IN THE CHEYENNE RIVER SIOUX TRIBAL
COURT OF APPEALS
APPEAL NO. 03-002-A

THE BANK OF HOVEN n/k/a PLAINS COMMERCE BANK,
Appellant,

vs.

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

APPEAL FROM THE CHEYENNE RIVER SIOUX
TRIBAL COURT, EAGLE BUTTE,
CHEYENNE RIVER SIOUX RESERVATION

The Honorable B. J. Jones, Special Judge

Notice of Appeal Dated March 27, 2003

BRIEF OF *AMICUS CURIAE* CHEYENNE RIVER SIOUX TRIBE

Roger K. Heidenreich
Kimberly A. Naegele
Sonnenschein Nath & Rosenthal LLP
One Metropolitan Square
Suite 3000
Saint Louis, MO 63102
(314) 241-1800 Phone
(314) 259-5959 Facsimile

Thomas J. Van Norman*
Cheyenne River Sioux Tribe
Legal Department
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-6686 Phone
(605) 964-1166 Facsimile

* Counsel of Record

Steven J. Gunn
Civil Justice Clinic
Washington University School of Law
One Brookings Drive
Campus Box 1120
St. Louis, MO 63130
(314) 935-6413 Phone
(314) 935-5356 Facsimile

Attorneys for Cheyenne River Sioux Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Laws:

INTEREST OF AMICUS CURIAE

The Cheyenne River Sioux Tribe ("CRST") submits this brief as *amicus curiae*. On December 27, 1935, the CRST adopted a Constitution pursuant to the Indian Reorganization Act. 48 Stat. 984. The CRST Tribal Court was established "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe...." Constitution and By-Laws of the Cheyenne River Sioux Tribe ("CRST Const."), Art. IV, § 1(k). The CRST has an interest in this matter because of a challenge to the CRST Tribal Court's jurisdiction over such a dispute. The territorial jurisdiction of the CRST extends to "the territory within the original confines of the diminished reservation boundaries, which are described by the Act of March 2, 1889 (25 Stat. L. 888)...." (CRST Const., Art. I.) The property involved in this matter lies within that territory. Plaintiffs Ronnie and Lila Long are enrolled members of the CRST. This brief is submitted pursuant to the tribal council's authority to "assist members of the tribe in presenting their claims and grievances before any court or agency of government." (CRST Const., Art. IV, §1(b).)

STATEMENT OF FACTS

A. The Parties.

Plaintiff Long Family Land and Cattle Company (the "Company") was at all times a majority Indian-owned corporation engaged in farming and ranching operations. (Trial Tr., pp. 93-95.) As an Indian-owned corporation, the Company was entitled to apply for and receive BIA guarantees for bank loans. (Id. at 93.)

Plaintiffs Ronnie and Lila Long are husband and wife. They reside in Timber Lake, South Dakota, and are enrolled members in the CRST. (Trial Tr., pp. 91-93.) The original shareholders of the Company are Ronnie and Lila Long and Ronnie Long's parents, Kenneth and Maxine Long. Maxine Long was an enrolled member of the CRST. (Id. at 93.) Upon her death, Maxine Long's interest in the Company was transferred to Lila and Ronnie Long.

Defendant Bank of Hoven, now known as Plains Commerce Bank, is a state-chartered bank with its principal place of business in Hoven, South Dakota (the "Bank"). The Bank was the Company's lender, and some of its loans to the Company were guaranteed by the BIA. (Trial Tr., p. 94.) The Bank has routinely made BIA guaranteed loans on the reservation to members of the CRST. See, e.g., Bank of Hoven v. Director, Office of Economic Development, B.I.A., 2000 I.D. Lexis 58, 34 I.B.I.A. 206 (2000) (BIA guaranteed 90% of $500,000 loan made by Bank to majority Indian-owned cattle company); Bank of Hoven v. Acting Aberdeen Area Director, B.I.A., 1996 I.D. Lexis 28, 29 IBIA 121 (1996) (dismissing Bank's appeal of BIA decision to reduce Bank's claim for loss on BIA guaranteed loan to tribal members); River Bottom Cattle Co., Inc., v. Acting Aberdeen Area Director, B.I.A., 1994 I.D. Lexis 5 at *1, n. 1, 25 I.B.I.A. 110 (1994) (Bank sought 80% guaranty of $410,040 loan to majority Indian-owned cattle company). See, also, Netterville v. Aberdeen Area Director, B.I.A., 1993 I.D. Lexis 12, 24 I.B.I.A. 52 (1993) (concerning application for Indian Business Development grant in conjunction with agricultural loan from Bank to tribal member).

B. The Longs' Land.

Kenneth Long owned 2,225 acres of land located within the boundaries of the Cheyenne River Indian Reservation (the "Land"). The Land was used in the Company's farming and ranching operations.

Kenneth Long pledged the Land as collateral to the Bank to secure loans for the Company's operations. (Id. at 95.) Kenneth Long died on July 17, 1995. Under Kenneth Long's Will, the Land and his share of the Company were devised to his children. (Pl. Ex. 2; Trial Tr., p. 96.) After Kenneth Long's death, Ronnie Long's brothers and sisters transferred all of their interests in the Land and the Company to Ronnie Long. (Pl. Ex. 3; Trial Tr., p. 96.)

In April 1996, the Bank met with Ronnie Long at the CRST Planning Office in Eagle Butte, South Dakota. (Trial Tr., p. 97.) The Bank proposed that Kenneth Long's house in Timber Lake be sold with the proceeds applied to debt that had been guaranteed by the BIA. (Pl. Ex. 4.) As for the Land, it "would be deeded to the bank and sold back to you on a contract." (Id.)

