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United States Court of Appeals
for the Eighth Circuit

No. 06-3093

Plains Commerce Bank,
Plaintiff/Appellant, Appeal from the United States District Court for the District of South Dakota.

v.

Long Family Land and Cattle Company, Inc.; Ronnie Long; Lila Long,
Defendants/Appellees.

Cheyenne River Sioux Tribe,
Amicus Curiae - Amicus on Behalf of Appellee.

Submitted: March 12, 2007
Filed: June 26, 2007

Before WOLLMAN, JOHN R. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

The Plains Commerce Bank (bank) brought this declaratory judgment action in the federal district court against Ronnie and Lila Long and the Long Family Land and Cattle Company, Inc. (Long Company), seeking to have a tribal judgment of the Cheyenne River Sioux Tribal Court of Appeals declared null and void. That judgment upheld a jury verdict in the Longs' favor on their claim that the bank had discriminated against them as Indians and tribal members. The bank now argues that the tribal courts lacked jurisdiction over the Longs' discrimination claim and that it was denied

due process by the tribal proceedings. The district court[1] granted summary judgment to the Longs, and we affirm.

I.

The Long Company is a family farming and ranching business incorporated under the laws of South Dakota and located on the Cheyenne River Sioux Indian Reservation. Under its articles of incorporation, at least 51% of the company's outstanding shares must be Indian owned at all times, ensuring the company's eligibility for Bureau of Indian Affairs (BIA) loan guarantees. See 25 C.F.R. § 103.7 (2000); see also id. § 103.25(b) (2006). Husband and wife Ronnie and Lila Long, who are both enrolled members of the Cheyenne River Sioux Tribe (Tribe), own at least 51% of the company's shares. Ronnie Long's father, Kenneth Long, who was not a tribal member, owned the remaining 49% of the company's shares until his death in 1995. The parties disagree about whether his shares were distributed to Ronnie Long,[2] but it is undisputed that the Longs have majority ownership of the company.

The bank is a South Dakota corporation with its principal place of business outside the reservation. The bank had been lending to the Long Company for many years, and

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[1] The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

[2] In his will Kenneth purported to devise his interest in the company and his land on the reservation to his four children. Since Ronnie Long's siblings assigned their interest to him, the Longs claim 100% ownership of the Long Company. The bank disputes this, noting that it has filed a creditor's claim against the estate and asserting that Kenneth's interest in the company was never distributed by the probate court. The estate was still in probate at the time of the district court judgement.

these loans were guaranteed by the BIA because of the Long Company's Indian owned status. Kenneth, Lila, Ronnie, and Ronnie's mother Maxine, an enrolled tribal member, also personally guaranteed loans extended to the company. Prior to their deaths, Kenneth and Maxine Long mortgaged to the bank some 2,230 acres of fee land inside the reservation in order to secure loans for the Long Company operation. At the time of his death, Kenneth and the Long Company owed the bank $750,000.

In the spring of 1996 a bank officer came onto the reservation to inspect the Longs' land, cattle, hay, and machinery. Thereafter, the bank and the Longs entered into negotiations for a new loan agreement, and tribal officers and BIA employees helped to facilitate the negotiating sessions which took place in the Tribe's offices. The final agreement, which was signed at the bank's offices, provided that the mortgaged land would be deeded over to the bank in consideration for canceling some debt and making additional loans to the Long Company for use in its ranching operations. The Long Company was given a two year lease on the property with an option to purchase.

According to the Longs, the bank initially offered them more favorable terms, proposing to sell the mortgaged land back to them with a twenty year contract for deed. The bank later sent a letter to Ronnie Long withdrawing that offer, however, citing "possible jurisdictional problems" posed by the Long Company's status as an "Indian owned entity on the reservation." The Longs also claim that the bank never provided the promised operating loans to the Long Company and as a result the company was not able sustain its ranching operation through the particularly harsh winter of 1996-97.

Because the Longs lost hundreds of livestock that winter, they were unable to exercise their option to repurchase their land, which required full payment for the land within

sixty days of the expiration of their two year lease. When they did not vacate the property after their lease expired in late 1998, the bank initiated state eviction proceedings against them. The bank also asked the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit, but by this time the bank had already sold 320 acres of the land to Ralph and Norma Pesicka. In June of 1999, while the Longs continued to occupy a 960 acre parcel of the land, the bank sold the remaining 1,910 acres to Edward and Mary Maciejewski under a ten year contract for deed with a lower interest rate than that offered to the Long Company under its lease with option to purchase. Neither the Pesickas nor the Maciejewskis are tribal members.

The Longs filed a complaint in tribal court alleging that the bank had impermissibly engaged in self help measures when it sold the land while the Longs were still in possession. The Longs moved for a restraining order to prevent the bank from going through with the sales, and the bank moved to dismiss for lack of subject matter jurisdiction. The tribal court denied both motions. The Longs then amended their complaint to add their company as a plaintiff and to include a number of additional causes of action against the bank, including breach of contract, bad faith, and lack of consideration.

The Longs also brought a discrimination claim, seeking to have the land sales set aside on the ground that the sale to nonmembers "on terms more favorable" than the bank had extended to the Longs evidenced "unequal treatment and unfair discrimination against the Longs . . . ." The claim did not allege any statutory violation. The Longs introduced as evidence the bank's letter explaining its reluctance to sell the land to the Long Company on account of its status as an Indian owned entity. The bank filed a counterclaim in the tribal court for wrongful holdover of possession of the land,

seeking damages and the Longs' eviction. While the Longs requested that their claims be tried to a jury, the bank did not.

In a motion for summary judgment on its counterclaim, the bank conceded that the tribal court had jurisdiction over the subject matter because enrolled tribal members held majority ownership of the Long Company. Shortly before the jury was charged, the bank changed its position. At that point the bank asserted in a short colloquy with the tribal court that jurisdiction was lacking over the Longs' discrimination claim, alleging that the claim arose under federal law and could therefore not be heard in tribal court under Nevada v. Hicks, 533 U.S. 353 (2001). The trial judge rejected this argument and stated, "I think we have authority to enforce federal laws." At no time did the Longs state that their claim arose under federal law. The bank did not challenge tribal jurisdiction over the Longs' other claims.

A seven member jury was instructed on four of the Longs' claims: breach of contract, bad faith, discrimination, and improper use of self help remedies. The bank had the opportunity to request that nonmembers or non Indians be summoned to serve on the jury, but it made no such request. On the Longs' discrimination claim the judge instructed the jury: "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."[3] No reference was made to any statute or to federal law. A unanimous jury found for the Longs on all counts except the self help claim and returned a general verdict in their favor for $750,000 in damages plus interest. In addition, the trial court awarded the Longs the option to

[3] The jury verdict form similarly read: "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?"

purchase the 960 acres of land which they continued to occupy. The court also dismissed the bank's counterclaim in light of the jury verdict and tribal law.

The bank filed a post trial motion challenging tribal jurisdiction over the Longs' discrimination claim, contending that the claim "would fall under 42 U.S.C. § 1981" and therefore could only be adjudicated in federal or state court. The bank did not challenge tribal jurisdiction over the Longs' other claims, however. The trial court denied the motion. In discussing the basis for the discrimination claim, the court stated that 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." In the course of upholding the judgment the trial court referenced 42 U.S.C. § 2000d, a federal statute prohibiting racial discrimination in the distribution of benefits from a federally assisted program.

The bank appealed the judgment to the tribal court of appeals which affirmed tribal jurisdiction. The appellate court concluded that although the tribal court might lack authority to adjudicate federal causes of action, the Longs' claim for discrimination did not arise under federal law even if the trial judge believed that it contained some "federal ingredients." Instead, the claim arose under the traditional common law of the Tribe. Relying in part on an amicus brief submitted by the Tribe, the court of appeals concluded that under traditional Lakota notions of justice, fair play, and decency to others, discrimination because of race or tribal affiliation was tortious conduct. It noted that the tribal code gives the tribal courts jurisdiction over tort claims like that of the Longs. It also concluded that Supreme Court precedent permitted the exercise of such jurisdiction over a non Indian bank because the bank had formed a consensual relationship with members of the Tribe and because the bank's conduct implicated the

Tribe's economic security.

The bank subsequently filed this action in federal district court seeking a declaration that the tribal judgment was null and void and not entitled to recognition because the tribal court lacked jurisdiction over the Longs' discrimination claim and because the proceedings violated due process. The bank alleged that by upholding the jury verdict on the discrimination claim on the basis of tribal law when the trial judge believed the claim to be founded on federal law, the tribal court of appeals had deprived it of notice and a fair opportunity to defend against the claim.

Both parties moved for summary judgment, and the district court granted it to the Longs. The court concluded that the tribal courts had jurisdiction under one of the categories of permissible tribal jurisdiction over nonmembers which were recognized in Montana v. United States, 450 U.S. 544 (1981), because the bank had entered into a consensual relationship with the Longs and their company. The court emphasized that the Longs' claim arose directly out of their relationship with the bank and noted that the bank had conceded tribal jurisdiction at an earlier point in the tribal proceedings. The district court found no due process violation, noting that appellate courts may affirm on any ground supported by the record and that the bank had had a full opportunity to develop the record on the issue of discrimination.

The bank appeals from the grant of summary judgment. It argues that the district court erred in concluding that the tribal court had jurisdiction under the Montana exception for consensual relationships between members and nonmembers. It contends that it formed a business relationship only with the Long Company, a South Dakota corporation with no racial or tribal identity. The bank also argues that the Longs' discrimination claim was federal in nature and that tribal courts may not entertain federal causes

of action even if one of the Montana exceptions is met. Although the bank alleged in the district court that the Longs' claim arose under 42 U.S.C. § 1981, it contends on appeal that it was manifestly a § 2000d action. Finally, the bank argues that the tribal judgment is not entitled to comity in federal court because the proceedings denied it fundamental due process. It claims that by invoking tribal common law to uphold the discrimination claim, the tribal court of appeals employed a new theory of recovery and thereby deprived the bank of a fair opportunity to defend itself. Both the Longs and the Tribe as their amicus urge us to adopt the reasoning of the district court and affirm its judgment.

II.

We review a grant of summary judgment de novo, applying the same standard as the district court. Passions Video, Inc. v. Nixon, 458 F.3d 837, 840 (8th Cir. 2006). Summary judgment is appropriate where there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law. Id.; see also Fed. R. Civ. P. 56(c). Whether a tribal court properly exercised jurisdiction over a claim is an issue of federal law reviewed de novo. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994); see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985) (claim arises under 28 U.S.C. § 1331).

In recognition of the status of Indian tribes as distinct cultural and political communities, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978), the federal government has long encouraged tribal self government, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). Although the tribes no longer possess the "full attributes of sovereignty," United States v. Kagama, 118 U.S. 375, 381 (1886), they nevertheless retain those internal powers necessary to their self government which have not been withdrawn by the

federal government. See United States v. Wheeler, 435 U.S. 313, 323 (1978).

Because the authority of the tribes is founded on their "right . . . to make their own laws and be ruled by them," tribal jurisdiction does not normally extend to the conduct of nonmembers unless Congress has expressly granted such authority. See Strate v. A-1 Contractors., 520 U.S. 438,446, 459 (1997), quoting Williams v. Lee, 358 U.S. 217, 220 (1959). In the watershed case of Montana v. United States,, the Supreme Court identified two exceptions to this general principle. 450 U.S. 544 (1981).

Under Montana, tribes may exercise jurisdiction over nonmembers if they have entered into certain kinds of consensual relationships or if they have engaged in conduct on tribal lands which would harm tribal interests:

> 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. 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.

Id. at 565-66 (citations omitted).

The unifying principle behind both exceptions is that absent express congressional delegation, a tribe has civil authority[4] over non Indians only where such authority is

[4] Tribes are unable to exercise criminal jurisdiction over non Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191

"necessary to protect tribal self-government or to control internal relations." Id. at 564. Although Montana specifically addressed the regulatory rather than adjudicatory jurisdiction of tribes, see id. at 557, there is nevertheless a presumption that if a tribe has authority under Montana to regulate the activities of a nonmember, jurisdiction over disputes arising out of those activities exists in the tribal courts. Strate, 520 U.S. at 453.

The Longs argue, and the district court concluded, that the Tribe's exercise of jurisdiction over the bank falls within its inherent authority under the first Montana exception.[5] Consideration of this basis for tribal jurisdiction involves two separate questions: whether the bank formed a consensual relationship with the Tribe or its members and whether the tribal tort law invoked by the Longs is an appropriate "other means" by which a tribe may regulate nonmember conduct.

The bank argues that it never formed a consensual relationship with any tribal member because it provided loans to the Long Company, a South Dakota corporation. It contends that a corporation does not take on the tribal identity of its owners, pointing to the general principle that a corporation and its shareholders are distinct entities, see, e.g., Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003), and arguing that there is no justification here to pierce the corporate veil separating the Longs and their company. The Longs respond that the bank should not be heard to challenge the tribal character of their company when for many years the bank took advantage of financial incentives available to it only because the Long Company was Indian owned. They

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(1978).

