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**CROW CREEK SIOUX TRIBE
TRIBAL COURT**

In Re:

MOUNTAIN MOVERS, INC.

CASE NO.

PRE-HEARING BRIEF

Date: January 15, 2013

COMES NOW, the Crow Creek Sioux Tribal Employment Rights Office (hereinafter the "Petitioner"), by and through its counsel of record, Steven D. Sandven, and hereby files its prehearing brief in support of its request for enforcement of agency action.

FACTS

The Crow Creek Sioux Tribe is a sovereign federally recognized Tribe that operates and administers a Tribal Law and Order Code within the boundaries of its Reservation. Pursuant to that authority, the Crow Creek Sioux Tribe established Tribal Ordinance No. 17 (hereinafter the "TERO Ordinance") "for the purpose of requiring Indian preference in employment, training, contract and subcontracting." CCST Tribal Code 17-1-1.

On August 23 and August 29, 2012, TERO Director Tom Pickner informed Morris, Inc., a subcontractor of Mountain Movers, Inc., via memoranda that Morris, Inc. owed TERO fees for recent work performed on the improvement and repair of portions of the Big Bend Dam spillway near Ft. Thompson, South Dakota. Ex. 1 and 2. On or about September 4, 2012, Morris, Inc. responded that Mountain Movers, Inc. was the prime contractor on the Big Bend Dam spillway project. Ex. 3.

Upon receipt of Morris' Inc.'s response, Director Pickner sent a memorandum to Mountain Movers, Inc., who had recently initiated working on the improvement and repair of portions of the Big Bend Dam spillway, informing them that they were responsible for payment of TERO fees pursuant to 17-1-11. Ex. 4. Additionally, Director Pickner informed Mountain Movers how to submit payment and the potential penalties for non-compliance. Id. Director Pickner stated that he wished to informally settle the matter. Mountain Movers, Inc. did not respond. Id.

Shortly thereafter, Director Pickner sent a second memorandum to Mountain Movers, Inc. re-iterating his desire to enter into informal settlement negotiations. Ex. 5. This letter also served as a final warning: if Mountain Movers, Inc. did not respond or was unwilling to discuss payment of TERO Fees, Director Pickner would request a hearing before the TERO Commission. Id. Again, Mountain Movers, Inc. did not respond.

Based upon the non-responsiveness of Mountain Movers, Inc., Director Pickner requested a hearing with the TERO Commission. The TERO Commission sent a Notice of Scheduled Hearing to Mountain Movers, Inc. and Director Pickner. Ex. 6. The original

hearing was scheduled for October 28, 2012 at 10:00 a.m. The hearing was later re-scheduled for October 29, 2012 at 10:00 a.m.

Because the Tribal Council Chambers was being used as a satellite early voting location, the hearing was held in Chairman Sazue's Office at the Tribal Headquarters which is directly down the hall from the Tribal Council Chambers. All parties were present – with the exception of Mountain Movers. An audio recording of the hearing is attached to this brief as Exhibit 7.

At the close of the hearing, the Commission adopted Order No. 12-TERO-01, which found Mountain Movers, Inc. in violation of the Crow Creek Sioux Tribe TERO Ordinance for failure to pay TERO fees. Ex. 8. Specifically, the Commission ordered pursuant to TERO Ordinance 17-1-24 (1) Mountain Movers to suspend any current operations with the Crow Creek Sioux Tribe Reservation; (2) To deny Mountain Movers any future business within the Crow Creek Sioux Tribe reservation; and, (3) to impose a maximum of \$500/violation per day in civil penalties from the date of contract execution. A copy of Order No. 12-TERO-01 was delivered to Mountain Movers, Inc. via facsimile. Ex. 9.

Nevertheless, Mountain Movers, Inc. never responded to Order No. 12-TERO-01 and the Commission's ordered relief has not been satisfied. Pursuant to TERO Ordinance 17-1-24, the Commission initiated these proceedings requesting "such injunctive relief as is necessary to preserve the rights of the beneficiaries of this Ordinance, pending the party's appeal or expiration of the time for appeal."

