No. 06-3093

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Plains Commerce Bank,

Plaintiff - Appellant

v.

Long Family Land and Cattle Company, Inc. and
Ronnie and Lila Long,

Defendants - Appellees

On Appeal from the United States District Court
For the District of South Dakota
District Court File No. 05-3002

BRIEF AND APPENDIX OF *AMICUS CURIAE* CHEYENNE RIVER SIOUX TRIBE SUPPORTING AFFIRMANCE OF MEMORANDUM OPINION AND ORDER DATED JULY 17, 2006

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INTEREST OF AMICUS CURIAE

The Cheyenne River Sioux Tribe ("CRST") submits this brief with consent of all of the parties as *amicus curiae*.

The CRST is a signatory to the Treaty with the Sioux, et al., April 29, 1868. 15 Stat. 635, reprinted in 2 Kappler, Indian Affairs--Laws and Treaties (1905). Pursuant to the Indian Reorganization Act, the CRST adopted a Constitution. 48 Stat. 984. The Constitution established a Tribal Court "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe." Constitution and By-Laws of the Cheyenne River Sioux Tribe ("CRST Const."), Art. IV, § 1(k).

Appellees Ronnie and Lila Long (the "Longs") are enrolled members of the CRST. The Longs, and the Long Family Land and Cattle Company, Inc. (the "Company"), a majority-owned Indian corporation, filed a lawsuit in CRST Tribal Court against the Appellant Bank of Hoven n/k/a Plains Commerce Bank (the "Bank"). A judgment was entered in favor of the Longs and the Company. That judgment was upheld on appeal by the CRST Tribal Court of Appeals. Thereafter, the Bank filed this proceeding alleging that the Tribal Court lacked subject matter jurisdiction and denied it due process.

The CRST has an interest in this matter. The Longs are tribal members and the property involved lies within the CRST reservation. The Bank challenges the Tribal Court's authority to hear a dispute arising out of commercial lending

transactions between non-Indian lenders and tribal members. Indeed, the Bank has routinely made BIA guaranteed loans on the Reservation to members of the CRST. See, e.g., Bank of Hoven v. Director, Office of Economic Development, B.I.A., 2000 I.D. Lexis 58, 34 I.B.I.A. 206 (2000) (BIA guaranteed 90% of $500,000 loan made by the Bank to the Company); River Bottom Cattle Company, Inc. v. Acting Aberdeen Area Director, B.I.A., 1994 I.D. Lexis 5 at *1, n. 1, 25 I.B.I.A. 110 (1994) (Bank sought 80% guaranty of $410,040 loan to majority Indian-owned cattle company). The CRST has an interest in preventing discrimination in lending transactions on the reservation. The Bank's argument in the Tribal Court of Appeals underscores the importance of permitting the Tribal Court to adjudicate claims against financial institutions who enter consensual business relationships with tribal members:

> What I'm concerned with, is that this bank is not acting on its own. There are a number of banks around that are looking at this case, not just this Tribe; there are a number of banks around. And let me tell you, if they want to discriminate against tribal members, they can do it and get by with it. They can. They don't have to make everybody loans. They can find a reason for rejecting the loans.

(Appendix of *Amicus Curiae* Cheyenne River Sioux Tribe ("C.App.") 00005, which is attached hereto.)

This brief is submitted pursuant to the Tribal Council's authority to "assist a member of the tribe in presenting their claims and grievances before any court…."

CRST Const., Art. IV, §1(b). The Tribal Council is authorized to retain attorneys to provide such services and has duly authorized all counsel of record to appear on its behalf. The CRST requests that it be allowed to participate in oral argument.

ARGUMENT

I. THE CRST TRIBAL COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION OVER THIS ACTION.

"Tribal courts play a vital role in tribal self-government…and the Federal Government has consistently encouraged their development." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14, 107 S. Ct. 971, 975-76 (1987) (citations omitted). As a general matter, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana v. United States, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258 (1981). Yet this general proposition is subject to controlling provisions in treaties, congressional direction enlarging tribal court jurisdiction and the two exceptions identified in Montana. Strate v. A-1 Contractors, 520 U.S. 438, 453, 117 S. Ct. 1404, 1413 (1997).

Montana is the "pathmarking" case concerning tribal civil authority over non-Indians. Nevada v. Hicks, 533 U.S. 353, 358, 121 S. Ct. 2304, 2309 (2001). After stating the general rule of no jurisdiction over non-members, the Court in Montana cautioned that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565, 101 S. Ct. at 1258. Under the two exceptions established by the Court, tribes retain jurisdiction over: (1) "the activities of non members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"

and (2) “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 565-66, 101 S. Ct. at 1258.

