CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

BERNARD WOODS, et al.,	)	Case No. 10C126
	)	Case No. A-005-11
PLAINTIFFS /APPELLEES,	)	
v.	)	
	)	MEMORANDUM OPINION
CHEYENNE RIVER SIOUX TRIBAL COUNCIL, et al.,	)	AND ORDER
DEFENDANTS/APPELLANTS.	)	

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Taylor Bald Eagle and Franklin Ducheneaux)

I. Introduction

This case has a long history, now stretching beyond five years. This fact coupled with the important Tribal constitutional question embedded in its core suggests the necessity of an in-depth chronology of what has occurred to date.

Plaintiffs/appellees originally filed this action in the Fall of 2010. The essential gravamen of their complaint was the (alleged) failure of the Cheyenne River Sioux Tribal Council to reapportion[1] the Reservation's six voting districts as required by Art. III, Sec. 3[2] of the Cheyenne River Sioux Tribe Constitution. The essential substantive allegation was that the current districts did not demographically comply with the 'one man, one vote' mandate of *Baker v. Carr*, 369 U.S. 186 (1962). This failure to reapportion allegedly violated both the due process

[1] This Court has consistently used the term 'reapportionment.' The Tribal Council has consistently used the term 'redistricting plan.' The terms are used interchangeably in this opinion.

[2] Art. III, Sec. 3 of the Cheyenne River Sioux Tribe Constitution provides:

> That the Cheyenne River Sioux Tribal Council shall have the power both to redistrict the reservation and its precincts, and to reassign the number of councilmen to be elected from each district in proportion to the number of qualified voters residing therein, or on a population basis.

and equal protection guarantees of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), as well as Lakota common law principles of due process and equal protection. The plaintiffs sought both declaratory and injunctive relief.[3]

The Tribal Council (and other individual Tribal Council representatives) filed a motion to dismiss on several grounds, including failure to state a claim upon which relief might be grounded and sovereign immunity. Special Judge Jones filed an order on May 10, 2011. Judge Jones' order granted defendants/appellants' motion to dismiss on the grounds that it failed to state a claim. The essence of Judge Jones' order was that reapportionment could only be effectuated through an amendment to the Tribe's constitution. Judge Jones' order did not rule on the issue of sovereign immunity.

The plaintiffs/appellees filed a timely notice of appeal with this Court. The case was then fully briefed and oral argument was heard. This Court issued its memorandum opinion and order on February 8, 2012. This Court expressly reversed Judge Jones' order, finding that reapportionment did not require a constitutional amendment. Indeed, the Court found that reapportionment was the *mandatory* constitutional responsibility of the Tribal Council (Court of Appeals opinion at 8-9). The Court also found that issue of sovereign immunity had not been pursued on appeal and consequently made *no* ruling on it. *Id*. at 3, n.7.

This Court noted that the Tribal Council was deeply engaged in its own discussion of reapportionment and ordered it on remand to present a reapportionment plan to Judge Jones by May 10, 2012. *Id*. at 10. The Court also ordered that reapportionment take place at least once every ten years thereafter. *Id*. at 9. The Tribal Council was *not* ordered to conduct a census as part of this process.

[3] At some point, the thrust of injunctive relief morphed into a request that this Court order the Tribal Council to submit a redistricting plan for Court approval. It is further noted that plaintiffs/appellees have proceeded *pro se* in this matter.

The Tribal Council complied with this Court's order and submitted a plan. This plan is described in Tribal Council Resolution No. 101-2012-CR. Plaintiffs/appellees objected to the plan. Special Judge Jones rejected the plan in his order of July 2, 2012. Judge Jones found that the proposed plan was not a "plan at all, but merely a process to reach a plan." Slip Opinion at 9. Special Judge Jones ordered that a new plan be submitted within thirty days. *Id*. at 6. Special Judge Jones also expressly denied the Tribal Council's motion to dismiss and rejected its assertion of sovereign immunity.

In response to Special Judge Jones order, the Tribal Council did two (separate) things. It filed a notice of appeal with this Court on August 1, 2012, which contested the failure of Special Judge Jones to grant its motion to dismiss. Its notice of appeal expressly identified and preserved the issue of Tribal Council sovereign immunity. This notice of appeal was never officially docketed and at the time no action was taken upon it.[4] See discussion *infra* at pp. 4-6.