JURISDICTION

The Tribal Court of the Crow Creek Sioux Tribe has jurisdiction over this matter pursuant to Section 17-1-27 of the TERO Ordinance which provides:

If the Commission's order is upheld by the Tribal Court on appeal, or if no appeal is sought within 20 days from the date of the respondent's receipt of the Commission's order, the Commission shall petition the Tribal Court and the Court shall grant such orders as are necessary and appropriate to enforce the orders of the Commission and the sanctions imposed by it.

Mountain Movers did not file an appeal of the TERO Commission's order, and so, on or about November 19, 2012, Director Pickner filed a timely Petition for Enforcement of Agency Action.

ARGUMENT

I. MOUNTAIN MOVERS, INC WAS AFFORDED DUE PROCESS BUT CHOSE NOT TO PARTICIPATE.

Mountain Movers, Inc. was found in violation of the TERO ordinance, failed to respond to Director Pickner's repeated requests for recovery, failed to attend the TERO Commission hearing concerning its violation of the TERO ordinance, and failed to respond to the allegations of the TERO Commission's petition to this Court. At no point were they ever denied an opportunity to present their argument and be heard. In fact, Director Pickner contacted Mountain Movers, Inc. on two separate occasions with the intent of settling this dispute before formal proceedings were even initiated.

The TERO Ordinance anticipates that many violators may feel accosted by the accusations of the Tribe, particularly since violators are probably not familiar with the purpose or process behind the TERO ordinance. Therefore, the ordinance establishes a long, procedural process to ensure the alleged violator has an opportunity to be heard. Director Pickner and the TERO Commission followed this procedure precisely. First, Director Pickner, after a thorough investigation, sent a memorandum notifying Mountain

Movers, Inc. that they were in violation of the TERO ordinance. He requested that the matter be settled informally pursuant to TERO Ordinance 17-1-18. Once Mountain Movers, Inc. failed to respond to Director Pickner's request for informal settlement, Director Pickner sent a formal notice of alleged violation to Mountain Movers and informed them of their right to a hearing pursuant to TERO Ordinance 17-1-19.

After Mountain Movers, Inc. again failed to respond, Director Pickner requested a TERO Commission hearing. The TERO Commission scheduled a hearing and provided thirty days' notice for Mountain Movers, Inc. to respond in compliance with TERO Ordinance 17-1-22 and 17-1-23. In providing notice, Mountain Movers was officially notified of their numerous due process rights. For example, they were informed of their right to review the Director's files - Mountain Movers, Inc. made no such request. The TERO Commission also allowed both parties to present evidence and witness testimony - Mountain Movers, Inc. did not attend the hearing. The TERO Commission also did not enter an unduly harsh or unconscionable order for relief. All relief was within the boundaries of Section 17-1-24 of the TERO Ordinance.

As the foregoing illustrates, Mountain Movers, Inc. was afforded adequate due process to dispute the violation and any failings to utilize that due process are solely the of Mountain Movers.

II. THE BIG BEND DAM SPILLWAY IS WITHIN THE EXTERIOR BOUNDARIES OF THE CROW CREEK SIOUX INDIAN RESERVATION.

The Crow Creek Indian Reservation is a federally recognized Indian Reservation in South Dakota. The Reservation boundaries are defined in the Great Sioux Agreement of 1889, Act of March 2, 1889, 25 Stat. 888. The Army Corp of Engineer claims that they

are not within the boundaries of the Crow Creek Indian Reservation because of the Supreme Court's decision in South Dakota v. Bourland, 508 U.S. 679 (1993) which stated that the Flood Control Act of 1944 had effectively taken the Tribe's right to regulate hunting and fishing on that land away. To the contrary, the Bourland case was specifically discussing the rights of the Cheyenne River Sioux Tribe in relation to the creation of the Oahe Dam and does not apply to the Crow Creek Sioux Tribe.