The Bank, however, changed course in a letter to Ronnie Long, dated April 26, 1996. The Bank declined to sell the Land back to Ronnie Long or the Company based solely on Mr. Long's status as a tribal member and the Company's status as an Indian-owned corporation because of "possible jurisdictional problems" if the Bank had to foreclose on land contracted "to an Indian-owned entity on the reservation." (Pl. Ex. 4.)

C. The Bank Agrees To Restructure The Company's Debt.

In two related agreements dated December 5, 1996, the Bank agreed to restructure the Company's debt, and provide additional working capital so that the Company would be in a position to purchase the Land back from the Bank. (Pl. Exs. 6, 7.)

1. Loan Agreement.

- The Bank received a deed to the Land and Kenneth Long's home and the Company received a credit on its existing debts in the amount of $468,000 for the Land and $10,000 for the house. A Personal Representatives Deed to the Land dated December 10, 1996, was given to the Bank. (Pl. Ex. 9.)
- The Bank agreed to ask the BIA for an increase in the guarantee percentage from 84% to 90% and to reschedule an approximately $415,000 loan over 20 years with an annual payment from crop and yearling sales.

- The Bank agreed to request a 90% BIA guarantee on a $70,000 annual operating loan to be paid down each year to $1.00 through the Company's sales of calves, yearlings or crops.
- If the Bank's guarantee requests were approved, the Bank agreed to lend the Company $53,500. Of that amount, a portion would be used to pay off other indebtedness and $37,500 would be available to the Company to purchase 110 calves.

The Loan Agreement references and attaches the deed the Bank had received to the Land and also provides that the Bank would give the Company a lease/purchase option for the Land.

2. Lease With Option to Purchase. (Pl. Ex. 7.)

- The Company agreed to lease the Land from the Bank for two years. As rent, the Company agreed to assign two annual CRP payments of $44,198 to the Bank. The Company was responsible for paying real estate taxes on the Land.
- During the Lease term, the Company was given an option to buy back the Land for $468,000.
- If the Company exercised the option, all of the rent payments were to be credited to the purchase price (less an amount equal to interest on the unpaid purchase price balance from December 5, 1996).
- If the proceeds from any sale of Kenneth Long's house exceeded $10,000, then the selling price would be decreased by the excess amount. The house eventually sold for $30,000 and after selling expenses the option purchase price was to be reduced by $16,478.64. (Pl. Ex. 15.)

By deeding the Land to the Bank, leasing it back, and restructuring the remaining debt, the Company reduced its debt payments and improved its cash flow. (Pl. Exs. 8, 8a.) The

operating loan would allow the Company to pay annual operating expenses until crops or calves were sold. When the agreements were finalized on December 5, Ronnie Long explained that he needed the operating loan to move hay twenty miles to where his cattle would spend the winter. (Trial Tr., p. 151.) Ronnie Long also told the Bank that he planned to use $2,000 of the operating loan to pay for insurance covering the cattle. (Trial Tr., p. 156.) The $37,500 loan to purchase 110 calves would allow the Company to increase its income. (Trial Tr., p. 120.) These agreements were designed so that the Company would be in a position to purchase the Land in two years. (Trial Tr., p. 146.)

D. The Bank's Breach.

The Bank made an effort to restructure the BIA loans in a letter to Russell McClure, CRST Superintendent, dated December 12, 1996. (Pl. Ex. 8.) By letter dated February 14, 1997, the BIA informed the Bank that a more complete application was required by the Bank's Loan Guarantee Agreement and applicable federal regulations. (Pl. Ex. 11.) The BIA said it would not act on the Bank's request until it received a more complete application. (Id.)

The Bank, however, never submitted a further application, but did restructure the BIA loans in April, 1997. (Def. Exs. 3-5.) The Bank did not, however, make the $70,000 operating loan or the loan to purchase 110 additional calves. (Trial Tr., pp. 130, 149, 358.)[1]

Ronnie Long was told on December 5 that he would receive his operating loan so that he could pay for moving hay to his cattle located 20 miles away. (Trial Tr., pp. 150-152.) This was just one of many requests to the Bank to release money during November through January so that hay could be moved to the cattle. (Trial Tr., p. 291.) Even without the BIA's approval of the

[1] Between December 10, 1996 and February 12, 1997, the Bank did, under new promissory notes, lend $23,968.46 for lease payments and other miscellaneous expenses. (Pl. Ex. 22.) The money was not part of the promised annual operating loan. (Trial Tr., pp. 170, 358.) In April 1997, the Bank extended a $40,000 operating line which was used to pay off the advances described above. (Trial Tr., p. 215.)

restructured loans and the operating line, federal regulations permitted an emergency advance to preserve collateral of up to 10% of the guaranteed amount, or $42,800. (Pl. Ex. 11; Trial Tr., pp. 354-355.)

A five-day blizzard began on December 13, 1996, which completely blocked the county roads. When the roads were opened, Ronnie Long did everything possible to get feed to his cattle. There were minimal losses to the cattle until the blizzard of January 15-16, 1997, when the wind chill dipped to 80 degrees below zero. Because the cattle had no hay, three-fourths of the Company's cattle drifted out of the protected draws and died. The Company lost 277 of 286 calves, and 230 of 349 cows. (Pl. Ex. 14.) If hay had been available, the Company's cattle would have not have drifted out from the protected draws and would have survived. (Trial Tr., p. 158.) And, if insurance had been purchased, the Company would not have suffered a financial loss. Ultimately, the Company received only $48,000 from FEMA as compensation for the losses. (Trial Tr., p. 159.)