[5] Neither party suggests that any treaty or federal statute has directly enlarged or contracted the inherent tribal authority under discussion.

also argue that the bank formed relationships with them as individual tribal members.

We agree that the bank's argument ignores the broader context of its interaction with the Long Company and with the Longs themselves. The Long Company, which was formed to take advantage of BIA incentives for developing Indian enterprises located on the reservation, was overwhelmingly tribal in character, as were its interactions with the bank. See Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1134-35 (9th Cir. 2006) (en banc) (nonprofit corporation that was designated a tribal corporation in its charter and that operated inside the reservation can be treated as a tribal member under Montana). The bank directly benefited from the Long Company's status as an Indian owned business entity, see 25 C.F.R. § 103.7 (2000) (requiring at least 51% Indian ownership), which qualified the company for BIA guaranteed loans and allowed the bank to greatly reduce its lending risk, see id. § 103.2 (2006). The bank could not have been unaware that it might be subject to tribal jurisdiction since in its letter to Ronnie Long withdrawing its offer to sell the land back to the Longs, the bank alluded to the "jurisdictional" implications of the Long Company's Indian ownership.

Moreover, the bank's loans to the Long Company were not simple corporate transactions. The bank repeatedly interacted with Lila, Ronnie, and Maxine Long. All three tribal members personally guaranteed the debt of the Long Company. The bank also sought the assistance of the Tribe in renegotiating a loan agreement with the Longs and their company, as well as in serving the Longs with notice to quit after they were unable to exercise their option to purchase.[6]

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[6] By this point the bank had another quite basic tie to the reservation since it had become the owner of the Long's former land on the reservation.

Because the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged in the kind of consensual relationship contemplated by Montana. At its heart the Montana inquiry is about tribal interests and tribal self government. See generally Hicks, 533 U.S. 353. The Tribe's interest in regulating commercial transactions between its members and nonmembers does not disappear just because a corporation is also a party to those transactions. That the Tribe was actively involved in facilitating negotiations between the Longs and the bank confirms that the Tribe had its own interest in facilitating the commercial endeavors of its members and in ensuring that they are not unfairly dispossessed of reservation land.

The existence of a consensual relationship is not alone sufficient to support tribal jurisdiction. See Strate, 520 U.S. at 457. The tribal exercise of authority must also take the form of taxation, licensing, or "other means" of regulating the activities of the nonmember, Montana, 450 U.S. at 565, and this regulation must have some nexus to the consensual relationship. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001). In other words, a nonmember's consensual relationship in one area "does not trigger tribal civil authority in another." Id.

The Supreme Court applied this limiting principle in the context of tort law in Strate v. A-1 Contractors, 520 U.S. 438 (1997). In Strate, a nonmember brought a lawsuit in tribal court against another nonmember for injuries sustained in an accident on a state highway within an Indian reservation. Although the defendant in that action had a consensual relationship with the Three Affiliated Tribes as a result of his work as a subcontractor for them, the lawsuit had not arisen within the context of that relationship. Rather, it arose out of a

purely accidental encounter between two strangers. Because the tort was "distinctly non-tribal in nature," id. at 457, the tribes' interest in regulating the conduct was correspondingly attenuated, see id. at 459. Notably, the Court did not hold that tort law could never be an appropriate means for tribes to regulate nonmember conduct, but rather that there was no connection between the personal injury claim and the defendant's consensual relationship with tribal entities. See id. at 457.

In contrast, the Longs' discrimination claim arose directly from their preexisting commercial relationship with the bank. While the personal injury tort at issue in Strate defined the duties of one stranger to another, the tribal tort in this case provided a standard of conduct to govern the bank's preexisting relationship with the Longs. Moreover, the legal obligation to refrain from discriminating on the basis of tribal affiliation is decidedly more "tribal" than the basic personal injury law applicable in Strate. Unlike Strate, this case is not about a tribe's power to govern nonmembers "just because they enter the tribe's territory." See A-1 Contractors v. Strate, 76 F.3d 930, 941 (8th Cir. 1996) (characterizing central issue), aff'd, 520 U.S. 438. Rather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.

In this respect we find the present situation more closely akin to the regulation upheld in Buster v. Wright, 135 F. 947 (8th Cir. 1905), a case cited by the Court in Montana as an illustration of the consensual relationship exception. See 450 U.S. at 566; see also Strate, 520 U.S. at 457. In Buster, this court upheld a permit tax on nonmembers for the privilege of conducting business with members on the reservation. After likening the permit tax to a license, we concluded that the regulation was permissible because the tribe had inherent authority to "prescribe the terms upon

which noncitizens may transact business within its borders." 135 F. at 950.

Here, the Tribe was doing just that and exercising its inherent authority. By subjecting the bank to liability for violating tribal antidiscrimination law in the course of its business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation. The fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here. Tort law is after all both a means of regulating conduct, see, e.g., W. Page Keeton, et al., Prosser and Keeton on Torts 25 (5th ed. 1984) (Prosser), and an important aspect of tribal governance. See Smith 434 F.3d at 1140. As the Supreme Court indicated in Curtis v. Loether, 415 U.S. 189 (1974), the distinction between statutory and common law rights may be functionally irrelevant in the context of intentional discrimination. Id. at 195 (discrimination claim for damages under the Civil Rights Act sounds in tort for purpose of Seventh Amendment). We see no reason why a tribal tort cannot be applied against a nonmember in that narrow set of circumstances where the consensual relationship exception is otherwise completely satisfied.

We therefore conclude that under Montana, the Tribe had inherent authority to regulate the bank's conduct arising out of its consensual relationship with the Longs by subjecting it to liability for tortious discrimination.[7]

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[7] Because we conclude that the case falls within the first Montana exception, we need not address the Longs' additional argument that tribal jurisdiction would also be appropriate under the second exception (on the ground that the bank's conduct "threatens or has some direct effect on the political

The bank argues that the Montana test is not dispositive of jurisdiction in this case because even if the tribal courts *would have had* authority under Montana to adjudicate a tribal law claim against it, they did not actually hear such a case. It contends that the Longs' discrimination claim is more properly characterized as a federal claim under 42 U.S.C. § 2000d. The bank also contends that the Supreme Court's decision in Hicks, 533 U.S. 353, precludes the tribal courts from exercising jurisdiction over a federal claim even if it falls within one of the Montana exceptions. The Longs respond that Hicks is not implicated here because their claim arose under tribal rather than federal law. They also add that even if they had raised a federal claim, the holding in Hicks was sufficiently narrow that it would not bar jurisdiction in this case.

In Hicks, the Supreme Court held that tribal courts had no jurisdiction to hear a § 1983 claim brought by a tribal member against state officers who had entered onto tribal land to execute a search warrant. Id. at 374. The bank argues that Hicks implicitly foreclosed tribal jurisdiction over other federal claims as well, including the Longs' claim which it now characterizes as arising under § 2000d. In contrast to the present case, however, the exercise of jurisdiction in Hicks did not fall within either Montana exception. Id. at 359 n.3, 364. The Supreme Court has never addressed whether tribal courts would be barred from hearing federal claims even when they would otherwise have jurisdiction under Montana, and we need not address this open question in this case.

We conclude that the tribal court of appeals appropriately upheld jurisdiction on the basis of tribal rather than federal law. Although the tribal trial court offered a post

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integrity, the economic security, or the health or welfare of the tribe"). 450 U.S. at 566.

hoc federal basis for upholding the jury's verdict on the Longs' discrimination claim and even asserted it had authority to enforce federal law against nonmembers, a mistaken jurisdictional analysis in the trial court cannot override the Longs' pleadings and the decision of the tribal court of appeals. Moreover, even though the tribal court looked to federal law for guidance in upholding the verdict,[8] this would not necessarily mean that it regarded the cause of action as arising under federal law. Tribal law often draws upon an array of sources, from customary law to treaties, and the Cheyenne River Sioux are "free to borrow from the law of other tribes, states, and the federal government." F. Cohen, Handbook of Federal Indian Law 274 (2005).

The existence of subject matter jurisdiction has traditionally depended on how a claim was pled, not on how the claim was perceived by the trial court. See, e.g., The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon."); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (as "master of the claim," plaintiff may "avoid federal jurisdiction by exclusive reliance on state law"). There is no indication that the Longs pled a federal cause of action, and the fact that the Longs *could have* pled a federal action is immaterial. The Longs' complaint alleged that the bank had engaged in "unequal treatment and unfair discrimination" when it granted more favorable terms to non Indian purchasers than to the Longs, making no mention of federal law or the elements of a particular federal claim. Cf. Wardle v. Nw. Inv. Co., 830 F.2d 118, 121-122 (8th Cir. 1987) (failure to allege specific elements of Little Tucker Act claim "strongly suggests" that no such claim was pled).

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[8] The trial court noted that the "Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law."

The bank's argument places undue emphasis on the trial court's jurisdictional analysis and gives too little regard to the decision of the tribal court of appeals. The Supreme Court has made it clear that until tribal appellate courts have had the "opportunity to review the determinations of the lower tribal courts" and to "rectify any errors," tribal evaluation of its own jurisdiction is not complete. Iowa Mut., 480 U.S. at 16-17, quoting Nat'l Farmers, 471 U.S. at 857 (1985).

Under the exhaustion doctrine first enunciated in National Farmers, 471 U.S. 845, federal courts will not review a tribe's jurisdiction until the tribal appellate review is complete. Iowa Mut., 480 U.S. at 17. The exhaustion requirement gives tribal courts the opportunity "to explain to the parties the precise basis for accepting jurisdiction" and to "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." Nat'l Farmers, 471 U.S. at 857. Exhaustion would be a meaningless exercise if federal courts were to ignore the determinations of the tribal appellate court. Here, the tribal court of appeals corrected the trial court's erroneous assumption that because the tribal code itself did not create a cause of action for discrimination, the only source of jurisdiction would be its authority to adjudicate federal law. "Proper respect for tribal legal institutions," Iowa Mut., 480 U.S. at 16, requires that we not overlook the appellate court's analysis as the bank would have us do. Since the tribal court of appeals upheld jurisdiction over a tribal rather than federal law claim and since the Longs' claim was not pled as a federal cause of action, we need not consider whether the tribal court would have had jurisdiction over a federal civil rights claim.

We conclude that the Montana inquiry is dispositive of tribal court jurisdiction over the Longs' tribal law discrimination claim. See Hicks, 533 U.S. at 358 n.2 (limiting

holding to its facts). The Tribe had inherent authority to regulate the bank's activities in connection with its consensual business relationship with the Longs and their company. As a natural corollary, the tribal court system – the institution "best qualified to interpret and apply tribal law," Iowa Mut., 480 U.S. at 16 – also had jurisdiction to entertain tribal law disputes arising out of those activities.[9] See Strate, 520 U.S. at 453 (discussing presumption of coextensive adjudicative jurisdiction); see also Martinez, 436 U.S. at 65 (recognizing tribal courts as appropriate fora for adjudicating disputes involving interests of both Indians and non Indians). The tribal court therefore properly exercised jurisdiction over the Longs' discrimination claim.

III.

The bank next argues that the tribal judgment is not entitled to recognition because it was obtained in violation of due process. It objects to the decision by the tribal court of appeals to uphold the jury's discrimination verdict on the basis of tribal tort law, arguing that the appellate court should have been constrained to address it under the federal law mentioned by the trial judge. The bank contends that it did not have proper notice that it was facing a tribal rather than a federal claim for discrimination and therefore was denied an adequate opportunity to defend itself against the claim. Finally, the bank suggests that it should not have been subject to liability for a tort that had not previously been recognized.

The Longs respond that the bank had adequate notice

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[9] Any distinction between regulatory and adjudicative jurisdiction would be artificial here, since the tribal courts acted in both a regulatory and adjudicatory capacity when they determined the respective rights and duties of the parties. See Strate, 76 F.3d at 938.

because their complaint was pled as a tribal law claim, the same basis upon which it was ultimately upheld. The Longs also point out that appellate courts may and often do affirm judgments on alternate grounds so long as doing so does not cause unfairness to the litigants. There was no unfairness here they say, because the bank had a full opportunity to develop the record on all elements of the tort and these elements did not materially differ from those included in the jury instructions or verdict form. The Tribe as amicus also urges this court not to second guess the authority or competency of its court system to articulate the evolving principles of tribal common law.

As an initial matter we note that the bank's due process claim is quite distinct from a traditional due process challenge. That is because the Bill of Rights and the Fourteenth Amendment do not of their own force constrain the authority of tribes or tribal courts.[10] See Martinez, 436 U.S. at 56. Tribes are obliged to comply with the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1303, which contains analogous due process protections. The bank did not raise a claim under the ICRA, and even if it had, that statute created no private cause of action for declaratory relief in federal court. See Martinez, 436 U.S. at 72.

