IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW RESERVATION

CROW AGENCY, MONTANA

CIVIL NO. 82-287

LEROY SAGE, a minor, by
FLORA NOT AFRAID, his Guardian,
Plaintiff/Appellee,

vs.

LODGE GRASS SCHOOL DISTRICT NO. 27,
Defendant/Appellant.

Decision Entered July 30, 1986

[Cite as: 1986 CROW 1]

Before: Dennis Big Hair, C.J., Rowena Gets Down, J., and William A. Thorne, Jr., S.J.

DECISION

¶1 The Appeal in this case arises from the decisions of the Tribal Court dated 7/8/85, by Judge Roundface, and 9/12/85, by Judge Birdinground, after remand from the United States Supreme Court. Defendants filed their Notice of Appeal September 20, 1985 pursuant to the Crow Rules of Civil Procedure.

¶2 Defendant's Notice of Appeal raises four (4) issues for consideration by this Court. First, does the Crow Tribal Court have jurisdiction to adjudicate controversies between a tribal member and a Montana School District, a subdivision of the State of Montana, for activities occurring within the exterior boundaries of the Crow Reservation upon fee patent land held by the non-Indian school district? Second, did the Trial Court properly refuse to

set aside the default judgment entered October 25, 1982? Third, did the Trial Court properly refuse to exclude Clarence Belue from representation of Leroy Sage, notwithstanding Belue's meeting with Defendant School District? Fourth, did the Crow Trial Judges properly refuse to excuse themselves from consideration of this case due to a conflict of interest stemming from the activities of Mr. James Vogel as both Tribal Court Advisor and as Deputy County Attorney after the election of Clarence Belue, Plaintiff's attorney herein, as County Attorney in November, 1984?

¶3 On November 15, 1985, by stipulation, both parties waived oral argument and appellate briefs were received during January of 1986. On April 18, 1986, this Court ordered further briefs on the questions surrounding jurisdiction of the tribal court over non-Indians and their activities within the Crow Reservation. Briefs were received from counsel and, inasmuch as there have been no requests for oral argument, the matter is ripe for decision.

HISTORICAL SUMMARY OF THE CASE

¶4 This case arose from an injury suffered by Leroy Sage, an enrolled member of the Crow Indian Tribe, on the grounds of the Lodge Grass Elementary School where he was a fifth grade student. On September 27, 1982, a complaint for $153,000.00 was filed in the Crow Tribal Court against Lodge Grass School District No. 27 alleging that the district's negligence was the proximate cause of the injuries to the minor. That same day the Complaint was served upon Wesley Falls Down, Chairman of the School Board for Lodge Grass School District No. 27. Mr. Falls Down is also an enrolled nether of the Crow Indian Tribe.

¶5 The records of the tribal court indicate that on October 18, 1982, the fifteen (15) day answer period ended, as provided in the Crow Tribal Code. *See* Rule 6, paragraph B, of the Crow Tribal Rules of Civil Procedure.

¶6 On October 19, 1982, an application for Minute Entry of Default was received from Plaintiff's counsel and entered into the court minutes. On October 25, 1982, a default hearing was held in the absence of Defendant or its representative. The record does not reflect notice being sent to Defendant of this hearing. A resulting set of Default Findings of Fact, Conclusions of Law, and Judgment for $153,010.00 was entered by Judge Roundface against Defendant School District. There were no specific findings made as to jurisdiction and none of the four tests for the exercise of tribal jurisdiction over non-Indians, set forth by the Supreme Court in the case of Montana vs. U.S., 450 U.S. 554, were conducted by the tribal court. The Court issued a simple assertion of jurisdiction. The default judgment was mailed to Wesley Falls Down, Chairman of the School District. No record is available today for the October 25, 1982, hearing.

¶7 On November 3, 1982, eight days after entry of the default judgment, Lodge Grass School District No. 27 filed a Complaint in United States District Court for the State of Montana and a Summons was then issued. The School District at the same time also filed a

Motion for a Preliminary Injunction and Temporary Restraining Order.

¶8 Finding that "plaintiffs' (Lodge Grass School District No. 27 & The National Farmers Insurance Company) constitutional rights of equal protection under law and of due process . . . may be irrevocably violated . . ." and that ". . notice cannot be given due to the imminence of the possible writs of execution . . . ." from the Crow Tribal Court, Federal District Court Judge Battin issued a Temporary Restraining Order at 11:45 a.m. on November 3, 1982.[1] Defendants in the federal court action, including the Crow Tribal Court, were restrained by Judge Battin from ". . . attempting to assert jurisdiction over plaintiffs or issuing writs of execution. . . until this Court orders otherwise".[2] The effectiveness of this order was continued by stipulation of counsel until the final order in the matter was to be issued by the Court.[3] On December 29, 1982, Judge Battin issued a permanent injunction barring further proceedings against the School District in the Crow Tribal Court.[4]

¶9 This injunction was appealed by the Tribe and on December 6, 1983, the matter was argued in the U.S. Court of Appeals for the Ninth Circuit. On July 3, 1984, the Ninth Circuit Court of Appeals issued a decision reversing the holding of the District Court.[5] The Court of Appeals held that the Crow Tribal Court should be the first court to decide whether it properly had jurisdiction to hear the matter. The Ninth Circuit decision was docketed with the District Court on July 27, 1984.

