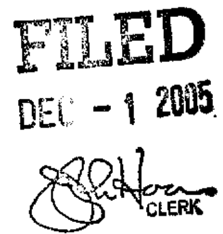

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

PLAINS COMMERCE BANK, CIV 05-3002

Plaintiff,

v.

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF PLAINS COMMERCE BANK'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Plains Commerce Bank ("Plains Bank") submits this Memorandum in Support of its Motion for Summary Judgment in this declaratory judgment action. We demonstrate below that there is no genuine issue of material fact with respect to the lack of Tribal Court jurisdiction and the due process violations of the Cheyenne River Sioux Tribe ("CRST") Tribal Court in asserting jurisdiction over Plains Bank in the case of Plains Bank v. Long Family and Cattle Company, et al. We also demonstrate that this Court has the power pursuant to 28 U.S.C. § 2201-02 to determine the rights of the parties and grant further relief to resolve this matter.

The questions submitted for decision, all of which arise under the federal law of comity, are (a) whether a Tribal Court may assert jurisdiction over a non-member for claims arising from a lease of non-tribal fee land owned by Plains Bank, an off reservation South Dakota corporation, and a related loan agreement between the Bank and another South Dakota corporation, itself not a tribal entity; (b) whether the Tribal Court had jurisdiction to decide a claim for discrimination against the Bank premised

upon 42 U.S.C. 1981; and (c) whether due process was accorded the Bank when the Tribal Appellate Court found a basis in tribal law, never asserted previously in the case, to support the discrimination decision.

STATEMENT OF FACTS

Plains Bank, formerly known as Bank of Hoven, is a South Dakota Banking Corporation with its main place of business then located in Hoven, South Dakota, off the CRST Reservation. The Bank is wholly owned by non-tribal members. It loaned money to defendant Long Family Land and Cattle Company, Inc. ("Long Company") commencing in 1989. The Long Company is a South Dakota chartered corporation. Its Articles of Incorporation were issued by the South Dakota Secretary of State March 24, 1987. Kenneth Long, a non-tribal member and the father of defendant Ronnie Long, at the time of his death owned 49% of the corporation. Fifty-one percent of the corporation was owned by defendants, Ronnie Long and his wife, Lila Long, both members of the CRST. Kenneth Long owned approximately 2,230 acres of Dewey County real estate and a house in Timber Lake, South Dakota, which were mortgaged to the Bank for the Long Company debt.

Kenneth Long died July 17, 1995. The Bank filed a creditor's claim against his estate, which was being probated in Circuit Court, Eighth Judicial Circuit, Dewey County, South Dakota. At that time the Long Company owed the Bank approximately $687,000.00. Kenneth's second wife, Paulette Long, was appointed as personal representative of his estate. The estate deeded the Dewey County real estate and home in Timber Lake to the Bank in lieu of foreclosure.

On December 5, 1996, the Long Company, in consideration of the Kenneth Long Estate deeding the land and house to the Bank, was given credit for $478,000.00 on loans with the Bank and other expenditures which the Bank had incurred relating to the Long Company's debt on Kenneth's land. On the same date, the Bank entered into a lease with the option to purchase the farm real estate with Long Company as lessee. It was a two-year lease wherein the annual CRP payments of approximately $44,000.00 were to be assigned to the Bank as a lease payment during the term of the lease. Long Company was given an option to purchase the farm real estate for $468,000.00. There was a second document signed on December 5, 1996 which was entitled loan agreement. That document itemized what loans were paid and the other payments that were made by the Bank with the $478,000.00 worth of real estate the Bank had received. Additionally that document stated that the Bank would apply to the Federal Bureau of Indian Affairs ("BIA") for an increase in the guaranteed percentage of Long Company's BIA guaranteed loan, to reschedule delinquent a loan, and to apply for a new BIA guaranteed operating line of $70,000.00. If the BIA did authorize the increase in the guaranteed percentage, reschedule the delinquent note and grant a new operating loan, the Bank would then make a loan for $37,500.00 to the Long Company for the purchase of calves.

