UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

FILED

FEB 1 8 2003

STATE OF SOUTH DAKOTA Plaintiff, vs. THE HONORABLE PAUL MUELLER, in his personal capacity and official capacity as Judge of the Crow Creek Sioux Tribe Tribal Court and NORMAN THOMPSON, SR., Vice-Chairman, Crow Creek Sioux Tribal Council in his personal and official capacities; CRYSTAL J. KIRKIE, Secretary, Crow Creek Sioux Tribal Council in her personal and official capacities; DARLA R. FALLIS, Treasurer, Crow Creek Sioux Tribal Council in her personal and official capacities; RANDY SHIELDS, SR., Councilmember, in his personal and official capacities; and LOREN FALLIS, SR., Councilmember, in his personal and official capacities, Defendants.	)	Civ. No. 03-3002-CBK MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Paul Mueller, Norman Thompson, Sr., Crystal J. Kirkie, Darla R. Fallis, Randy Shield, Sr., and Loren Fallis, Sr., by and through their attorney, Terry L. Pechota, respectfully submit the following memorandum of law in opposition to South Dakota's motion for a preliminary injunction.

The facts of this case, taken from the Complaint, are simple. On January 8, 2003, South Dakota Deputy Attorney General Robert Mayer provided Buffalo County Sheriff Frank Gorneau

("Gorneau") with subpoenas to be served on tribal member residents on the Crow Creek Sioux Reservation having been identified as potential witnesses at a grand jury proceeding in Sioux Falls related to an underlying state forgery case, State v. Red Earth, Crim. 02-6075 (2d Jud. Cir.2002). Sheriff Gorneau did not serve the subpoenas, so on January 17, 2003, the State dispatched an agent for the South Dakota Department of Criminal Investigation ("DCI"), James Severson ("Severson") to the Crow Creek Sioux Reservation to effectuate the service. Severson met with Gorneau, who had resigned his sheriff's position and was now acting in his capacity as a Tribal or BIA law enforcement officer, who put Severson in touch telephonically with the primary defendant in this case, Judge Paul Mueller ("Judge Mueller") of the Crow Creek Sioux Tribal Court. Judge Mueller told Severson that the Tribe's position was that the state had no jurisdiction to serve the subpoenas. Severson left without serving the subpoenas. The grand jury proceedings were continued.

On January 27, 2003, South Dakota Attorney General Larry Long ("Long") conferred with Judge Mueller telephonically and explained his position that recent U.S. Supreme Court precedent would allow the state to effect service of subpoenas on tribal residents on the reservation. Long also indicated that the state and the tribe would seek a gentlemanly manner of resolution that would avoid a confrontation. Judge Mueller indicated to Long that he would check with the Tribal Council on the issue. Some level of discussions between state and tribal officials ensued but the Vice-Chairman, Secretary, Treasurer and three Council members of the Tribal Council eventually issued a memorandum on January 28, 2003, forbidding service of the subpoenas on the identified tribal member witnesses residing on the reservation. When Severson, along with an additional DCI agent, Nate Leuning, showed up at the tribal courthouse with newly drafted subpoenas on January 29, 2003, Judge Mueller indicated to them, on the record in open court, that he had spoken with Long, had

received a memorandum from the Tribal Council and had determined that the agents had no authority to execute subpoenas to tribal members on the reservation unless a federal court ordered it. Severson and Leuning left Ft. Thompson and this action was filed by the state in federal court two days later requesting declaratory judgment that the defendants lack authority to issue orders or otherwise prevent the state from serving witness subpoenas on tribal members within the reservation, and requesting preliminary and permanent injunctive relief, disbursements, costs and attorney's fees.

While Long was preparing his lawsuit, the Tribe consulted with legal counsel to secure the admission of service or service of subpoenas on the witnesses to be subpoenaed, and organized transportation for the witnesses to travel to Sioux Falls on February 7, 2003, for the grand jury proceeding. Also following consultation with legal counsel, the Tribe notified the state that if it desired to serve the subpoenas that the Tribe would not prohibit that effort. The state has since, temporarily at least, dismissed the underlying lawsuit giving rise to the subpoena issue.