E. The Bank Sells The Land.

By letter dated December 1, 1998, Ronnie Long asked the Bank to extend the option exercise date by 60 days. (Pl. Ex. 17.) The next day, the Bank denied the extension and said that the Company's right to possess the Land would terminate on December 5, 1998. (Pl. Ex. 18.) On June 16, 1999, the Bank caused a Notice to Quit to be served on the Company through the CRST Tribal Court. (Pl. Ex. 20)

The Bank then sold portions of the Land. Three-hundred and twenty acres were sold to defendants Ralph and Norma Pesicka, non-CRST members, for $49,000. (Pl. Ex. 19.) The Pesickas moved their cattle onto that portion of the Land sold to them. The remaining acreage was sold pursuant to a Contract for Deed for $401,100 to defendants Edward and Mary Jo Maciejewski, non-CRST members. The acreage sold to the Maciejewskis was divided into two

parcels. On Parcel One, the Maciejewskis took possession immediately. (Pl. Ex. 21.) No order to quit possession was ever sought or obtained from the CRST Tribal Court. The Maciejewskis chased the Company's cattle off Parcel One and fenced it off removing some of the Company's machinery. (Trial Tr., p. 169.) Based on their possession of Parcel One, the Maciejewskis received two $23,000 FSA payments that otherwise would have been paid to the Company. (Pl. Ex. 23; Trial Tr., pp. 168-169, 275, 304-305.) The FSA payment was sufficient to make a payment for Parcel One under the Contract for Sale. (Trial Tr., p. 368.)

The Bank also received a total of $392,968.55 in federal loan guarantees from the BIA. (Pl. Ex. 16.) And, because the Company was not able to exercise the option to purchase, the Bank did not have to offset the purchase price by the proceeds from the sale of the house in an amount of about $16,400, or the excess of the CRP payments over the interest on the unpaid purchase price, an amount of about $8,000 to $9,000. (Trial Tr., p. 349.)

The Company offered evidence that it suffered $1,236,792 in damages from 1997 to 2002. (Pl. Ex. 23; Trial Tr., pp. 302-306.) The damage calculation measures the net financial consequences to the Company arising from the Bank's breach of the loan agreement during each calendar year from 1997 to 2002. The damage amounts are attributable to the death of the Company's cattle, the lost opportunity from not having the 110 calves, and the loss of the use of the Land. (Pl. Ex. 23.) Thus, the damage calculation was based entirely on the Bank's breach of the Loan Agreement and the resulting inability of the Company to exercise the purchase option.

F. Proceedings Below.

Plaintiffs filed a nine-count complaint alleging fraud (Count I), breach of contract (Count II), failure of consideration (Count III), avoidance of the deed given to the Bank (Count IV), self-help in violation of the CRST Tribal Code (Count V), discrimination (Count VI), bad faith (Count VII) and unconscionability (Count VIII). The plaintiffs sought damages and permanent

injunctive relief (Count IX). A trial was held over two days before a jury with the Honorable B. J. Jones, presiding.

After the close of plaintiffs' case, the court dismissed the claims that sought to void the contract (Count IV) and for fraud (Count I), failure of consideration (Count III) and unconscionability (Count VIII). Special interrogatories were submitted to the jury. By a unanimous verdict, the jury found: (1) the Bank breached the Loan Agreement; (2) the breach prevented the Company from performing under the Lease with Option to Purchase; (3) the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA; and (4) the Bank intentionally discriminated against Ronnie and Lila Long based solely on their status as Indians or tribal members in the Lease with Option to Purchase. The jury found that the Bank did not use self-help remedies in an attempt to remove Plaintiffs from the land. The jury awarded $750,000 in damages and found that interest should be added to the judgment. A judgment was entered on the verdict in the amount of $750,000 plus prejudgment interest of $123,131.81 and costs of $2,850.65. A supplemental judgment was later entered allowing the plaintiffs to exercise the option to purchase as to the portion (960 acres) of the Land they presently occupied for $201,600 in exchange for a Partial Satisfaction of the Judgment.

SUMMARY OF ARGUMENT

The CRST Tribal Court properly exercised jurisdiction over this action. The Bank entered into a consensual relationship with the Company, a majority-owned Indian corporation, through the Loan Agreement and the Lease with Option to Purchase. In addition, the Bank's conduct directly affected the economic security and welfare of the CRST because the dispute involves the ownership of Land within the boundaries of the CRST reservation by CRST members, and the ability of those tribal members to earn a living. Under the path marking case

of Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981), nothing more was required to establish the tribal court's subject matter jurisdiction over the entire dispute.

The Bank's contrary argument is based on a misreading of the applicable precedents. The Montana decision addresses subject matter, not personal jurisdiction. The analysis in Montana determines whether or not a tribal court has jurisdiction over a dispute involving a non-Indian as a result of its inherent sovereign authority. The Bank, relying on Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304 (2001), erroneously argues that tribal court subject matter jurisdiction depends upon authority from a statute or treaty. In Hicks, the Court made the limited holding that there was no inherent sovereign authority to adjudicate a claim against state officers executing a warrant. The congressional enactment, 42 U.S.C. §1983, was addressed by the Court to see if it may have enlarged the tribal court's jurisdiction. No such inquiry is necessary here because both of the exceptions in Montana apply. In any event, tribal law was an adequate source of law for the claims, obviating the need for a federal source of law or federal authorizing legislation. Accordingly, the CRST Tribal Court had jurisdiction over all aspects of the dispute, including the claim for discrimination.

ARGUMENT

I. THE CHEYENNE RIVER SIOUX TRIBAL COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION OVER THIS ACTION.

"Tribal courts play a vital role in tribal self-government...and the Federal Government has consistently encouraged their development." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14, 107 S.Ct. 971, 975-76 (1987) (citations omitted). The Supreme Court has held that, as a general matter, "the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe." Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981). Yet this general proposition is subject to controlling provisions in treaties, congressional

direction enlarging tribal court jurisdiction and the two exceptions identified in Montana. Strate v. A-1 Contractors, 520 U.S. 438, 453, 117 S.Ct. 1404, 1413 (1997).

