¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45
¶50	¶55	¶60	¶65	¶70	¶75	¶80	Endnotes	

CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 89-320

ONE HUNDRED EIGHT EMPLOYEES OF THE CROW TRIBE OF INDIANS,
Plaintiffs/Appellees,

vs.

CROW TRIBE OF INDIANS,
Defendant/Appellant.

Decided November 21, 2001

[Cite as 2001 CROW 10]

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

OPINION

¶1 This is an appeal by the Crow Tribe from the order of the Crow Tribal Court (Arneson,

Special Judge) on July 21, 1993, denying the Tribe's motion to dismiss based on sovereign immunity. The Tribe's appeal was previously heard in 1994 by a panel of visiting judges acting for this court, who dismissed the appeal for lack of a final appealable order. Pursuant to Tribal Council Resolution No. 95-14, the Tribe petitioned for a rehearing.

¶2 Because of the important principles at stake in this case, we now grant the Tribe's petition for rehearing and vacate the previous panel's decision. This court having appellate jurisdiction, we reverse the Tribal Court's order and hold that this action is barred by the Tribe's sovereign immunity.

A. Facts and Course of Proceedings

¶3 This case involves pay claims by employees of the Crow Tribe stemming back to the Real Bird administration. According to depositions taken during 1991, the pay claims cover various periods for different employees up through early July, 1990. For the purpose of deciding its sovereign immunity defense, the Tribe has stipulated that the plaintiff employees "performed services for the Defendant Tribe and have not been paid wages or other compensation for those services[.]" See Tribe's Reply Brief in Support of Motion for Summary Judgment (March 4, 1993).

¶4 In February 1993, the Tribe moved for summary judgment of dismissal based on the Tribe's immunity from suit as a sovereign government. Alternatively, the Tribe moved for partial summary judgment that Montana's wage and hour statutes do not apply to the Tribe, and that plaintiffs could not recover from the Tribe penalties for non-payment of wages as provided in those State statutes.

¶5 In its Order issued on July 21, 1993, the Tribal Court denied the Tribe's motion for summary judgment based on its defense of sovereign immunity. The court held that the Tribe waived its sovereign immunity from suit by Tribal employees when it adopted Section 1.16.1 of the Tribal Personnel Practices and Policy Manual in 1978. While recognizing Section 1.16.1 as a waiver of sovereign immunity for back pay suits by Tribal employees, Judge Arneson also held that the court's jurisdiction was limited to those cases in which employees had followed the grievance procedures specified in Section 1.18 of the personnel manual. Accordingly, the court ordered plaintiffs' attorney to provide documentation to the court showing the extent of each individual employee's compliance with the grievance

procedures.

¶6 In its July 21 Order, the Tribal Court also held that Resolution No. 90-6 creating the Debt Retirement Committee was not a specific waiver of the Tribe's sovereign immunity. Finally, Judge Arneson held that Montana's wage and hour laws did not apply to cases within the Tribal Court's jurisdiction, because Section 3-1-104(4) of the Tribal Code prohibits the court from following State law as the applicable law absent agreement by the parties.[1]

¶7 The Tribe filed this appeal from the Tribal Court's ruling recognizing Section 1.16.1 of the Tribal personnel manual as a waiver of sovereign immunity. Both parties summarily briefed the appeal in early August, 1993. Later that month, the plaintiffs and the Tribe apparently reached a settlement agreement whereby the Tribe would pay the plaintiffs' wages actually due (plus interest), as funds became available, with any disputes on the amounts due to be resolved by the Debt Retirement Committee (see Pl. Mem. of Settlement of Case filed June 10, 1994). In consideration of the settlement agreement, U.S. District Judge Shanstrom dismissed a related federal-court action without prejudice on August 17, 1993. Alden, et al., v. Crow Tribal Council, et al., Cause No. CV 93-50 BLG-JDS (see Exh. A to Tribe's Brief on Status filed May 20, 1996).

¶8 Although the federal-court case was dismissed, proceedings in the Tribal Court continued for some time. On September 16, 1993, the plaintiffs filed a "Memorandum re. Compliance" responding to the Tribal Court's Order of July 21. Plaintiffs admitted that none of them had followed the procedures in the Tribal personnel policy, which they argued would have been futile because the Personnel Director himself was a plaintiff and the personnel committee was not functioning at the time. Plaintiffs also advised the court that, in any event, the issue of plaintiffs' exhaustion of their administrative remedies was no longer relevant in view of the Tribe's agreement to pay the plaintiffs' wage claims through the Debt Retirement Committee. On March 21, 1994, the parties filed a Stipulation reciting that they had agreed to work with the Debt Retirement Committee in resolving plaintiffs' claims, and requesting the Tribal Court to stay proceedings for 90 days. Judge Arneson granted the 90-day stay to permit time for the parties to effectuate the settlement. The record does not reflect any further Tribal Court proceedings.

¶9 Oral argument on the Tribe's appeal was scheduled for June 7, 1994. Plaintiffs filed a Memorandum advising the Court of Appeals of the settlement, and that they were waiting for the accounting firm to complete its work and for the Tribe's receipt of necessary funds to pay

the plaintiffs. Plaintiffs took the position that, in view of the settlement, the appeal was moot and should be dismissed. The record reflects that the oral argument was nevertheless rescheduled, and the parties' counsel argued the appeal before a panel of three visiting special judges on August 15, 1994. That panel issued an Opinion on August 16, 1994, holding that the Court of Appeals lacked jurisdiction of the appeal because it was not an appeal from a "final order" as required in Rule 1 of the Crow Rules of Appellate Procedure. The panel therefore dismissed the appeal.

¶10 Thereafter, on January 14, 1995, the Crow Tribal Council enacted Resolution No. 95-14, which authorized rehearings of any decisions of the Court of Appeals during 1994 that were made by panels not constituted as required by Section 3-3-331 of the Tribal Code. The Tribe timely filed a petition for rehearing pursuant to that Resolution on February 9, 1995. In December, 1995, the docket judge for this court scheduled further proceedings, including a status conference to be held in February 1996. After a continuance requested by the parties, a three-judge panel of this court, constituted pursuant to Crow Tribal Code Section 3-3-331, held oral argument in June 1996 on the issues of appellate jurisdiction and the merits.

¶11 At oral argument on June 20, 1996, the Tribe asserted that Resolution No. 95-14 gave this court jurisdiction to reconsider this appeal. The Tribe also renewed its principal arguments from the earlier proceedings that the Tribal Court's order was immediately appealable under the federal collateral order doctrine, and that the Tribal Court erred in finding a waiver of sovereign immunity in Section 1.16 of the Tribal personnel manual. The Tribe's counsel, Mr. Austin, represented that efforts were still underway to review all remaining pay claims with the Debt Retirement Committee, and that regardless of the court's ruling, the Tribe would carry out its promises under the parties' settlement.

¶12 The plaintiffs objected to further appellate review based on the separation of powers and lack of a final order. On the merits, plaintiffs argued that sovereign immunity does not shield the Tribe from claims based on contract, such as the contract formed with Tribal employees by the Tribal personnel policy, as opposed to claims founded in tort. Counsel for the plaintiffs further advised the court that the Debt Retirement Committee had still not addressed the claims of the 64 employees who remained in the Tribal Court action, and that only the forty-odd employees who withdrew from the court case had been paid by the Committee. Although both counsel indicated that the parties were still attempting to implement their settlement, they both urged this court to rule without waiting for the settlement to be completed.

B. Appellate Jurisdiction

¶13 In order to determine whether the present panel of the Crow Court of Appeals has jurisdiction to consider the Tribe's appeal, we must decide two questions. The first is whether this court may properly grant a rehearing of the previous panel's decision pursuant to Tribal Council Resolution No. 95-14. If we answer that question in the affirmative, we must then answer the question of whether the previous panel erred by holding that the Court of Appeals lacked jurisdiction because the Tribe did not appeal from a "final" order.

1. Applicability of Resolution No. 95-14.

¶14 The composition of the 3-judge panels who act as the Crow Court of Appeals is governed by Section 3-3-331 of the Crow Tribal Code. As enacted in the original Crow Law and Order Code of 1978, Section 3-3-331 provides that the Court of Appeals shall be composed of (a) the two Tribal Court judges who did not preside over the action being appealed, and (b) a third member appointed "at the sole discretion of the Chief Judge" and who is "a professional attorney or a judge provided by the National Indian Tribal Judges Association[2] through its exchange procedure[.]" In turn, the qualifications for judges of the Crow Tribal Court (including the Chief and the two Associate Judges) are that they be 25 years old, never convicted of a felony, enrolled members of the Crow Tribe, and fluent in both the Crow and English languages. See Crow Tribal Code Sections 3-3-302 and 303. The judges are elected by the Tribal Council (i.e., all Tribal members eligible to vote) for four-year terms. Id.