¶10 In the meantime, on May 25, 1984, a complaint was filed by Clarence Belue on behalf of Leroy Sage in the Montana state courts.

¶11 On August 1, 1984, pursuant to a request of the original Plaintiff, a Writ of Execution was issued by the Crow Tribal Court authorizing the seizure of computer equipment etc., from the premises of the school district. On August 2, 1984, the District Court dismissed the federal complaint pursuant to the Ninth Circuit mandate.

¶12 On August 16, 1984, Defendant School District filed with the United States Supreme Court a Motion for Emergency Recall of Mandate.

¶13 On August 21, 1984, a motion was filed in the Crow Tribal Court to admit Donald Harris and Jack Ramirez as attorneys on behalf of Defendant School District. On August 22, 1984, the School District, through its attorneys, made a "special appearance" at a hearing in the Crow Tribal Court. At that time, Defendants (a) filed a Motion To Set Aside The Default, (b) requested that the Court issue a temporary restraining order barring the sale of the seized property, and (c) filed an Answer to the Complaint filed in the Crow Tribal Court. A hearing was held that same day in Tribal Court with Plaintiffs and Defendants present and represented by counsel. After the hearing, a Memorandum ant Order were entered by the Tribal Court (1) staying the sale of the seized property which had been previously scheduled for August 23, 1984, (2) setting September 19, 1984, at 10:00 a.m., as the time and date for a hearing on Defendant's Motion To Set Aside The Default, and (3) directing counsel to

establish a stipulated briefing schedule.

¶14 On August 23, 1984, U.S. Supreme Court Justice William Rehnquist recalled the Ninth Circuit mandate. Tribal Court Advisor Jim Vogel was notified of the recall by telephone and follow-up mailgram. On that same day, the Tribal Court issued a supplemental order postponing the sale of the seized equipment until further notice of the Court. In the same Order, the Court placed both parties on notice that the Order previously issued by the Tribal Court of August 22, 1984, was still in effect as it related to the briefs being due and the hearing being set for September 19, 1984, on Defendant's Motion to Set Aside the Default Judgment.

¶15 On August 27, 1984, the Tribal Court orders of August 22, ant 23, were mailed to the attorneys for Defendant School District and hand-delivered to counsel for Leroy Sage at the Tribal Court Clerk's Office. The Tribal Court, that same day, also issued a supplemental order computing interest on the judgment and setting bond at $200,000.00. This order was mailed to counsel for School District and personally served upon counsel for Sage.

¶16 On August 29, 1984, the School District and Insurance Company filed a Reply Memorandum in the United States Supreme Court. On Page 2, footnote 2, Defendants herein note that if a stay was to be continued by the United States Supreme Court as they had requested, that the School District and Insurance Company would ask that ". . . the Crow Tribal Court proceedings be held in abeyance pending final disposition of the Court."

¶17 On September 6, 1984, the Crow Tribal Court set a briefing schedule after having rot received a stipulated schedule from counsel. The Court also re-noticed the September 19, 1984, hearing on Defendant's Motion to Set Aside the default judgment. Jim Vogel, the Court Advisor, informed counsel for School District and Sage by phone of this order. On September 7, 1984, the Order of September 6, 1984, was mailed to counsel for both the School District and Sage.

¶18 On September 10, 1984, Justice Rehnquist continued the Emergency Recall of Mandate. On that same day, Judge Battin, U.S. District Court, rescinded his Order of August 2, 1984, dismissing the federal action pursuant to the direction of the Ninth Circuit Cant and reinstated his Order of December 29, 1982, enjoining execution upon the default judgment or the pressing of a claim against the Defendants in the tribal court.

¶19 On September 19, 1984, a brief was filed in the Crow Tribal Court on behalf of Sage in opposition to the Motion To Set Aside the Default. On that same day, a Tribal Court hearing was held. The Defendant School District was not present nor represented. The tribal court record indicates that the Court was notified by phone that the Defendants had received notice but would not be appearing. The Tribal Court then entered an Order noting the non-appearance of the Defendants and the lack of a brief on behalf of the Defendants. The Court further noted that there had been no request to withdraw the Motion To Set Aside nor was there a request that the Court's consideration be stayed until a later date. Nevertheless, a final ruling in the Tribal Court was withheld until after Supreme Court consideration, in order to ". . . give Defendants every possible opportunity in this

case . . . ." See Crow Tribal Court Order of September 11, 1984.

¶20 On November 26, 1984, Certiorari was granted by the United States Supreme Court.

¶21 On December 10, 1984, U.S. District Judge Battin ordered the return of the property which had been seized August 1, 1984, pursuant to a Tribal Court Writ of Execution.