Montana is the "pathmarking" case concerning tribal civil authority over non-Indians. Nevada v. Hicks, 533 U.S. 353, 358, 121 S.Ct. 2304, 2309 (2001). After stating the general rule of no jurisdiction over non-members, the Court in Montana cautioned that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565, 101 S.Ct. at 1258. The two exceptions established by the Court were: (1) "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66, 101 S.Ct. at 1258.

A. Both Exceptions Recognized In Montana Are Present In This Action.

The Bank entered into a consensual relationship with the Company through the Loan Agreement and the Lease with Option to Purchase. The Company's status as a majority-owned Indian corporation was critical to these transactions since it allowed the Bank to obtain BIA guarantees. The negotiations of these consensual relationships occurred within the territory of the CRST and directly involved Ronnie and Lila Long, CRST members, officials from the CRST Planning Office and officials from the BIA. (These negotiations were similar to those the Bank conducted in prior dealings with other tribal members. See, IBIA cases cited on page 2, supra.)

The Bank's conduct also had a direct effect on the "economic security" and "welfare" of the CRST. The CRST was organized "to conserve our tribal property, to develop our common resources, to establish justice and to promote the welfare of ourselves and our descendants. . . ." CRST Const. Preamble. This dispute goes to the very heart of those principles as the entire

purpose of these transactions was to allow an Indian corporation, owned by CRST members, to purchase property within the boundaries of the CRST reservation, in order to maintain the tribal members' livelihood.

Accordingly, the tribal court had subject matter jurisdiction over this action under the two exceptions set forth in Montana.

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

The Bank concedes that the tribal court had jurisdiction over all of the claims in this action except the discrimination claim. The Bank's argument that there was no jurisdiction over the discrimination claim is based on a misreading of the applicable Supreme Court precedents. The Bank argues without citation that the exceptions in Montana merely confer personal jurisdiction over a party. (App. Br., p. 7.) Subject matter jurisdiction, according to the Bank, requires that some statute or treaty authorize the tribal court to hear a particular claim. (Id. at 8.)

A. No Federal Authorizing Legislation Is Required.

There is no basis to limit the exceptions in Montana and Strate to matters of personal jurisdiction so as to require, as the Bank argues, a specific statute or treaty to confer subject matter jurisdiction.

The exceptions in Montana are not matters of personal jurisdiction. Personal jurisdiction involves whether the defendant has sufficient "minimum contacts" with the forum so that due process is satisfied by the court's exercise of jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310 (1945). A challenge to personal jurisdiction could be made by an Indian or non-Indian defendant on the grounds they did not engage in conduct within the

reservation boundaries. See, Law and Order Code of the CRST ("C.R.C.") § 1-4-3.[2]

Subject-matter jurisdiction involves whether a court is authorized to hear a particular claim. In Strate, for instance, the tribal court undeniably had personal jurisdiction over the defendants because the accident occurred on the reservation. The Supreme Court applied the Montana exceptions to that case, holding that the tribal court had no power arising from its inherent sovereign authority to adjudicate claims between non-Indians from an automobile accident on a state highway. As Justice Scalia observed in Hicks, "Strate's limitation on jurisdiction over non-members pertains to subject-matter rather than merely personal jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe." Hicks, 533 U.S. 368 n.8, 121 S.Ct. 3314 n.8.

Because the Montana exceptions apply to this dispute, and because they have been satisfied, the tribal court had the power under its inherent sovereign authority to adjudicate the conduct at issue in this litigation.

The Supreme Court's decision in Hicks regarding jurisdiction over claims arising under 42 U.S.C. §1983 does not change this result. In Hicks, the Court held that a tribal court did not have jurisdiction over state wardens executing a search warrant for evidence of an off-reservation crime. The Court limited this holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction over non-member defendants in general." 533 U.S. 358 n.2, 121 S.Ct. 2309 n.2. Applying Montana and Strate, the Court first concluded that jurisdiction did not arise as a result of the tribe's inherent sovereign

[2] The Law & Order Code provides that the tribal courts shall have jurisdiction over any "person," including any individual, firm, company, association, or corporation, "who transacts, conducts, or performs any business or activity within the Reservation, either in person or by an agent or representative, for any civil cause of action ..." C.R.C. § 1-4-3(2)(B). Challenges to the personal jurisdiction of the courts may be made under Rule 12(b)(2) of the CRST Rules of Civil Procedure. Cf., CRST Rules Civ. Pro. 12(b)(1) (permitting challenges to courts' subject matter jurisdiction).

authority. The Court then examined 42 U.S.C. §1983 to determine whether there was any "congressional direction enlarging tribal court jurisdiction." Hicks, 533 U.S. 366 n.7, 121 S.Ct. 2313 n.7. The Court concluded that 42 U.S.C. §1983 did not enlarge the tribal court's jurisdiction. Id.

Hicks does not require, as the Bank contends, a statute or treaty authorizing a tribal court to hear discrimination claims against private parties as opposed to state officers. Taken to its illogical conclusion, the Bank argues that after Hicks, tribal courts may never hear a federal claim absent an express authorization in the applicable federal statute itself. The limited holding in Hicks did not overrule the existing precedent that "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law...." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 n.7, 119 S.Ct. 1430, 1438 n.7 (1999). Once subject matter jurisdiction attaches under either of the Montana exceptions, the tribal court has the authority to adjudicate the dispute as result of its inherent sovereign authority. See, CRST By-Laws, Art. V, § 1(c) (tribal courts "have jurisdiction over claims and disputes arising on the reservation"). See, also, C.R.C. § 1-4-5. Here, the Montana exceptions indisputably apply to this action. No further authorization was necessary for the tribal court to hear all aspects of the dispute.

