**NO. 06-3093**

***In The United States Court Of Appeals***
***For The Eighth Circuit***

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Plains Commerce Bank,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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# *APPELLEES LONG FAMILY LAND AND CATTLE COMPANY, INC. AND RONNIE AND LILA LONG'S BRIEF*

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The U.S. District Court was correct in finding that the Cheyenne River Sioux Tribe (CRST) Tribal Court had subject-matter jurisdiction of a suit commenced by the Long Family Land and Cattle Company, Inc. (the Company), and Ronnie and Lila Long against Plains Commerce Bank (the bank) in the CRST Tribal Court, and in the tribal court proceedings the bank was afforded due process.

The U.S. District Court correctly determined that the bank consented to subject-matter jurisdiction in the tribal court action because the bank initially went into tribal court and requested the tribal court to serve the bank's Notice to Quit on the Longs to evict them from the land, and filed a counterclaim against the Longs in tribal court requesting eviction of the Longs from the land and damages against the Company and Ronnie and Lila Long individually. The U.S. District Court also correctly determined that the bank voluntarily dealt with tribal members and their Indian owned and controlled corporation in the transactions underlying the lawsuit, and that the underlying transaction involved consensual relationships between the bank and tribal members and their Indian-owned corporation. The U.S. District Court correctly determined that there was a basis in the trial record for the CRST Court of Appeals to uphold the jury verdict on discrimination; and that the due

process rights of the bank were not violated. This Court should affirm the decision of the U.S. District Court.

Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long request oral argument and suggest that 30 minutes for each party should be sufficient to fully address these issues.

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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PLAINS COMMERCE BANK,

Plaintiff-Appellant,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC. AND RONNIE AND LILA LONG,

Defendants-Appellees.

Eighth Circuit File No. 06-3093

**CORPORATE DISCLOSURE STATEMENT**

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Pursuant to Fed. R. App. P. 28(a)(1) and 26.1(b), Appellees provide the following information regarding the parties to this appeal and their representation by counsel:

Parent Companies:

None.

Listing of all publicly held companies that own 10% or more of Appellee, Long Family Land and Cattle Company, Inc.'s, stock:

None.

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1. First and Second Issues: Jurisdiction

- Montana v. U.S., 450 U.S. 544 (1981)
- Nevada v. Hicks, 533 U.S. 353 (2001)
- El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)
- Pourier v. South Dakota, 658 N.W.2d 395 (S.D. 2003)

2. Third Issue: Due Process

- Wilkinson v. Austin, 544 U.S. 903 (2005)
- United States v. Sager, 743 F.2d 1261 (8th Cir. 1984)
- Wisdom v. First Midwest Bank, 167 F.3d 402 (8th Cir. 1999)

Long Family Land and Cattle Company, Inc. is referred to as the Company, and the Company and Ronnie and Lila Long are sometimes collectively referred to as the Longs. Appellant Plains Commerce Bank is referred as the bank. Documents included in Appellee Longs' Separate Appendix are referred to as (L.App.__)

## STATEMENT OF FACTS

1. Appellant bank is a South Dakota banking corporation with its principal place of business in Hoven, South Dakota.

2. Appellee Company is a South Dakota family farm corporation with its principal place of business in Dewey County, South Dakota, within the Cheyenne River Sioux Indian Tribe (CRST) Reservation. The Company has been and continues to be controlled by Native American tribal members who at all times owned at least 51% of the corporation stock, as provided in its Articles of Incorporation (L.App.13, 00023). The Company was formed to qualify for Bureau of Indian Affairs (BIA) guaranteed bank loans as required by 25 C.F.R. § 103.7. (L.App.10, 00016)

3. Ronnie Long is the son of Kenneth and Maxine Long. His wife is Lila Long. They have lived on CRST Reservation all of their lives farming and ranching raising crops and livestock. Maxine and her son Ronnie and his wife Lila, are all members of the CRST. Kenneth was not a CRST member.

4. Kenneth and tribal member Maxine owned 2,230 acres of deeded agricultural land located within the reservation. This land had been owned by the Longs for over forty years.

5. The Company was formed to obtain BIA guaranteed bank loans for Longs' family farming and ranching business. The Company owned livestock and machinery, grew crops on land owned by Kenneth and Maxine, and pastured its livestock and on the Indian Range Unit trust land leased by Ronnie.

6. Through his will Kenneth gave his land and his shares in the Company to his four children, who are all tribal members. Three children transferred their interests to Ronnie. Thus, under the will Ronnie inherited Kenneth's land and his 49% of the Company. (L.App.14, 00028) After Kenneth's death, Ronnie and Lila owned 100% of the Company.

7. Loans made by the bank to the Company were guaranteed by BIA. The guarantees required first lien on cattle, machinery, crops, and feed of the Company, and second lien (mortgage) on land owned by Kenneth and Maxine. (L.App.12, 00022) The bank held a mortgage signed by Maxine, a tribal member who owned one-half the land. Kenneth and Maxine and Ronnie and Lila were required to sign personal guarantees of bank's loans to the Company. Kenneth and tribal member Maxine mortgaged their land to the bank to provide collateral for the

bank's loans to the Company as required by the BIA guarantees, which are noted in the mortgages on the land. (L.App.18, 00038)

8. In the spring of 1996, after Kenneth's death, bank officers came on Longs' land, as they had many times in the past on the reservation, and inspected the land, cattle, hay, and machinery. The cattle were located on Ronnie's Indian Range Unit trust land. The bank proposed a new loan agreement. Numerous discussions concerning the new loan agreement took place with bank officers, tribal members Ronnie and Lila, and tribal credit and financial planning officers John Lemke and Harley Henderson at CRST Tribal offices on the reservation. The bank proposed a deed in lieu of foreclosure transferring Longs' land and house to the bank, and in return the bank would credit $478,000 against debt owed by Longs to the bank, and the bank agreed to finance sale of Longs' land back to them on a twenty-year contract for deed.

9. Later the bank changed the proposed agreement. The bank sent a letter to Ronnie, admitted into evidence at trial without objection, wherein the bank told Ronnie it would not finance sale of the land back to the Longs on a contract for deed because of "possible jurisdictional problems" with "an Indian owned entity on the reservation." (L.App.2, 00007)

10. The bank changed the terms from a bank financed contract for deed to a two-year lease with option to purchase. Longs could buy the land back from the bank by paying $468,000 in a lump sum in only two years. (A.App.3, 00028)

11. The bank's agreement involved several main points: (a) when the 2,230 acres of land and house were deeded to the bank, the bank would credit $478,000 against debt owed by Ronnie and Lila Long and the Company; (b) Longs would lease the land from the bank for two years, (c) the bank would make Longs a new operating loan of $70,000 to pay operating expenses until crops or calves were sold; (d) bank would make Longs a loan of $37,500 to purchase 110 calves to increase their income so they could buy back their land from the bank; and (e) the bank would enter into a lease and option to purchase so Longs could buy back their land from the bank in two years. (A.App.3, 00028 and 00033) During discussions, drafting, and signing the agreement, the bank was represented by its lawyer, but Longs were not represented by a lawyer.

12. Ronnie was bequeathed the land by Kenneth under his will and assignments of the other children. When the bank received the deed, credit for the land paid off loans owed by the Company and Ronnie and Lila individually. (A.App.3, 00033) The bank prepared the agreement in two documents signed December 5, 1996, entitled: (a) Loan Agreement, and (b) Lease With Option to Purchase. The deed to the land was filed in December 1996, and the bank owned

the land subject to the Loan Agreement and Lease With Option to Purchase entered into with the Longs.

