UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

FILED

FEB 18 2003

STATE OF SOUTH DAKOTA, Plaintiff, 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.	)	Civil No. 03-3002 MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN OPPOSITION TO SOUTH DAKOTA'S MOTION FOR A PRELIMINARY INJUNCTION

COMES NOW the Oglala Sioux Tribe, by and through its attorney Mario Gonzalez, and respectfully moves the court for an order granting leave to file a brief amicus curiae in the above-entitled civil action. The attorneys for the Plaintiff and Defendants have indicated to the undersigned that they consent to the Oglala Sioux Tribe filing the brief, a copy of which is attached hereto as Exhibit "A."

Dated this 18th day of February, 2003.

Respectfully submitted,

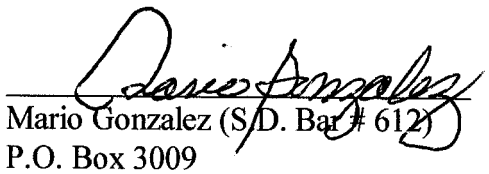

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EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA, Plaintiff, 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.	)	Civil No. 03-3002 AMICUS CURIAE BRIEF IN OPPOSITION TO SOUTH DAKOTA'S MOTION FOR A PRELIMINARY INJUNCTION

This Amicus Curiae Brief is submitted in opposition to South Dakota's Motion for a Preliminary Injunction. In its motion, South Dakota seeks an order which requires the above-named Defendants to allow the State to serve witness subpoenas on ten tribal members within the Crow Creek Reservation. These witness subpoenas direct the tribal members to appear as witnesses before a grand jury, investigating the alleged forgery of absentee ballot applications by

Rebecca Red Earth-Villeda. For the reasons outlined in detail in this Brief, the injunction should not be issued.

STATEMENT OF FACTS

For purposes of this Brief, it will be assumed that the facts of the case are in accordance with those set forth in South Dakota's brief.

ARGUMENT

SOUTH DAKOTA IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

When considering whether to issue a preliminary injunction, courts within the Eighth Circuit must consider the following factors: (1) threat of irreparable harm to the movant; (2) state of balance between this harm and the injury that granting the injunction will inflict upon other parties to the action; (3) probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. CL Systems Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

The burden on the movant to establish its right to preliminary injunctive relief is heavy. *Dakota Industries, Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991). This is particularly true where, as here, "granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits." *Id.* at 440. The court must exercise caution in granting a preliminary injunction, and the "essential inquiry . . . is whether the balance of . . . factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for a more deliberate investigation." *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 624-25 (8th Cir. 1987).

An analysis of the requisite factors here reveals that the injunction should not be issued.

South Dakota has no right to the relief it seeks, and the Defendants and the Crow Creek Sioux Tribe will suffer immediate and substantial damage if the injunction is granted.

I. SOUTH DAKOTA IS NOT FACED WITH THE THREAT OF IRREPARABLE HARM.

South Dakota's arguments in favor of the issuance of a preliminary injunction all conveniently ignore one key principle: Indian sovereignty. As the United States Supreme Court has long recognized, it is the policy of this country to leave "Indians free from state jurisdiction and control." *Rice v. Olson*, 324 U.S. 786, 798, 65 S. Ct. 989 (1945). Hence, "[t]here exists a plethora of federal laws both encouraging tribal sovereignty and providing for the continuing vitality of tribal courts in Indian country." Douglas R. Nash, Christopher P. Graham, *The Importance of Being Honest: Exploring the Need for Tribal Court Approval for Search Warrants Executed in Indian Country After State v. Matthews*, 38 Idaho L. Rev. 581, 588 (2002). *See, e.g.*, Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (stating principles which favor tribal self-determination and self-government); Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(4) ("Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems"); 25 U.S.C. § 3601(6) ("Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights").

