



Since the basis for the request is my appointment by the tribal chairman to a case in which he is a litigant it can be assumed my replacement will face the same problem unless there is some provision of law, of which I am not aware, under which someone else can make the appointment. ...Hopefully you will be able to find a way around this problem.

The undersigned had also deemed himself, and other sitting judges, to be disqualified from hearing either case on the merits, and recused himself from any adjudication on the merits, on April 6, 2006. Under the Standing Rock Sioux Tribe Code of Justice recusal is required in any case in which a judge's impartiality may "reasonably be questioned."

Aside from sitting on the case, the undersigned is also vested by the Code with administrative duties relating to assignment of files and docket management. Code § 1-305, provides:

The Chief Judge of the Standing Rock Sioux Tribal Court shall be responsible for the administration of the Court, the assignment of cases and the management of the Court's calendar and business....

The undersigned being the only judge qualified, as a licensed attorney, or for that matter, as an attorney, the task of finding an impartial judge and of recommending him to the Council for appointment had fallen to the undersigned. The decision to seek the services of a retired North Dakota District Judge, and of Judge Hodny in particular, was made in order to find a judge for these cases who was of unquestioned ethics and competence and was made by the undersigned in consultation with the Chief Justice of the North Dakota Supreme Court.

The Supreme Court maintains a group of retired district judges, as Surrogate Judges, to sit on selected cases in the North Dakota trial and appellate systems, on appointment by the Supreme Court. Generally, these judges are prohibited, under Canon 4 of the Code of Judicial Conduct, from taking adjudicatory appointments outside the North Dakota court system. However, the Commentary to Rule 4(F) provides:

*For the purposes of Section 4F, service as a tribal judge by a county or district judge, with the approval of the Supreme Court, is not considered the performance of judicial functions in a private capacity.*

Judge Hodny was specifically recommended by the Chief Justice, for his impartiality and competence, and approved by the North Dakota Supreme Court for appointment as a Special Tribal Judge.

However, as noted by Judge Hodny, a tribal judge must also be appointed and ratified by the Tribe, which is a sovereign entity, in order to hear any Tribal case. Code § 1-302, is

the apparent Code reference by Judge Hodny, for it is the exclusive authority for appointment and retention of Standing Rock Sioux Tribal Court Judges:

Each Justice and Judge shall initially be appointed by a two-thirds vote of the Tribal Council taken by roll call at a meeting at which a quorum is present. ...Should a vacancy in a judgeship occur between sessions of the Tribal Council, the Chairman of the Tribal Council may fill the vacancy, subject to confirmation by a two-thirds vote of the Tribal Council taken by roll call vote at the next meeting of the Tribal Council at which a quorum is present.

This brings us to a consideration of the appointment of a judge to replace Judge Hodny.

Prior to the filing of the instant action, Judge Lola Agard, who was a party to the first action was appointed by the Chairman and ratified by the Council as a Tribal Judge. She bears the double disqualification of appointment by the Chairman and, as an initial co-plaintiff, having expressed an unqualified opinion on the merits of the matter, being absolutely disqualified

Joining the Court since the matter was re-initiated was Judge Curtis Carroll, sitting as civil judge. However, he suffers the same disqualification stated by the plaintiffs, of appointment by the Chairman, as well as the substantive grounds for self recusal stated by Judge Carroll. Attached is his written recusal from the case.

This leaves only one judge qualified under the Code to hear the matter, Judge B.J. Jones. He has been contacted by the undersigned, as the only remaining possible judge for this case. He has also recused himself; copy attached.

Thus, the only option open is to secure the appointment of another judge under the provisions of Code § 1-302. But, regardless of how § 1-302 is construed, the appointment of a judge able to hear the matter cannot be effected.

Although Judge Hodny has raised the issue of "judge shopping," this Court must take the plaintiffs at their word. They have stated that the reason for disqualification of Judge Hodny is based on the statutory criteria of § 1-308, not improper motive. Pursuant to Rule 1 of the Rules of Court, the Federal Rules of Civil Procedure govern the practice in this Court, when not in conflict with the Code. This includes Rule 11, which provides, in pertinent part:

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney... is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose....

(3) the allegations and other factual contentions have evidentiary support....

If, in fact, the challenge to Judge Hodny was made for legitimate grounds under Code § 1-308, and for the reasons stated, then the Court must conclude that any future appointments or ratifications by any of the defendants in this case must likewise be subject to legitimate challenge. The parties deserve this Court's presumption that its officers, including their counsel, are acting in good faith.

This presents a logical imperative and a conundrum for this Court.

One may question whether, under § 1-302, the Chairman's appointment is a necessary step in seating a judge. It is not clear precisely what the Code means by "between sessions of the Tribal Council." But what is clear is that no judge may be appointed, except by:

1. Ratification by two-thirds of the Council, and
2. By a quorum of the Council.

Article III, Section 7, of the Standing Rock Sioux Tribe Constitution, sets a quorum at 11 members. The Council consists of 17 members, 7 of whom are defendants in the Gipp case and 11 in the Miner case. Thus, absent the defendants, a quorum cannot be reached to ratify a judge in either case. Thus, the logical imperative, as Judge Hodny noted, as well: a judge may not be appointed to hear either case.

The undersigned is cognizant that he has also disqualified himself from presiding on the merits of these files. Thus, the conundrum: the Code, § 1-305 (a) places on the presiding judge a non-delegable duty to effect the assignment of cases, which, given the plaintiffs' challenge to Judge Hodny, has become a legal impossibility.

This judge may not preside over the resolution of any matters involving the determination of disputed facts, but must act to bring about a resolution of these matters. The only resolution on the undisputed facts and the law in this case, given the impossibility of proceeding further, the logical imperative of the plaintiffs' position, is dismissal with prejudice.

This resolution is the only resolution, paradoxically, which provides the plaintiffs with a speedy and efficacious remedy. Dismissal without prejudice would be an interlocutory decision, while prompt dismissal with prejudice provides a prompt avenue of appeal to the Standing Rock Supreme Court, which sits in session in November.

This being a disposition taken strictly as a matter of law, it is fully reviewable on appeal. The Standing Rock Supreme Court, indeed, appears to be the only possible judicial authority on this Reservation which can act without running afoul of the plaintiffs'

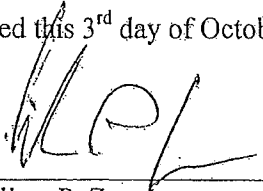
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objection. The Justices all substantially pre-date the present Chairman and Council. The Supreme Court may, it would appear, act without appearance of partiality or impropriety.

The Supreme Court may decide to affirm this Court. Or it may conclude that there exists some acceptable course for resolution of the merits in the Tribal Court. If so, it has the authority of remand with specific instructions for handling. Therefore, it is this Court's opinion that the matter shall be dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 3<sup>rd</sup> day of October, 2006,



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William P. Zuehl  
Associate Judge