¶22 On March 11, 1985, a hearing was set for March 13, 1985 concerning Clarence Belue's contempt in federal court for failing to arrange the return of the seized property. On March 12, 1985, the March 13, hearing was vacated pursuant to a Ninth Circuit Court of Appeals stay.

¶23 On June 3, 1985, the United States Supreme Court issued a decision in *National Farmer's Union vs. Crow Tribe*, ___ U.S. ___, 105 S.Ct. 2447, 12 Indian L. Rep. 1035, which required that the parties exhaust available tribal remedies before the federal courts would consider the question of tribal court jurisdiction over these non-Indians.

¶24 On July 8, 1985, the Tribal Court, by way of Judge Roundface, issued an order and opinion citing the fact that it had been one month since the Supreme Court decision and that no new action had been taken on behalf of the Defendant School District in the Crow Tribal Court. The Court, noting that consideration had been given "in a light most favorable to the defendant, in an effort to afford the defendant every possible chance to avoid the default . . . ." issued a decision and order refusing to set aside the default judgment entered October 25, 1982. *Sage v. Lodge Grass School District No. 27,* Opinion and Order of July 8, 1985.

¶25 The Court found first, that if Defendants had appeared, pursuant to Rule 17(d) of the Crow Rules of Civil Procedure and moved to set aside the default, within thirty (30) days, that good cause could have been shown and the default could have been set aside. Apparently the Court concluded that competent evidence existed to show the reasons why an answer had not been timely filed and simply awaited presentation to the Court. Second, the Court found that Defendant School District had ". . . flatly ignored the rules and processes of this Court, upon the faulty advice of 'expert counsel'." Third, the Court explained that parties cannot "sleep" on their rights and in this situation the School District had slept on its rights and thereby lost the right to set aside the default for good cause. Fourth, the Court tallied the days from October 25, the date of the Judgment, to November 3, 1982, the date of the Federal Court injunction, counting nine (9) days and then noted that the Court regained jurisdiction with the filing of the Ninth Circuit mandate on July 27, 1984, running until August 22, 1984, when the Motion to Set Aside the Default was filed, adding another 25 days. Totaling the two time periods the Court found that 34 days had passed, thus exceeding the 30 days allowed by Rule 17(d). Fifth, the Court established a schedule of further proceedings. The Court set July 15, 1985, as the deadline for filing additional jurisdictional motions and the raising of new issues, if any. July 19, 1985, was set for an evidentiary hearing on these motions. August 9, 1985, was set as the deadline for

the filing of Defendant's briefs. August 25, was set as the deadline for the filing of Plaintiff's briefs, and September 9, as the time for Defendant's reply.

¶26 On July 12, 1985, bond was posted for the seized equipment in the amount of $200,000.00 and a receipt issued by the Tribal Court.

¶27 On July 15, 1985, Defendants filed a Motion to Disqualify Clarence Belue for having communicated directly with, and attempting to interfere with, the Lodge Grass School District as a client. On the same day, Defendants also filed a Notice of Appeal as to the July 8, 1985, Order.

¶28 On July 18, 1985, a new judge, Glen Birdinground, was appointed to handle the case after Judge Roundface resigned. On July 19, 1985, an evidentiary hearing on jurisdictional issues was held. On August 9, 1985, Defendant' s brief on jurisdictional grounds was filed. On August 27, 1985, an Order releasing the seized computer equipment was issued by the Tribal Court. On September 3, 1985, Plaintiff's brief on jurisdictional grounds was submitted.

¶29 On September 12, Judge Birdinground issued an order upholding Tribal Court jurisdiction.

¶30 On September 20, 1985, Defendant filed a Notice of Appeal.

I.
JURISDICTION

¶31 When examining these very facts, the Supreme Court has held in *National Farmer's Union vs. Crow Tribe,* ___ U.S. ___, 105 S. Ct. 2447, 12 I.L.R. 1035 (1985), that the question of tribal court jurisdiction should be resolved within the tribal court system in the first instance. To determine the extent of this Tribal Court's jurisdiction, we must conduct ". . . a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished as well as a detailed study of relevant statutes, Executive Branch policy as embodied in the treaties and elsewhere, and administrative or judicial decisions." ___ U.S. ___, 105 S.Ct. 2447, 2454, 12 Indian L. Rep. 1035, 1038 (1985).

¶32 The Crow Tribe has been the subject of several pieces of legislation including the following: *Treaty of August 4, 1825 with the Crow Tribe,* 7 Stat. 266, Vol. 2 Kappler 244; *The September 17, 1851 Treaty of Fart Laramie,* 11 Stat. 749, Vol. 2 Kappler 594; *The May 7, 1868 Treaty with the Crows,* 15 Stat. 1649, Vol. 2 Kappler 1008; and the 1882 statute dealing with the sale of a portion of the Crow Reservation and allotment of the remaining portion, 22 Stat. 42 (April 11, 1882), Vol. 1 Kappler, 2nd ed., 195.