Although South Dakota undoubtedly has an interest in serving witness subpoenas and prosecuting criminal offenses committed within the state, this interest cannot be permitted to run roughshod over the fundamental doctrine of tribal sovereignty. This is particularly true given the fact that other means exist whereby the State may accomplish service within the requisite time

period. Specifically, the Crow Creek Sioux Tribe has in place a tribal court and has enacted Tribal Rules of Criminal Procedure. Chapter 9, Section 9-1-11 of the Crow Creek Sioux Tribe's Law and Order Code, entitled "RULES OF CRIMINAL PROCEDURE," states that a "subpoena may be served by any police officer of the Crow Creek Sioux Tribe" and may be accomplished "by handing a copy of the subpoena to the person named therein." These tribal rules provide for procedures to effectuate service of criminal subpoenas through the tribal court. Because South Dakota can easily comply with these tribal procedures, the State is not faced with the threat of irreparable harm if preliminary injunctive relief is not granted.

In the Eighth Circuit, the failure to demonstrate irreparable harm, standing alone, may be fatal to the movant's ability to obtain preliminary injunctive relief. *Caballo Coal Co. v. Indiana Michigan Power Co.*, 305 F.3d 796, 800 (8th Cir. 2002); *Dataphase*, 640 F.2d at 114. Because South Dakota has failed to demonstrate that it will suffer any irreparable harm here, it is not entitled to the issuance of a preliminary injunction.

II. SOUTH DAKOTA HAS NOT DEMONSTRATED A HIGH PROBABILITY OF SUCCESS ON THE MERITS.

A. Subject Matter Jurisdiction

At the outset, it may be noted that South Dakota asserts that the District Court has jurisdiction over the case pursuant to 28 U.S.C. § 1331, and that case arises under the General Allotment Act, 25 U.S.C. §§ 331 et seq.. However, the Crow Creek Sioux Reservation and the Pine Ridge Reservation were not allotted under the General Allotment Act. Instead, these reservations were allotted under the 1889 Sioux Act, 25 Stat. 888, §§ 8-12. Nothing in the General Allotment Act or the 1889 Sioux Act gives South Dakota jurisdiction over this case. As

a result, South Dakota's claims here do not arise under federal law. *See Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, ___ F.3d ____, 2003 WL 162775 (8th Cir. Jan. 24, 2003).

Because no federal question exists under the General Allotment Act, as alleged by South Dakota, the District Court lacks subject matter jurisdiction over the case. It follows that South Dakota has not demonstrated a high probability of success on the merits, and no injunction should be issued.

B. Service of Process

Contrary to South Dakota's arguments, *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304 (2001), does not control the service of process issue here. *Hicks* holds that a state's law enforcement officers may carry out their activities involving individual tribal members on tribal land located in an Executive Order Reservation. 533 U.S. at 365, 121 S. Ct. as 2313. By its express terms, the case dealt purely with individuals. It does not provide authority for state officers to act against the tribal government.

Because *Hicks* is inapplicable, the majority of South Dakota's arguments should be ignored. Based in large measure upon the fundamental principle of tribal sovereignty, the State has no right to force compliance with the subpoenas at issue here. For the reasons discussed throughout this Brief, the State has failed to show a high probability of success on the merits and, therefore, is not entitled to preliminary injunctive relief.

C. Exhaustion

As a general rule, a plaintiff is obligated to exhaust its remedies in tribal court before bringing any action in federal district court. *See National Farmers Union Insurance Companies*

v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447 (1985); *Gaming World International, Ltd.*, 2003 WL 162775. A federal court should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *National Farmers Union Insurance Companies*, 471 U.S. at 857, 105 S. Ct. at 2447.

This tribal exhaustion doctrine is based on a "policy of supporting tribal self-government and self-determination." 471 U.S. at 856, 105 S. Ct. at 2447. Thus, exhaustion is mandatory when the case fits within the policy. *Gaming World International, Ltd.*, 2003 WL 162775; *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103, 115 S. Ct. 779 (1995).