On December 12, 1996, after receiving a new cash flow statement from the Long Company, the Bank applied to the BIA for the items above-mentioned, however because of the new cash flow, the operating line was increased to $85,000.00. The request to the BIA was not acted upon by the BIA until February 14, 1997, more than two months after the application. By letter dated February 14, 1997, the BIA informed

the Bank that the request was considered a modification and a more formal application was required. By that time, the Bank had learned that many of the Long Company's cattle, which were collateral for the loans, had died.

One of the worst winters in South Dakota took place during the winter of 1996-1997. During that winter, approximately 500 head of Long Company's cows and calves perished from winter blizzards. On February 13, 1997, Ronnie Long advised the Bank by telephone that all of the cows except 150 head and all of the calves except 25 head had died.

After the Bank was advised of the cattle losses, the original application to the BIA was not pursued. The Long Company submitted a new cash flow. That cash flow showed that the Long Company would need an operating line of $40,595.00. The Bank then made a second request to the BIA to reschedule the delinquent loan and to approve a $40,595.00 operating line from the Bank. The BIA rescheduled the delinquent loan and authorized a $40,595.00 operating loan. Even though the operating loan was not guaranteed, the Bank made the $40,595.00 operating loan to the Long Company in April 1997.

During the time period that the Long Company and the Bank were waiting for the BIA to process the loan requests, the Bank continued to grant additional credit to the Long Company. On December 10, 1996 the Bank loaned $16,718.46 to the Long Company to pre-pay tribal leases for the 1997 grazing year. On January 8, 1997 the Bank loaned the Long Company $5,000.00 for additional operating and $2,250.00 to purchase a snowmobile so that the Long Company could feed cattle. The Long Company's cattle were wintering in river breaks approximately 17 miles from the home

of Ronnie Long near Timber Lake, South Dakota. Due to winter blizzards, roads were closed and not opened by the CRST highway department on a regular basis during that winter.

The Long Company had possession of all of the 2,230 acres of the Bank's Dewey County real estate, which was formerly owned by Kenneth Long, during the term of the lease. The option to purchase in that lease was never exercised by the Long Company. After the expiration of the lease on December 5, 1998, the Bank sold approximately 320 acres to Mr. and Mrs. Ralph Pesicka. It sold the remaining portion of the real estate to Mr. and Mrs. Edward Maciejewski under a contract for deed. Because the Long Company continued to hold over and occupy approximately 960 acres of the real estate after the lease had expired however, the Bank sold the real estate in two parcels. The parcel of 960 acres, which the Long Company held over possession and the other parcel, which was not occupied by the Long Company, were sold under the same contract. Maciejewskis paid for and received a deed for that portion not occupied by the Long Company. The remaining 960 acres has been possessed continuously since the expiration of the lease on December 5, 1998 by the Long Company. The Long Company has paid nothing for the use of the land since the lease terminated. The Bank has continued to pay real estate taxes during this entire time period to date.

The Bank, prior to starting an action for forcible entry and detainer in South Dakota Circuit Court, served a Notice to Quit on the Long Company in June of 1999. The Long Company and Ronnie and Lila Long then commenced an action in Tribal Court for a temporary restraining order restraining the Bank from selling the real estate to the Maciejewskis. A hearing was held on the temporary restraining order on July 30,

1999 before Leisah C. Bluespruce, Tribal Court Judge. The Bank claimed that the Tribal Court lacked jurisdiction. The Tribal Court Judge upheld jurisdiction, but did not grant the restraining order, but did not dismiss the complain, and continued the matter as a permanent injunction. On January 3, 2000 the Long plaintiffs amended their complaint and alleged numerous causes of action including breach of contract, discrimination, bad faith and sundry other claims. The Bank answered with a general denial, and again denied Tribal Court jurisdiction. In the event the Tribal Court did have jurisdiction, however, the Bank counterclaimed. The counterclaim was for eviction of the Long Company from the real estate owned by the Bank plus damages for holding over under the lease. The Long plaintiffs requested a jury trial.