B. Tribal Law Is An Adequate Source Of Law For Plaintiffs' Discrimination Claim.

The Bank's argument also hinges on the erroneous contention that the discrimination claim in this action necessarily was based on 42 U.S.C. §1981. (App. Br., p. 6.) A tribal court is not so limited in looking to sources of law. While the Bank's conduct may have violated 42 U.S.C. §1981, it also violated tribal law.

The 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 through a motion to dismiss. Accordingly, the Bank's argument that 42 U.S.C. §1981 does not

provide for tribal court jurisdiction contributes nothing to the analysis because it was only one of many possible sources of law.

The Supreme Court has recognized that tribal law is often a "complex 'mix of tribal codes and federal, state, and traditional law.'" Hicks, 533 U.S. at 384-85, 121 S.Ct. at 2323 (J. Souter, concurring) (quoting National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978)). Private claims of discrimination based on status are recognized under federal and state statutes. See, e.g., 42 U.S.C. § 2000-d, et seq. (2003); S.D. Codified Laws § 20-13-21 (2003). They are also recognized under the traditional law of the Cheyenne River Sioux Tribe.[3]

1. Tribal Tradition And Custom Have The Force Of Law.

Traditional tribal law is "still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices...'" Hicks, 533 U.S. at 384-85, 121 S.Ct. at 2323 (J. Souter, concurring) (quoting Melton, "Indigenous Justice Systems and Tribal Society," 79 Judicature 126, 130-131 (1995)). This is certainly true among the Lakota, where historically:

---

[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.Ct. 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, n. 10. These are is precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation," CRST By-Laws, Art. V, § 1(c), including claims arising out of "tortious conduct." C.R.C. § 1-4-3.

> Written laws were not a part of the tribal consciousness. Such laws are written to be, in time, rewritten or unwritten, and that means to be kept and broken ... The Lakotas were, in fact, bound by the only codes that endure – those written into the essence of living .... [T]hey are in the minds of the people from the times of remoteness. And they [the Lakota people] still have memories of that golden day when a man's word was as it should always have remained – potent with the reverence of truth.

Chief Standing Bear, Land of the Spotted Eagle 124-125 (Houghton Mifflin Co. 1933).

This Court has held that, "[t]ribal tradition and custom is a vital source of tribal law and should apply in appropriate situations." Jacobs v. Jacobs, Chy. R. Sx. Tr. Ct. App., No. 87-005, Mem. Op. and Order at 5 (Dec. 18, 1987). When determining matters of tribal law, the tribal court looks first to controlling provisions of the tribal Constitution and By-Laws, the Law and Order Code, and the various other codes, ordinances, and resolutions of the Tribe. See, Clark v. Zorin, Chy. R. Sx. Tr. Ct. App., No. 89-014-A, Mem. Op. and Order at 1 (May 18, 1990). In the absence of such provisions, "the tribal court is governed ... by the traditional customs of the different Sioux bands residing on the reservation." Id. Such "[t]raditional customs can be adduced by expert testimony and/or a wealth of written material located in libraries and archives throughout the United States." Id.

Tribal tradition and custom have the force of law and, where applicable, are binding on the tribal courts. Tribal customary law has also been respected and enforced by non-tribal courts. For example, in Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985), the South Dakota Supreme Court granted comity to, and enforced a judgment of, the Cheyenne River Sioux Tribe in which the trial judge relied on customary Lakota law to determine, among other things, the proper disposition of the remains of a deceased Lakota medicine man. See, Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, American Indian Law: Native Nations and the Federal System 370 (4th ed. 2003) (quoting tribal court proceedings).

2. Tribal Tradition And Custom Prohibit Discrimination Based On Race, National Origin, Or Tribal Membership.

Several fundamental Lakota customs and norms prohibit discrimination and the disparate treatment of individuals based on their status. Among them are the traditions of:

- Treating all people equally and in a fair and respectful manner;
- Establishing bonds of kinship with outsiders and treating them as relatives;
- Prohibiting practices that subordinated others, denying them an equal opportunity to succeed;
- Helping others, no matter who they are or what their status is in society; and
- Maintaining peace and cooperation between all people and nations.

These traditions and customs, interrelated as they may be, are discussed in turn below.

a. Equality, Fairness, And Respect.

The essence of discrimination is the differential treatment of individuals based on status. See, Black's Law Dictionary (8th ed. 2004). This is antithetical to Lakota tradition and custom, which emphasize the principles of equality and fair, honest, and respectful relationships among all persons. This Court has repeatedly held that Lakota law is based, among other things, on:

- "the traditional Lakota sense of justice, fair play, and decency to others," Miner v. Banley, Chy. R. Sx. Tr. Ct. App., No. 94-003A, Mem. Op. and Order at 6 (Feb. 3, 1995);
- "Lakota principles of equity and fairness," Clement v. LeCompte, Chy. R. Sx. Tr. Ct. App., No. 93-009-A, Mem. Op. and Order at 17 (Jan. 12, 1994);
- "the Lakota custom of fairness and respect for individual dignity," Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners, 23 ILR 6045, 6048 (Chey. R. Sx. Ct. App. 1996); and

- "fundamental Lakota cultural notions of fair play," including "being fair and honest in our dealings with each other." Thorstenson v. Cudmore, 18 Ind. L. Rep. 6051, 6054 (Chy. R. Sx. Tr. Ct. App. 1991).