¶15 During 1994, several cases pending before the Crow Court of Appeals were heard by panels of visiting judges through an intertribal exchange program administered by the Montana-Wyoming Indian Supreme Court. The panels consisted of distinguished and experienced lay and attorney-judges from other Tribal courts in Montana and Wyoming, and were designated Special Crow Tribal Appeals Judges in their opinions. It is not clear whether panels of visiting judges were employed because of disqualifications of sitting Tribal Court judges, Tribal budgetary considerations, complexity of the legal issues involved, or a combination of these or other factors. There is no record of any of the parties to those appeals, including the Tribe, having objected to the composition of the appellate panels.

¶16 The preamble to Resolution No. 95-14 recited that questions had arisen as to whether some appellate panels were composed as required by Section 3-3-331 of the Crow Tribal Code. The Resolution also recited that "the purpose of Section 3-3-331 . . . is to insure that the decisions of the Crow Court of Appeals are made by judges who are familiar with the traditions, customs, and culture of the Crow People, as well as with the conditions of life on the Crow Indian Reservation." To further that purpose, the Resolution clarified Section 3-3-331 by adding the following:

> In the event that either or both of the two judges of the Crow Tribal Court who did not preside over the action being appealed are disqualified, recuse themselves, or are otherwise unavailable to hear the appeal, the Chief Judge shall appoint members of the Crow Tribe – preferably with previous judicial experience – to replace them. In no event shall a panel of the Crow Court of Appeals be comprised of a majority of judges who are not members of the Crow Tribe.

¶17 The Resolution called for reconstituting the Tribal Law and Order Commission for the purpose of reviewing the Tribal Code and making recommendations on enhancements "to promote the independence and integrity of the Crow Tribal Court system[.]" As it applies to the present case, the Resolution also provided the following:

> [A]ny decisions of the Crow Tribal Court of Appeals issued after January 1, 1994, by panels not constituted as required by Section 3-3-331 of the Crow Tribal Law and Order Code, as it existed prior to this Resolution, may be reheard by panels of the Crow Tribal Court of Appeals whose members are appointed in accordance with Section 3-3-331, as amended by this Resolution, provided that petitions for rehearing are filed with the Crow Tribal Court of Appeals within ninety (90) days following adoption of this Resolution by the Crow Tribal Council.

Resolution No. 95-14 (emphasis added).

¶18 The panel of visiting judges that issued a decision in this appeal in August 1994 did not include any elected judges of the Crow Tribal Court, as specified by the original version

of Crow Tribal Code § 3-3-331. There is no indication that any of the panel members were eligible, in terms of Crow Tribal membership or fluency in the Crow language, to act as Tribal Court judges sitting on an appellate panel. The Code does provide for appointment of a Special Judge "to sit as judge of the Crow Tribal Court for the trial of a particular matter," as Special Judge Arneson did at the trial level in this case (Crow Tribal Code § 3-3-304). However, that provision does not by its terms apply to the Court of Appeals. Thus, it appears that the panel was not constituted as required by Section 3-3-331, or any other provision of the Tribal Code. The Tribe having filed its motion for rehearing on February 9, 1995, it is clear that the present case falls within the class of appeals for which Resolution No. 95-14 authorizes a rehearing.

2. Limitations of Due Process and Separation of Powers

¶19 Plaintiffs have argued that Resolution No. 95-14 violates the separation of powers doctrine and their rights to due process under the United States Constitution. Neither of these Federal constitutional limitations apply directly to the Crow Tribe, because the Tribe's sovereign powers pre-date the Constitution and are independent of the State and Federal powers regulated by the Constitution. See, e.g., Crow Tribe v. Big Man, 2000 CROW 7, ¶ 19, citing Talton v. Mayes, 163 U.S. 376, 384 (1896) and United States v. Wheeler, 435 U.S. 313 (1978). As explained below, however, even if they are applied directly to the present case, our research in this regard indicates that Resolution No. 95-14 would not violate any Federal constitutional right or principle.

¶20 We analyze the plaintiffs' due process argument under the Indian Civil Rights Act, 25 U.S.C. § 1302 (the "ICRA"). The ICRA guarantees to persons subjected to Tribal government actions certain protections that are similar to those provided in Bill of Rights and the Fourteenth Amendment of the U.S. Constitution, including the guarantee that the Tribe shall not "deprive any person of liberty or property without due process of law[.]" 25 U.S.C. § 1302(8). Particularly in the context of a civil case, such as the present one, the federal courts have recognized that the interpretation of the ICRA "will frequently depend on questions of tribal tradition and custom[.]" Big Man, supra, 2000 CROW 7, ¶¶ 24-25, quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978); Tom v. Sutton, 533 F.2d 1101, 1104-05 n.5 (9th Cir. 1976). Although this court is not required to apply the ICRA in precisely the same manner as the corresponding provisions of the U.S. Constitution, we have nevertheless looked to the decisions of the U.S. Supreme Court on federal

constitutional rights as the starting point for interpreting specific provisions of the ICRA. See Big Man, supra (Miranda warnings); Crow Tribe v. Bull Tail, 2000 CROW 8, ¶ 9.

¶21 The ICRA does not expressly require any "separation of powers" among the branches of Tribal governments. Thus, it has long been recognized that a Tribal Council itself may hear appeals under Tribal law without violating the ICRA's due process clause, and there does not appear to be any other Federal-law requirement for Tribes to maintain a separation of powers. See Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51, 58 (W. D. N.Y. 1972)(permitting appeals of decisions from Peacemakers Court to the Tribal council). Under our Tribal Constitution, at least prior to December 2000, the Tribal Court system was not a separate constitutional branch of government. Rather, the Constitution declared that "the Crow Tribal Council, which encompasses the entire membership of the Tribe . . . shall be supreme in determining by a majority vote of those attending, any course of action taken which is designed to protect Crow tribal interests." Crow Constitution, Article VII Section 6 (June 24, 1948). The authority of the Crow Tribal Court to adjudicate "all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation" as a "court of general civil and criminal jurisdiction" was delegated by the Tribal Council in the 1978 Crow Law and Order Code (see Sections 3-1-101(2) and 3-2-205).

¶22 On December 9, 2000, the Crow Tribal membership at a special election enacted several amendments to the Tribal Constitution, one of which expressly created a separation of powers similar to that which has been recognized in the U.S. Constitution. Under the new Article X added by the amendments, the Tribal Government "shall be divided into three distinct and separate branches: the Legislative, the Executive, and the Judicial." (Amendment No. 6, Article X, Section 1). "No person or entity charged with the exercise of power of one branch shall exercise a power belonging to another branch," unless expressly authorized in the Constitution or Tribal Code. Id. With respect to the Tribal Courts, in language similar to Article III of the U.S. Constitution, the amendment provided that "[t]he Judicial power of the Apsaalooke Nation shall be vested in one Appellate Court and in such other courts as the Apsaalooke Nation General Council may from time to time ordain and establish." (Amendment No. 6, Article X, Section 2). The effectiveness of these amendments is not clear, in part because the Article VIII, Section 1 of the 1948 Constitution provided that "no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs or his authorized representative." In other litigation pending before this court, the Tribe's counsel took the position that the amendments were not effective absent approval from the U.S. Department of the Interior, and that approval had not been granted.[3] Apparently, the Tribal administration "believed those amendments

were flawed and asked the BIA to allow the Tribe to re-visit the amendments." See Letter from the BIA's Rocky Mountain Regional Director Keith Beartusk to the Deputy Commissioner of Indian Affairs dated August 24, 2001 at page 2.