A. The Bank Entered Into A Consensual Relationship With Members Of The CRST.

Ronnie and Lila Long are enrolled members of the CRST. (Appellees Long Family Land and Cattle Co., Inc. and Ronnie and Lila Long's Separate Appendix ("L.App.") 00040.) At the time of the loan restructure negotiations, Ronnie and Lila Long owned all of the Company's stock. (L.App. 00041.) The negotiations were conducted on the CRST Reservation and Ronnie Long represented the Company. (L.App. 00041-00042.) The loans were further secured by the property in which Ronnie and Lila Long had a beneficial interest. Under his Will, Ronnie Long’s father bequeathed the property to his children. (L.App. 00028-00029; L.App. 00041; Appellant Plains Commerce Bank's Separate Appendix ("A.App.") 00002.) All of Ronnie Long’s brothers and sisters transferred their interests in the property to him in December, 1995. (Id.)

Ronnie and Lila Long were party plaintiffs, and, indeed, necessary parties to this litigation because of their beneficial ownership interests in the property. The Bank did not move to dismiss them from the litigation on the grounds that they had no individual claims. On the contrary, when the Bank asked the Tribal Court to

serve a Notice to Quit, they asked for service on the Company and Ronnie Long, individually. (L.App. 00046; A.App. 00146-00147.)

Notwithstanding the undisputed evidence showing the Longs' personal interests, the Bank states that it "dealt with the Long Company." (Appellant's Br., p. 10.) The Bank then argues that it had no consensual relationship with a tribal member because the Company is a South Dakota chartered family farm corporation. Id.

The Bank's argument not only ignores the Longs' personal interests, it ignores the fact that the tribal membership of the owners was a critical part of the transaction. The Company's status as an Indian-owned entity was essential to the Bank's ability to obtain BIA guarantees of the loans. "To be eligible for a BIA-guaranteed or insured loan, a business entity…must be at least 51 percent Indian owned…." 25 C.F.R. §103.25(b). Failure to maintain the required ownership is a default allowing the lender to seek available remedies, but if the lender continues the loan, the guaranty becomes invalid. Id. For this reason, the Company's Articles of Incorporation required that Native Americans own 51% of the stock of the Company at all times. (L.App. 00040.) The district court correctly recognized that the majority Indian-owned status of the Company was an essential part of the commercial relationship sought by the Bank:

> The BIA guarantees allowed the bank to make loans to the Longs with greatly reduced risk. In fact, after the Longs' cattle died, the bank was able to submit a claim on

> the BIA guarantees, and the bank received $392,968.55 from the BIA. Simply stated, the loan agreements between the bank and the Long Company were not only crafted with tribal membership in mind; they would not likely have been possible without it.

A.App. 00009 (footnote omitted).

To accept the Bank's argument, one must read Montana's first exception to exclude all consensual relationships between non-Indians and all Indian-owned corporations other than corporations wholly owned by Indian tribes. Such a reading is not defensible. The Bank makes much of the fact that the Longs incorporated under state law, as opposed to tribal law. (Appellant's Br., pp. 10-11.) The Bank ignores the fact that no mechanism existed under tribal law for the Longs to incorporate their business. (A.App. 00009.) However, even had such a mechanism existed, incorporation under tribal law would not have transformed the Longs' corporation into a tribal member or given it an Indian racial identity. If that were the case, then mere incorporation under tribal law would operate to transform all corporations, including those owned by Indians and non-Indians alike, into tribal members – a nonsensical result. What matters is not the law under which an entity is incorporated, but the tribal membership status of the corporation's owners.

The Bank entered into a consensual relationship with tribal members. Accordingly, the CRST Tribal Court had subject matter jurisdiction over this dispute.

B. The District Court Did Not Hold That The Bank Had Waived Subject Matter Jurisdiction.

As the district court rightly observed, the Bank's position on subject matter jurisdiction has been "somewhat equivocal." (A.App. 00012.) Indeed, the argument that the Montana consensual relationship test was not satisfied, was never made in the CRST Tribal Court or the CRST Tribal Court of Appeals.

The Bank availed itself of the Tribal Court's jurisdiction when it was in its interests to do so. The Bank asked the Tribal Court to serve a Notice to Quit on Ronnie Long and the Company and counterclaimed for wrongful possession. (A.App. 00145-00147.) The Notice to Quit does not reflect, as the Bank contends, that it was the service of process for a state court action. (Appellant's Br., p. 13.) It does not even mention such a suit. Instead, the Notice demands that Ronnie Long and the Company immediately cease possession of the property. Id.

The Bank then counterclaimed for possession. While the Bank may have pled its counterclaim in the alternative, its conduct in the litigation was quite different. Indeed, the Bank moved for summary judgment and unequivocally stated that the CRST Tribal Court had "jurisdiction over the subject matter of this action." (L.App. 00059.) The Bank asked the Tribal Court for an order of eviction and to grant them possession without any suggestion that its request was conditioned on some jurisdictional hedge.

