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

THE BANK OF HOVEN, now known as Plains Commerce Bank, Defendant/Appellant, vs. Long Family Land and Cattle Company, Inc. - Ronnie and Lila Long Plaintiff/Appellee	IN APPELLATE COURT APPEAL NUMBER 03-002-A

BEFORE: CHIEF JUSTICE FRANK R. POMMERSHEIM
USD School of Law
414 E. Clark st.
Vermillion, South Dakota

DATE: October 6, 2004
PLACE: Cheyenne River Sioux Tribal Court
Eagle Butte, sD 57625

APPEARANCES:

Representing the Appellee	JAMES P. HURLEY Bangs, McCullen, Butler, Foye & Simmons 818 St. Joseph Street Rapid City, South Dakota
Representing the Appellant: Bank of Hoven	DAVID A. VON WALD Attorney at Law PO Box 468 Hoven, South Dakota
Representing the Cheyenne River Sioux Tribe	TOM VAN NORMAN Attorny at Law Box 590 Eagle Butte, South Dakota

I N D E X

THE COURT: This is the time and place set for oral argument in the case of the Bank of Hoven versus the Long Family Land and Cattle Company. Let the record reflect that both parties are represented by counsel and counsel is present.

Also the Cheyenne River Sioux Tribe, who has filed an Amicus Brief in this case is also present by their attorney. And when each attorney speaks, just identify yourself for the record.

Before we begin, I just want to set the ground work for oral argument. Each side will be granted 30 minutes for oral argument. The Appellant may reserve up to ten minutes for rebuttal. The Tribe, as Amicus Curiae has been granted ten minutes of oral argument, and then there may be three minutes of rebuttal to argument provided by the Tribe for the Appellant, as well. So, the format will be, the Appellant obviously will start and you can just tell the Court and the clerk how much time you are reserving for rebuttal. And then we will hear from Respondent, and then we will hear from the Amicus, Cheyenne River Sioux Tribe.

I guess we are set to go unless any of the attorneys have any questions, procedural questions of

the bench before we start.

MR. VON WALD: I wasn't aware of just the 30 minutes. I guess I had prepared for more than 30 minutes, so I'm not sure that I can reduce it to that amount. But I didn't realize that there was a 30-minute --

THE COURT: Well, I think the Court is generally flexible. How much time did you prepare for?

MR. VON WALD: I'm not exactly sure as far as time-wise. I haven't timed it, your Honor. But I know that what I prepared is more than 30 minutes. I will try to pare it down as far as the facts are concerned. I will probably just disregard the facts then, or not disregard them, but not give you a summary, because that would shorten it up considerably, and I can try to do that.

THE COURT: Well, why don't we do it that way and then at the conclusion if you still feel that you need more time, the Court is open to hearing a motion for some extended time.

MR. VON WALD: Okay.

THE COURT: You may proceed.

MR. VON WALD: I know that all of you judges have copies of this, but I thought it might be handier just to look at with what I am going to be talking about

here.

My name is Dave Von Wald, and I'm a lawyer from Hoven, and I represent Plains Commerce Bank. Plains Commerce Bank was formerly Bank of Hoven, and they just changed their name.

At any rate, this case is the case of where the Long Family Corporation started borrowing money from the bank back in about 1989, and they continued to borrow money throughout. The Long Family Corporation was owned by Kenneth Long, Maxine Long and Ronnie Long, and I think Lila Long, his wife, may have had some shares in that corporation. The land that was part of the assets that were pledged for the loans that were made, was about twenty-two, two hundred and fifty acres of Dewey County farm real estate, and a house which was owned by Kenneth and Maxine Long; and a house in Timber Lake, South Dakota. And Maxine, to make a long story short, Maxine Long died in approximately 1994; and Kenneth Long died in 1995; and after Kenneth died. What happened was that the bank was going to foreclose on the property, because there was a debt to them of about $850,000, and there was some life insurance proceeds that was applied to the loan corporation debt, so it was down to about 750,000.

So the bank then negotiated with Paulette Long,

who was Kenneth's second spouse, and she was a personal representative. And his estate, he was not a tribal member, and his estate was being probated in State Court. And the personal representative, Paulette Long, eventually deeded the land, 2250, and the house in Timber Lake, to the bank, by a personal representative's deed. That was done in the fall of 1996.

And then the bank wanted to continue -- and by the way, the bank gave the Long Corporation credit for $478,000 total; $10,000 in the house, and $468,000 on the farm real estate. And the bank wanted to continue with the operation for the Longs, for financing the Long Corporation. And they were doing so at the present time through a debt that was remaining yet after the land had been applied, the credit for the land. There was a debt yet of about $417,000 under a BIA-guaranteed loan, which was guaranteed 70-some percent to the bank. The bank had a guarantee.

There was another loan for about 17,000, and that was a BIA-guaranteed loan. And the bank wanted to continue with the operation with the Long Corporation, and so on December 5th, of 1996, they entered into a lease with option to purchase, giving the Long Corporation an option, actually a two-year lease of the father's land, Kenneth Long's former land, and gave the

Long Corporation an option to purchase that land over a two-year period. On that same day, they entered into what is entitled to a loan agreement, and that's what you have before you. The loan agreement that you have before you, if the Court would look at that document, requires absolutely nothing of the Long Corporation. It's a two-page document, which shows the credit for the land of 468,000; and it shows the credit for the house in Timber Lake, of 10,000. And then it goes on to show what notes were paid off and so forth, for the Long Corporation or expenses were paid totalling $478,000.

The second part of the document says that the bank will request from the BIA an increase of the BIA-guaranteed loan, which I said was guaranteed at about 70 or 75 percent, up to 90 percent. And that they would reschedule that loan, that was the four hundred and some thousand dollar loan, over a 20-year period. There was principal and late charges at that time. So, then in addition to that it said that they would apply for a $70,000 operating line of credit, guaranteed by the BIA. And then in the last paragraph it says, if the loans were guaranteed by the BIA, and increased to 90 percent, then the bank would loan the Longs $37,500 for the purchase of some other calves to help out on their operation.

As you read that document, gentlemen, you can see that nothing is required of the bank, and it was an informational document. At any rate, what happened after that document was signed, the bank then sent in the application. The application was sent to the BIA on December 12th, about a week later. That was during the winter of '96-'97. From the time that the application was sent in on the 12th, December 12th, until about February 14th they got word back from the BIA, two months later, most of Ronnie Long's cattle died, of Long Corporation, cattle had died, because of the blizzards and so forth during '96 and '97.

So the bank, once they found out that the land, that the cattle had died, they didn't apply for the $70,000 operating line of credit anymore. The cash flow of Kenneth, of the Long Family Corporation changed completely when you didn't have cattle to sell, because the cattle had died. They did, however, get a new line of credit of $40,000, and so they gave the Long Corporation an operating line of $40,000, even though that operating line was not guaranteed by the BIA. And the BIA didn't increase, up to 90 percent, the loan, the larger loan of 417,000.

At any rate, then Ronnie Long and the Long Corporation continued on the land for a two-year period,

leasing the land. The lease payment, by the way, was simply the Conservation Reserve Program, the CRP Program was to be sent, was assigned to the bank. It's about $44,000 a year, that was the lease payment. In order to get that lease payment, the bank actually had to pay off the State of South Dakota. The State of South Dakota had a prior mortgage, and they paid off the State of South Dakota about 82,000 to get what it was a total of about 88,000 during the term of the lease. But that helped the cash flow for the Long Corporation, and that's why it was apparently done that way.

At the end of the two-year period, or close to the end, within three or four days of the end, the Long Corporation sent a letter to the bank asking them for another 60-day extension on the lease with option to purchase. There is a two-year period of time basically, or almost a two-year period of time where the Long Corporation had an opportunity to refinance or to buy the land, and nothing was done up until the end. The bank denied that 60-day extension and told the Long Corporation to get off the land; the lease would terminate on December 5th of 1998. And what happened after that is that part of the land was being occupied by the Long Corporation as far as cattle being on the land, and part of it was not. So 320 acres of the land

was then sold by the bank to Pesicka, and the remaining portion of the land was sold to an Ed Maciejewski, Ed and his wife. But it was sold in two portions. The portion that was not being occupied by the Long Corporation was sold and down payment was made and actually that was deeded to Ed Maciejewski, eventually. And the other portion, he didn't have to make a down payment, there was about 960 acres that was still being occupied with some cattle by the Long Corporation.

So, at that time, in an attempt to evict the Long Corporation, the bank served a Notice to Quit, and after that, how this lawsuit was started, Ronnie Long came into Tribal Court and got a Temporary Restraining Order, attempted to get a permanent Restraining Order, and that was denied by the Court. Judge Boostrus was the judge at the time, and the bank objected to jurisdiction. Like (inaudible) ruled that the Tribal Court had jurisdiction.

THE COURT: When the bank filed the Notice to Quit, what Court's jurisdiction did they invoke there?

MR. VON WALD: What I did, your Honor, is under South Dakota law, it's required that we have a Notice of Eviction. And in order to serve that Notice of Eviction we have to have it served by a tribal personnel. So we went through Tribal Court to get the tribal personnel to

serve this Notice to Quit. I started an action in State Court afterwards and there again, to serve the papers I have to have tribal authorities to do that, so that's what I did. But I originally started an action for forcible entry and detainer through State Court, however, the papers were served by tribal officers rather than State officers, because we can't get State officers to serve tribal members on the reservation.

At any rate, we resisted jurisdiction at that time and the Court found that they did have jurisdiction, however, did not grant the Temporary Restraining Order, but continued the process. The Plaintiff then amended the complaint and came up with about a nine or ten count, nine or ten causes of action against us, and then eventually we had a jury trial, I think it was in December of 2002, here in Eagle Butte. So, that's basically how this case got started and what was involved in the case.

Now, going through the issues, the first issue that I raised is that -- by the way, I'd like to point out to the Court, that in the Amicus brief of the Tribe, that they represented that we have submitted to the Tribal Court jurisdiction, and have admitted that the Court has jurisdiction. We have never done that. It's possible that the Tribal Court does have personal

jurisdiction of the bank, that's a possibility, but we have never admitted that they do. And I wanted to point that out that just essentially to the Court.

But the first issue I raise is regarding the Tribal Court lacking jurisdiction. And I think it's lacking subject matter jurisdiction, for one of the causes of action, and that was for discrimination. Under 42 U.S.C.S. 1981, a discrimination action can lie, that's in Federal law. However, our Supreme Court in Nevada versus Hicks has said basically that the Tribal Courts are Courts of limited jurisdiction, and that they are not, not general jurisdiction that State Court or Federal Court would be. And so determining an action for discrimination, a Tribal Court lacks basically subject matter jurisdiction. I wanted to point that out to the Court, I guess, more than any other jurisdictional problem, because to me --

THE COURT: But isn't it true in Nevada versus Hicks they were talking about Tribal Court didn't have jurisdiction over a 1983 claim --

MR. VON WALD: That's right.

THE COURT: That's a Federal cause of action. And here, I don't believe that the Plaintiffs were asserting a Federal cause of action against the bank. They were serving a Tribal Court cause of action against the bank.

I think the theory of the discrimination claim was not that it created a Federal cause of action, which under Nevada v. Hicks would raise some problems, but that it was a recognized Tribal Court cause of action.

MR. VON WALD: Well, I don't think the Plaintiff has ever alleged that, your Honor. The Tribe has alleged that, but the Plaintiff has never alleged the authority for what the discrimination cause of action is. As I understand it, there is no tribal statute specifically on point, that would allege that, whatsoever. So either, because of the fact that there is no tribal statute that alleges that the Tribe can have a cause of action against a tribal member, I don't see that tribal law can be used at all. So if it isn't tribal law, it has to either be State law or Federal law.

So in the Federal case, it came out specifically -- and not to say that the Plaintiff has brought forth specifically, 42 U.S.C.S. 1981. They haven't. But the allegations they have made would be taken care of under that Federal statute, or possibly under a State statute. But in either case, Tribal Court doesn't have jurisdiction, unless there is a specific statute that allows Tribal Court to have jurisdiction over discrimination cases, and/or a treaty, and there isn't

anything in this case. That's why I'm saying, to me, this is about as black and white as what it can get.

And when you think about it, your Honor, I think the problem that -- this is basically using the race card, is what it's using. And you are using the race card against a non-tribal member in Tribal Court, which is consistent of 100 percent tribal members. I mean, it's just a place where it's very, very difficult to get a fair trial, once that race card is used, and that's what was done here. Basically I think that's what tainted the whole case. I'm not even opposed to walking into Tribal Court and trying something. I think the tribal members are just as honest as any other members are, but when it comes to arguing race, boy, you are in trouble if you are in Tribal Court, when race can be brought in. And that's what I am thinking has happened here.

For issue two, did the Trial Court err in not granting the bank's Motion For a Directed Verdict or NOV on a breach of contract action? Now, the document which I showed, to begin with, I don't think, which is what was alleged to have been breached, was the loan agreement. Now, I don't think that was an agreement to begin with, whatsoever -- it was a binding contract I should say. Because if you look at that lease

agreement, it requires nothing, no consideration whatsoever of the Long Corporation. The Trial Court Judge, B.J. Jones, used the integrated document theory to say that because of the fact that the contract for deed was entered into that date, and this agreement was signed that date, that the two documents were integrated, and basically boot-strapped this loan agreement, which is nothing but an informational document, into having some consideration. So, I think that the loan agreement was a separate document. The contract for deed was a separate document. It was unambiguous, put it on his terms, and didn't need this other agreement or this other document here to determine what the contract for deed was -- not the contract, but the --

THE COURT: From your point of view, this is captioned a loan agreement and signed by both parties, and you are saying basically it's not a loan agreement. What is it?

MR. VON WALD: Well, I'm saying it's an informational document, which shows Ronnie Long, how the credits were made. So I'm not saying that he -- by signing it he may not have accepted, and he knew then that those credits were made and what notes were paid off and so forth, your Honor. And that was basically

the reason for the agreement, is to make sure that Ronnie Long knew how all of those credits were going to be, what notes were going to be credited, and what expenses were going to be paid. That's basically the reason for the document.