Despite appealing Special Judge Jones' order, it also complied with the order and submitted a new proposed reapportionment plan on July 30, 2012. This plan is fully described in Tribal Council Resolution 247-2012-CR. The essence of the plan was to alter the *boundaries* of the voting districts on the Reservation to provide proportionate representation within each district based on the number of qualified Tribal voters residing there. Special Judge Jones *approved* this plan in his order of August 10, 2012.

This redistricting plan was implemented in both the 2012 and 2014 elections. The actions of both sides certainly created the 'appearance' of compliance with the Court's order of August 10, 2012. In fact *nothing* happened in the case during this two year period. Although no one moved to dismiss the case, no one filed any pleading or motion to 'advance' the case that

[4] The notice of appeal did not include any motion for a stay and no stay was granted.

appeared moribund and operationally concluded. Reapportionment appeared to have been achieved.

Then in September 2014, one of the plaintiffs/appellees, Lanny LaPlante, (not the Defendant/Appellant Tribal Council), filed an affidavit seeking an order to show cause why the Tribal Council had not conducted a new Tribal census on which to develop its redistricting plan. The Tribal Council responded that it fully complied with all orders in the case and that no court order required the Tribal Council to conduct a new census. It further requested a stay, while this Court considered its notice of appeal filed back on August 1, 2012. The stay was granted by Special Judge Jones. Subsequently, Special Judge Jones decided that a notice of appeal had *not* been filed back in the summer of 2012, dismissed that appeal, and vacated the previously granted stay in his order of December 17, 2014. A timely notice of appeal was filed on January 16, 2015.

Oral argument on this appeal was heard on September 18, 2015.

II. Issues

This appeal raises a single issue, namely whether the defendant/appellant Tribal Council filed any (timely) notice of appeal to Special Judge Jones' order of July 2, 2012.

III. Discussion

The narrow issue raised in this case is factual, not legal, in nature and is easily resolved. The legal implications are not so easily resolved.

A. Factual Determination

This Court finds as a matter of fact that the Tribal Council filed a (timely) notice of appeal to Special Judge Jones' order of July 2, 2012 which, *inter alia*, preserved the issue of the Tribal Council's sovereign immunity. This Court has the highest regard for the character and

integrity of both Mr. Steven Emery and Mr. Steven Gunn, who have represented the Tribal Council in this matter. They say and swear that the notice of appeal was filed. This Court believes them.

Special Judge Jones' order of December 17, 2014, which found to the contrary (in which he heard no testimony and received no evidence),[5] relies exclusively on a single brief telephone conversation that he had with Chief Justice Frank Pommersheim. His order summarizes the conversation thusly:

> [A]fter this Court contacted the Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals it was advised that the Defendants had never appealed from the July 2, 2012 ruling of this Court rejecting the sovereign immunity defense. Therefore this Court's ruling is final on that issue and has not (sic) become the law of this particular case. The Defendant Council is not immune from suit on the motion before the Court. [Opening Brief of Cheyenne River Sioux Tribe at 5.]

This is not an accurate rendition of that telephonic conversation. What the Chief Justice said in the telephone conversation was that he never *saw* the notice of appeal and noted that such is the common and customary practice. Notices of appeal are filed with the Appellate Clerk's (Ms. Dale Charging Cloud) office at the Tribal Courthouse in Eagle Butte, South Dakota. The Chief Justice has no office there. His office is located at the University of South Dakota School of Law which is 360 miles away. The normal practice is for Ms. Charging Cloud to telephone the Chief Justice when a notice of appeal is filed and to review the adequacy of the notice of appeal telephonically. Unless the notice of appeal is deficient in some manner, the Chief Justice informs the clerk to issue a briefing schedule.[6]

[5] The case is quite remarkable in that regard. Despite the many orders and rulings, very little, if any, evidence or testimony was ever received by the lower court.

[6] These verbal comments of the Chief Justice were made on the record during the oral argument of this case on September 18, 2015.

In this case, Ms. Charging Cloud never called the Chief Justice as she contends that she *herself* never physically saw or received the notice of appeal. The resulting factual conclusion is that this is a rare (very rare) instance, where the notice of appeal apparently 'fell through the cracks,' and no one acted with the intent to engage in conscious wrongdoing or deception.

