
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR MONTANA**

ABIGAIL Y. REDDOOR, FLORENCE YOUPEE, AND ARLENE
RED EAGLE,
Plaintiffs/Appellees,

vs.

Appeal No. 095

LAWRENCE WETSIT, JOSEPH RED THUNDER, PAULA BRIEN,
JAMES DONEY, IRIS DANIEL, ANITA BRIEN, DONOVAN RED
BOY, RITA BELGARDE, GLORIA URBANIAK, ALICE HARRIS,
WANDA SIBLEY,
Defendants/Appellants.

THIS APPEAL is from orders denying a motion to consolidate a show cause hearing on a preliminary injunction into a trial on the merits and for final judgment and denial of motion to dismiss based upon sovereign immunity and nonjusticiable question. Honorable Terry L. Boyd, Associate Judge presiding.

FOR APPELLANTS: Reid Peyton Chambers, SONOSKY, CHAMBERS & SACHSE, 1250 Eye Street, N.W., Suite 1000, Washington, D.C. 20005; and Robert L. McAnally, P.O. Box 1027, Poplar, MT 59255.

FOR APPELLEES: Melissa G. Schauer, Lay Counselor, P.O. Box 214, Wolf Point, MT 59201 and Florence Youpee, Lay Counselor, P.O. Box 52, Poplar, MT 59255

CIVIL: ABSENT A PROVISION IN THE ELECTION ORDINANCE OR CCOJ, THE TRIBAL COURT HAS NO AUTHORITY TO DECIDE ELECTION CONTESTS; THE ELECTION COMMISSIONS' PERFORMANCE OF XIV CCOJ 111(i) IS NOT SUBJECT TO JUDICIAL CONTROL OR SUPERVISION; AND SUMMARY JUDGMENT IS APPROPRIATE ON A MOTION TO DISMISS BASED ON FAILURE TO STATE A CLAIM UNDER Fed. R. Civ. P. 12(b).

Argued: January 10, 1990 Decided: January 18, 1990

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne and Floyd Azure, Associate Justices.

HELD: THIS MATTER IS DISMISSED WITH PREJUDICE.

FACTS:

On October 28, 1989, the regular tribal election was held. on October 29,1989, the Election Commission certified its results, except as to a twelfth seat on the Tribal Executive Board, which was subject to a recount. On November 1, 1989, the candidates certified by the Commission took the oath of office at a Board meeting; after the recount was completed and its results certified, the final Board member was sworn in and took office.

At the election, 1,885 tribal members cast ballots. The Chairman received 151 more votes than his nearest challenger. The Vice Chairman received over 400 votes more than the second place candidate, and became the first official in the history of the Tribes to receive over 1,000 votes. These officials and the other elected members of the Tribal Executive Board have been discharging the duties of office since November 1, 1989.

On November 3, 1989, three (3) plaintiffs filed a civil complaint for injunctive and declaratory relief. In addition to the elected Chairman and Vice Chairman, the tribal Secretary— Accountant, Election Supervisor and certain members of the Election Commission were named as defendants. Two of the plaintiffs and the lay counselor are defeated candidates for the Board, and each plaintiff and lay counselor are registered voters. Neither of the plaintiffs or lay counselor came close to being elected. Plaintiff Youpee, who is also acting as a co-lay counselor, received 353 votes — 113 less than the twelfth member of the Tribal Executive Board. She placed 22nd out of a field of 67 candidates for the Board. Plaintiff Reddoor received 174 votes tying another candidate and ran 46th or 47th out of 67 candidates. The lay counselor received 130 votes, and ran 56th out of 67 candidates.

In their complaint, plaintiffs seek to have the tribal court declare the election certification to be invalid and therefore null and void; order Chairman Wetsit and Vice Chairman Red Thunder to cease and desist in conducting business for the Fort Peck Tribes; declare the tribal election held on October 28, 1989 invalid and therefore null and void; declare any actions taken by the new Tribal Executive Board invalid and therefore null and void; and order that a new Fort Peck tribal election be held as soon as possible. A preliminary injunction was also sought to enjoin the Election Commission from certifying the election results; barring the Chairman and Vice Chairman from taking office and/or conducting business while the suit proceeded and ordering appellants to appear at a show cause hearing.

Plaintiffs complaint alleged three (3) election irregularities. The irregularities were as follows:

1. Voters of the Riverside District, where there are over 150 registered voters, were not allowed to vote their ballots in secrecy and privacy as provided in Title XIV, Sec. 110(d) of the FPCCOJ.
2. Grossly inadequate procedures occurred in the process of the voting of approximately 58 firefighters.
3. Paula Brien grossly mishandled approximately 94 absentee ballots.

Plaintiffs' complaint alleged, "That the outcome of the tribal election held on October 28, 1989 has been drastically affected due to the aforementioned irregularities."

On November 7, 1989, appellants moved to dismiss the motion and complaint because they presented a nonjusticiable political question and were barred by the Tribes' sovereign immunity. Judge Boyd denied this motion from the bench and by a written opinion dated November 13, 1989. On November 17, 1989, appellants filed a Petition for Review with this Court. **On November 20, 1989, Judge Boyd filed his own Motion for Summary Judgment and Order Setting Hearing Date for appellants.** On December 1, 1989, Judge Boyd issued an Order Denying Motion to Consolidate and Motion to Amend Complaint and set a briefing schedule on his motion as follows: "Plaintiffs shall submit a brief and affidavits by December 7, 1989 and defendants will submit a response by December 21, 1989."