THE COURT: I guess a more general question is, in this context, since obviously the issue was found against you in the Tribal Court, but what do you think is the standard of review that this Court should be using? Should we just disregard what the Trial Court found on this and just exercise our judgment, or do we have to give some kind of deference to what the Tribal Court found on --

MR. VON WALD: Well, if it's a question of law, I don't think this Court has to have, give deference to the Trial Court's opinion whatsoever, as far as the question of law. I mean it's not done in the South Dakota Supreme Court. If it's a question of fact, then yes.

THE COURT: And your argument is that it is a mistake of law, that the Trial Judge was just wrong in finding that these two documents should be integrated to find an enforceable contract.

MR. VON WALD: That's right. That's a question of law. And as a question of law, I think an Appellate

Court has a free reign, basically.

THE COURT: And how was it a mistake of law? I guess that's what I need some clarification on.

MR. VON WALD: I'm saying that it's a mistake of law in that he ruled that it was an integrated document, and because the two documents are integrated, that gave this document consideration. Without them, without using the integrated document theory, this would have no consideration, and the lower Court actually thought that would be the case. You couldn't see any consideration except if you said that this document and the lease with option to purchase were one and the same document.

THE COURT: I guess, to help the Court, why was his decision wrong as a matter of law, to find that they weren't integrated? I know that you think that that's wrong as a matter of law, but I have a little trouble ---

MR. VON WALD: I'm saying that in order to have an integrated document, a number of things have to happen. They have to be signed the same -- usually the same date. You have to basically find that this document, the second document, is a part of what everybody intended to be one separate agreement. And I'm saying that if the lease with option to purchase is unambiguous and clear and can be read and understood on its own

terms without having to have another parole document, which is what this is, to be used, to understand the first document, then it's not integrated document.

THE COURT: Mr. Von Wald, if part of the agreement is to induce the Bank of Hoven to increase the guarantee to 90 percent to reschedule Note Number 9818 or 181, wouldn't that require the Plaintiff to apply for a modification of the loan guarantee?

MR. VON WALD: No. Actually I would think the same thing, and I thought the same thing, that it would require something on the part of Ronnie Long, who at that time was the president of Long Corporation. It would require some writing or some application form or something for him to do, but it doesn't, which was surprising.

THE COURT: But he would be expected to repay the loan, wouldn't he?

MR. VON WALD: Well, of course --

THE COURT: I mean he would be obligated, wouldn't he?

MR. VON WALD: To repay the loan?

THE COURT: Yes. Ultimately the loan --

MR. VON WALD: He's already obligated, you see, to pay the loan. So it's not additional consideration by them rescheduling. The 90 percent guarantee has to do

with the bank. It really doesn't have to do anything with Ronnie Long.

And if you would like to look at the next document that I handed you there, which is a document of December 12, 1996, that shows, that's the application that was sent into the BIA to be approved. And it shows there, the very first letter, the first page of course is the letter from the bank officer, requesting the guaranteed loans that was mentioned on the loan agreement. And the second, third and fourth pages are cash flows. And the cash flows that were there, if as you can see the full imprint on the very end of the page, was faxed from the Cheyenne River Sioux Tribal Chairman's Office, and prepared by John Lembke.

Just to let you know, the reason that the letter, you can see in here applies for a line of credit of 85,000, and the loan agreement was only 70,000. So the bank actually applied for a larger line of credit than what the loan agreement said it was going to apply for. So they are going to make a larger loan. The reason for that, if you look at the very first page of the cash flow that was prepared by John Lembke, who is employed here, was employed at least, at the Tribal Chairman's Office, and was in, I think, the planning office they called it, to help people on the reservation that needed

to fill out applications and so forth to get loans. If you will look at the seventh month, if you look down on that, on the very bottom of the line, it says $84,477 as a minus, see. So, that's how they come up, they came up with $85,000 that would be required under this cash flow at some point during the year. And so the operating line of credit was increased from 70,000 actually that was applied for, to 85,000.

Anyhow, if you look through these documents, you'll see that Ronnie Long, other than the financial statement was probably signed by him, but Ronnie Long and Long Corporation really doesn't have to sign anything, which seems to be unusual. But that's how these things are done.

Okay. The first thing I'm saying is that the loan agreement was invalid to begin with, was not a binding contract -- I wouldn't say invalid, but not a binding contract. The second thing is that even if it was a binding contract, the bank did absolutely everything it said it was going to do, and it's black on white. These are documents that were at the trial, and the bank did absolutely everything it said it was going to do under the loan agreement.

You see on the one hand, the first document I sent, I gave you, the loan agreement. You see on the

other hand it said it was going to apply for those BIA-guaranteed loans and the increases and so forth, and it did that. Here's where it did it, in the second document, which is dated December 12th, a week after the first document. And the reason that it was December 12th, by the way, is that it was waiting for a cash flow statement from John Lembke, which was faxed to them, you can see by the stamp, the bate-stamp on the 11th of December. And the narrative statement, which Mr. Lembke prepared, which was dated December 10th. So after the bank received those documents, then it sent a letter in to the BIA, to try to get everything it said it was going to do, approved. The problem that we ran into, is that the bank didn't hear anything back from the BIA until the letter of February 14th, which is the next letter, the next document that you have. And February 14th basically says that it takes a more formal application. So they didn't hear anything back from the US Department of the Interior basically for over two months, and by that time the cattle were dead. But at any rate, my point is, as a matter of law, I believe the lower Court should have ruled that there was no breach of contract, because the bank showed that everything that it agreed it would do in the loan agreement, it did.

THE COURT: But I think you have also admitted that after that letter of February 14th, you basically, the banks have stopped going forward to secure the loan guarantee from the bureau.

MR. VON WALD: No. No, the bank didn't stop going forward from securing the loan guarantee. The bank switched, instead of the (inaudible) loan guarantees and requested a new, not a $70,000, or not an $85,000 operating line, it sought a new operating line of forty thousand some odd dollars. The exact amount I don't know. At any rate, it still attempted to get a guaranteed operating line, but for less than 70,000.

THE COURT: And was that guarantee ever achieved?

MR. VON WALD: No, the guarantee wasn't achieved. The BIA didn't increase, did not increase to 90 percent, which was requested, the guaranteed portion. They did allow the restructuring of the note, so the note was restructured, the two notes, actually, were restructured, but they didn't increase the guarantee to 90 percent. So basically the bank was more at risk at that point, and this was sometime in April by the time this $40,000 operating line was received, and that was not even a guaranteed operating line. But the BIA said, well, yeah, you can give them the operating line on what they call a LIFO basis, Last In First Out. So as the

flap is (inaudible) or whatever to pay off the note, this would basically be one of the first notes paid off, but it was not a guaranteed operating line. So if the money was never there to pay off to the indebtedness, that would have been all the bank's risk.

So, actually they did make, they did not proceed with the $70,000 request, and the reason that they didn't, and if the Court will look at the proceedings, the reason that they didn't is the new cash flow, which was submitted by the John Lembke again, over here at the chairman's office. That new cash flow was for a $40,000 line of credit, everything had changed after the cattle died. The way that the first one worked, the $85,000 line of credit, the way the cash flow worked, is because the cattle were there to sell at that time. But once the cattle weren't there anymore, why, obviously the bank, after February 14th, could not just resubmit the same cash flow for 85,000 because it would be impossible to perform under that cash flow. The cattle were dead, so the income that would come in from the cattle was no longer there. So they couldn't, at that time, send in a formal application, a more formal application for the same amount; they couldn't, and they didn't. It would have been completely a fraud on the BIA to do that. So that's the second issue. If the Court has any other

questions as I go through, please ask them.

Then the third issue that I raised in my appeal is that the Court erred in not drafting a directed verdict or NOV on the seventh cause of action. This is maybe a side issue, and I'm not going to spend a lot of time on it. But basically the law in the State of South Dakota, at least, is that there is either bad faith, which is a fraud and deceit action, a tort, or there is bad faith as a part of a contract, breach of contract cause of action, which is a contract case. A contract requires good faith between the parties.

And the Court in this case, one of the causes of action was for fraud and deceit. The lower Court dismissed that cause of action for fraud and deceit and found that there wasn't that kind of tort, but left a separate cause of action for bad faith. That should have been combined, and I'm thinking that it was confusing to the jury by not combining it into the contract action, and to confuse the jury, and I think may have helped to prejudice the case.

Then the fourth issue that I have raised is, were the damages excessive and controlled by passion or prejudice. And the Court was erroneous in not allowing the Motion NOV, and Directed Verdict on this. Basically my thought is, if this Court looks at the facts of the

case, the facts of the case are that on December 12th, the bank sent in the application for -- to preface this, it's the Plaintiffs' contention that the bank didn't make the operating loan for $70,000 on December 5th, and didn't loan, and so we breached the contract at that time, and didn't loan enough money for Ronnie Long to move hay to the corporation's cattle, and so that's the reason for the damages. The fact of the matter is that, nothing required the bank, if you look at the loan agreement, nothing required the bank to make any operating loan whatsoever to Ronnie Long, or to the corporation, until they received notice back from the BIA that it was a guaranteed loan.

In order to receive a notice back that it's a guaranteed loan, we have to make an application. The application was made on December 12th, of 1996. On December 13, 1996, according to a letter, and that's the last document that I've given you, on December 13th of 1996, Ronnie Long wrote a letter to the bank, and that letter was dated the 18th of February. After that came, and on that document it shows that on the 13th we had the roads opened to try to get the cattle out. That would be a day after the bank had sent the application in. So he tried to get the cattle out and the roads are open, and he had the semis lined up, it says here, for

the 15th of December. But on the evening of the 13th, it started snowing, and they had a five-day blizzard. His cattle are located basically about 18 or 20 miles south of where he lived, out in the briggs, and he didn't have enough hay there apparently to feed them. So he tried to get the cattle out, and he couldn't always get to them, because this was the winter of '96-'97, a very bad winter.

At any rate this letter says that, from the 13th on, the roads were never opened until the 29th of January. The roads were never open wide enough so that he could get a semi there to get his cattle out. And if he couldn't get the semi there to get his cattle out, obviously he couldn't get a semi to move the hay in, either way. So what I'm saying is, even had there been money there, which I don't think the bank had any obligation of providing, until we got the approval of the BIA, but had there been money there from the 13th on it would have been too late. Because you just couldn't get hay to the cattle and you couldn't get the cattle out.

Ronnie Long, actually the bank did loan Ronnie Long about $23,000 over a two-month period, which is a sizeable amount of money. They have loaned him about $16,600 on December 6th, or sometime shortly thereafter,

for the prepayment of tribal leases he had, which is for the next summer. They loaned him $5,000 for an operating line of credit. They loaned him $2,250 for a snowmobile, because the roads were so filled up and plugged, he couldn't get out there and he needed a snowmobile to feed his cattle. So they loaned him money for operating, but his contention is, of course, that they didn't loan him enough. And we are saying that when you look at the evidence that has been submitted to the trial, that there is no way that the bank could have been the cause of those cattle dying, by not loaning him enough money. There is no way.

The other thing is, that the case law is, in South Dakota at least, the case law is very clear that it's not bad faith on the bank's part to, because they don't lend unlimited amounts of money. Now, Ronnie Long may have wanted, or the corporation may have wanted more money than what the bank was willing to loan them, but it's not bad faith by the bank not loaning more money. And in this case, gentlemen, the bank did loan about $23,000 after December 5th, and they were loaning money to him before that too, but after December 5th they still loaned him $23,000, money that they really didn't have to.

Issues five and six, I am going to combine,

because I think they are related. Issue number five was whether the Trial Court erred in not granting the eviction notice, by granting the possession of the remaining 960 acres that the Long Corporation has possessed ever since the lease with option to purchase expired, February 5, 1998, almost six years now. And has paid no real estate taxes, has paid no interest, has paid no rent, hasn't paid anything, just used the land for six years. We think and thought that the Trial Court erred in not granting our Motion for Eviction.

And number six is that the Trial Court granted Ronnie Long, or the Long Corporation, an option to purchase that remaining 960 acres as an offset against the $750,000 jury verdict that the jury came up with. And the purchase price for that is the same purchase price that the bank would have sold the land to Ed Maciejewski for back in 1999. And to us that seems like an unjust enrichment. Basically he's been compensated, if the jury verdict stands up, he's been compensated for damages that were caused by any breach. And in addition to that, he's got the use of the land for six years and paid nothing. If the land was worth about two hundred thousand, I think the judge gave him an option to purchase for that amount, he would have to pay nothing; not the taxes for six years -- he's gotten out of taxes;

wouldn't have to pay any interest for six years, and he's used the land is unjustly enriched, and I think it really doubles the damages.

And I'm sure I'm over a half an hour. May I continue? I'm just about done.

THE COURT: Sure. That's fine.

MR. VON WALD: The last issue is interest. And in this case what happened is the jury verdict was returned, and an interrogatory was sent to the jury, and the jury was asked if there should be interest in addition to the judgment. And the jury said that, yes, there should be. The problem is that Plaintiffs' damages were for approximately 1.2 million, set forth in different, by different exhibits, and the jury came back with a rounded off figure of 750,000. And interest on a judgment that is calculated is required under South Dakota law. However, in the Ellvein case, which is a 2001 South Dakota case, in the Ellvein case the very same set of facts happened. Ellvein, I think, versus Mercedes Benz. In that case, the Court asked the jury if there should be interest, and left it as a discretionary type thing, and the jury says, yes, and they come back with a verdict. The jury is sent home and then the Judge looks at it, and nobody knows, and the attorneys look at it, and nobody knows how it is

that the jury came up with the damages.

So, in order for interest to start, interest starts on the date, say $10,000 worth of damages started on January 1st, well, then interest starts on that, from January 1st out. And then if some of the damages weren't until a year later, then interest starts on that figure until later. Well, we don't know how the jury came up with $750,000 in this case.