13. Ronnie and Lila and the Company claimed at trial that the agreement was breached by the bank because (a) the bank never made the operating loan of $70,000 that the Longs desperately needed; and (b) the bank never made the loan for $37,500 for the purchase of 110 calves. The purpose of the loans was to enable Longs to continue to operate and put Longs in a stronger financial position so they could buy back their land from the bank. Longs claimed at trial that as a direct result of the bank's breach of the Loan Agreement, they were unable to feed or care for their livestock during the severe winter of 1996-1997. The operating loan was to pay expenses until crops or calves were sold. Ronnie was told on December 5 that the bank would make the operating loan as soon as the agreement was signed so he could move hay to the cattle before winter set in. Longs claimed the bank knew they did not have operating money to move their hay 20 miles to their cattle that needed hay on Ronnie's Indian Range Unit. The bank knew the cattle did not have feed, and cattle without feed cannot survive very long in winter weather. Federal regulations authorized the bank to make emergency loans guaranteed by BIA to take care of the cattle. 25 C.F.R. § 103.22. A severe winter blizzard hit. Because the bank failed to make the $70,000 operating loan as promised, and did not make an emergency loan to care for the cattle, the Longs lost

230 cows, 277 yearlings, and 8 horses. Livestock that died in the winter storms, plus lost calf crops, were a substantial loss for the Longs. (L.App.18, 00043-44)

14. The record shows that Longs' land and house were transferred to the bank, but the bank did not make the loans they needed as the bank promised. The operating loan of $70,000 would have enabled hay to be moved twenty miles to the cattle on the Indian Range Unit, and provided care for the cattle during the winter. They claimed the bank's failure to make the loans as promised caused them to suffer losses of $1,236,792. (L.App.18, 00044) They claimed that the bank's failure to make the loan of $70,000 to pay operating expenses, and failure to make the loan of $37,500 to purchase calves, made it impossible for them to exercise the option to buy back their land. They were unable to purchase the calves, and they lost income from the calves. They were unable to care for and feed their over 600 head of cattle, and they suffered substantial losses of cattle. With these losses it was impossible for them to buy back their land under the Option to Purchase.

15. Under the Lease With Option to Purchase, annual CRP payments of $44,198 were assigned to the bank. (A.App.3, 00028) The bank received two CRP payments of $88,396.

16. In March 1999, the bank sold 320 acres of the land to nonmembers Pesicka, while Longs were legally still in possession under the lease with rights

under the option to purchase, without first obtaining an order authorizing the sale of Longs' land. (L.App.7, 00012)

17. The bank made no attempt to comply with CRST Tribal Law and Order Code sec. 10-2-1 thru 10-2-8. CRST Code provides in section 10-2-6(6), that when a tenant has held over for more than sixty days without notice to quit by the landlord, the tenant shall remain in possession for a full year after the lease termination date. The lease terminated December 6, 1998, but the bank failed to serve its notice to quit within sixty days, before February 5, 1999. The bank's Notice to Quit was not served on Longs until June 16, 1999. (A.App.4, 00145; A.App.5, 00146-47) Longs had the legal right to remain on the land until December 6, 1999. Despite the fact that Longs were legally in possession as a matter of express tribal law, the bank sold the land in violation of Longs' right to hold over and exercise their option to purchase. At no time did the bank ever obtain an order removing Longs from the land or authorizing sale of the land.

18. On June 4, 1999, after the bank sold land to Pesicka, the bank asked the tribal court to serve the bank's Notice to Quit on Ronnie Long to evict Longs from the land. The bank knew Longs were in possession of all the land. The bank's Notice to Quit was signed by the bank president and included legal descriptions of all 2,230 acres previously owned by Longs, then owned by the bank, and leased by the bank to the Company with option to purchase. The tribal court accommodated

the bank. The bank's request was approved ex parte and served on Ronnie and Lila's under age daughter Sheri, who is a tribal member. (A.App.4, 00147) The bank voluntarily came into tribal court on its eviction action without stating any objection or reservation to jurisdiction of the tribal court over the bank as the party initiating the eviction action. (A.App.4, 00145; A.App.5, 00146-147) No eviction order was ever entered, and Ronnie and Lila and their children did not move off the land or remove their cattle, machinery, crops, or hay off the land. (L.App.18, 00047)

19. On June 29, 1999, without obtaining an order authorizing sale, and with Longs still legally in possession, the bank sold the remaining 1,905 acres to nonmember Maciejewski on a favorable bank financed contract for deed. (A.App.2, 00050-56)

20. Maciejewskis took possession of Parcel One of 950 acres. The contract for deed provides that the bank is in the process of evicting Longs from the land, and Maciejewskis will have possession of Parcel Two of 960 acres when the eviction is accomplished. (A.App.2, 00052)

21. The bank sold 320 acres to Pesickas for $155 per acre, but the bank required Longs to pay $210 per acre. (A.App.2, 00028-32) The bank sold Longs' land to Pesickas for $55 less per acre, which is $17,600 less than bank required Longs to pay for the 320 acres. (L.App. 18, 00045)

22. The bank sold 950 acres to Maciejewskis on a contract for deed with favorable credit terms at 7.75% interest, with ten years to pay in annual payments of $23,229. (A.App.2, 00050-56) (L.App.18, 00045) FSA payments on the land of $23,000 per year paid the payments for Maciejewskis on the contract for deed. (L.App.18, 00045-46) The bank's terms of sale for nonmembers were more favorable than terms the bank required of tribal members Longs. (L.App.18, 00046) The bank required Longs pay 9.25% interest to restructure the note (L.App.18, 00046), and 8.5% on the Lease With Option to Purchase (A.App.3, 00028), but the bank charged Maciejewskis only 7.75% interest. (A.App.2, 00051) The bank required Longs to pay the full purchase price of $468,000 in a lump sum cash payment in only two years, but Maciejewskis got ten years with annual payments of $23,329. (L.App.18, 00046) A contract for deed would have made it substantially easier for Longs to buy back their land, where annual FSA payments and crop production paid the payments in ten years. (L.App.18, 00046)

23. Longs filed a request in tribal court to restrain the bank from selling the land to Maciejewskis. The bank moved to dismiss Longs petition. Longs' petition and the bank's motion were denied. Longs amended their complaint including several causes of action requesting damages and a jury trial. The bank then filed a counterclaim in tribal court against the Company and Ronnie and Lila

individually seeking eviction of the Longs from the land and requesting money damages from the Longs.

24. A two-day jury trial was held on December 6, and 11, 2002, before Special Tribal Judge B.J. Jones, who is a member of the State Bar of South Dakota. During trial the bank raised an objection to Longs' discrimination claim. The bank did not seek to question the source of law for this claim pretrial, through a motion to dismiss for failure to state a claim on which relief might be granted. Judge Jones determined that the above facts concerning sale of the land on a bank financed contract for deed to nonmembers constituted prima facie evidence that the bank intentionally denied Longs the privilege of favorable bank financing on a contract for deed solely because of their status as Indians and tribal members, and submitted Longs' discrimination claim to the jury along with Longs' other claims.

25. The jury determined that the bank breached the Loan Agreement (L.App.1, 00001) (Jury Interrogatory One), that failure of the bank to perform the Loan Agreement prevented and made it impossible for Longs to perform and buy back their land from the bank (L.App.1, 00002) (Jury Verdict Two), that the bank did not use self-help remedies in its attempt to remove Longs from the land (L.App.1, 00003) (Jury Verdict Three), that the bank intentionally discriminated against Longs based solely on their status as Indians or tribal members in the Lease With Option to Purchase, (L.App.1, 00004) (Jury Verdict Four), and that the bank

acted in bad faith in attempting to obtain an increased guarantee from BIA as required by the Loan Agreement (L.App.1, 00005) (Jury Verdict Five). The jury awarded Longs $750,000 plus prejudgment interest, calculated by the court at $123,131. (L.App.1, 00006) (Jury Verdict Six) Because the jury decided that the bank breached the Loan Agreement, making it impossible for Longs to buy back their land under the Option to Purchase, Judge Jones allowed the Company an option to purchase the remaining parcel two of 960 acres for the sum of $201,600 as provided under the Option to Purchase. (A.App.2, 00095-96)

26. Judgment was entered against the bank pursuant to the jury's verdict. The bank appealed to the CRST Court of Appeals, where CRST Chief Justice Frank Pommersheim, and Associate Justices Everett Dupris and Patrick Lee considered the bank's jurisdictional argument, along with the other arguments, and affirmed the trial court in all respects. Justice Frank Pommersheim and Associate Justice Patrick Lee are members of the South Dakota Bar. The court entered a Memorandum Opinion and Order affirming the decisions of the tribal court and jury. (A.App.2, 00097-115)

27. The bank filed a lawsuit in United States District Court for the District of South Dakota, Central Division, alleging that the tribal court lacked subject matter jurisdiction and denied it due process of law. The parties filed cross motions for summary judgment. United States District Judge Charles B. Kornmann entered

a Memorandum Opinion and Order holding that the tribal court had jurisdiction over the issues in this case, and that the tribal court did not deny the bank due process of law. (A.App.1, 00001-15)

## SUMMARY OF ARGUMENT

1. First Issue: Jurisdiction

The decision of the U.S. District Court is correct, that the tribal court properly exercised jurisdiction over this civil action and did not deny the bank due process of law.

The tribal court had jurisdiction under the first Montana exception because, as the evidentiary record shows, over the years the bank entered into numerous consensual relationships with tribal members Maxine, Ronnie, and Lila Long and their Indian-owned and controlled corporation.