On December 1, 1989, appellants' petition was granted during a telephone conference with the attorneys and lay counselors. This Court also granted appellants' motion to stay all proceedings in the tribal court.

The appellants' Petition for Review requested an immediate review be granted regarding the following decisions made by Associate Judge Boyd:

1. Denial of Petitioners'/Appellants' motion to consolidate a four (4) day Show Cause Hearing concerning Appellees' motion for a Preliminary Injunction, into a vii Trial on the merits and for final judgment.
2. Denial of Petitioners'/Appellants' motion to dismiss this cause of action. Said motion being based upon the legal theories of Governmental Sovereign Immunity and nonjusticiable political question.

During the telephone conference, appellants' attorneys contended this Court had jurisdiction pursuant to I CCOJ 202(c) to review the denial of appellants' motions. Appellants' reason for jurisdiction was that the Order Denying Motion to Dismiss was a final order on the issues set forth above. Although this order was arguably interlocutory in nature, in effect it was the tribal court's final order of the whole controversy regarding the consolidation of the hearing and civil trial and whether there is sovereign immunity or a nonjusticiable political question.

On January 10, 1990, oral arguments were heard. Appellees counsel arrived several minutes late after the scheduled time and the setting of this

Court. This will be addressed below.

At the oral arguments, appellants' counsel agreed this Court should recognize and apply the Federal Rules of Civil Procedure (hereinafter Fed. R. Civ. P.) and that this was appropriate under the Applicable laws section of the CCOJ. Title IV CCOJ 501(a) reads as follows:

"In determining any case over which it has jurisdiction, the Court shall give binding effect to:

"(a) any applicable constitutional provision, treaty, law, or any valid regulation, of the United States;

" "

Because of IV CCOJ 501(a), appellants' counsel agreed it would be appropriate to apply Fed. R. Civ. P. 12(b). Fed. R. Civ. P. 12(b) deals with treating motions to dismiss in certain circumstances as motions for summary judgment under Fed. R. Civ. p. 56. Fed. R. Civ. P. 12(b) reads as follows:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross—claim, or third—party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. **If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.**" (Emphasis Added).

On November 3, 1989, the pleadings filed by appellees' were their Civil Complaint for Injunctive Relief and Declaratory Judgment and Motion for Preliminary Injunction. On or about November 7, 1989 appellants filed Defendant's Motion to Dismiss and Motion for Denial of Preliminary Injunction and on November 20, 1989, their Answer. Appellants' motion asserted defenses of sovereign immunity and nonjusticiable political question which are in effect claiming appellees' have failed to state claims upon which relief can be granted.

In finding the above were the only pleadings filed and that matters outside the pleading were presented by way of testimony at the order to show cause hearing, the appellants' motion to dismiss shall be treated at least in part as one for summary judgment. This Court will apply Fed. R. Civ. P. 12(b) and determine whether summary judgment is appropriate under Fed. R. Civ. P. 56 in addressing appellants' issue numbered 3 below. However, this Court will be addressing four (4) issues which are as follows:

1. Whether this Court has jurisdiction over the orders denying appellants' motions to consolidate and motions to dismiss.
2. Whether the tribal court erred in denying appellants' motion to consolidate a four (4) day show cause hearing concerning appellees' Motion for a Preliminary Injunction into a civil trial on the merits and for final judgment.
3. Whether the tribal court erred in denying appellants' motion to dismiss this cause of action based upon the legal theories of sovereign immunity and a nonjusticiable political question.
4. Whether appellants' are entitled to a dismissal with prejudice of further proceedings pursuant to Fed. R. Civ. P. 12(b).

I.

In the instant case, this Court had jurisdiction over the order denying appellants' motions to consolidate and dismiss. The jurisdiction of this Court is set forth in I CCOJ 202. This section reads in full as follows:

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. The Court of Appeals, or the Chief Justice alone, shall have jurisdiction:

- (a) to take all necessary steps to preserve and protect the jurisdiction of the Court;
- (b) during the pendency of any criminal appeal, to release the appellant on his/her own recognizance or on bail pursuant to Section 206(e) of this Code; and
- (c) to make any order appropriate to preserve the status quo or to protect any ultimate judgment of the Court of Appeals.

During the December 1, 1989 telephone conference, appellants' attorneys contended this Court has jurisdiction to review the denial of their motions pursuant to I CCOJ 202(c). The November 13, 1989 Order Denying Motion to Dismiss was a final order. Although the order was arguably interlocutory in nature, in effect it was a final order regarding consolidation of the hearing for the preliminary injunction and civil trial on the complaint and whether there is sovereign immunity or a nonjusticiable political question.

After entry of the November 13, 1989 order, appellants' filed a Petition for Review and requested an immediate stay of the proceedings in the lower court. Such action and request were appropriate under I CCOJ 205(b) and (c). This section reads in applicable part as follows:

- (b) Civil cases. Any party who is aggrieved by a final order or judgment of the Tribal Court may file a petition requesting the Court of Appeals to review that order or judgment as provided in Section 207.
- (c) Unless the Court stays an order pursuant to Section 206(e) or Section 207(e) of this Title, all final orders of the Court shall be carried out while appeals are pending. An application for a stay of an order shall temporarily stay the order.

In conclusion, because the Tribal Court's November 13, 1989 order was determined a final order on the motions to consolidate and dismiss and appellants' were aggrieved by the same, this Court properly assumed jurisdiction. Therefore, it was appropriate to grant appellants' requested appeal and stay which denied further discovery requests of appellees to preserve the "status quo".

II.