In the Ellvein case, the supreme court did not allow any interest whatsoever, South Dakota Supreme Court, did not allow any interest whatsoever, because the Plaintiffs' attorney did not object, did not object to the Instructions that were sent to the jury, and didn't object in that there were no special interrogatories sent to the jury. And in this case, Mr. Hurley, of course, the Plaintiffs' attorney, didn't object either. And our problem is that we really have no idea, it's completely speculative as to how the jury came up with damages. So, I would think that that interest, according to South Dakota law, at least, interest would not be, should not be included.

One other thing I'd like to point out is, Judge Jones adopted a calculation of interest that I had, which was at 8.5, and not 2.7, as was briefed by the Plaintiff, but it was 8.5 percent that he allowed. And

I speculated as to what the jury may have allowed for damages, and it was only speculation on my part, but that's what Judge Jones adopted. So that was the interest that he had. However, like I say, I don't think in this case that interest should have been allowed whatsoever, because no one knows how the jury came up with that. Basically that's what I have.

THE COURT: I had one last question or two. Going back to an observation or a statement that you made early on, in terms of using the term race card and enflamed jury, did you object at all to the selection of any particular jurors, or to the jury panel same --

MR. VON WALD: For cause, you mean?

THE COURT: Yeah.

MR. VON WALD: I objected --

THE COURT: You could have objected to the jury panel as being somehow improper because it only had tribal members.

MR. VON WALD: No, I'm not saying that I was dissatisfied, your Honor, with the jury. I'm not saying that I was dissatisfied with the jury. What I am saying is that once the race card was played, and it's a cause of action that should not have been before a Tribal Jury, then basically we could not obtain a fair trial.

THE COURT: Okay. If I can just understand your

equation. Is your equation that since there was a theory of discrimination brought by the Plaintiffs, and since it was an all-tribal member jury, that equals the race card?

MR. VON WALD: That's what I am saying.

THE COURT: Okay. I just wanted to make sure I understand your argument.

MR. VON WALD: I'm saying that they were being racist, that we were being racist by a letter that was prepared by Chuck Simmon back in -- I'm not sure when it was prepared, but by a letter. And basically the letter said that they could not make the Long Corporation a lease -- they could not make the Long Corporation --- they couldn't enter into a contract with them, because there is some question about tribal jurisdiction, about jurisdiction problems, I think is basically what the letter said. Well, as it turns out, of course, they did enter into a contract, a lease with option to purchase. It wasn't a contract for deed, but it was a lease with option to purchase. But that's the letter that they are accusing was racist.

THE COURT: Thank you, counsel.

MR. HURLEY: Thank you, your Honor. I'm Jim Hurley of the Bangs, McCullen law firm of Rapid City, South Dakota. And I represent Ronnie Long, to my right,

and Lila Long, sitting back against the wall, and her daughter sitting to her left. May I remain seated?

THE COURT: That's fine.

MR. HURLEY: I might start off with a brief statement of several facts. This case does involve approximately 2230 acres of deeded land located within the Cheyenne River Sioux Tribe Indian Reservation. This land has been in the Long family for over 40 years. Ronnie and Lila Long are enrolled members of the CRST, and they reside on the CRST Indian Reservation. Long Family Land and Cattle Company, Incorporated, is a wholly owned Indian corporation, which is owned hundred percent by Ronnie and Lila Long.

Ronnie Long is the son of Kenneth Long. Kenneth Long, Ronnie Long and Lila Long have lived on the CRST Reservation all of their lives, making their living farming and ranching. Until his death in 1995, Kenneth owned the 2230 acres, and before his wife Maxine died, they owned it together. When she died, then he took her interest. He also owned 49 percent of Long Family Land and Cattle Company, Inc. When Maxine died, she gave her interest in the company to Ronnie and Lila, so when Kenneth died in 1995, Ronnie and Lila Long owned 51 percent of the company. And at all times Long Family Land and Cattle Company, Incorporated was an Indian-

controlled corporation.

The 2230 was mortgaged to the Bank of Hoven by Kenneth Long to provide collateral for the loans of the Long Family Land and Cattle Company, Inc. And the Bureau of Indian Affairs guaranteed several of the Bank of Hoven loans to the company. Ronnie Long was to inherit the 2230 acres of land, and his father's 49 percent interest in the company, as shown on the will of his father, which was a trial exhibit, and that's included in number two, admitted into evidence.

In the spring of 1996, after Kenneth had died, officers of the bank came to the Long's land on the reservation, and inspected the land and the cattle and the hay and the equipment that the bank had a lien on, as well as the land that the bank had a mortgage on. And the bank proposed a new loan agreement to the Longs. Discussions took place with bank officers, the Longs, CRST officers at the CRT offices right here on the reservation, in Eagle Butte. The bank proposed that the Longs 2230 acres of land and Kenneth's house would be deeded over to the bank in lieu of foreclosure, instead of foreclosure.

And the bank then would credit the appraised value of the land, plus $10,000 on the house, for a total of 478,000 against the debt owed to the bank. And then the

bank proposed to sell the 2230 acres back to the Longs on favorable bank financing on a contract for deed. The bank then changed the proposal on the advice of their lawyer, and they told the Longs they could not sell the land back to them on a contract for deed, because they are tribal members, and Long Family Land and Cattle Company is an Indian-owned entity on the reservation. If that is a race card, as counsel is stating, the bank did it to itself. It's on Bank of Hoven letterhead. It's signed by Charles Simmon, vice president, Bank of Hoven. And the reason why they were changing the agreement after there was an understanding reached between the bank and Ronnie and Lila Long, was for the very reason that Ronnie and Lila Long were tribal members, and that the company was an "Indian-owned entity on the reservation". It was a business letter and it was sent out by the bank, and it's part of this file, and of course the jury would see it, the Judge would see it.

In the revised agreement the bank changed the terms from a contract for deed, to a two-year lease, for the Longs only had two years to pay for their land, and then they were required to come up with 468,000 in a lump sum at the end of two years.

I would like now to go to our response to the

bank's arguments, the first one, the bank argues that the CRST Tribal Court lacks jurisdiction for Long's claim of discrimination against the Bank of Hoven. The Long's submit that the Trial Court properly exercised subject matter jurisdiction over the Long claim of discrimination, and all other claims involved in this case. The reason for that is set forth in Judge Jones' well-written, and well- researched opinion on this very subject. And, he states that the United States Supreme Court in Montana versus United States stated that, "to be sure Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian lands". The Supreme Court in Montana stated two circumstances where Tribal Court has jurisdiction. All circumstances are present in this case.

One, the activities of non-members who enter into consensual relationships with a Tribe or its members through commercial dealings, contracts, leases or other arrangements. And that's exactly what we have here between the Bank of Hoven and the Longs.

Number two, conduct that threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. And, of course, on those words, it covers a lot of

circumstances, but in our circumstances here, it certainly effects the economic security of these members of the tribe.

The bank entered into a consensual relationship with the Longs through the loan agreement, which is Exhibit 6, submitted into evidence, and the lease with option to purchase, which is Exhibit 7. The Long Family Land and Cattle Company is an Indian-owned corporation. This status was important to the transactions with the bank, because it allowed the bank to obtain BIA guarantees. Negotiation of these consensual relationships occurred within the CRST Reservation, and directly involve Ronnie and Lila Long, who are CRST members. It also involved officials from the CRST Planning Office and officers of the BIA, Harley Henderson and John Lembke, and this is all evidence that was not contradicted.

The Long's land is all located within the CRST Reservation. The bank held a mortgage on the Long's land, and a lien on the Long's cattle and machinery located on their land on the reservation. The bank regularly makes farm and ranch loans, and the BIA-guaranteed loans with members of the Cheyenne River Sioux Tribe. These facts satisfy exception one, as the Supreme Court set those out in the Montana case.

THE COURT: Counsel, if I might ask a slightly different question. I think what you say is basically on point, but what I heard the Appellant saying that there is kind of a wrinkle in that argument. They don't seem to be claiming that the Tribal Court didn't have some kind of jurisdiction. They seem to be arguing in a more narrow way, that somehow the Tribal Court didn't have jurisdiction over this discrimination claim. And because the discrimination claim either was, from what I was hearing, and what I read in the brief, is that either because it was a Federal cause of action, which runs into some problems under Nevada versus Hicks, or it wasn't really recognized as a tribal cause of action.

And it would be helpful, at least to me, to hear your response as to whether this was either a Federal cause of action and discrimination claim, or a proper tribal cause of action for discrimination.

MR. HURLEY: In our presentation on that point to the Court, we cited the CRST Code, to the effect that all persons who are members, or who deal with non-members shall be treated fairly and equally.

Number two, we cited 42 U.S.C. 2000D(d), Federal law prohibits any entity that receives the benefit of Federal financial assistance from discriminating against any person in the delivery of services. This statute

has been held to prevent the bank from red-lying a certain area because of racial composition of residents in that area. And we cited to Laughlin versus Oakely Building and Loan, an Ohio case.

Those two basis I think were the underpinnings of the discrimination suit, that discrimination is not tolerated by the Tribe, historically and as a matter of code. And in the relationships within each other and with persons that are not residents of the Tribe. And number two, the statute specifically prohibits the bank from discriminating against any person in the delivery of banking services. That's the two things that we cited to the Court.

The purpose of the consensual agreements, that meaning the loan agreement and the lease with option to purchase, was to allow an Indian corporation, owned by CRST members, to operate their farming and ranching business on the reservation; to continue to do business and to make a living here; and to borrow money with BIA guarantees, and to purchase their property back from the bank, property located on the reservation. And the purpose was, I think, this is clear from the evidence, that the purpose was to restructure the financial situation of the Long family, after father Kenneth had died, and to assist the Longs, to get back on their feet

and have more cattle, and have an operating line, and to be able to make money and buy their land back from the bank.

THE COURT: Mr. Hurley, excuse me. Mr. Von Wald was arguing that the agreement, dated December 5, 1996, does not have the elements of a contract; that it's simply informational only, in that it sets forth the plans and activities of the bank, would do. What is your take on whether there is some kind of reliance or consideration with respect to comprising all the elements of a contract?

MR. HURLEY: That's a very good question, your Honor. Actually bank counsel has argued that to Judge Jones, and he ruled against that argument. It's been argued to the jury, and the bank ruled against the jury on that. They found it was a contract and found it was breached. And they viewed it as a contract, as well. But anyway, to go through the particulars, as the Court pointed out during counsel's argument, the heading is important; "Loan Agreement Between Long Family Land and Cattle Company, Incorporated and the Bank of Hoven." It tells the reader that it's an agreement about a loan. It's not an information sheet.

The second thing you look at when you look at page two, you look at the signatures. And the information

sheet isn't dated or signed by the two parties making the agreement. And so, Contracts 101 would say, well, if it looks like a contract, and it has the earmarks of a contract, it's probably a contract. And then go further in depth where your question goes, what was the consideration. Under this consideration the bank got a deed from Kenneth's probate estate, to land that had been appraised in 1991. It was probably worth more than that, because this was 1996. But for $468,000. It's a valuable piece of ground. Number two, they also got a deed to the little house.

What that does for the bank is that they don't have to foreclose. They don't have to come into this Court and go through the CRST foreclosure statute. They get the deed right now and they don't have to go through the expense of foreclosure, plus the one-year redemption period, they don't have to wait for that. So, they immediately got consideration in that they got the deeds right there.

In addition, in this agreement Ronnie and Lila Long assigned over to the bank their CRP payments, and that was $44,297 and $44,298. So there's consideration of $88,400. That's not small money. So there was another consideration. Just those three added up come to 568,000 bucks. And that did happen. The bank did

get what they wanted. What our complaint was is, what were the Longs supposed to get. They were supposed to get a $70,000 operative line of credit, so they could operate their ranch, number one, and that was every year.

And then number two, they were supposed to get $37,500 to buy another 110 female cattle to grow up into cows so they'd have more income produced, more calves produced so they could buy their land back from the bank. And the testimony is clear, that those two loans were never made. But, yes, it's a very good question, but I think this is a contract, because the parties are identified. What they are agreeing to is identified. It's encaptioned, a loan agreement between Long Family Land and Cattle Company, Incorporated and Bank of Hoven. It sure looks like a contract, and the parties certainly treated it as such.

Back to Montana, we believe the Montana exceptions apply to the claims in this litigation. Our claims were breach of contract, because the Longs didn't get either the 70,000 operating loan, or the 37,500 loan to buy cattle promised by the bank. Number two, bad faith. And number three, discrimination. The CRST Tribal Court had jurisdiction under its inherent sovereign authority to hear and decide the claims presented in this case.

In the spring of '96, the bank and the Longs had reached an understanding that the Long's land would be deeded to the bank, and the bank would sell the land back to the Longs on a contract for deed financed by the bank. And that's shown on Exhibit Number 4, which is admitted into evidence, and that is a letter from the bank we were talking about. The bank then unilaterally changed the agreement, and the Longs would lease the land for two years, and at the end of two years the Longs had to pay 468,000 in a lump sum to buy back their land. The bank decided not to sell the Long's land back to them on a contract for deed, because they were tribal members, and the Long Family Land and Cattle Company was an Indian-owned entity on the reservation. That's Exhibit 4.

The bank sold 320 acres to the Pesickas for $155 an acre, or $55 less per acre or, $17,500 less than the bank required the Longs to pay for 320 acres. The bank sold 1910 acres to Maciejewski on a payroll contract for deed, with interest at 7.75 percent. The bank required the Longs to pay 9.25 interest to restructure the note, as shown on Exhibit 8.

Maciejewskis had ten years to pay off their purchase of the Long's land, and they paid annual payments of $23,000 a year, which is shown on

Exhibit 21. The crop production and the FSA payments on the land, which paid the payments from Maciejewski on the contract for deed. One of the bank's terms of sale for Pesicka and Maciejewski, they were certainly more favorable than the terms the bank required of the Longs, because the Longs are CRST tribal members, and the Long Family Land and Cattle Company is an Indian-owned entity on the reservation, as stated by the bank in Exhibit Number 4.

Pesicka and Maciejewski are not members of the CRST Tribe, and that's Exhibit 26, admitted into evidence. A contract for deed would have made it substantially easier for the Longs to buy their land back from the bank; no question about it. But they were not given that same opportunity that the bank gave to nonmembers.