The bank maintains, however, that under principles of comity a tribal judgment should not be recognized in federal court if the tribal proceedings violated due process of law. Comity refers to the recognition that one court affords to the

[10] We have jurisdiction over the bank's due process claim whether or not it arises under 28 U.S.C. § 1331 because it is part of the same case or controversy, see 28 U.S.C. § 1367(a), as the bank's challenge to tribal jurisdiction which arises under federal law. See Nat'l Farmers, 471 U.S. at 852-53; see also Alternate Fuels, Inc. v. Cabanas, 435 F.3d 855, 857 n.2 (8th Cir. 2006).

decision of another "not as a matter of obligation, but out of deference and respect." Black's Law Dictionary 242 (5th ed. 1979). For support the bank cites the Ninth Circuit decision in Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), which concluded that a federal court should recognize tribal judgments under principles of comity similar to those which govern recognition of foreign judgments. Id. at 810; see also, e.g., Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985). Using an analogy to Hilton v. Guyot, 159 U.S. 113 (1895), the leading case on federal recognition of foreign judgments, the Ninth Circuit concluded that a tribal court judgment should not be recognized if it was obtained in violation of basic due process rights. Marchington, 127 F.3d at 810. It reasoned that in the context of comity, due process requires that a defendant be given the opportunity for a "full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." Id. at 811.

This court has not had occasion to consider whether to borrow principles for recognition of foreign judgments in considering recognition of tribal judgments, and we need not do so in this case. Since we conclude on the basis of this record that the tribal proceedings violated no basic tenet of due process, we need not discuss the test articulated in Marchington.

As the Longs point out, it is not uncommon for this court to uphold a judgment on grounds not decided or discussed in the district court so long as those grounds are supported by the record. See, e.g., United States v. Sager, 743 F.2d 1261, 1263 n.4 (8th Cir. 1984). A tribe is neither required nor expected to use the same judicial procedures employed by federal courts, however, and federal courts must

take care not to exercise "unnecessary judicial paternalism in derogation of tribal self-governance." Marchington, 127 F.3d at 811; see also Kremer v. Chem. Constr. Corp., 456 U.S. 461, 483 (1982) (due process dictates "no single model of procedural fairness, let alone a particular form of procedure"). The rules that this circuit has developed for departing from the reasoning of a lower court reflect our own balancing of considerations like judicial economy and the interests of both parties. Cf. Singleton v. Wulff, 428 U.S. 106, 121 (1976) (decision is primarily matter of discretion for appellate court). The tribal court of appeals is free to strike a different balance between those considerations so long as its procedures do not deny defendants adequate notice and fair opportunity to defend themselves. See Hilton, 159 U.S. at 167, 205.

In this case there was no deficiency in notice or opportunity to defend sufficient to make out a due process violation. The Longs never asserted a violation of federal law, the bank made no attempt to dismiss the discrimination claim for vagueness, and no reference to federal law was made to the jury.[11] The bank has also not shown that it suffered prejudice as a result of having tailored its defense to a federal rather than tribal claim. The fighting issue in the trial court was whether the bank denied the Longs favorable terms on a deal solely on the basis of their race or tribal affiliation. The bank had ample opportunity to present evidence that it did not give the Longs less favorable terms than its non Indian customers or that it did so for some other permissible reason. We discern no difference between the tribal tort of

[11] If the bank was convinced that it was defending against a federal claim over which the tribal court had no jurisdiction, it could have gone immediately to federal court to seek a declaratory judgment that the tribal courts lacked authority to hear the case. See Hicks, 533 U.S. at 369, 374 (holding exhaustion requirement inapplicable where jurisdiction clearly lacking).

discrimination as recognized by the tribal court of appeals and the claim as it was presented to the jury. The bank was therefore not denied a fair opportunity to present relevant evidence or to defend itself.

The bank also argues that it should not have been subject to liability under a tort that had not previously been recognized by the tribal court of appeals. That the Longs' discrimination claim was novel is not itself grounds for refusing comity to the subsequent judgment where there is no indication that the court otherwise acted out of bias or refused to follow its own law. See Prosser, supra, at 4(novelty of claim not itself a bar to recovery). Tort law has historically developed incrementally in the courts. See id. at 3 ("[T]he progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before."). If the encouragement of tribal self governance through the development of legal institutions is to remain a federal priority, see, e.g., Iowa Mut., 480 U.S. at 16-17, then tribal appellate courts must be given latitude to shape their own common law to respond to the cases before them, as our own courts have done over the centuries.

The bank has also suggested that as a non Indian company it could not obtain a fair hearing in tribal court on a claim that it discriminated against Indians, but there is simply no evidence to support this assertion. If the bank feared prejudice from an all Indian jury, it could have requested that the tribal court exercise the discretion granted to it by the tribal code to summon non Indians to serve on the jury. It made no such request, but instead proceeded to trial without striking any jurors or challenging the composition of the panel. Absent some indication that the tribal courts were biased or subject to political control, we must presume the court system to be competent and impartial. Duncan Energy,

27 F.3d at 1301. The bank has failed to show any bias in this case.

Since the bank has failed to show that it was denied a full and fair opportunity to be heard in tribal court, we see no reason on this record to deny comity to the Longs' tribal judgment.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLAINS COMMERCE BANK, Plaintiff, CIV 05-3002 **2006 DSD II**

-vs-

MEMORANDUM OPINION AND ORDER

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

**KORNMANN, U.S. DISTRICT JUDGE**

[¶1] Plains Commerce Bank ("bank") filed this action under 28 U.S.C. § 2201 seeking declaratory relief against the Long Family Land and Cattle Company, Inc. ("Long Company") and Ronnie and Lila Long. On December 1, 2005, cross motions for summary judgment were filed by the bank (Doc. 28) and the defendants (Doc. 33).

## BACKGROUND

[¶2] The bank, formerly known as Bank of Hoven, is a South Dakota banking corporation with its principal place of business located in Potter County, South Dakota. The Long Company is a South Dakota chartered family farm corporation with its principal place of business in Dewey County, South Dakota, on the Cheyenne River Sioux Tribe ("CRST") Indian Reservation. Ronnie Long ("Ronnie") is the son of Kenneth ("Kenneth") and the late Maxine ("Maxine") Long. Ronnie's wife is Lila ("Lila") Long. Ronnie and Lila are both members of the CRST, as was Maxine before her

death. Kenneth was not a member of the CRST.

[¶3] The bank provided Kenneth and the Long Company with various loans. It is undisputed that CRST members have at all times relevant owned at least 51% of the outstanding stock in the Long Company. Native American control of the Long Company was required in order to qualify for Bureau of Indian Affairs ("BIA") guarantees of the loans of the bank to the Long Company. *See* 25 C.F.R. § 103.7. Some of the Long Company's loans from the bank were guaranteed by the BIA.

[¶4] Prior to his death on July 17, 1995, Kenneth owned 2,230 acres of deeded agricultural land located within the CRST Indian Reservation. He also owned 49% of the Long Company. The land was used in the Long Company's farming and ranching operation. Kenneth had mortgaged this land and his home in Timber Lake to the bank to secure loans for the Long Company's operations. In his will, Kenneth purported to devise his land and his shares in the Long Company to his four children. Ronnie's brothers and sisters sought to assign all of their interests in the land and the company to Ronnie. The Longs thus claim that Ronnie inherited and controlled all of Kenneth's land and his 49% interest in the Long Company, thereby giving Ronnie and Lila 100% ownership of the Long Company.

[¶5] The bank claims that neither Ronnie nor any of Kenneth's children inherited his Dewey County real estate or his 49% interest in the Long Company. Kenneth's estate is being probated in the Circuit Court for the Eighth Judicial Circuit, Dewey County, South Dakota. Kenneth and the Long Company owed approximately $750,000 to the bank at the time of Kenneth's death. This amount greatly exceeded the value of the assets of Kenneth's estate. The bank filed a creditor's claim against Kenneth's estate on September 26, 1995. Kenneth's second wife, Paulette Long ("Paulette"), was appointed personal representative of the estate, and she

eventually deeded the real estate to the bank in lieu of foreclosure, as discussed below. The bank claims that Kenneth's 49% interest in the Long Company was never distributed by the Circuit Court. The probate estate remains open.

[¶6] In the spring of 1996, an officer of the bank came on the Longs' land on the CRST Reservation and inspected the land, cattle, hay, and machinery. Discussions concerning a new loan agreement took place among bank officers, Ronnie and Lila, and CRST Tribal officers at the CRST Tribal offices on the CRST Reservation. There were discussions involving a deed in lieu of foreclosure, in which Kenneth's land and house would be deeded to the bank, and, in return, the bank would credit $478,000 against the debt owed by Kenneth and the Long Company to the bank. The Longs claim that the bank proposed at that time that it would finance the sale of the Longs' land back to the Longs via a 20 year contract for deed. The bank claims that, although it was discussed, it did not propose a new loan agreement during that visit and nothing was reduced to writing.

[¶7] The Longs claim that the bank thereafter changed the "agreement." In a letter dated April 26, 1996, the bank stated that, on the advice of counsel, it would not sell the land under a contract because of "possible jurisdictional problems if the bank ever had to foreclose on [the] land when it is contracted or leased to an Indian owned entity on the reservation." The bank claims that no agreement was in place up to that point in time. There are no documents that expressly set forth what the Longs claim they were offered by the bank.

[¶8] On December 5, 1996, a meeting occurred at the bank's office in Hoven, South Dakota. The bank and the Long Company entered into a two year lease which gave the Longs the option to purchase the land for $468,000 at the conclusion

of the lease. A part of this agreement involved Kenneth's estate, acting through Paulette, conveying the Dewey County real estate, as well as the house in Timber Lake, to the bank, in lieu of foreclosure. The Long Company's annual Crop Reserve Program (CRP) payments of approximately $44,198 were assigned to the bank for lease payments. The bank and the Long Company entered into a second document, entitled "Loan Agreement." This document staled that the Long Company would be credited $478,000 for the land and house conveyed by Kenneth's estate. Moreover, the document stated that the bank would do a number of things. The bank would request that the BIA increase the guarantee on one of the Long Company's existing loans to 90%. It would request a 90% BIA guarantee on a $70,000 operating loan to be used by the Longs to care for their cattle and crops. Also, if the BIA approved that request, the bank would loan the Longs $37,500 to purchase 110 calves to be fed and pastured with the Long Company's calves to increase income so it could buy back the land from the bank.

[¶9] The Longs claim that the bank breached this agreement by failing to make the operating loans it promised to make. Specifically, the bank never made the $70,000 operating loan or the $37,500 loan, According to the Longs, as a direct result of the bank's failure to make these loans, the Longs were unable to feed or care for their livestock during the severe winter of 1996-1997. The Court takes judicial notice of the terribly harsh winter of 1996-1997, The Longs' cattle were positioned in winter breaks about seven miles from Ronnie's house. Due to blizzards, roads were closed and the Longs were not able to feed their cattle. The Longs claimed the bank knew that the Longs did not have operating money to move their hay several miles to the cattle on Ronnie Long's Indian range unit. The Longs lost 230 cows, 277 yearlings, and 8 horses during the winter of 1996-1997. Obviously, this resulted in a great amount of loss to the Long Company.

[¶10] Conversely, the bank claims that it made application to the BIA for the various guarantees set forth in the loan agreement of December 12, 1996. The bank received no response from the BIA until February 14, 1997, but when it did receive a response, the BIA asked that a more formal application be made. This was not done. The bank contends that it was not automatically required to make the operating loans. Rather, its promise was contingent on the BIA approving its requests. The bank argues that it did make various loans to the Long Company. On December 10, 1996, the bank loaned the Long Company $16,718.46 to pay for tribal leases for the 1997 grazing year. On December 14, 1996, the bank loaned the Long Company an additional $5,000 for operating expenses and $2,250 for the purchase of a snowmobile to get feed to the cattle.

[¶11] Due to the cattle losses and resulting economic circumstances, the Longs lacked the financial resources to exercise their option to purchase the land. On December 5, 1998, the lease expired. The Longs did not vacate the land. Nonetheless, on March 17, 1999, the bank sold 320 acres to Mr. and Mrs. Ralph Pesicka. In June of 1999, the Bank sent a letter to the CRST Court requesting that the CRST Court serve a Notice to Quit on Ronnie describing the entire 2,230 acres. The CRST Court accommodated the bank. The request was approved ex parte by Chief Judge Leisah Bluespruce on June 15, 1999, and was served on the Longs by the CRST Court on June 16, 1999. On June 29, 1999, the bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed.[1] Why a judge or a court would become involved on behalf of one party to serve a notice to quit is not understandable. The responsibility to prepare and see to the service of a notice to quit lies with the party seeking to start

[1] Neither the Pesickas nor the Mackjewskis are members of the CRST.

the process to evict a party.

[¶12] The Long Company then commenced an action in tribal court seeking a temporary restraining order restraining the bank from selling the land to the Mackjewski's. The bank moved to dismiss, claiming that the tribal court lacked subject matter jurisdiction. Both the bank's motion to dismiss and the Longs' motion for a restraining order were denied. The Longs then amended the complaint to include several causes of action against the bank that sought damages and other relief. The bank counterclaimed seeking eviction of the Longs and damages.

