections 3-2-201 and -205). As a result of the Chairman’s order implementing CLB 0201 and removing all the elected Tribal Court Judges, the Crow Court of Appeals acting through the undersigned Judge is the only authorized Tribal judicial institution capable of exercising the general jurisdiction conferred on the Tribal Court.

3. Article X of the 2001 Constitution expressly grants the Judicial Branch a limited power of “review of legislation passed by the Legislative Branch to determine whether the subject legislation is consistent with or in conflict with this Constitution.” This grant of jurisdiction in the 2001 Constitution is self-executing. In the forced absence of the elected Tribal Court Judges to hear cases, appoint a special judge or sit on appeals, this Court may exercise the Crow Tribal Judicial Branch’s power to review the constitutionality of CLB 0201.

4. A proceeding for a writ of mandamus is authorized by the Crow Rules of Civil Procedure “to compel a public officer to perform duties required by law[.]” Crow R. Civ. P. 23(c)(1). “The main use of *mandamus* in American courts today is to allow for appellate court review of a lower court decision when no other appeal route is available.” *One Hundred Eight Employees, supra*, at page 31, 2001 CROW 10, ¶ 68 , *citing* 1 Dobbs, Dan B., *Law of Remedies* § 2.9(1) (2d ed. 1993).

5. In the present circumstances, requiring the elected Tribal Court Judges to first file a *mandamus* petition in the Tribal Court would be futile, and no other appeal route is available. Furthermore, in view of the CLB 0201’s impact on the Tribal Judiciary, vindication of the principles at stake in this proceedings should not depend on the Tribal Judges’ ability to hire private lawyers to figure out how to proceed in these extraordinary circumstances.

6. This Court has inherent authority to prevent disruptions to its proceedings. The implementation of CLB 0201 has irreparably harmed the dignity of this Court and seriously disrupted its ability to hear and decide important issues of Tribal law in pending cases.

7. In extraordinary circumstances, there is precedent for a single Judge of the Crow Court of Appeals to issue substantive rulings on matters before the Court. *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, 1996 CROW 3 (opinion and order denying stay and waiver of bond during appeal). Previously, disposition of cases by a single judge of this Court has been in circumstances similar to when a single Judge of a U.S. Court of Appeals would be authorized to act, and was subject to review by the full 3-judge panel sitting on the case. *Sylvester Goes Ahead, et al., v. Clara Nomee*, Civ. App. Dkt. No. 00-117 (Crow Ct. App., 2000), 2000 CROW 4 (Order Granting Permission to Appeal and Dissolving Temporary Injunction) and 2000 CROW 5 (Memorandum Opinion). In the present case, there is no precedent for action by a Federal appellate judge in similar circumstances, because Congress has never attempted to oust all sitting U.S. District Judges. As in *Goes Ahead, supra*, no other Tribal Judges are available to sit on a 3-judge appellate panel.

8. For the reasons set forth above, this Court acting through the undersigned Judge has jurisdiction to initiate this *mandamus* proceeding on its own motion, and to hear and decide the issues relating to the validity of CLB 0201.

B. Merits

9. The immediate removal of all the sitting elected Tribal Court Judges violates the “separation of powers” doctrine that is expressly set forth in the 2001 Constitution, because it constitutes gross interference with the Tribal Judicial Branch. It may be reasonably inferred from the other Branches’ actions that the ouster and replacement of all the sitting elected Judges was, *inter alia*, for the purpose of

improperly controlling the Tribal Judicial Branch's future decisions on issues of fundamental importance to the future of the Tribe.

10. The immediate removal of all the sitting elected Tribal Court Judges, in a manner that violates the separation of powers and deprives the sitting judges of their property interests in their positions during their terms of elective office, violates the due process rights set forth in the Article XI, Sections 3 and 4(h) of the 2001 Constitution.

11. The immediate removal of all the sitting elected Tribal Court Judges violates their rights to due process guaranteed by the Indian Civil Rights Act, 25 U.S.C. § 1302(8).

12. The immediate change in requirements for admission to practice in Tribal Court violates the separation of powers doctrine and the due process rights of persons currently admitted to practice in the Tribal Courts, because in the absence of an incumbent Chief Judge to approve an application, or any other attorneys or lay counselors admitted to practice pursuant to CLB 0201 who can provide affidavits for other applicants, it is technically impossible for any attorney or lay counselor to become admitted to practice before the Crow Tribal Courts.

13. The appointment method of selecting Tribal Court Judges in CLB 0201 violates the "election process" clause in Article X of the Tribal Constitution. While Article X may grant the Legislature the power to alter judicial qualifications (prospectively) and the details of the election process, it does not allow the other Branches to eliminate the requirement for electing Tribal Court Judges, or substantially curtail the elected Judges' powers under the 1978 Law and Order Code, without amending the 2001 Constitution.

14. To the extent that the Legislature's decision in CLB 0201 to immediately remove all the elected Judges was based on the possibility that one or more of the Judges may have criminal backgrounds that would disqualify them from service as Judges under the Tribal Code or the Indian Child Protection Act, and such Judges were not afforded the opportunity to explain or refute the charges, that decision and action violated the Judges' rights to due process under the Tribal Constitution and the Indian Civil Rights Act, and the Judges' privacy and hearing rights under 25 CFR § 63.23.

15. To the extent that the Legislature's decisions in CLB 0201 to immediately remove all the elected Judges, and change the judicial selection process from elections to appointments, were based on contract compliance conditions asserted by the Bureau of Indian Affairs, the Bureau's conditions constituted unauthorized interference with the Tribal Government in violation of Federal Indian Policy.

16. For the reasons stated above, Chapters III and VII of CLB 0201 are void and without effect because they are in conflict with Articles X and XI of the 2001 Constitution and the Indian Civil Rights Act.

ⁱⁱⁱ The appeals scheduled for oral argument, and the composition of the 3-judge panels, were: *Crow Tribe Credit Committee v. Frederick Lefthand, et al.*, No. 92-26 (Gros-Ventre, C.J., Smells and Watt, JJ.); *In re. Matter of M.R.H., I.P., and T.P.*, Juv. No. 01-C70 (Gros-Ventre, C.J., Medicine Horse and Watt, JJ.); and *Anna Horseman v. Valeen Whiteman Plainfeather*, No. 99-121 (Medicine Horse, Smells, and Watt, JJ.). A fourth case scheduled for argument on February 28 was continued at the request of counsel.

²⁴ This neutral electronic citation is from the Court's Opinion as published on the Court of Appeals Website: www.littlehorn.com/CCA_Home.htm.