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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

FILED
BILLINGS DIV.

2004 OCT 6 PM 3 31

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BY Heather McLean
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BILLINGS DIVISION

DORMA TAKES ENEMY, et al.)	CV 04-48-BLG-RFC
)	
)	
Plaintiffs,)	
)	
vs.)	ORDER
)	
CROW TRIBE OF INDIANS,)	
)	
Defendant.)	

BACKGROUND

This action was brought by former employees of the Crow Tribe who were terminated on or about June 30, 2000, by the outgoing tribal administration of Chairwoman Clara Nomee immediately before the administration of former Chairman Clifford Birdinground took office on July 1, 2000. The Crow Tribal Personnel Practices and Policy Manual (adopted in 1978) provides that every employee who has worked a minimum of one year is entitled to severance pay if they lose their job "through no fault of their own." The Plaintiffs herein worked for the tribe for more than one year and every Plaintiff received a letter from the Chairman of the tribe stating they were terminated "through no fault of your own" and that they would "be afforded those employee benefits of payment for accrued annual leave and severance pay, in accordance with the Crow Tribal Policies and Procedures Manual."

On September 14, 2000, at least 58 former employees sought severance pay pursuant to the Tribe's former Personnel Practices and Policy Manual (adopted in 1978) or, in the alternative, damages for wrongful discharge and denial of reemployment rights. These claims are based on the grievance procedures in the Personnel Manual, which they allege provide a waiver of the Tribe's sovereign immunity for adjudication of the monetary claims against the Tribe. Plaintiffs allege they have complied with the grievance procedures in the Personnel Manual and exhausted their tribal court remedies. These former tribal employees filed a grievance seeking severance pay or damages with the Director of the Tribal Personnel Department. The Personnel Director responded on September 21, 2000, denying the grievance on the grounds that severance pay was not provided for political appointees and there was no proof that the claimants were other than political appointees. The former employees appealed this decision on September 26, 2000, to the Executive Director of Tribal Operations, and resubmitted it on October 9, 2000. There is no record that the Executive Director ever responded to the grievance appeal.

Subsequently, the former employees filed suit in Tribal court on December 15, 2000. On May 23, 2001, the Tribal Court dismissed the complaint based on the Tribe's sovereign immunity. Plaintiffs appealed and on October 10, 2003, a three-judge panel of the Crow Court of Appeals affirmed, with one dissent. The majority opinion held that regardless of the plaintiffs' classification as appointees, their claims for monetary relief were barred by the Tribe's sovereign immunity. A complaint was filed in this matter on April 14, 2004, in U.S. District Court. The complaint in a companion class action lawsuit (CV-04-49-BLG-RFC) was filed on the same day.

Defendant alleges that because this matter involves tribal employment claims, which are an internal Crow Tribal matter involving a core function of tribal government performed on tribal

alleges that lands within the reservation, there is no question of federal law. Further, Defendant alleges that federal even if Plaintiffs' complaint sufficiently raises the issue of tribal sovereign immunity as a federal question within the Court's jurisdiction, the Court should defer to the Crow Court of Appeals' interpretation of tribal law and hold that the grievance procedure in the former 1978 Personnel Manual does not clearly or specifically waive the Tribe's sovereign immunity for a damages suit in Tribal Court.

Plaintiffs allege that this Court has jurisdiction to hear this matter for two reasons. First, plaintiffs argue the issue of whether or not the Crow Tribe has waived sovereign immunity is a federal question. Second, Plaintiffs state that the money paid to the Crow tribal employees is provided, in part, by the federal government and the Court has jurisdiction over actions regarding the disbursement of federal funds and over the disbursement of funds that are supervised by the federal government.

STANDARD OF REVIEW

The Court reviews *de novo* whether an Indian tribe possesses sovereign immunity, *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992); whether Congress has statutorily waived an Indian tribe's sovereign immunity, *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 (9th Cir. 1995); and whether dismissal for lack of subject matter jurisdiction was correct, *Brady v. U.S.*, 211 F.3d 502 (9th Cir. 2000).

ANALYSIS

DOES THE COURT HAVE FEDERAL QUESTION JURISDICTION ON THE ISSUE OF TRIBAL SOVEREIGN IMMUNITY?

It has long been recognized that Indian tribes possess the common-law immunity from suit that is traditionally bestowed upon sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). “Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991). There is a strong presumption against waiver of tribal sovereign immunity. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 491 (9th Cir. 1989). The Supreme Court weighed in on this issue when it explained, “. . . as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. “[A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” *Santa Clara Pueblo*, 436 U.S. at 59.