The district court did not hold that this conduct was a waiver. Rather, the district court observed that the Bank's use of the Tribal Court was further evidence for the consensual relationship between the Bank and the Longs. (A.App. 00012 (citing Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006)).)

II. THE TRIBAL COURT PROPERLY EXERCISED JURISDICTION OVER THE CLAIM OF DISCRIMINATION.

A. No Federal Law Claim For Discrimination Was Asserted.

The discrimination claim was not based on federal law as the Bank contends. This argument has also changed considerably over the course of the litigation. In the Tribal Court of Appeals, the Bank's counsel stated: "[N]ot to say that the plaintiff has brought forth specifically, 42 U.S.C. 1981. They haven't." (C.App. 00002.) In the district court, the Bank asserted, as an uncontested fact, that the "cause of action for discrimination was tried at the trial court level based on a 42 U.S.C. 1981 claim." (Pls. Statement of Uncontested Facts, ¶ 17.) Now on appeal, the Bank believes that it was an action commenced under 42.U.S.C. § 2000d. (Appellant's Br., p. 17.)

Yet, the undisputed fact is that the Complaint does not assert or even reference a federal law discrimination claim. (A.App. 00013.) The Bank's entire jurisdictional claim hinges on whether the claim was based on federal law. The Bank did not challenge the Complaint with either a motion for failure to state a claim or a motion for a more definite statement. Either of these well-known

procedural devices would have required an identification of the precise legal basis or bases for the claim. Having failed to raise the issue in the trial court by appropriate motion, the Bank should not now be heard to say that the claim was a de facto claim under 42 U.S.C. § 1981, 42 U.S.C. §2000d, or some other federal law.

The Tribal Trial Court looked to federal antidiscrimination law in denying the Bank's motion to dismiss the Longs' discrimination claim and the Bank's motion for judgment notwithstanding the verdict. This does not mean that the claim, as plead and tried before the Tribal Court, was based on federal, rather than tribal, law. Indeed, in affirming the judgment, the Tribal Court of Appeals noted that tribal law permits the Tribal Courts to derive the elements of tribal causes of action from federal law. (A.App. 00104.) The Tribal Court of Appeals was careful to note that this process "is not the pursuit of a federal cause of action in tribal court … but that of a 'borrowing' of federal law to stand in or amplify tribal law where it is necessary." Id.

This comports with Justice Souter's admonition in Hicks, 533 U.S. at 384-385, 121 S. Ct. at 2323, that tribal law is often a "complex mix of tribal codes and federal, state, and traditional law." Private claims of discrimination based on status are recognized under federal and state statutes. See, e.g., 42 U.S.C. §§ 2000-d, et seq. (2003); S.D. Codified Laws § 20-13-21 (2003). They are also recognized

under the common law of the CRST which emphasizes principles of equality, justice, fair play, and decency to others. (A.App. 00131.)

Discrimination is prohibited under tribal common law in much the same way that other injurious or tortious conduct is prohibited. The Supreme Court has long recognized that "an action brought for compensation by a victim of … discrimination is, in effect, a tort action." Meyer v. Holley, 537 U.S. 280, 285, 123 S. Ct. 824, 828 (2003) (citing Curtis v. Loethen, 415 U.S. 189, 94 S. Ct. 1005 (1974)).

Tort claims are precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation," CRST By-Laws, Art. V, § 1(c), including claims arising out of "tortious conduct." C.R.C. § 1-4-3. Just as the Tribal Court did not need congressional authority to hear the Longs' contractual-based claims (Count II (breach of contract), Count III (a failure of consideration), Count VII (bad faith)), it did not need congressional authority to hear the Longs' tort-based claims (Count I (fraud), Count VI (discrimination), and Count VII (unconscionability)).

B. Adjudication of Common Law Tort Claims, Including Discrimination Claims, Is An "Other Means" By Which Tribes May Regulate The Activities Of Non-Members.

The district court properly recognized that tort claims are part of the "other means" by which Indian tribes may regulate the activities of non-Indians who enter

consensual relationships with tribal members. (A.App. 00010.) The district court distinguished Ford Motor Co. v. Todecheene, 394 F.3d 1170 (9th Cir. 2005), because in that case there was no nexus between the tortious conduct and the consensual relationship. Tribal court adjudication of common law causes of action, including tort claims, is a well-established method by which tribes may regulate the activities of non-Indians who enter consensual relationships with the tribal members.