¶33 In addition, there are several relevant Acts of Congress which apply to Indian tribes in general, including the Crow Tribe. These include the *General Allotment Act of 1887,*

24 Stat. 388 (February 18, 1887), 1 Kappler 2nd ed., pg. 333; and the amendment of that act in 1891, 26 Stat. 794 (February 28, 1891), 1 Kappler 2nd ed., pg. 56; *The Indian Reorganization Act of 1934*, 25 U.S.C. §461, et seq.; and *The Indian Civil Rights Act of 1968*, 25 U.S.C. §1301, et seq.

A. THE ACCIDENT OCCURRED WITHIN THE CROW RESERVATION

¶34 A review of these statutes together with relevant case decisions from the federal court system, including the United States Supreme Court, lead this Court to conclude that Lodge Grass Elementary School is within the exterior boundaries of the Crow Indian Reservation. The Supreme Court has held that only Congress may divest an Indian tribe of its land or diminish its boundaries. Dealing with a 1908 act authorizing the Secretary of the Interior to ". . . sell and dispose of . . ." land within the Cheyenne River Sioux Reservation, 35 Stat. 460 et seq., the Court held that a clear congressional purpose must be established to diminish the reservation. *Solem v. Bartlett*, ___ U.S. ___, 11 Indian L. Rep. 1007 (1984). A similar review of the applicable statutes, etc., in this matter results in the clear conclusion that the Crow Reservation has not been disestablished, at least to the extent that the Lodge Grass Elementary School is within the exterior boundaries of the Crow Reservation.

¶35 Neither the existence of allotments nor authorizations for surplus land sales settle the question of reservation diminishment. "The effect of any given surplus land act depends on the language of the act and the circumstances underlying its passage." *Solem v. Bartlett, supra*, 11 Indian L. Rep. at 1009. "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." Ibid, citing with approval United States v. Celestine, 215 U.S. 278, 285 (1909).

¶36 In the case at hand, the land upon which the Lodge Grass Elementary School was built was originally allotted to Dosh Kosh, a member of the Crow Tribe, on November 14, 1907. The land was eventually sold by her heirs and a patent was issued by the United States on January 9, 1911. The parcel was sold by its non-Indian owners to the School District on June 20, 1918. The district had been created pursuant to Montana law on February 28, 1911.[6]

¶37 We note in the case before us, the same "strong tribal presence" at Lodge Grass as the Supreme Court found in Solem.[7] In this situation, 85% to 93% of the students are Indians, four of the five school board members are Indians, and police, fire and emergency medical services are provided either by the Crow Tribe or the United States for the benefit of the Crow Tribe.[8] In fact, Defendants in this action appear not to contest the assertion that the Lodge Grass Elementary School is within the exterior boundaries of the Crow Indian Reservation.[9]

B. CIVIL JURISDICTION EXISTS IN THE CROW TRIBAL COURT OVER DISPUTES ARISING WITHIN THE RESERVATION INVOLVING MEMBERS OF THE TRIBE.

¶38 Assuming therefore that we are dealing with land located within the Crow Reservation, the next consideration must be whether there are special jurisdictional statutes or binding case precedent which would prevent this Court from exercising the jurisdiction normally accorded an Indian Tribe within its own reservation.

¶39 There appear to be no special jurisdictional statutes or case decisions which would restrict the jurisdiction of this tribal court to a greater extent than general principles of federal Indian law which are applicable to Indian tribes in general.

¶40 The Montana Supreme Court has conducted its own evaluation of state jurisdiction over activity on the Indian reservations located within Montana. Justice Weber, writing for the Court, in construing land reserved pursuant to the 1851 Treaty of Fort Laramie, supra (also applicable to the Crow Tribe), noted that "Land reserved through treaties, agreements ratified by Congress, or executive orders was originally beyond the reach of state governmental authority." *Milbank Mutual Insurance Co. v. Eagleman,* ___ Mont.___, 12 Indian L. Rep. 5106, 5107 (September 12, 1985). Finding that Montana could assume such jurisdiction under either Public Law 280, 28 U.S.C. §1360(a), or the Indian Civil Rights Act of 1968, 28 U.S.C. §1322(a), the Court noted that "(I)n Montana, the state assumed jurisdiction after Public Law 280 on only one reservation, [the] Flathead [Reservation]. It has not acted concerning the other six Montana reservations . . . ." *Ibid, citing State ex rel. Iron Bear v. District Court,* 162 Mont. 335, 346, 512 P.2d 1292, 1299 (1973). The Crow Indian Reservation is one of the "other six Montana reservations."

¶41 The Montana Supreme Court in Milbank, supra, went on to quote the Ninth Circuit noting a test for jurisdiction similar to Iron Bear, supra.

> We have recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation . . . We emphasize that the Indians in the Fort Belknap community are, and always have been, entitled to assume exclusive jurisdiction over civil controversies within the reservation

Milbank, supra, at 12 Indian L. Rep. 5107, *citing R.J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979, 983-84 (9th Cir. 1983), *cert. denied,* ___ U.S.___, 105 S.Ct. 3476 (1985).