[¶13] A two day jury trial was held on December 6, 2002, and December 11, 2002, before Tribal Judge B.J. Jones. Jones is a member of the State Bar of South Dakota. The jury returned a verdict in favor of the Longs on their claims that the bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs, The jury awarded the Longs $750,000 plus prejudgment interest, calculated in the amount of $123,131. Judge Jones gave the Long Company the option to purchase the remaining 960 acres owned by the bank for the sum of $201,600. Both parties appealed, and the trial court decision was affirmed in all respects, including on the jurisdictional grounds raised by the bank.

[¶14] The bank has filed a motion for summary judgment (Doc. 28) seeking a declaratory judgment that the CRST Court lacked subject matter jurisdiction over it in the matter of Long Family Land and Cattle Company Inc. et al. v. Edward and Mary Maciejewski, et al. The bank also claims that the CRST Court and CRST Court of Appeals denied it due process of law. The Long Company filed a motion for summary judgment (Doc. 33) requesting that the Court enter

summary judgment declaring that the CRST Court had jurisdiction to enter the judgment previously discussed.

## DECISION

[¶15] The summary judgment standard is well known and has been set forth by this court in numerous opinions. *See* Hanson v. North Star Mutual Insurance Co., 1999 DSD 34 ¶ 8, 71 F.Supp.2d 1007, 1009-1010 (D.S.D. 1999), Gardner v. Trip County, 1998 DSD 38 ¶ 8, 66 F.Supp.2d 1094, 1098 (D.S.D. 1998), Patterson Farm, Inc. v. City of Britton, 1998 DSD 34 ¶ 7, 22 F.Supp.2d 1085, 1088-89 (D.S.D. 1998), and Smith v. Horton Industries, 1998 DSD 26 ¶ 12, 17 F.Supp.2d 1094, 1095 (D.S.D. 1998). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c); Donaho v. FMC Corp., 74 F.3d 894, 898 (8th Cir. 1996). "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1326 (8th Cir. 1995).

### I. Jurisdiction

[¶16] Tribal courts must in appropriate cases be given the first opportunity to determine whether the tribal court has the power to exercise jurisdiction over non-Indians. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985). A district court may perform a *de novo* review of a tribal court's determination of its own jurisdiction. Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103, 115 S. Ct. 779, 130 L. Ed. 2d 673 (1995), (*citing* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19, 107 S. Ct. 971, 978, 94 L. Ed. 2d 10 (1987)). The Court of Appeals for the Eighth

Circuit has likewise recognized that federal district courts in appropriate cases should not consider a case until tribal court remedies have been exhausted. *Id.* In some cases not falling within the Tribe's inherent sovereign authority, there is no exhaustion requirement because the tribal court simply lacks authority to adjudicate disputes arising from such conduct. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998). Because both parties participated fully in tribal proceedings, and the issue of jurisdiction was explored by the tribal courts, the question of jurisdiction can now be reviewed by this court. Nat'l Farmers Union Ins. Co., 471 U.S. at 57, 105 S. Ct. at 2454, Duncan Energy, 27 F.3d at 1300, and United States *ex rel.* Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (stating that ". . . a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction . . .").

[¶17] "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances." Strate v. A-1 Contractors, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).[2] In Montana v. United States, the United States Supreme Court held that the inherent sovereign powers of an Indian tribe do not, as a general proposition, extend to the activities of non-members of the tribe. 450 U.S. 544, 565-66, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The Court described two instances in which tribes could exercise such sovereignty. First, "[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 dealings, contracts, leases, or other arrangements." *Id.* Second, "[a]

[2] Neither party makes mention of any federal statute or treaty conferring subject matter jurisdiction over the Longs' claims in the tribal court.

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 and welfare of the tribe." *Id.* at 566.

[¶18] The CRST tribal court considered whether it had subject matter jurisdiction. It concluded that it did have the requisite jurisdiction to hear the lawsuit filed by the Longs, and, as discussed above, judgment was ultimately entered against the bank pursuant to the jury's verdict. The bank appealed to the CRST Court of Appeals, where CRST Chief Judge Frank Pommersheim and Associate Justices Everett Dupris and Patrick Lee considered the jurisdictional arguments, along with the bank's other arguments.

[¶19] Interestingly, on appeal, the bank asked the CRST Court of Appeals to consider a very narrow issue. It did not generally challenge the jurisdiction of the CRST Tribal Court over the lawsuit brought by the Longs against the bank. Rather, relying on Nevada v. Hicks, 533 U.S. 353 (2002), it challenged the tribal court's subject matter jurisdiction only as to the discrimination cause of action, claiming that tribal courts do not have jurisdiction over federal causes of action. The CRST Court of Appeals rendered a written opinion in which it determined that the Longs' discrimination claim is grounded in tribal, not federal, law. Accordingly, the CRST Court of Appeals concluded that the tribal court properly exercised jurisdiction over the case, 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 it was owned by the Bank.
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> 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 was 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.

[¶20] Indeed, the issue presented here is whether this lawsuit falls within one of the Montana exceptions. The Longs seem to focus most on the first Montana exception; their reliance on it will be discussed below. Amicus continues to urge that the second exception is equally applicable. As the Supreme Court noted in Strate the key to the proper application of the second Montana exception is a recognition that "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is

necessary to protect tribal self-government or to control internal relations.'" Strate, 502 U.S. at 459 (*quoting* Montana, 450 U.S. at 564). The fact that the Long Company is owned by tribal members does not, in and of itself, translate to a finding that the dealings between the bank and the Longs necessarily have an effect on the political integrity, economic security, or the health and welfare of the tribe. If taken to this extreme, tribal jurisdiction would exist in any circumstance where a private entity conducts business with a tribal member. This is clearly not the law as described in Montana and Strate.

[¶21] The written submissions by the Longs focus largely on the first exception discussed in Montana, namely the "consensual relationship" exception. The Longs argue that the bank entered into consensual relationships with Ronnie and Lila Long, who are tribal members, and with the Long corporation when the corporate stock was at all times owned 51% by CRST members. The bank seems to argue that, since the Long Company is a South Dakota corporation, it is not a tribal member. Therefore, the relationship between the bank and the Long Company was nothing more than a relationship between two non-member corporations. This assessment, although perhaps technically correct since a corporation apparently cannot be incorporated tribally, very much ignores important facts of this case. The Long Company is a closely held corporation. CRST members have controlled at least 51% of the Long Company's outstanding stock at all times pertinent to this action. Native American control was necessary in order for the Long Company to qualify for BIA guarantees. The BIA guarantees allowed the bank to make loans to the Longs with greatly reduced risk.[3] In fact, after the

[3] The very purpose of the BIA loan guaranty program is "to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The direct

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.

[¶22] The bank cites Hornell Brewing Co., where the Eighth Circuit noted that "[n]either Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations." 133 F.3d at 1091 (emphasis in original). I was the lower court judge in Hornell. The bank's argument is somewhat misplaced. In Hornell, the dispute centered on an alcoholic beverage styled "The Original Crazy Horse Malt Liquor." The brewery responsible for the beverage did not manufacture, sell, or distribute the malt liquor on the Rosebud Sioux Reservation, and the Court of Appeals specifically noted that Montana's discussion of activities of non-Indians on fee land within a reservation was irrelevant under the facts of that case. "The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty." *Id.* at 1091. Hornell is readily distinguishable from the facts of the instant case. Most notably, Hornell did not involve the consensual relationship criteria. It involved the question of whether the malt liquor's use of the "Crazy Horse" name had an effect on the political integrity, economic security, or the health and welfare of the tribe. The instant case involves a non-member's direct contractual involvement with a Native American owned corporate entity and concerns land located wholly

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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.

within the boundaries of the CRST reservation.

[¶23] Assuming for the moment that tribal tort law was applied, as the CRST appellate court concluded, there are other matters which must be considered in determining whether the tribal courts properly considered the case under the consensual relationship exception. In Strate, 520 U.S. at 457, the Supreme Court identified several cases which fall within this exception. *See e.g.* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 152-54 (1980) (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status"), Williams v. Lee, 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants), Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation), Buster v. Wright, 135 F. 947, 950 (8th Cir, 1905) (upholding tribe's permit tax on nonmembers for the privilege of conducting business within tribe's borders). Montana provides that "the 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 dealings, contracts, leases, or other arrangements." 450 U.S. at 565-66 (emphasis added). These cases aptly demonstrate tribal power to regulate though taxation, but they do not directly answer the question of whether tort litigation is part of the "other means" which is mentioned in Montana.

[¶24] The bank urges the Court to conclude that tort law does not fall within the rubric of "other means," citing Ford Motor Co. v. Todecheene, 394 F.3d 1 170 (9th Cir. 2005). In

Todecheene, parents of a tribal member who was killed in a one-vehicle accident on the Navaho Reservation in Arizona filed a product liability action in tribal court against the vehicle manufacturer. The Court of Appeals for the Ninth Circuit held that the existence of a financing agreement between the tribe and the manufacturer did not provide a sufficient basis to subject the vehicle manufacturer to the tribal court's jurisdiction on the basis of consensual relations.[4] Also, the Court of Appeals concluded that the tribe's interest in protecting the lives of its member police officers on tribal roads did not provide a sufficient basis to subject the manufacturer to the tribal court's jurisdiction under tribal self-government power.

> The consensual relations exception recognizes that tribes have jurisdiction to regulate consensual relations "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565, 101 S.Ct. 1245. The question here is whether "other means" includes tort law. Tort law does constitute a form of regulation. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1000 (9th Cir.1987) (recognizing that the implied covenant tort regulates the employment relationship); *see also Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337-38 (5th Cir.1995) (state

[4] In reaching this conclusion, the Court of Appeals for the Ninth Circuit followed an interpretive maxim which generally instructs that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* at 1180, n.6 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115-115 (2001)). "[E]nforcement through the prolonged and uncertain vehicle of litigation is worlds apart from taxation and licensing mechanisms." *Id.*

> tort law may result in "indirect regulatory impact"). But the Supreme Court in *Strate* appears to have required that the regulation be more directly connected to the contract itself. It would not be illogical to say that Ford agreed to finance the purchase of the Expedition, that the Expedition possibly had a defect, and that the tribe thus has jurisdiction to adjudicate Ford's liability. But one would be hard-pressed to argue convincingly that the product liability action has a direct nexus to the lease itself. It appears somewhat arbitrary to conclude that the Tribe has a greater interest in regulating product defects in vehicles it leases (for which there is a contract between the Tribe and Ford Credit) than in vehicles it purchases for cash (for which there would be no contract with Ford Credit).

Todecheene, 394 F.3d at 1180.

[¶25] What differs in this case is that the claimed tortious conduct of the bank has a clear nexus with the contractual dealings between the bank and the Long Company. The Court does not read Todecheene to completely foreclose the possibility of tribal jurisdiction over tort actions. Rather, Todecheene seems to suggest that there must be a connection between the tort and the dealings between the parties. This connection was absent in Todecheene, where the parties were tenuously tied through a vehicle lease agreement. Conversely, the discrimination claim raised by the Longs relates exclusively to the manner in which the bank treated the Longs in the various agreements concerning the lease with option to purchase land located wholly within the boundaries of the CRST Reservation. For these reasons, Todecheene is inapposite.

[¶26] It is also significant that the bank originally sought relief through the assistance of the CRST courts, 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.

[¶27] In the instant case, the bank opted to utilize the tribal courts 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 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 the majority ownership of the corporation is owned by Ronnie Long and Lila Long, enrolled members of the Cheyenne River Sioux Tribe and the Court has jurisdiction over the subject matter of this action.

Doc. 50, Ex. 10, page 1 (emphasis added).

[¶28] This is a significant concession by the bank and the bank should be held to it.

[¶29] There is no simple test for determining whether tribal court jurisdiction exists. Questions of jurisdiction over Indians and Indian country remain a "'complex patchwork of federal, state, and tribal law,' which is better explained by history than by logic." United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir, 2005) (quoting Duro v. Reina, 495 U.S. 676, 680 n.1 (1990)). While the Supreme Court has been reluctant to find civil tribal jurisdiction over defendants who are not members of the tribe, its decisions do not foreclose the possibility, particularly where the defendants enter consensual relationships with tribal members through commercial dealings, contracts, leases, or other arrangements. The tribe properly exercised jurisdiction over Long Family Land and Cattle Company Inc. et at. v. Edward and Mary Maciejewski, et al., and there are no genuine issues of material fact remaining for the Court to resolve. The Long Company's motion for summary judgment should be granted in this

regard. The bank's motion should be denied.