In addressing issue number 2, the tribal court erred in denying appellants' motion to consolidate a four (4) day show cause hearing on appellees' Motion for a Preliminary Injunction into a civil trial on the merits and for final judgment. Going one step further, the tribal court erred in scheduling and holding a hearing in which an attempt was made to obtain a preliminary injunction which involved a tribal official acting in his official capacity. This Court will begin its discussion with basic civil procedure in tribal court.

Civil procedure is set forth in Title IV of the CCOJ. Title IV CCOJ 101 designates the commencement of a civil proceeding as the filing of a complaint with the clerk and establishes what a proper complaint must contain. This section reads as follows:

A complaint is a concise written statement of the essential facts constituting the claim. All civil proceedings shall be commenced by filing a complaint with the clerk, accompanied by a filing fee of ten dollars (\$10.00) and the costs of service. Tribal Civil Form No. 1, or its equivalent may be used. The complaint shall be verified before a judge, clerk or assistant clerk, or any notary public.

Appellees' did file a complaint entitled a Civil Complaint for Injunctive Relief and Declaratory Judgment. However, the complaint does not comply with IV CCOJ 101 since it does not contain the proper verification. Therefore, appellees' complaint is defective and should have been dismissed.

Regardless of the above and assuming for the discussion herein that appellees' complaint contained the proper verification, appellees' complaint makes several allegations relevant to the discussion of this issue. The allegations relevant to the discussion of this issue were as follows:

3. That on Saturday, October 28, 1989, the Fort Peck tribal election was held throughout the Fort Peck Indian Reservation; and that such election was accomplished under the auspices of Defendants Paula Brien, James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belgarde, Gloria Urbaniak, Alice Harris and Wanda Sibley.

4. That Defendants Paula Brien, James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belgarde, Gloria Urbaniak, Alice Harris and Wanda Sibley, caused the occurrence of several irregularities which are of sufficient magnitude and involve a significant number of ballots to warrant an investigation by court hearing and review of the entire election process and procedure to ensure the right of the entire election process and procedure to ensure the right of the Plaintiffs as enrolled members of the Fort Peck Tribes to have a fair election wherein the secrecy and sanctity of the ballot is ensured, as provided for in the Fort Peck **CCOJ**, Title XIV at Section 114. These irregularities are as follows:

1) Voters of the Riverside District, where there are over 150 registered voters, were not allowed to voter their ballots in secrecy and privacy as provided in Title XIV, Sec. 110(d) of the FPCCOJ.

2) Grossly inadequate procedures occurred in the process of the voting of approximately 58 firefighters.

3) Paula Brien grossly mishandled approximately 94 absentee voter ballots.

5. That the outcome of the tribal election held on October 28, 1989 has been drastically affected due to the aforementioned irregularities.

6. That the outcome of the tribal election of October 28, 1989 has caused Defendants Lawrence Wetsit and Joseph Red Thunder to become the impending Chairman and Vice Chairman, respectively, of the Fort Peck Tribal Executive Board.

7. That Defendants Lawrence Wetsit and Joseph Red Thunder intend to, or have already, taken their oaths of office an convened the impending Fort Peck Tribal Executive Board to conduct tribal business contrary to the laws of the Fort Peck Tribes as provided in the Constitution and By-Laws of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation at Article V, Section 4.

In addition to the above allegations, appellees' complaint contained five (5) specific requests for relief. The requests were as follows:

1. That this Court immediately restrain Defendants James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belegarde, Gloria Urbaniak, Alice Harris, and Wanda Sibley from certifying the election results until a hearing can be held in this matter. Alternatively, if such certification has already been made, that this Court order such certification to be invalid and therefore null and void.

2. That this Court immediately restrain Defendants Lawrence Wetsit and Joseph Red Thunder from taking office or conducting business for the Fort Peck Tribes. Alternatively, if such persons have already assumed office and conducted business for the Fort Peck Tribes, that such persons be immediately ordered to cease and desist in conducting business for the Fort Peck Tribes.

3. That this Court make a declaratory judgment that the results of the Fort Peck tribal election held on October 28 1989 are invalid and therefore null and void due to the gross irregularities which prevented a fair election and has

affected the outcome of such election. And further, any actions which may have been taken, after October 28, 1989, by the new impending Fort Peck Tribal Executive Board, are invalid and therefore null and void.

4. That this Court take the necessary actions to order that a new Fort Peck tribal election be held as soon as possible, and in strict accordance with Title XIV of the Comprehensive Code of Justice of the Fort Peck Tribes.

5. That this Court make a declaratory judgment that under the Constitution and By-Laws at Article V, Sec. 4, and Resolutions of the Fort Peck Tribes, the proper time for newly elected members of the Fort Peck Tribal Executive Board to take office is the 4th Monday in October or the 2nd Monday in November.

On November 3, 1989, appellees filed a Motion for Preliminary Injunction in addition to the complaint. With this motion, appellees sought a preliminary injunction against the appellants for similar reasons stated in the complaint. Appellees' motion stated the following:

Defendants Paula Brien, James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belgarde, Gloria Urbaniak, Alice Harris, and Wanda Sibley, during the course of the Fort Peck tribal election of October 28, 1989, caused the occurrence of several gross irregularities which are of sufficient magnitude and involve a significant number of ballots to warrant an investigation by court hearing and review of the entire election process and procedure used in such election. And further, Defendants James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belgarde, Gloria Urbaniak, Alice Harris, and Wanda Sibley are expected to certify, or have already certified the results of such election. The outcome of such election has caused a new impending Fort Peck Tribal Executive Board to come into existence and will allow, or has allowed Defendants Lawrence Wetsit and Joseph Red Thunder to take office as Chairman and Vice Chairman, respectively, of the Fort Peck Tribal Executive Board, and convene a new Fort Peck Tribal executive Board to conduct tribal business without allowing the people of the Fort Peck Tribes the right to have a fair election wherein the secrecy and sanctity of the ballots is ensured. This motion is made pursuant to Title XIV, Section 114 of the Fort Peck Comprehensive Code of Justice.