In its Brief, South Dakota concedes that it might be subject to the exhaustion doctrine. However, the State contends that the limited exception set forth in *Hicks*, 533 U.S. at 353, 121 S. Ct. at 2304, negates this requirement. However, as explained *supra*, *Hicks* does not apply to the present case. As a result, South Dakota's reliance on it is misplaced.

Clearly, South Dakota is required to exhaust its remedies in tribal court before bringing any action in federal court. Because the State has failed to comply with this requirement, the instant proceedings should not be recognized as valid. It follows that the State's motion for a preliminary injunction must be denied.

D. Sovereign Immunity

South Dakota's actions here violate the Crow Creek Sioux Tribe's sovereign immunity. This principle is demonstrated in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir. 2002), *cert. granted, Inyo County, California v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*, 123 S. Ct. 618 (2002). In that case, the Ninth Circuit ruled that the execution

of a search warrant against an Indian tribe interfered with the "right of reservation Indians to make their own laws and be ruled by them." *Id.* at 558 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269 (1959)). In so doing, the court emphasized that the service of a subpoena against a tribe is different from the execution of a warrant against an individual. *Bishop Paiute Tribe*, 291 F.3d at 558. Indian tribes are sovereigns and cannot be compelled to comply with a federal procedure when they have their own procedures for disclosure of information in place. *Id.*

In reaching this decision, the *Bishop Paiute Tribe* court relied upon *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838, 114 S. Ct. 119 (1993). In *James*, an Indian defendant was prosecuted in federal court for the crime of rape against another Indian pursuant to the grant of federal jurisdiction in the Indian Major Crimes Act, 18 U.S.C. § 1153. The defendant appealed, contending in part that the district court erred in quashing a subpoena that ordered the Quinault Tribe to release documents in its possession relating to the victim's drug and alcohol problems. The court affirmed the district court's order to quash the subpoena, noting that "Congress did not address implicitly, much less explicitly, the amenability of the tribes to the processes of the court in which the prosecution is commenced" when it granted federal criminal jurisdiction over individual Indians for certain crimes pursuant to the Indian Major Crimes Act. *Id.* at 1319. Because the tribe possessed sovereign immunity, the court lacked jurisdiction to enforce a subpoena against it, despite the fact that the court had jurisdiction to enforce federal criminal laws against individual Indians. *Id.*

As *Bishop Paiute Tribe* and *James* demonstrate, the status of Indian tribes as sovereigns precludes the federal government from compelling them to comply with subpoenas or search warrants directed against them. As discussed in Argument I *supra*, the Crow Creek Sioux Tribe

has in place its own policies and procedures whereby Indians on tribal land may be subpoenaed as witnesses in a criminal case. If the Tribe is forced to bypass these procedures in favor of compliance with South Dakota's rules, the Tribe's sovereign immunity will be severely compromised. The Tribe has a fundamental right "not to have its policies undermined by the states and their political subdivisions." *Bishop Paiute Tribe*, 291 F.3d at 558.

In an attempt to avoid this conclusion, South Dakota argues that it is seeking enforcement not against the Crow Creek Sioux Tribe but rather, against its individual tribal officers, and that those officers have acted beyond the scope of their authority and have thus placed themselves outside of the tribe's sovereign immunity. This argument is without legal basis. The tribal officers in question did not act outside the scope of their authority. Instead, they simply followed the policies and procedures already in place by the tribal court and the tribe's Rules of Criminal Procedure. The fact that South Dakota would prefer to have the Tribe comply with state rules of procedure does not mean that the Tribe's own rules are invalid.

It is apparent that South Dakota's true aim is to force the Crow Creek Sioux Tribe to adhere to state procedures and policies. The action is really against the Tribe itself and not against individuals.[1] Hence, the doctrine of sovereign immunity applies and precludes the issuance of a preliminary injunction here.