In Montana, the Supreme Court cited Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 (1959) as support for the proposition that tribes may in some cases regulate activities of non-members. The suit at issue in Williams was a breach of contract action between a non-Indian general store proprietor and two tribal members concerning the sale of goods on the Navajo Indian Reservation. 358 U.S. at 217-219, 79 S. Ct. at 269. The court found that the Navajo courts had exclusive jurisdiction over such actions. Id. at 222, 79 S. Ct. at 272. The citation of Williams makes clear that adjudication of common law actions involving non-Indians is included within the "other means" by which tribes may "regulate…the activities of nonmembers who enter consensual relationships with the tribe or its members." See Montana, 450 U.S. at 565-566, 101 S. Ct. at 1258.

Since Montana, on four separate occasions, the Supreme Court has addressed the power of Indian tribal courts to adjudicate tort claims brought by tribal members against non-Indians. In none of these cases did the Court suggest

that tribal common law -- or, to be more precise, the adjudication in tribal court of tort claims against nonmembers -- was an inappropriate bases for tribes to regulate the on-reservation conduct of non-Indians. See National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447 (1985) (tort claim arising out of motorcycle accident); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971 (1987) (tort claim for bad faith refusal to settle); Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404 (1997) (tort claim arising from motor vehicle accident); Nevada v Hicks, 533 U.S. 353, 121 S. Ct. 2304 (2001) (claims for trespass and abuse of process).

This Court should affirm the order finding jurisdiction over this dispute in the CRST Tribal Court because the discrimination claim arose out of the consensual relationship between the Bank and tribal members.

III. EVEN IF THERE WERE NO JURISDICTION OVER THE DISCRIMINATION CLAIM, THE DAMAGE AWARD WAS ENTIRELY SUPPORTED BY THE BANK'S BREACH OF CONTRACT.

The damages awarded by the jury were based on the financial consequences of the breach of the Loan Agreement and the resulting inability of the Company to exercise the purchase option for the property. The Company offered evidence that it suffered $1,236,792 in damages from 1997 to 2002. (L.App. 00044.) The damage calculation measured the net financial consequences to the Company arising from the Bank's breach of the loan agreement during each calendar year

from 1997 to 2002. (C.App. 00006-00012.) Specifically, the damages were attributable to the death of the Company's cattle, the lost opportunity from not having the 110 calves, and the loss of use of the property. (Id.)

Although the jury found that the Bank had intentionally discriminated against Ronnie and Lila Long, no attempt was made to identify any economic consequences from the Bank's discriminatory behavior and the Longs did not ask for (and the jury was not instructed that it could award) non-economic and punitive damages. (C.App. 00013.) Instead, the jury was instructed that the measure of damages were the amount which would compensate the Company and the Longs for a breach of contract. (Id.)

The damage award was completely supported by the verdict in favor of the Company for the breach of contract. The Tribal Court undeniably had jurisdiction over claims that supported the entire verdict, even if there were no jurisdiction over the discrimination claim.

IV. THE BANK'S DUE PROCESS CLAIM IS NOT PROPERLY BEFORE THIS COURT.

The Bank argues that it is entitled to "a declaration that the Tribal Court of Appeals denied it due process," Appellant's Br., p. 19, because the Tribal Court of Appeals "recast the Longs' discrimination claim from federal to tribal law." Id., at 37. Not only does this argument lack merit (as will be shown in Part V), the issue

itself is not properly before this Court. No jurisdictional basis exists for this Court to issue the declaratory relief sought by the Bank.

A. The Court Lacks Federal Question Jurisdiction Over The Bank's Due Process Claim.

In its Complaint for Declaratory and Related Relief, the Bank asserts that the "Court has federal question jurisdiction over the subject of this action pursuant to 28 U.S.C. § 1331." Compl. at pp. 2, 5. This is certainly true of the Bank's claim that the CRST lacked jurisdiction over the Longs' suit in Tribal Court. The Supreme Court has long made clear that, "§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction" under Montana and its progeny. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 857, 105 S. Ct. 2447, 2454 (1985). The same cannot be said for the Bank's due process claim.

The due process claim does not arise under the Constitution of the United States. Neither the CRST nor the CRST Tribal Courts are subject to the due process clauses of the Fifth or Fourteenth Amendments to the U.S. Constitution. The Supreme Court has made clear that, "the powers of local self-government" exercised by Indian Tribes "are not operated upon the fifth amendment," Talton v. Mayes, 163 U.S. 376, 384, 16 S. Ct. 986, 989 (1896), the "other provisions of the Bill of Rights,…[or] the Fourteenth Amendment." Santa Clara Pueblo v. Martinez,

436 U.S. 49, 56, 98, S. Ct. 1670, 1676 (1978). These constitutional provisions operate on the national and state governments, not tribal governments.