I. LACK OF JURISDICTION

Under the facts of this case, this court does not have jurisdiction to hear this case because the triggering of various justiciability doctrines precludes review. Article III of the United States Constitution defines the scope of authority of the federal judiciary. Federal courts must dismiss a case, as here, in which a live controversy no longer exists. An absence of a genuine adversarial issue between the parties means that a case is not justiciable. United States v. Johnson, 319 U.S. 302, 304 (1943). See also Muskrat v. United States, 219 U.S. 346 (1911) (interests of parties were not adverse and litigation was designed to elicit a disallowed advisory opinion from the federal court). Similarly review is prevented if there is not a sufficient likelihood that the federal court decision will make some difference in terms of remedying a claimed injury. C & S. Air Lines v. Waterman Corp.,

333 U.S. 103, 113 (1948). A fair analysis of the current underlying facts here require dismissal of the case. The principles of standing, ripeness and mootness were created through judicial interpretation of Article III and are dispositive of the case here.

A. Standing

Under the current circumstances of this case, the Plaintiff does not have constitutional standing.[1] For constitutional standing, the plaintiff must allege that it has suffered or imminently will suffer an injury, that the injury was attributable to the defendant's conduct, and that a favorable decision for the plaintiff by the federal court is likely to redress the injury. Northeast Florida Contractors v. Jacksonville, 113 S.Ct. 2297, 2303 (1993) (requirements for standing must all be met in order for a federal court to adjudicate a case). None of these necessary elements exist in the current case. Instead, the facts are clear here that although the Tribe was admittedly initially taken aback by the state's request and resisted the service of the subpoenas, it has since worked cooperatively with the state in securing admission of service of the subpoenas, encouragement of the participation of the witnesses and organization of transportation for the witnesses to access the grand jury proceeding.

Further, a plaintiff seeking injunctive or declaratory relief, as here, must show a likelihood that it will be injured in the future. City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983) (denying standing for failure to demonstrate likelihood of future injury). Given the cooperative efforts put forth by the Tribe with regard to the subpoenas in this case, the procurement of the cooperation of the witnesses, and the arrangement and financing of transportation for the witnesses to the grand jury

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[1]Prudential standing is an additional judicially created doctrine that, although important in many cases, is not relevant here. See, e.g., Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992).

proceedings, the plaintiff here will have a difficult time showing injury in the future. Injuries to common law, constitutional, and statutory rights are sufficient for standing. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152-53 (1951). Whether the state adequately alleges a likelihood of future injury under Nevada v. Hicks, 533 U.S. 353 (2001), which is analyzed more fully, infra, is doubtful given the factual and legal circumstances here.

B. Ripeness

The ripeness doctrine clarifies when a proper party may litigate because it seeks to separate matters that are premature for review when the injury is speculative and may never occur from those cases appropriate for federal adjudicatory action. Abbott Laboratories v. Gardner ("Abbott"), 387 U.S. 136, 148 (1967). If the plaintiff here is not currently facing opposition to the execution of its subpoenas in the underlying Red Earth matter and, indeed, is experiencing cooperation from tribal officials and witnesses, the threat of injury from the alleged course of conduct under attack in the plaintiff's complaint is simply too remote to satisfy the 'case or controversy' requirement necessary for Article III jurisdiction. O'Shea v. Littleton, 414 U.S. 488, 498 (1974). The Declaratory Judgment Act does not allow pre-enforcement review but, rather, permits federal court decisions only in justiciable cases, that is, "in a case of actual controversy." See 28 U.S.C. § 2201(a). The basic rationale of the ripeness requirement is to help courts avoid premature adjudication and unnecessary judicial entanglement in abstract disagreements. Abbott, 387 U.S. at 148. An analysis of the facts indicate that this matter embodied in the plaintiff's complaint is more of an abstract disagreement, now resolved, and not ripe for judicial review. The court's involvement at this juncture would not satisfy the "case of actual controversy" requirement under law.

