

FILED

UNITED STATES DISTRICT COURT

JAN 31 2003

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA,)
)
 Plaintiff,)
)
 v.)
)
 THE HONORABLE PAUL MUELLER,)
 in his personal capacity)
 and official capacity)
 as Judge of the Crow Creek)
 Sioux Tribe Tribal Court and)
 NORMAN THOMPSON, SR.,)
 Vice-Chairman, Crow Creek)
 Sioux Tribal Council in his)
 personal and official)
 capacities; CRYSTAL J. KIRKIE,)
 Secretary, Crow Creek Sioux)
 Tribal Council in her personal)
 and official capacities;)
 DARLA R. FALLIS, Treasurer,)
 Crow Creek Sioux Tribal)
 Council in her personal)
 and official capacities;)
 RANDY SHIELDS, SR.,)
 Councilmember, in his)
 personal and official)
 capacities; DONALD MCGHEE,)
 Councilmember, in his)
 personal and official)
 capacities; and LORON)
 FALLIS, SR., Councilmember,)
 in his personal and)
 official capacities.)
)
 Defendants.)

Civ. 03-3002

COMPLAINT

COMES NOW, the State of South Dakota, by and through its
Attorney General and states:

1. This is an action by the State of South Dakota against
the Honorable Paul Mueller, in his personal and official capacity
as tribal judge, and Norman Thompson, Sr., Vice-Chairman, Crow
Creek Sioux Tribal Council, in his personal and official

capacity; Crystal J. Kirkie, Secretary, Crow Creek Sioux Tribal Council in her personal and official capacity; Darla R. Fallis, Treasurer, Crow Creek Sioux Tribal Council in her personal and official capacity; Randy Shields, Sr., Councilmember, in his personal and official capacity; Donald McGhee, Councilmember, in his personal and official capacity; and Loron Fallis, Sr., Councilmember, in his personal and official capacity. The action seeks to restrain each of these tribal officers from preventing or attempting to prevent agents of the State of South Dakota, from serving South Dakota process on a tribal member within the Crow Creek Indian Reservation when the process commands a tribal member to appear as a witness in a grand jury investigation of a crime occurring off of the reservation.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331.

3. This case arises under various federal laws and statutes, including, but not limited to, the General Allotment Act, 25 U.S.C. § 331 et seq.

4. Preliminary and permanent injunctive relief are authorized by Rule 65 of the Federal Rules of Civil Procedure. Declaratory relief is available pursuant to 28 U.S.C. §§ 2201 and 2202.

5. Venue is properly in this Court in accordance with 28 U.S.C. § 1391(e) because the cause of action arose, and the Plaintiff resides, in the Central Division.

6. The State of South Dakota is one of the states of the federal union.

7. Paul Mueller is a judge of the Crow Creek Sioux Tribal Court. He is sued in his personal and official capacity. He is not a member of an Indian Tribe. Norman Thompson, Sr. is Vice-Chairman, Crow Creek Sioux Tribal Council. He is sued in his personal and official capacity. Crystal J. Kirkie is Secretary, Crow Creek Sioux Tribal Council. She is sued in her personal and official capacity. Darla R. Fallis is Treasurer of the Crow Creek Sioux Tribal Council. She is sued in her personal and official capacity. Randy Shields, Sr., Donald McGhee and Loron Fallis, Sr., are each Councilmembers, Crow Creek Sioux Tribal Council, and each is sued in his personal and official capacity.

FACTS

8. In the summer of the year 2002, the Democratic Coordinated Campaign (hereinafter Coordinated Campaign) hired a number of persons as independent contractors to, among other things, register voters, including particularly Indian voters. Training was provided by, among others, Emily's List. Rebecca Red Earth, aka Rebecca Red Earth-Villeda, aka Maka Duta, was one of those persons who was hired and who acted as an independent contractor to register voters. The independent contractors were paid a particular amount for each voter registered.

9. Red Earth subsequently decided, apparently independently, that she would also collect signatures on absentee ballot applications. Up to the middle of September 2002, Red Earth collected a large number of such absentee ballot applications. In some cases, Red Earth actually obtained the

signature of voters; in others, she forged the signature of voters.