The tribal court had jurisdiction under the second Montana exception because the bank's conduct threatens or has some direct effect on the economic security and the welfare of the tribe.

2. Second Issue: Jurisdiction-Discrimination

The tribal court had jurisdiction over the Longs' discrimination claim, which was based on tribal law. The tribal code confers on the tribal court jurisdiction over claims arising out of tortuous conduct. Discrimination is a tort and involves

tortuous conduct. Where the tribal code does not define the elements of discrimination, the tribal court may look to or borrow or adopt state or federal law.

3. Third Issue: Due Process

The bank was not denied due process of law in the tribal court proceedings. Throughout the tribal court proceedings, the bank had notice of the Longs' discrimination claim, and had ample opportunity in discovery to determine the factual basis of the claim, and had ample opportunity through pretrial motions to determine the legal basis for the claim. The fundamental requirements of due process were satisfied in the tribal court process. A tribal court may look to or borrow or adopt state or federal law. An appeals court may affirm a judgment on any basis supported by the record, and has discretion to affirm a judgment on grounds not considered by the trial court. An appeals court affirms judgments, not opinions, and may affirm on any ground supported by the record, whether or not that ground was urged below or passed on by the trial court.

## STANDARD OF REVIEW

The bank argues that the U.S. District Court erred by denying summary judgment to the bank and granting summary judgment in favor of Longs. This Court reviews a grant of summary judgment de novo. Simpson v. Des Moines Water Works, 425 F.3d 538, 541 (8th Cir. 2005). This Court applies the same standard as the district court and may affirm on any grounds supported by the

record. Id. (citing Bass v. SBC Communications, Inc., 418 F.3d 870, 872 (8th Cir. 2005)).

## ARGUMENT

1. First Issue: Subject Matter Jurisdiction

The bank's first and second issues challenge the jurisdiction of the tribal court in this case. The decisions of the CRST Court of Appeals and the U.S. District Court are correct, that the tribal court properly exercised jurisdiction over this action and did not deny the bank due process of law. This Court should affirm the decisions of the CRST Court of Appeals and the U.S. District Court.

The bank relies heavily on Nevada v. Hicks, 533 U.S. 353 (2001), for its position that the tribal court had no jurisdiction over Longs' discrimination claim. The bank's reliance is misplaced because Hicks does not apply to the facts of this case. The instant case differs markedly. Hicks involved a state game warden, a 1983 claim, and there was no consensual relationship with the tribe or a tribal member. In contrast, in the instant case there are numerous private consensual agreements between the bank and Longs, no state officer is involved, and no 1983 claim was pled or argued. The Hicks case presented the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of violating state criminal law outside the reservation. The Hicks Court itself

repeatedly emphasized the limited scope of its ruling, explaining that the case goes no farther than denying tribal court jurisdiction over "a narrow category of outsiders," i.e., state game wardens or state officials, sued under 42 U.S.C. § 1983 for allegedly wrongful behavior in the course of conducting, in the performance of their law enforcement duties, on-reservation investigations pursuant to allegations of off-reservation crime. Id. at 371, 373. "Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general." Id. at 358 n.2. Justice Ginsberg concurring states "The Court's decision explicitly 'leaves open the question of tribal-court jurisdiction over nonmember defendants in general,' including state officials engaged on tribal land in a venture or frolic of their own." Id. at 386. The Hicks case is clearly distinguished on the facts from the instant case and is therefore not applicable.

The CRST Court of Appeals and the U.S. District Court both applied Montana v. United States, 450 U.S. 544 (1981), as the relevant case to determine the jurisdiction issue. In Montana, the Court set out rules concerning civil jurisdiction of tribal courts over non-Indians. After stating the general rule of no jurisdiction over nonmembers, the Court set out a two-pronged test to determine tribal court civil jurisdiction over nonmembers:

First Test: “to 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. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565.

Second Test: “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct 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.

The instant case fits squarely into both Montana tests, the tribal court had jurisdiction over the issues, and the Memorandums and Orders of the CRST Court of Appeals and the U.S. District Court should be affirmed.

a. Application-First Montana Test:

Under the first test, tribes may exercise civil jurisdiction over “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”(Emphasis added.) The bank entered into numerous consensual relationships with Longs’ Indian-owned Company and with tribal members, Ronnie, Lila, and Maxine. The bank admits on pages 7 and 10 of its brief that it entered into contractual

relationships with the Company. The bank argues on page 10 of its brief, however, that the Company is a South Dakota corporation and not a tribal member; thus, the first Montana exception is inapplicable. The bank argues on page 15 of its brief "the bank dealt with a non-member of the CRST, the Company, which is separate and distinct from its shareholders." The bank contends that the Company lacks the racial identity to be treated as a tribal member under the first Montana test. The bank, however, in its affidavit in support of its motion for summary judgment in the U.S. District Court, in discussing Longs' Company, states that "51% of the corporation was owned by Ronnie Long and Lila Long, who are tribal members." (A.App.2, 00017)

The bank's position is simply not persuasive in view of its letter dated April 26, 1996, to Ronnie. (L.App.2, 00007) In its letter the bank confirmed previous discussions that "the land base would be deeded to the bank and sold back to you on a contract." After talking to bank counsel, however, the bank decided it could not sell Longs' land back to them on a contract as discussed, "because of possible jurisdictional problems if the bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." (Emphasis added.) In its letter the bank used the fact that the Company is "an Indian owned entity" in denying Longs bank financing to buy back the land under a favorable contract, although it offered favorable financing to nonmembers. The bank argues

now, however, that this Court should disregard the fact that the Company is "an Indian owned entity." Bank cannot have it both ways.

The bank's argument is without legal merit. The South Dakota Supreme Court in Pourier v. South Dakota Department of Revenue, 658 N.W.2d 395 (S.D. 2003) addressed the same argument. Pourier, an enrolled member of the Oglala Sioux Tribe and resident the of Pine Ridge Indian Reservation in South Dakota, was sole shareholder and president of Muddy Creek Oil and Gas, Inc., a South Dakota corporation. The U.S. Supreme Court in Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450 (1995), held that a state is without power to tax reservation lands or tribal members. Like the bank here, the Department argued that Muddy Creek could not meet the legal test of being a tribal member because a corporation does not have the racial identity necessary to pass the Chickasaw test for exclusion, and therefore should pay the tax. The South Dakota Supreme Court disagreed, and held that Muddy Creek would be treated as a tribal member. The Court stated:

> Furthermore, Congress has recognized the fact that there is such a thing as an "Indian corporation." The Indian Business Development Program is legislation created to "establish and expand profit-making Indian-owned economic enterprises." 25 USC § 1521. Under federal regulations, the only persons or entities that may apply for funds from this program are, "Indians, Indian tribes, Indian partnerships, corporations, or cooperative associations authorized to do business under State, Federal, or Tribal law." 25 CFR § 286.3. The regulations go on to require that the "Indian ownership must actively participate in the management

> and operation of the economic enterprise" and that corporations must be at least 51% owned by eligible Indians or Indian Tribes. Id. We agree with this recognition by courts and Congress that the identity of those owning and operating a business is pertinent to classification of the entity itself.
>
> Policy considerations also weigh heavily in favor of treating Muddy Creek as a tribal member. Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development. By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forgo the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law. This could hinder economic development. This is particularly unwarranted in the instant case because the Pine Ridge Reservation is the poorest in the country. We therefore reject the Department's contention that Muddy Creek fails the first inquiry under Chickasaw. Id. at para. 24-25. (Emphasis added.)

The Company was required to be and always has been controlled by the Longs, Native Americans, who owned at least 51% of the stock to qualify for BIA guarantees of bank loans as required by 25 C.F.R. § 103.7. (L.App.10, 00016-17) This Court should follow the decision of the South Dakota Supreme Court in Pourier, and hold that Long Company should be treated as a tribal member for the purposes of the first Montana test. The CRST Court of Appeals and the U.S. District Court were correct in treating the Company as a tribal member under the first Montana test of tribal court civil jurisdiction.

The bank cites Christian Children's Fund v. Crow Creek Sioux Tribal Court, 103 F. Supp. 2d 1161 (D.S.D. 2000), as support for its position. U.S. District Court Judge Kornmann was the judge in Christian, and was also the judge in the instant

case. This case is factually not applicable to the instant case. The Court in Christian found that the first Montana test was not satisfied because the parties were not tribal members, and there was no consensual relationship with tribal members. One of the corporations was located on the reservation, but key individuals were not tribal members. Letters of agreement between CCF and Hunkpati did not, unlike this case, require that Hunkpati's board of directors be members of the tribe. None of the conduct forming the basis for the complaint occurred on the reservation. The facts are very different from the instant case where the bank became the owner of Longs' land on the reservation, and sold 1,270 acres to nonmembers while the Longs were in legal possession of the land.

