IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 99-116

BERNADETTE C. SMITH, BURTON J. SMITH and MIRIAM C. SMITH,
Plaintiffs/Appellees,

vs.

ADDLEE PLAIN BULL ECKHART, LENORA TURNS PLENTY,
RHONDA AMERICAN HORSE, and ANNA LITTLE LIGHT,
Defendants/Appellants.

Decision entered September 29, 2000

[Cite as 2000 CROW 6]

Before Stewart, C.J., Gros-Ventre, J., and Watt, J.

OPINION

¶1 This is an appeal from the Judgment of the Tribal Court (Yellowtail, S.J.) entered on October 29, 1999, permanently enjoining the Defendants/Appellants from interfering with the Plaintiffs/Appellees' construction and maintenance of a fence between their two trust allotments on the property boundary line established by a U.S. Bureau of Land Management survey.

¶2 The Appellants' Statement in Support of Appeal essentially states two main reasons for why they are appealing the Tribal Court's judgment:

> (1) the Defendants/Appellants have not yet had a chance to present their case or defense, since they were unable to afford an attorney to represent them from June through September, 1999, and they had difficulty obtaining a copies of the hearing videotapes and case file; and
>
> (2) not all the owners of Allotment 1821 were ever served notice of the proceedings, since only Addlee Eckhart received service of

process before the first hearing, and the Tribal Court improperly made it the Defendants' responsibility to notify the rest of the heirs.

¶3 The Plaintiffs/Appellees have not filed a responsive statement or brief, apparently satisfied that the Tribal Court's procedures and decision will stand on their own. We agree, and affirm the Tribal Court's judgment without the need for oral argument.

A. Summary of Facts and Proceedings

¶4 The following summary is based on the Tribal Court's findings of fact, which we find to accurately reflect the record in all respects, and the testimony in the main hearing held on June 25, 1999.

¶5 Plaintiffs Burton and Miriam Smith are the owners by heirship of Crow Allotment No. 1896 located on the Crow Reservation near Pryor, Montana. The Defendants are the heirs to Crow Allotment No. 1821, which is located adjacent to and immediately north of the west half of Smiths' allotment. Title to both allotments is held in trust by the United States of America. Defendant Addlee Plain Bull Eckhart currently lives in a home near the Smith property boundary.

¶6 There has been a dispute between the parties over the boundary between their two allotments since at least 1992. That spring, the Smiths tore down an old 3-wire fence on the northern portion of their property. They planned to build a new fence several feet north of the existing fence, along a property boundary line that had been marked by the local Bureau of Indian Affairs Realty Office in 1987. When the Smiths began laying out the new fence in the Spring of 1993, one or more of the Defendants objected. The fence was not built that year.

¶7 During the intervening years, the parties had several brief confrontations about the use of the property north of the old fence. Burton Smith testified that without the new fence, he could not make use of his allotment, because he couldn't keep livestock on his land or protect his crops from other people's livestock.

¶8 Eventually, at the Smiths' request, the BIA Agency Superintendent authorized a formal survey of the property line. The BIA does not have staff to perform surveys, so it arranges for official surveys of trust allotments to be done by the Bureau of Land Management, a sister agency within the U.S. Department of the Interior. The BLM survey was performed during the summer of 1998 by Mr. R. Wayne Wilson.

¶9 Mr. Wilson testified that he had been performing surveys for the BLM on Indian trust allotments and other land owned by the United States in the Billings area for 28 years. Mr. Wilson testified that there were no records or other indications that the boundary between these two allotments had ever been surveyed before. Mr. Wilson established the corners of the property line between Allotment Nos. 1896 and 1821 by measuring off the existing quarter corners. He placed brass caps on the corners, and documented the survey on the still-unofficial plat admitted as Plaintiffs' Exhibit 1.

¶10 The property line established by Mr. Wilson's survey was apparently close to the line staked earlier by BIA Realty, being north of the old fenceline and closer to the house on Defendants' property. In fact, the line cut through a portion of the driveway to Ms.

Eckhart's home.