In sum, the Court finds that a timely notice of appeal was filed in this matter and Special Judge Jones' order of July 2, 2012 to the contrary is reversed. Nevertheless, this determination does not end the Court's legal inquiry and review.

B. Legal Consequences

As to the matter of the legal consequences of this factual determination, this Court reaches a quite different result than the one sought by the Tribal Council. The Tribal Council forcefully argues that it is now entitled to a full hearing before the trial court on the issue of sovereign immunity. This Court disagrees for several different and overlapping reasons. Each of these will be discussed in turn.

1. Mootness[7]

Mootness is a basic staple of federal courts jurisprudence that is rooted in the "case and controversy" requirement of Art. III in the federal Constitution. A case becomes moot when the issues in the case are no longer viable and/or there is no applicable remedy with which to resolve the case. *Murphy v. Hunt*, 455 U.S. 478 (1981). The doctrine of mootness requires that the plaintiff's claims remain alive throughout the course of the proceeding. 13A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533, at 211 (2nd ed. 1984).

[7] Much of the discussion on the issue of mootness directly parallels and incorporates part of the recent opinion of the Rosebud Sioux Supreme Court in *Scott v. Kindle* (Rosebud Sioux Supreme Court 2015).

The doctrine of mootness is closely related to the issue of standing, another core ingredient of the Article III "case and controversy" requirement. If facts develop subsequent to the filing of a case that resolve the dispute, the case should be dismissed. As noted by the Supreme Court, "mootness [is] the 'doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)'." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

It is important, of course, to note that this staple of federal court practice does not automatically apply in tribal court. Tribal courts are *not* Art. III courts of limited jurisdiction under the United States Constitution. More accurately, they are courts of general jurisdiction.

Many tribal courts including the Cheyenne River Sioux Tribal Court of Appeals have adopted the doctrine of mootness. For example, in applying the mootness doctrine in a tribal court context, tribal courts have recognized and applied the doctrine, notwithstanding the fact that it may not be articulated in their tribal constitutions. *See, e.g.*, *Ducheneaux v. Cheyenne River Sioux Tribe Election Bd.*, 2 AM. TRIBAL LAW 39 (Cheyenne River Sioux Tribal Court of Appeals 1999). *Id.* at 41.

Other tribal courts have also recognized and applied the mootness doctrine. In *Funmaker v. Cloud*, 7 AM. TRIBAL LAW 48 (Ho-Chunk Nation Supreme Court 2007), the major issue was "whether the case was moot due to the prior removal of George Lewis as President of the Ho-Chunk Nation by a subsequent General Council previously upheld by this Court." *Id*. at 49. The major relief the appellants were requesting was for the recall of President George Lewis, who had already been removed from office and replaced through a subsequent election. In holding

the issue to be moot, the Tribal Court found that it could not provide meaningful relief and therefore the appeal should be dismissed.

Further, in *Wilson v. White*, 2004 WL 6012174 (Leech Lake Band of Ojibwa Tribal Court, Trial Division 2004), a case that involved the brief suspension of salary payments of two Tribal Council members, which were later reinstated, the Tribal Court found the issue to be moot and therefore found that it "lack[ed] jurisdiction to resolve any action that is moot because no active case or controversy exists." The Tribal Court further found that it was "not permitted to resolve legal issues merely because they may become the grist of future disagreements." *Id.*

Inasmuch as the doctrine of mootness is part of the jurisprudence of the Cheyenne River Sioux Tribal Court of Appeals, the sole remaining question is whether it is applicable in the case at bar. The answer is an unequivocal yes. Given the current posture of this case, there is no practical *remedy* to apply (even if the Tribal Council prevailed on the issue of Tribal sovereign immunity) and hence the doctrine of mootness is dispositive.