The bank's arguments in this Court are in direct opposition to the position it took in the tribal court. In its Motion for Summary Judgment on its counterclaim against the Company and Ronnie and Lila individually, to evict Longs from the land and for money damages from them because they were holding over after the Lease with Option to Purchase had expired, which motion was opposed by Longs based on their claims, the bank stated to the tribal court:

> The Court has jurisdiction over Long Family Land and Cattle Company, Inc. and Ronnie Long and Lila Long in that Ronnie Long and Lila Long own the majority ownership of the corporation, enrolled members of the Cheyenne River Sioux Tribe, and the Court has jurisdiction over the subject matter of this action. (L.App.__) Doc. 50, Ex. 10, page 1 (Emphasis added).

This is a significant concession by the bank in view of the bank's opposite position in this Court now, i.e., that the Company was not a tribal member and not an Indian-owned entity, and that the tribal court had no jurisdiction over the subject matter of this action.

The bank's arguments are inconsistent. The bank states on page 3 of its brief that the bank sought to serve its Notice to Quit on the "Long Company." The bank argues on page 13 of its brief that the bank had no choice but to seek service of its Notice to Quit in tribal court. The bank states it wanted to commence an action in state court to evict "Long Company" from the land. But then states: "It is well established that state officials have no jurisdiction on Indian reservations . . .to serve process on an enrolled Indian." (Emphasis added.) Was the bank trying to serve the Company, or was it trying to serve Ronnie Long, an enrolled Indian residing on the reservation? The bank's Notice to Quit was addressed to the Company and to Ronnie Long individually. The bank's Notice to Quit was actually served on Sheri Long, Ronnie and Lila's underage daughter, who is a tribal member but is not a shareholder or officer of the Company. (A.App.5, 00147) The bank voluntarily chose to go into tribal court, and have the tribal court file and serve its Notice to Quit to force Longs off the land. The bank received the deed to the land subject to the bank performing on the Loan Agreement and subject to the Lease With Option to Purchase. Where the bank breached the Loan Agreement,

and failed to make loans Longs needed as the bank promised, it was impossible for Longs to take care of business and buy back their land from the bank. In these circumstances the Long family refused to leave the land.

The bank's argument that it had no choice but to go into tribal court and request the tribal court judge to serve its Notice to Quit on the Company is without legal merit. The Company was incorporated under South Dakota statutes, which provide that every corporation shall have a registered agent,[1] upon whom any process, notice, or demand upon the corporation may be served,[2] and if the registered agent cannot be served, the Secretary of State shall be the agent of the corporation upon whom any process, notice, or demand upon the corporation may be served.[3] If the bank could not serve the Company's registered agent, the bank

[1] SDCL 47-2-27 provides: "Each corporation shall have and continuously maintain in this state a registered agent, which agent may be either an individual resident of this state whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to do or engage in any business in this state, having a business office identical with such registered office."

[2] SDCL 47-2-32 provides: "The registered agent appointed by a corporation shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served."

[3] SDCL 47-2-33 provides: "If a corporation fails to appoint or maintain a registered agent in this state, or if its registered agent cannot be found at its registered office, the secretary of state shall be an agent of such corporation upon whom any process, notice or demand may be served. Service on the secretary of state of any process, notice or demand shall be made by delivering to him or any

simply could have served the Secretary of State. The bank did have a choice. It could have served its Notice to Quit on the Company by serving the Secretary of State. Instead, the bank voluntarily came into tribal court to start an eviction action without reserving objection or reservation as to jurisdiction of the tribal court over the bank as a party to the bank's eviction action. The U.S. District Court stated:

> In the instant case, the bank opted to utilize the tribal court in an attempt to force the Longs off the land. It sent a letter to the CRST tribal court asking that a notice to quit be served upon the Longs. The tribal court accommodated the bank and caused the notice to quit to be served on June 16, 1999. The Longs then filed a complaint in tribal court. In response to the Long Company's action in tribal court, the bank counterclaimed, seeking damages and eviction. It is noteworthy that the bank's position as to the tribal court's subject matter jurisdiction has been somewhat equivocal. In many of its tribal court filings, the bank continued to challenge the jurisdiction of the tribal courts. However, in its motion for summary judgment on its counterclaim in Long Family Land and Cattle Company, Inc. et al. v. Edward and Mary Maciejewski, et al., dated September 12, 2002, the bank made various claims, arguing essentially that the lease had expired and the Longs were wrongfully holding over. Appearing in paragraph 2 of that document is the following statement on behalf of the bank:
>
> The Court has jurisdiction over Long Family Land and Cattle Company, Inc. and Ronnie Long and Lila Long in that Ronnie Long and Lila Long own the majority ownership of the corporation, enrolled members of the Cheyenne River Sioux Tribe and the Court has jurisdiction over the subject matter of this action.
>
> emphasis added) Doc. 50, Ex. 10, page 1.
>
> This is a significant concession by the bank and the bank should be held to it. (A.Add.1)

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clerk having charge of the corporation department an original and one exact or conforming copy of the process, notice, or demand."

The bank has admitted entering into numerous consensual relationships with the Company over the years. The closely held Company was owned 100% by the Longs, and was formed to obtain BIA guarantees of bank loans for Longs' family farming and ranching business. The Company owned livestock and machinery, grew crops on the land owned by Kenneth and tribal member Maxine, and pastured livestock on the Indian Range Unit trust land leased by tribal member Ronnie.

The evidentiary record shows that over the years the bank engaged in numerous discussions, negotiated agreements, inspected livestock and feed, and conducted other activities on both fee and trust land on the reservation. The bank loaned money and entered into commercial dealing, contracts, leases, and other consensual relationships with individual tribal members Ronnie, Lila, and Maxine. The bank was lender for the Company and for Kenneth, Maxine, Ronnie, and Lila since 1989. (A.App.2, 00017, para.4) BIA guaranteed some of the bank's loans to the Company, and the bank benefited from BIA guarantee arrangements with Longs and BIA. (L.App.18, 00041, para.10) Bank loans involved loan agreements, promissory notes, personal guarantees, mortgages, and security agreements entered into by the bank and the Longs. The bank has admitted numerous consensual relationships with Longs in its Brief in Support of Motion for Summary Judgment in the Tribal Court:

> Plains Commerce Bank, formerly Bank of Hoven, has been doing business with various members of the Long Family and entities

> owned by them since approximately 1989. Kenneth and Maxine Long, husband and wife, as well as their son, Ronnie Long, and his wife, Lila Long, and Long Family Land and Cattle Company, Inc., the corporation owned by them, all did business with Plains Commerce Bank.
>
> The Bank made numerous loans to Long Family Land and Cattle Company, Inc. Kenneth Long and Maxine Long mortgaged all of the land, which they owned in Dewey County, which was approximately 2,230 acres, to the Bank as collateral for these loans. Both Kenneth Long and Maxine Long personally guaranteed the debt of Long Family Land and Cattle Company, Inc. to the Bank. (Emphasis added.)

The bank has admitted numerous consensual relationships and loans with the Company and with tribal members Maxine, Ronnie, and Lila. The bank made loans to the Company, an Indian-owned and controlled corporation. (L.App.18, 00041, para.10) The bank required the Company grant the bank a security interest in its livestock, machinery, crops, and feed. (L.App.18, 00041, para.10) The bank entered into contracts and agreements with the Company and with members Maxine, Ronnie, and Lila, including loan agreements, promissory notes, security agreements, a lease with option to purchase, and other consensual relationships, and became owner of the Longs' land on the reservation. (L.App.18, 00041, para.10)

The bank required Kenneth and tribal member Maxine to mortgage their 2,230 acres and house to the bank for collateral for Company loans. (L.App.18, 00041, para.10) The bank required Kenneth and tribal members Maxine, Ronnie, and Lila to personally guarantee loans to the Company. (L.App.18, 00041)

Kenneth and tribal members Maxine, Ronnie, and Lila were required to grant security interests in their personal livestock, machinery, crops, and feed. (L.App.18, 00041) The bank required Ronnie to assign to the bank CRP contract payments of $44,198 per year. (L.App.18, 00041, para.21)

Such consensual relationships extended over the years beginning in 1989. The bank became owner of Longs' land and house located on the reservation in December 1996, subject to the bank performing under the Loan Agreement and Longs' possession of the land under the Lease with Option to Purchase. The bank was an on reservation landowner and lessor, subject to Longs' Lease and Option to Purchase, and after selling 1,270 acres of Longs' land to nonmembers, the bank is still the owner of 960 acres occupied by the Longs. Because the jury decided the bank breached the Loan Agreement making it impossible for Longs to perform under the Option to Purchase, Judge Jones allowed Longs to purchase the remaining 960 acres for the sum of $201,600 under the Option to Purchase.