10. On or about September 15, 2002, Red Earth took boxes of absentee ballot applications, some of them validly signed, and some forged, and attempted to turn them over to Dave Hamrick, Director of the Coordinated Campaign in Sioux Falls, Minnehaha County, South Dakota. Hamrick, at that time, examined a handful of the applications. He did not make any determination as to whether any ballots had been forged. He did, however, notice that each of the absentee ballot applications he inspected was invalid for another reason: The "messenger" portion of the application had been manipulated so as to allow the absentee ballot to be messenger-delivered without the proper certification or authorization. On this basis, Mr. Hamrick rejected all of the absentee ballot applications. However, Hamrick subsequently told Red Earth that she could recontact the voters and get properly completed applications. Hamrick warned Red Earth about the necessity for complete adherence to the law and told her that for each properly completed application, she would be paid two dollars.

11. Red Earth then took the boxes of absentee ballot applications home and began to burn those applications. However, according to Red Earth, "something clicked" and she pulled the absentee ballot applications from the fire.

12. Red Earth thereafter actually obtained new valid absentee ballot applications from some voters. She also forged new absentee ballot applications for numerous voters.

13. On September 28, 2002, Red Earth took the new, forged applications, along with a certain number of new valid applications, to the Coordinated Campaign office in Sioux Falls, Minnehaha County, South Dakota. The Coordinated Campaign paid Red Earth \$1,000 up front for these applications, and later paid the balance at a rate of two dollars for each application, including many of which had been forged.

14. In particular, the Coordinated Campaign, on September 28, 2002, paid Red Earth for the new forged documents in the name of, among others, tribal members and Crow Creek residents Robert Ducheneaux Sr., Brenda Dion, Elizabeth Day, Daisy Merritt, Amber Wilson, Hilda Long Crow, Yvette Herman, Theresa Red Bear, Cheryl Antelope and Bonita Coleman.

15. As these events were taking place, on September 13, 2002, D. Mark Collins, Assistant Attorney General for the State of South Dakota, filed an application for grand jury in the Second Judicial Circuit, State of South Dakota. Ex. A. This application for grand jury was filed in the usual course of business, unrelated to events described above. The application was to "investigate public offenses being committed in Minnehaha County, South Dakota."

16. On September 17, 2002, then Circuit Judge Judith K. Meierhenry granted an "Order Summoning Grand Jury" regarding In the Matter of Minnehaha County Grand Jury, Civil 02-2129 (2d Judicial Circuit, September 17, 2002). Ex. B.

17. On December 14, 2002, a Complaint was filed in South Dakota Circuit Court. State v. Red Earth, Crim. 02-6075 (2d Jud.

Cir. 2002). The material portions of the Complaint alleged that Rebecca Red Earth had committed the public offense of forgery in violation of SDCL 22-39-36, in that she had, with intent to defraud, falsely made, completed or altered a written instrument, or had passed such an instrument. The Complaint alleged such a violation with regard to tribal members and Crow Creek Reservation residents, including Robert Ducheneaux Sr., Theresa Red Bear, Cheryl Antelope, Brenda Dion, Elizabeth Day, Daisy Merritt, Amber Wilson, Hilda Long Crow, Yvette Herman, and Bonita Coleman. A preliminary hearing had been scheduled on the Complaint for February 14, 2003.

18. On January 8, 2003, Deputy Attorney General Robert Mayer provided (by facsimile and U.S. Mail) recently elected Buffalo County Sheriff Frank Gourneau with witness subpoenas to be served on each tribal member resident on the Crow Creek Reservation identified in the paragraph immediately above. The Subpoenas directed each of these persons to appear before the grand jury in Minnehaha County on January 23, 2003. The subject of their testimony would have been the allegation of forged absentee ballot applications passed in Minnehaha County, South Dakota.

19. Newly-elected Sheriff Frank Gourneau did not serve the subpoenas on the above-named witnesses. As a result, James Severson, an Agent for the DCI, was dispatched by the State of South Dakota to Buffalo County to serve the subpoenas.