C. Mootness

An actual controversy must exist at all stages of federal court proceedings and if events subsequent to the filing of the case resolve the dispute, the case should be dismissed as moot. Church of Scientology of California, v. United States, 113 S.Ct. 447, 449 (1992) (a case is moot when a controversy no longer exists and events subsequent to the initiation of the lawsuit have resolved the matter). Here, the state brought its complaint to federal court essentially to seek assistance in the service of its subpoenas to tribal member witnesses on the Crow Creek Sioux Reservation. The Tribe has rescinded its January 28 memorandum and indicated that the subpoenas can be served.. The Tribe has also arranged transportation for the attendance of the witnesses at the grand jury proceedings in Sioux Falls. Moreover, the state has chosen here to at least temporarily dismiss the underlying criminal action that necessitated the subpoenas in the first instance, rendering moot the issue of issuance and service of subpoenas. The United States Supreme Court has frequently explained that the mootness doctrine is derived from the prohibition in Article III against federal courts issuing advisory opinions. See, e.g., SEC v. Medical Comm. For Human Rights, 404 U.S. 403, 406 (1972); Hall v. Beals, 396 U.S. 45, 48 (1960); Amalgamated Assn. of Street, Elec. Ry. and Motor Coach Employees of Am. v. Wisconsin Employment Relations Bd., 340 U.S. 416, 418 (1951). A more recent view indicates that the mootness doctrine is primarily prudential and not constitutionally based. See Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring). Either way, the matter here is now moot and the lawsuit must be dismissed.

II. NEVADA v. HICKS

The State's case as to success on the merits rests upon the infringement analysis under Nevada v. Hicks. The differences here are legion and the State's arguments fail.

There are two distinct barriers to a state's assumption of jurisdiction over reservation Indians, namely, infringement and preemption. Although they are related, either can be a sufficient basis for holding state law inapplicable to activity undertaken on an Indian reservation. E.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Sage v. Sicangu Oyate Ho, Inc., 473 NW2d 480 (SD 1991). Williams v. Lee, 358 U.S. 217 (1959), set forth the infringement test. The preemption test looks at "the applicable treaties and statutes which define the limits of state power." McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 172 (1973).

A. Preemption–P.L. 280 and 1968 Amendments

When South Dakota was admitted to the Union, act of Congress required a disclaimer of jurisdiction to be included within the State constitution:

> (T)he people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. See also S.D. Const. Art. XXII; id., art XXVI, § 18.

In 1953, Congress modified the federal-tribal scheme of jurisdiction over Indian land to allow certain states to assume jurisdiction over Indians within the State. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part at 18 USC 1162 (1988)(P.L. 280). While P.L. 280 allowed an express, immediate cession of jurisdiction to some states, see 18 USC 1162 (a), other states fell within the provisions of section 6 and 7 of P.L. 280, which provided the option of assuming jurisdiction.

Nevada, the state involved in Nevada v. Hicks, was not a state covered under either the mandatory or optional provisions of P.L. 280.

South Dakota made a number of attempts to assume jurisdiction, but none were effective. In 1957, criminal and civil jurisdiction was affected if the Tribes consented. No tribal consent was forthcoming. In 1959, jurisdiction over highways jointly maintained with the federal government was provided. The prerequisite to that assumption, i.e., that the roads be jointly maintained, was never met and jurisdiction was never assumed. In 1961, jurisdiction was accepted over all criminal and civil matters conditioned on federal reimbursement. SDCL 1967 §§ 1-1-18, 1-1-21 (1985)(1961 legislation). The governor never filed the proclamation obligating federal reimbursement and jurisdiction was never assumed. In 1963, an attempt was made to assume complete civil and criminal jurisdiction without federal reimbursement but the effort was defeated by a referendum vote of the people of South Dakota. See Act of Mar. 15, 1963, Ch. 467, 2963 S.D. Laws 522; SDCL § 1-1-12 Commission Note (1985)(chapter 467 defeated in referendum vote by 3 to 1 margin).

In 1968, Congress amended P.L. 280 to require tribal consent prior to any assumptions of jurisdiction. Act of Apr. 11, 1968, Pub. L. 90-284, Title IV, §§ 401-03, 82 Stat. 73, 78-79 (codified at 25 USC §§ 1321 (a), 1322 (a), 1323 (1982). South Dakota has never attempted to assume any jurisdiction under this amendment and no Tribe in South Dakota, including but not limited to the Crow Creek Sioux Tribe, has ever consented to South Dakota jurisdiction under the 1968 amendments.