The CRST Court of Appeals concluded that the tribal court properly exercised jurisdiction over this case, under the first Montana test, reasoning as follows:

> This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the controverted events in this lawsuit. All bank loans in this matter were provided

> solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the Bank with the Longs, with Cheyenne River Sioux Tribal Officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when the Bank owned it. (Emphasis added.) (A.Add.00010)

The BIA guaranteed the bank's loans to the Company because the Company had a good credit standing, and because the Company was an Indian-owned and controlled business qualified for BIA guarantees. The bank benefited from the BIA guarantees. After Longs' cattle died, the bank submitted a claim on the BIA guarantees, and the bank received $392,968.55 from BIA. (Tr. Ex. 16) The bank received $88,396 in CRP payments, received the deed to the house and land valued by the bank at $478,000 in the Loan Agreement, received $100,000 from Kenneth's life insurance, and received BIA interest subsidy payments and FSA farm program payments since 1996 as owner of the land. The bank benefited from the consensual relationships with the Indian-owned Company and tribal members. The bank was involved and benefited from federal financial programs: $88,396 from CRP contract payments, $392,968.55 from BIA guarantee payments, and several years of BIA interest subsidy payments and FSA farm program payments.

The bank admits that it went on the reservation to make money. The bank stated at oral argument before the CRST Court of Appeals:

> …the bank admits that they were dealing with the tribal members to make money. It wasn't just to help tribal members. The bank was doing it with the intent of making money. That's what any business

> does. And how much money they made from tribal members, is really nothing for us to even worry about.

There is nothing wrong with the bank making money on the reservation, provided that such activity does not involve unfair predatory conduct. When such conduct occurs, the tribal court must have jurisdiction under the Montana tests to regulate such important activity on the reservation that can impact adversely on the tribe and its members.

The record shows that the bank's activity on the CRST reservation properly characterizes the bank as a nonmember for profit lender/landowner/lessor doing substantial commercial business with tribal members the Longs, with their Indian-owned Company, with tribal officers, and with the BIA. Clearly, the facts of this case meet the first Montana test.

In addition, the bank voluntarily came into tribal court and filed its Notice to Quit to evict tribal members Ronnie, his wife Lila, and their children from the land. The bank filed a counterclaim in tribal court against the Company and Ronnie and Lila, demanding money damages for wrongful possession of the land, and demanding that Longs be evicted with the bank placed in possession of the land. These facts provide a further jurisdictional basis.

The Court in Montana, cited Williams v. Lee, 358 U.S. 217 (1959), as an example of both the first and second test of tribal civil court jurisdiction. Non-Indian Lee filed suit in state court against Williams, an Indian. Williams bought

goods at Lee's on reservation store and failed to pay. Williams argued that the tribal court had jurisdiction. The Supreme Court agreed, noting that tribal courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." The Court found it was "immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there." 358 U.S. at 222, 223. The Williams case involved claims by a nonmember against tribal members and is analogous to the instant case. The bank voluntarily filed its Notice to Quit in tribal court beginning its eviction action, and filed a counterclaim in tribal court against the Company and Ronnie and Lila individually for wrongful possession demanding money damages. Williams applies because the bank is a nonmember filing claims in tribal court against tribal members. Thus, the tribal court had civil jurisdiction in this case.

The U.S. District Court stated:

> In the instant case, the bank opted to utilize the tribal court in an attempt to force the Longs off the land. It sent a letter to the CRST tribal court asking that a notice to quit be served upon the Longs. The tribal court accommodated the bank and caused the notice to quit to be served on June 16, 1999. The Longs then filed a complaint in tribal court. In response to the Long Company's action in tribal court, the bank counterclaimed, seeking damages and eviction.
>
> Recently, the Court of Appeals for the Ninth Circuit considered Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006), in which a nonmember student at a tribal college brought an action in federal court, alleging that the tribal court lacked jurisdiction over his claims against the tribe. Smith was originally a defendant in the lawsuit, which involved an accident that occurred while he was driving a dump truck owned by the college. Prior to trial, all claims

> were settled except Smith's cross-claim against the college. Smith litigated his cross-claim in tribal court and a verdict was returned in favor of the college. Following the unfavorable verdict, Smith argued for the first time that the tribal court did not have subject matter jurisdiction. Following a ruling by the district court that the tribal court had jurisdiction, the Court of Appeals considered the Montana factors and concluded that the tribal court properly exercised jurisdiction, holding that "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a "consensual relationship" with the tribe within the meaning of Montana." *Id.* at 1140.

The record shows that the tribal court had civil jurisdiction under the first Montana test over the bank and the issues in this case, because the bank entered into consensual relationships with tribal members Maxine, Ronnie, and Lila and with Longs' Indian-owned Company, through commercial dealing, contracts, leases, or other arrangements on the reservation, and because the bank voluntarily filed its Notice to Quit in tribal court initiating its eviction action, and filed in tribal court a counterclaim for eviction and damages against tribal members Ronnie and Lila and their Indian-owned Company.

b. Application-Second Montana Test:

Under the second test, tribes may exercise civil jurisdiction over: "the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." (Emphasis added.)

The second Montana test of tribal civil court jurisdiction applies in this case because conduct of the bank threatens or has some direct effect on the economic security or welfare of the tribe.

Economic security and welfare of the tribe is best served, when the tribe assists members who own farm and ranch businesses on this economically poor rural Indian reservation, to stay in business and remain economically healthy. The tribe has been directly involved over the years with the financial affairs of the Longs and other members through its credit and financial planning officers. They have continuously worked with tribal members, the bank, and BIA to obtain BIA guarantees for bank loans to tribal members. Family farms and ranches owned by tribal members, like the Longs' cattle ranch, contribute beneficially to the economy of the Indian reservation.

The purpose of the federal BIA guaranty loan program is stated in 25 CFR § 13.2, "for financing economic enterprises which contribute beneficially to the economy of an Indian reservation," and "This program will provide Indians with additional sources of financing needed to develop and manage their reservation resources to a higher degree."

BIA guarantees greatly reduced the bank's risk of making loans to Longs and other members. The purpose of the federal BIA loan guaranty program is "to encourage eligible borrowers to develop viable Indian businesses through

conventional lender financing. The direct function of the Program is to help lenders reduce excessive risks on loans they make. That function in turn helps borrowers secure conventional financing that might otherwise be unavailable." 25 C.F.R. § 103.2. The tribe's involvement over the years assisting the bank and members with the BIA Guarantee Program benefited the bank and Indian-owned reservation farm and ranch businesses. Tribal officers continually assisted members preparing financial statements, cash flows, valuations, correspondence, and documents required by the bank and BIA. Tribal officers worked closely with the bank and BIA assisting members in obtaining BIA guaranteed loans. This full-time assistance by the tribe is invaluable to members, the bank, and BIA. Without BIA guarantees there are no loans, and without loans, tribal member ownership and operation of family farm and ranch businesses is not possible.

BIA loan guarantees are made under the Indian Financing Act of 1974 (25 U.S.C. § 1451, et seq.) and regulations of the Department of the Interior. 25 CFR § 93, et seq. The bank would not make loans to the Longs unless BIA agreed to guarantee the loans. The tribe worked with the bank, the Longs, and BIA to bring about each BIA guaranteed loan. Each BIA federally guaranteed loan involved a three party consensual agreement: The bank and Longs entered into a loan agreement, and based on Longs' good credit standing, BIA agreed to guarantee the loan. The bank, the Longs, and BIA had to sign the documents, and the bank paid the premium to

BIA. The tribe was directly involved in such consensual agreements, resulting in BIA guaranteed bank loans for tribal members and their Indian-owned entities. The tribe was directly involved in the BIA guarantee program because it directly benefited the economic security and welfare of the tribe.

Longs' family farm and ranch business contributed beneficially to the economy of the reservation. Their lease payment was approximately $17,000 a year to the tribe and BIA for their Indian Range Unit of 6,400 acres of trust land. Such lease payments provided income to the tribe and individual Indian allottees. Ronnie has leased this Indian Range Unit from the tribe and BIA for over 20 years. Longs' owned over 600 cattle located year around on the Indian Range Unit. Over the years they paid wages for labor, repairs, fuel, parts, machines, and supplies. They raised their family and contributed to the economic security and welfare of the tribe.