**II. Due Process**

[¶30] The bank also argues that it was not afforded fundamental due process rights by the CRST Tribal Courts. As such, it urges the Court not to recognize the tribal court judgment. The bank contends that it proceeded through the tribal court proceedings assuming that the Longs' discrimination claim was based upon federal law. It contends that tribal law was never pled or discussed, the case was tried on a federal discrimination theory, the jury instructions were fashioned based on federal law, and the verdict was upheld over its post trial motions based on federal law. It further argues that, because it did not have adequate notice of the tribal law basis of the discrimination claim, it was not afforded a full and fair opportunity to defend itself and be heard on a tribal law claim of discrimination.

[¶31] The Longs' amended complaint in tribal court made no reference to 42 U.S.C. or § 1981 or any federal statute. It generally alleged that "[t]he sale of the Longs' land to the Pesickas and Maciejewskis on terms more favorable than the bank required of the Longs, constitutes unequal treatment and unfair discrimination against the Longs, and prevented the Longs from buying back their land." The Longs, and the CRST, appearing before the Court as *amicus curiae*, urge that the tribal courts applied tribal law.

[¶32] An examination of the prior proceedings reveals that the bank is correct that the tribal trial court and appellate court are not in accord on the issue. In addressing the bank's argument that the tribal court lacked jurisdiction to enforce federal anti-discrimination laws, the trial court noted that

> [t]he 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.

Doc. 32, Ex. 22, p. 9.

[¶33] Clearly, the CRST trial court considered the Longs' discrimination claim essentially a matter of federal law. It was error for the tribal court to interpret or apply federal law. The CRST submitted an amicus brief in conjunction with the appeal. Perhaps guided by CRST' s arguments, the CRST appellate court took a different tack than the trial court, stating that private claims of discrimination are "recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe." Doc. 32, Ex. 24, p. 7. The appellate court treated the Longs' discrimination claim as a tort, and made reference to Cheyenne River Sioux Law and Order Code § 1-4-3, which confers jurisdiction on the tribal court over claims arising out of tortious conduct. The appellate court reasoned as follows:

> Since it is well understood that a claim based on discrimination essentially sounds in tort, jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim. In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense ofjustice, fair play and decency to others." *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003 A,

> Mem. Op. And Order at 6 (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 ILR 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River Sioux Tribal Code, as derived from Tribal tradition and custom, or even from the federal ingredients defined at 42 U.S.C. § 2000-2001.

Doc. 32, Ex. 24, p, 8.

[¶34] The Court of Appeals for the Eighth Circuit has noted that it reviews 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 district court." Gralike v. Cook, 191 F.3d 911, 921 n. 9 (8th Cir. 1999). The Court has no reason to believe the law is otherwise in tribal courts, and the bank does not claim that it is.

[¶35] The bank had opportunities throughout the litigation to challenge the source of law for the Longs' discrimination claim. It could have filed a motion to dismiss based upon the vagueness of the Longs' discrimination claim in the amended complaint. It made no such challenge. The factual record at the trial level was fully developed vis-a-vis the claimed discrimination. The gravamen of the bank's appeal was centered on the source of law for the discrimination claim and the CRST appellate court decided the issue, albeit differently than the CRST trial court. It requires no citation of authority to state that an appellate court may find that a lower court

reached the correct result, albeit for the wrong reason. The bank's motion for summary judgment should be denied.

[¶36] Now, therefore,

[¶37] IT IS ORDERED:

(1) The Longs' motion for summary judgment (Doc. 33) is granted. The Cheyenne River Sioux Tribal Court properly exercised jurisdiction over Long Family Land and Cattle Company Inc. et al. v. Edward and Mary Maciejewski, et al.

(2) The bank's motion for summary judgment (Doc. 28) is denied.

(3) No costs will be taxed.

[¶38] Dated this 17th day of July, 2006.

BY THE COURT:
s/
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK
BY: s/
DEPUTY (SEAL)

IN THE CHEYENNE RIVER
SIOUX TRIBAL COURT OF APPEALS

THE BANK OF HOVEN, NOW KNOWN AS PLAINS COMMERCE BANK,
Defendant/Appellant/Respondent

#03-002-A
R-120-99

vs.

MEMORANDUM OPINION AND ORDER

LONG FAMILY LAND AND CATTLE COMPANY, INC. – RONNIE AND LILA LONG,
Plaintiffs/Respondents/Appellants.

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Everett Dupris and Patrick Lee).

1. Introduction and Background

The facts in this case involve a series of complex commercial interactions between Ronnie and Lila Long, the Long Family Land and Cattle Company, Inc., Plaintiffs/ Respondents/Appellants (Longs), and Plains Commerce Bank (formerly Bank of Hoven), Defendant/Appellant/Respondent (Bank), dating back to 1989. Kenneth Long was a non-Tribal member whose first wife, Maxine Long, was a member of the Cheyenne River Sioux Tribe. Kenneth and Maxine owned approximately 2,230 acres of Dewey County real estate in fee simple as well as a house in Timber Lake. All of this real estate is located within the exterior boundaries of the Cheyenne River Sioux Reservation. All of this real estate was mortgaged to the Bank for loans to the Long Family Land and Cattle Company, Inc.

Upon the death of Maxine, Kenneth became the sole owner of the real estate in Dewey County. At the time of Kenneth's death on July 17, 1995, Mr. Long and the Long Family Land and Cattle Company owed the Bank

approximately $750,000. Mr. Long's estate acting through Paulette Long, Kenneth's second wife and personal representative of the estate, conveyed the Dewey County real estate, as well as the house in Timber Lake, to the Bank in lieu of foreclosure. As a result of this conveyance on December 5, 1996, the Long Family Land and Cattle Company was given credit for $478,000 on its outstanding debt to the bank.

Ronnie Long is a member of the Cheyenne River Sioux Tribe and is the son of Kenneth Long. Upon his father's death, Ronnie inherited Kenneth's interest in the 2,250 acres of land in Dewey County on the Cheyenne River Sioux Reservation as well as his father's 49% imterest in the Long Family Land and Cattle Company, Inc. The other 51% of the Company is owned by Ronnie and his wife Lila, who is also a member of the Cheyenne River Sioux Tribe. The Company has always been an Indian controlled company.

After Kenneth Long's death, employees of the Bank came to the Longs' land on the Cheyenne River Sioux Reservation to inspect it as well as the cattle, hay and machinery on the land. In addition, Bank officers met several times with the Longs, officials of the Cheyenne River Sioux Tribe, and Bureau of Indian Affairs employees. These meetings all took place on the Cheyenne River Sioux Reservation. All of these activities were directed to establishing a basis from which the Bank would provide new loans to Ronnie Long and the Long Family Land and Cattle Company, Inc. for their ranching operation on this land.

The Bank initially proposed that it would sell the land back to the Longs (which was conveyed to the Bank by the Long Estate) via a 20 year contract for decd. Upon the advice of counsel, in a letter to Ronnie Long dated April 20, 1996, the Bank withdrew this offer because of "possible

jurisdictional problems." (Exhibit 4) The revised proposal of the Bank offered the Longs only a two year lease and option within which to purchase and pay for the land in full.

The Lease with Option to Purchase included a purchase price of $478,000 for the land. The other features of the lease provided that annual Crop Reserve Program (CRP) payments to the Longs were assigned to the Bank and the right of the Longs to exercise their option to purchase for $478,000 at the conclusion of the lease period. Another document captioned "Loan Agreement" was signed by both the Bank and the Longs. It recited a series of debits and credits of the Longs to the Bank, and also stated that the Bank would request that the BIA increase the loan guarantee to 90% of note #98181, that the Bank would make an operating loan to the Longs in the amount of $70,000. The Bank also agreed to make another loan of $53,000 to pay off note #98809 of $17,000 with the balance of $37,000 to be used to purchase 110 cattle. Both the Lease with Option to Purchase and the Loan Agreement were signed by the Bank and the Longs on December 5, 1996.

Shortly thereafter, mother nature intervened with a vengeance during the horrific winter of 1996-97. As a result of the failure to provide the $70,000 loan and the implacable force of the brutal winter, the Longs lost 230 cows, 277 yearlings, and 8 horses. The Bank did provide some additional loans that were quite modest. The Longs never recovered from these financial and weather-related blows and were unable to meet their outstanding debt to the Bank and were not able to exercise their option to purchase.

The Longs did not remove from the property in question at the expiration of the lease. The Bank began (state) eviction proceedings by sending a notice to quit to the Cheyenne River Sioux Tribal Court for service on the Longs. Service was apparently never effectuated. There was never

any hearing or ruling by the stale court. Without any order of eviction and with the Longs remaining in possession of the land. the Bank nevertheless sold the land. On March 17, 1999, the Bank sold 320 acres to Ralph Pesicka for cash and on June 29, 1999, the Bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed. None of these purchasers are members of the Cheyenne River Sioux Tribe.

The Longs then commenced an action in the Cheyenne River Sioux Tribal Court seeking a restraining order preventing the Bank from selling the real estate. The Bank's motion to dismiss for lack of subject matter jurisdiction was denied as was the Longs motion for a restraining order against the Bank. The Longs subsequently amended their complaint to include several causes of action against the Bank that sought damages and other relief. The Bank counterclaimed seeking eviction of the Longs and damages. The Longs requested a jury trial on their claims. The Bank did not seek a jury trial on its counterclaim.

A two day jury trial was held on December 6 and 11, 2002. At the close of the Plaintiffs' case, Special Judge B.J. Jones dismissed Plaintiffs' claims that sought to void the contract, alleged fraud, failure of consideration, and unconscionability. The jury returned a verdict in favor of the Longs on their claims that the Bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs. The jury awarded the Longs $750,000 along with pre-judgment interest. Special Judge B.J. Jones determined that interest to be $123,131. The jury also found that the Bank did *not* use self-help remedies in an attempt to remove Plaintiffs from the land. A supplemental judgment was later entered permitting the Plaintiffs to exercise the Option to purchase the 960 acres of the land they

continued to occupy.

Both sides filed timely notices of appeal with this Court. Oral argument was heard on October 6, 2004.

II. Issues

This appeal involves seven (7) issues raised by the Defendant/Appellant/Respondent and two (2) issues of the Plaintiffs/Respondents/Appellants. They are:

A. Defendant/Appellant/Respondent

1. Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off reservation bank.

2. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiffs' breach of contract claim.

3. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiffs' separate cause of action based on bad faith.

4. Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.

5. Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.

6. Whether the trial court erred in granting Plaintiffs' motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a

contract for deed.

7. Whether the trial court erred in allowing pre judgment interest on certain damages absent specific instructions to the jury.

B. Plaintiffs/Appellees/Respondents Longs and Long Ranch and Cattle Company, Inc.

1. Whether the trial court erred in its calculation of prejudgment interest.

2. Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.

Each issue will be discussed in turn.

III. Discussion

A. Defendant/Appellant/Respondent Bank

1. Jurisdiction

The Bank's jurisdictional claim is quite limited in scope and is best understood as involving two separate (but overlapping) legal contentions. As to scope, the Bank argues that the Cheyenne River Sioux Tribal court does not have jurisdiction over the Longs' discrimination claim. Bank's brief at 6-9. This presumably forecloses any federal appeal under the *National Farmers Union* exhaustion doctrine of any other issue involved in this case save the jurisdiction claim relative to the discrimination cause of action. *See e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985). The Bank's two legal arguments, while not drawn

as sharply as they might be, assert that the trial court did not have jurisdiction over the discrimination claim because it is a *federal* claim barred under *Nevada v. Hicks*, 533 U.S. 353 (2002), and because no discrimination cause of action exists as a matter of Cheyenne River Sioux Tribal law. Each of these will be discussed in turn concluding with the pertinent jurisdictional analysis under *Montana v. United States*, 450 U.S. 544 (1981).

a) *Nevada v. Hicks* and Federal Causes of Action

The Bank alleges that Cheyenne River Sioux Tribal Court did not have subject matter jurisdiction over Plaintiffs' discrimination claim against the Bank. It is critical to note that the Bank does *not* challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit brought by the Longs against the Bank, but only against a single cause of action. Appellant's argument centers its claim on its reading of *Nevada v. Hicks*, 533 U.S. 353 (2002). More precisely, the Bank relies on *Hicks* for the limited proposition that tribal courts do not have jurisdiction over federal causes of action. Appellant's interpretation of *Nevada v. Hicks* in this regard is not incorrect, but it is inapposite. The Court in *Hicks* did hold that tribal courts do not have jurisdiction over a *federal* cause of action alleged under 42 U.S.C. § 1983.[1] The Bank argues by extension that tribal courts would have no jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981 (c). This is likely true, but misses the point. The Plaintiffs discrimination claim is

[1] The Court's rationale for this holding that there was no congressional delegation of such authority to tribal courts remains unconvincing in light of Justice Stevens' observation that there is no congressional delegation to state courts yet it is unquestioned that state courts have 42 U.S.C. § 1983 jurisdiction. See *Nevada v. Hicks*, 533 U.S. at 402-03 (2002). (Stevens, J. dissenting).

based on a cause of action grounded in tribal, not federal, law.