¶42 Citing the Fort Peck Tribe's Comprehensive Code of Justice (1983) and its 1965 predecessor code, the Montana Supreme Court found that as to ". . . a civil controversy

arising within the exterior boundaries of the reservation . . . (the Indian tribes) are entitled to and have assumed exclusive jurisdiction." *Milbank, supra*, 12 Indian L. Rep. 5108.

¶43 The Crow Indian Tribe has chosen to exercise similar jurisdiction. *See* Crow Tribal Code § 3-2-201 to 205. We must therefore conclude that the Crow Tribe could legitimately place civil controversies occurring within the Reservation involving non-Indians with the province of the Crow Tribal Court and has in fact done so. We can identify no special limitations which would prevent the exercise of jurisdiction by the Crow Tribal Court.

C. THE CROW TRIBAL COURT HAS JURISDICTION OVER THE DEFENDANT SCHOOL DISTRICT IN THIS CASE.

¶44 After concluding that the Lodge Grass Elementary School is physically within the exterior boundaries of the Crow Reservation and further concluding that there are no special limitations placed upon Crow Tribal Jurisdiction, the next question is to determine the proper extent of tribal jurisdiction over the non-Indian school district, given the facts of this case.

¶45 The United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), set forth benchmarks to determine whether tribal jurisdiction over non-Indian activity within Indian reservations is proper.[10]

¶46 The first of the four tests is whether a consensual business transaction has occurred. The second consideration is whether the tribe has a legitimate interest based upon health and welfare concerns. The third issue is whether the tribe has a legitimate interest based upon economic security concerns. And finally, the fourth question is whether the tribe has a legitimate interest based upon political integrity concerns. All of these must be examined as they relate to the activity or conduct by non-Indians within the Reservation. This Court must therefore proceed to examine the actions at issue in light of the guideposts set by the United States Supreme Court.

¶47 The trial court made its findings that tribal jurisdiction exists over the activities of the non-Indians at issue, making factual findings to support its conclusions. Since this is an appeal of a question of law, this Court is entitled to review that portion of the decision to determine if there is adequate support, legally and factually, for a finding that jurisdiction exists.

(1) The School District has entered into consensual transactions with the Crow Tribe.

¶48 The first of the Montana tests concern business transactions affecting the reservation. The record of this case, in the various courts in which these parties have found themselves, indicates that there have been at least four consensual transactions between the Crow Indian Reservation and the State of Montana, involving its political subdivision the

Defendant Lodge Grass School District No. 27.

¶49 First, the school district built Lodge Grass Elementary School within the exterior boundaries of the Crow Reservation on land that had been purchased from a non-Indian fee patent holder. The land originally had been allotted to a Crow Indian in 1907, pursuant to the 1887 Allotment Act, supra. The school was originally built to educate the non-Indian children of the area only. The State of Montana was under no obligation, however, to build a school within the exterior boundaries of the reservation but in 1918 nevertheless entered into a consensual transaction to accomplish that purpose.

¶50 Second, in 1920, the State of Montana accepted over 25,000 acres of land in exchange for a commitment that they would educate the Crow children (see Crow Allotment Act of 1920, Chapter 224, Section 16, 41 Stat. 756).[11] The State of Montana was not under any obligation at that time to enter the Reservation nor to accept tracts of land within the Crow Reservation. The Crow Tribe entered into the transaction for the benefit of the Crow children, and the State of Montana thereby acquired tracts of land within the Crow Indian Reservation.

¶51 Third, the State of Montana has continued to operate a school within the exterior boundaries of the reservation. They have accepted large amounts of federal impact aid, as well as aid from other federal assistance programs,[12] for the purpose of continuing to operate a school within the exterior boundaries of the Crow Reservation for the benefit of Crow and other children of the area.

¶52 Fourth, in the operation of the school the district has availed itself of services provided by the Crow Tribe and the Bureau of Indian Affairs including police protection, fire protection, assistance with truancy, road services, and emergency medical services.[13] The importance of each of these services speaks for itself.

¶53 Each of these transactions separately, and certainly when considered together, amount to the intentional, voluntary undertaking of consensual relationships with the Tribe and its members related to education.

(2) The actions complained of affect a legitimate health and welfare interest of the Crow Tribe.

¶54 A second area of concern under *Montana* is the health and welfare interest of the Tribe as it is affected by the actions at issue within this case. Defendant School District argues that unless the action affects the Crow Tribe as a whole, the actions do not satisfy the criteria established by *Montana* and that this Court would therefore not have jurisdiction. This Appeals Court finds to the contrary, however. Specifically, we hold that it is not necessary that the "interest" affected be that of the whole tribe, but simply affect the local community. We do not believe that the action must have a demonstrable [e]ffect upon

every member of the tribe, as Defendants urge, but only that the tribe, in a given instance, exercise a legitimate tribal concern for the health and welfare of its members. In the case before us today, the health and safety interest of the community requires that the tribe actively do what it can to protect just such a legitimate concern. Indeed, the Tribe has a legitimate interest in protecting its individual members from harm within its reservation, just as the State of Montana has an interest in protecting its citizens from harm within the state and as the School District has a duty to avoid subjecting children to harm.