The Indian Civil Rights Act ("ICRA") of 1968 imposes on tribal governments some, but not all, of the provisions of the Bill of Rights. 25 U.S.C. §§ 1301-1303. Among the provisions imposed is a due process requirement similar to that found in the Fifth and Fourteenth Amendments. ICRA provides that, "[n]o Indian tribe in exercising powers of self-government shall … deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8).

However, ICRA provides no jurisdictional basis for the Bank's claim for declaratory relief in federal court. The exclusive federal remedy for violations of ICRA is the right of an individual to petition for a "writ of habeas corpus … to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. In Santa Clara Pueblo v. Martinez, the Supreme Court held that ICRA does not expressly or impliedly authorize federal actions for declaratory or injunctive relief. 436 U.S. at 72, 98 S. Ct. 1684.

The Martinez court found that, "Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people." 436 U.S. at 66-67, 98 S. Ct. at 1681 (internal citation and quotation marks omitted). The Court declined to find federal jurisdiction over claims for

declaratory or injunctive relief because of the "intrusive effect of federal judicial review upon tribal self-government." 436 U.S. at 69, 98 S. Ct. 1682. Thus, even in conjunction with federal jurisdictional statutes like 28 U.S.C. § 1343(4) or 28 U.S.C. § 1331, ICRA does not confer jurisdiction to the federal courts over actions for declaratory or injunctive relief. 436 U.S. at 54-55, 98 S. Ct. at 1675. Such actions may be brought in the tribal courts, 436 U.S. at 65-66, 98 S. Ct. at 1680-1681, but not the federal courts. 436 U.S. at 72, 98 S. Ct. at 1684.

B. The Bank Is Not Entitled To Declaratory Relief To Shield Itself From A Speculative, Future "Foreign Judgment" Recognition Proceeding.

Perhaps realizing the limitations on federal jurisdiction over ICRA claims, the Bank nowhere alleges that the CRST or the CRST Tribal Courts violated the Bank's rights under ICRA. Instead, the Bank argues that it is entitled to a declaratory judgment in order to prevent the Longs from seeking recognition of the Tribal Court judgment under principles of comity. (Appellant's Br., p. 19.) Yet, the Longs have not asserted in this action, by way of counterclaim or otherwise, that the Tribal Court judgment is entitled to enforcement in the district court. The Bank recognized as much in the district court proceedings, stating that, "this is not a case in which [the Longs] have filed an affirmative claim seeking recognition of the Tribal Court judgment by this Court." Pl. Mem. at 9 (emphasis added). This distinguishes the instant case from Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997). In Wilson, a tribal member "brought suit in the United States District Court

… to register [a] tribal court judgment in the federal court system." 127 F.3d at 807. The court rejected an argument that the tribal court judgment was entitled to recognition under the Full Faith and Credit Clause and its implementing legislation. Const. Art. IV, § 1, cl. 1; 28 U.S.C. § 1738. The court instead held that principles of comity govern whether the courts of the United States should recognize and enforce tribal judgments. 127 F.3d at 809. Finding that the tribal court lacked jurisdiction over the underlying tribal court proceedings, the Wilson court held that the tribal court judgment was not entitled to recognition or enforcement in federal court. Id. at 813.

Were the Longs ever to bring suit in federal court seeking recognition of the CRST Tribal Court judgment (assuming there were a jurisdictional basis for them to do so), the Bank would have a full and fair opportunity to raise any claims it might have concerning alleged flaws in the Tribal Court proceedings. This is precisely what happened in Wilson. However, given that the Longs have not sought federal recognition of the Tribal Court judgment, the Bank's claims are not ripe for review. The "basic rationale" behind the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves" in "disagreements" premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 580-581, 105 S. Ct. 3325, 3332-33 (1985) (internal citations and quotation marks omitted). The federal courts are "not empowered to

decide abstract propositions … or to declare, for the government of future cases, principles or rules of law." Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900). This Court need not - and should not - entangle itself in the merits of speculative, future "foreign court" recognition proceedings.

The Longs may never seek recognition or enforcement of the CRST Tribal Court judgment in the federal court system. Instead, they may seek to enforce the judgment exclusively within the CRST Tribal Court system by, for example, attempting to reach any on-reservation income or assets of the Bank. Alternately, they may seek to enforcement the judgment in the state court system.

South Dakota law allows for the recognition of tribal court judgments as a matter of comity. See S.D.C.L. § 1-1-25. Before recognizing a tribal court judgment, the state court must find, among other things, that the "judgment was not fraudulently obtained," the tribal court process "assure[d] the requisites of an impartial administration of justice," and the tribal court judgment "does not contravene the public policy of the State of South Dakota." Id. Resolution of these questions requires the state courts to apply unique principles of state law and state public policy. This Court should not preclude the state courts from considering these questions in the first instance and in accordance with the laws and policies of the State.