In 1986, South Dakota made an attempt to assume jurisdiction over highways within Indian Country on the basis of the decision in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). This effort by the State was addressed by the 8th Circuit in

Rosebud Sioux Tribe v. South Dakota, 900 F2d 1164 (1990). The 8th Circuit found that Yakima was not controlling on the South Dakota attempt at assuming jurisdiction. South Dakota could not simply assume jurisdiction over those aspects that would reap it an economic benefit because such an effort was not responsive to the concerns underlying the passage of P.L. 280. In addition, the 8th Circuit held that South Dakota could not assume jurisdiction after 1968 without tribal consent by relying upon a retroactive application of a new statutory interpretation. "We believe the Tribes had a vested right in the protection offered by the 1968 tribal consent amendment." 900 F2d 1173. "We believe retroactive application in this case would disrupt the Tribes' 'justifiable expectations'." 900 F2d 1173. The language of the 8th Circuit is instructive and dispositive:

> The Tribes, particularly in South Dakota, have relied upon the protection offered by the tribal consent amendment since 1968. The Tribes have co-existed with state authorities with knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the Yakima interpretation of P.L. 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.

In conclusion, P.L. 280 is a federal law that allowed South Dakota to assume jurisdiction over reservation Indians that it disclaimed upon admission to the Union. 25 USC 1322-1326. Although having the opportunity to do so, South Dakota never availed itself of that opportunity. Rosebud Sioux Tribe v. South Dakota, 900 F2d 1164, 1170-71, 1174 (8th Cir. 1990), cert. denied, 111 S.Ct. 2009 (1991). See State of South Dakota v. Spotted Horse, 462 NW2d 463, 467 (SD 1990), and Ford v. Moore, 552 NW2d 550 (1996). South Dakota is preempted from assuming jurisdiction that it attempts to assume in this case.

B. Preemption–Treaty of 1868 and Tribal laws

The Indian reservation at issue in Hicks was one created by statute. The Crow Creek Indian Reservation was created by the Treaty of 1868. Act of April 29, 1868, 15 Stat. 635; Section 6 & 30, Act of March 2, 1889, 25 Stat. 888. That Treaty at Article I contains a specific provision for delivering Indians to a higher authority. "If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws... ."

The Crow Creek Sioux Tribe is a non-IRA Tribe that operates pursuant to a federally recognized Constitution and Bylaws. It has accepted benefits of the IRA. It has a Tribal Court that operates pursuant to a Tribal Code. The Tribal Code has a provision for extradition as well as provision for subpoenas in Tribal Court. The role of the agent in Article I of the 1868 Treaty has been assumed by its Tribal Court and provision for extradition of tribal members and subpoenas in Tribal Court. The provision of Article I and the Tribe's provisions for extradition and subpoenas preempts the State's efforts to apply willy nilly its subpoena power on the Crow Creek Indian reservation. See Fisher v. District Court, 424 U.S. 382, 390 (1976) ("The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by §16 of the Indian Reorganization Act, 25 USC § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians").

C. Nevada v. Hicks is Inapplicable

First, the Hicks opinion rests upon the facts of that case. This is made clear by the language

of the opinion. The very first sentence of the opinion sets forth the question to be answered and it is clear that the bedstone of the opinion is the fact that the tribal member in that case had committed a crime outside the reservation. In this case we have tribal members who have never left the Crow Creek Indian Reservation. They did nothing to invoke any State jurisdiction over their persons. The State is making no claim that any tribal members committed any unlawful act outside or, for that matter, upon the Reservation.

Second, Nevada v. Hicks dealt with jurisdiction of the tribal court inasmuch as the State officers were sued in that court. There is no tribal court action of any kind in this case. The Crow Creek Sioux Tribal Court has assumed jurisdiction over no officer or official of South Dakota. Indeed, the Tribe in this case has indicated to the State that they can serve the subpoenas or, alternatively, that the Tribe would transport to Sioux Falls those persons whose presence was required.

D. Infringement Test Violated

Nevada v. Hicks recognized the right of Indians to protect tribal self government and control internal relations often referred to as the right of Indians to make their own laws and be governed by them. On this latter point, Hicks citing Montana indicated that tribes have authority to punish tribal members. The State's position in this case amounts to the contention that they can enforce subpoenas on tribal members who have never left the Crow Creek Indian Reservation, never committed any offense against the authority of South Dakota, and reside on tribal land. A subpoena is basically only as good as the power to enforce it. To enforce it requires the power to subject the person to contempt and incarceration in the event of noncompliance. Hicks does not authorize South Dakota to punish by contempt or otherwise members for conduct that occurs only on the Crow Creek Indian

Reservation. To do so would be the ultimate violation of the Williams v. Lee rule. As the Hicks court states "when on-reservation conduct involving Indians is at issue, state law is generally inapplicable... ."