These reasons demonstrate that there exists a reasonable basis to believe that immediate and irreparable injury, loss, damage, and/or harm will result to the Plaintiffs and the entire membership of the Fort Peck Tribes if the Defendants are not immediately enjoined from the complained-of actions.

Based on these similar allegations, appellees' motion requested injunctive relief. The relief requested was as follows:

Issue an injunction effective immediately and remaining in effect until a hearing can be scheduled and the case can be determined on its merits. Said order should enjoin the named Defendants as follows:

1. James Doney, Iris Daniels, Anita Brien, Donovan Red Boy, Rita Belgard, Gloria Urbaniak, Alice Harris, and Wanda Sibley from certifying the tribal election results of October 28, 1989; and further, warn such persons that any attempts to certify the results of such tribal election shall be punished as Contempt of Court.

2. Lawrence Wetsit and Joseph Red Thunder from taking office and/or conducting business for the Fort Peck Tribes; and further, warn such persons that any attempts to take office and/or conduct business for the Fort Peck Tribes shall be punished as Contempt of Court. Alternatively, if such persons have already assumed office and/or conducted business for the Fort Peck Tribes, that this Court order such persons to immediately cease and desist in conducting business for the Fort Peck Tribes.

3. Order the Defendants to appear at a Show Cause hearing on this matter, as scheduled by the Court.

4. Order all other necessary and proper actions and/or Orders this Court deems appropriate.

The order to show cause hearing was held on November 13, 14 and 15. At the conclusion of the hearing, the tribal court properly denied the preliminary injunction. Regardless, it is this Court's position that the tribal court erred in entertaining the motion against tribal officials and Election Commission because of sovereign immunity and the applicable sections of the CCOJ.

Title IV CCOJ 401 deals with obtaining a temporary restraining order without notice. Title IV CCOJ 402 deals with obtaining a preliminary injunction. The effects of a temporary restraining order and preliminary injunction are to restrain activities of defendant(s). The temporary restraining order is not available in certain circumstances. In addition, the temporary restraining order requires that a preliminary injunction be eventually obtained since it is only effective for a period of ten (10) days.

Title IV CCOJ 401 specifically prohibits obtaining temporary restraining orders or other injunctions against the Tribes or a tribal official. This portion of IV CCOJ 401 reads as follows:

"(a) No temporary restraining order or other injunction (sic) without notice shall be granted where the Tribe is a defendant or a tribal official is a defendant in his/her official capacity...."

Because IV CCOJ 401 prohibits the use of temporary restraining orders against the Tribes or a tribal official, it is obviously intended to recognize sovereign immunity and the individual immunity afforded tribal officials under I CCOJ 111(a). The sovereign immunity afforded tribal officials under I CCOJ 111(a) will be discussed in issue number 2 below.

From the clear intention of IV CCOJ 401, neither temporary restraining order or preliminary injunction could be issued against a tribal official who was acting in their official capacity since the only other injunction provided for in the CCOJ is the preliminary injunction. Where appellees' requested a preliminary injunction under IV CCOJ 402 against Chairman Wetsit, Vice Chairman Red Thunder who were recently elected, certified by the election commission, sworn in and had assumed the duties of their respective offices, and members of the Election Commission performing their official duties, the motion should have been immediately dismissed with prejudice.

In conclusion, the tribal court erred in several instances. First, appellees' complaint was not properly verified and should have been dismissed. Second, the order to show cause hearing on a preliminary injunction which could not have been issued against tribal officials acting in their official capacities was a clear waste of time and money. Third, appellees' complaint and motion contained the same allegations and requests for relief and appellees were unable to prove the allegations in the motion to obtain injunctive relief although the tribal court permitted an extensive three (3) day hearing. Therefore, the tribal court erred in denying appellants' motion to consolidate a three (3) day show cause hearing regarding appellees' Motion for a Preliminary Injunction into a civil trial on the merits and for final judgment in favor of appellants.

III.

In addressing issue number 3, the tribal court erred in denying appellants' motion to dismiss this cause of action based upon either legal theory of sovereign immunity or nonjusticiable political question. Under Fed. R. Civ. p. 12(b), appellants were entitled to Summary Judgment. Sovereign immunity of the Tribes and the immunity afforded tribal officials was discussed briefly in issue number 1 and will now be discussed in greater detail.

Title I CCOJ 110 and 111 establishes sovereign immunity and immunity for Tribal officials and judges. Title I CCOJ 110 establishes the Tribes' sovereign immunity from suit and reads as follows:

"The Tribes shall be immune from suit. Nothing in the Code shall be construed as consent of the Tribes to be sued."

This sovereign immunity is extended to elected officials and judges under certain circumstances through I CCOJ 111. This section establishes tribal court jurisdiction over suits involving officials and employees and the extent of an official or judges' immunity. This section reads as follows:

The Court shall have jurisdiction over all suits in which Tribal officials or employees are defendants, except habeas corpus proceedings authorized by 25 U.S.C. 1303.