E. South Dakota's Asserted Authority to Serve Criminal Process on the Crow

[1]The instant action is defective because it does not name the Crow Creek Sioux Tribal Council as a defendant. The Tribal Council adopted Rules of Criminal Procedure which prevent a state official from serving process on tribal members on the reservation. Accordingly, the Tribal Council is an indispensable party to the action, and the case cannot be maintained without joining it as a party defendant. *See* Fed. R. Civ. P. 12(h)2), 19(a - b); *see also Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 746 (8th Cir. 2001), *cert. denied*, 535 U.S. 988, 122 S. Ct. 1541 (2002); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 482 (7th Cir. 1996). This, of course, would require service of process on the Tribe.

Creek Reservation Indians Is Pre-Empted By Federal Law.

In many instances, a State's regulatory authority over a tribal reservation and its members is pre-empted by federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S. Ct. 2578, 2583 (1980); *see Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242 (1965). "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by federal law." *White Mountain Apache Tribe*, 448 U.S. at 143, 100 S. Ct. at 2583. Given the fundamental concept of Indian sovereignty, no express Congressional statement of preemption is required, but "automatic exemptions" to the State's regulatory interest are unusual. 448 U.S. at 144, 100 S. Ct. at 2584. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271 (1959).

In the present case, South Dakota's attempted actions unduly impede upon the Crow Creek Sioux Tribe's sovereignty and are thus preempted by federal law. As a result, the State cannot force the Defendants to comply with its service of process procedures.

Federal recognition of the tribe's sovereign status is longstanding. The members of the Crow Creek Sioux Tribe (and the Oglala Sioux Tribe) executed the 1868 Ft. Laramie Treaty which set aside a permanent reservation, commonly referred to as the "Great Sioux Reservation," for the "absolute and undisturbed use and occupation" of the Sioux bands. 15 Stat. 635, Art. II. The Great Sioux Reservation included the territory comprising the current Crow Creek Reservation, which Congress established as a separate reservation in the 1889 Act for the Crow

Creek Sioux Tribe. See 25 Stat. 888, §§ 1-6. South Dakota's attempt to enter the Crow Creek Sioux Tribe's lands to serve the subpoenas at issue therefore interferes with the Crow Creek Sioux Tribe's "undisturbed use and occupation" of its reservation under the 1868 Treaty.

Further, the 1868 Ft. Laramie Treaty contains an extradition provision which provides in pertinent part that "[i]f bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . ." 15 Stat. 635, Art. I.

The role of the Indian agent in extradition proceedings under Article I of the 1868 Treaty now rests with the Tribal Court under the Tribe's Rules of Criminal Procedure which provide that "[i]n all instances were Indians commit criminal violations outside the exterior boundaries of the Crow Creek Indian Reservation, and subsequently return thereto, law enforcement agencies are authorized pursuant to this ordinance to arrest such persons and return them to the appropriate state and/or county or Tribal enforcement agency, pursuant to the provisions herein." See Tribal Law and Order Code, Chapter 9 (Rules of Criminal Procedure), § 9-1-28.

Thus, process must be served in accordance with the Crow Creek Sioux Tribe's Rules of Criminal Procedure and this treaty extradition provision. *See also* Article 8 of the 1877 Act, 19 Stat. 254 (guaranteeing the Crow Creek Sioux Tribe and the Oglala Sioux Tribe an "orderly government" on their respective reservations); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). Compare *Fisher v. District Court*, 424 U.S. 382 (1976). The guarantee of an "orderly government" under federal law requires South Dakota and its officials to utilize the

Tribe's Rules of Criminal Procedure in serving criminal process on the Crow Creek Reservation.