Implicit in these norms are the principles of equal treatment and anti-discrimination between and among all people. The equal treatment of all people is fundamental to – indeed, inseparable from – the notion of justice in Lakota tradition and custom. Chief Standing Bear once wrote that, "[t]here is no word in the Lakota language which can be translated literally into the word 'justice'; nevertheless there was the certain practice of it as evidenced in the phrase, Wowa un sila, 'A heart full of pity for all.'" Land of the Spotted Eagle, supra, at 137 (emphasis added). According to Chief Standing Bear:

> The bands were governed, as were individuals, families, and the nation, by ancient and traditional customs. And these customs, which had, throughout many years of time, become established in the minds of the people, were based upon human and individual needs. The central aim of the Lakota code was to bring ease and comfort in equal measure to all. There were no weak and no strong individuals from the standpoint of possessing human rights. It was every person's duty to see that the right of every other person to eat and be clothed was respected and there was no more question about it than there was about the free and ungoverned use of sunshine, pure air, and the rains with which they bathed their bodies. There were no groups of strength allied against groups of those weak in power.

Id., at 123-124 (emphasis added).

b. Bonds of Kinship With Outsiders.

Historically and today, the Sioux have permitted non-member Indians and, after contact, whites and other non-Indians to live and trade amongst them. This practice is reflected in the Fort Laramie Treaty of 1868, which provides, in part, that the Great Sioux Reservation is:

> set apart for the absolute and undisturbed use of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing... to admit amongst them....

Treaty with the Sioux of 1868, Art. 2, 15 Stat. 635, reprinted in, II Charles J. Kappler, Indian Affairs: Laws and Treaties 998, 998 (1904).

In the Lakota tradition, those individuals whom the Lakota have admitted to live or trade amongst them have always been treated as relatives, not as outsiders:

> Sioux culture is based very firmly on their system of kinship. The kinship provides all the moral context of the society.... When Sioux dealt with other people who were not Sioux, they felt the necessity of establishing a kinship relationship so that they would know how to deal. These are patterns of behavior, models for behavior.

Expert Testimony of Raymond J. DeMallie in United States v. Consolidated Wounded Knee Cases, 389 F.Supp. 235 (D. Neb. 1975), adopted by, U.S. v. Dodge, 538 F.2d 770 (8th Cir. 1976), cert. denied, Cooper v U.S., 429 U.S. 1099 (1977), reprinted in, Roxanne Dunbar Ortiz, The Great Sioux Nation at 112 (1977).

For the Sioux, "[k]inship was the all-important matter." Ella Deloria, Speaking of Indians at 17 (Dakota Press 1979). It has been said that:

> [O]f all the aspects identified as fundamental to Lakota culture, the importance of relatives and the obligations of each individual to his or her relatives is still the most pervasive. "When Wóȟpe, daughter of Maȟpíyatho, came before the people as White Buffalo Calf Woman, she brought two very important laws: Respect your elders and take care of your relatives. These laws were the basis for the tiyóšpaye. When wise men speak at feasts and meetings, they always remind the people that these laws are important to the Sioux people." The phrase Mitákuye Oyás'i, translated 'All my relatives,' is used as the ending to prayers, speeches, and editorials.

Kathleen Ann Pickering, Lakota Culture, World Economy 6 (U. Nebr. Press 2000) (quoting Vivian One Feather, Tiyospayes at 21 (Black Hills State College, 1974)). Under the kinship system, the "ultimate aim" of life was simple:

> [O]ne must be a good relative.... [E]very other consideration was secondary.... [T]o be civilized was to keep the rules imposed by kinship for achieving civility, good manners, and a sense of responsibility toward every individual dealt with.

Deloria, Speaking of Indians, supra, at 18 (emphasis added). Among other things, "[t]he dictates of kinship demanded of relatives that they not harm each other." Id., at 20.

Kinship bonds were most often established by blood and marriage, but still others were "established on a purely social basis." Deloria, Speaking of Indians, supra, at 19. "Through this social kinship system even real outsiders became relatives." Id. (emphasis added). Of this phenomenon, Lame Deer once said: "We have many visitors.... We try to help. First we feed them.... There's a feeling of friendliness, of kinship between us and them...." John Fire/Lame Deer and Richard Erdoes, Lame Deer: Seeker of Visions at 214 (Simon and Schuster 1972).

Chief Sitting Bull twice adopted outsiders into his family, and consistent with tribal custom, these outsiders were accepted into the camp and treated equally, as relatives. Sitting Bull first adopted an Assiniboine boy as his younger brother, calling him "Jumping Bull," the name once held by Sitting Bull's father. Robert Utley, The Lance and the Shield: The Life and Times of Sitting Bull at 23 (Henry Holt & Co. 1993). Later, Sitting Bull adopted as his brother a white man named Frank Grouard, also known as "Standing Bear," who was especially respected, providing "information and advice about dealing with the white world that gained thoughtful consideration." Id. at 94.

These individuals, like all others admitted to live among the Lakota, were subject to the same laws and customs as Lakota Indians, regardless of their race, national origin, or prior tribal affiliation. In Lakota tradition, "a man in a camp was subject to the commonly accepted laws and customs, and to the regulations of that camp." Charles Garner, "Bands, Chiefs, and Laws," in James R. Walker, Lakota Society (Raymond J. DeMallie, ed.) at 23-24 (U. Nebr. Press 1982). No exceptions were made based on status. Indeed, under the Fort Laramie Treaty of 1868, outsiders admitted onto the reservation and "legally incorporated" with the Tribe could obtain allotments of reservation land for farming, just as could tribal members. Treaty with the Sioux of

1868, Art. 6, 15 Stat. 635, reprinted in, II Charles J. Kappler, Indian Affairs: Laws and Treaties 998, 999 (1904).