The Crow Creek Sioux Tribe, like any sovereign, has the legislative jurisdiction to govern the subpoena process within the Crow Creek Indian Reservation. The power of a subpoena does not extend beyond the territory of the issuing sovereign. A reciprocal arrangement under a uniform law has been implemented by South Dakota and other jurisdictions to secure the presence of witnesses outside the State. E.g., SDCL 1967 23A-14-15 &16. Under that provision, a request is made of another jurisdiction. The requested jurisdiction holds a hearing to determine materiality and necessity, whether undue hardship will result, and to assure that the person whose presence is required will be protected from arrest and service of civil and criminal process while in the requesting state. Only then will a request for subpoena from another jurisdiction be granted. That the exercise of the subpoena power over tribal members is part and parcel of the right to make laws and be governed by them could not be more clear.

E. Independent State Ground

The South Dakota Supreme Court has determined in a number of cases that Indians residing on an Indian reservation are not subject to state process as the state is attempting to enforce in the present case.

State v. Lufkins, 381 NW2d 263, 266 (SD 1986), held that "both of these (Indian) men were on Indian trust land and beyond subpoena power. Hayes was on trust land near Sisseton and Hedine was on trust land in North Dakota. It is beyond contention that South Dakota officials and courts do not have jurisdiction over Indian trust lands," citing DeCoteau v. District County Court, 420 U.S.

425 (1975), and Annis v. Dewey County Bank, 335 F.Supp. 133 (DSD 1971). Accord, United States v. Anderson, 857 F.Supp. 52 (DSD 1994)(Judge Piersol).

In Bradley v. Deloria, 587 NW2d 591, 593 (SD 1998), the Supreme Court of South Dakota held that "it was well established that state officials have no jurisdiction on Indian reservations either to serve process on an enrolled Indian or to enforce a state judgment. Annis v. Dewey County Bank, 335 F.Supp. 133, 136 (DSD 1971); Martin v. Denver Juvenile Ct., 493 P2d 1093 (Colo. 1972). An Indian reservation constitutes a sovereign nation separate from a state and a reservation Indian's domicile on the reservation is not an in state contact which grants jurisdiction to state courts." Accord, Risse v. Meeks, 585 NW2d 875, 877 (SD 1998)("South Dakota's Constitution art XXII declares that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. See Smith v. Temple, 152 NW2d 547 (SD 1967").

Most recently in State v. Aesoph, 2002 SD 397 n. 13, subsequent to Nevada v. Hicks, the Supreme Court of South Dakota stated that "It is worth noting that tribal members residing in Indian country, such as those living on the Lower Brule Indian Reservation, are generally not subject to state statutory requirements and cannot be compelled to appear."

Not only is there ample and plentiful federal and state authority that state subpoenas cannot be enforced in Indian Country, but, more importantly, the South Dakota Supreme Court has grounded its decision on the State Constitution, which constitutes an adequate and independent state ground which does not implicate the jurisdiction or need for a determination by this Court.

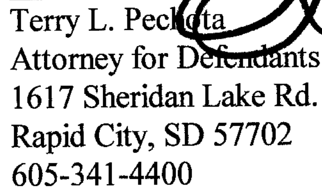
CONCLUSION

For all the above reasons, South Dakota's request for a preliminary injunction should be denied.

Dated this 17th day of February, 2003.

Respectfully submitted,

VIKEN, VIKEN, PECHOTA, LEACH & DEWELL, LLP



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CERTIFICATE OF SERVICE

The below-signed hereby certifies that he served a true and correct copy of the above and foregoing Defendants' Motion to Dismiss upon the person(s) next designated herein, by depositing a copy thereof in the United States mail, postage for first class mail prepaid, in an envelope addressed to said person at his last known address, to wit:

Lawrence E. Long, Attorney General
John P. Guhin, Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 17th day of February, 2003.

Terry L. Pechota