¶55 A legitimate tribal interest is invoked, in this instance, where the enrollment of the school district at the time of the accident was 85% to 92% Indian children.[14] As recognized by the United States Congress in the Indian Child Welfare Act, 25 U.S.C. 1901, *et seq.*, the future of Indian tribes such as the Crow Tribe depends largely upon the well-being of today's Indian children.[15] In addition, tort law, and its application to parties and their actions within the Anglo tradition of law, has been a generally accepted government means of assuring safety for communities and individuals. What we have been asked to do here today is no more than to take similar steps to assure the safety of school children and individuals by assessing risks and apportioning liabilities. The Crow Tribal Court is the appropriate forum to adjudicate such matters where Crow children are injured on the Reservation.

¶56 Defendants urge the Court to view the lack of official Tribal involvement in the regulation and operation of Lodge Grass Elementary School as either an official disclaimer of jurisdiction or an abandonment of all regulatory authority. Lack of tribal intervention in the school process, however, does not equate with a lack of interest. Rather, it may simply indicate a degree of satisfaction with the general process as it has been ongoing.[16] In fact, the Ninth Circuit Court of Appeals has declared that where

> "(t)he tribe has chosen to adopt the framework of state law to cover gaps in the tribal code. . . . it has not relinquished its own sovereignty, and it has not involved the state in any way in the enforcement or interpretation of tribal law. (citations omitted)"

R.J. Williams v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (1983). The same reasoning would seem to be applicable here. The Tribe's acquiescence to state education is neither a surrender of responsibility nor jurisdiction.

¶57 This Court finds, therefore, that the Crow Tribe does in fact have a legitimate governmental interest in protecting the health and safety of school children while they are attending school within the Reservation or otherwise participating in school activities. This interest of the tribe extends to the adjudication of just such a civil dispute as we have before us arising from the injury of a tribal member within the Reservation.

(3) The Tribe has a legitimate interest in the economic aspects of the actions complained of in this case.

¶58 In respect to a third of the four *Montana* tests, this Court further finds that the Tribe also has a legitimate interest and concern as these same activities relate to the economic security of the Tribe. The Tribe has a legitimate interest, albeit a lesser one than the concern with health and welfare as previously reviewed, with the care of persons, particularly children, who may be injured or disabled. Such an injury or disability certainly affects the limited scope of tribal resources and the tribe's ability to care for such people. Once again tort law has been a traditional response of Anglo law concerns arising from injuries occurring within the community. Further, the Tribe has an interest in the economic security and well-being of the community as it relates to the future of the Tribe, which is hinged upon the quality of education and coupled with the safety of the educational process. [17]

(4) The Crow Tribe's Adjudicatory Power is Broader Than Regulatory Power.

¶59 Defendants further argue that the Tribe could have established and operated its own school but has chosen not to do so. Defendants go on to argue that the Tribe, while it may operate its own school, cannot impose its regulations upon how the State of Montana operates its schools. Defendants conclude that since the Tribe cannot regulate Montana schools, the Tribal Court may not adjudicate controversies involving Montana school districts nor activities upon property owned by the districts.

¶60 Assuming without deciding that the Crow Tribe may not impose affirmative safety regulations upon the Montana schools operating within the Crow Reservation[18] it is not at all clear that the jurisdiction of the Crow Tribal Court is limited simply to those areas where the Tribal Council may regulate. As the Ninth Circuit pointed in their earlier review of this issue,

> Cases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes. *See generally Allstate Insurance Company v. Ilague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). In analyzing whether a dispute may be decided in a particular state or federal court, we have inquired only whether the court's exercise of jurisdiction is authorized by applicable forum law and whether it comports with due process. *See, e.g., Keeton v. Hustler Magazine,* ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). The jurisdictional, question is not controlled by whether it would be appropriate to apply the forum's substantive law to the dispute. *See Shaffer v. Heitner,* 433 U.S. 186, 215, 97 S.Ct. 2569, 2585, 53 L.Ed.2d 683 (1977). The tribal character of a challenged forum does not alter the essential nature of this inquiry. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non--Indians." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65, 98 S.Ct. 1670, 1680, 56 L.Ed.2d 106 (1978).

National Farmers Union Insurance Co. v. Crow Tribe, 736 F.2d 1320, 11 Indian L.Rep 2133, 2134, Footnote 3. The power to adjudicate, while co-extensive with the power to regulate, is not limited to simply those areas where governmental regulation is permissible. The failure of the Crow Tribe to disturb the ongoing federal-state-tribal features of the educational process within the Crow Reservation cannot be considered to be the explicit repudiation of tribal civil jurisdiction which would otherwise be necessary to deprive this Court of jurisdiction to adjudicate disputes. We hold therefore the power of the Crow Tribal Court to adjudicate controversies extends to the specific type of dispute at issue here.