A trial of the matter was held before a Tribal Court jury composed of all CRST members on December 6th and 11th, 2002. Tribal Judge, B.J. Jones, specially appointed, presided. The jury returned a verdict against Plains Bank in the amount of $750,000.00 and indicated that interest should also be awarded. Judge Jones calculated and ordered pre-judgment interest and costs, for a total judgment of $875,982.46. Judge Jones also gave the Long Company an option to purchase the remaining 960 acres owned by the Bank for the sum of $201,600.00, which sum could be used as an offset against the judgment against the Bank. All of the Bank's motions for Judgment N.O.V. and new trial were denied.

The Bank appealed the judgment to the Cheyenne River Sioux Tribal Civil Appellate Court. The Civil Appellate Court was comprised of two law-trained justices and one lay justice. Throughout the lower court proceedings, the discrimination claim was brought under Federal Law 42 U.S.C. § 1981. The Bank claimed that the Tribal

Court lacked jurisdiction to decide a discrimination claim under Federal Law against a non-member. For the first time, at the appellate level, through the Tribe's Amicus Brief it was alleged that the Tribal Court, under unwritten tribal law, had jurisdiction over the discrimination claim. The Appellate Court affirmed the trial court on all issues and held for the first time, that under tribal law, the court had jurisdiction for the discrimination claim. Exhausting all Tribal Court remedies, the Bank then commenced the present action in the U.S. District Court, District of South Dakota, Central Division.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD.

The summary judgment standard is well known and has been set forth by this Court in numerous opinions. See Hanson v. North Star Mut. Ins. Co., 71 F.Supp.2d 1007, 1009-1010 (D. S.D. 1999), Gardner v. Tripp County, 66 F.Supp.2d 1094, 1098 (D. S.D. 1998), Patterson Farm, Inc. v. City of Britton, 22 F.Supp.2d 1085, 1088-89 (D. S.D. 1998), and Smith v. Horton Indus., 17 F.Supp.2d 1094, 1095 (D. S.D. 1998). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Donaho v. FMC Corp., 74 F.3d 894, 898 (8th Cir. 1996). The United States Supreme Court has held that:

> The plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

"A material fact dispute is genuine if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party." Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995). In considering a motion for summary judgment, this Court reviews the facts in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences that can be drawn from the facts. Donaho, 74 F.3d at 897-98 (8th Cir. 1996).

B. FEDERAL LAW.

The question of whether a Native American tribe has the power to compel a non-tribal member to submit to the civil jurisdiction of a tribal court is a question of federal law. National Farmers Union Ins. Companies v. Crow Tribe, 471 U.S. 845, 852, 105 S.Ct. 2447, 2452, 85 L.Ed.2d 818 (1985). See El Paso Natural Gas Co. v. Neztsosic, 526 U.S. 473, 483, 119 S.Ct. 1430, 1437, 143 L.Ed.2d 635 (1999) ("[F]ederal courts have the authority to determine, as a matter 'arising under' federal laws", the limits of tribal court jurisdiction); Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997) ("Indian law is uniquely federal in nature, having been drawn from the Constitution, Treaties, Legislation, and an 'intricate web of judicially made Indian law.")

Under federal law the defendants in this case bear the burden of proving that jurisdiction existed in the Tribal Court. See Strate v. A-I Contractors, 520 U.S. 431, 456, 117 S.Ct. 1404, 1414,137 L.Ed.2d 661 (1997). Furthermore, because tribal courts are not courts of general jurisdiction, this Court is obliged to start with the presumption that the tribal court did not have jurisdiction, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659, 121 S.Ct. 1825, 1835, 149 L.Ed.2d 889 (2001), and, because the question is one of federal law, this Court's review of tribal court jurisdiction is de novo. Duncan Energy

Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994); Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court, 103 F. Supp.2d 1161, 1164 (D. S.D. 2000).