¶11 During Memorial Day weekend of 1999, the Smiths rented equipment and started building a fence along the property line established by the BIA/BLM survey. There is no evidence that the Smiths notified any of the Defendants before beginning construction. After they had set a few posts, the BIA Police and a sheriff's deputy arrived, apparently summoned by one of the Defendants. The officers advised the Smiths that, in order to keep the peace, they should not to do anything further until the dispute was resolved by the Crow Tribal Court.

¶12 The Smiths filed their Complaint and Motion for Temporary Restraining Order in the Tribal Court on June 1, 1999, requesting that Defendant Addlee Eckhart be enjoined from interfering with construction of their new fence along the boundary of Allotment 1896, and that she be ordered to remove some vehicles from the Smiths' property.

¶13 The Tribal Court held a preliminary injunction hearing on June 25, 1999. Burton Smith appeared on behalf of the plaintiffs, and was represented by counsel. Ms. Eckhart appeared *pro se*. The other three co-owners of Allotment 1821 who attended this first hearing were added as Defendants under the Crow Rules of Civil Procedure without objection. The plaintiffs presented their case-in-chief through the testimony of Burton Smith and R. Wayne Wilson.

¶14 The Tribal Court scheduled further hearings for the August 6, and September 20, 1999 for the Defendants to present their defense in the case. However, the Defendants were not prepared at either of these times, and no further testimony was received. Thus, the Tribal Court's Findings of Fact and Conclusions of Law entered on October 29, 1999 were based on the evidence taken at the first hearing on June 25, 1999.

¶15 The Tribal Court held that the BLM survey performed by Mr. Wilson established the boundary between the parties' two allotments (slip op. at page 5). The court found no evidence that the old fence removed by the Smiths was ever intended as a boundary fence, and held that its location had no legal significance to the determination of the boundary between the two tracts (slip op. at 4).

¶16 The Tribal Court interpreted a Tribal fencing ordinance as requiring that boundary fences be constructed on the property line. Therefore, the Tribal Court concluded, the Smiths were entitled to erect their fence, in compliance with the ordinance, on the line established by the BLM survey (slip op. at 5).

¶17 Based on the foregoing, the Tribal Court entered judgment for the Plaintiffs/Appellees, permanently enjoining the Defendants "from doing any act, or in any way interfering with Plaintiffs' construction, maintenance or use of a boundary fence between their respective real estate on the boundary line established by the Bureau of Land Management Survey[.]"

B. Jurisdiction

¶18 As a threshold matter, it is prudent to examine the Tribal Court's subject matter jurisdiction of this case, which involves a dispute related to Indian trust land whose legal title is held by the United States. The Tribal Court stated that it had jurisdiction, without citing any authority (slip op. at 5).

¶19 Crow Tribal Code Sections 3-2-202 and 205 generally confer jurisdiction on the Tribal Court over all lands and all civil causes of action arising within the exterior boundaries of

the Reservation. More specifically, Section 3-2-204 confers jurisdiction to determine ownership rights and other interests in real property "limited only by federal law."

¶20 In this case, the Tribal fencing ordinance provides another source of jurisdiction under Tribal law. Section X of Ordinance No. 1, adopted by Tribal Resolution No. 75-22 (April 12, 1975), provides:

> Jurisdiction is hereby conferred upon the Crow Tribal court, also known as the Court of Indian Offenses, and with the assistance of the Department of Interior through the Federal Courts, to adjudicate all disputs[sic] arising hereunder with the authority to apply any applicable federal law or regulation, any Tribal custom or law, or any applicable law of the state.

The Ordinance was apparently reaffirmed by the Tribal Council in Resolution No. 96-20 (April 13, 1996).

¶21 Thus, both specific grants of jurisdiction refer to limitations of federal law, or assistance by the Federal Courts. These references, and the federal courts' jurisdiction to adjudicate interests in Indian allotments under 25 U.S.C. § 345 and 28 U.S.C. § 1353, raise a question of whether Tribal Court jurisdiction is pre-empted by, or concurrent with, that of the Federal courts.