Plaintiffs' amended complaint did not invoke 42 U.S.C. § 1981 or any federal statute as the source of the discrimination claim and the Bank did not seek to question the source of law for this claim through a motion to dismiss for failure to state a claim on which relief might be granted. In addition, there were no jury instructions provided to the jury on an alleged *federal* cause of action for discrimination. In fact, the Court in the *Hicks* case itself noted that tribal law is often a "complex 'mix of tribal codes and federal, state, and traditional law' " 533 U.S. at 384- 85.

In addition, the Court in *Hicks* concluded:

> that tribal authority to regulate *state officers* in executing process related to the violation, off reservation, of state [criminal] laws is not essential to tribal self-government or internal relations.[2]

The case at bar is not a criminal case, does not involve stale officers, and did not take place off the Reservation. It is therefore totally inapplicable as to causes of action arising on the Reservation involving private individuals. The *Hicks* opinion limited its holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction and non-member defendants in general." 533 U.S. 358 n. 2.

b) Discrimination Causes of Action Under Tribal Law

Notwithstanding its citation to *Nevada v. Hicks*, the Bank's claim is not really that the Tribal Court does not have subject matter jurisdiction over the discrimination claim, but

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[2] Nevada v. Hicks, 533 U.S. al 364 (2002) (emphasis added).

rather there is no such cause of action under tribal law. In essence, the Bank is claiming that the Longs' discrimination claim should have been dismissed not for lack of jurisdiction, but for a failure to state a claim upon which relief might be granted. This is especially evident in that the Bank's motion to dismiss was not directed to all of the Plaintiffs' claims, but was limited to the discrimination cause of action premised on the (erroneous) theory that it was being pursued as a federal cause of action under 42 U.S.C. § 1981. This more precise claim is also insufficient as a matter of 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), SDCL § 20-13-21 (2003). They are also recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe.[3] While there is no

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[3] Discrimination is prohibited under tribal customary law in much the same way that other injurious or tortious conduct is prohibited under the common law. While it is true that discrimination is frequently the subject of legislation, it is also actionable under the common law. 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. Loether*, 415 U.S. 189, 94 S.Ct. 1005 (1974)). In *Curtis*, the Court held that a claim for damages under the Civil Rights Act of 1968 "sounds basically in tort" and "is analogous to a number of tort actions recognized at common law." 415 U.S. 189, 195-196, 94 S.D. 1005, 1008-1009. The Court noted that, "[a]n action to redress racial discrimination may ... be likened to an action for defamation or intentional infliction of mental distress," and further that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." 415 U.S. at 195-196, n. 10, 94 S.Ct. at 1008-1009, 10.

express tribal ordinance creating a civil cause of action based on discrimination, there are nevertheless at least two other sources of tribal law that do recognize such a cause of action. They are tribal common law and the Cheyenne River Sioux Law and Order Code § 1-4-3 which confers jurisdiction on the trial court over claims arising out of "tortious conduct."

Since it is well understood that a claim based on discrimination essentially sounds in tort jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim.[4] In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003 A, Mem. Op. and Order at 6 (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 ILR 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Cheyenne River

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These 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." Cheyenne River Sioux Tribal Code § 1-4-3. Cheyenne River Sioux Tribe's Amicus Brief at 14, footnote 3.

[4] One kind of classical tort is the harm that results from the differential and invidious treatment of one individual by another individual or entity.

Sioux Tribal Code, as derived from Tribal tradition and custom, or even from the federal ingredients defined at 42 U.S.C. § 2000-2001.[5]

The core of the Longs' discrimination claim was based on the Bank's letter to the Longs dated April 26, 1996, (Exhibit 4, TR 106-07, 330) in which the Bank withdrew its offer to sell the land back to Longs on a 20 year contract for deed because it involved an "Indian owned entity" and related (but unidentified) "jurisdictional problems." The Bank's subsequent offer as contained in the lease with option to purchase required *full* payment within 60 days of the expiration of the two year lease. (Exhibit 7) It is also significant to recall that the land involved is fee land not trust land. While trust land does involve certain federal restrictions on alienability, fee land does not. The Longs contended that this adverse and differential treatment of them was based on their status as "Indians" and constituted discrimination, a question that was ultimately resolved in their favor by the jury verdict.

It is a testament to the vitality and dignity of American jurisprudence that it would most certainly shock the conscience if a claim of discrimination – especially one based on the disparity of treatment on account or race or status – would not be cognizable in state or federal court. In this vein, the Cheyenne River Sioux Tribal Court is no different from its federal and state brethren in its unwillingness to ignore claims of discrimination. In the area of discrimination, there is a direct and laudable convergence of federal, state, and

[5] Note this last theory is not the pursuit of a *federal* cause of action in tribal court like the 42 U.S.C. § 1983 claim in *Nevada v. Hicks*, but that of a "borrowing" of federal law to stand in or amplify tribal law where it is necessary. *See, e.g.*. Cheyenne River Sioux Tribal Law and Order Code, Title VII Rule 1 (d).

tribal concern.

c) Jurisdiction under *Montana v. United States*

Since there is a discrimination cause of action under Tribal law involving fee land, the most relevant case for jurisdictional purposes therefore is not *Nevada v. Hicks* but *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court held that tribal courts generally do *not* have jurisdiction over non-Indians involving matters that arise on fee land within the reservation. This presumption against tribal court jurisdiction is nevertheless subject to *Montana's* well-known proviso which states: "to be sure, Indian tribes retain 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 members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements... A tribe may also retain inherent power to exercise civil authority over non-Indians on fee lands within its reservation when that conduct threatens charities or has some effect on the political integrity, economic security, or the health or welfare of the tribe." 450 U.S. 565-66 (citations omitted).

It is clear that the case at bar satisfies both prongs. 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 it was owned by the Bank.

It is somewhat misleading for the Bank to identify itself as an *off* reservation Bank, because it *owned* the land *on* the Reservation that is the subject of this lawsuit. As a result, the Bank is more accurately described as owning properly and engaged in business activities *both* on and off the Reservation.

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 was 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.

2. Breach of Contract Cause of Action

Appellant Bank asserts that the Longs' breach of contract claim was improperly submitted to the jury or if properly submitted to the jury, improperly decided by it because *no* contract existed as a matter of law or fact. In particular, the Bank contends that the key document captioned "Loan Agreement" which was prepared by the Bank and signed by both the Bank and the Longs on December 5, 1996 and recites, among other things, the Bank's commitment to provide two loans to the Long Land and Cattle Company, was not a contract at all. It was merely some kind of balance sheet that mainly recited a list of debts and

credits relative to the real estate conveyed by the Long Estate to the Bank. In essence, according to the Bank, there was no consideration and hence no contract.

In the Bank's motion for judgment N.O.V. on this issue, Judge B.J. Jones decided against the Bank finding there was sufficient consideration when the "Loan Agreement" is considered as part of the Lease with Option to Purchase under the integrated document doctrine. These documents were contemporaneous, applied to the same subject matter, and were interrelated as to terms. *See Battey Steamship Comp. v. Refineria Panama S.A.*, 513 F.2d 735, 738 n. 3 (2d Cir. 1975). Judge Jones had already adopted the integrated document doctrine in denying the Defendant's motion for summary judgment on its counterclaim for eviction and it appropriately became the law of the case. This Court now adopts the substance of this rule as appropriate law within this jurisdiction. In this view, it is reasonable to construe the Loan Agreement along with the Lease with Option to Purchase and find sufficient consideration provided by the Longs in their commitment to assign their CRP payments to the Bank and their commitment to continue the operation of their ranch in an attempt to pay off their debts to the Bank without the Bank having to resort to legal action and the less than complete loan guarantees provided by the BIA.

The analysis set out by Judge Jones in his well-reasoned opinion of June 7, 2003 is persuasive. As noted above, there certainly was enough evidence submitted to the jury for it to have found adequate consideration. In reviewing a jury's determination on a motion for a judgment N.O.V., the South Dakota Supreme Court has established a reasonable standard of review, which this Court adopts. This standard directs the reviewing court to review the testimony and evidence in a light most favorable to the verdict or nonmoving party and then to decide without weighing the

evidence if there is evidence which did support the verdict. *Matter of Estate of Holan*, 621 N.W.2d 588, 591 (SD 2000).

In sum, the application of the integrated documents doctrine is an appropriate legal standard within this jurisdiction. In addition, its legal elements of contemporaneity, similar subject matter, and interrelatedness of terms were also satisfied as a matter of law and there was a sufficient factual basis for the jury to find there was adequate consideration for a contract, and the Bank's failure to perform breached this contract.

3. Bad Faith Cause of Action

In a similar vein to the breach of contract claim, the Bank makes two contentions. First, that such a cause of action does not exist as a matter of law because it is subsumed in the breach of contract claim and second, even if such an independent cause of action does exist, there was insufficient evidence submitted to the jury to sustain a verdict upholding such a bad faith claim.

The question of law concerning a bad faith cause of action involves an issue of first impression within this jurisdiction. The trial court ruled that such a cause of action does exist within this jurisdiction and that it is one that is independent of any breach of contract claim. More precisely it might be stated that the trial court ruled that the bad faith claim *derives from* but is *severable* and hence independent of the breach of contract claim. As Judge Jones stated in his order of June 7, 2003 on the post-trial motions, the heart of the breach of contract claim was the failure to *provide* the $70,000 loan, while the heart of the bad faith claim was the Bank's failure to follow through with its promise to seek an increase in the level of the BIA guarantee for several outstanding loans.

This statement of the governing law is reasonable and appropriate. While it appears that no other tribal court has addressed this issue, it is true that the rule articulated by the trial court is within the ambit of both South Dakota Law, *see e.g. Garrett v. Bank West, Inc.*, 459 N.W.2d 833 (SD 1990) and the general rule as articulated in the *Restatement 2nd of Contracts* § 204 (1990) that every contract includes an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed upon benefits of the contract.

The Bank's challenge to the sufficiency of the evidence in this issue is likewise rejected. Given the standard of review articulated in Part IIIA2 at p. 11, clearly there was sufficient evidence in the record concerning the Bank's failure to respond to the BIA's request for a mote detailed application relative to potential increased loan guarantees from which the jury might conclude that the Bank acted in bad faith.

4. Excessive Damages Controlled by Passion or Prejudice

The jury awarded damages to the plaintiffs in the amount of $750,000. The Bank claims this was "excessive and controlled by passion and prejudice." (Bank's brief at 16.) This conclusion remains just that, a conclusion unsupported by reason or law. Plaintiffs sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested. The trial judge also sustained a number of objections made by the Bank to the Plaintiffs' claimed damages and Exhibit 23 was changed accordingly. The Bank did not object, stating, "I have no objections with these changes," TR 308 and therefore the Bank waived any subsequent right to appeal. The absence of 'prejudice' is also further evidenced by the jury's rejection

of the Longs' claim of improper self-help eviction by the Bank.

The Plaintiffs provided extensive evidentiary data and testimony relative to their damages. The Bank had the same opportunity. Given the appropriate standard of review in challenging a jury finding of fact as noted above, this Court cannot conclude that the jury award in this context lacked a sufficient factual predicate, even disregarding the Bank's waiver of this issue.

Ordinarily, this would conclude the Court's analysis of this otherwise legitimate issue, but for the Bank's decision to characterize the entire trial as "tainted":

> Once a claim for discrimination was allowed to be tried to the jury, where no one but tribal members could serve, the Bank could no longer obtain a fair trial. Allegations of racial discrimination by a nonmember Bank located off the reservation *completely enflamed the jury*. They became incapable of rendering a fair and impartial verdict. The *race card tainted* the entire trial process. (emphasis added) (Bank's brief at 23).

This rhetoric is itself inflammatory. At oral argument, counsel for the Bank admitted that he did not challenge any juror for cause, did not challenge the jury panel as a whole because it did not contain any non-tribal members, and perhaps most importantly, he did *not* request that the trial court use its discretionary power under Sec. 1-6-1(2) of the Tribal Code to "adopt procedures whereby non-enrolled Indians and non-Indians may be summoned for jury duty in cases in which one or more non-Indian parties are involved."

The Bank, apparently excusing its own ('benign')

neglect of the issue at the trial, then twists it (somehow) to contend that the very existence of a discrimination cause of action was playing the 'race card.' The Bank's apparent 'solution' to this 'problem' is that claims of discrimination against non-resident Banks should not exist as a matter of tribal law. This asserts a rather extravagant privilege for the Bank that is presumably not available to others, especially tribal members and the Tribe itself. Whether intended or not, this *is* the Bank playing its own 'race card', which at a minimum is quite baffling and potentially quite disturbing in the context of seeking to maintain a fair and reasonable legal context for the necessary commercial transactions involving individual Tribal ranchers and business people and the banking establishment. Both Tribal members and the Bank need each other and it is quite disheartening to have the Bank interject the potentially destabilizing 'race card' into these proceedings.