Judge Jones determined that the above facts are prima fascia evidence, that the bank denied the Longs the opportunity of favorable bank financing on a contract for deed, solely because of their status as Indians and tribal members, and therefore submitted Long's claim to the jury. That's at transcript 438-439.

The jury determined that the bank intentionally discriminated against the Long's solely on their status as Indians or tribal members and the lease with option

to purchase. And that is tab one, Jury Instruction 4, in your red brief. And the footnote there in the judge's decision said that the judge intentionally instructed the jury that way to make sure that if any juror felt that the bank did not treat Longs the same as the non-member, that it could have been for some other reason, bad credit or whatever. But as I said before, I don't believe Exhibit 4 is a race card in any way, shape or form. It's a business letter, and if it was prejudicial, it's certainly relevant. And if it is prejudicial, then the bank did it to themselves. They wrote the letter, and that's the reasons they used.

We submit that Judge Jones correctly denied the bank's Motion to Dismiss for lack of jurisdiction over the Long's claim of discrimination. And his decision is at tab four in the red brief. There was substantial, credible evidence presented to sustain the jury verdict. The Long's request that this Appellate Court affirm the decision of the Trial Court, and the jury, on this discrimination issue.

Going to issue two, breach of contract, the bank argues that the Trial Court should have granted Bank of Hoven's Motion for Directed Verdict and Judgment Notwithstanding The Verdict of the Jury on the Long's breach of contract claim against the Bank of Hoven,

because the loan agreement lacked consideration. And we spoke to that just a few minutes ago. The well-established rule of law is that any benefit conferred, or any prejudice suffered by either party is sufficient consideration to bind the contract. And I cite the cases in my brief.

The bank received from the Longs, land worth $468,000, a house that sold for $30,000 by deed, in lieu of foreclosure, plus the Longs assigned their CRP payments of $88,400 to the bank, thus the bank received $586,400.

Longs, on the other hand, what were they supposed to get out of the contracts? They were to receive two new loans; the $70,000 pre-year operating loan, and $37,500 cattle purchase loan. By obtaining the deed to the land in lieu of foreclosure, the bank was saved the cost of foreclosure, and did not have to wait for the year redemption period. We submit that the evidence is clear that there was adequate consideration, and it was a binding contract, and that they both, as the Court pointed out, in citing the Battleship case, neither of these agreements, that is the loan agreement, or the lease with option to purchase, have clauses in them that are standard in contract drafting, that would state that this contract stands alone, or would say that this

contract stands alone. And then all other agreements oral or written, that precede these, are superseded by this contract. Those contracts are not here.

As a matter of fact, the loan agreement on page two refers to the lease with option to purchase. It says, the Bank of Hoven will enter into a lease-purchase option on the approximately 2230 acres of land described in Exhibit A under a separate agreement attached hereto. That's the lease with option to purchase. So I think it's very, very clear that the two were signed the same day, and they both were drafted by the bank. If the bank wanted to make that clear, they should have done it in the written documents, and not here, after the fact. If it was an informational sheet, then that's how it should have been headed. And an informational sheet would not have to be signed by the bank or by Ronnie Long except maybe to receive it and that he read and understood it. But we submit that both -- that Judge Jones was correct that both of these contracts are part and parcel of one agreement, and that there was adequate consideration to bind both contracts.

The evidence is also clear, we submit, that the bank breached the loan agreement. The bank admitted at trial that the $70,000 operating loan was necessary for the Long's success. And that the $37,500 cattle

purchase loan was to buy 110 head more cattle for the purpose to increase the Long's income, so they could buy their land back from the bank. It's undisputed that one, the bank never made the $70,000 operating loan that the Longs needed to operate their ranch and feed and take care of their cattle. Two, the bank never made the loan of 37,500 so the Longs could buy an additional 110 head of cattle to increase their income so they could buy their land back from the bank.

Dennis Huber, he's the financial expert that was involved. He's from the North and South Dakota Native American Business Center. And he testified that without the $70,000 operating loan, the Longs were doomed to failure from the start. They had to have operating money. As a direct result of no operating money the Longs were unable to feed or care for their livestock during the winter of '96-'97. The bank knew that they did not have operating money to move their hay 20 miles from where the hay was baled, and to feed their cattle on their winter Indian range unit. The bank knew that cattle without feed cannot survive very long in severe winter weather without feed.

THE COURT: Counsel, I think what the Appellants were arguing that the application for the loan was filed and the bureau, in characteristic fashion, didn't act on

it very promptly, and when they finally said that a more detailed application would be needed, the bad weather had already struck, and the cattle were dead. So, if I understood Appellant's argument, they were saying that it would be somewhat fruitless to pursue the loan at that point.

MR. HURLEY: I would agree with the last there that when you get out into April and May of 1997, it certainly is fruitless. The scope of this case though, is what happened from April of 1996, when this restructure was proposed by the bank, and then how did that move along. The evidence was clear that on October 28, 1996, there was a meeting, and two bank officers were there; bank lawyer was there; Dennis Huber was there of the North and South Dakota Native American Business Center out of North Dakota was there; and Ronnie and Lila Long were there, and they were not represented by counsel. But at that meeting, the proposed agreements were discussed.

And Dennis Huber testified that his work product was Exhibit 8-A, and Exhibit 8-A is a cash flow that he prepared in line with what the agreements are. And I'll furnish to the Court, what the jury saw just so you can see it more clearly. And, of course, what he built in there, in November of 1996, out of the line of credit of

70,000, he said 40,000 was needed right away. (Inaudible) -- in order to get ready for winter, get the cattle ready for winter. That was November. The meeting was October 28th. And the bank should have, we contend, gotten busy, after everybody was agreed to it, the BIA, the bank and Longs, and put together these little documents and had them signed and make the loan in November.

We find ourselves at December 5th, five weeks after the meeting, signing these documents. Then we find an application going to the BIA, December 12th. Well, the BIA was here and heard the agreement and agreed to it. So what happened in these five weeks, we get down to December 12th, and the testimony is clear on this point, enclosed with the letter from the bank, the BIA dated December 12th, which is Exhibit 8, it says the cash flow, at trial, this is the first time that Ronnie and Lila Long sought this cash flow. This cash flow was changed, and Ronnie Long didn't agree to it, and had no knowledge of it, but this is a cash flow that doesn't work.

First of all, there is no line of credit. So, by the way, first month, 28,000 ready, checks, and 31, 35, 43, 46. BIA looked at it, understandably and said, this isn't going to work. It runs up to 104,000. What in

the world -- so a letter comes back from BIA, this is a modification, and you are going to have to have a more complete application. And in response to the Court's question of bank counsel, the evidence that was submitted was very clear, that the bank did not make further application. Never did. So, that is the background on that issue, and of course, that pertains to bad faith, we feel, and it pertains to breach of contract. But that's a very good question, and that I feel again we are probably rehashing arguments to the jury. But still it's good information, and it's part of the evidence, and I appreciate the question.

As a direct result of no operating loan, the Long's were unable to feed or care for their livestock during the winter of '96-'97. Because the bank did not make the $70,000 operating loan as promised and did not make an emergency loan to care for the cattle as provided by the CFR, the Long's lost 230 cows, 277 yearlings, and eight horses. It was a terrible, terrible loss, and that's shown on Exhibit 14. And that loss was verified by FEMA. The cattle that died had a value of 340,000 and that was the cows plus the lost calf crops.

In reference to this CFR, the CFR, this is made reference to in the BIA letter that's in evidence, that

in any emergency situation, the holder of a BIA-guarantee to the bank, can make an emergency loan to protect the collateral for feed, care, fuel, whatever, up to ten percent of the loan, which in this case would have been right at $40,000. And that advance loan to protect and care for the collateral would be automatically guaranteed. Don't have to submit an application to anybody, and that wasn't done. The evidence is clear that Ronnie Long and John Lembke called from the office here of the bank in December, just before Christmas, and specifically requested an emergency operating loan in that amount. So, although we are rehashing the testimony and the evidence, I think it is pertinent to the question.

We feel the evidence shows that the bank received 586,000 of value from the Longs in the deed to the land, and the house proceeds, and the CRP payments. But the Longs did not receive from the bank the promise of 70,000 operating loan for the 37,500 cattle purchase loan that they needed. Testimony was clear that if the bank had made the operating loan money available soon after the October 28th meeting, where the parties and the BIA agreed, or soon after the loan agreement was signed December 5th, would still have worked, because the snows didn't start until December 13th, and the real

tough winter was still ahead. Or had made an emergency loan of 40,000, which would have been immediately granted by BIA under the CFR; automatically; doesn't even take a phone call, the cattle would not have died. This was a question for the jury, and the jury decided against the bank. And we would submit that it was substantial, credible evidence in the testimony, and in the documents submitted to the jury, to support their determination that the bank breached the agreement.

And back to this point in time that the Court was asking about, from December 12th, it was ready to go on the 12th, and if it was the same cash flow, could have been faxed, telephone call the next day; what's the hang-up; same thing we talked about; did you prove it; okay; send the money; phone call to Ronnie; money is available; move the bank, or whatever the procedure was. But it certainly doesn't take five weeks and then longer and then never. It would lead one to believe that there was no intention on the part of the bank to ever make those loans, is the only conclusion I could come to.

As to issue three, bad faith, the Trial Court, we submit, should have granted the Bank of Hoven's motion. Although the bank argues that the Trial Court should have granted Bank of Hoven's Motion For a Directed Verdict and Judgment Notwithstanding the Jury Verdict,

separate cause of action for bad faith by Longs against Bank of Hoven. In other words, you heard counsel state that it's his belief that the claim of bad faith in South Dakota, and in CRST, is not a separate cause of action, but it is tied in with breach of contract. It's only one cause of action.

The bank argues that a bad faith claim is not a separate cause of action. However, the South Dakota Supreme Court disagrees with the bank's argument. The South Dakota Supreme Court in Garrett versus BankWest held that an aggrieved party may sue for breach of contract for lack of good faith, even though the complainant's conduct did not violate or breach any of the expressed terms of the contract. Therefore, breach of the implied covenant of good faith is a separate claim from a claim for breach of the expressed terms of the contract. Two different things. And we believe that Judge Jones handled it properly.

In the loan agreement, which is Exhibit 6, the bank obligated itself to promptly prepare the loan agreement. That was the obligation they undertook. We don't think that was done. Five weeks later? It's a simple four-page deal. And, prepare the lease with option to purchase, and, to make the $70,000 operating loan available to the Longs, and to promptly obtain the

approvement of the BIA. On October 28, 1996, the bank, their lawyer, the Longs, and the BIA all approved the restructure plan and the cash flow prepared by Dennis Huber of the North and South Dakota Native American Business Center. And incidentally, the testimony with respect to Mr. Huber's exhibit, you can see the signature right here, is Jim Neilson, vice president of the bank.

It was all approved on October 28th, and we submit that the delay from October 28th to December 5th was a dangerous delay, and a lot had to be done before winter closed in. And then the further delay from the 5th to the 12th; and then the further delay out to never. That was absolutely failed to this agreement. The bank, however, did not have the agreements prepared and ready to sign until December 5th, some five weeks later. Dennis Huber's cash flow, as we saw, required that 40,000 of the new operating money be distributed to the Longs in November of 1996.

And, of course, as we covered briefly before, when the cash flow was modified, that means Exhibit A, then the BIA, of course, responded that such modification of the plan required a more complete application to the BIA for approval, by the BIA. And the testimony is clear that the bank never submitted anything beyond that to

the BIA; never submitted a more complete application. We submit that the bank was in bad faith when it unilaterally (someone coughed) cash flow prepared by Dennis Huber without the knowledge or approval of the Longs or Dennis Huber. Dennis Huber testified that he had never seen Exhibit 8 before.

The bank was in bad faith, we submit, in not properly preparing the agreements to be signed and obtain the BIAs approval within a few days after the October 28th meeting when everyone approved, and it was fresh in their mind. The forty thousand to seventy thousand operating loan should have been made available to the Longs in November, as required by the plan and the cash flow that everyone agreed upon, which was 8-A. This period of time was critical to the Longs so that they could move the hay to the cattle, and prepare for the coming winter storms. By switching the cash flows the bank delayed the approval by BIA. The bank could have made an emergency loan of $40,000, which would then automatically have guaranteed the BIA and CFR and it did not do so. Such conduct we submit violated the spirit of the deal, which is the essence of good faith, and failed to cooperate with the Longs in achieving the purposes of the agreement and interfered with the Long's performance of the agreement, and frustrated the Long's

expectations under the agreement. And all those are earmarks of bad faith, under the South Dakota Supreme Court in Garrett versus BankWest.

Substantial evidence was presented to sustain the jury determination of bad faith. The Trial Court was therefore correct in denying the bank's motion for a Directed Verdict and Judgment Notwithstanding the Verdict of the Jury. The decisions of the Trial Court and the jury on bad faith should be affirmed, we believe, and we would ask this Appellate Court to do that.

Issue four, the bank argues that the damages awarded by the jury were excessive and controlled by passion and prejudice. The bank, however, has absolutely no evidence to support this filed claim. The jury only awarded the Longs 60 percent of their proven damages. The Longs presented substantial, credible evidence that their losses caused by the bank were $1,236,000 plus $792. The jury awarded $750,000, which is $500,000 less than the evidence showed the loss was. The jury awarded the Longs 750,000 to compensate the Longs for three causes of action. And the jury verdict, which is Exhibit 1 in the red brief, last page, if you answered, yes, to number one, three, four, five, what amount of damages should be awarded, and they say

750,000. And, of course, they awarded that for number one, the bank's discrimination against the Longs; number two, bad faith; and number three, the breach of contract.

And, of course, talking about excessive damages being awarded, the evidence was clear that it's going to take more than $750,000 for the Longs to buy their cattle, and replace their cattle that died and to buy back their land from the bank. And that's the standard of breach of contract, to put the parties back to where they were before the breach. And $750,000 will not replace the land and the cattle and put the Longs back to where they were before this happened. We submit that substantial evidence was presented to sustain the jury verdict, and the Trial Court was correct in denying the bank's Motion for Judgment Notwithstanding the Verdict, and this Court we request affirm the decision of the Trial Court and the jury as to the damages.