20. Upon arriving on the reservation on January 17, 2003, Special Agent Severson met with Frank Gourneau. Ex. D.

(Affidavit of Jim Severson) at ¶ 6. Gourneau was now acting in his capacity as a Tribal or BIA officer, having resigned his position as Sheriff of Buffalo County. Gourneau put Severson in contact, by telephone, with Judge Paul Mueller of the Crow Creek Sioux Tribal Court. Judge Mueller told Severson, among other things, that Severson was not allowed to serve any papers on the reservation and that he should leave the reservation, as far as this case was concerned. Id. Mueller also said that the Attorney General should call him. Special Agent Severson did not violate the order of the Tribal Judge and left the reservation without serving the witness subpoenas. Id. See Ex. C., Affidavit of Larry Long.

21. As a result of its inability to have its subpoenas served, the State of South Dakota was forced to postpone the above-named witnesses' appearances before the grand jury for January 23, 2003, and issue new subpoenas.

22. Prior to issuance of new subpoenas, however, the State sought to confer with the tribe. On January 22 and 23, 2003, Attorney General Long made repeated attempts to contact Judge Mueller. Attorney General Long utilized the telephone, regular mail and e-mail. No response was obtained. Ex. C, at ¶ 5.

23. On January 27, 2003, Attorney General Long again attempted to reach Judge Mueller and was finally successful. Ex. C. at ¶ 16. Long explained that the State desired to serve witness subpoenas on tribal members on the reservation with regard to an off reservation crime, and explained his view that this was allowable under Nevada v. Hicks. Id. Judge Mueller

stated that he would check with the Tribal Council. Id. The Attorney General and Judge agreed that if the state and tribe were unable to resolve the matter between themselves, that they would seek a gentlemanly manner of resolution which would avoid a confrontation. Id.

24. Attorney General Long thereafter had other contacts with tribal representatives.

25. Ultimately, however, the Tribal Council determined that it would not allow subpoenas to be served on the reservation and instructed the Tribal Judge to forbid service on their reservation. The Tribal Council set forth its direction to Judge Mueller in a January 28, 2003, Memorandum. The Memorandum was signed by the Vice-Chairman, the Secretary, the Treasurer, and all three Councilmembers. The Memorandum states that the Judge is "not to accept and allow the issuance of state subpoenas on our reservation." Att. L-2 to Ex. C.

26. On January 29, 2003, Deputy Attorney General Robert Mayer issued new witness subpoenas for the following persons, all of whom are tribal members who are residence on the Crow Creek Indian Reservation: Elizabeth Day, Brenda Dion, Robert C. Ducheneaux Sr., Hilda Long Crow, Daisy Merritt, Yvette Herman, Theresa Red Bear, Amber Wilson, Cheryl Antelope, and Bonita Coleman. Each of these persons was directed to appear before the Grand Jury in Minnehaha County on February 7, 2003. Each is a victim of having absentee ballot applications forged in his or her name and passed by Red Earth in Minnehaha County. Each is a material witness to the facts relating to that chain of events.

27. Each witness subpoena was accompanied by a brief memo from Robert Mayer which explained the process. Each was likewise accompanied by a check for \$135.15 as a witness fee and for travel. A copy of the packet to be supplied to the witnesses is attached at Exhibit D, Att. S-1.

28. On January 29, 2003, Agent Severson arrived at the tribal courthouse on the Crow Creek Reservation with the subpoenas and the packet. A court employee brought back a message that Judge Mueller had requested that Severson and the agent who accompanied him come into the courtroom. They did so. Affidavit of Jim Severson, Ex. D. at ¶ 8. At that time, Judge Mueller instructed the agents, in open court, that they were not allowed to serve a witness subpoena on the Crow Creek Reservation unless authorized by a federal court order. Id. at ¶ 9.

29. Judge Mueller also directed the two agents to give their names and addressees to the Clerk of the Tribal Court in case it became appropriate for a suit to be brought against them under Section 1983. The agents supplied their names and addresses as directed. Id. at ¶ 9.