¶23 At the Tribal Council meeting on July 14, 2001, the attendees voted to repeal the 1948 Constitution and adopt an entirely new Tribal Constitution. Article I of the revised Constitution establishes the same "three branches of government . . . which shall exercise a separation of powers." Article X of the revised Constitution provides that the "Judicial Branch shall be a separate and distinct branch of government," consisting of "all courts established by the Crow Law and Order Code," and with qualifications and elections for judges also governed by the Code. Revised Article X further provides that "[t]he Judicial Branch shall have a limited review of legislation passed by the Legislative Branch to determine whether the subject legislation is consistent with or in conflict with this Constitution." Some controversy has arisen as to, among other things, whether the notice and method of voting for the revised Constitution at the July 14 Council meeting complied with Tribal law. See Beartusk Letter, supra. Despite these concerns, and the BIA's lack of authority under Federal law to approve or disapprove the changes because the Crow Tribe is a non-IRA Tribe, Regional Director Beartusk has recommended that the Interior Department recognize the revised Constitution passed by the Council on July 14, 2001. Id. at pages 2-3.

¶24 Thus, unfortunately, it would appear that the Tribal Constitution is somewhat in a state of flux. This court cannot resolve any questions related to the status of the Constitutional revisions on the record in the present case, and need not do so. Whether by virtue of the comprehensive delegation of authority in the 1978 Law and Order Code, or by virtue of the "separation of powers" provisions in both 2000 and 2001 Constitutional revisions, we conclude that under Tribal law, only the Tribal Courts have the authority to exercise the judicial powers and functions of the Crow Tribe. Thus, in analyzing whether the Tribal Council could lawfully authorize the reopening of certain appeals previously decided by panels of visiting special judges in 1994, this court will apply the separation of powers principles developed by the Supreme Court under the U.S. Constitution.

¶25 Under Article III Section 2 of the U.S. Constitution, Congress' power to establish and define the jurisdiction of the lower Federal courts is similar to that of the Tribal Council or Legislature under all versions of the Tribal Constitution. The U.S. Supreme Court has had several occasions to rule on the validity of similar Congressional acts that retroactively enlarged or contracted the Federal courts' jurisdiction to hear cases or to reopen previous decisions. For example, in Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869), the Court

sustained Congress' power to withdraw a new statutory right of appeal while a case was pending before it. Congress' action was obviously intended to avoid the Court's review of the constitutionality of the Reconstruction legislation following the Civil War. But factors working in favor of upholding the jurisdictional revision were that it did not remove all appellate jurisdiction, it was neutral in that it applied to the Government as well as to opposing private parties, and it was therefore not being used to control the substantive results of a particular case. See Nowak and Rotunda, Constitutional Law § 2.9 at pages 36-38 (West, 6th ed. 2000). On the other hand, the Court has also clearly held that Congress' power to control jurisdiction is limited by the constitutional requirement for an independent judiciary. When Congress passed another law that withdrew the Supreme Court's jurisdiction of a case pending before it, the Court held that Congress had crossed the line separating itself from the judicial branch by mandating a rule of decision that denied the effect the Court had previously given to presidential pardons of Confederate veterans. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), discussed in Nowak and Rotunda, supra at pp. 38-39.

¶26 More recently, the Court addressed due process and separation of powers challenges to retroactive jurisdictional legislation in the three opinions issued in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). The legislation at issue in Plaut gave plaintiffs in certain securities fraud cases the opportunity to reinstate their cases which had previously been dismissed based on the statute of limitations.[4] Justice Scalia, writing for the majority of the Court, recognized that Congress can always revise judgments that are pending on appeal, in the sense that "an appellate court must apply that [retroactive] law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." Plaut, 514 U.S. at 226. However, when it came to a judgment of dismissal that was no longer subject to appeal, the Plaut Court held that the constitutional separation of powers prohibited Congress from "retroactively commanding the federal courts to reopen final judgments." Id. at 219.[5] The Court explained that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy." Id. at 218-19.

¶27 The concurring opinion by Justice Breyer criticized the majority's absolutist view of the separation of powers. Instead, Justice Breyer based his review of the statute on three features, "its exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments," which, taken together, violated a "basic 'separation of powers' principle - one intended to protect individual liberty." Plaut, 514 U.S. at 241 (Breyer, J., concurring). The majority opinion in Plaut also did not reach the plaintiffs'

alternative due process argument. However, Justice Stevens' dissenting opinion indicated his view that the statute "easily survives a due process challenge" because it was "rationally related to a legitimate public purpose" and did not upset any "settled expectations." Id. at 247-48, n.2 (Stevens, J., dissenting), citing Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636-641 (1993) (substantive and procedural due process not violated when pension law amendments retroactively imposed withdrawal liability on employer).

¶28 Applying the foregoing principles in the present case leads us to conclude that Resolution No. 95-14 does not violate the separation of powers under Tribal law or the plaintiffs' due process rights under the ICRA. Although the Resolution by its terms affects an identifiable class of litigants before the Crow Court of Appeals, it does not involve any "suspect" classification (e.g., based on race) that would trigger a heightened level of scrutiny under the equal protection clause. The Resolution is neutral in its application – it does not dictate any particular result on the petition for rehearing or on the merits of the appeal. Thus, unlike the statute in Klein, it does not "prescribe a rule of decision" in the guise of granting this court jurisdiction to reopen the appeals.

¶29 Nor will granting the rehearing authorized by the Resolution result in a deprivation of property or liberty that would require procedural due process. The litigants could not have had relied on any expectations that their appeal would be heard by a panel of visiting judges. And the previous panel's decision did not vest the plaintiffs in the present case with any cognizable right. By declining to assume jurisdiction of the Tribe's interlocutory appeal, the previous panel did not make any decision on the merits of the plaintiffs' claims or the Tribe's sovereign immunity defense. Therefore, as distinguished from Plaut, the Resolution did not mandate the reopening of a "final judgment" in the present case.

¶30 There is another important reason why Resolution No. 95-14 does not violate the separation of powers, even as applied to cases in which the previous panel's decision would otherwise have concluded the judicial proceedings. Rehearing the 1994 appeals will correct any defect in the previous panel's jurisdiction resulting from it not having been constituted as provided under the Section 3-3-331 of the Tribal Code. While some types of judicial decisions may be upheld under the "de facto officer doctrine" when there is some technical defect in the judges' authority to serve on the case, the defect is "jurisdictional" when it violates a statutory or constitutional requirement that is "not merely technical but embodies a strong policy concerning the proper administration of judicial business." Glidden Co. v. Zdanok, 370 U.S. 530, 535-36 (1962), citing Ayrshire Collieries Corp. v. United States, 331

U.S. 132 (1947)(in appeal from administrative decision where statute required special three-judge court, judgment entered by only two judges vacated as void). Like a question of subject matter jurisdiction, when a question arises as to whether a judge's or an appellate panel's decision is void for lack of constitutional authority, that question can be considered for the first time on appeal even if it was not raised below. Glidden, 370 U.S. at 536; see also, Freytag v. Commissioner, 501 U.S. 868, 878-79 (1991). In a recent example where an appellate panel's decision was void because of a defect in the way it was constituted, the Court vacated a court-martial conviction because two of the three judges who sat on the Court of Military Review were appointed in violation of the Appointments Clause of Article II, Section 2 of the Constitution. Ryder v. United States, 515 U.S. 177 (1995).

¶31 Based on this precedent, the decision of the previous panel of visiting judges was void and without effect, because the appellate panel was not constituted according to Section 3-3-331 of the Tribal Code, and we do not believe that those Code requirements are "merely technical." Viewed in this way, Resolution No. 95-14 only authorizes this court to do what it already had the power to do – to reopen the appeal so that it can be heard by a properly constituted panel of the Crow Court of Appeals. The Resolution is rationally related to its stated purpose of ensuring that "decisions of the Crow Court of Appeals are made by judges who are familiar with the traditions, customs, and culture of the Crow People." This purpose is consistent with the Council's historic intent as reflected in the qualifications for elected Tribal Court judges that have existed since 1978 – that they be Tribal members and speak Crow. In the present case, which involves fundamental questions of Crow Tribal sovereignty and Tribal employees' rights, that historic intent would be wholly frustrated in the absence of a rehearing by this panel, because neither the Special Judge at the trial court level nor any of the special appellate judges on the previous panel were members of the Tribe. The legitimacy of that purpose and intent, as expressed by the Council in the current Code, cannot be subject to serious question, for if we were to wholly ignore Crow culture in the Tribal judiciary, we would serve merely as an instrument of assimilation rather than an important institution of Tribal self-government. As importantly, if we heed the lessons of the Federal constitutional jurisprudence reviewed above, the scrupulous adherence to judicial qualifications set forth in the Code is essential to maintaining the independence of the Tribal Courts.