(a) Suits for money damages. No elected official or judge of the Tribes shall be subject to suit for any action taken in the course of his/her official duties. or in the reasonable belief that such action was within the scope of his/her official duties (Emphasis added).

(b) No employee of the Tribes shall be subject to suit for money damages for any action taken in the course of his/her official duties, or in the reasonable belief that such action was within the scope of his/her official duties, unless

it is clearly established that such action was taken with malicious intent and in bad faith. The Court shall have jurisdiction over actions seeking declaratory and equitable relief against tribal employees, but the Court shall not grant any relief against tribal employees except after service of process has been made as prescribed in this Code and proof of service has been received by the Court.

The facts in this case are not in dispute. On October 23, 1989, the election was held. On October 29, 1989, the results were canvassed and on October 30, 1989 certified to the Tribal Executive Board. On November 1, 1989, the successful candidates were sworn in and it is the unanimous decision of this Court that any immunity they were entitled to as tribal officials would have attached. The general rule of law as to the right of an office holder to assume his position and undertake the duties of the office is as follows:

A certificate of election is not title to a public office, but a mere muniment of title. It is only prima facie evidence of the holder's right to the office. Unless so provided by statute, it is not conclusive of an election as against direct attack, yet it entitles the recipient to take the office as against an incumbent whose term has expired, notwithstanding the pendency of a proceeding to contest the election instituted by the incumbent or another. He has a right to exercise the functions of the office until the true result of the election is determined in the manner authorized by law, or until the certificate is set aside in an appropriate proceeding. In other words, the certificate confers a temporary right subject to destruction by an adverse decision of a tribunal having jurisdiction in the matter.

Although a certificate of election may be superseded by a decree in proceedings to contest the election, it is conclusive as to the result of the election until set aside or vacated in some manner authorized by law, and is not subject to collateral attack. 26 AM. JUR.2d Elections, Section 305.

In applying this general rule, Chairman Wetsit and Vice Chairman Red Thunder were certified, sworn in and on November 1, 1989, assumed the duties of their office which was prior to the filing of any pleading by appellees. Chairman Wetsit and Vice Chairman Red Thunder were entitled to their positions and had the right to exercise the functions of their offices until the true result of the election is determined in the manner authorized by law.

Title XIV CCOJ 107 provides the manner in which the result of a tribal election is determined. This is accomplished by the Election Commissions' canvass of the results the day after the election and its decision is final. A provision in the election ordinance or elsewhere in the Code of Justice allowing the tribal court to decide election contests is absent, therefore, it has no power to do so.

In view of the general rule of law and more specifically I CCOJ 111(a), a suit against newly elected officials or members of the Election Commission for any action taken in the course of his/her official duties, or in the reasonable belief that such action was within the scope of his/her official duties could not be maintained unless sovereign immunity had been specifically waived or otherwise provided for in the CCOJ. Therefore, it is the continuing position of this Court that appellees' motion and complaint for injunctive relief were not appropriate or authorized by the CCOJ against Chairman Wetsit, Vice Chairman Red Thunder or members of the Election Commission.

As support for this position, this Court previously cited IV CCOJ 401(a) which dealt with obtaining a temporary restraining order. This Court pointed out that the section prohibited temporary restraining orders or other injunctions against the Tribes or a tribal official. As further support for this Court's position, IV CCOJ 402 does not permit granting a preliminary injunction against the Tribes or tribal official. If the CCOJ intended for preliminary injunctions to be issued against the Tribes or tribal officials, IV CCOJ 402 should have specifically provided for the same. Title IV CCOJ 402 reads as follows:

A preliminary injunction restrains activities of a defendant until the case can be determined on the merits. No preliminary injunction shall be issued without notice to the adverse party and an opportunity to be heard, and no preliminary injunction shall be issued absent clear and convincing proof by specific evidence that the applicant will suffer irreparable harm during the pendency of the litigation unless a preliminary injunction is issued, that the applicant has a high likelihood of success on the merits, and that the balance of equities favors the applicant over the party sought to be enjoined. The Court may dissolve or modify a preliminary injunction at any time as the interests of justice require.

In view of the language in IV CCOJ 401(a) which was previously cited and the tribal court's ignoring the prohibiting language therein, there is

some question as to the appropriateness of Associate Judge Boyd's actions. First, Judge Boyd held an unnecessary show cause hearing when under IV CCOJ 401(a) he had no authority to issue any injunction against Chairman Wetsit, Vice Chairman Red Thunder and members of the Election Commission who were appointed by the Tribal Executive Board to perform mandated statutory duties. Second, Judge Boyd's Order Denying Motion to Dismiss included a Memorandum Opinion which was poorly reasoned and an obvious far reaching attempt by the tribal court to invade the province of the Tribal people and their election process. No court has ever been given the authority or power to impose its will over the vote of the majority of a people.

In further discussing the Memorandum Opinion, the reasoning of the tribal court in asserting jurisdiction is illogical in view of Title XIV of the CCOJ which governs the election process and cases previously construing sovereign immunity and nonjusticiable political questions. Appellants presented a well reasoned and compelling argument that this suit was barred because of the Tribes' sovereign immunity. Appellants' argument was basically ignored by the tribal court.

Judge Boyd eventually realized the inappropriateness of the proceedings and filed his own Motion for Summary Judgment. The act of filing a motion for summary judgment by a judge is highly inappropriate and is indicative of a lack of knowledge of correct civil procedure and the CCOJ. A court does not file its own motion moving for summary judgment on behalf of a party.