The practice of admitting outsiders into Lakota society and treating them as equals demonstrates the long-standing commitment in Lakota tradition against discrimination based on race, national origin, tribal affiliation, or the lack thereof.

c. Anti-Subordination.

In her book, Lakota Culture, World Economy, Kathleen Pickering describes the emotional and financial stress of a Lakota businessman on the Pine Ridge Reservation who encountered racism and rejection from non-Indian customers: "I don't think there should be any distinctions made because of your color, it shouldn't make a difference, and a person can make it whether they're Indian or white in business." Pickering, supra, at 103.

According to Lakota tradition and custom, discrimination, the subordination of others, the use of unfair practices to deny others an equal opportunity to succeed, and unscrupulous efforts to gain material advantage over others are all prohibited. Traditionally, "the Lakota mind was never blighted with the idea that strength was to be gained through the domination of other individuals ... [I]n the society of the Lakota there were no hungry and no overfed; no groveling and no arrogant; no jails, no judges, no poor houses, no brothels, and no orphan asylums." Standing Bear, Land of the Spotted Eagle, supra, at 125. Neither slavery nor its incidents or badges have ever been part of the Lakota tradition. See, id., at 170, 172, 202.

It has been said that in Lakota tradition, "certain laws were designed to provide a sense of security in vital areas of societal existence." Royal B. Hassrick, The Sioux: Life and Customs of a Warrior Society 47 (Univ. Okla. Press 1964). The laws did so -- indeed, continue to do so -- by requiring adherence to notions of justice and fair play. Consider the rules of the hunt, which guarantee "communal hunting rights." Id.

> Rules of the hunt, recognized by all: All must move together. No one must take advantage to get to the game before the others can profit by it.... The meat gotten during a hunt must be fairly and equally divided among all members of the party.

Thomas Tyon and John Blunt Horn, "Original Lakota Government," in Lakota Society, supra, at 32.

The written laws of the Cheyenne River Sioux Tribe echo these traditional principles. For example, the tribal bill of rights provides that "[a]ll members of the Cheyenne River Sioux Tribe shall be accorded equal political rights and equal opportunities to participate in the economic resources and activities of the Tribe ..." Chy. R. Sx. Tr. Law & Order Code, Title I, § 1(A) (1967).

Despite the rigid adherence in Lakota tradition to "equality in treatment," there has always been some "distinction" in capacity and, hence, achievement among the Lakota people as individuals. Standing Bear, Land of the Spotted Eagle, supra, at 130. But, "[t]here were no social strata so definite that some were unattainable by reason of class or birth ..." Id.

d. Helping Others, Regardless Of Status.

In Lakota tradition, those less able to care for themselves "were never the objects of pity, charity, or contempt. When the camp moved, they were taken, and when food was dispensed they were never forgotten. They were never allowed to want, nor to grow sick and die from neglect." Standing Bear, Land of the Spotted Eagle, supra, at 131.

It is a virtue in Lakota culture to help others, no matter who they are or what their status is in society – racial, economic, or otherwise. A "precept of the Sioux was stated frequently by the tribesmen: 'A man must help others as much as possible, no matter who, by giving him horses, food or clothing.'" Hassrick, The Sioux, supra, at 36 (emphasis added).

No better example of this precept can be found than in the actions of Chief Martin Charger and the other Lakotas of the Fool Soldier Society, who in 1862 risked their lives to

rescue eight white captives – two women and six children – who had been captured by the Santee Dakotas near Lake Shetak during the Minnesota Uprising. When Charger learned of the unprincipled actions of his Santee Dakota brothers, he and his men set out immediately to liberate the helpless white captives. When they arrived at the Santee camp, Charger valiantly proclaimed: "You have done wrong. The Teton Sioux from the west will not take sides with you and we are here to get the captives." Sam Charger, Biography of Martin Charger, in 22 S.D. Historical Collections 1, 9 (S.D. State Historical Society 1946). Trading everything they had to the Santee, Charger and the Fool Soldier Society secured the release of the captives. Thereafter:

> The rescue party started for home, but a blizzard was coming from the north, and the captives were not clothed for winter weather. One of the elder women was without shoes, and Charger took off his moccasins, put them on the woman and went bare foot the remainder of the day, until they reached the Yanktonai camp ...
>
> At last they reached their camp where there was much rejoicing. They were a pitiful sight. The captives were not only dirty, but their clothes were in rags. The moccasins they wore were ill fitting and the savages were much grieved especially for the children. Wives of the Fool Soldier band came out and took the children in their arms and wept. A collection of robes and other commodities was again made and exchanged at the Post for clothing. The wives of LaPlant, Dupree and the Fool Soldiers band assisted in bathing and dressing the captives in the best that they had.

Id.

Of Charger and the Fool Soldier Society, it was later written that they "solemnly pledged themselves to withhold nothing in comfort, effort, life, or property which it might be necessary to sacrifice to serve the white people." Doane Robinson, "A Side Light on Sioux Character: An Incident in Dakota History," The Dakotan (Aug. 1902) (emphasis added), reprinted in, Senate Committee on Indian Affairs Report, 59th Cong., 1st Sess., p. 10 (Feb. 1906) (LCCN E99.D1.G6.U5).

> [T]hey sacrificed everything they possessed and at great personal hazard rescued the white captives ... When the circumstances

> surrounding this case are considered; when the Dakota country as it was in 1862 is taken into account; when the condition and environment of these young Tetons, unschooled, beyond the influence of the missionaries, unprompted to the heroic action which they performed, except by the instincts of humanity, unrewarded, and without the hope of reward, are reckoned with, I submit the record of the world's history will be searched in vain for a parallel.