In sum, the Bank's due process claim is not properly before this Court. The claim does not arise under the U.S. Constitution and the relief the Bank seeks is not

authorized by ICRA or other federal laws. The Bank's request for declaratory relief is inappropriately directed at a speculative comity proceeding that may never be brought and that, even if brought, may not raise questions of federal law.

V. THE BANK WAS NOT DENIED DUE PROCESS OF LAW IN TRIBAL COURT.

If this Court determines that it has jurisdiction to reach the Bank's due process claim, it should deny the claim as wholly without merit. The gravamen of the Bank's argument is that it was denied due process of law in the Tribal Court when, in its words, "the Tribal Court of Appeals found a basis in tribal law," as opposed to federal law, "to support the discrimination decision." (Appellant's Br., p. 1.) The Bank asserts that, throughout the lower court proceedings, the discrimination claim was brought under federal law, and it was not until the appellate level that it was alleged for the first time, by the Tribe as *amicus*, that the discrimination claim arose under tribal law. This alleged switch was an unfair surprise, the Bank says, depriving it of a fair opportunity to defend against the underlying allegations of intentional discrimination.

These arguments do not hold up to scrutiny: the Longs' claim was pled as a common law claim of intentional, tortious discrimination; the Longs never alleged federal law as the basis of the claim; the Tribal Court never instructed the jury that the discrimination claim arose under federal law; and the Bank had a full and fair

opportunity to litigate the factual and legal bases of the discrimination claim in the Tribal Court.

A. The Longs' Discrimination Claim Was Brought Under Tribal, Not Federal, Law.

The Longs' discrimination claim was brought under tribal law. The complaint alleged that, in selling the Longs' land, the Bank "unfairly discriminated" against the Longs in favor of non-tribal members. (A.App. 00070.) The Longs alleged that the Bank's sale of the land to non-Indians on terms more favorable than those offered the Longs "constitute[d] unequal treatment and unfair discrimination." (A.App. 00071.) The complaint did not mention federal law. (A.App. 00070-00071.) Instead, without citing any constitutional or statutory provisions, the complaint set forth the basic elements of the Longs' claim of discrimination.

B. The Tribal Court's Jury Instructions and Interrogatories Did Not Mention Federal Law.

It is incorrect to assert that the Tribal Court "submitted [the discrimination claim] to the jury under federal law," Appellant's Br., p. 4, and "instructed the jury" that "the Longs' discrimination claim was based on federal law." (Appellant's Br., p. 18.) The Bank fails to cite a single jury instruction or interrogatory that supports these assertions.

The Tribal Court's instruction and interrogatory to the jury on the discrimination claim made no mention of federal law:

> A person or entity engages in discrimination under these instructions when that person or entity intentionally denies a privilege to a person based solely on that person's race or tribal identity.

A.App. 118. Similarly, the interrogatory did not reference federal law. It asked:

> Did the Defendant Bank intentionally discriminate against the Plaintiffs Ronnie and Lila Long based solely on their status as Indians or tribal members in the lease with option to purchase …?

L.App. 00004.

C. The Bank's Incorrect Assumptions About The Nature Of The Longs' Discrimination Claim Do Not Form The Basis Of A Due Process Claim.

The Bank concedes that "the Longs' pleadings made no explicit reference to federal law." (Appellant's Br., p. 31.) Yet, the Bank maintains that it was somehow "clear" that everyone "believed" the Longs' claim "was a federal discrimination claim." Id. Perhaps the Bank "proceeded" under this "assumption." (Appellant's Br., p. 36.) But this is of no consequence. Nothing in the Longs' submissions or arguments in the tribal court provided a reasonable basis for this assumption.

The Bank's characterization of the Tribal Court proceedings is inaccurate. In its brief in this Court, the Bank asserts categorically - more than a dozen times - that "the Longs litigated a federal discrimination claim" in the Tribal Court. (Appellant's Br., p. 6 (emphasis added); see id., at pp. i, 4, 6, 15, 18, 20, 29, 31, 34, 35, 36, 37.) Yet, out of the massive volume of pleadings and briefs submitted

to the Tribal Court and the more than 600 pages of trial transcript, the Bank points to but two items in support its assertion that the Longs "tried the discrimination claim under federal law." Id. at 15.

First, in the district court, the Bank claimed that the Longs argued in a post-trial brief in the Tribal Court that "the Tribal Court had jurisdiction over a federal claim of discrimination." (C.App. 00015.) But, not a single mention of federal law appeared in the Longs' post-trial brief, see A.App. 00122, and the Bank has not repeated this argument in this Court.