(5) Conclusion.

¶61 This Court therefore concludes that upon application of the various *Montana* case tests to the factual situation at issue, and after consideration of the subject matter at issue, that the Crow Tribal Court has jurisdiction to adjudicate a controversy between a tribal member and a non-Indian school district for activities, or the foreseeable consequences of such activities, occurring within the exterior boundaries of the Crow Indian Reservation and affecting tribal children.

II.
TRIAL COURT'S REFUSAL TO SET ASIDE DEFAULT JUDGMENT

¶62 The Crow Rules of Civil Procedure clearly set forth the time in which motions to set aside a default judgment may be filed. The Trial Judge apparently found that good cause could be found to exist on the record for the setting aside of the default judgment. He further found, however, that the time for motions to set aside had expired, pursuant to Rule 17(d) of the Crow Rules of Civil Procedure. The Trial Court Judge computed the applicable time from the date the Default Judgment was entered, October 25, 1982, until such time as Judge Battin issued his Temporary Restraining Order, November 3, 1982. He then counted from the time the Ninth Circuit decision was docketed with the District Court, July 27, 1984, until the Motion To Set Aside the default was filed at the Tribal Court, August 22, 1984. Computing the days in this manner, 35 days had run from the docketing of the Default Judgment, thereby exceeding the 30 days allowed under the Crow Rules of Civil Procedure.

¶63 Tribal Courts, in both their present form and their "traditional" predecessors, however, have been centrally concerned with the overall concept of justice and have often times managed to be free of the obsession with technicalities that has so often plagued non-tribal court systems. In light of this, this Appeals Court must consider alternative reasonable readings of Rule 17(d) and correspondingly reasonable methods for counting the days elapsed so as to serve the interests of "justice". It appears from the documents which have been filed with this Court that Defendant School District counted the elapsed time from the entry of the Default Judgment differently than that counted by the Trial Judge. Defendants had apparently counted the days from the entry of the Default Judgment until

the injunction issued by Judge Battin in exactly the same manner as the Trial Court. They have, however, counted the days as beginning to run from the time Judge Battin lifted his injunction and dismissed the case pursuant to the Ninth Circuit mandate August 2, 1984, until the time when the Motion for Default Set Aside was filed and not as the Trial Judge did from the time of the docketing of the Ninth Circuit Order. Using Defendant's method of computing the days elapsed, it appears that 29 days had passed during which Defendants could have filed a Motion for Set Aside of the Default Judgment, without violating the federal court injunction.

¶64 It appears that Defendants could reasonably have interpreted the Crow Rules of Civil Procedure to have found that only 29 days elapsed before the filing of their Motion to Set Aside the Default Judgment. This Court must scrutinize the issue presented here in keeping with its traditional concern for justice and fairness, and in the interest, when appropriate, of deciding important cases on their merits rather than o[n] mere technicalities. We conclude, therefore, that the Default Judgment should have been set aside by the Tribal Judge in the interest of justice and in accordance with Rule 17(d) of the Crow Rules of Civil Procedure.

¶65 This determination is based upon the Defendant's apparent good faith reading of the rules, and in the absence of clear authority to the contrary. This ruling should not be interpreted to abolish or denigrate the time periods established in the Crow Rules of Civil Procedure, but rather should be found to support the interests of justice when a reasonable reading of the rules allows more than one interpretation. If the Motion to Set Aside the Default Judgment had clearly been filed 35 days after the entry of the Default Judgment, the trial Court could have properly refused to set aside the Default Judgment.

III.
OTHER ISSUES

¶66 This Court has, thus far, decided that the Crow Tribal Court properly took jurisdiction over the Defendant non-Indian school district concerning the district's actions complained of in Complaint No. 85-294. We have further found, however, that the Default Judgment entered October 25, 1982, should have been set aside in compliance with Defendant's Motion to Set Aside filed pursuant to Crow Rules of Civil Procedure 17(d). Our inquiry, however, does not end here. Defendants in their Notice of Appeal have raised several other issues which conservation of judicial resources would dictate should be addressed herewith. The remaining issues to be dealt with therefore are: 1) Defendant's motion to remove the local trial judges from hearing this matter, and 2) Defendant's motion for the disqualification of Clarence Belue.

A. *Disqualification of Local Trial Judges.*

¶67 Defendant School District in their Notice of Appeal raised the issue of the role

played by Jim Vogel in these proceedings. The record reflects that in November of 1984, Clarence Belue was elected Big Horn County Attorney. Subsequent to his election, he employed Jim Vogel as a part-time Deputy County Attorney. At the same time, however, Jim Vogel was serving as a Court Advisor to the Crow Tribal Court.

¶68 The developing court systems of various tribes throughout the country, including the Crow Tribal Court, are in great need of professional assistance. This Court commends Mr. Vogel for the high level of professional assistance he has rendered to the Crow Tribal Court. This Court further does not wish to call into question the scrupulous method with which Mr. Vogel has abstained from involvement in this matter.