Id., at p. 12.

Today, just as yesterday, it is well-established that the duty of the Tribe to protect "its people" is not constrained by considerations of race, ethnicity, or tribal membership, but rather "extends to all persons on the reservation, Indians and non-Indians alike." Cheyenne River Sioux Tribe v. Isabel City Package Liquor, 18 Ind. L. Rep. 6079, 6087 (Chy. R. Sx. Tr. Ct., 1991).

c. Peace Among All People And Nations.

Lakota tradition also teaches the importance of maintaining peace and cooperation between all people and nations. See, Pickering, Lakota Culture, World Economy, supra, at 3; Joseph Epes Brown (ed.), The Sacred Pipe: Black Elk's Account of the Seven Rites of the Oglala Sioux 115 (MJF Books 1989). Oglala medicine man Black Elk has said, "[a]s we always love Wakan-Tanka first, and before all else, so we should love and establish closer relationships with our fellow men, even if they should be of another nation than ours." Brown, The Sacred Pipe, supra, at 101. Black Elk spoke of maintaining a "three-fold peace":

> The first peace...is that which comes within the souls of men when they realize their relationship, their oneness, with the universe and all its Powers, and when they realize that at the center of the universe dwells Wakan-Tanka, and that this center is really everywhere, is within each of us. This is the real Peace, and the others are but reflections of this. The second peace is that which is made between two individuals, and the third is that which is made between two nations.

Id. at 115.

Together, these Lakota norms establish the principle that under traditional tribal law, discrimination and the disparate treatment of individuals based on their race, national origin, or tribal affiliation are prohibited. Thus, tribal law is an adequate source of law for the discrimination claim.

III. THE EXISTENCE OF THE DISCRIMINATION CLAIM DID NOT TAINT THE ENTIRE TRIAL.

The existence of the discrimination claim did not taint the entire trial or inflame the jury. The Bank received a fair trial in every respect. Ironically, when it suited its purposes, the Bank invoked the jurisdiction of the tribal court. Through the offices of the CRST Tribal Court, the Bank caused a Notice to Quit to be served on the Longs. Nevertheless, the Bank never filed foreclosure proceedings which would have provided several protections to the Longs. See Leasehold Mortgage Foreclosure Code of the Cheyenne River Sioux Tribe § 3-1 et seq. (foreclosure proceedings). Moreover, in this very proceeding, the Bank filed a Counterclaim and in its Motion for Summary Judgment affirmatively said that "the Court has jurisdiction over the subject matter of this action." (App. Mot. Summ. J. ¶ 2.)

All of the damages awarded by the jury were solely based on the financial consequences of the breach of the Loan Agreement and the resulting inability of the Company to exercise the purchase option for the Land. Specifically, the damages were attributable to the death of the Company's cattle (276 calves and 230 cows), the lost opportunity from not having the 110 calves, and the loss of use of the Land. (Pl. Ex. 23.) No attempt was made to identify any economic consequences from the Bank's discriminatory behavior and plaintiffs did not ask for (and the jury was not instructed that it could award) non-economic and punitive damages.

There is no support in the record (and the Bank cites to none) that the discrimination claim "tainted the whole trial process" and "inflamed the jury composed solely of tribal members against a nonmember off-reservation bank." (App. Br., p. 9.) Indeed, the jury found in favor of

the Bank as to its use of self-help in violation of the CRST Tribal Code and awarded $750,000 as damages, even though the Longs asked for over $1.2 million. The evidence concerning the Bank's differing treatment of the Longs and those who purchased the Land was admissible even if there had been no discrimination claim. The evidence of discrimination was relevant as background for the transaction, breach of the agreement, and damages. Thus, if the matter were retried, the jury would hear the same facts.

A review of the record shows that the discrimination claim did not "taint" the entire trial. Plaintiffs' counsel did not even mention the discrimination claim in his opening statement and only a small portion of his closing statement was devoted to that claim. A reading of counsel's closing shows that it was not the least bit inflammatory. (Trial Tr., pp. 599-601.)

Finally, the Bank desperately complains that the jury was "composed solely of trial members." The Bank, however, did not take the opportunity to have non-Indians summoned to jury duty. See C.R.C. §1-6-1 (2). And, the Bank did not challenge any juror for cause, waiving any argument as to the composition of the jury.

In sum, there was no unfairness to the Bank from the jury having heard the discrimination claim. The Bank, in fact, invoked the jurisdiction of the Court at various times. The evidence and the claim for damages did not focus on the discrimination claim. Indeed, the jury would have heard the same evidence even if there had been no discrimination claim. There is no basis in the record to argue that the presence of the claim inflamed the jury, and any such argument has been effectively waived.

CONCLUSION

For the reasons stated herein, *amicus curiae* Cheyenne River Sioux Tribe respectfully requests that this Court affirm the Judgment dated February 18, 2003, and the Supplemental Judgment dated February 18, 2003.

Respectfully submitted,

By: Thomas J. Van Norman

Thomas J. Van Norman*
Cheyenne River Sioux Tribe
Legal Department
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-6686 Phone
(605) 964-1166 Facsimile

* Counsel of Record

- and -

Roger K. Heidenreich
Kimberly A. Naegele
Sonnenschein Nath & Rosenthal LLP
One Metropolitan Square
Suite 3000
Saint Louis, MO 63102
(314) 241-1800 Phone
(314) 259-5959 Facsimile

- and -

Steven J. Gunn
Civil Justice Clinic
Washington University School of Law
One Brookings Drive
Campus Box 1120
St. Louis, MO 63130
(314) 935-6413 Phone
(314) 935-5356 Facsimile

Attorneys for Cheyenne River Sioux Tribe

23143330\V-10