C. COMITY

While this is not a case in which defendants have filed an affirmative claim seeking recognition of the Tribal Court judgment by this Court,[1] plaintiff has asserted that the judgment is not entitled to recognition (Complaint Count II) and the defendants have answered that the judgment is entitled to recognition (Answer, Defenses to Count II). Thus, the question is squarely before the Court. It is controlled by the doctrine of comity. Hilton v. Guyot, 159 U.S. 113, 163, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895) (the extent to which the United States, or any state honors the judicial decrees of foreign nations is matter of choice, governed by 'the comity of nations."). See AT&T Corporation v. Coeur D'Alene Tribe, 283 F.3d 1156, 1161 (9th Cir. 2002); Wilson, 127 F.3d at 807-09 (9th Cir. 1997).

Comity "is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other". Hilton, 159 U.S. at 163-64, 16 S.Ct. at 143-44 (1895). In a scholarly and oft cited discussion of comity,[2] the Ninth Circuit in Wilson, relying in part upon the Restatement (Third) of Foreign Relations Law § 482 and, to an extent discussed below, upon state law, concluded that the existence of subject matter

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[1] See, Bird v. Glacier Electric Cooperative, Inc., 255 F.3d 1136, 1140 (9th Cir. 2001) ("Bird ... filed this action in the United States District Court for the District of Montana, asking the court to 'recognize, and enforce and register' the judgment of the Tribal Court, 'so that execution may be issued thereon in the federal court system"); Wilson, 127 F.3d at 807 (9th Cir. 1997) ("Claiming her judgment was entitled to full faith and credit or comity, Wilson brought suit in the United States District Court for the District of Montana to register the Tribal Court judgment in the federal court system")

[2] See, e.g., Christian Children's Fund Inc., 103 F.Supp.2d at 1167 (D. S.D. 2000).

jurisdiction and the extension to the defendant of basic due process of law are mandatory requirements for the extension of comity in the recognition of a tribal court judgment. Wilson, 127 F.3d at 811 (9th Cir. 1997) ("[T]he existence of subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment. ... A federal court must also reject a tribal judgment if the defendant was not afforded due process of law").[3]

We demonstrate below that the CRST Tribal Court did not have subject matter jurisdiction over the proceeding between the Bank and the Long defendants and that the Bank was denied due process by the CRST Tribal Court. See infra at pp. 11-21.

Reciprocity is also a factor to be considered in deciding whether comity should be granted to a tribal court judgment. In Hilton, the foundational Supreme Court opinion on comity, the Court determined that judgments from foreign countries should not be recognized by United States courts if the foreign country would not enforce a similar American judgment in its courts. Hilton, 159 U.S. at 210, 16 S.Ct. at 161(1895).[4] In Wilson the Ninth Circuit concluded that "The question of whether a reciprocity requirement ought to be imposed on an Indian tribe before its judgments may be recognized is essentially a public policy question best left to the executive and

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[3] South Dakota imposes the same requirements by statute. See S.D. Codified Laws § 1-1-25(1)(a) (requiring a party seeking recognition of a tribal court judgment to establish that the tribal court had jurisdiction, both subject matter and personal) and (1)(c) (requiring such party to establish that the judgment "was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and hearing"). The burden under the statute is upon the party seeking recognition and a "clear and convincing evidence" standard is imposed. See First National Bank of Phillip v. Temple, 642 N.W.22 197, 203 (S.D. 2002) (tribal court order denied comity in the absence of clear and convincing evidence of compliance with S.D. Codified Laws § 1-1-25)

[4] Since Hilton the Supreme Court has suggested that reciprocity may not be required in every circumstance. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411, 84 S.Ct. 923, 931, 11 L.Ed.2d

legislative branches. The fact that some states have chosen to impose such a condition by statute reinforces this conclusion, as does the judicial response of looking to applicable statutes to decide reciprocity issues." Wilson, 127 F.3d at 812 (9th Cir. 1997).