5. Eviction

The trial court dismissed the Bank's counterclaim for forcible entry and detainer against the Longs. The counterclaim was not tried to the jury as neither party requested it. The trial court rendered its decision after the jury verdict. It reasoned that based on its own previous decision that the loan agreement and the lease with option to purchase formed an integrated document and the jury's verdict that the Bank breached the contract, it could not render a favorable decision to the Bank on its counterclaim for eviction. The court's reasoning was that the jury finding that the Bank breached the contract (including the lease) effectively precluded any finding that Longs had breached the lease or otherwise improperly held over and were subject to eviction.

In addition, the Bank made no attempt to comply with the Tribal Law and Order Code provisions for recovering the possession of real properly set out §§ 10-2-1 – 10-2-8. § 10-2-

6(6) specifically provides that when a tenant has held over for more than sixty days without any notice to quit by the landlord, the tenant shall have the right to remain in possession for a full year after the lease termination date. The lease between the Bank and the Longs ran from December 5, 1996 to December 6, 1998. The Longs held over but no notice to quit was served within the sixty days (i.e. February 5, 1999) and thus the Longs had the right to hold over to December 6, 1999. Indeed, the notice to quit was not served on the Longs until June 16, 1999. (Exhibit 20). The notice to quit described the Longs as still in possession of the entire 2,230 acres. Despite the fact that the Longs were legally in possession of this land as a matter of express tribal law during this period, the Bank *sold* the land to two different purchasers in violation of the Longs' right to hold over and exercise their option to purchase under the original lease. (Exhibit 20). At no time did the Bank ever get an order from the tribal court removing the Longs from the land (TR 370).

6. Option to Purchase

The trial court granted partial relief to the Longs on this issue when it ruled that the Longs would be permitted to exercise their option to purchase the 960 acres they were currently occupying but not the 960 acres that were sold to the Maciejewskis and the 320 acres sold to the Pesickas. The Bank asserts that the trial court in essence ordered (partial) specific performance be granted against the Bank, but that such a remedy was never sought by the Longs and that such a remedy is equitable in nature and not available in a breach of contract action which is 'action at law' that does not authorize equitable relief. These statements constitute legal observations of a quite general kind and are not part of the positive law of the Cheyenne River Sioux Tribe.

In the instant case, the trial court attempted to strike a

balance between law and equity and to secure fairness to both sides. The specific performance element involving the option to purchase involved land originally owned by the lessee and lost because of tire inability to pay a significant debt to the Bank. The fact that the Longs were seeking to (re)purchase land that had been in their family for generations lakes the case outside the realm of the formal law/equity distinction. In addition, Judge Jones was careful not to interfere with the property rights of the Maciejewskis and the Pesickas as good faith purchasers. The balance struck by the trial court is fair, reasonable, and violated no rule of Cheyenne River Sioux Tribal law.

7. Pre-Judgment interest

The Bank objects to the award of pre-judgment interest.[6] Its essential argument – drawn primarily from South Dakota and California Law – is that prejudgment interest should only be awarded if the defendant knows or should have known based on reasonably accessible information what the amount owed was. This general observation however does not require a different result. It is routine in the West – including South Dakota – to calculate pre-judgment interest on lost cattle based on their market value at the time of the loss. Deciding the date of loss – if contested – is a factual question to be resolved by the jury. Thus the method of awarding prejudgment interest in this case conforms to the general practice throughout Western parts of the United States.

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[6] Pre-judgment interest is neither directly authorized nor prohibited by the Tribal Code. This might be an area where direct legislative guidance by the Cheyenne River Sioux Tribal Council would be beneficial, especially as to the rate of interest and the means of calculation of such interest.

The Bank's claim is further undermined by the fact that it did not object to special jury interrogatory 6 or jury instruction 10a on the issue of the potential award of interest and it did not propose any special jury interrogatories of its own. Such failure ordinarily precludes raising the issue on appeal. See e.g. *Alvine v. Mercedes-Benz of North America*, 620 N.W.2d 608 (SD 2001). In addition, the trial court adopted and accepted (to the penny) the Bank's proposed interest of $123,131.81 as opposed to the Plaintiffs' proposal of $453,698.

B. Plaintiffs/Respondents/Appellants Issues on Appeal

The Plaintiff Longs raise two issues on appeal and they are the mirror images of the Bank's issues numbers six and seven, namely that trial court erred in *not* awarding Plaintiffs complete specific performance to (re)purchase *all* the land involved in the original lease and option to purchase and the trial court erred in its calculation of pre-judgment interest to be awarded. Each issue will be discussed in turn.

1. Option to Purchase

The Longs contend that the trial court erred in its failure to permit the Longs to exercise its option to purchase all of their 2,225 acres rather than just 960 acres on which they effectively heldover. The Bank had already sold 320 acres to Pesickas and 960 acres to Maciejewskis and Judge Jones decided the option to purchase would *not* apply to these parcels.

In Judge Jones' supplemental judgment of February 18, 2003, he expressly stated:

> The court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on

> the Plaintiffs' claim that the Bank violated tribal law against self-help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and the other defendants [i.e. the Pesickas and Maciejewskis] were good faith purchasers.

Counsel for the Longs does not state what the appropriate standard of review is and more directly, why this legal determination of Judge Jones is wrong as a matter of tribal law.[7] Under these circumstances, Judge Jones' decision violated no rule of tribal law and balanced the equities in a most reasonable and fair manner.

2. Pre-Judgment Interest

The Longs contend that while the trial court was correct in submitting the question of whether to award pre judgment interest to the jury (which answered in the affirmative), the trial judge erred in his calculations of the amount of pre-judgment interest to be awarded. The core of the Longs claim on this issue is that the trial judge should have adopted the South Dakota statute, SDCL 21-1-13.1, which sets a rate of 10% for pre-judgment interest. Working from this assertion, plaintiffs' counsel does what he regards as the necessary mathematical calculations and arrives at the figure of $453,698 (Respondents-Appellants brief at 9).

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[7] The discussion of Cheyenne River Sioux Tribe Law and Order Code Sec. 10-1-5 is inappropriate as it deals with the proposed sale of foreclosed property which is not involved in this lawsuit.

There are several shortcomings in this line of argument. Counsel for the Longs does not identify what the appropriate standard of review is and whether the trial judge's mistake was one of law and/or fact, There can be no mistake of law because there is no express rate of interest specified in Me tribal code and therefore any (reasonable) rate of pre-judgment interest would he an appropriate legal standard.[8] Judge Jones required that counsel for both parties submit proposals to him. Then Judge Jones accepted the Bank's proposal of pre-judgment interest in the amount of $123,131.81 based on a rate of 8.5%, the rate of interest identified in the lease with option to purchase to be charged the Longs if they exercised their option to purchase.

In addition to different rates of interest, the proposals of both parties used slightly different mathematical models of calculation based on the varying assessments as to the time of loss, value at the time of loss, and whether interest would be simple or compound. While these differences in approach lead to quite different final calculations, there is no demonstration by the Longs that these figures are clearly erroneous or arbitrary and capricious and therefore the amount of pre-judgment interest awarded by Judge Jones is affirmed.

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather

[8] As noted above in footnote 6, *supra* at p. 16, the issue of pre-judgment interest including the specific rate of interest and method of calculation would greatly benefit form specific statutory guidance provided by the Cheyenne River Sioux Tribal Council.

more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

IV. Conclusion

For all the reasons above stated, the decision of the trial court is affirmed on all issues.

Ho Hec'etu Ye Lo

IT IS SO ORDERED.

FOR THIS COURT:
s/
Frank Pommersheim
Chief Justice

Dated November 22, 2004.

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOU INDIAN RESERVATION

IN CIVIL COURT
IN GENERAL SESSION
R-120-99

LONG FAMILY LAND AND CATTLE
COMPANY- RONNIE AND LILA LONG,
Plaintiffs,

vs.

SUPPLEMENTAL
JUDGMENT

EDWARD AND MARY MACIEJEWSKI,
RALPH AND NORMA J. PSICKA,
And THE BANK OF HOVEN, nka PLAINS
COMMERCE BANK,
Defendants.

This Court entered its judgment in this matter awarding the amount of principal awarded by the jury plus interest, as directed by the jury, and costs and disbursements. This supplemental judgment will address the Plaintiff's request to exercise its option to purchase all of the land conveyed by administrator's deed from the estate of Kenneth Long to the Bank of Hoven, including the land purchased by the Pesickas and Maciejewskis from the Bank. The Bank opposes the motion with regard to the land that was conveyed to the other parties, and also with regard to the land the Plaintiffs presently occupy.

The Court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on the Plaintiffs' claim that the Bank violated tribal law against self-help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and

therefore the other Defendants were good faith purchasers of the land.

The Plaintiffs contend that the jury's verdict coupled with this Court's denial of the Defendant Bank's counterclaim for eviction, due to the jury's finding that the Bank's breach of the loan agreement prevented them from exercising their option to purchase, preserves them the option to purchase the land including the land that was sold to the other Defendants after the Bank determined that the Plaintiffs' option to purchase had expired. Were it not for the intervening purchases, the Court may well be inclined to agree with the Plaintiffs. However, the Court does not feel it has the authority to set aside the contracts for deed the Bank entered into with the other Defendants if those Defendants entered into those contracts in good faith and without knowledge of the existing legal dispute between the Bank and the Plaintiffs. Additionally, the only legal issue presented by the counterclaim was whether the Court should evict the Plaintiffs from the 960 acres they presently occupy. The jury ruled against the Plaintiffs on their theory that the conveyances to the other Defendants violated the law.

In light of this, the Court finds that the Plaintiffs continue to possess an option to purchase the 960 acres they presently occupy at the amount per acre contemplated in the original option, but that they do not have a right to purchase the lands sold the other Defendants. The Court rejects the Bank's argument that enforcing the original option to purchase would be inequitable because land values have gone up because the Plaintiffs were denied the right to exercise the option because of the Defendant Bank's breach. The Court also finds that under the original agreement the proceeds from the sale of the house as well as the CRP payments were to be applied to the purchase price for the entire parcel. However, those amounts were pled in the request for the monetary

judgment arid a further reduction here would result in the Plaintiff achieving a double recovery.

WHEREFORE, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs are entitled to exercise the option to purchase the 960 acres they presently occupy in the amount of $201,600 and said amount shall be reduced from the judgment entered on their behalf against the Defendant Bank. The Plaintiffs shall file a partial satisfaction of judgment in that amount and the Bank shall, within 30 days of that filing, convey a quit claim deed to the Plaintiffs for the 960 acres they presently occupy, and it is further

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' request to exercise the option on the remaining balance of land referenced in the option to purchase is DENIED.

So adjudged this 18th day of February 2003.

s/_____
B.J. Jones
Special Judge

ATTEST: s/_____
Clerk of Courts

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOU INDIAN RESERVATION

IN CIVIL COURT
IN GENERAL SESSION
R-120-99

LONG FAMILY LAND AND CATTLE
COMPANY- RONNIE AND LILA LONG,
Plaintiffs,

vs. ORDER

EDWARD AND MARY MACIEJEWSKI,
RALPH AND NORMA J. PSICKA,
And THE BANK OF HOVEN, nka PLAINS
COMMERCE BANK,
Defendants.

The Defendant Bank has moved this Court for judgment notwithstanding the verdict, or in the alternative a new trial, on several causes of action asserted in the Plaintiffs' complaint and tried to a seven-member jury[1] on December 6 and 11, 2002. This Court dismissed several counts of the complaint, including one for fraud, one for failure of consideration, one pleading an unconscionable contract, and one praying for rescission of contract, after submission of the Plaintiffs' case, but permitted four counts-breach of contract, bad faith, discrimination, and violation of self-help remedies-to be submitted to the jury.[2] The Defendant's counterclaim for

[1] Although the Court impaneled six jurors and one alternate in this case, the Parties during the trial stipulated that all seven jurors could deliberate the case.

[2] The Court also dismissed, prior to trial, the count of the complaint (alleging fraud in the inducement of a personal representative's deed from the estate of Kenneth L. Long to

unlawful entry and detainer was heard by the Court at the same time as the legal issues were tried to the jury. The jury returned its verdict in the form of six interrogatories finding for the Plaintiffs on the causes of action alleging breach of contract, bad faith, and discrimination and finding for the Defendants on the count alleging violation of self-help remedies. The jury also issued an advisory verdict on the issue of whether the Defendant Bank's breach of contract prevented the Plaintiffs from performing on a lease with an option to purchase, finding that it did. That verdict informs the Court with regard to the counterclaim of the Bank to evict the Plaintiffs from certain real property it had acquired title to in the probate proceedings of Kenneth L. Long. The jury also returned a verdict for damages in the amount of $750,000 and directed the Court to award interest on that amount. The Defendant Bank timely filed its motion for JNOV and for a new trial on all counts the jury returned against it. This order will also address the Defendant Bank's counterclaim seeking to evict the Plaintiffs from certain fee lands within the Cheyenne River reservation.