¶32 For the all the foregoing reasons, this court holds that Resolution No. 95-14 does not violate the plaintiffs' due process rights guaranteed by the ICRA, nor does it violate the separation of powers provided for under Tribal law. We therefore grant the Tribe's motion for rehearing pursuant to Resolution No. 95-14. Although a great deal of time has elapsed

since the Tribal Court's ruling, the importance of the sovereign immunity issues presented in this case compel this court to reconsider Tribe's appeal.

3. Appealability of Order Denying Sovereign Immunity

¶33 The order being appealed in this case is the Tribal Court's order denying the Tribe's motion for a summary judgment of dismissal based on sovereign immunity. The previous panel summarily ruled that the Crow Court of Appeals lacked jurisdiction of the Tribe's appeal, because it was not an appeal from a "final order" under Rule 1 of the Crow Rules of Appellate Procedure. The plaintiffs have urged this court to sustain that ruling on rehearing. The Tribe, on the other hand, contends that the "collateral order" doctrine recognized by the federal courts allows the Tribe to immediately appeal the Tribal Court's order, and that the threat it poses to Tribal sovereignty compels us to decide its appeal.

¶34 The Tribal Council has conferred jurisdiction on the Crow Court of Appeals "to hear all appeals from final judgments and/or orders of the Crow Tribal court and the Crow Juvenile Court." Crow Tribal Code Section 3-1-103(2). Interpreting this jurisdictional grant in the same manner as the similar federal appellate jurisdictional statutes, this court has dismissed so-called "interlocutory" appeals that were filed before the case was finally decided on its merits in the lower court. See Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co., 1996 CROW 2 (dismissing appeal from various pre-trial rulings); In re. Marriage of Redfox, 2000 CROW 3 (dismissing appeal from order denying motion to dismiss for lack of jurisdiction). At the same time, this court has recognized that immediate appeals may be allowed for a "small class" of orders under the collateral order doctrine, including an order denying a motion to intervene. Burlington Northern, 1996 CROW 2, ¶ 4, quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949); Burlington Northern, 1996 CROW 1 (affirming denial of motion to intervene).

¶35 "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress. . . but as a 'practical' construction of it[.]" Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)(citations omitted). To qualify as a collateral order, the order being appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)(footnote omitted).

¶36 Following these criteria, the Supreme Court has held that orders denying dismissal of claims based on various types of immunities are immediately appealable. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982)(President's absolute immunity from damages suit based on official acts); Mitchell v. Forsyth, 472 U.S. 511 (1985)(Attorney General's qualified immunity from suit for violation of constitutional rights); Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, 506 U.S. 139 (1993)(Eleventh Amendment immunity from suit on contract claim against "state" instrumentality). In turn, based on the Supreme Court's decisions, the Ninth Circuit has held that denials of motions to dismiss federal-court actions by various entities claiming sovereign immunity[6] are immediately appealable under the collateral order doctrine. See, e.g., Adler v. Federal Republic of Nigeria, 107 F.3d 720, 723 (9th Cir. 1997)(Nigerian sovereign immunity under the Foreign Sovereign Immunities Act); Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989)(action in admiralty barred by territory of Guam's inherent sovereign immunity).

¶37 The logic behind appellate jurisdiction lying in these cases is that an "essential attribute" of the immunity is "an entitlement not to stand trial." Mitchell v. Forsyth, supra, 472 U.S. at 525. Requiring a sovereign to defend a case through trial, without allowing it to immediately appeal, would destroy this sovereign right "to be free from the 'crippling interference' of litigation." Marx, 866 F.2d at 296, cited in In re. Marriage of Redfox, supra, 2000 CROW 3, ¶ 5. Thus, a lower court's denial of a motion to dismiss is, in effect, a "final" order with respect to sovereign's immunity against standing trial, and because the damage to the sovereign can never be undone, it is effectively unreviewable on appeal from a final judgment following trial.

¶38 This same logic applies equally forcefully to the Crow Tribe's claim of sovereign immunity in the present case. Therefore, this court holds that the Tribal Court's order denying the Tribe's motion for summary judgment on the basis of sovereign immunity was a "final order" of which we have appellate jurisdiction under Crow Tribal Code § 3-1-103(2). Because we respectfully disagree with the previous panel, we must vacate its decision.

C. Sovereign Immunity

¶39 "Sovereign immunity" is shorthand for the common-law concept that the sovereign cannot be sued without its consent. The doctrine of sovereign immunity had its origins in

the English feudal system, where "no lord could be sued by a vassal in his own court[.]" Nevada v. Hall, 440 U.S. 410, 414-15 (1979). He could only be sued in the court of a higher lord. Since there was no higher lord than the King (who was also considered incapable of doing, or even thinking, any wrong), the King was immune from suit. See id., nn.6 & 7. While the American colonists rejected the notion of the King's infallibility, the Supreme Court continued to recognize the doctrine of immunity from suit as an attribute of sovereignty "based 'on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" Id. at 416, quoting Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)(Holmes, J.)

1. Background on Federal Sovereign Immunity and Employee Backpay Suits

¶40 The United States Government maintained its cloak of sovereign immunity essentially intact for nearly the first one hundred years of its existence. During that time, the only recourse for monetary losses suffered by citizens due to wrongful Government actions was to petition Congress for relief in the form of "private bills." United States v. Mitchell, 463 U.S. 206, 212-13 (1983)(Mitchell II). To avoid this burden, and the resultant inequities and delays, Congress enacted the Tucker Act of 1887 as a "comprehensive measure by which claims against the United States may be heard and determined." Id., quoting H. Rep. No. 1077, 49th Cong. 1st Sess., 1 (1886). The Tucker Act granted jurisdiction to the U.S. Court of Claims, [7] a special court created under Article I of the Constitution, to "render judgment on any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." [8] Id. at 212, quoting 28 U.S.C. § 1491(a)(1). By granting that jurisdiction, the Congress consented to suit and waived the United States' sovereign immunity for claims within the Act. Mitchell II, 463 U.S. at 212.

¶41 Although the Tucker Act waives the United States' sovereign immunity for monetary claims founded upon Federal statutes, it does not by itself create any right to recovery. A claim must be based on another source of substantive law that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" Id., quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607 (1967). This additional requirement has served as another line of defense for the Government. For example, in a

case involving claims by the Quinault Tribe and individual allottees, the Supreme Court held that the General Allotment Act did not create a trust responsibility to properly manage Indian timber resources, and was therefore not a money-mandating statute whose violation would give rise to a claim for money damages under the Tucker Act. United States v. Mitchell, 445 U.S. 535 (1980)("Mitchell I"). Later, affirming the Court of Claims' decision on remand, the Court in Mitchell II held that the elaborate system of Federal statutes and regulations governing Indian timber management and right-of-way grants established all the elements of a common-law trust, thus mandating compensation when the United States breached the trust. Mitchell II, 463 U.S. at 224-228.

¶42 In the context of Government employment claims, the comprehensive Federal statutes governing pay and allowances of civil service employees provide the "money-mandating" substantive law on which Tucker Act suits for backpay have been based (see Title 5 United States Code, Chapters 51-57). Thus, in United States v. Wickersham, 201 U.S. 390 (1906), the Court affirmed a Court of Claims judgment for the compensation that a Boise land office clerk was entitled to receive under the Federal pay statutes during the period in which he was wrongfully suspended from his office. The Back Pay Act of 1966, 5 U.S.C. § 5596, codified the remedies for victims of an "unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee[.]" The BPA was amended in 1978 to allow Federal employees to recover their attorneys' fees (in some cases), and again in 1987 to mandate payment of interest from the time of the wrongful pay reduction (see 5 U.S.C. § 5596(b)(1)(A)(ii) and (b)(2)). Still, under the Tucker Act and the BPA, Federal employees were not entitled to recover backpay for promotions wrongfully denied them, because no law mandated that they be paid at the higher rate until they were actually appointed to the higher position. United States v. Testan, 424 U.S. 392 (1976). Moreover, confusion persists as to whether the Back Pay Act is itself a waiver of sovereign immunity, a money-mandating statute within the meaning of the Tucker Act meaning, or neither. See Hambsch v. United States, 490 U.S. 1054 (1989) (O'Connor, J., dissenting to denial of certiorari)

¶43 The Civil Service Reform Act of 1978 extensively revised Federal employees' remedies for actions affecting individual employees, replacing the Court of Claims' Tucker Act jurisdiction with administrative appeals to the Merit System Protection Board, whose decisions are reviewable by the Federal Circuit (see 5 U.S.C. §§ 7701-03). Because the CSRA created a "comprehensive system for reviewing personnel action taken against federal employees" instead of the former "outdated patchwork of statutes and rules built up over almost a century," the Supreme Court interpreted its omission of rights for certain

employees to be a "deliberate exclusion." United States v. Fausto, 484 U.S. 439, 444, 455 (1988). Thus, when the CSRA did not provide any appeal rights for a "nonpreference eligible" employee of the "excepted service," the Court held that he also no longer had any right to sue the United States for his wrongful dismissal under the Tucker Act. Id. at 455. [9]

¶44 The foregoing review only hints at the complexities that the doctrine of sovereign immunity has added to the litigation of monetary claims against the Federal Government. [10] The Congress has enacted waivers of the United States' sovereign immunity on a gradual, piecemeal basis over the past 150 years, and due to the limitations of the waivers, many otherwise meritorious claims (including Federal employee pay claims) have still been barred by the Government's immunity. With this background on sovereign immunity principles as they have been applied to the United States and its civilian employees, we turn to the issue of the Crow Tribe's immunity from suit for Tribal employees' back pay.