¶22 We first reviewed a similar question in *Warren v. Gardner*, Civ. App. Dkt. No. 95-095 (Aug. 21, 1997), 1997 CROW 1, which involved a dispute over payment for an appraisal of Crow trust land. In *Warren*, this court held that a contract to appraise trust land did not directly or indirectly affect title to the land, and therefore was not subject to any exclusive federal-court jurisdiction which may exist to adjudicate interests in Indian allotments. *Id*. at ¶¶ 17-18.

¶23 Later, in *Lande v. Schwend*, Civ. App. Dkt. No. 92-30 (Mar. 4, 1999), 1999 CROW 1, this court sustained the Tribal Court's jurisdiction of a dispute involving payment for and tortious interference with a competent lease on Crow trust land. We distinguished the cases barring Tribal courts from ordering federal officials to take certain actions. We also reviewed conflicting authority from the Eight Circuit on Tribal Courts' jurisdiction to divide trust land in a divorce, or to recognize an easement across trust lands. *Id*., ¶¶ 37-38 and 41. Our holding in *Lande* was based on the lack of controlling federal statutory or decisional law to the contrary,[1] the importance of trust land to Tribal sovereignty, *see United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992), and the special provisions of the Crow Allotment Act allowing Crows to lease their own trust land without BIA approval. *Id*. at ¶¶ 42-43.

¶24 Before determining jurisdiction in the present case, it is important to understand the scope of the Tribal Court's judgment. This case was not brought as a "quiet title action," i. e., to forever establish the legal boundary between the two allotments against all claimants. Although the Crow Tribal Code does not prescribe a special form for quiet title actions, such a complaint filed under State law would need to name all known owners of the property as defendants, along with "all other persons, unknown, claiming or who might claim any right . . . adverse to Plaintiff's ownership [.]" *See* Mont. Code Ann. § 70-28-104.

¶25 In the present case, the Complaint only sought to enjoin the person who lived on

Allotment 1821 from interfering with the fence construction, and the Plaintiffs never made any attempt to serve process on all the other owners. The judgment on its face only binds the four named Defendants. As further explained below, other persons who own an interest in Allotment 1821 could still bring a new case to challenge the location of the boundary line if they can show that the Tribal Court's judgment and the BLM survey were erroneous. Thus, the Tribal Court's judgment in this case came close, but did not permanently adjudicate title to trust land.

¶26 The case of *Enlow v. Moore*, 134 F.3d 993 (10th Cir. 1998) is instructive, because it involved a disputed boundary fence on Indian trust land in Oklahoma. *Enlow* differed somewhat from the present case, because it involved a permanent adjudication of a trust allotment boundary against a non-Indian defendant who owned the adjacent tract of fee land. Thus, jurisdictional questions were present in *Enlow* that are not present here.

¶27 In *Enlow*, the Tribal allotment owners brought a quiet title action in Tribal court, alleging that the non-Indian neighbor had removed a boundary fence and built a new one that encroached on their allotment. *Id*. at 994. The defendant, in turn, brought a Federal-court action challenging the Tribal court's jurisdiction, which the district court dismissed for failure to exhaust Tribal remedies.

¶28 On appeal, the Tenth Circuit held that Tribal-court remedies had, in fact, been exhausted. The Supreme Court of the Muscogee (Creek) Nation had found that the new fence was located on the trust allotment, and that it therefore had jurisdiction of the case. *Enlow*, 134 F.3d at 996. Thus, according to the Tenth Circuit, the Federal district court should not have dismissed, but should instead have gone on to decide whether the Tribal court did in fact have jurisdiction under federal law.

¶29 In reversing and remanding for that purpose, the *Enlow* court noted that jurisdiction presumptively lay in the tribal court if the fence which was the subject of the dispute was located on Indian trust land. *Id*. The Court of Appeals also instructed the district court to treat with deference the Tribal court's finding that the disputed property was trust land, and overrule it only if it was "clearly erroneous." *Id*. at 997. The *Enlow* court thus had little trouble with the possibility that the Tribal court would have jurisdiction to quiet title if the controversy arose on trust land as determined by the Tribal court itself.

¶30 Considering *Enlow* and *Plainbull, supra*, and consistent with our previous decisions in *Warren* and *Lande*, this court affirms that the Tribal Court had jurisdiction to issue the permanent injunction in the present case to resolve a dispute between Tribal heirs over the construction of a boundary fence between their two trust allotments.