The Defendant Bank's first argument is that the finding that it breached a loan agreement (Plaintiff's Exhibit 6) is legally insufficient because the loan agreement is not a legally-enforceable contract because the Defendants failed to give consideration. Although this defense was not pled by the Defendant Bank prior to trial, it did make an oral motion to conform its pleadings to the evidence submitted and that motion was granted by the Court. The Defendant Bank also moved for a directed verdict on the issue and the motion is therefore appropriate. The issue of want of consideration was therefore appropriately submitted to the jury and is therefore

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the Bank prior to trial on the ground that this count was an attempt to collaterally attack state court probate proceedings and should have been brought in the state court.

now resolvable by the Court.

In general, a Court should not overturn the verdict of a jury if sufficient evidence was submitted to the jury so that reasonable minds could disagree about the evidence. See Dunes Hospitality v. Country Kitchen, 623 NW2d 484 (SD 2001). As the South Dakota Supreme Court has stated with regard to judgments nov:

> Thus, the grounds asserted in support of the directed verdict motion are brought before the trial court for a second review. We review the testimony and evidence in a light most favorable to the verdict or the nonmoving party, "then without weighing the evidence [we] must decide if there is evidence which would have supported or did support a verdict.

Matter of Estate of Holan, 621 NW2d 588, 591 (SD 2000).

BREACH OF CONTRACT ACTION

The Bank makes a strong argument that the loan agreement that the jury found it breached is non-enforceable because of a lack of consideration by the Plaintiffs. If a contract is lacking in consideration, a party not giving consideration cannot recover for a breach of that contract. At first blush, it is difficult to see what consideration the Plaintiffs gave in exchange for the promises made by the Bank in the loan agreement, Trial Exhibit 6. The Bank had received a personal representative's deed to the land owned by Kenneth Long that secured the loans to Long Family Land and Cattle Company. The Plaintiffs owed the Bank the amounts reflected in the loan agreement and the agreement appears to be a method for the Bank to re-amortize the payments on the outstanding owed the Bank by the

Defendants. Admittedly, the Bank was attempting to gain an increased guarantee from the BIA and needed the Longs cooperation in seeking this, but that "consideration" is not anything the Longs were giving up.

However, the Longs still occupied the land and were receiving the CRP payments on the land. It is impossible to gauge whether valid consideration was given by the Plaintiffs for the loan agreement without also viewing the lease with the option to purchase, which the Court has already ruled, in denying the Defendant's motion for summary judgment on its counterclaim for eviction, was a related document under the integrated document doctrine. See Battery Steamship Corp. v. Refineria Panama S.A., 513 F.2d 735, 738 n.3 (2d Cir. 1975). It is possible that the jury found consideration in the fact that the Longs were agreeing to continue the operation of their cattle ranch in order to pay the entire amount of principal plus interest instead of having the Bank call the loans and collect the guarantee from the BIA in an amount substantially less than what was owed by the Plaintiffs. In addition, the Longs agreed to assign the CRP payments to the Bank as part of the plan to permit them to get on their feet again and attempt to regain title to the land that was in the Long family name for many years. The Court cannot conclude that there is no evidence that supports the jury's verdict and therefore denies the motion for judgment notwithstanding the verdict on the claim that consideration was wanting.

The Bank also contends that even if consideration existed, no evidence was submitted to the jury to support the Plaintiffs' claim that the Bank breached the loan agreement. The Bank contends that by the time it was required to perform under the loan agreement- late winter of 1997- the Plaintiffs had suffered substantial livestock losses due to the catastrophic winter of 96-97 and could not have possibly met the loan payments under the loan agreement. The Bank also contends that the only thing it promised to do in the loan

agreement was to seek an increase in the BIA guarantee, which it did and the BIA delayed action on the request, and the advance of operating monies of $70,000 was contingent upon the increased guarantee by the BIA which never came.

The Plaintiffs' theory at trial was that the guarantee of $70,000 in annual operating loans was breached and that the advances were not contingent upon the increase by the BIA in the guarantee. The Plaintiffs advanced the theory that had the Bank advanced the $70,000 in operating costs to it they would not have had the catastrophic cattle losses they experienced because they would have gotten feed to their livestock.[3] It was undisputed that the Bank did not advance the $70,000 referred to in the loan agreement and the Court believes the issue of whether that advance was contingent upon the increase in the BIA guarantee is not clear from the face of the loan agreement and was therefore a jury issue. The jury apparently felt that the Bank breached the promise to advance the operating costs and this Court cannot substitute its opinion for that of the jury when evidence does exist to support the verdict. The loan agreement is ambiguous on its face on the issue of whether the annual advance of the $70,000 in operating monies was contingent upon the BIA improving the increase in the guarantee and that ambiguity must be construed against the drafter of the document- in this case, the Bank.

The Bank also seems to be contending in its motion that it should have been excused from performing the loan agreement after the winter of 96-97 because the catastrophic livestock losses suffered by the Longs precluded them from

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[3] There was conflicting testimony whether the Longs had ever asked the Bank for operating monies to move hay to the livestock or to move the livestock, but this was a jury issue that was apparently resolved against the Bank.

paying the notes that were consolidated into the loan agreement. This is a legal issue that the Bank did not ask for a jury instruction on and was not therefore properly preserved at trial. Even had it been proposed as a defense, however, the success of this defense would depend upon the jury accepting the premise that the Bank had complied with the loan agreement up to the point when the Longs lost their livestock. The Plaintiffs' theory of the case appeared to be that the operating loan, had it been made prior to the cattle losses, would have prevented those losses and this was a question of fact for the jury to resolve.

## BAD FAITH CAUSE OF ACTION

The jury also returned a verdict finding that the Bank acted in bad faith when it attempted to gain the increase in the guarantee from the BIA. The Bank contends that there is no evidence to support this conclusion and the verdict should therefore be set aside. Although there is evidence from the record that the BIA was somewhat derelict in delaying a decision on the guarantee until after the Longs had suffered substantial cattle losses,[4] the undisputed evidence presented to the jury was that the Bank failed to respond to a request from the BIA to correct the submission for the increased guarantee in accordance with federal regulations attached to the letter notifying the Bank and the Longs of the insufficient application. The Bank decided not to respond to the request because it apparently had concluded that with the Longs' cattle losses the Longs were no longer able to make the

[4] The BIA took almost two months before it denied the Bank's request for an increase in the BIA guarantee because it was not appropriately submitted. The record is not clear regarding who submitted the documentation for the increase- the Bank or the Cheyenne River Sioux Tribe's Finance Office- but it is clear in that the Bank did not respond to the increase for a correct application.

payments on the loan agreement. Admittedly, the Bank did proceed to loan more monies to the Longs and to re-amortize additional loans. However, the jury must have decided that this was not a substitute for the $70,000 in operating monies the Longs needed in order to survive the winter of 96-97.

The Bank argues that the bad faith claim is subsumed into the cause of action alleging breach of contract and a separate cause of action should not have been tried to the jury on this issue. The Court believes that the bad faith claim relates to the failure of the Bank to follow through with the promise to seek an increase in the BIA guarantee, while the breach of contract action relates to the failure of the Bank to make the operating loans as promised in the loan agreement. These are discrete claims and both impacted the ultimate inability of the Longs to purchase back the land of Kenneth Long under the lease with an option to purchase.

## DISCRIMINATION

The third verdict returned against the Defendant Bank related to the claim of the Longs for discrimination in the lending practices of the Bank. During the trial a document was admitted into evidence, without objection, wherein the Vice-President of the Bank advised the Longs that the Bank would not sell them the land they obtained from the personal representative of the estate of Kenneth Long by contract for deed because of the "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." (Pl's Exhibit 4). This letter was dispatched after the Parties had apparently reached an understanding that the Bank would resale the Longs the land on a contract for deed. The Bank then proceeded to sell a parcel of the land to the Maciejewskis, non-Indians, on a contract for deed. The Court determined that his was prima facie evidence that the Bank denied the

Longs the privilege of contracting for a deed because of their status as tribal members and thus submitted the count to the jury for determination over the objection of the Bank, which timely made a motion for a direct verdict on that issue and objected to the jury instruction and interrogatory on the issue.

The Bank reiterates its argument that this Court has no jurisdiction over a claim of discrimination arising under federal law against a non-Indian entity. Federal law prohibits any entity that receives the benefit of federal financial assistance from discriminating against any person in the delivery of services. See 42 U.S.C. 2000d. This statute has been held to prevent a bank from "redlining" a certain area because of the racial composition of the residents of that area. See Laufman v. Oakley Bldg and Loan, 408 F.Supp 489 (SD Ohio 1976). The Longs are Indian residents of the Cheyenne River Sioux Indian reservation who claimed that the Bank denied them a privilege of contracting for a deed that was granted non-Indians.[5] There was uncontroverted evidence during the trial that the Bank was receiving the benefit of Department of Interior guarantees and CRP payments under federal programs and thus the Bank appears to be covered by federal law.

The Bank contends, however, that even if a prima facie case of discrimination was demonstrated, this Court lacks the jurisdiction to enforce federal civil rights laws under

[5] In denying the Bank's motion for a directed verdict on this issue, the Court stated that it did not feel that the mere denial of the 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 contract for deed was based "solely" upon 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.

Nevada v. Hicks, 150 L.Ed. 2d 398, 121 S.Ct. 2304 (2001). In Hicks the Supreme Court held that a tribal court lacks the authority to hear claims against state officials or those acting under the color of state law who allegedly violate the rights preserved persons under federal law under the provisions of 42 USC 1983. The Defendants argue that the same logic applies to claims brought against private parties for violations of other federal Jaws protecting the rights of individuals to be free of discrimination.

The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks. It is undisputed in this case, and was conceded by the Bank, that the Bank had a consensual commercial relationship with the Longs, enrolled members of the Cheyenne River Sioux Tribe, and their family cattle corporation, an Indian-owned entity. Even under the very proscribed view of tribal court jurisdiction over non-Indians contained in Hicks, this Court has jurisdiction over a non-Indian Bank that enters into a consensual relationship with the Band or its member or whose actions "threaten or ha(ve) some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." Montana v. United States, 450 U.S. 544, at 566 (1981); see also Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995). In Hicks the Supreme Court found that the tribal court jurisdiction over the game warden there was wanting because he had no consensual relationship with the Tribe or its members and his actions did not meet the second prong of the Montana test.

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. 42 U.S.C. 1983 is not a basis for substantive law, but merely a procedural vehicle for a federal court to exercise jurisdiction over claims of violations of federal law that fund their source in other federal laws. If this Court were precluded under Hicks from enforcing all federal civil rights laws, it would be stripped of the authority to enforce the Indian Civil Rights Act, notwithstanding the United States Supreme Court's pronouncement in Santa Clara Pueblo v. Martinez, , 436 U.S. 49, 58 (1978) that it has ultimate authority to enforce that law. Merely because the genesis of a right arises under federal law does not preclude this Court from enforcing that right.

## REDUCTION OF DAMAGES

The Bank argues that the verdict returned by the jury was excessive and had no basis in the law. The Court disagrees. The verdict returned was approximately $500,000 less than what was claimed by the Longs as their damages. Based upon the special interrogatory answers and the exhibits submitted, including Plaintiff's Exhibit 23, the Court cannot conclude that there was no basis for the amount of damages awarded by the jury and therefore denies the motion to reduce the amount of damages awarded.

## COUNTERCLAIM FOR EVICTION

In light of the jury's verdict that the Bank did breach

the loan agreement, and this Court's previous finding that the lease with an option to purchase and loan agreement were part and parcel of the same agreement, the Court must rule against the Bank on the counterclaim for eviction. A party that has failed to comply with a lease with an option to purchase cannot seek to enforce that agreement through an eviction action. The jury advised the Court that the Bank's breach prevented the Longs from performing under the lease with an option to purchase. The Court therefore concludes that the Plaintiffs did not violate the lease with an option to purchase and their option to purchase remains intact.

However, the jury concluded that the Bank did not violate the tribal law prohibiting self-help remedies when it conveyed parcels of the land covered by the lease with an option to purchase to the other Defendants. The Court has no authority therefore to set aside the land conveyances to the other Defendants. The Court acknowledges that this leaves an ultimate resolution of this matter in a state of flux. The parties are urged to seek a resolution of the issues left pending by the jury verdict regarding ownership of the land involved herein.

Now, therefore based upon the foregoing analysis, it is hereby

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for judgments notwithstanding the verdict, or in the alternative a new trial, on the counts of breach of contract, bad faith, and discrimination are hereby DENIED, and it is further

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for a reduction in the amount of damages of $750,000 is DENIED and it is further.

ORDERED, ADJUDGED, AND DECREED that the

Defendant Bank's counterclaim for eviction of the Plaintiffs from the lands they presently occupy is DENIED at this time, and it is further

ORDERED, ADJUDGED, AND DECREED that counsel for the Plaintiffs shall submit a judgment conforming to the verdict of the jury in this case.

So ordered this 3rd day of January 2003.

BY ORDER OF THE COURT:

s/_____
B.J. Jones
Special Judge

ATTEST: s/_____
Clerk of Courts