2. Tribal Sovereign Immunity and Waiver Principles

¶45 The Supreme Court has recently restated the general rule on Tribal sovereign immunity: "As a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). In that case, the Court upheld the Tribe's sovereign immunity from suit in the courts of Oklahoma on an off-reservation note.

¶46 Although questioning some of the theoretical underpinnings of the doctrine of Tribal sovereign immunity, the Court declined to revisit or overrule its previous decisions on the subject. Id. at 756-760. The Court also declined to draw any distinction based on where the Tribe's activities occurred, or between its commercial as compared to its governmental activities, finding none in its previous decisions. Id. at 754-55. Integral to the Court's holding was an affirmation that Tribes' sovereign immunity is more similar to that of foreign nations than States, at least in the respect that Tribes are immune from suit in the courts of a State where they conduct activities. That is because Tribes were not parties to the Constitution, and thus did not consent to suit in any State court. Id. at 755, citing Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)(Constitution did not give States' consent to suit by Tribes in Federal court).

¶47 Completing its analysis, the Kiowa Court reviewed some of the limited circumstances in which Congress has restricted Tribal sovereign immunity, none of which were pertinent to that case or the present one. The Court also noted that Congress specifically provided that nothing in the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, may be construed as "affecting modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe[.]" Kiowa, 523 U.S. at 758, quoting 25 U.S.C. § 450n. Finding no Congressional waiver, the Court concluded:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Kiowa, 523 U.S. at 760.

¶48 Following the rule of Federal law in Kiowa, the Crow Tribe, too, is immune from suit unless Congress has authorized it, or the Tribe has waived its sovereign immunity. In the present case, there is no indication that Congress has unequivocally expressed its intent to waive the Tribe's sovereign immunity with respect to suits by Tribal employees. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)(suit in Federal court for declaratory and injunctive relief against Tribe under the ICRA barred by Tribe's sovereign immunity). Consistent with Kiowa and Martinez, the Ninth Circuit has recently held that the ISDEAA did not abrogate the Tribe's sovereign immunity for claims by a Tribal-member contractor, even though the project was funded by Federal self-determination contract between the BIA and the Tribe. Demontiney v. United States ex rel. Dept. of Interior, 255 F.3d 801, 813-14 (9th Cir. 2001)(dam modification project on Rocky Boy's Reservation). Thus, the plaintiffs in the present case cannot rely on any waiver provided by Congress regardless of whether or not they were employed in programs funded under Federal self-determination contracts.

¶49 The Crow Tribal Code preserves the Tribe's immunity as a general matter, and provides as follows:

Nothing contained in the preceding provisions on jurisdiction, or any other provision of the Crow Tribal Code shall be construed as a waiver of the sovereign immunity of the Crow

Tribe, its officers, or businesses, unless specifically waived.

¶50 Crow Tribal Code § 3-2-206 (emphasis added). Thus, under the Code and pursuant to Kiowa, the question in this case is whether or not the Tribe has specifically waived its sovereign immunity to suit by its employees.

¶51 Because of the nature of sovereign immunity, "waiver cannot be implied and must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). Furthermore, in construing alleged waivers of immunity by the United States, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941); see also, Mitchell II, 463 U.S. at 218-19.

¶52 Similarly, as a matter of Federal law, "to relinquish its immunity, a tribe's waiver must be clear." C&L Enterprises, Inc. v. Citizen Band of Potawatomi Tribe of Okla., 532 U.S. ___, 121 S. Ct. 1589, 1594 (2001). In C&L Enterprises, the Supreme Court held that the Tribe waived its sovereign immunity when it agreed to an arbitration clause in a construction contract. The construction contract involved an off-reservation commercial building on Tribally-owned non-trust land, and was on a standard form proposed by the Tribe. The arbitration clause provided that all contract disputes were to be resolved by binding arbitration according to the rules of the American Arbitration Association, and that "judgment may be entered upon [the arbitrator's award] in accordance with applicable law in any court having jurisdiction thereof." C&L Enterprises, 121 S. Ct. at 1592-93. In turn, the AAA rules provided that the parties consented to entry of judgment on the arbitration award in any federal or state court with jurisdiction, and another part of the contract provided that the "applicable law" was the law where the project was located (i.e., Oklahoma). Id. at 1593. The Court rejected the notion that a waiver must actually say that the Tribe waives its sovereign immunity, or that "the tribe will not assert the defense of sovereign immunity is sued on breach of contract," and noted that agreements to arbitrate by foreign sovereigns are construed as waivers of their immunity. Id. at 1595 and 1596, n.4. The Court's holding that such an arbitration agreement waives Tribal sovereign immunity was intended to resolve conflicting decisions among the Federal circuits, id. at 1594, citing Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989)(arbitration clause did not waive sovereign immunity). It signals that the Federal courts should not be too solicitous toward the Tribes in construing alleged waivers.

¶54 This court will now apply the foregoing principles to determine whether the Tribal

Court erred in holding that the Crow Tribe has waived its sovereign immunity for the type of claims at issue in the present case.

3. Tribal Personnel Manual

¶55 The Tribal Court held that there was "a specific waiver of sovereign immunity" in Section 1.16.1 of the Crow Tribal Personnel Practices and Policy Manual (hereinafter, the "Personnel Manual"). The Tribe argues that the portion of the Personnel Manual relied on by the Tribal Court only applies to confidentiality of employee records, and does not waive the Tribe's immunity from employee pay suits (see Tribe's Brief on Status and Jurisdiction at 9-10). We must agree with the Tribe.

¶56 Section 1.16.1 of the Tribal Personnel Manual, entitled "Employee Rights," is quoted in its entirety below (emphasis added):

> The Act provides employees with the following rights:
>
> (a) The ability of individuals to determine what records pertaining to them are collected, maintained, used or disseminated by the Personnel Department.
>
> (b) The ability of individuals to prevent records pertaining to them obtained by the Crow Tribe for particular purpose from being used or made available for another purpose without consent.
>
> (c) The ability of the individuals to review records pertaining to them, obtain copies and to correct or amend such records in the presence of Employment Manager.
>
> (d) The ability to ascertain that records pertaining to the individual are as current as possible and being used for lawful purposes.

> (e) Permit the individual to bring suit for any damages which occurred as a result of willful or intentional action which violates any individual rights.

The Tribal Court relied on subsection (e) quoted above for the specific waiver of sovereign immunity in this case. The "Act" referred to in the first line quoted above is apparently the "Privacy Act of 1974" which, according to the last sentence of the immediately preceding section, "provides for safeguards for an employee against an invasion of personal privacy." Personnel Manual Section 1.16 ("Employee Records").

¶57 The Privacy Act of 1974 is an Act of Congress which, among other things, prohibits the disclosure of personal information about Federal employees without their consent (see 5 U.S. C. § 552a). Actually, the lettered subsections of Section 1.16.1 of the Personnel Manual quoted above are taken nearly verbatim from paragraphs (1) – (4) and (6) of the Congressional statement of purpose for the Privacy Act (Pub. L. 93-579, § 2). The provisions of the Act, as amended, are very detailed and cover several pages of the United States Code. They include "Civil Remedies" in U.S. District Court for certain "intentional or willful" violations of the Act, whereby "the United States shall be liable to the individual" for the greater of "actual damages sustained" or $1,000, plus costs and attorneys' fees. 5 U.S.C. § 552a(g)(4) and (5)(emphasis added).