The defendant/appellant Tribal Council wants its day in court on the issue of Tribal sovereign immunity. Let's examine the implication of such a course of action. Say the Tribe would prevail[8] on its claim of sovereign immunity, what then? Would it expect that five years of litigation would simply disappear? Would it assume that it would no longer be bound by Judge Jones' order accepting the Tribal Council's *own* redistricting plan?[9]

But, of course, this cannot be done. The clock cannot be unwound. To somehow suggest to the contrary is to invite legal chaos and grave uncertainty. Much good (but unfinished) work would likely be undone and cast aside. Going back to the 'beginning' solves nothing except to

[8] This is an assumption for hypothetical purposes only.
[9] Oddly, the Tribal Council never sought a stay when it filed its notice of appeal to Judge Jones' order of July 2, 2012. On a certain practical level, the Tribal Council accepted the momentum of the case and is bound by its trajectory.

undo much, even all, of the *mutual* good work accomplished by both parties to this litigation. This Court cannot endorse such a fraught course of action. The doctrine of mootness – already part of the jurisprudence of this Court – is therefore both necessary and appropriate to apply in this situation.

2. Final Judgment Rule

Another relevant and pertinent doctrine to the case at bar is the final judgment rule. As recently noted in our decision in *Ganje v. Bad Warrior* (CRST Ct. of Appeals, September 8, 2015,

> the words 'final' and 'final judgment' mean 'conclusion' and 'completed' and 'one that ends litigation on the merits and leaves nothing for the courts to do but execute the judgment." BLACK'S LAW DICTIONARY 629 (6th ed. 1990).
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> It is clear, therefore, that the final judgment rule serves several important interests. *Flanagan v. United States*, 465 U.S. 259 (1984). It helps to preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation, it reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals, and it is crucial to the efficient administration of justice. *Id*.

Special Judge Jones' order of July 2, 2012, from which the Tribal Council appealed and is the matter before this Court was itself *not* a final judgment on the merits but rather an appeal asserting the lower court's failure to grant a motion to dismiss. Such a procedural configuration would normally only be appealable if it satisfied the stringent requirements of an interlocutory appeal. These stringent requirements are also part of this Court's jurisprudence and create another high bar for appeal and are unlikely to be satisfied in the case at bar. The essential point being that these requirements, when added to the mootness problems, create a nightmare of insoluble procedural and substantive complexity.

The general interlocutory appeal rule is codified in 28 U.S.C.A § 1292(b), and provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Interlocutory appeal is a rare exception to the final judgment rule and is used sparingly by both federal and tribal courts. Applied on a purely discretionary basis, interlocutory review is intended for those few instances where rigid adherence to the finality rule would cause a severe hardship and injustice to a particular litigant. This does not appear to be true in the case at bar.

Procedurally, 28 U.S.C.A § 1292(b) requires dual judicial review. Both the trial court and appellate court must approve an order for interlocutory review before an applicant will be allowed to proceed. The party seeking interlocutory review must first obtain certification from the trial court. In the event that the trial court refuses to certify the order, the court of appeals is divested of appellate jurisdiction. Upon certification, however, the party then must "obtain leave from the appeals court to pursue the review of the certified interlocutory order." 28 U.S.C.A § 1292(b) does not expressly guide the appellate court in its exercise of judicial discretion. However, at a minimum, the appellate court should both concur with the trial court that the appeal presents an unsettled, central question of law, and that a prompt decision by the appellate court would serve the ends of justice.

Various tribal courts have enumerated guidelines for interlocutory appeals, many of which mirror federal law guidelines. Besides requiring a notice of appeal, various tribal courts require that an applicant first file a memorandum which meets the requirements laid out in 28 U.S.C.A § 1292(b)—(1) why the issue involves a controlling issue of law; (2) to which there is a substantial ground for difference of opinion and (3) that will materially advance the ultimate termination of the litigation. *Colville Confederated Tribes v. Abrahamson*, 2004 WL 5827132, at *2 (Colville C.A. June 10, 2004). Of course, none of this was done in the case at bar and thus constitutes another unnecessary pitfall and complication. *See, e.g., Antoine v. Cherry-Todd Electric Cooperative* (Rosebud Sioux Sup. Ct. 2013) and *Dupree v. Cheyenne River Housing Authority* (Cheyenne River Sioux Tribal Ct. of Appeals 1999).

C. Law of the Case

Finally, there is the related doctrine known as the 'law of the case.' The law of the case doctrine holds that as a general rule an appellate court should not reconsider matters resolved in prior proceedings. *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997), *overruled* for other reasons by *Gonzalez v. Arizona*, 877 F.3d 383 (9th Cir. 2012). *See also Arizona v. California*, 460 U.S. 605, 618 (1985).