30. The agents secured an audio recording of the proceedings and produced a transcript. Ex. D, Att. S-2.

31. The agents did not violate the order of the tribal court and did not serve the state subpoenas on the tribal members who resided on the Crow Creek Reservation. Id. at ¶ 10. Rather they left the Reservation.

32. The State of South Dakota has a legitimate and compelling interest in fully investigating crimes which undermine

the integrity of, and confidence in, the voting franchise, and the work of the grand jury in the present cases furthers that interest.

33. The grand jury constituted under SDCL ch. 23A-5 has a legitimate and compelling interest in receiving the material testimony of the persons for whom the new subpoenas have been issued.

34. On the basis of the evidence sought by way of the new subpoenas, and by way of other witnesses, the grand jury will be requested to determine whether there is probable cause that forged documents were passed in Minnehaha county, and that Red Earth passed them.

35. The action of the tribal officials in interfering with the work of the duly constituted grand jury in this matter tends to undermine the integrity of, and confidence in, the democratic process and in the exercise of the franchise in the State of South Dakota.

36. The Crow Creek Sioux Tribe lacks the authority, as matter of federal law, to authorize Judge Mueller to issue an order preventing, or attempting to prevent, state officers from serving witness subpoenas on tribal members on the reservation with regard to an off-reservation crime. Judge Mueller thus acted outside the authority the tribe is capable of bestowing on him and he therefore lacks sovereign immunity with regard to his action. In addition, each of the six tribal officers and Councilmembers identified in paragraph 1 of the Complaint acted beyond the authority the tribe is capable of bestowing on him or

her in adopting the January 28, 2003, Memorandum, and otherwise, in resisting the service of state process on the Reservation and therefore each lacks sovereign immunity with regard to this action.

37. The action of the judge, officers, and councilmembers of Crow Creek Sioux Tribe in this controversy is consistent with their recent actions. Although the officers of Crow Creek Sioux Tribe at one time would serve state process on tribal members on the reservation in abuse and neglect cases arising under the Indian Child Welfare Act, they now refuse to do so. Ex. E, Affidavit of Barb Hugelman. The Hughes County State's attorney office thus has been forced to resort to publication to obtain service of process. Id.

38. Each of the Exhibits (and Attachments to the Exhibits) identified above is incorporated in this Complaint as if set out verbatim.

FIRST CLAIM FOR RELIEF

As a matter of federal law, the order issued by Tribal Judge Paul Mueller and directed to be entered by the six members of the Tribal Council identified, in paragraph 1, is invalid and is contrary to the law established by the United States Supreme Court.

PRAYER FOR RELIEF

Wherefore, the State of South Dakota respectfully requests this Court as follows:

A. To assume immediate jurisdiction of this manner.

B. To issue a declaratory judgment determining that Judge Mueller, acting either in his official or personal capacity, and each of the six members of the tribal council identified in paragraph 1 of this Complaint, acting either in his official or personal capacity, lacks authority to issue orders or take other action preventing or attempting to prevent the State of South Dakota from serving witness subpoenas on tribal members within the Crow Creek Reservation with regard to criminal offenses committed by any person off the reservation.

C. To issue preliminary and permanent injunctions prohibiting Judge Mueller in his personal or official capacity, and each of the Tribal Councilmembers identified above, in their personal or official capacities, from preventing or attempting to prevent the State of South Dakota or its agents from serving witness subpoenas on tribal members who are resident on the Crow Creek Reservation with regard to crimes alleged to have occurred off reservation.

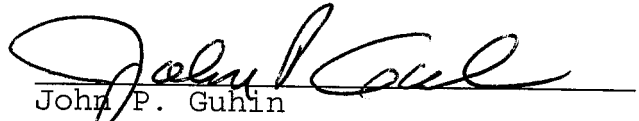
D. Award Plaintiff its costs and disbursements including an award of attorneys fees and costs.

E. Award Plaintiff such other an additional
alternative relief as may appear just and proper.

Dated this 31st day of January, 2003.

Respectfully submitted,

LAWRENCE E. LONG
ATTORNEY GENERAL


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c-pld582.jpg Paul Mueller, State v Crow Creek Sioux Tribe Complaint