¶58 In view of its context in the Personnel Manual, its reference to the Federal Privacy Act, and the fact that it only paraphrases Congress' statement of purpose for that Act, any civil damages suit which may be authorized by Subsection 1.16.1 (e) would be limited to violations of the "individual rights" listed in Subsections (a) – (d), which do not pertain to the withholding of pay which is at issue in the present case.[11] This is not a clear or specific waiver of the Tribe's immunity from the type of suit brought in the present case, as required by Crow Tribal Code § 3-2-206, C&L Enterprises, and general sovereign immunity jurisprudence.

¶59 This court therefore holds that the Tribal Court erred as a matter of law when it held that Section 1.16.1(e) of the Tribal Personnel Manual waived the Tribe's immunity from this back pay suit. This holding is sufficient grounds to dispose of this appeal by reversing the Tribal Court. However, in view of the importance of the issue in this case, we will determine

whether there is any other basis in law for Tribal employees to be entitled to recover back pay from the Tribe.

¶60 It is clear from its Order that the Tribal Court considered that the "individual rights" on which Section 1.16.1(e) authorizes suit must be read together with the rest of the Personnel Manual, including the employee grievance process in Sections 1.18 and 1.20 of the Manual. As stated above, that linkage was erroneous. However, as the Tribal Court observed, Section 1.18 of the Manual establishes a grievance procedure for Tribal employees, Section 1.20 provides that terminated employees have a right to appeal under the grievance procedures in Section 1.18, and subsection 1.18.3 gives Tribal employees the right to appeal grievances to the Tribal Court. The Tribal Court's Order conditioned the Tribe's liability on the employees having complied with the grievance procedure. The plaintiffs later admitted that they had not complied with the procedure, but argued that it would have been futile because the Personnel Director himself was an aggrieved party (Plaintiffs' Memorandum re. Compliance filed September 16, 1993).

¶61 The grievance procedure in Section 1.18 by its terms "covers such things as working conditions, relationships with other employees, and disciplinary action." The procedure embodies a strong preference for resolving grievances at the "lowest possible level," requires the employee to first discuss the grievance with his or her immediate supervisor, and requires the Director of Personnel Resources to mediate the grievance or "forward it to the Executive Director of Tribal Operations within ten (10) working days" (Subsections 1.18.1 and 1.18.2(d)). If the grievance is not settled at that level, or the employee is not satisfied with the decision, the employee "may appeal the decision to the Tribal Court, which shall conduct a hearing" (Subsection 1.18.3). With respect to appeals to the Tribal Court, Subsection 1.18.4(b) provides for an informal hearing in which "the technical rules of evidence shall not apply." The hearing is to be presided over by the "Chairman of the Tribal Court" (presumably, the Chief Judge), and "a quorum must be present." This meaning of this "quorum" requirement is not clear, but it seems to require that at least one of the other two elected Tribal Judges sit on the administrative appeal. The Manual is silent on the forms of relief that the Tribal Court may grant to the employee. Subsection 1.18.6 provides that the Executive Director of Tribal Operations "shall insure that all grievances are settled within a period of 45 days from the date of filing to the determination of the Tribal Court (if needed)." Finally, if the employee is not satisfied with the Tribal Court's decision, he or she may "appeal the decision through the proper channels in the non-Tribal judicial system (National Labor Relations Board, etc.)."

¶62 From this review of the grievance procedure, it is not at all clear that it covers the claims in the present case, or that it authorizes the Tribal Court to award back pay or other monetary relief against the Tribe. Rather, its scope appears to be limited to individual disciplinary matters and workplace conditions, with an emphasis on prompt and informal resolution. Nowhere does it state that the Tribal Court has jurisdiction to award a money judgment against the Tribe. In this respect, the Crow grievance procedure differs from that of the Flathead Tribes, which specifically authorizes their Tribal court to award monetary damages against the Tribe (including punitive damages), and has therefore been held to be a limited waiver of sovereign immunity. See Peregoy v. Tribal Council of the Confederated Salish and Kootenai Tribes, Cause No. 99-117-CV (administrative grievance procedure was Tribal judge's exclusive remedy, and his pay claim was barred by sovereign immunity because he failed to follow the procedure).

¶63 To be sure, the Crow grievance procedure may grant the Tribal Court authority, in normal circumstances, to order a Tribal agency or department head to adjust an employee's pay for the period during which the grievance was pending, as incidental to any other "corrective action" it may order. But that kind of relief is quite different than a money judgment against the Tribe in favor of a whole class of Tribal employees who did not receive their pay because of a shortage of Tribal funds or other reasons affecting the entire Tribal administration.[12] The latter type of claims, like those in the present case, are certainly as meritorious as the types covered by the grievance procedure. But in the absence of a "clear" or "specific" authorization for the Tribal Court to award a money judgment against the Tribe, this court may not infer such remedy. Our conclusion is reinforced by the preamble to Resolution No. 78-06, which adopted the Tribal Personnel Manual, and which states that "the intent of the proposed resolution does not infringe upon the sovereignty of the Crow Constitution and general Council[.]"

¶64 This court therefore holds that regardless of whether or not the plaintiffs complied with the grievance procedure in the Personnel Manual, their pay claims are barred by the Tribe's sovereign immunity.

4. Officer Suits and Mandamus

¶65 In order to prevent unlawful behavior by government officials that would otherwise be shielded by the doctrine of sovereign immunity, the courts have allowed suits at common law against individual government officers. The rationale behind allowing such suits for specific relief is that government agents cannot be acting for the sovereign if they are acting

illegally or outside the scope of their valid authority. See generally, Steadman, Schwartz and Jacoby, Litigation with the Federal Government, §§ 16.101 – .103 (3d ed. 1994).

¶66 This same rationale has been applied by the Federal courts to suits against Tribal officers, where it has been held that "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law." Burlington Northern Railroad Co. v. Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991), cert. denied, 505 U.S. 1212 (1992)(suit against Blackfeet and Fort Peck Tribal officials to test constitutionality of utility tax not barred by Tribal sovereign immunity). It has also been applied to allow suits in Tribal court for declaratory relief against Tribal officials who allegedly acted illegally or outside the scope of their lawful authority. See, e.g., Moran v. Council of the Confederated Salish & Kootenai Tribes, 22 I.L.R. 6149 (1995). However, officer suits will be barred by Tribal sovereign immunity when they have the same practical effect as a suit against the sovereign itself, such as when the relief requested would have to be paid out of the public treasury. Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992) (Tribal members' suit against Council members challenging Hoopa-Yurok Settlement Act barred by sovereign immunity), citing Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). Thus, except in limited circumstances not applicable to the present case, officer suits (now brought against Federal agencies under 5 U.S.C. § 702) may not be used as a device to compel the sovereign to pay money. See Bowen v. Massachusetts, 487 U.S. 879, 905 n.42 (1988)(allowing suit for Medicaid reimbursements to State, but distinguishing from "compensation for past injuries or labors").

¶67 It has also been argued in this case that the Tribal Court may compel Tribal officials to pay employees by issuing a "writ of mandamus," as authorized by Rule 23 of the Crow Rules of Civil Procedure. Rule 23(c)(1) provides that a "writ of mandamus shall ...[d]irect a public officer to perform duties required by law[.]"[13] We interpret this mandamus authority granted by Rule 23 as being equivalent to that exercised by American courts under the common law and more recent statutes, where the writ has been used to "compel a public officer to carry out a ministerial duty about which the officer had no discretion." 1 Dobbs, Dan B., Law of Remedies § 2.9(1) (2d ed. 1993). Because by definition it is directed at government officials acting in their official capacity (in contrast to the other types of officer suits discussed above), mandamus is "the oldest action in disregard of the doctrine of sovereign immunity." Steadman, supra, § 16.109.

¶68 The main use of mandamus in American courts today is to allow for appellate court review of a lower court decision when no other appeal route is available. Dobbs on

Remedies, supra. Although Federal writs of mandamus have most commonly involved land patents, mineral rights, and claims involving public lands, some older cases have directed the payment of money by the Government in particular circumstances. Steadman, supra, citing Clackamas County, Oregon v. McKay, 219 F.2d 479, 489-90, nn. 29 & 30 (D.C. Cir. 1954), vacated as moot, 340 U.S. 909 (1955)(collecting Supreme Court decisions where the writ was granted or denied). More recent State-court cases have involved the issuance of a writ of mandamus to compel the payment of wages and benefits to public employees when (1) the employee has a clear legal right to the wages and benefits of a particular position; (2) a government official or agency has a clear legal duty to compensate the employee in that capacity; and (3) the employee has no adequate remedy at law. 52 Am. Jur. 2d, Mandamus § 161 (2000).