Argument number five had to do with eviction. And the bank argues that the Trial Court should have granted the Bank of Hoven's counterclaim for eviction of the Longs from their land. The testimony is clear that the Longs held over on their land after the lease term ended, December 6, 1998, and that lease term is set out in the lease with option to purchase, which is Exhibit

7. They did not leave the land, because they felt the bank had breached the contract; didn't make the operating loan; didn't make the loan to buy the additional cattle, and they felt that the contract had been breached and they weren't going to leave. They also believed (someone coughed) Long's testimony, he had, in fact, exercised the option to purchase. And the breach of contract by the bank prevented them from performing under their agreement. Had the bank performed and had they gotten the two loans, Dennis Huber testified, my cash flow would have worked. But without those two things, they were doomed from the start.

CRST Law and Order Code 10-2-6, paragraph six provides that when a tenant has held over for more than 60 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. And these are in cases of Tennessee on agricultural land. The 60 days ended February 6, 1999. The Long's had held over for 60 days, but the bank did not file their Notice to Quit until June 16, 1999, which was well after the 60-day period. And the Notice to Quit is one of the documents in the exhibits. Therefore, the Longs were legally in possession of all their land from December 7,

1998, to December 7, 1999.

During this period when the Longs were legally in possession, the bank sold 320 acres of their land to Pesicka, on March 17, 1999, and Pesicka was given possession by the bank, in violation of the Long's leasehold interest under the CRST statute, and under the Long's option to purchase the land, which Judge Jones found and held was still intact. And then the bank sold 1910 acres on Maciejewski on June 25, 1995, and gave Maciejewski possession of 960 acres, parcel one, in violation of the Long's legal right under the CRST Code to possession of the land, and the Long's right to purchase their land under the option. The bank knew the Longs were in possession of the land on June 16, 1999, when the bank filed their Notice to Quit here in CRST Tribal Court. And the Court asked that question of counsel, what jurisdiction did you invoke. They invoked the CRST Tribal Court. And in that Notice to Quit, which is in the evidence here, the bank knew that the Longs were still in possession of all of the land, because they asked the Court to evict the Longs from all 2230 acres. And that's a matter of record in this Court.

The bank never did then bother to go forward and get an order from the CRST Court, or schedule a hearing

on that request to remove the Longs from their land. The Longs did not voluntarily relinquish possession of any of the land. On June 25, 1999, the bank gave Maciejewski possession of 960 acres, parcel one. On that date the Longs were putting up hay on that land, had machinery on the land, and had cattle grazing on parcel one. Maciejewski threatened the people haying, and ran them off parcel one, which is at tab 14 in the red cover brief. Maciejewski drove the Long's cattle off parcel one and put a fence up to keep them off parcel one and pulled some of the Long's machinery off of parcel one, transcript at 274.

The jury determined that the bank breached the loan agreement, that's Jury Interrogatory Number 1; and the jury determined that the bank's breach of the loan agreement prevented the Longs from performing under the lease with option to purchase, Jury Interrogatory Number 2. The Trial Court then correctly reasoned that a party that has failed to comply with a lease with option to purchase, that being the bank, cannot now seek to enforce that agreement by an eviction action. Based on jury determination that the bank's breach prevented the Longs from being able to perform with the lease with the option to purchase, the Trial Court correctly ruled that the Long's option to purchase remains intact.

THE COURT: I'm sorry. I guess I definitely just want to hear you on the interest issue.

MR. HURLEY: Okay. Here I'm just responding to bank counsel's issues that he raised as an Appellate, and I as the Respondent. When we get to that, the Longs are the Appellants on that issue, in that sense, and the bank is the Respondent. But I will address that in a minute, if that's okay.

THE COURT: That's fine.

MR. HURLEY: The jury determined that the bank breached the loan agreement, Jury Interrogatory Number 1, and the jury determined that the bank's breach of the loan agreement prevented the Longs from performing under the lease with option to purchase, because they didn't have any operating money or any money to buy cattle. The Trial Court correctly reasoned, we submit, that a party that has failed to comply with a lease with option to purchase cannot seek to enforce that agreement by an eviction action.

Based on a jury determination that the bank's breach prevented the Longs from being able to perform under the lease with option to purchase, the Trial Court ruled then that the Long's option to purchase remains intact.

And the Court further ruled that the time frame

set out in Exhibit 7, that is the two-year profit time frame, never began to run. Thus the Long's land was sold to Pesicka and Maciejewski and they took possession, in violation of the Long's right to possession under CRST Code 10-2-6(6). And the Long's land was sold in violation of the Long's right to buy back their land under the lease with option to purchase. And that lease with option to purchase, as ruled upon by Judge Jones remains intact. Therefore, the sale of the land to Pesicka and Maciejewski by the bank was legally defective and void. The Trial Court was correct in ruling against the bank on their counterclaim for eviction, and the Trial Court's decision we feel should be affirmed by this Appellate Court.

In their argument six, the option to purchase, the bank argues that the Trial Court should not have granted the Long's motion to exercise their option to purchase back their land from the bank. The jury decided that the bank breached the loan agreement, Jury Interrogatory 1, and that the bank's breach prevented the Longs from performing under the lease with the option to purchase, Jury Interrogatory 2. The jury decided those two important questions.

Based on these findings by the jury, the Court concluded that the two-year time frame under the lease

with option to purchase, never began to run, and that the Long's option to purchase remains intact. The jury verdicts are supported by substantial and credible evidence, and the Trial Court's decision to grant Long's motion to exercise their option to purchase, was correct. This Appellate Court should therefore, we submit, affirm the jury verdicts, and the Trial Court's decision to remit the Longs to exercise their option to purchase their land back from the bank.

And this is in response to the bank's issue on that point. On our Appellate side, we, of course, are grateful that the Court granted us the right to buy back 960 acres of that land. But we submit to this Court that there was more land there that was sold to Maciejewski and Pesicka, that we also should have the opportunity to buy back, so that we are back to where we were at square one. And that's the rule of breach of contract law. When we started this thing, we had 2230 and 960. And 960 is too small a piece to really make it work for the herd of cows. You've got to have that piece of land back, the other 960 and the other 320. We would argue to the Court that the bank should not have sold that land to Pesicka and Maciejewski.

When the Longs were physically in possession, and legally in possession of the CRST Code, and as Judge

Jones ruled, because of the breach by the bank of the loan agreement, they didn't have any money to operate with, the time frame of two years never started to run, and their option to purchase remains intact. That means that the bank sold the 960 acres to Maciejewski, and the 320 acres to Pesicka, subject to the Long's option to purchase. And they choose to exercise it. They choose to exercise it now, so they can get their land back and get back to square one.

How would that work? It would work pretty simple. The bank gives Pesicka and Maciejewski their money back, and Pesicka and Maciejewski give the bank the land back. Now, we are back where we were. The Longs exercise their option to purchase, pursuant to the agreement, and they get, the bank gets full pay that they agreed to take, and we get our land back.

THE COURT: Mr. Hurley, did you say the instrument which conveyed the land to Maciejewski, was subject to the option to purchase, exercised by Mr. Long?

MR. HURLEY: Yes.

THE COURT: As they exist today?

MR. HURLEY: Yes. And that's been decided by Judge Jones, and that's what he decided?

UNIDENTIFIED PERSON: That's what the instrument said, Jim?

MR. HURLEY: That's what Judge --

UNIDENTIFIED PERSON: Is that your question, Judge?

THE COURT: Yes. My question, is the instrument, does it contain that condition, the conveyance to Maciejewski?

MR. HURLEY: Well, in this respect it does, and if you get a minute to look at Exhibit 21. Interesting thing, the bank sold the 1910 acres to Maciejewski on a contract for deed. And on that contract for deed, they give fair warning to the Maciejewskis that (someone sneezed) trying to get this Notice to Evict and eviction and there is litigation concerning eviction up on page four, currently Long, Long Family Land and Cattle Company or Ronnie Long has machinery located on some or all of the above real estate. And seller or its agents shall be entitled to enter upon the real estate for the purpose of removing any machinery owned by the Longs or Ronald Long.

Number two, they, of course bought a policy of title insurance to protect themselves.

UNIDENTIFIED PERSON: I object to that. Title insurance is -- any insurance is completely irrelevant, and should never have been brought up before.

MR. HURLEY: This is admitted into evidence and

never objected to before. This is page four.

And then in that contract for deed, the bank says that, page three, buyers should be entitled to possession of parcel two and the current lessee quits possession of the real estate, either voluntarily or involuntarily. And it's specifically understood that Long Company is currently grazing cattle on parcel two. Rhonda Long is living in the house located on parcel two, and the Bank of Hoven is in the process of evicting the lessees and Rhonda Long from said real estate. Due to the uncertainty of litigation, it's impossible to accurately predict when the lessee shall be evicted from the real estate, but that upon either eviction or voluntary surrender of the real estate, by the past lessee, buyers should be entitled at that time to possession of parcel two, as well as parcel one.

So, in the terms you are thinking of, I guess the answer would be, no, it doesn't say it's subject to Ronnie Long's option to purchase. Judge Jones ruled that, but there is notice here to Maciejewskis that there is litigation going on, and we are trying to get the Longs off the real estate.

Does that answer your question?

THE COURT: Yes. Thank you.

MR. HURLEY: Further, while this litigation was

going on, on January 11, 2002, the Bank of Hoven gave a warranty deed to Maciejewskis during this litigation. All that we -- I was going to say suggest, but it's stronger than that, because Judge Jones has ruled on it, all of that was subject to the Long's option to purchase this land, which remains intact. And for that reason we are asking this Court to follow the lead of Judge Jones.

Judge Jones ruled that Ronnie and Lila Long could buy parcel two, because they were still in possession of that. But the judge felt that if, and he uses that word, if Maciejewski and Pesicka were buyers in good faith, without knowledge of the litigation, then they shouldn't be disturbed. But, we think the evidence is clear, as we've been discussing. They certainly had reason to believe, or they could have went to a lawyer and asked about it. If they had reason to believe that there was litigation going on -- this is a small area. People hear what's going on, and there is no question that what's written in this contract for deed is legal notice, that litigation is going on.

The seventh issue is the bank argues that the Trial Court should not have allowed any prejudgment interest on the damages awarded to the Longs by the jury. And on the interest question I will just respond to their argument here. The bank's argument, we submit,

violates the jury verdict. The jury decided that interest should be added to the judgment. And Judge Jones tasked the jury with that question; should we add interest or should we not? The jury said, yes, add interest to the judgment. And that's the last page of the jury verdict; the Jury Interrogatory Number 6, and that's tab one of the red brief.

The statute that applies here, of course is, SDCL 21-1-13.1, which abrogated in 1990 the old rule that prejudgment interest cannot be obtained if damages remain uncertain until determined by a Court. And that's exactly what the bank is arguing. That's old law. Now, prejudgment interest is allowed from the day that the loss or damage occurred, and that, of course, is by statute. And then it's also backed up by a number of South Dakota Supreme Court cases. Counsel mentioned the Outland(sp) case, and of course, that's exactly what the Supreme Court says there.

THE COURT: I guess on the issue of prejudgment interest, I mean, that's really up to the courts, since I don't believe the Cheyenne River Sioux Tribe has any such statutes on point. So, the South Dakota rule is only sort of persuasive evidence about what this Court should actually follow.

MR. HURLEY: I think that's correct. And Judge

Jones spoke to that in our discussions about it. And oftentimes -- I think he put it in one of his decisions -- oftentimes when the CRST Code is silent on a matter, then he feels that he should look to State and Federal law for guidance. And I think the Court puts it correct, it's guidance. It certainly isn't binding. However, the CRST Tribal Reservation is within the State of South Dakota, and of course, that's one place you'd look to see if you liked that rather than California, or some other place. So that's the reason we are using this one, which is used by all the Circuit Courts around the State.

The point is, under that statute as guidance is that prejudgment interest is mandatory if the jury finds that damages -- if the jury finds damages. The second point is that interest is allowed from the date that the loss or damage occurred, which makes all kinds of sense. If that's when you had the loss, then prejudgment interest starts at that point, so that you can keep up with inflation or cost of money. And when you do, in fact, then get paid under the judgment, interest stops, and the judgment is satisfied, but you have time, cost of money for waiting. And that's the point.

Another point we make is the same point that was made by the South Dakota Supreme Court in the Ellvein

case versus Mercedes Benz case, and that is that the Bank of Hoven did not object in this case to Jury Interrogatory 6, or Jury Instruction 10-A. The bank did not propose any special interrogatories, and therefore the bank has waived objections and should not be heard to complain for the first time on appeal. And that's exactly what the South Dakota Supreme Court says about that situation.

Interesting difference between Ellvein and here however, is in Ellvein the jury came back and said, no interest. And there came the objection, and the Supreme Court said, well, if you didn't object at trial you can't raise it for the first time here on appeal. So you are stuck with it. And he didn't object to the Jury Instruction, or the Interrogatory that went to the jury in the Ellvein case, you can't raise it for the first time on appeal.

When you look at the interest allowed by the Court here, and you take the jury judgment of 750,000 over six years, divided by $123,000, 2.7 percent interest. And the other thing that's interesting is that the 123,131 is exactly the amount proposed to Judge Jones by the Bank of Hoven. So, we submit to the Court that they should not be heard to complain here, that the Court gave some interest, albeit a small amount to the Longs,

when the bank adopted verbatim the exact amount prejudgment interest and calculations that were provided by the Bank of Hoven.

Thus, in response to the arguments of the Appellant, Bank of Hoven, the Respondents, Ronnie and Lila Long, and Long Family Land and Cattle Company, Incorporated would submit that the rulings by Judge Jones were correct, and of a sound legal basis, and that the decisions of the jury were supported by substantial evidence, and therefore we would ask this Appellate Court to a firm the decisions of the jury and the decisions of Judge Jones.

THE COURT: I know this is stretching everyone's endurance, but it's necessary. And so the plan of the Court is to hear response, and then we will hear from the tribe and have a final response. I'm tempted to adjourn briefly, but I'm not going to do that.