By statute South Dakota allows its state courts to recognize tribal court judgments in cases such as this only if the courts of that tribe recognize the orders and judgments of South Dakota Courts.[5] See S. D. Codified Laws § 1-1-25(2)(b). The CRST Code does not allow for the recognition of South Dakota State Court judgments. The Tribe enacted a resolution in 1997 which reads simply "enacts the requirements for recognition of foreign judgments and/or comity in the CRST Courts". The meaning and application of this resolution is unclear, as is the question of whether it is a formal part of the CRST Code. There is therefore, no basis (certainly no clear and convincing basis) for concluding that this is a case "in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota Courts". S.D. Codified Laws § 1-1-25(2)(b).

Comity should not be accorded the decision of the Tribal Court in this case.

D. SUBJECT MATTER JURISDICTION

Ultimately, the determination of whether the CRST Tribal Court had subject matter jurisdiction over Plains Bank with respect to its business dealings with the Long Company will turn, in the first instance, upon an analysis of the two so-called "Montana

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804 (1964). Nevertheless, reciprocity remains a consideration where, as here, relevant state law provides for its application. See Wilson, 127 F.3d at 812 (9th Cir. 1997)

[5] The statute recognizes three exceptions to this requirement, none of which apply here. See S.D. Codified Laws § 1-1-25(2)(a) (child custody or domestic relations cases), (c) (where "exceptional

exceptions" to the general rule announced in the United States Supreme Court decision of the same name and their application to the facts here. Montana v. U.S, 450 U.S. 544, 101 S.Ct. 1245, 672 L.Ed.2d 661 (1992). We address those exceptions below. But context is important in this complex area of the law and the discussion must begin with a brief history of tribal sovereignty and what courts have called the "main rule" of Montana[6]

1. **Montana**

Subject matter jurisdiction of tribal courts over the conduct of non-members exists only in limited circumstances. Strate v A-1 Contractors, 520 U.S. 438, 445, 117 S.Ct. 1404, 1409, 137 L.Ed.2d 661 (1997). In Montana, the Supreme Court observed that Indian tribes have lost many of the attributes of sovereignty, especially with respect to matters involving relations between the tribe and non-tribal members. Citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the Court noted "that the Indian tribes have lost any right of governing every person within their limits except themselves". Montana, 450 U.S. at 564, 101 S.Ct. 1258 (1981). The Court then declared the seminal modern statement of the limitation of tribal power over non-members:

> [I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.... But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent

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circumstances" warrant) and (d) (orders required or authorized pursuant to 25 U.S.C. §§ 1911(d) and 1919).

[6] Christian Children's Fund, Inc., 103 F.Supp.2d at 1165 (D. S.D. 2000).

> status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564, 101 S.Ct. at 1257-58 (1981)

The teaching of Montana was subsequently elucidated by Justice Scalia in the most recent expression of the Supreme Court regarding the limited powers of tribal courts. Nevada v. Hicks, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). In Nevada the Court explained that in Montana it had rejected the notion that a tribal court has the right to regulate the conduct of non-members with respect to activities on non-Indian land. Nevada, 533 U.S. at 359, 121 S.Ct. at 2310 (2001). The Court went on to observe that even where the land in question is Indian owned it does not necessarily follow that a tribe can regulate non-members thereon. Nevada, 533 U.S. at 360, 121 S.Ct. at 2310 (2001). Where, however, as is the case here, the land is owned by a non-tribal member, the Court observed that the absence of tribal ownership is "virtually conclusive of the absence of tribal civil jurisdiction" and also noted that the Supreme Court in fact has "never held that a tribal court had jurisdiction over a non-member defendant." Id. These statements provide important context to the following discussion of the Montana exceptions.