¶69 The Tribe has acknowledged that Crow R. Civ. P. 23(a) is a limited waiver of Tribal sovereign immunity for certain types of equitable relief, and that the Tribal Court has properly issued such writs in previous cases involving Tribal employment. See Defendant's Brief in Support of Motion for Summary Judgment at p. 10 (Feb. 9, 1993), citing Haukaas v. Stewart, Civ. No. 85-188 (Crow Tribal Ct., July 8, 1985)(ordering Tribal officials to seat new members of Tribal Housing Authority appointed pursuant to Tribal Council resolution), and Left Hand v. Stewart, Civ. No. 85-185 (Crow Tribal Ct., July 12, 1985)(ordering reinstatement of Tribal judges, and payment of salary for past and future work). The Tribe has argued, however, that because no Tribal funds have been budgeted for payment of the plaintiffs' salaries after the 1990 fiscal year, and Tribal funds are always extremely limited, no Tribal official currently has a clear, non-discretionary legal duty to pay the plaintiffs' salaries (Def. Brief at 11-12). This situation is distinguishable from the one in Lefthand, supra, where the Tribal Court made specific findings that budgeted funds were currently available to pay Tribal judges through the Tribe's self-determination contract (Def. Brief at 10). Although the Tribe made this argument in 1993, there is no reason to believe that the situation is any different at the present time.

¶70 We must agree with the Tribe on this point. There may be some precedent for State courts to mandate that money be budgeted or appropriated for certain purposes pursuant to specific constitutional or statutory requirements, but there is also ample precedent holding that appropriating and budgeting public funds is a discretionary function of the other branches of government. See, e.g., 52 Am. Jur. 2d, Mandamus §§ 155, 157, and 160. When there are insufficient funds even to provide for current Tribal operations, we cannot say that some Tribal official is under a clear legal duty to give first priority to payment of the plaintiffs' back pay claims out of the limited funds available.

¶71 Apart from the fact that this case was not brought as a mandamus action, there are problems with meeting other criteria for mandamus relief in the present case. In order to seek mandamus relief, the petitioner must first pursue any administrative remedies provided by law, 52 Am. Jur. 2d, Mandamus § 31, but the plaintiffs in this case have admitted that none of them attempted to followed the grievance procedure in the Tribal Personnel Manual. Another typical requirement for mandamus is that the claim be of a sum-certain or "liquidated" amount, so that the legal duty being enforced by mandamus is purely "ministerial" in nature. Id., § 154. Thus, "where...the officer must examine the claim before allowing it, and determine its correctness, or where the amount of compensation to be awarded is not fixed by law, mandamus will not lie to compel the allowance or payment of the claim." Id. Despite several years of proceedings at the Tribal Court level, the record in this case does not indicate whether the amounts claimed by the plaintiffs were ever determined, or were readily determinable by reference to Tribal law and incontrovertible or stipulated facts (e.g., salary levels and time worked). Finally, even when all the requirements are satisfied, the court still has discretion to refuse to issue the writ when it would be detrimental to the broader public interest, such as when it would result in disorder or confusion in government fiscal matters. Id., § 22; see also, State ex re. Moran v. Dept. of Administration, 307 N.W.2d 658, 660 (Wis. 1981)(refusing to direct expenditure of budgeted funds for court system's electronic legal research project "in light of the current fiscal condition of the state"). It would likely be an abuse of judicial discretion to use the extraordinary remedy of mandamus to circumvent Tribal sovereign immunity by ordering Tribal officials to pay back salaries to employees when all available funds are budgeted and necessary for other purposes.

¶72 Thus, it would appear that a mandamus action would be an alternative remedy for Tribal employees whose claims are not covered by, or who cannot obtain complete relief through, the grievance procedure in the Tribal Personnel Manual. However, monetary relief (i.e., back pay) would be limited to amounts authorized and budgeted for the period covered by the compensation claim. Therefore, a writ of mandamus is not available to the plaintiffs in the present case.

5. Debt Retirement Committee

¶73 Recognizing its moral (if not a legal) obligation to pay Tribal employees, the Tribal Council did provide some recourse for the plaintiffs in this case. Resolution No. 90-6 was enacted by the Council on October 14, 1989, to provide for "the relief of all legitimate debts due and payable from the Crow Tribe" resulting from the Tribe's financial distress prior to

that time. Reciting that "there currently exists sufficient funding in the name of the Crow Tribe to cause alleviation of the current critical condition," the Resolution established a debt retirement Committee serving under the direction of the Tribal Secretary. The Committee was charged with completing its tasks and making its recommendations to the Secretary within 30 days. Among other things, the Resolution provided:

> BE IT FURTHER RESOLVED, the Committee shall review all existing claims for back pay alledgedly [sic] to be owing to various persons for serverance [sic] etc. some of which are currently under various states of litigation and recommend those deemed appropriate for payment or settlement to be paid, and or contact the pertinent parties for negotiated settlement.

The record reflects that more than 40 of the original plaintiff-employees in this case were settled and paid by the Committee, and that further settlement discussions were still occurring as late as 1996.

¶74 The Tribal Council's referral of the employees' pay claims to the debt retirement Committee was analogous to the process by which Congress has referred cases to the Court of Federal Claims (and its predecessor legislative courts) to report back to Congress on whether a private relief bill should be enacted, based on whether it is a "legal or equitable claim or a gratuity." 28 U.S.C. § 2509; see also, 28 U.S.C. § 1492, and Steadman, supra, § 6.115. The "Congressional reference" process offers a "last chance" for claims that would otherwise be barred by sovereign immunity, but payment is still contingent on a private bill being introduced and enacted by the Congress. Id.

¶75 Considering, as we have held above, that the plaintiffs in this case had no enforceable legal right to compensation, the Tribe's referral of their claims to the Committee raises no due process or separation of powers issues. Although the process of settling the Tribal employees' pay claims through the debt retirement Committee may not have provided complete relief to all employees, it was their last and only chance for relief under current Tribal law.

6. Policy Reasons for Limited Waiver

¶76 This Court is not unmindful of the unconscionable result we have reached in this case. It means that more than sixty Tribal members and other individuals who were not able to successfully negotiate their claims with the debt retirement committee have no legal claim for compensation for their past labors on the Tribe's behalf. In other words, when funding runs out, Tribal employees who continue their service to the Tribe do so at their own peril, because the doctrine of sovereign immunity renders their pay claims subject to the political whims of Tribal government. Unfortunately, this is a risk that most current and former Tribal employees know only too well, but the remedy for this situation does not lie with the Tribal courts.

¶77 The sound policy interests of attracting and retaining qualified Tribal government employees who can depend on getting paid for their services should be sufficient justification for the Tribal to waive its sovereign immunity on a limited basis. Rather than bankrupting the Tribal treasury, such a waiver would serve to deter violations of Tribal employees' legitimate rights, mass layoffs when administrations change, and arbitrary, politically-motivated threats of termination. Such a waiver is also compelled in the interest of fundamental fairness to Tribal members, whose legal assurances of being paid by State, Federal, and private employers far exceed those of our own Tribe. In the words of President Abraham Lincoln, inscribed in stone at the National Courts Building: "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Mitchell II, supra, 463 U.S. at 213, quoting Cong. Globe, 37th Cong. 2d Sess., App 2 (1861).

¶78 If those reasons are not sufficient to convince the Tribe that a waiver is necessary, for suits in its own courts and on its own terms, then perhaps the Supreme Court's warning should be heeded:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. ... In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no

choice in the matter, as in the case of tort victims.

> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule....[W]e defer to the role Congress may wish to exercise in this important judgment. ...In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries [reviewing events leading to enactment of Foreign Sovereign Immunities Act in 1976.] ... Like foreign sovereign immunity, tribal immunity is a matter of federal law. ... In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. ...Congress "has occasionally authorized limited classes of suits against Indian tribes" and "has always been at liberty to dispense with such tribal immunity or to limit it." Potawatomi, supra, at 510. It has not yet done so.