However, the invocation of “magic words” stating that the tribe hereby waives its sovereign immunity has never been required. *Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota, Inc.*, 50 F.3d 560 (8th Cir. 1995). Where a tribe expressly consents to submit a dispute to a particular forum, and be bound by that submission, a waiver of sovereign immunity exists. *Rosebud Sioux Tribe*, 50 F.3d at 562-63. “To agree to be sued is to waive any immunity one might have from being sued.” *New York v. Oneida Indian Nation of New York*, 78 F.Supp.2d 49, 54 (N.D.N.Y. 1998), *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659-60 (7th Cir. 1996).

The Crow Tribal Personnel Practices and Policy Manual states that “appointed employees are covered by the Crow Tribal Personnel Practices and Policies as outlined in the manual.” (Manual at 19, ¶1.10.6.) Therefore, the Plaintiffs are clearly covered by this Manual. Further, the Manual defines grievance as “a work related dispute or an employee’s expressed feelings of dissatisfaction with aspects of his/her working conditions and working relationships which are outside his/her control.” (Manual at 44, ¶1.18.) There is a specific grievance procedure for employees to follow set out in the Manual. (Manual at 44-47.) First, the employee shall discuss the grievance with his/her immediate supervisor. (Manual at 46, ¶1.18.1.) If not settled, the employee should present the grievance in writing to the Director of Personnel Resources. (Manual at 46, ¶1.18.1.) The Director of Personnel Resources is to act as mediator while the grievance is discussed or forward to the Executive Director [of] Tribal Operations within ten working days. (Manual at 46, ¶1.18.2.) Appeals can be made to the Executive Director [of] Tribal Operations and will include the Personnel Department. If the grievance cannot be settled, the employee “may appeal the decision to the Tribal Court, which shall conduct a hearing.” (Manual at 46, ¶1.18.3.) If the employee is not satisfied with the decision of the Tribal Court, “he/she may appeal the decision through proper legal channels in the non-Tribal judicial system.” (Manual at 47, ¶1.18.6.)

The language of the manual seems to express a clear waiver of immunity in that it allows employees to appeal any decision to Tribal Court and further appeal any decision “through proper legal channels in the non-Tribal judicial system.” Like the tribe in *Rosebud Sioux Tribe*, where the parties clearly manifested an intent to resolve disputes by arbitration, thereby waiving their sovereign immunity, the Crow Tribe clearly manifested an intent to resolve disputes through

Tribal Court and the non-Tribal judicial system, thereby waiving their sovereign immunity.

Much like in the case of *Sokaogon Gaming Enter. Corp.*, “[n]o one reading this clause would doubt that the effect was to make the tribe suable.” *Id.* at 659-60.

**DOES THE COURT HAVE FEDERAL QUESTION JURISDICTION
BY VIRTUE OF THE STATUTORY SUPERVISION
OVER THE EXPENDITURE OF TRIBAL FUNDS?**

Pursuant to 18 U.S.C. § 1331, the District Courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. By way of treaty, statutes, grants and other federal programs, funds are awarded to Indian Tribes for their use. In 1978, the Crow Tribe adopted the Crow Tribal Personnel Practice and Policy Manual for all tribal employees by Resolution No. 78-06. Specific authority for expenditure of Crow Tribal Funds was provided by an act of Congress, namely, the Act of June 20, 1936, P.L. 718, 74th Congress, which authorizes the dispersal of Crow Tribal Funds as approved by the Crow Tribal Council and the Secretary of Interior or his representative.

While not directly on point with this matter, *Harjo v. Kleppe*, 420 F.Supp. 1110, 1116 (D.C.D.C. 1976), is similar in that the District Court for the District of Columbia found federal question jurisdiction due to the various statutes which governed tribal authority to dispense revenue sharing funds and Indian claim funds. This case law supports the conclusion that when a question arises regarding the distribution of these federal funds, a federal question arises and this Court has jurisdiction over the matter.

Therefore, this Court has jurisdiction to hear this matter and Defendant’s motion to dismiss (*docket # 4*) is DENIED.

The Clerk of Court is directed to notify the parties of this Order.

Dated this 5th day of October, 2004.


Richard F. Cebull
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

DATE: _____ BY: _____

I hereby certify that a copy
of this order was mailed to:

William Watt
Urban Bear Don't Walk
Thomas Towe