¶69 However, our duty compels us to be as concerned with the appearance or perception of possible impropriety as with the actual substance. To this end, this Court is today ordering that the remand of this case is not to be tried in front of a regular judge of the Crow Tribal Court. This is being ordered so as to avoid the appearance of impropriety. Mr. Vogel should not be placed in a conflict of interest position, having worked for Mr. Belue in one capacity as deputy county attorney while serving in another capacity as Tribal Court Advisor to judges who would otherwise hear a case in which Mr. Belue is involved. In this particular instance, the matters involved were in litigation at the same period of time as the conflict in service.[19]

¶70 This Court further notes that the question of applicable tort law is, from all appearances, a question of first impression in this Court. The trial judge, upon remand of this case, must decide the question of whether to apply contributory negligence/traditional tort law or whether to apply the more modern rule of comparative negligence, in all its various permutations, to the case at issue. This will certainly involve the weighing of different legal approaches and necessarily calls for a significant level of experience and/or training to properly evaluate the competing theories. To this end, the Appeals Court for the Crow Tribe is directing that an experienced tribal court judge from outside the Crow Tribal Court system, with formal legal training (law school), be appointed to hear this matter. This addresses both the need for an outside independent judge and an experienced judge who must decide these issues of first impression.

¶71 As to the motion to disqualify Mr. Belue from active participation in this case, this Court finds that this matter is more properly presented to the Montana State Bar Association for any disciplinary actions which they may deem appropriate.

¶72 Therefore, this Court affirms the Crow Tribal Court as to its finding of jurisdiction over the parties, reverses as to the refusal of the Crow Tribal Court to set aside the default judgment of October 25, 1982, and remands with instructions as noted herein for further proceedings not inconsistent with our ruling today.

Endnotes

[1] Temporary Restraining Order of November 3, 1982, *National Farmers Union Insurance Co. v. Crow Tribe of Indians,* CV-82-230.

[2] *Ibid.*

[3] *See Affidavit of Rodney Hartmen,* Counsel for Lodge Grass School District No. 27, August 22, 1984.

[4] *See National Farmers Union Insurance Co. v. Crow Tribe of Indians,* 360 F. Supp. 213, 10 Indian L. Rep. 3022 (D. Mont. 1983).

[5] *See National Farmer's Union Insurance Co. v. Crow Tribe of Indians,* 736 F.2d 1320, 11 Indian L. Rep. 2133 (9th Cir.)

[6] *See Sage v. Lodge Grass School District No. 27,* Order of September 12, 1985.

[7] *See Solem v. Bartlett, supra,* 11 Indian L. Rep. at 1012.

[8] *See Sage v. Lodge Grass,* Order of September 12, 1985, and transcript of July 19, 1985, Testimony of Gary Graham, 1985 School Board Chairman.

[9] *See* Brief of Defendant-Appellant, p.2, submitted December 3, 1985.

[10] "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee,* 358 U.S. 217, 223; *Morris v. Hitchcock,* 194 U.S. 384; *Buster v. Wright,* 135 F. 2d 947, 950 (CA8); *see Washington v. Confederated Tribes of the Colville Indian Reservation,* ___ U.S. ___, ___. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court,* 424 U.S. 382, 386; *Williams v. Lee,* 358 U.S. 217, 220; *Montana Catholic Missions v. Missoula County,* 200 U.S. 118, 128-129; *Thomas v. Gay,* 169 U.S. 264, 273." *Montana v. U.S.,* 450 U.S. 544 at 565.

[11] *See also* Transcript of July 19, 1985, hearing in Crow Tribal Court, specifically the testimony of Board Chairman, Gary Graham.

[12] *Ibid*; See also the Johnson - O'Mally Act of 1934, 25 U.S.C. §452, et seq.

[13] *Ibid*.

[14] *See* Transcript of July 19, 1985, *supra*.

[15] ". . . (T)he Congress finds . . . that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ." 25 U.S.C. 1901, Public Law 95-608.

[16] In fact, there are, and traditionally have been, quite a number of tribal members on the school board itself. *See* Transcript of Proceedings, July 19, 1985, Testimony of Bert Kronmiller, former attorney for the Crow Tribe and former attorney for the School District.

[17] Once again, we refer to the findings of the United States Congress as set forth at 25 U.S. C. 1901.

[18] This Court is unwilling to hold here that the Crow Tribe may not impose reasonable fire safety regulations, building and zoning codes, sanitation ordinances, and other regulations designed to assure the safety of not only its children but all those involved in the educational process within the reservation.

[19] Nothing in this opinion should be interpreted as finding or suggesting any finding that there has been a lack of impartiality or basic fairness by the judges or personnel of the Crow Tribal Court.

¶5 | ¶10 | ¶15 | ¶20 | ¶25 | ¶30 | ¶35 | ¶40 | ¶45 | ¶50 | ¶55 | ¶60 | ¶65 | ¶70 | Endnotes