In *State ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S. Ct. 551 (1970), the Governor of Arizona attempted to secure extradition to Oklahoma of a Cheyenne Indian residing on the Navajo Reservation. The Governor attempted to do this by way of Arizona law. The Ninth Circuit, however, ruled that Arizona had no authority, and hence, no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation in Arizona. *Id.* at 686. In reaching this decision, the court noted that the Navajo Tribal Council had adopted a resolution providing extradition procedures for Indian extradition, which, by its terms, did not allow for extradition to the State of Oklahoma. *Id.*

As *Turtle* indicates, where an Indian tribe has enacted specific rules of criminal procedure, the State is required to give deference to and comply with those rules. The Crow Creek Sioux Tribe here has in place specific procedures regarding extradition and service of process. As a result, South Dakota is obligated to comply with those procedures. The State's own rules concerning these matters are preempted.

Further, the South Dakota Enabling Act and State Constitution contain disclaimer clauses which disclaim any right over Indian lands, which lands are to remain under the exclusive jurisdiction of the United States. See South Dakota Enabling Act and State Constitution in S.D.C.L., Vol. I. See also P.L. 280, 25 U.S.C. §§ 1321-1326, which allows South Dakota to assume criminal jurisdiction on the Crow Creek reservation "with the consent" of the Crow Creek Sioux Tribe. Consent of the tribe must be expressed in a special referendum election called by the Secretary of the Interior. *Id.* at § 1326; *Kennerly v. District Court*, 400 U.S. 423 (1971). Accordingly, the State has no authority to serve criminal process on the Crow Creek Sioux

Reservation.[2]

Clearly, South Dakota has no right to rely upon state law to enter the Crow Creek Sioux Tribe's property to serve subpoenas to Indians on tribal land. Instead, the State is required to comply with the Tribe's established rules regarding service of process. Because South Dakota failed to comply with those tribal rules, it has failed to establish that it has a strong probability of success on the merits. Accordingly, South Dakota has no right to the issuance of a preliminary injunction.

III. THE BALANCE OF INTERESTS FAVORS THE DEFENDANTS.

Here, South Dakota's interest in fair elections and the prosecution of criminal offenses must be weighed against the interests of the Defendants and the Crow Creek Sioux Tribe in their tribal sovereignty. Specifically, the court must examine the undermining of tribal sovereignty and the infringement on tribal self-government that will ensue if the State is allowed to bypass valid tribal Rules of Criminal Procedure and force the Tribe to accept service of state subpoenas on tribal lands.

As discussed in Argument I *supra*, South Dakota could easily obtain valid service of process over Indians residing on the Crow Creek Sioux Reservation by going through the tribal court and complying with the Tribe's Rules of Criminal Procedure. Hence, any harm South Dakota will suffer if the injunction is not granted is minimal. On the other hand, the harm to the

[2]In contrast, certain federal statutes expressly grant specific states the authority to serve criminal process on Indian reservations. *See, e.g.*, Kansas Act, 18 U.S.C. § 3243. Absent such an express grant of authority, it may be inferred that the State has no such right. In the present case, this point is made clear by the disclaimer clauses in South Dakota's Enabling Act and the State Constitution.

Defendants and the Crow Creek Sioux Tribe caused by the issuance of the injunction would be substantial. Clearly, the balance of interests weighs heavily in favor of the Defendants, and constitutes sufficient cause for the court to decline to grant the State any preliminary injunctive relief.

IV. THE GRANT OF A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST.

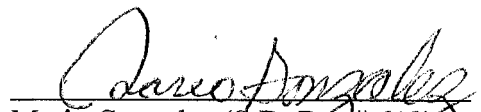
Based upon the foregoing discussion, it cannot reasonably be concluded that the issuance of a preliminary injunction here would not serve the public interest. Although matters for South Dakota would be simplified if the State could force all Indian tribes to comply with state service of process rules, the resulting harm to the Defendants, the Crow Creek Sioux Tribe, and, indeed, all Indian tribes, would be substantial. The tribes' sovereignty and ability to govern themselves by their own rules and policies would be severely undermined. Such inequitable action by the State is not in the public interest.

CONCLUSION

For the foregoing reasons, South Dakota's Motion for Preliminary Injunction should be denied.

Dated this 18th day of February, 2003.

Respectfully submitted,



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