C. Discussion

With the preceding background, we turn to the arguments raised in the Appellants' brief.

1. Time to Retain Counsel.

¶31 Appellants have requested another chance to present their defense, since they were unable to retain counsel to assist them throughout the proceedings in the Tribal Court. It is an unfortunate fact that it is very difficult for most people to afford legal representation, especially when they are defendants in a lawsuit of someone else's making. In these circumstances, the most the trial court can do is to give the defendants reasonable time to obtain an attorney or lay advocate, or to prepare to present their case *pro se*. This

accommodation must be tempered, however, by the opposing party's interest in obtaining a prompt and efficient resolution of the matter. The Tribal Council sought to achieve this balance when it enacted the Crow Rules of Civil Procedure.

¶32 As explained below, the Tribal Court gave the Defendants/Appellants every reasonable opportunity under the rules of procedure to obtain legal assistance and prepare their case. First, Judge Yellowtail properly denied the Plaintiffs' request for an *ex parte* temporary restraining order at the time they filed their complaint, because he was not convinced of the potential for immediate, irreparable harm in an 8-year-old dispute, and because the plaintiffs did not post a security bond. *See* Order entered June 1, 1999; *see also*, Crow R. Civ. P. 22(a) and (d); *accord*, *Goes Ahead v. Nomee*, Civ. App. Dkt. No. 00-117 (April 19-20, 2000), 2000 CROW 4 and 5.

¶33 The Tribal Court instead scheduled a preliminary injunction hearing for June 25, 1999. However, the record reflects that Addlee (the only Defendant named in the Complaint) did not receive service of process until June 24, the day before the hearing. Although they did not have adequate time to prepare, Ms. Eckhart and three other owners of Allotment 1821 appeared at the June 25th hearing, along with Mr. David Turns Plenty who assisted the Plain Bull family in the proceedings.

¶34 At the hearing, the Plaintiffs presented their case through the testimony of J. Wayne Wilson, the BLM surveyor, and plaintiff Burton Smith. The court allowed both of these witnesses to be cross-examined and re-crossed by Mr. Turns Plenty and several of the Defendants. At the end of the hearing, the Tribal Court again denied preliminary relief for the Plaintiffs, and instead ordered that the *status quo* be maintained until the Defendants could retain counsel and present their side of the case.[2] Judge Yellowtail asked the Defendants how long they would need to prepare. They said three weeks, so he scheduled the next hearing for July 21. The Tribal Court later continued that hearing until August 6 at the Defendants' request, because of a death in the family.

¶35 At the time scheduled for the August 6th hearing, the Defendants' attorney entered an appearance and requested additional time to prepare. Over the Plaintiffs' renewed objection, the Tribal Court continued the hearing once again until September 20, 1999. The Tribal Court again warned the Defendants that this would be their last chance to defend. The Defendants' attorney obtained the court's leave to withdraw on September 9, upon the court being advised that the Defendants were going to retain a different attorney. On its own initiative, the court forwarded a copy of the case file to the other attorney that same day.

¶36 At the time set for the final hearing on September 20, 1999, only Addlee Eckhart appeared for the Defendants, without counsel, and no testimony was given.

¶37 To summarize, the Tribal Court twice denied the preliminary relief requested by the Plaintiffs, and gave the Defendants an additional 60 days past the time they said they would be prepared to present their case. The Defendants also never filed an Answer to the Complaint. Rule 6 of the Crow Rules of Civil Procedure requires that a written answer be filed within 15 days after the complaint has been served, and further provides that the failure deny an allegation or claim in the complaint shall be deemed an admission. Finally, with several additional months of extensions during this appeal, the Defendants have still not stated any reason or tendered any evidence that would call into question the accuracy or validity of the BLM/BIA survey,

¶38 The Defendants' complaints about the case file and hearing videotape not being available were not raised with the Tribal Court as grounds for any extension. Those complaints are not well-founded in any event, because these same materials have been

available to this court as part of the record on appeal.