MR. HURLEY: On our side of it, we were the Appellant on two issues, and that being interest and purchasing back the land. I think I would be brief on both of those, because I think we covered most of it, except I just want to cover the other side of the interest question.

THE COURT: Okay. We will hear the response first and then --

MR. VON WALD: Yes. One of the questions counsel has asked was about the discrimination action, and whether there is any tribal law regarding discrimination. And basically he told the Court that it was, you know, that there is a statute that says everybody is to be treated equally through tribal law, and cited that, and I'm not familiar with that. But he also mentioned that a bank is required, under Federal law, and he used Federal law, to treat everyone equally when they are making loans. So, basically what they're using, your Honor, is Federal law. And I think that Nevada versus Hicks is appropriate in this case, and is controlling in this case, and it requires that there be no Tribal Court jurisdiction for discrimination actions against (someone coughed).

In response to the question, your Honor, that you had asked, regarding the consideration for the loan agreement, you'll notice that only the consideration that was mentioned was consideration that was given, some of their time and not for that loan agreement. For instance, he mentioned the deed. They deeded 468 acres. Yup, that's right. That was consideration that the estate, not the Long Family Land and Cattle Company Incorporated, but the estate, the Kenneth Long estate is the one who deeded that land, not the corporation; not

Ronnie Long, but Kenneth Long's estate. That was deeded to the bank, that's right, and that could be consideration by the estate. But it's not consideration for this loan agreement, not whatsoever. As a matter of fact, this loan agreement, this had happened -- the deed had already been received, and the agreement says that. The Bank of Hoven has received a deed to the property, so they have already received that deed. Long Corporation didn't give any consideration whatsoever for this loan agreement.

He mentions the $44,000 payments, yeah, that's consideration he said. That's consideration for the lease, with option to purchase, not this loan agreement. There isn't any consideration, and counsel can't bring anything forward showing any consideration whatsoever by the loan corporation for this document that's entitled loan agreement. And then he says, well, if it looks like an agreement, it's entitled an agreement and it's signed like an agreement, walks like a duck, it's a duck type of thing, just doesn't hold. They still, contracts in order to be valid, still have to have consideration or reliance, and this has none whatsoever.

The other thing that I wanted to point out, and that is that counsel says, well, the discrimination action, and if it was a race card, it was the bank's

fault. And he cites the letter there, that Mr. Simmon here actually wrote, the Long Corporation, or Ronnie Long, I'm not sure which. But what he failed to tell the Court is that the remainder of that letter says that there will be possible problems with jurisdiction, as the reason that they had a difficult time making a contract for deed to Ronnie Long, or to the Long Corporation. And, when it comes to playing that to the trial, what damages did the Plaintiff show that relate to race, to discrimination? Absolutely none. There were no damages whatsoever. All their damages were relating to the breach of contract action.

Basically, your Honors, this letter was entered into evidence by the Plaintiff for the sole reason of coloring the jury, and it worked.

Then he mentioned the bank didn't make the $70,000 loan; we didn't make the $37,500 loan for the purchase of cattle. That's true we did not. We didn't make the $70,000 loan because by that time, by February 14th, all the cattle were dead, and it was fruitless to apply to the BIA to make a loan that they wouldn't have approved before, when the cattle and the collateral was there. As a matter of fact, when we did make a request for a smaller amount, even 40,000, they wouldn't approve that one. They would approve it as long as the bank made it,

but they wouldn't guarantee it.

I'm trying to make this quick, your Honors.

THE COURT: I appreciate that.

MR. VON WALD: The other thing is that, Plaintiffs' counsel mentions something that an agreement was made in October of 1996, and Dennis Huber was there and a number of other people. And he mentions the cash flow and points out to the Court this cash flow. And so that's the cash flow that Ronnie Long -- he had never seen this cash flow, which was sent in by the bank in the letter of December 12th. But this cash flow was prepared, and it shows right here, comes from the chairman's office, the Cheyenne River Sioux Tribe Chairman's Office. The bank didn't make that cash flow. John Lembke made it, and John Lembke was working with Ronnie Long. So he may not have seen the finished product, but I'll guarantee you that John Lembke didn't pull those figures out of the air. They came from some place, as to the number of cattle that he had, and what his operation was planning on being, number one.

Number two, it's too bad that this cash flow wouldn't have worked. The problem was, that the bank noticed after the meeting that Mr. Huber had cattle being sold, the same cattle being sold on two separate years. He sold his calves in one portion of them, and

then he turned around the next year and sold those same cattle. It was a mistake on his part, and not something that I'm sure he intentionally did to deceive anybody. But the problem was, Mr. Long had changed his operation, so he was just selling calves every year, and he decided to change it, to keep the calves over and sell them as yearlings. Well, the problem was the cash flow reflected that they were sold in the fall of the year and then the next year sold again as yearlings, same calves. So that's the reason that that cash flow was not used, and a new cash flow was required, and that was the one that was prepared by John Lembke.

The other thing is, counsel for the Plaintiff says, yeah, this isn't going to work, this cash flow, and he puts it in front of you. He says, the first line is minus $28,000. Yup, it is a minus $28,000. That doesn't mean to say that Ronnie Long and the Long Corporation is writing checks and are going to be $28,000 overdrawn. This bottom figure here is to show, throughout the year, the maximum amount of cash that the corporation and that is the operating loan. So this minus $84,000 figure here, is what was required for cash for that year. That's the most they'd be in the hole. So they'd make the operating loan, hopefully, shortly after December 12th is when it was sent in, when it

didn't get approved. I didn't hear a word about it. Had they received that 85,000 at the beginning, like in December, had they received that, then this wouldn't have been a minus 31, it would have been a positive. And so, it wasn't that this cash flow wouldn't work, because they were bouncing checks all year long. That's not the idea. That's not how this cash flow was made. And it shows at the end of the year it was a positive 28,000 that the corporation showed.

And the other thing is, the five weeks or however long it was from when the bank -- it was more than that -- two months from when the bank sent the application in from December 12th on, the bank really has no control. They cannot send the letter to the BIA, and instantly get a response back that says, yup, your loan is approved. It just doesn't work that way with the BIA. It's sent in to the tribal chairman's office, and it's approved here, and then it went to Stacy Johnson, I'm thinking, out in Rapid City -- and don't quote me on that. But it goes to other people, and it took -- well, the letter that you see, the response, and I'm not even sure I can read his name on the letter, and I'm not certain who it is, but the response came from the Aberdeen office, and the request was sent to Russell McClure here on the Cheyenne River at the time. So it

goes through a number of hands and it isn't instantly approved or disapproved. That's all I have.

THE COURT: Briefly, on your issues ---

MR. HURLEY: I'm afraid we are going to need a break here or we are going to have an accident.

THE COURT: The Court will be in recess for ten minutes. It's a quarter after twelve here, and we will been back in here at 25 after twelve.

(A break was taken for approximately ten minutes.)

THE COURT: Okay. We will pick up where we left off, counsel.

MR. HURLEY: Do I respond briefly to what counsel just said?

THE COURT: No.

MR. HURLEY: Go to our issues then. Your Honors, Ronnie and Lila Long, and Long Family Land and Cattle Company Incorporated have raised two issues on appeal. One is the inadequacy of the interest award by the Trial Court. And although the Longs appreciate very much the interest that was added, it had to be added because the jury came back with a jury verdict two, that interest shall be added to the judgment. And then the statute in South Dakota, which is guidance and not binding, but it does say that once the jury decides that, then the Court computes the interest.

And so, the Court asked for proposals, and the Longs submitted a proposal. We submitted the first one. And as you will see in our briefs, we compounded interest, and that was objected to by the bank, so then we figured simple annual interest. And, of course, the way that comes out in our brief here to this Court on page 13 of the blue-colored brief is, if you figure 750,000, and you do use this guidance, the Category B rates in the South Dakota Statute, that's ten percent. And whatever figure you take in there is just simple annual interest. If you do figure ten percent, that's 75,000 a year for six years, which comes out to $450,000, plus a few dollars for the eighteen days past six years. And that amount we set forth on page 13 and 14 of our brief, and that was a proposal to the Court.

The Court, however, took verbatim the proposal of the bank, which the bottom line was 123,000. The odd part about it, however, is the inventive calculations of the bank. Even though CRST does not have a prejudgment interest statute, prejudgment interest in common law is simply the time value of money that the Longs have waited to get justice in this matter, and six years went by. And when you figure six years of time, and what has happened to the value of money, and inflation and so forth, and what you could have borrowed that money at

the bank for, and we set that forth in our brief, the bank certainly wouldn't loan money at 2.7 percent. And that's figured at 750,000, produces interest of 123,000 over six years; a simple divide by six is $20,000 a year, that's 2.7 percent.

We would submit to the Court that it is a convenient figure, in that the bank proposed it. So how can you object to that? But is it fair? Is it fair that the Longs have waited six years for this to come to this point, and the jury could have said no damages and that would have been the end of it, but they didn't. They said 750,000, and they said in Interrogatory two, add interest to the judgment. Okay. What's a fair amount? 2.7 percent? 6 percent? Maybe ten is too high, but we submit to the Court that 2.7 is too low, if we are going to be fair about it. And that is, in essence, our argument asking for this Court to compute the interest on a percent figure higher than 2.7 percent.

The odd thing about the bank's computations is that in common law and also in South Dakota statute, the interest is figured from the date of loss. That makes all kinds of sense. If somebody destroyed (someone coughed) and you didn't have it for a period of time, of course it's from the date of loss. The argument from

the bank to the Trial Court was, no, it shouldn't be figured on the day that the cattle died, or when the bad faith happened, or when the discrimination happened. All that happened prior to February 1, 1997. The cattle died mid-January. The understanding that the Longs would have a contract for deed, switched April 26, 1996 as Plaintiffs' Exhibit 4 that we've been talking about. The discrimination happened at that time. The bad faith in the way that this thing was handled, which frustrated the expectations of the Longs in this contract, and reasonable expectations as to what would happen if they would be made a loan of $70,000, and they would be made a loan of 37,500 to increase their cattle herd. That happened right away. The agreement was made by all concerned, October 28th, and it was inked on December 5th, and the loans were never made.

So, those things happened prior to February 1st. So the testimony is clear, without contradiction, that the loss happened before, on or before February 1, 1997. But the bank says, no, let's not use that figure. The reason being is that you weren't going to sell the cows then. They died then, but you weren't going to sell them then. In fact, you were never going to sell them, that's your mother herd. So you will notice in the Court's computations it was adopted verbatim from the

bank's proposal, there is no interest whatsoever on a $142,600. So, that really lowers the effective interest rate over six years, and it violates the jury verdict that they are shoving interest at into the judgment of 750,000. And for that matter, how can we take 750,000 and subtract 142,600 of cow value off of it? Nobody knows, and the bank didn't submit any particular interrogatories to the jury; didn't object to the ones that the Judge sent to the jury. But how do we know that the jury gave 100 percent value on the cows? It was also discrimination, and it was also bad faith, and it was also breach of contract.

Obviously they didn't give 100 percent on anything. They gave 60 percent of the value asked for. So, to take 142,600 and accrue no interest whatsoever on it, seems to violate the finding of the jury that interest shall be added to the jury verdict of $750,000.

To go further, the calves that died mid-January weren't going to be sold until October. So the Court will see that the interest doesn't start there until some months later down to October. Also the yearlings, the same kind of calculations. And the proposal that interest begin to accrue when the Longs plan to sell each category of cattle. And, of course, the cows were not going to be sold, so you don't get any interest on

those. So that's basically our argument on interest.

The second issue that we asked this Court to look at was the Trial Court's decision that was based on the fact that the jury decided that the bank breached the loan agreement, that's Interrogatory 1. Interrogatory 2 the jury said that by the bank breaching the loan agreement, the bank prevented the Longs from performing the lease with option to purchase, and therefore the Long's option to purchase remains intact. So, therefore I am going to grant the Long's motion to allow them to exercise their option to purchase right now on the parcel 2, 960 acres, where Rhonda lives, and where the machinery is, and the cattle, and they never gave up possession of that. In fact, the evidence is clear that the Longs never gave up possession of any of the land. It was simply sold and the new buyers moved them aside.

On that point, we submit to the Court that the Longs should be able to purchase parcel one, 960 acres; and the parcel of 320 acres, for the reason that, on a breach of contract the measure of damages, whatever it will take to get the party who was the victim of this, back to where they were when all of this started. That would be back in ownership and possession of their 2230 acres.

The purchase price on that, can be simply

subtracted from the judgment. Under the contract itself it's 468,000. You get the minus off the value of the little house, 30,000, minus some clean-up costs and commissions, it was about 27 in the contract, which is Exhibit 6, they only gave us on the front end $10,000. So there is just short of 17,000 that the bank has been holding that's never been applied anywhere. And we would ask that that be applied under the clear language of Exhibit 7, the lease with option to purchase.

Number two, under that same document, when the Longs purchased their land back from the bank, they get credit for the two CRP payments of 88,400, and those two figures then subtract off.

The bank argues that, well, wait a minute, that document also says that, that credit is reduced by eight and a half percent interest on the purchase price over the two-year period. But wait a minute, Judge Jones found, based on the jury verdicts one and two, that the bank's breach prevented the Longs from performing under the lease with option to purchase, and therefore the time frames didn't even start. So, interest at eight and a half percent does not accrue.

We would submit to the Court that the correct calculation there is the price of the land to the Longs is the 468,000, minus the 17,000 for the little house,

minus the 88,400 for the CRP, and they would subtract that much off the judgment, and the bank then would have to give them a deed to that land to put them back to where they were before. We would submit to the Court that that is our submission on issue number two on the Long's motion to the Trial Court to be able to buy their land back by offsetting against the judgment. The Court granted that in part by allowing them to buy back 960 acres, parcel two, but denied it as to parcel one, the Maciejewskis bought and took possession of; and denied it as to the 320 acres that the Pesickas bought and took possession of.