Second, in the district court and again in this Court, the Bank alleges that the Longs' attorney stated on the record in the Tribal Court that the Bank violated "the federal law regarding 'private lending.'" (Appellant's Br., p. 36 (emphasis added).) This is simply not true. In the relevant exchange, the Tribal Court judge directed the following question to the Longs' attorney: "And I guess the discrimination law you are alleging was violated was in private lending?" (A.App. 117 at p. 437.) The Longs' attorney replied: "Yes." Id. This was the only statement made by the Longs' attorney on the subject. The Tribal Court of Appeals and the district court did not find this statement to be evidence that the Longs were litigating a federal discrimination claim. Nor should this Court.

The Bank eventually concedes that, "[t]he question of whether the Longs based their discrimination claim on tribal or federal law was not 'beyond doubt.'" (Appellant's Br., p. 34.) The Bank argues, though, that this question was one that

called for "additional evidence and argument in the Tribal Court." Id. The Bank had a full and fair opportunity to litigate the issue in tribal court proceedings. The Bank had notice of the Longs' claim of intentional discrimination. The Bank knew, or had to know, that the Complaint did not mention federal law. The Bank had ample opportunity to conduct discovery as to the factual basis of the claim. The Bank also had ample opportunity to file pretrial motions to clarify the source of law for the claim. That the Bank relied instead on its own assumptions and beliefs about the source of law for the Longs' claim does not give rise to a due process violation.

D. The Tribal Appellate Court's Articulation Of A Tribal Common Law Tort Of Intentional Discrimination Was An Appropriate Exercise Of Its Judicial Authority.

The Tribal Court of Appeals articulated a tribal law basis for the Longs' discrimination claim. The appellate court expressly held that, under the CRST common law, discrimination in lending based on race or tribal membership is "tortious conduct" over which the tribal courts have jurisdiction pursuant to CRST Law and Order Code § 1-4-3. The court based its common law holding on the reported decisions of the U.S. Supreme Court and the CRST. (See A.App. 00103-00104.[1])

[1] The tribal appellate court did not base its holding on historical texts, library books, or other archival information, as the Bank would have this Court believe. See Appellant's Br., p. 23. Indeed, in its nineteen-page opinion, the Tribal Court of Appeals cited no such sources. See A.App. 00097-00115.

The common law basis for the discrimination claim was not raised for the first time by the Tribe as amicus, as the Bank suggests. (Appellant's Br., p. 20.) It was raised by the Longs themselves when, in their Complaint, they raised a common law claim of discrimination, citing no federal, state, or even tribal statutes. The Tribe did not expand the scope of the Longs' Complaint, nor did it ask the Tribal Court of Appeals to issue any new relief not already requested by the Longs. Cf., Banks v. Heun-Norwood, 566 F.2d 1073, 1078 (8th Cir. 1977) (refusing invitation of amicus to direct district court to issue injunction that was never requested by plaintiff).

However, even if the Tribe had been the first to raise tribal common law as a source of law for the discrimination claim, this would not have deprived the Bank of its due process rights. Amici can raise new arguments on appeal. Indeed, the U.S. Supreme Court has said that it "will consider arguments raised only in an amicus brief." Davis v. U.S., 512 U.S. 452, 457, 114 S. Ct. 2350, 2354 (1994) (emphasis added). See Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989) (addressing retroactivity claim raised only in an amicus brief); Mapp v Ohio, 367 US 643, 81 S. Ct. 1684 (1961) (applying exclusionary rule to the States even although such a course of action was urged only by amicus).

The Tribal Court of Appeals properly exercised its authority in articulating the tribal common law tort of intentional discrimination. It derived the law from "the interstices of prior opinions and a well-considered judgment of what is best

for the community." See Gregory v. Ashcroft, 501 U.S. 452, 466, 111 S. Ct. 2395, 2403 (1991). The court applied reason, common sense, and core tribal values to state a rule of law that serves the public welfare and interests of justice, responds to the changing conditions of tribal society, and meets the social needs of the community. See Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968).

The Bank incorrectly asserts that tribal common law is based solely on "tribal tradition and custom," Appellant's Br., p. 23, which "can only be adduced through expert testimony and … written materials … in libraries and archives …." Id. (emphasis added). The Bank further errs in asserting that it should have had an "opportunity … to create a record that defined the applicable parameters of tribal discrimination law." (Appellant's Br., pp. 21-22 (emphasis added).) The Tribal Court of Appeals is competent in its own right to articulate the evolving principles of tribal common law. It may, but need not, base its decisions on evidence concerning tribal traditions and customs, and it certainly is not required to remand cases to the trial court for the gathering of such evidence before making pronouncements on the law.