¶39 From the preceding review of the proceedings, this court must conclude that the Tribal Court gave the Defendants every fair opportunity to present evidence that would refute the Plaintiffs' testimony at the June 25th hearing, but they were unable to do so.

2. Failure to Join Other Owners

¶40 The Appellants' other main argument on appeal, that not all the owners of their allotment had a chance to participate in the case, has already been partially addressed above in relation to jurisdiction.

¶41 As the Tribal Court recognized at the end of the June 25 hearing, its orders and judgment can only bind the four named Defendants (and anyone acting for them). Because this case was not brought as a quiet title action, and all the owners were not properly joined by the plaintiffs, it would not be appropriate for the doctrine of collateral estoppel to completely bar any further challenge to the boundary line by other heirs to the Plain Bull allotment. Rather, in any new case filed by those other heirs, they would have the burden of proving that the Tribal Court's judgment and the BLM survey were erroneous.

¶42 Therefore, since, the Tribal Court has not finally adjudicated the unnamed owners' interest in their trust allotment, their joinder was not necessary under Rule 25 of the Crow Rules of Civil Procedure.

3. Violations of Tribal Fencing Ordinance

¶43 Although not raised as an issue in their appellate brief, the issue of the Smiths' non-compliance with the Tribal fencing ordinance was raised by the Defendants/Appellants at the June 25th hearing, and was addressed in the Tribal Court's decision. Because it was the only substantive issue raised by the Defendants in this case, and because of its importance in future disputes such as this, we will review the Tribal fencing ordinance as it applies to the facts of this case.

¶44 At the June 25th hearing, the Defendants introduced as evidence Ordinance No. 1, "Fencing Ordinance for the Crow Reservation," and the Tribal Council resolutions adopting and ratifying it. The Tribal fencing ordinance was apparently enacted to avoid disputes just such as this. It sets up a comprehensive procedure for construction of boundary fences, and recognizes certain rights with respect to the costs and ownership of the new fences.

¶45 Section VI of the Ordinance requires that all boundary fences be built on the property line. Boundary fences built beyond the line onto Indian land must be removed upon demand by the Indian owner or lessee. If the fence is between two tracts of Indian-owned land, then the Indian owner of the other tract is responsible for construction, maintenance and the cost of half the fence (Section III). Regardless of who pays the cost of the fence, it is deemed to be jointly owned (Section V). The Ordinance also sets out specifications for boundary fences, including the number of wires and spacing, post and stay spacing, corners and cattle guards (Section VII).

¶46 Section I of the Ordinance specifically requires 10 days written notice to the adjoining landowners before beginning construction, and gives those landowners 60 days to complete their half of the fence. According to Section IX, if the other landowners fail to construct their half of the fence within the 60 days allowed, they waive any claim for trespass by the requesting party's livestock grazing across the boundary.

¶47 Section VIII of the Ordinance also provides:

> No fences built or existing upon lands within the exterior boundaries of the Crow Indian Reservation shall be removed without the prior written consent of each adjoining landowner whose lands the fence serves as a boundary for.

In his cross-examination of Burton Smith at the June 25th hearing, Mr. Turns Plenty elicited Mr. Smith's admission that he was not aware of the fencing ordinance, and never notified the Defendants prior to tearing down the old fence.

¶48 With respect to this alleged violation, the Tribal Court found that the old fence was not a boundary fence covered by the Fencing Ordinance, because the property line had never been surveyed before, and there was no evidence that the parties (or their predecessors) ever intended the old fence to serve as the boundary between their properties (Findings of Fact Nos. 17 and 18). The Tribal Court went on to hold that the Plaintiffs were entitled to construct a boundary fence on the line established by the BLM survey, because Section VI of the Ordinance requires that boundary fences be constructed on the property line (Conclusion of Law No. 4).

¶49 This court will not set aside the Tribal Court's findings of fact unless they are "clearly erroneous." *Lande v. Schwend*, 1999 CROW 1, ¶ 47; *see also*, Fed. R. Civ. P. 52(a). This court may affirm on any ground supported by the evidence. *Id*. at ¶ 48, *citing Crow Tribe v. Gregori*, 1998 CROW 2, ¶ 97.