We would submit to the Court that the reasoning of the judge, of Judge Jones is probably correct. If Maciejewskis and Pesicka really and truly had absolutely no knowledge of this litigation and were buyers in good faith, clean as the driven snow, then maybe there is a point. And in this situation, however, as we pointed out in the earlier conversation here today, the Maciejewskis certainly had notice, it's printed right in their contract for deed. And the testimony in the transcript will show that Ronnie Long had a conversation with Mr. Pesicka, and he told him, it isn't over. So both of them were not absolutely without knowledge that this litigation was going on.

And the other point is that, people who are knowledgeable about buying land, like both of these people are, they certainly check things out and ask people. This is a small community, and there is no question that this litigation was going on during that entire period of time.

The other point we covered earlier is that under the CRST statute, there is a hold-over tenant. The Longs were legally entitled to absolute possession of those 2230 acres clear up until 1999. During that period of time, from December 7th of '98 to December 7th of '99, that's when the bank sold these pieces of land and gave possession away to these third parties. And that's in violation of CRST statute, and the rights of these members of the tribe. And those statutes should be honored, and we submit that the way to honor those is to grant that motion and allow the Longs to buy back parcel two, and the 320-acre parcel.

And as we said in our brief, that will be no damage to Maciejewski or Pesickas. They took it with some knowledge that there was litigation going on. They have used it these past years. They have received the FSA payments, and they received whatever crops were raised on that land or grazing. And if they are paid back the amount of money that they paid to the bank,

pays them back that money, of course, then the land comes back to the bank, and they are put in the same position they were before.

And there is evidence in the record, that there is adequate title insurance.

MR. VON WALD: Objection, your Honor. Title insurance is highly irrelevant.

THE COURT: Okay.

MR. HURLEY: On Exhibit 6 it shows that Ronnie and Lila Long paid the bank through their land credit title insurance of $1,118.25. They had insured good title at the bank. And we saw in the contract for deed, the bank had to insure good title to Maciejewskis. So all of that just comes back.

And then we have the land sitting at the bank. We have the money here in the judgment. We trade the money for the land, and the bank is paid in full for that land, just as it was envisioned when the bank agreed to take that amount for that land in the option to purchase.

With that, your Honor, we would submit those two positions to the Court for consideration.

THE COURT: Thank you, counsel. Respond to both those issues.

MR. VON WALD: Just I think basically I have

responded mostly before on these same two issues. But as far as the interest rate that Judge Jones adopted was not 2.7 percent, it was 8.5 percent. And the 2.7 percent would be figured on the entire $750,000, that all would have occurred December 5th or in December or January of 1996 or 1997. Whereas all the evidence that the Plaintiff had was losses from the sale of calves, loss of income over a period of four years. So, the calculation that I submitted to Judge Jones was actually calculated interest, interest was calculated when losses, although I didn't know what the jury found to be the actual losses on particular dates, losses that I thought may have made sense, and that's what the judge adopted.

And when counsel mentions the jury could have found, as an example, that there were damages because of bad faith or because of discrimination, those type of damages are not entitled to any interest, because they are incalculable under South Dakota law, and I think under the law of most states, as far as I know. And, so if they are intangible damages that the Plaintiff has suffered, there shouldn't have been any interest whatsoever. There lies my argument that we don't know how the jury came up with their figures for interest, and so interest shouldn't be allowed, and even though

they said that it should have been.

The last thing, as far as the land is concerned, giving Ronnie Long or Long Family Land and Cattle Company, Incorporated an option to purchase all the land, the Pesickas and the Maciejewskis, are not even made parties of this appeal. So obviously, they'd be effected if this Court were to give them all the land, the Longs an option to purchase all the land, number one.

And number two, if they would have been made a party, then they would have been here to defend themselves. But they are not a party to this and they haven't been served by counsel. And number two, the jury found that neither the Maciejewskis, the Pesickas nor the bank used self-help to evict the loan corporation off of the land that was sold to the Maciejewskis and to the Pesickas. So, that's why the judge ruled that they wouldn't be entitled to an option to purchase all of the land.

THE COURT: Thank you, counsel.

MR. HURLEY: Point of clarification to clear up the record. The certificate of service on both of our briefs was served on their counsel, Mr. Kenneth E. Jasper. So he has been included.

THE COURT: Okay. Now, Mr. Norman, for the Tribe,

appearing as Amicus Curiae.

MR. VAN NORMAN: Your Honors and counsel, the Tribe comes into this case, because the Tribe heard the situation from the Long family that they were basically freezed out. And when they applied for financing and tried to get financial terms to carry them through the winter, that they did not have, in their view when they spoke with me, fair and honest dealings by the bank in getting the financing they need. And things have changed after the Cattle Company, which was first owned by Mr. Long's father and mother. The mother is a tribal member, that there were never any "jurisdictional issues" prior to that, but after the death, things changed with the beck(sic).

And they also note, collaterally that there is a case involving this same bank (inaudible) BIA, trying to seek a guaranteed loan, I believe with the same parties here enforcement or a different one that is cited on page one of the Tribes, page two of the Tribe's brief, that this information caused concern for the bank, apparently '96, it appears from my reading, because the authority here says that bank (inaudible) Aberdeen area director BIA 1996, U.S. 28, 29 IBIA 121, a '96 case, dismissing bank's appeal, BIA decision to reduce bank's claim for loss on a BIA-guaranteed loan to tribal

members. To me, that raises a question.

I don't know the record here, but hearing for the first time arguments about our tribal courts being unfair, does come back to me to this letter of April, 1996. I believe the gentlemen in the room know that letter, which talked about Plaintiffs' Exhibit 4 in the record, addressed to Ronnie Long, Timber Lake, which is on the reservation. And it spoke to difficulties with the situation trying to lend and selling -- if I may. Dear Ronnie, this is an update to my letter of April 17, 1996. I had previously talked to you about the bank foreclosing on the land base and the house in Timber Lake, and I know those are within the reservation boundaries. The house would be sold with the sale proceeds applied to your BIA-guaranteed debt, and the land base would be deeded to the bank and sold back to you on a contract. There appears to be some difficulties in dealing with this situation in that manner. After talking to our legal counsel, David Von Wald, the only way the bank could sell this property back to you would be for you to secure financing through another financial institution, or go through a government agency guaranteed loan such as FHA, BIA or SBA to our bank. This is because of possible jurisdictional problems, if the bank ever had to

foreclose on this land when it is contracted or leased to an Indian-owned entity on the reservation. Please call me at the bank if you have any questions in the above matter.

We will try to proceed as soon as possible to secure financing through one of the above Federal agencies, or you can try to secure financing through another financial institution. But these appear to be the only ways we can sell the land base back to you. Thank you. Sincerely Charles Simmon, VP Bank of Hoven.

And collaterally I know in a recent Federal decision in the Bullsure(sp) case, cited by Judge Karen Schrier, approximately one month ago or less, recognized District Court of South Dakota, Rapid City. They noted that there has been a pattern of discrimination in different areas. It's the Federal finding in a voting rights case. But I think that the evidence there by a preponderance was shown that there was discrimination in lending to Native Americans in this state. And they also showed other areas of discrimination, that discrimination was in the past, and it was also ongoing. And that's sort of a backdrop for me, when I protect the Tribe's jurisdictions and its laws and its authorities within this area. Why it's so important is because we are standing in one of the nation's poorest counties.

Next door to us is one that's even worse. According to the 1990s census, this county was the 29th poorest county in all of the United States. People need capital. People need opportunity.

Second, the other half of our reservation, Zeibach County was the seventh poorest, and that fell down to the second poorest. So lending to all the people here, including all the reservation residents who are approximately 75 percent Lakotas, or their relatives are people that they are married to. By membership, it's notable that when someone is on the reservation that there are some considerations that they try and get financing, but the people feel that they are discriminated against.

This particular case concerned me, because I know that the very land of this transaction that we are talking about, was divided, and given to a third party, and the bank knew about these proceedings. And the bank coming into this jurisdiction should have known or should have done some research into what the Tribe's laws were about repossession and about securing collateral under civil procedures. In fact, the bank, through letter, came into this Court and requested service of that letter, and to have part of it as Plaintiffs' Exhibit 18. There is a document telecopier

(inaudible) dated 12-2-98 received CRST Tribal Court, and Charles signed it. And the rest of it, I don't have readily at my fingertips, but in the record, prior to Mr. Wallgrins(sp) proceeding, the bank earlier, in its argument referred to seeking process. It sought that process through this Court.

And in speaking of what the bank has done in this Court directly, your Honor, I'd like to refer to the bank's counterclaim, dated February 3, 2000, which was filed in article 12099, page 3, the bank has some language in the counterclaims, that although (inaudible) denied jurisdiction of the Court, in the event the Court finds that it does have jurisdiction both Defendants make this counterclaim against Plaintiffs. So, it's sort of tenuous language there, tempered to preserve, apparently, arguments on jurisdiction.

However, below in the prayer for relief on page 4 of this February 3, 2000 document, the bank's counsel assigned and requested part of the relief wherefore the Defendants pray so on, and so on, granting the Defendant's possession of the same. They were asking for affirmative relief right from the Court. So the Tribe would take the position that requesting for affirmative relieve, we believe would be a waiver of jurisdictional objection.

And first, prior to that, I wanted to point to the bank's Motion for Summary Judgment, a little bit out of order. This is the first one I would point your attention to, second comment about the counterclaim. This is paragraph two of the Motion for Summary Judgment by the bank. It says, the Court has jurisdiction over Long Family Land and Cattle Company, Incorporated. And Ronnie Long and Lila Long in that, the majority ownership of the corporations 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. And that was filed, received by reports, September 13, 2002. So, respectfully I believe that the bank has come to this Court and stated in pleadings and motions, that this Court has jurisdiction.

We are on the reservation today, defense counsel today related the facts, and the Plaintiff related the facts of tribal members, tribal business, dealings with the tribal government to secure financing; dealings with the Bureau of Indian Affairs, who obviously deal with Indians to secure financing. The bank in this transaction, loan money and got money back through legal, and negotiations, and through business negotiations here on the reservation, with the parties here. These are tribal members, to whom the Tribe owes

a duty of protecting its laws in an even-handed manner.

And in our brief, Amicus, we discussed, as this Court knows, our authority from the Appellate Court, talking about the clear notions of fair dealing and justice, and how those principles apply in our tribal common law. While the bank would dismiss those as non authorities, I would point that those are the authorities that recognize the tribal customs and tribal traditions that do apply in particular cases and go across the board for fair and even dealing.

Going back, why is this an unfair manner? Upon review, when we look back to this piece of land that was divided from the Longs into apparently four pieces now, the Maciejewskis, who are the neighbors next door are not tribal members. I don't know about the Pesickas. But the first parcel went over there. Basically we have what could have been a third party, and does appear to be a third party, it does appear to be a third party for possession and we heard evidence about that. That is a concern for the Tribe, that the laws against self-help repossession carried out. We have this Court, the bank has attorneys, use the Court to discuss the possibility of repossession, and it's in the letter of April of '96 that negotiations were ongoing with these tribal members.

The bank came in and did business with these members, did business with the tribe and did business with the BIA, all on the reservation. For what? For a commercial bank for the bank, and for opportunity for the business and the tribal members involved. This arrangement did not work out because of the freeze, and in a review of the record, what I believe to be a freeze-out by the bank in not allowing the additional opportunity to correct the financing. And when it changed over to the non-Indian people, who came up, they got the same tract of land that the Longs had historically had, and all they had to do was pay approximately $40,000 as a down payment, which came from the guaranteed federal stream of funding.

Now, why couldn't the Longs get the same deal over ten years instead of getting a two-year deal with the balloon payment, and then when they needed help, they couldn't get that help? That was the question that was in front of the Court. And they had every right at trial, and every opportunity at trial to work with the Court when their motions and granted rulings, to work with the jury and to work with jury instructions.

And, in fact, even as in the brief indicates, they had the opportunity to select non-tribal members for the jury. The bank today asserted that it had no problem

with the jury. And we find, I find, on behalf of the Tribe, that there is no evidence here of a race card being played against the bank. There is a situation that a commercial transaction, where the non-Indians who came in second and basically forced these tribal members off of their land. Without going through legal process the bank was a participant to that arrangement, and to the other arrangement with the Pesickas grabbing a smaller part of this tract. And the one tract that the Longs still occupy and hold, is the one piece that they have to their livelihood. This goes about the well-being of the Tribe and its members who enter a treaty. We are given allotments. So why? So they could have a future. So they could go and work on their own allotment and try to get pasture and leasing and other opportunities would come to them. And today we have a mixed hodgepodge of trust land and fee land. And in this transaction, with this family trying to survive in their business, they needed the help from the bank. It did not come. Something went wrong.

The jury found in part for the Longs, but not completely. They gave 500,000 short of what they were asking for, at least.

They did not grant their claim. And when we look at the review of that, there were additional motions.

And we are here in front of this Court, and yet strangely the bank is trying to say that the Tribe has, or that there was a race card raised by the Plaintiff here that tainted the whole process. I think if we review that and we look back, there was minimal discussion. The transcript on page 599 to 601 talking about the discrimination claim. We have two and a half pages of the text. We are asking for help, in front of a jury, about this claim.

What about the tribal claim and the source of authority? Well, when we go to Lakota customs, there is something that's also parallel in Federal law when we look to the Civil Rights Act and discriminatory claims, that those sound in tort. Similarly, the Tribe has a tort on the books, which is noted in the brief. And when a discrimination claims, they can also sound in tort, and that's what's noted in the authorities that we cited and presented to the Court. And therefore, there is authority, tribal authority to protect. What other means does the Tribe have to protect? Through this Court, people from discrimination under unusual circumstances such as this, and the answer is, that people may go to the Court, whatever people, our Court doors are open for anyone. There are circumscribed limits by the U.S. Supreme Court in its decisions and by

Congress. However, did not it violate the Hicks case on behalf of the Tribe, I would assert the Court, does not apply to this case, in the way that the bank is saying. And I don't believe it applies at all. We don't have a State factor. We don't have a criminal judgment. We don't have an off-reservation crime coming in. What we have is a transaction that went bad for these folks, and they sought relief. And the bank in their argument today said that none of the compensation, there was no compensation attached to the discrimination claim.