Appellants also contended that the requested relief of voiding an election and ordering a new one is not within the power of the tribal court. Appellants are correct. Pursuant to XIV CCOJ 105(a) and (b), only the Tribal Executive Board has the XIV CCOJ 105 read as follows:

"(a) Time of general election. General elections of the Board shall be held on the last Saturday in October in every odd—numbered year. If such day is a holiday, the election shall be held on the first subsequent day that is not a holiday.

"(b) Time of special elections. Special elections shall be held on dates specified by the Executive Board.

" "

In their brief, appellants' set forth a discussion of tribal sovereign immunity and the barring of suits against Indian tribes. This discussion was in part as follows:

The Supreme Court, in the case of Santa Clara Pueblo v. Martinez, 426 U.S. 49 (1978), explained the sovereign immunity of Indian tribes as follows:

Indian tribes have long been recognized as possessing the common—law immunity from suit traditionally enjoyed by sovereign posers. [citations omitted.] This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." United states v. United states Fidelity & Guaranty Co., [309 U.S. 506, 512], 84 L.Ed. 894, 60 S.Ct. 653 [(1940)].

It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" United States v. Testan, 424 U.S. 392, 399, 47 L. Ed.2d 114, 96 S.Ct.948 (1976) quoting United States v. King, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969).

Judge Boyd should have been aware of this well settled case law and that a waiver of sovereign immunity cannot be implied. In the instant case, the Tribes' have not unequivocally expressed a waiver of its sovereign immunity or that of tribal officials to be sued or the granting of temporary restraining orders and preliminary injunctions. Therefore, the tribal court when asserting jurisdiction improperly implied such a waiver.

This Court will finally address whether this matter involved a nonjusticiable political question. The Tribes' constitution provides some guidance as to the appropriateness of the judicial review of the election process requested by appellees and being attempted by the tribal court. Section 7 of Article V of the Constitution and By-laws of the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation reads as follows:

"The Tribal Executive Board shall have the authority to pass ordinances providing for method of elections, and not limiting said power to, but including election announcements, nominations, and fees, registration of voters lists, election officials and their duties, place of voting, certificates of elections, manner of protests and recount, and all election procedures; and as a guide, to follow as near as practicable Chapter 23 of the Revised Codes of Montana, 1947, as amended, and effective at the time; and in case of disputed interpretation, the decisional laws of Montana shall be resorted to, subject to the approval to the Fort Peck Tribal Executive Board."

The Tribal Executive Board has passed Title XIV of the CCOJ which provides for the method of elections, election officials and their duties, certificates of elections, manner of protests and recount, all election procedures and etc. Although the Tribal Executive Board has not specifically approved resorting to the decisional laws of Montana in resolving election disputes in Title XIV of the CCOJ, under the applicable laws section at IV CCOJ 501(d) a compelling argument has been made to resort to the **decisional** laws of Montana in the instant case is not appropriate. The general rule of law is stated as follows:

The legislature has the power, within constitutional limitations, to provide for the manner in which the result of an election shall be determined and declared and, where the legislature has so provided, the election is not complete until the legislative mandate is obeyed. The declaration of the result of an election is an indispensable adjunct to the election process....

The election laws of the various states usually impose on the board of canvassers or on some other designated officer the duty of declaring the result of the election or of issuing a certificate of election. The duty of declaring the result of an election is ministerial. It is a duty the board or officer may not properly refuse to perform, and its performance may be enforced by mandamus.... 26 AM. JUR.2d Elections Section 304 (1966).

The Tribal Executive Board has provided the manner in which the results tribal elections are determined. Title XIV CCOJ 106(a) directs the Tribal Executive Board to appoint an election supervisor and election commission. This section reads as follows:

The Executive Board, at least thirty (30) days before a general election and as early as practicable but at least twenty five (25) days before a special election, shall appoint an Election Supervisor, two (2) members from any district where the last registration showed eight hundred (800) or more voters, and one member from each district of the Reservation to constitute an Election Commission. The Supervisor shall be the head of the Commission. Each of the other members of the Commission shall serve as one of the election judges for his/her respective district. The Board shall designate one of these Commission members as the alternate Election Supervisor. The alternate Supervisor shall become the Supervisor if the original Commissioner resigns or if the Board disqualifies the original Commissioner from service, either under subsection 106(d) of this Section, or because the Supervisor fails to carry out the duties of the office (Emphasis added).

The Election Commission then acts as the election canvassers under XIV CCOJ 107(b). The duties and powers of the election canvassers are set forth in XIV CCOJ 111(i). Title XIV CCOJ 107 reads in full as follows:

(a) Testing eligibility of candidates. The Commission shall test the eligibility of each person seeking to become a candidate in accordance with Section 204 of this Title, and rule on challenges in accordance with Sections 205 and 206 of this Title.

(b) Board of canvassers. The Commission shall constitute the board of canvassers as set forth in Section 111(i)

(c) Finality of rulings. **The rulings of the Commission within the scope of its authority shall be final** (Emphasis added).

In applying the general rule of law to XIV CCOJ 107, the Tribal Executive Board, with its legislative power and within constitutional limits, has established the Election Commission and the board of canvassers. The Tribal Executive Board, with its legislative power and within constitutional limits, has established that the Election Commission's rulings within the scope of its authority are final.