Kiowa, supra, 523 U.S. at 758-59 (emphasis added); see also, the "American Indian Equal Justice Act," S. 1691, 105th Cong., 2d Sess. (Gorton, Feb. 27, 1998), which would have waived Tribal immunity to suit in Federal courts under the Tucker Act and the Federal Tort Claims Act, as well as in State courts for torts or contract claims. If the Tribe does not take steps to enact appropriate waivers of its sovereign immunity, we believe it is only a question of when Congress will do it for us.

D. Conclusion

¶79 This court holds that Resolution No. 95-14, which authorizes this rehearing, does not violate the plaintiffs' due process rights under the ICRA, or separation of powers principles under Tribal law and the Constitution. In view of the important issues presented in this appeal, this court grants the Tribe's petition for rehearing. The previous panel's decision that it lacked appellate jurisdiction of the Tribe's appeal was erroneous, and must be vacated.

¶80 The Crow Tribe enjoys common-law sovereign immunity except to the extent waived by the Congress or by the Tribe itself. Congress has not waived the Tribe's immunity for the pay claims of Tribal employees, even if they work in programs funded through Federal

contracts or compacts. The Tribe has not clearly or specifically waived its immunity from suit for the types of claims in the present case, either in the Tribal Code or the Tribal Personnel Manual. The Tribal Court erred in finding a waiver in the Privacy Act provisions of the Personnel Manual, and the Manual's grievance procedure does not clearly grant the Tribal Court jurisdiction to award back pay. Furthermore, this is not an appropriate case for a writ of mandamus, because such a writ would improperly interfere with the fiscal discretion vested in the other branches of Tribal government. This court therefore holds that the Tribal employees' claims for compensation for their past Tribal service are barred by the Tribe's sovereign immunity.

¶81 The decision of the previous panel of the Court of Appeals issued on August 16, 1994 is **VACATED**. The Tribal Court's Order dated July 21, 1993, denying the Tribe's motion to dismiss, is **REVERSED**, and this case is **REMANDED** to the Tribal Court with directions to dismiss the claims with prejudice. No costs.

¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45
¶50	¶55	¶60	¶65	¶70	¶75	¶80	Endnotes	

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Endnotes

[1] *See* Mont. Code Ann. § 39-3-201, *et seq.* (employer liable for penalties, costs and attorneys' fees for non-payment of wages). Although not an issue raised by the Tribe's appeal, the Tribal Court's holding in this regard was clearly correct. "Tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Application of state law in a case such as this, even if sovereign immunity were not an issue, would obviously infringe on the right of Tribe to govern itself. *Williams v. Lee*, 358 U.S. 217 (1959).

[2] The organization referred to in Section 3-3-331 is probably the National American Indian Court Judges Association.

[3] *See* Crow Tribe's brief at page 4 in appeal of *Janine Pease-Pretty On Top v. He Does It, et*

al., No. 012-214 (filed March 13, 2001). This court's subsequent "Order Requesting Amicus Brief" from the Department of Interior on the status of its approval, issued on May 1, 2001, has gone unanswered.

[4] The remedial legislation was prompted by an earlier surprise (and itself, retroactive) ruling by the Supreme Court on the interpretation of the statute of limitations for claims brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

[5] The Court later distinguished the final judgment dismissing the monetary claims in *Plaut* from a final judgment granting only prospective, equitable relief in *Miller v. French*, 530 U.S. 327 (2000), in which the Court upheld the validity of the Prison Litigation Reform Act commanding the Federal courts to reopen and temporarily stay their existing permanent prison reform injunctions. The Court reasoned that because remedial injunctions were subject to the lower courts' continuing supervision, they could be altered by subsequent changes in the law. *Id*. at 347.

[6] It has also been held in the Ninth Circuit that an order denying a motion to dismiss based on the sovereign immunity of the Federal Government is not immediately appealable as a matter of right. *State of Alaska v. United States*, 64 F.2d 1352, 1354 n.4, 1355 (9th Cir. 1995), *following Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166 (7th Cir. 1994). In so holding, those decisions relied on the "broad exceptions carved out of [Federal sovereign immunity]" which they viewed as having surrendered the Government's right "'not to be a litigant in its own courts.'" *Alaska*, 64 F.3d at 1356, *quoting Pullman*, 23 F.3d at 1169. Those decisions were questioned and distinguished in *In re. Sealed Case No. 99-3091*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999)(federal sovereign immunity in contempt action against Office of the Independent Counsel, decided on other grounds). In any event, as the present case indicates, the Crow Tribe has not carved out such broad and extensive waivers that could be construed as a blanket surrender of its immunity from having to defend against lawsuits.

[7] The Court of Claims was originally created in 1855, but without the power to finally decide cases. Congress made the court's judgments final in 1863. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 553-54 (1962). The Tucker Act also granted jurisdiction over these types of claims to the U.S. District Courts for amounts not exceeding $10,000 (*see* 28 U.S.C. § 1346(a)(2), the "Little Tucker Act"). The "Indian Tucker Act" granted the Court of Claims jurisdiction to decide Tribal claims against the United States accruing after August 13, 1946 (*see* 28 U.S.C. § 1505). Major revisions to Tucker Act jurisdiction for Government contracts

were enacted with the Contract Disputes Act of 1978 (41 U.S.C. § 601, *et seq.*). The Court of Claims was abolished by the Federal Courts Improvement Act of 1982, and its jurisdiction divided between a new Article I court, the U.S. Claims Court, and a new Article III court, the U.S. Court of Appeals for the Federal Circuit. The Claims Court's name was changed to the Court of Federal Claims in 1992 (*see* 28 U.S.C. § 171). *See also, generally*, Steadman, Schwartz and Jacoby, *Litigation with the Federal Government* §§ 6.101 – 6.107 (ALI, 3d ed. 1994).

[8] The Tucker Act's waiver did not extend to liability for torts such as the common-law negligence of government employees. A waiver of the United States' sovereign immunity to allow those types of suits for money damages was not enacted until 1946 with the Federal Tort Claims Act, which still has important exceptions for intentional torts and so-called "discretionary functions." *See* 28 U.S.C. §§ 1346(b) and 2671-2680. It was not until the 1976 amendments to the Administrative Procedure Act that Congress waived the United States' sovereign immunity for specific relief (e.g., injunctions, but not money damages) against federal agencies (*see* 5 U.S.C. § 702).

[9] In response to the *Fausto* decision, Congress in 1990 amended 5 U.S.C. §§ 4303 and 7511 to cover certain nonpreference eligible excepted service employees (Pub. L. 101-376). Despite the Government's attempts to extend *Fausto*, it has been held that suits on types of pay reductions that are not covered by the CSRA may still be brought under the Tucker Act and the Back Pay Act. *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994)(refunds of unlawfully withheld Puerto Rico income taxes).

[10] The State of Montana has taken the opposite approach toward sovereign immunity. Article II, Section 20 of the 1972 Montana Constitution provides that the State and all local government entities "shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature." The legislature has so acted to reassert the State's immunity in limited circumstances, including limiting the State's liability for tort damages (Mont. Code Ann. § 2-9-108), barring punitive damages in contract actions (Mont. Code Ann. § 18-1-404), and extending immunity to legislative and judicial acts (Mont. Code Ann. §§ 2-1-111 and –112).

[11] This case does not require us to decide whether Section 1.16.1(e) effectively waives the Crow Tribe's immunity to suit for violations of its employee confidentiality provisions.

Because of its relatively general language, compared to the specific language used in the Privacy Act itself (*i.e.*, "the United States shall be liable"), this remains an open question to be decided in a future case properly presented to the Tribal Court.

[12] Although a terminated employee may appeal under the grievance procedure, Section 1.20 of the Manual also provides that "[a]n employee may be terminated without cause when it becomes necessary by reason of shortage of work or funds, elimination of the position or other changes in the duties of the job, or for other related reasons and causes which are outside the employee's control and which do not reflect discredit on the service of the employee."

[13] Rule 23(a) also sets forth the expedited procedure for obtaining a writ of mandamus (along with the other extraordinary writs of *habeas corpus* and *quo warranto*), which requires the Tribal Court to hold a show cause hearing not more than 10 days after a petition is filed, and to issue a written decision within 48 hours. In the absence of more detailed criteria for issuance of the writ under Rule 23, the Tribal Code authorizes this court to "seek authority... in the common law jurisprudence both in law and equity." Crow Tribal Code § 3-1-104(3).

¶5	¶10	¶15	¶20	¶25	¶30	¶35	¶40	¶45
¶50	¶55	¶60	¶65	¶70	¶75	¶80	Endnotes	