Without assistance of the tribe, Longs would not have been able to obtain BIA guarantees, and without BIA guarantees the Longs and other members would not have been able to obtain bank loans to operate their family farm and ranch business. With BIA guaranteed loans, the Longs were able to be self-employed, make their own income, and raise and care for their family on this economically poor, sparsely populated, rural reservation where good jobs are in short supply. Indian-owned farming and ranching businesses are also in short supply on the

reservation. Each one is important to the economic security and welfare of the tribe. That is why the tribe assists tribal members in obtaining BIA guaranteed loans. The program has benefited the bank, the Longs' family business, and other Indian-owned farm and ranch businesses on the reservation, and contributed to the economic security and welfare of the tribe.

Because of the bank's breach of the Loan Agreement, all efforts of the Longs, the tribe, and BIA to maintain the Longs' business on the reservation is ruined, and the Longs' business was seriously crippled. This was a blow to the tribe's BIA guaranteed loan program. Without most of their cattle and land the Longs are barely able to stay in business. The bank sold 1,270 acres of the land Longs' owned to nonmembers, and without their cattle that died they do not have income to pay the lease on their Indian Range Unit. Loss of a long established Indian-owned family cattle business on the reservation is a serious economic matter for the tribe. Of course, nonmember ranchers can take over Longs' land and expand their nonmember operations, but that does not help the tribe maintain the economic security or welfare of the tribe or its tribal members. Longs had been farming and ranching on the land for over forty years. The bank's conduct resulted in serious financial loss for the Longs, and threatens the economic security and welfare of the tribe.

In this case the bank challenges the authority of tribal courts to adjudicate disputes between tribal members and their lenders, including discriminatory, arbitrary, or predatory conduct by lenders, where the tribe was directly involved in obtaining BIA guarantees for the bank and its members. The results of the bank's conduct in this case show the serious threat to the tribe's economic security and welfare, if the tribe is powerless to adjudicate such claims locally in tribal court. The bank was not simply an off reservation lender that made a loan to a tribal member. The facts of this case clearly show that the bank's conduct went far beyond and threatens or has some direct effect on the economic security and welfare of the tribe.

The bank made money on Longs' loans for years. When Kenneth died the bank decided to take 2,230 acres of their land. The option to buy back their land in only two years for $468,000 cash was a long shot, even with the loans promised by the bank in the Loan Agreement. Longs were not represented by a lawyer. Ronnie was told that as soon as the agreement was signed the bank would make the operating loan that the Longs desperately needed. But when the bank did not make the promised operating loan of $70,000, the Longs' business was crippled. They had the hay to feed the cattle, but without money they could not buy fuel or hire trucks to move the hay twenty miles to the cattle. They could not feed or take care of their over 600 cattle in the winter, and they suffered huge losses. As a result,

they could not buy back their land, their cattle herd was nearly gone, and their business was seriously damaged. While Longs were legally in possession of the land holding over as provided in the tribal code, the bank sold 1,270 acres to nonmembers with bank financing on favorable terms not offered to the Longs. The bank went into tribal court to get Longs evicted off the land so the bank could sell the remaining 960 acres to nonmembers Mackjewskis. The bank filed a counterclaim in tribal court for eviction and money damages against the Longs. When the jury verdicts were not favorable to the bank it appealed to the CRST Court of Appeals. With the bank's conduct in this case in issue, the bank clearly stated the threat to the tribe's economic security and welfare in its oral argument to the CRST Court of Appeals:

> That's why I am concerned, not just for the bank, the bank has got the money to pay the judgment, your honors. What I am 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. <u>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</u>. (Emphasis added.)

The bank's conduct shown on the record in this case and its speech to the CRST Court of Appeals, clearly shows how such conduct threatens the economic security and welfare of the tribe. If there are no more bank loans made to tribal members, farm and ranch businesses owned by tribal members will fail, and the fragile economy of the tribe will fail.

The CRST Court of Appeals concluded that the tribal court properly exercised jurisdiction over this case under the second Montana test, reasoning as follows:

> In addition, the case clearly involves the "economic security" of the tribe in that the Cheyenne River Sioux Tribe (along with the Bureau of Indian Affairs) was a direct participant actively consulted by both the Longs *and* the Bank seeking economic data and support relevant to the cattle operation on the Longs' land. If the economic security of the Tribe were not involved, the tribe would not have played such a large role in these events in seeking to support and advance the opportunity for Tribal members to succeed in their ranching operation on the Reservation.
> Doc. 36, Attach. 16, page 10.

This case meets the second Montana test of tribal court civil jurisdiction. The decisions of the CRST Court of Appeals and U.S. District Court are correct, that the tribal court had civil jurisdiction over the breach of contract and related claims presented by Longs against the bank.

Contrary to the bank's arguments, there is no basis to further limit the Montana tests of civil jurisdiction by requiring specific congressional delegation of authority conferring subject matter jurisdiction over claims against nonmembers. Where requirements of one or both Montana tests are met, as in this case, tribal courts have jurisdiction under inherent sovereign authority to adjudicate the conduct and issues presented. The Supreme Court's decision in Hicks regarding jurisdiction over claims arising under 42 U.S.C. § 1983 does not change this result. In Hicks, the Court held that tribal courts do not have jurisdiction over state game

wardens executing search warrants on the reservation for evidence of an off-reservation crime. The Court limited this holding "to the question of tribal court jurisdiction over state officers," leaving "open the question of tribal court jurisdiction over non-member defendants in general." 533 U.S. 358 n.2. Applying Montana and Strate v. A-1 Contractors, 520 U.S. 438 (1997), the Court concluded that jurisdiction did not arise from the tribe's inherent sovereign authority. The Court then examined 42 U.S.C. § 1983 to determine whether there was any "congressional direction enlarging tribal court jurisdiction." 533 U.S. 366 n.7. The Court concluded that 42 U.S.C. § 1983 did not enlarge tribal court jurisdiction. Where requirements of one or both Montana tests are met, as in this case, Hicks does not require a statute or treaty authorizing a tribal court to decide claims involving contracts, torts, and other matters. Hicks does not require a statute or treaty authorizing tribal courts to hear breach of contract and related discrimination claims involving private parties as opposed to state officers.

Taken to its illogical conclusion, the bank argues that after Hicks, tribal courts may never hear a federal claim absent express authorization in the federal statute. The limited holding in Hicks did not overrule the existing precedent that "under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 n.7 (1999). In Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-65 (1978), the

Court recognized that tribal courts are available to vindicate rights created by federal law. Once subject matter jurisdiction attaches under either of the Montana tests, tribal courts have jurisdiction to adjudicate the dispute under inherent sovereign authority. Here, both Montana tests are met. No further authorization was necessary for the tribal court to hear all aspects of the dispute.

2. Second Issue: Jurisdiction-Discrimination

The bank's second issue is really part of its first issue. As discussed above, both Montana tests were met, and the tribal court had subject matter jurisdiction to adjudicate the dispute under inherent sovereign authority. The bank contends that the Longs pled a 42 U.S.C. § 1981 discrimination claim, and since the Hicks court held that tribal courts do not have jurisdiction over a federal cause of action alleged under 42 U.S.C. § 1983, the bank argues by extension that tribal courts would therefore not have jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981. The bank's theory is that Longs' discrimination claim was premised on a federal cause of action under 42 U.S.C. § 1981. The bank's theory is legally and factually incorrect. The Longs' amended complaint did not invoke 42 U.S.C. § 1981 or any federal statute as the source of the discrimination claim. Although the bank filed and argued other motions, the bank did not question the source of law for this claim through a pretrial motion to dismiss for failure to state a claim on which relief might be granted. Having failed to raise the issue in the trial court by

appropriate pretrial motion, the bank should not now be heard to speculate that the claim was a de facto claim under 42 U.S.C. § 1981, or some other federal law. There were no jury instructions on a federal cause of action for discrimination. Judge Jones looked to the CRST Code to define the claim. The CRST Law and Order Code, Chapter IV, Jurisdiction, provides in applicable part:

> Sec. 1-4-1. the public interest and the interests of the Cheyenne River Sioux Tribe demand that the Tribe provide itself, its members with an effective means of redress in civil cases against members and non-Tribal members who through their presence, business dealings, other actions or failures to act incur civil obligations to persons or entities entitled to the Tribes protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, and other persons and entities over which the Tribe has previously elected to exercise jurisdiction. The jurisdictional provisions of this Code should be applied equally to all persons, members and nonmembers alike. (Emphasis added.)