Based on the other claims, the breach of contract, the damages, there is sufficient evidence. And the case, the evidence is the same about what happened here? And that was submitted to the jury and to the Trial Court. We had a special, law-trained judge come out, and people had their opportunities.

So, I believe that on behalf of the Tribe we really have to look at U.S. v. Montana and the civil authority of the Tribe. Our doors are open. Where people come into this reservation or businesses or (inaudible), and want to do business. There is a forum that the tribe provides if the businesses dispute that, and that forum is Tribal Court.

Cited in our brief are the authorities for our Tribe, in general, and our tribal constitution, talking

about how our doors are open. And I know, Article I of our Tribal Constitution, the jurisdiction of Cheyenne River Sioux Tribe, shall extend to territory within the original confines of the diminished reservation boundaries, which are described by The Act of March 2, 1889, and including trust allotments without the herein mentioned boundaries, and lands hereafter added thereto under any law of the United States, except as otherwise provided by law.

The bank misconstrues personal jurisdiction, which goes with significant contacts, (inaudible) subject matter jurisdiction, which I read to the Court it agreed to at least in that particular provision on my interpretation. And they came in here and they did business. And as you know, on page two of the Tribe's brief, they have done business before, and had secured these BIA loans. I cited 34 IBIA Bank of Hoven, DBIA Office of Economic Development Director. BIA, guaranteed loan of 500,000. The one I cited, 29 IBIA, 121 is over the loss, they lost their claim on a BIA-guaranteed loan. River Bottom Cow Company versus Acting Aberdeen Area Director BIA, 1994, the bank sought 80 percent guarantee for 410,000.

There's another case Netterville versus Aberdeen Area Director. And so if we look further into those

cases that are on the books, the bank has very significant revenue from this reservation, and it's provided services and been doing business quite a few years. So it's ironic that the bank would come here to this very Court and deny that jurisdiction, and claim that somehow the people here have discriminated against the bank. All they needed were, these folks needed was a little bit of help to sustain their loss of cattle, which was nearly totaled, 273 cattle, and over 250 died in that freeze. And food had to be taken out to people, as well, by snowmobile. It was a very difficult winter. That was the time help was needed. Why did the bank decide what it did? I don't know. But in this case, tribal members for their very subsistence and survival are vying to hold onto their last piece of land under this transaction. And they're trying to get back the other part. They are still trying through this Court to get an opportunity to make a living for themselves and their family members. And that's what the reservation purposes were created for.

And we have our Treaty that guarantees that, coming down from the 1889 Act, and our Tribal Government Act, which started in 1935 when we adopted the Indian Reorganization Act. All these authorities were designed to promote the health, safety, welfare, well-being of

tribal members for their very livelihood.

Now, I have cited these provisions in detail in my brief, but speaking clearly to the Court, this concerns me as the lead counsel for the Tribe, that the bank came in here and did all this business with the Tribe, and then I heard today that they tried to go to State Court, tribal members. And I read that letter that was sent to the parties in this room, involved in the letter, saying that during the jury trial somehow there was race as a factor. That is the first. I think the record is devoid. And I disagree.

I would cite to the Court in my brief, Lakota notions and traditions and the facts how tribal laws, tribal customs have the force of law in this Court of Appeals and on this reservation. Even in Nevada v. Hicks Justice Souter's concurring opinion cites that the traditional tribal law is "still frequently unwritten (inaudible) instead, on the values, morays and norms of a Tribe and expressed in its customs, traditions and practices. And also, it's at 533 U.S. 38485, also the tribal laws offer a complex mix of tribal codes and Federal, State and traditional law.

In this Court, the Jacobs and Jacobs was held that tribal tradition and custom is a vital source of tribal law, and should apply in appropriate situations. In

Clark v. Zorin, the Court stated, traditional customs can be introduced by expert testimony and a wealth of written material, located in libraries and archives throughout the United States. In Mexican v. Circle Bear, a South Dakota case, tribal custom law was recognized and respected in a non-Tribal Court, when they enforced and granted commody to one of our orders where the tribal judge had relied on Lakota customs to determine, among other things, the proper disposition of the remains of the deceased Lakota medicine man.

When we talk about fundamental Lakota customs, we put those in a brief at page 16, those norms prohibit discrimination on the reservation. Are designed to treat all people equally and in a fair and respectful manner. To establish bonds of kinship with outsiders and treat them as relatives. To prohibit practices that subordinate others denying them an equal opportunity to succeed, and to help others, no matter who they are or what their status is in society, and to maintain peace and cooperation between all people and all nations where Lakota applied.

When I cited on that page, different cases that talk about this Miner v. Banley, versus LeCompte. Thomson versus Cheyenne River Sioux Tribe Board of Police Commissioners. The analogy is there, that the

essence of discrimination is a differential treatment, based on status. Surely this jurisdiction must be able to do something when it finds, based on facts and evidence, and by a jury award, that there was discrimination, and that basis is under Lakota laws and traditions.

I also cited to you the Law and Order Code, talking about the torts, footnote, and I would just point that out, the Cheyenne River Law and Order Code Section 143, tortious conduct.

Under our Treaty, our people were so fair that we would adopt others, and they could share an allotment like any tribal member could, pages 19 and 20, 1868 Treaty, Article 6, 15 stat 35. These practices in 1862, the Charter from our Tribe and other members, to go out when they heard that the (inaudible) eight people, two women and six children who were non-Indians, were being held by another band of Indians from the Dakota Tribe. Different area. Different reservation. They went out and they met them and they traded everything they had to save the lives of those people. That's the honor and respect that our people at Cheyenne River, who are descendant from them, and I am one of those collateral descendants, carry and try and exhibit more of what we do.

Therefore, these traditions run deep and are historically based, well, in fact, and in our people right here. It's documented (inaudible) to other sources of Lakota customs and traditions as a viable source of what it means to apply law fairly and equally on the reservation, and to not have discrimination against our tribal members.

Lakota, in our Tribal Court of Appeals, Cheyenne River Sioux Tribe versus Isabel City Package Liquor (unintelligible) 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".

With respect to these assertions of discrimination of Tribe. Seems ironic to me, and I put that in my brief, that we have these points in the back, and when the bank met with our staff, and the bank met with the BIA people, and when the bank met with the Longs. And when the bank sought remedies to have properties within the reservation, come back to them after this loan, that it deemed, economic advantage in that fashion. Sorting out the legal authorities, and sorting out what the damages may be. But it's clearly was a jury, and on the record that it was a fair decision. And that the bank

had every opportunity to object to who was on the jury, and to be lay these claims below, in a specific manner and have those addressed by the Court below. And they simply were not.

And all the evidence that goes to the breach of contract about bad faith, and of the bank in these transactions is there. Whether you call it bad faith or discrimination, either way, from a Tribe's standpoint, those are acts that the Court should be open to hear. And we believe that there is clear authority and it's outlined in my brief in further detail.

And I just close that there is really no support in the record for this discrimination race card that the bank is raising today. And the bank came in here and made a lot of money over time. And those other Federal decisions show it, and the bank's responsive brief Amicus, they tried to downplay that in certain ways, but in a very short manner that I would address in this way. It is clear that in U.S. v. Montana, the Tribe has the inherent authority to have its courthouse doors open for all civil causes. And they are cited to those provisions of tribal constitution in my brief, and also the 1992, the Tribe amended its constitution to make sure that the doors, or the language in the constitution reflected that the doors were open to all civil causes

of action arising on the reservation. The doors are open. We are here, and the bank has a fair opportunity and is represented by counsel. And we are giving the best that we can to make sure that the jurisdictional aspect is understood by the Court on all aspects of this case. Thank you.

THE COURT: Thank you, counsel.

MR. VON WALD: In response to some of Mr. Norman's comments, first of all, I'm here to tell you, your Honors, the bank wasn't attempting to freeze the Longs out. The weather did it. They were froze out, but it had nothing to do with what the bank was doing.

If they really wouldn't have wanted to do business with the Longs, they wouldn't have leased, with an option to purchase this land, on December 5th. They had the land. It was their land. They could have sold it at that time to Pesicka or to Maciejewski, or to anyone else that they wanted to. They already had the deed for it. They entered into a contract, and that letter says that the bank can't enter into a contract. It doesn't say a contract for deed. That's what was intended, but the bank couldn't entered into a contract. So when the bank entered into this contract on December 5th of 1996, wherein they sold the land, wherein they leased the land with an option to purchase, they knew what they were

doing. They knew there could be possible jurisdiction problems, if there was a default. They knew that at the time.

They didn't know, for sure, if it was in State Court. And I mentioned to this Court, that originally this action was started in State Court, or if it would be in Tribal Court. Frankly, I didn't know. I didn't know. But that's the jurisdictional problem we are talking about. Which Court are we in, we don't know. So there lies the problem. It would be nice if we could just draw the line and say, okay, with this transaction you are in Tribal Court; and with this transaction you are in State Court, but that ain't as easy as what it is. I'm sure that all of you are more than familiar with Indian law, and it's anything but clear. And for sure is to me.

THE COURT: I guess I just have a question in terms of part of what the Tribe outlined in oral argument and in their brief as well, is the idea that part of tribal tradition and custom provides a cause of action that sounds in discrimination.

MR. VON WALD: But see, let me address that one. When Mr. Van Norman quoted Judge Souter, and Judge Souter was the concurring opinion in the Nevada versus Hicks case. And when he said that tribal laws are often

unwritten, and I have forgotten the rest of the terminology that he used, the reason he said that is, that's why tribal courts don't have jurisdiction in Federal Court for -- in that case it was a civil rights violations. That's the reason for it. Because basically if laws are unwritten or customs are here, how does the bank or anyone off reservation have any possibility of knowing what those are?

THE COURT: Isn't that sort of an odd position to take? Because the only development of our legal system that bars largely from England, where does the common law come from? I mean, common law is originally unwritten. It's the traditions of the community. I mean, that's how it started. And so it doesn't quite fit in my way of thinking to sort of just out of hand, reject the possibility of tribal tradition and custom providing a cause of action, when it's analogous to the dominance system's theory of common law.

I mean, what is common law? I mean, it's not law that's written down. I mean it's law that originally emanates from the community and then begins to be written down in decision making. And so to me, there is not a disjuncture, but actually a parallel between the notion of common law and our system, and how tradition and custom may play and analogous role in a tribal

context.

MR. VON WALD: I agree, your Honor, that common law can be applicable, and I think should be applicable for those people that are living on the reservation, and the Indian people who have an opportunity of knowing what the customs and usage are. However, I think it's entirely unfair that that same common law should control someone who has no idea what the customs are. That's my point.

THE COURT: I would have a response.

MR. VON WALD: I assume you do.

THE COURT: I guess my response is that the particular custom that is being argued both by Amicus and by the Appellants is that just a notion of differential treatment, I mean, it's not like an arcane custom that we as non-Indians might say, wow, that's a pretty strange custom; why should I know that. If the custom is just that differential treatment is wrong, I mean, to me that's a tradition that kind of dovetails with our understanding in the dominance system, and that's a fairly universal understanding of what discrimination is, differential treatment.

MR. VON WALD: But, your Honor, I don't think that there was ever any discrimination action possible in either State Court or Federal Court, prior to there

being statutory statutes that were passed, that allowed those things. There wasn't any common law discrimination case in either Federal or State Court. I don't see how there would be --

THE COURT: But I think the origin of statutory claims, based on discrimination, actually tract back to torts. I mean, because I think a common law tort, a certain kind of common law tort does involve today what we call today discrimination. So, I think actually statutory claims of discrimination are actually grounded in sort of the tort understanding of differential treatment being a tort. Because I think that's --

MR. VON WALD: Basically, I think that's about all I have. But one of the things that Mr. Van Norman was concerned about, and so are we, and that is that -- by the way, the bank admits that they were dealing with tribal members to make money. It wasn't just to help tribal members. The bank was doing it with the intent of making money. That's what any business does. And how much money they made from tribal members, is really nothing for us to even worry about. But assuming that they did money, that's what they are in business for. And they will continue to do business with tribal members on the reservation, as long as they have a feeling that they're being treated fairly. We don't

have any problem with that.

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

We are here in Tribal Court hoping that we are treated fairly, and that's all we are asking for, according to what the law is. That's it. Period. But what I am saying is, that this case is not only being looked at by this Cheyenne River Sioux Tribe, it's also being looked at by banks. And it's necessary for the Tribe to be able to borrow money off of, the tribal members to be able to borrow money. And as long as tribal courts treat banks fairly, I think that that will come to pass.

THE COURT: Thank you, counsel.

MR. VAN NORMAN: I have one point of authority. Counsel, I also note that in the Cheyenne River Sioux Tribal Rules of Procedure, Rule 1-C states about the

rules that, collateral references. Any procedures or matters which are not specifically set forth herein, shall be handled in accordance with Federal Rules of Civil Appellate Procedure, and so as, and so floras such are not inconsistent with tribal law, or these rules; and also in accordance with the general principals of fairness and justice, as proscribed and interpreted by the Courts and the Cheyenne River Sioux Tribe. Thank you.

THE COURT: No further questions?

MR. HURLEY: Just one comment. We thank Attorney Norman for an excellent brief, and the enlightening information that's in it.

THE COURT: Court will take this case under advisement and will render an opinion as soon as possible. We appreciate the patience and preparation of all parties today. Thank you.

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, JEAN M. CARLSON, Court Reporter and Notary Public, South Dakota, duly commissioned to administer oaths, certify that the foregoing argument was taken by me in machine shorthand, from cassette tapes that were not produced by me, but were then reduced to typewritten, transcript form by me; that I did not have access to files for correct spellings or quotations, but that the foregoing transcript is a true and correct transcript of the argument had on October 6th of 2004, and as I was able to decipher to the best of my ability from said tapes.

I further certify that I am not related to, employed by, or in any way associated with any of the parties to this action, or their counsel, and have no interest in its event.

Witness my hand and seal at Rapid City, South Dakota, this 14th day of November, 2005.

JEAN M. CARLSON
Court Reporter
My Commission Expires: 6/8/08