¶50 In this case, BLM surveyor Wilson testified that the boundary between these two allotments had never been officially surveyed; in such circumstances, it was his opinion that the old fence was not relevant to the true property boundary. Plaintiff Smith testified that the old fence did not necessarily follow a straight line like a property boundary, that it was in a bad state of disrepair, and that had to be rebuilt anyway in order to hold cows and calves. There is no evidence in the record contradicting any of this testimony. Based this record, we cannot say that the Tribal Court's findings on this subject were clearly erroneous.

¶51 Also, the Tribal Court's conclusion (implicit in its holding) that the Ordinance only applies to boundary fences was a fair reading of the language in Section VII, which requires the consent of the other landowner "whose lands the fence *serves as a boundary for*" (emphasis added). If the fence did not serve as a boundary between the properties, there was no requirement under Section VIII to obtain the Defendants' consent before removing the fence.

¶52 In many cases, though, it will not be clear from the record whether or not a fence was intended to serve as the boundary fence, just because it was not located precisely on the property line. Section VI contemplates this situation, by providing that if a mislocated boundary fence is encroaching on Indian-owned land, the Indian owner has the right to have it removed to the property line.[3] This right to remove a mislocated boundary fence to the property line, and the further requirement in Section VI that boundary fences be built on the property line, would appear to override the requirement in Section VIII for obtaining the consent of the other property's owners before removing a mislocated fence. However, this court is not called upon to resolve this potential conflict in the Ordinance in the present case, because the old fence was not a boundary fence whose removal was subject to Section VIII.

¶53 This does not dispose of another violation of Ordinance as revealed in the record – the Smiths' failure to give 10 days' written notice before beginning construction of the fence.

According to Section I.A, the notice must "set forth in detail the plans for construction and maintenance of said fence[.]" The fact that this provision is the first matter covered in the Ordinance indicates that the notice requirement fulfills another important purpose of the Ordinance – to keep the peace. We agree with the point made by Mr. Turns Plenty in the hearing, that it is a very serious matter not to notify you neighbor in advance before you begin pounding fence posts a few feet away from her home.

¶54 In this case, though, the Smiths' failure to give written notice is not sufficient grounds to reverse the Tribal Court's judgment. Although Mr. Smith acknowledged that ignorance is no excuse for violating the law, it is true that Tribal ordinances are not always readily available to the public, or, for that matter, to this court.[4] More importantly, the record reflects that the Defendants were aware that the Smiths wanted to build a fence for several years, had verbally discussed the possibility of an electrified fence, and that various incidents over the years made it difficult for the parties to communicate. Finally, any surprise and distress suffered by the Defendants because of the lack of written notice would tend to be offset by the inconvenience and distress suffered by the Plaintiffs while the Defendants prevented them from using a portion of their land, especially after the BLM survey established the property line.

¶55 For the foregoing reasons, the judgment of the Tribal Court is **AFFIRMED**. No costs.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45	¶50	¶55	Endnotes

Endnotes

[1] This court's rationale was based, in part, on the case of *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610 (9th Cir. 1998), which was vacated by the U.S. Supreme Court, 526 U.S. 473 (1999). Due to the nature of that case (personal injury claims against uranium mine operators), the Supreme Court's reversal does not affect the continuing validity of our previous holding.

[2] The Defendants also requested permission to remove their vehicles from Plaintiffs' property, which the Court allowed without objection.

[3] If the mislocated boundary fence is encroaching on *non-Indian* land, Section VI purports to waive the non-Indian's trespass claims, and the mislocated fence remains jointly owned. Although Mr. Smith testified that he is not an enrolled member of the Crow Tribe, he also testified that he was a decendant of the original allottee and inherited the allotment. Therefore, it would appear that both properties involved in this case are clearly "Indian-owned" for purposes of the Ordinance.

[4] Resolution No. 96-20, which ratifies and reaffirms the Fencing Ordinance, directs the Chairman to mandate that a copy of the Fencing Ordinance be attached to all grazing and farming leases prior to signature. This court takes judicial notice that the Ordinance has not been publicized consistently in this manner.