2. Montana Exceptions

This Court has described the Montana exceptions as follows:

> "[A] tribe may (1) regulate by taxation, licensing, or other means, the actions of non-Indians who enter into true consensual relationships with the tribe or its members, or (2) retain other jurisdiction when non-Indians engage in conduct within a reservation which threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe."

Christian Children's Fund, Inc., 103 F.Supp.2d at 1165 (D. S.D. 2000).

The second exception in Montana is narrowly applied. The Supreme Court said as much in Strate:

> Read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: 'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members....But [a tribe's inherent power does not reach] beyond what is necessary to protect self-government or to control internal relations.

Strate, 520 U.S. at 459, 117 S.Ct. at 1404 (1997). Lower federal courts have consistently read the exception narrowly. See Christian Children's Fund, Inc., 103 F.Supp.2d at 1167 (D. S.D. 2000). See also Montana v. King, 191 F.3d 1108, 1114 (9th Cir. 1999); Wilson, 127 F.3d at 814-15 (9th Cir. 1997).

In this case, as in Christian Children's Fund, the Tribal Court was asked to judge the rights and conduct of two non-Indian entities as to business dealings between them relating to land owned by the Bank, though occupied by the Long Company and two Indian shareholders within the boundaries of the CRST reservation. Here, also as in Christian Children's Fund, "[a]judging in tribal court the rights and conduct of ...two non-Indian entities as to [these business dealings] is not necessary to preserve "the right of reservation Indians to make their own laws and be ruled by them." Christian Children's Fund, Inc., 103 F.Supp.2d at 1167 (D. S.D. 2000) (citing Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959)). Finally, and again as in Christian Children's Fund, the business dealings at issue in this case neither threatened nor had any serious direct effect on the political integrity, economic security or health or welfare of the CRST. The second Montana exception cannot be applied to sustain the jurisdiction of the CRST Tribal Court.

The first Montana exception has no application to this case either. Again this Court's decision in Christian Children's Fund, Inc. is instructive. The parties to the business dealings at issue in this case were South Dakota corporations. The Tribe had no connection with this relationship. The Long Company is not a tribal corporation. This case involves the dealings of two non-Indians. Neither party is a tribe or a tribal member. It cannot be disputed that the Bank had no consensual relationship with the CRST. This case does not involve an attempt by the Tribe to regulate either non-tribal corporation by use of its taxation, licensing or other powers. All decisions and transactions underlying the case were made and implemented off of the reservation. The Eighth Circuit has clearly held that tribal jurisdiction does not extend to such off reservation activities:

> The operative phase is 'on their reservations.' Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.

Hornell Brewing Company v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1091 (8th Cir. 1998) (emphasis in original).

While it is true that the land on which the Long Company operated was within reservation boundaries, the land was at all relevant times owned by Plains Bank. And in any event, the fact that the Long Company chose to conduct business on the reservation cannot govern, for if it did the concern raised by this Court in Christian Children's Fund, Inc. would become real: "If this choice were to govern, any non-Indian entity could move into Indian Country and thus 'drag along' another non-Indian party whose operations were all conducted outside the particular reservation." Christian Children's Fund, Inc., 103 F.Supp.2d at 1167 (D. S.D. 2000). The first Montana exception cannot be applied to uphold the jurisdiction of the CRST Tribal Court.

The sovereignty of Indian tribes is extremely limited with respect to the power to regulate activities of non-tribal members. Various courts have described these limitations differently. Compare, U.S. v. Wheeler, 435 U.S.313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1981)(tribes retain only those "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status."), with U.S. v. Archiambault, 174 F.Supp.2d 1009, 1011 (D. SD.2001)("it can be argued that the opinion of the Supreme Court [in Hicks] is that any tribe's adjudicative jurisdiction over nonmembers is at most only as broad as the jurisdiction granted legislatively by Congress.") and, Christian Children's Fund, Inc., 103 F.Supp.2d at 1165 (D. S.D. 2000) ("South Dakota v. Bourland, 508 U.S. 679, 695 n. 15, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) recognized 'the reality that after Montana, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' ... and is therefore not inherent.") (emphasis in original).