In view of the general rule of law, appellees' attempt to obtain a preliminary injunction against the Election Commission and their certification of the results of the election is highly inappropriate based on several underlying theories. This general rule of law and theories read as follows:

As a general rule, a court of equity will not enjoin the canvass of votes or declaration of the result of an election, although there is considerable conflict in the decisions as to the underlying theory in support of denying injunctive relief in such a case. Some courts refuse the injunction on the theory that a court of equity either has no jurisdiction over questions purely political in character or that it will not interfere in political matters or protect purely political rights. Others have predicated their decision on the theory that the courts will not prevent the performance of a legal duty, and since the statute imposes on designated officers the duty to canvass the votes and declare the result, their acts in so doing are not subject to judicial control and supervision. The existence of an exclusive statutory remedy or the existence of an otherwise adequate remedy at law has also been held to preclude injunctive relief. Failure to show irreparable injury will also preclude enjoining the canvass of votes and the declaration of the result of an election, the theory generally being that until enforcement of the result of an election, as distinguished from its declaration, is attempted or threatened, there is no invasion of the complainant's personal or property rights. However, equity will act to enjoin the canvass of votes and the declaration of the result of an election where the existence of particular factors justifies or calls for equitable intervention to protect personal or property rights. 26 AM. JUR.2d Elections Section 308 (1966).

In view of the provisions in the CCOJ, the applicable theory, is that the Election Commission had a duty imposed by statute not subject to judicial control or supervision. The duties of the board of canvassers are set forth in XIV CCOJ 111(i). This section reads as follows:

Board of canvassers. The Commission shall constitute the board of canvassers who shall meet the day following the election and canvass the results of the election in public. Upon completion of the canvass the Commission shall certify the results of the election to the Executive Board and to the Superintendent **of** the Fort Peck **Indian** Agency.

Title XIV CCOJ 111(i) requires the Election Commission to meet the day following the election and canvass the results in public and upon the completion of the canvass to certify the results to the Executive Board and the Superintendent. Under the theory that courts will not prevent the performance of a legal duty, the tribal court should not have entertained a request to impose an injunction against the Election Commission from performing its legal duty.

Again, the facts are not in dispute. On October 29, 1989, the Election Commission had canvassed the results of the October 28, 1989 election. On October 30, 1989, the Election Commission certified the results to the Tribal Executive Board. On October 31, 1989, the secretary then reported the results to the BIA. On November 1, 1989, the successful candidates were sworn in and assumed the duties of their respective offices.

Title XIV CCOJ 107(c) is clear, the Election Commission's decision to certify the results of the October 28, 1989 election to the Tribal Executive Board was final. This decision is not reviewable by the tribal court under the general rule of law previously set forth.

Despite the above and assuming for the sake of argument, the tribal court had the authority to review the Election Commissions' decision to certify the results of the election, XIV CCOJ 114 contains the standard of review for the Election Commission, the tribal court and this Court. This standard of review should have been, however, was not applied at the order to show cause hearing. Title XIV CCOJ 114 reads in full as follows:

The intent and purpose of this Chapter is to establish procedures for fair elections and to ensure the secrecy and sanctity of the ballot. This Chapter shall be construed to accomplish such purpose and intent. Cognizance shall be given to substantial compliance (Emphasis added). Want of form shall not cause an action or document to be invalid if the intent is clear. Technicalities, as such, shall not be employed to obstruct or impede elections, or cause confusion, or loss of confidence in the election system.

During the show cause hearing, the tribal court held appellees did not meet the burden of proof in IV CCOJ 402 of "clear and convincing proof by specific evidence" (Emphasis added). In denying the preliminary injunction, the tribal court erred by not determining there was substantial compliance with Title XIV of the CCOJ. The portion of the transcript in which the tribal court denied the preliminary injunction but did not apply the standard of review reads as follows:

Judge Boyd: ... [T]here's been quite a testimony but I'll have to agree with Counsel for Defendants (sic). You haven't met the requirements of Section 402 of Title IV on Injunctive Relief. Basically, you have shown no . . . what irreparable harm had occurred during the pendency of the litigation. You haven't shown through testimony or any other evidence that any actions taken by the existing Council is going to harm any one of the Plaintiffs and can't be revoked if this matter . . . or is the Court's find for the Plaintiffs, after the merits of the case has been hear (sic). Absent to those showing, the Court has no choice but to find in favor of the Defendants and deny your motion of the relief . . . or Injunctive Relief.... (Transcript p. 262. 1. 1—15).

Regardless of the tribal court's error, this Court will apply this standard and give cognizance to substantial compliance with applicable election statutes when reviewing the transcript.

At the hearing, the evidence established that the polling place for the Riverside District lacked curtains around the two polling tables. The tables were facing walls at opposite ends of a room and were at least fifteen feet apart, and at least twelve feet from the election judges. Transcript of Hearing (hereinafter "Tr"), pp. 180-184. The evidence established that the firefighters were mobilized to leave the Reservation on short notice the week prior to the election, Tr. at 66. The evidence established that those firefighters who were registered voters were allowed to vote by absentee ballot before departing late in the evening, Tr. at 65. The evidence established that the Secretary—Accountant neglected to give them receipts for their ballots after they voted. Tr. at 66. The absentee ballots cast by the firefighters were kept in a safe at the BIA until election day. Tr. at 67. The evidence also established that the Secretary-Accountant had taken home several absentee ballots one evening to address them for mailing. Tr. at 54. When this procedure was questioned by the incumbent Tribal Chairman, all the sealed ballots were opened in his and the Election Supervisor's presence prior to being mailed, and found to be in order. There were then resealed, with an explanatory note, and mailed Tr. at 85-89. No absentee voter and no firefighter gave evidence of an dissatisfaction with these procedures. Only one voter at the Riverside District testified that her privacy had been compromised by the arrangement of the tables. Tr. at 165-168.