Discrimination is tortuous conduct. Tribal Code sec. 1-4-3 confers jurisdiction on the tribal court over claims arising out of "tortuous conduct." 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 (2003), citing Curtis v. Loetker, 415 U.S. 189 (1974). Since it is well established that a claim based on discrimination is a tort, jurisdiction over tortuous conduct necessarily includes jurisdiction over Longs' discrimination claim. Therefore, a tribally based cause of for discrimination may proceed as a "tort" claim as stated in the Code. The Tribal Code, however, does not state the elements of the cause of

action for discrimination. In order to decide whether the evidence constituted prima facie evidence of discrimination, and in order to properly instruct the jury, Judge Jones stated he had to "look to relevant federal law." A tribal court may choose to borrow from or adopt a federal or state legal principle to decide a case of first impression. For example, in a case involving an interlocutory appeal, which was not addressed in the tribal code, the Rosebud Sioux Supreme Court adopted federal practice and applied the standards in 28 U.S.C. § 1292(b). In re J.R.B., 16 Indian L. Rep.6137, 6139 (Rbd. Sx. Tr. Ct. App. 1968). See, e.g. CRST Rules of Civil Procedure 1c (1993), and Dupree v. CRST Housing Authority, 16 Indian L. Rep. 6106 (CRST Ct. App. 1988). "Tribal courts are free to borrow from the law of other tribes, states, and the federal government, without any compulsion to do so." F. Cohen, Handbook of Federal Indian Law 275, 284 (2005 ed.) (Emphasis added.) Judge Jones stated:

> The Court notes that the Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law. The only anti-discrimination laws explicitly contained in the Cheyenne River Sioux Tribal Code and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to *look to relevant federal law*. The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, *ultimately founded upon federal law*, against a party over which the Court can exercise jurisdiction under Hicks and Montana. (Emphasis added.)

Tribal Court adjudication of contract and tort claims is a well-established method, under Montana's first test, of regulating the activities of non-Indians who enter consensual relationships with tribal members.

In this case, the Longs' common law contract and tort claims arose directly out of, and were inextricably linked to, the commercial dealings and contracts with the bank. This case does not suffer from the infirmities present in Strate. Instead, there was a direct and close nexus between the Longs' causes of action and the underlying consensual relationship. The Strate Court found no tribal court jurisdiction under the first Montana exception, because there was no nexus between the tort action and the contractor's consensual relationship with the tribe:

> The first exception to the Montana rule covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The tortuous conduct alleged in Fredericks' complaint does not fit that description. The dispute … is distinctly non-tribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident. Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribe, Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.

520 U.S. at 456-457. The Strate Court did not hold that tribal tort law is an inappropriate basis to regulate the on-reservation conduct of non-Indians who enter consensual relationships with tribal members. Instead, like the Ninth Circuit in Ford Motor Co. v. Todecheene, 394 F.3d 1170 (9th Cir. 2005), the Strate Court

based its holding on the absence of a nexus between the tort action and the underlying consensual relationship.

Longs' discrimination claim arose directly from the negotiations and discussions with the bank and tribal officers concerning formation of the Loan Agreement and Lease With Option to Purchase, which took place on the reservation, on Longs' land, and at the tribal office, which is on trust land. The proposed agreement changed direction, and the bank decided it would not sell the land back to the Longs on a contract, because of possible jurisdictional problems if the bank had to foreclose on the land when it is "contracted or leased to an Indian owned entity on the reservation." (L.App.2, 0007) The bank would only sell the land back to Longs on the Lease With Option to Purchase. The bank would not sell Longs' land back to tribal members Longs on a bank financed long term contract for deed, but the bank did sell Longs' land to nonmembers on a bank financed long term contract for deed on terms substantially more favorable than the bank provided to the Longs. Also, Longs claimed at trial that the bank switched the two page October cash flow that the Longs had approved, and that everyone agreed would work, including BIA, admitted at trial as Exhibit 8A, and replaced it with a three page December cash flow which is attached to the bank's letter, which would not work. (A.App.2.00035, 00037, 00039) The bank's three page cash flow was sent to the bank from the tribal office on December 11, 1996, without Longs'

knowledge or approval, six days after the Loan Agreement and Lease With Option to Purchase was approved and signed. The purpose of the letter dated December 12, 1996, was to obtain BIA signature approval, however, the December 11th cash flow sent by the bank to BIA showed that the plan would not work. BIA would not approve such modified cash flow and requested a more complete application. (A.App.2, 00038) The bank never prepared or submitted a more complete application to the BIA. It is evident from the jury verdicts, that the discrimination claim was an integral part of and directly tied to and arose out of the formation and approval process involved with the Loan Agreement and Lease With Option to Purchase which involved the Longs, the bank, and the tribal officers.

All damages awarded by the jury were based solely on the Longs' loss of cattle because the bank did not make the operating loan as promised, the resulting loss of income from their cattle that died, loss of income from the 110 calves that could not be purchased because the bank did not make the calf purchase loan as promised, and loss of use and income from their land that the bank sold while Longs were still legally in possession. The jury determined that because the bank breached the Loan Agreement, the Longs could not perform under the Lease With Option to Purchase. (L.App.1,00002) (Jury Interrogatory Two) All of the Longs' damages presented to the jury were directly connected to the bank's breach of the

Loan Agreement, which resulted in loss of cattle and cattle income and loss of land and land income.

This Court should affirm the decisions of the CRST Court of Appeals and the U.S. District Court, that the tribal court had jurisdiction of the Longs' claim of discrimination.

3. Third Issue: Due Process

The bank was not denied due process of law in the tribal court proceedings. The bank argues that it was denied due process of law when the CRST Court of Appeals found a basis in tribal law, as opposed to federal law, to support the Longs' discrimination claim. The bank erroneously asserts that throughout the lower court proceedings, the discrimination claim was brought under Federal Law 42 U.S.C. § 1981, and it was not until the appellate level that it discovered that the discrimination claim arose under tribal law.

In its memorandum in opposition to Longs' motion for summary judgment in the U.S. District Court, the bank incorrectly asserts as "fact," that Longs' claim of discrimination was based on federal law. The bank argues that it was denied due process of law when, in what it now characterizes as a surprising development, the CRST Court of Appeals "held that the claim was based on tribal, not federal law." The bank's recitation of the facts is wrong, and its argument concerning denial of due process is without merit.

The Longs never alleged federal law as the basis of their discrimination claim. The claim arose under the CRST tribal law and was upheld on that basis by the tribe's highest court. The bank had a full and fair opportunity to litigate the factual and legal basis of the claim.

Longs' discrimination claim was brought under tribal law, not federal law. Their amended complaint sets forth the elements of a common law claim of intentional discrimination. Their amended complaint did not cite a single federal anti-discrimination statute, and it never once mentioned federal law as the source of the discrimination claim. Their amended complaint alleged that in selling the land the bank unfairly discriminated against the Longs, who are tribal members, in favor of non-tribal members. Longs alleged that the bank's sale of the land to non-Indians on terms more favorable than those offered them as tribal members constituted unequal treatment and unfair discrimination. The amended complaint set forth the basic elements of the Longs' common law claim of intentional discrimination. Nothing more is required to state a claim for relief under the tribal law. The tribal rules of civil procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief.…" CRST Rules of Civil Procedure, Rule 8(a). There were no jury instructions given by the tribal court to the jury on a federal cause of action for discrimination.

The bank's issue of due process, based on the bank's "surprise" that the CRST Court of Appeals stated that Longs' claim of discrimination was based on tribal law, not federal law, begs the question: How is the tribal court's statement of discrimination set out in Jury Interrogatory Four, that the bank approved at trial, differ significantly from the federal law based tort of discrimination that the bank now says it was based on? The bank participated with Judge Jones in preparing the jury instructions and Jury Interrogatory Two. The interrogatory submitted to the jury on the discrimination claim made no mention of federal law. It simply 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 (Exhibit 7)?" The bank made its arguments to the jury. The jury responded in the affirmative by a vote of seven to zero.

The fact that the bank now claims that it misconstrued the discrimination claim as one arising under federal law does not mean that the claim was, in fact, somehow an objectionable federal cause of action. Whether the tribal court based the discrimination claim on tribal law or federal law, what difference would it make in the language the tribal court used in the discrimination interrogatory to the jury, or in the jury instruction on discrimination? The Court instructed the jury in Instruction No. 7 that "A person or entity engages in discrimination under these instructions when that person or entity intentionally denies a privilege to a person

based solely upon that person's race or tribal identity." The fact that the tribal trial court or tribal appellate court referred to, or looked to, or borrowed, or even applied, principles and elements of federal anti-discrimination law in forming the jury interrogatory or instruction, or affirming the judgment, does not change Longs' cause of action into a federal cause of action.