The Bank states that, "to this day, no one has articulated the parameters of … tribal discrimination law." (Appellant's Br., p. 18.) Not so. By affirming the Tribal Court judgment, the Tribal Court of Appeals found that tribal common law prohibits intentional discrimination in lending based on tribal membership or racial

identity. This is precisely what the Longs alleged in their complaint, and it is also the conduct the tribal court jury unanimously found the Bank to have engaged in. The Bank intentionally discriminated against the Longs based on their status as tribal members. The tribal common law prohibits such discrimination. Whether or not the tribal common also prohibits other kinds of discrimination was not before the Tribal Court. This is the nature of common law adjudication as opposed to legislation.

The Bank's claim that it was denied due process because tribal common law was not "proven" in the Tribal Court is also without merit. The Bank's authority for this proposition, Wilson v. Owens, 86 F. 571 (8th Cir. 1898), merely provides that federal appellate courts may not take judicial notice of tribal statutes not pleaded or proven in the lower federal courts. (Appellant's Br., pp. 22-23.) This is not unlike the rule in many court systems that the laws of other sovereigns must be pleaded or proven to be admissible. The question before the Tribal Court of Appeals was quite different. The Tribal Court of Appeals did not take judicial notice of unpleaded tribal laws. Rather, it stated the tribal common law. The Bank's statement that Wilson "should control the outcome of this case" is entirely off the mark. (Appellant's Br., p. 35.)

E. The Tribal Court Of Appeals Did Not Deny The Bank Due Process When It Affirmed The Trial Court Judgment On Alternate Grounds Not Relied Upon Below.

The Bank was not denied due process simply because the Tribal Court of Appeals affirmed the Tribal Court judgment on alternative grounds. An appellate court may affirm a "judgment below on any ground which the law and the record permit." Smith v. Phillips, 455 U.S. 209, 215, n.6, 102 S. Ct. 940, 945 n.6 (1982); U.S. v. Rowland, 341 F.3d 774, 782 (8th Cir. 2003), cert. denied, 540 U.S. 1093, 124 S. Ct. 969 (2003); Gralike v. Cook, 191 F.3d 911, 921 n. 9 (8th Cir. 1999).

In the instant action, the appellate court affirmed the trial court judgment on tribal common law grounds that were amply supported by the record. No new issue, claim for relief, or theory of wrong-doing was injected into the case on appeal. From the beginning, the Longs alleged that the Bank caused them injury by intentionally discriminating against them in a private lending transaction. The parties had a full and fair opportunity to litigate this issue in the Tribal Court. The parties developed a full and complete evidentiary record on this issue. The questions before the Tribal Court of Appeals were purely questions of law, and the court was competent to review those questions de novo without remanding to the trial court. This Court has held that when appellate courts engage in de novo review of legal questions, they may affirm on any legal basis supported by the record, including bases not considered below. See Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999).

The Bank claims repeatedly that it was somehow deprived an opportunity to present evidence concerning the Longs' tribal law discrimination claim. Yet, the Bank had every opportunity in the Tribal Court to present evidence on that claim. The Bank seems to suggest that it should have been allowed to present more evidence after the Tribal Court of Appeals ruled that the discrimination claim was actionable under the tribal common law of torts. Yet, the Bank nowhere specifies what evidence it would have presented if given another chance. Any evidence that the Bank did not, in fact, discriminate against the Longs should have been presented at the original trial.

The issue before the Tribal Court of Appeals – whether or not tribal common law recognized a tort claim based on discrimination in private lending transactions – was purely legal. No additional evidence would have affected the outcome of the case. The Complaint supported a common law claim and the Longs never waived reliance on the common law. It was appropriate for the Tribal Court of Appeals to decide the source of law issue and to dispose of the case without remanding to the trial court for further proceedings. See Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2000).

Conclusion

For the foregoing reasons, *Amicus Curiae* Cheyenne River Sioux Tribe respectfully requests that this Court affirm the district court's Order dated July 17, 2006.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Fed. R. App. P. 32(a)(7)(B). It contains 6,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); has been prepared in proportionally spaced typeface using Microsoft® Word 2002 in 14-point Times New Roman font; and includes a 3.5" diskette, which has been scanned for viruses and is virus free, containing the foregoing **BRIEF OF *AMICUS CURIAE* CHEYENNE RIVER SIOUX TRIBE SUPPORTING AFFIRMANCE OF MEMORANDUM OPINION AND ORDER DATED JULY 17, 2006** in .pdf format.

Dated: December 15, 2006.

/s/ Steven J. Gunn
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CERTIFICATE OF SERVICE

I hereby certify that two bound copies including a virus free 3.5" diskette containing an electronic copy in .pdf format of the foregoing was served on each party below this 15th day of December 2006, via U.S. mail, postage prepaid, and properly addressed to:

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APPENDIX TO

BRIEF OF *AMICUS CURIAE* CHEYENNE RIVER SIOUX TRIBE SUPPORTING AFFIRMANCE OF MEMORANDUM OPINION AND ORDER DATED JULY 17, 2006

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