Although, appellees presented some evidence at the hearing to substantiate their allegations, the evidence failed to establish there was not substantial compliance as required by XIV CCOJ 114. This is demonstrated by comparing the evidence with applicable statutes. In regard to whether voting booths were required at the Riverside District, XIV CCOJ 110(d) is applicable. This section reads as follows:

"Voting and casting ballot. Upon receipt of a ballot, the elector shall retire to one of the private voting booths or other designated places and there vote his/her ballot in secret. Only one (1) person shall occupy a voting booth at one time, except as provided in subsection (e). The elector must mark and cast his/her ballot without leaving the polling place.

Title XIV CCOJ 110(d) did not require voting booths at the Riverside District. Furthermore, testimony established there were the two polling tables separated by sufficient distance to allow the voters to vote their ballot in secret. Therefore, there was compliance with XIV CCOJ 110(d) at the Riverside District and there was no irregularity requiring a new election.

In regard to absentee ballots, the procedure for voting an absentee ballot is set forth in XIV CCOJ 104. The only procedure alluded to in the testimony presented by appellees that was not followed was the Secretary failed to obtain a receipt from the person to whom the absentee ballot was delivered. The testimony established the absentee ballots voted by the firefighters were no problem with anyone but the appellees.

Although appellees allege they will be able to present firefighters who claim to have had a problem with being held and required to vote, there was no evidence to substantiate these allegations at the three (3) day order to show cause hearing. Because there was substantial compliance with XIV CCOJ 114 regarding the absentee ballots, this Court finds no irregularity which would justify a new election.

In addition to the above on absentee ballots, the Secretary was to have grossly mishandled 94 ballots. There was absolutely no evidence to establish any violation of a provision in XIV CCOJ 114 by the Secretary in the handling of the 94 absentee ballots. In fact the evidence established that before the absentee ballots were mailed, several individuals scrutinized the ballots including the former Chairman Ray White Tail Feather. The persons involved were obviously satisfied that nothing was improper and allowed the absentee ballots to be mailed. Therefore, this Court again finds substantial compliance with XIV CCOJ 114 and no irregularity which would justify a new election.

Pursuant to Fed. Civ. P. 12(b), Appellants are entitled to summary judgment under Fed. R. Civ. P. 56 and an order dismissing further proceedings with prejudice. Fed. R. Civ. P. 12 to follow Fed. R. Civ. P. 56. This section reads as follows:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross—claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim or cross—claim is asserted or a declaratory judgment is sought may, at any *time move* with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages (Emphasis added).

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Available. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other parties to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

The following will apply Fed. R. Civ. P. 56 to the facts in this case.

Appellees have requested injunctive relief against appellants and a new election. Appellants' have raised the defenses of sovereign immunity and nonjusticiable political question and made a motion to dismiss appellees' action. Appellants' counsel agreed that Fed. R. Civ. P. 12(b) was applicable herein and that appellants' motion should be treated as a motion for summary judgment. Under Fed. R. Civ. P. 56(c), "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The testimony t t e hearing established there was no genuine issue as to any material fact and appellants are entitled to judgment as a matter of law.

The undisputed facts were that on October 28, 1989, the Tribal elections were held. On October 29, 1989, the canvassing was completed by appellants James Doney, Iris Daniel, Anita Brien, Donovan Red Boy, Rita Belgarde, Gloria Urbaniak, Alice Harris and Wanda Sibley which in part comprised the Election Commission. On October 30, 1989, the Election Commission certified the results of the canvass to the Tribal Executive Board. On October 31, 1989, the Secretary Paula Brien turned over the results of the certification to the BIA. On November 1, 1989, Chairman Wetsit and Vice Chairman Red Thunder were sworn in assumed the duties of their offices. The testimony present by appellees' witnesses did not establish any significant irregularity which appellants were responsible for and would have changed the outcome of the election as alleged in appellees' pleadings.

In conclusion, the testimony at the order to show cause hearing did not demonstrate where the appellants (or anyone else) failed to substantial comply with Title XIV of the CCOJ. Furthermore, the general rule of law and CCOJ provides members of the Election Commission, Chairman Wetsit and Vice Chairman Red Thunder with immunity from this type of suit for the performance of their statutory or otherwise mandated duties. Finally, the CCOJ does not contain a provision which provides a review of the election process by the Tribal court. Therefore, appellants are entitled to judgment as a matter of law and an order dismissing this action with prejudice.

BEFORE CLOSING THIS OPINION, THIS COURT WILL BRIEFLY COMMENT ON THE LATENESS OF APPELLEES' LAY COUNSEL IN ARRIVING IN THE COURTROOM AND BEING SEATED AFTER THE COURT. THE LATENESS OF APPELLEES' LAY COUNSEL WAS DISRESPECTFUL TO THE COURT AND UNFAIR TO THE OTHER PARTIES AND THEIR COUNSEL. SUCH ACTION IS CONTEMPTIBLE AND IN THE FUTURE WILL BE PUNISHED ACCORDINGLY.

IT IS THE UNANIMOUS DECISION OF THIS COURT TO DISMISS THE APPELLEES' ACTION AGAINST ALL OF THE APPELLANTS WITH PREJUDICE.

DATED this ____ day of January, 1990.

BY THE COURT OF APPEALS:

ARNIE A. HOVE, Chief Justice

GARY JAMES MELBOURNE, Associate Justice

FLOYD G. AZURE, Associate Justice