In the recent case of *Cressman v. Thompson*, 2015 WL 4820466 (10th Cir. 2015), the Court noted that "under this doctrine, 'the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal'." *Zinna v. Cosgrove*, 755 F.3d 1177, 1182 (10th Cir. 2014) (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995), *see also Ute Indian Tribe of the Uintah Ouray Reservation v. Utah*, 114 F.3d 1513, 1520-21 (10th Cir. 1997).[10]

[10] Research indicates that there does not appear to be any tribal court cases that discuss the law of the case doctrine.

In the Court's earlier opinion in this case, it ruled that the Tribal Council did not pursue the issue of sovereign immunity on appeal and therefore this Court did not rule on it. Thus, the law of the case in *this* case is that the issue of sovereign immunity is not an issue. To rule to the contrary would subvert basic judicial principles of predictability and efficiency. This case has already been appealed twice to this Court. Enough is enough. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), for a related discussion of the issue in the context of laches.

IV. Conclusion

For all of the above-discussed reasons, the Court finds that the Tribal Council did file a notice of appeal to Special Judge Jones' order of July 2, 2012. Nevertheless, the appeal is dismissed on grounds of mootness, absence of a final judgment, law of the case concerns, and Lakota tradition and custom.

Much progress has been in realizing the Tribal Court Constitutional mandate at Art. III, Sec. 3 to reapportion membership on the Tribal Council. In accord with Lakota common law principles of respect and harmony, this Court ought not and will not undermine or undo the 'good' that has been accomplished to date. This part of the journey is over and this case must come to a final rest.

The dismissal of this appeal necessarily reverses and vacates Special Judge Jones' order of July 2, 2012 holding that Tribal Council does *not* have sovereign immunity in this matter. This does not mean that Judge Jones' assessment was wrong on the merits, but rather that issue was not properly before him at that time. The substantive issue of Tribal Council sovereign immunity remains unresolved.

Despite the long and convoluted history of this case, much has been accomplished and *both* parties are to be commended for the positive results to date. As noted by Attorney Gunn in his letter of September 21, 2015, which is now part of the record in this case:

> … the Tribal Council does not seek to undermine the rights and values enshrined in the Tribal Constitution or the Indian Civil Rights Act. To the contrary, the Tribal Council has honored and protected those rights by enacting redistricting legislation that ensures, and will continue to ensure, proportionate representation in the Tribal Council for all Tribal citizens.

There may still be differences of opinion in the details, but not on the overarching Tribal constitutional principle that *mandates* Tribal Council reapportionment. This, indeed, is worthy and noteworthy advance.

To be clear, while *this* case is over, the process of reapportionment and redistricting is not. *Both* sides realize that there is more to come, especially in regards to the Tribal Council's commitment to taking a new tribal census in 2017 to guide redistricting for 2018 elections. *See, e.g.*, Tribal Council Resolution 10-2015-CR. The implementation of this Tribal Council resolution may or may not lead to new litigation. If there is such litigation, the issue of Tribal Council sovereign immunity *may* be raised as a defense at that time. If it is, both the trial court and this Court shall rule upon it.

Yet, it is also true – as acknowledged in Attorney Gunn's letter of September 18, 2015 – that this Court has expressly held that Cheyenne River Sioux Tribal Courts may adjudicate claims for prospective relief against administrative or executive officials who are responsible for carrying out laws that are unconstitutional or violate the Indian Civil Rights Act of 1968. *See, e.g. Clement v. LeCompte*, No. 93-009-A (Cheyenne River Sioux Ct. of App. 1994) and *Thompson v. Cheyenne River Sioux Tribe Bd. of Police Commissioners*, 23 IND. L. RPTR 6046 (Cheyenne River Sioux Tribe Ct. of App. 1996).

Finally, there is much in these lengthy proceedings that upholds and vindicates the dignity and importance of constitutional governance and adherence to traditional Lakota values. The Court notes and commends these efforts.

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IT IS SO ORDERED.

FOR THE COURT:

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Frank Pommersheim
Chief Justice

Dated October 21, 2015