The Eighth Circuit U.S. Court of Appeals addressed the boundaries of the Crow Creek Sioux Tribe Indian Reservation in United States v. Wounded Knee, 596 F.2d 790 (8th Cir. 1979) (hereinafter "Wounded Knee"). Here, the Court found that Congress did not intend to diminish the size of the Crow Creek Indian Reservation in the Big Bend Act of 1962. Id. "Once Congress has established a reservation, all tracts included within the boundaries remain a part of the reservation until separated from it by Congress. Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983) (*citing* DeCoteau v. District County Court, 420 U.S. 425 (1974)). Moreover, an Indian reservation's boundaries can only be disestablished by clear congressional intent to create a reservation with adjusted boundaries. Id. *citing* United States v. Dupris, 612 F.2d 319, 320-322 (8th Cir. 1979); United States ex rel. Condon v. Erickson, 478 F.2d 684, 687 (8th Cir. 1973). Disestablishment does not occur simply because Congress intended to remove Indian control of certain land within the boundaries. Id.

In Wounded Knee, the Court noted that the Big Bend Act of 1962 did not include the words "as diminished", even though many of the other Congressional Acts relating to the Pick-Sloan projects did. For example, in a similar dispute between the State of South Dakota and the Lower Brule Sioux Tribe, the Court noted, "This language falls short of

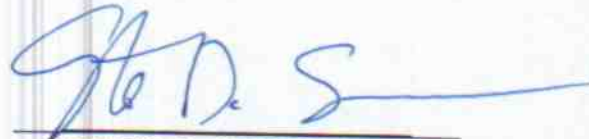
that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983). In Wounded Knee, the 8th Circuit explicitly described the legislative review of the Big Bend Act of 1962:

We are not free to speculate that the words "as diminished" were inadvertently omitted from the Act which authorized the Big Bend Dam and Reservoir taking. The bill which eventually became P.L. 87-735 was processed through the usual legislative channels. It was referred to the House Committee on Interior and Insular Affairs which studied the bill and received the views of various government agencies and officials including the Secretary of the Interior and officers of the Army Corps of Engineers. After being amended, the bill was reported to the full House of Representatives which passed and sent it to the Senate. A similar procedure was followed in the Senate. In due course the bill reached the President who signed it into law. Absent some strong indicia we must not assume that Congress carelessly or inadvertently omitted the critical words which it had included in similar previous acts with no intention or awareness that such an omission would result in any consequences. Defendants strenuously argue that there was simply no reason for Congress to treat the Crow Creek Sioux Reservation differently in this instance than it had treated other reservations in previous acts where Congress did explicitly diminish the reservations. [...] Congress was aware that the Big Bend project would take a large quantity of valuable bottom land from the Crow Creek Sioux Tribe. A substantial number of the Indians on the reservation lived near the river. Moreover, this land supplied an extensive amount of the tribe's firewood and building materials and was the location of the prime grazing and hunting land on the reservation. In short, the land taken by the project constituted an important source of livelihood for the Indians living on the reservation. See H.R.Rep.No.853, 87th Cong., 1st Sess. 10 (1961)." Wounded Knee, 596 F.2d at 794-795.

Consistent with the Wounded Knee holding, there has been a long history of the Crow Creek Sioux Tribe regulating the land surrounding the Big Bend Dam. Indeed, the Tribe is the only entity that has provided regulations for Indians and non-Indians, fire and police protection while the Army Corp of Engineer has "refused to control or assist the tribe in controlling this area." Wounded Knee, 596 F.2d at 795. The Eighth Circuit

upheld this interpretation of the Big Bend Act of 1962 in Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983) stating, "Although the land in issue in Wounded Knee was taken from the Crow Creek Sioux Reservation by the Big Bend Act, we are bound by that precedent." Id. at 815. As such, Petitioner has the authority, and indeed the absolute right, to regulate activities within this area of the reservation.

Dated this 15th day of January, 2013.



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CERTIFICATE OF SERVICE

I, Steven D. Sandven, hereby certify that on the 15th day of January 2013, I filed the foregoing PREHEARING BRIEF with the Clerk of Court for the Crow Creek Sioux Tribal Court via hand-delivery and provided a copy to Mountain Movers, Inc. 628 ½ 6th St., Ste. 204, Rapid City, SD 57701 via facsimile.



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