The bank did not question the source of law for Longs' discrimination claim through a pretrial motion to dismiss for failure to state a claim on which relief might be granted. Having failed to raise the issue in the trial court by appropriate motion, the bank should not now be heard to surmise that the claim was a de facto federal claim under 42 U.S.C. § 1981, or some other federal law.

Judge Jones first looked to the CRST Code to define the cause of action for the tort of discrimination. The CRST Law & Order Code § 1-4-3 authorizes the tribal court to exercise jurisdiction over tort actions. The tribal code, however, does not state the elements of discrimination that must be proven. In order determine the elements and decide whether the testimony presented constitutes prima facie evidence of discrimination, and in order to properly instruct the jury, Judge Jones states he had to "look to relevant federal law." A tribal court may choose to borrow from or adopt a federal or state legal principle to decide a case of first impression. "Tribal courts are free to borrow from the law of other tribes, states, and the federal government, without any compulsion to do so." F. Cohen, Handbook of Federal

Indian Law 275, 284 (2005 ed.) In the Order dated January 3, 2003, Judge Jones stated:

> The Court notes that the Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law. The only anti-discrimination laws explicitly contained in the Cheyenne River Sioux Tribal Code and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to look to relevant federal law. The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law, against a party over which the Court can exercise jurisdiction under Hicks and Montana. (Emphasis added.)

Judge Jones took care in forming the jury instruction on this issue and discussed the matter with counsel. In denying the bank's motion for a directed verdict on this issue, the tribal court stated that it did not feel that the intentional denial of favorable bank financing under a contract for deed to the Longs was conclusive evidence of discrimination, and thus instructed the jury that it must find that the bank's decision to deny the Longs the contract for deed was based "solely" on their status as tribal members, thus permitting the jury to return a verdict for the bank if it determined that the bank had other non-discriminatory reasons to deny the contract for deed. (A.App.2, 00091 n.5) The bank made its arguments to the jury, but based on the evidence the jury did not agree with the bank.

The CRST Court of Appeals discussed that intentional discrimination is a tort under tribal common law. The court did not invent this common law rule.

Rather, it found that the rule was well established and supported by the reported decisions of the U.S. Supreme Court and the Cheyenne River Sioux Tribe. (A.App.2, 00103-105) These reported decisions are available to all litigants in the tribal courts, members and nonmembers alike. They make clear that discrimination is a tort prohibited under tribal law.

The bank is not correct that the CRST Court of Appeals affirmed the tribal court on alternate grounds not relied upon by the trial court. Even if it did, this is an approved practice for appellate courts, see, e.g., Smith v. Phillips, 455 U.S. 209, 215, 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), and, in this case, it would be an appropriate exercise of the court's discretion. See Bennet v. Spear, 520 U.S. 154, 166-167, 117 S. Ct. 1154, 1163 (1997). The jury's verdict, that the bank intentionally discriminated against the Longs based solely on their status as Indians or tribal members, was well supported on the trial record. The sole issue raised by the bank on appeal was the source of law for the discrimination claim. The CRST Court of Appeals, relying on the well-settled precedents of the U.S. Supreme Court and the Cheyenne River Sioux Tribe, found that the claim arose under tribal tort law. (A.App.2, 00103-105) This was within the sound province of the court of appeals. No remand to the trial court for consideration of these precedents was required.

This Court has stated that "we may affirm the district court's judgment on any basis supported by the record." Stevens v. Redwing, 146 F.3d 538, 543 (8th Cir. 1998). As such we exercise our discretion to affirm the judgment on this ground, although it was not considered by the district court. In United States v. Sager, 743 F.2d 1261, 1263 n. 4 (8th Cir. 1984), this Court stated "We review judgments, not opinions, and we may affirm on any ground supported by the record, whether or not that ground was urged below or passed on by the district court." See also Wisdom v. First Midwest Bank, 167 F.3d 402, 406 (8th Cir. 1999) (quoting Stevens v. Redwing, 146 F.3d 538, 543 (8th Cir. 1998)).

The CRST Court of Appeals upheld the trial court judgment on the discrimination claim on tribal law grounds. The evidentiary record in this case supports this ruling. The appellate court expressly held that, under the common law of the Cheyenne River Sioux Tribe, intentional discrimination is "tortious conduct" over which the tribal courts have jurisdiction pursuant to Cheyenne River Sioux Tribal Law and Order Code § 1-4-3. The court based its common law discussion on the reported decisions of the U.S. Supreme Court and the Cheyenne River Sioux Tribe. These decisions, cited and discussed in the tribe's amicus brief filed in the bank's appeal to the tribal appellate court, affirm that discrimination is a tort, which is prohibited under core principles of tribal and other common law.

These are precisely the kinds of actions over which tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation," see CRST By-Laws, Art. V, I(c), including claims arising out of "tortuous conduct," as authorized by CRST Law and Order Code § 1-4-3. One kind of classic tort is the harm that results from the differential and invidious treatment of one individual by another individual or entity. This is not the pursuit of a federal cause of action in tribal court like the 42 U.S.C. § 1983 claim pled in Hicks, but that of a permitted "borrowing" of federal law to stand in or amplify tribal law where it is necessary. See, e.g., CRST Law and Order Code, Title VII Rule 1 (d).

In denying the bank's motion for judgment notwithstanding the verdict, the tribal trial court looked to tribal law and relevant federal law. In affirming the judgment, the appellate court noted that tribal law permits the tribal courts to derive the elements of tribal causes of action from federal law. (A.App.2, 00104) The appellate court 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." (A.App.2, 00104 n. 5) This comports with Justice Souter's declaration in 533 U.S. at 384-385, that tribal law is often a "complex mix of tribal codes and federal, state, and traditional law."

Throughout the tribal court proceedings, the bank had notice of the Longs' discrimination claim and had ample opportunity to dispute the claim, including the opportunity to file a motion to dismiss for failure to state a claim, which would have clarified the source of law for the bank. The bank participated in picking the jury and passed the jury for cause. The bank had the opportunity and did in fact file, brief, and argue motions. The bank had the right under the tribal code to remove tribal members as jurors and replace them with nonmembers. The bank argued factual and legal points to Judge Jones, and argued its case to the jury. The bank briefed and argued its issues to the CRST Court of Appeals. This more than satisfies the fundamental requirements of due process, as articulated by the Supreme Court: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Wilkinson v. Austin, 544 U.S. 903 (2005), quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972) and Baldwin v. Hale, 1 Wall. 223, 233, 17 L. Ed. 531 (1864). The bank was first notified in the Longs' amended complaint that Longs were asserting a claim for discrimination. The record shows clearly that the bank's due process rights were not denied. Through discovery the bank was fully aware of the factual basis for the claim. The bank was fully aware of Judge Jones' concept of the claim

through discussions Judge Jones had with counsel, and the language Judge Jones used in the jury instruction and interrogatory to the jury concerning the claim.

The bank had every opportunity throughout the litigation to challenge or dispute the source of law for the Longs' discrimination claim. That the bank failed to do so does not raise a valid due process issue.

## CONCLUSION

Based on the above authorities applied to the facts of this case, the Longs respectfully submit that this Court should affirm the decisions of the CRST Court of Appeals and the U.S. District Court, that the tribal court had jurisdiction to hear the Longs' claims against the bank and the bank's claims against the Longs, and that the tribal court proceedings did not violate the due process rights of the bank.

Respectfully submitted this 1st day of December, 2006.

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**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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PLAINS COMMERCE BANK,

Plaintiff-Appellant,

v.

LONG FAMILY LAND AND CATTLE COMPANY, INC. AND RONNIE AND LILA LONG,

Defendants-Appellees.

Eighth Circuit File No. 06-3093

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Dated this 1st day of December, 2006.

James P. Hurley
Attorney for Defendants-Appellees

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The undersigned hereby certifies that he served the following upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

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| Original and 9 copies (10 total) of Appellees Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long's Brief and 1 CD-ROM containing a digital version of the brief<br><br>Original and 2 copies (3 total) of Appellees Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long's Separate Appendix | Mr. Michael E. Gans<br>Clerk of Court<br>U.S. Court of Appeals for the Eighth Circuit 111 S. 10th St., Room 24.329<br>St. Louis, MO 63102 |
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James P. Hurley