However articulated, the consistently observed boundaries of the power of tribal courts to hear, decide and resolve claims such as those in this case were plainly exceeded by the CRST Tribal Court. The Court did not have proper subject matter jurisdiction to decide them and its decision cannot be recognized by this Court.

3. 42 U.S.C. 1981

Although as we explain below, the CRST, appearing Amicus in the Tribal Appellate proceedings, persuaded the CRST Civil Appellate Court to place the basis for the decision of the CRST Tribal Court upon tribal law—which was neither pled, argued nor in anyway of record in the proceedings before the trial court—it is clear that the basis for the discrimination claim asserted in the Tribal Court proceedings was federal law. See discussion infra at pp. 18-21. But, as the Tribe recognized and the CRST

Civil Appellate Court agreed, a tribal court has no jurisdiction to try a case based on federal discrimination laws. See Nevada, 533 U.S. at 366, 121 S.Ct. at 2314 (2001). In Nevada the Supreme Court was presented with a case in which a tribal court had purported to try a case under 42 U.S.C. § 1983. The reasoning of the Supreme Court applies with identical force here where the claim was based on 42 U.S.C. § 1981.

In Nevada the Supreme Court reasoned that, while it is true that state courts of "general jurisdiction" have the constitutional power to try cases arising under federal statutes such as § 1983, "[t]his historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts." Nevada, 533 U.S. at 367, 121 S.Ct. at 2314 (2001). Justice Scalia noted that some federal statutes provide tribal court jurisdiction over certain federal law questions, but concluded that "no provision in the federal law provides for tribal-court jurisdiction over § 1983 actions." Id. The same is true here. There is no federal law provision allowing a tribal court to try a case pursuant to 42 U.S.C. § 1981. Therefore, the "serious anomalies" noted by Justice Scalia in Nevada exist with equal force here:

> [T]he general federal-question removal statute refers only to removal from state court, see, 28 U.S.C. § 1441. Were § 1983 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum.

Id. (emphasis in original).

Section 1981 cases are removable from state courts when initiated there. See, State of Louisiana v. London, 335 F.Supp. 585, 588 (E.D. LA. 1971). But, just as there is no right to remove a § 1983 action initiated in tribal court, there is also no such right with respect to a § 1981 action commenced in tribal court. Therefore the logic of Nevada controls and "the...way to avoid the removal problem is to conclude (as other

indications suggest anyway) that tribal courts cannot entertain [§ 1981] suits." Nevada, 533 U.S. at 369, 121 S.Ct. at 2315 (2001).[7]

The CRST Tribal Court lacked jurisdiction to entertain the discrimination claim against Plains Bank. The last minute attempt at the appellate level to place the basis for the decision on tribal law, addressed below, speaks for itself. There was no basis for the Tribal Court to hear the federal law discrimination claim.

E. DUE PROCESS

Federal courts have no power to recognize a foreign judgment obtained without due process of law. See Hilton, 189 U.S. at 205-06, 16 S.Ct. at 159 (1895); AT&T Corporation, 283 F.3d at 1161 (9th Cir. 2002); Wilson, 127 F.3d at 810 (9th Cir. 1997). Moreover, Indian tribes exercising powers of self-government, such as the establishment of a tribal court, are statutorily precluded from depriving any person, including non-tribal members, of their liberty or property without due process of law. See, 25 U.S.C. § 1302(8); Oliphant, 435 U.S. at 196 n. 6 98 S.Ct. at 1014 n. 6 (1978)(the Indian Civil Rights Act's protections are available to non-Indians who are subject to the jurisdiction of tribal governments). Plains Bank was not afforded fundamental due process rights by the CRST Tribal Courts. Accordingly, this Court cannot recognize the Tribal Court judgment.

A fundamental tenet of due process is that a defending party must be afforded notice of the claims asserted against it and a full and fair opportunity to be heard on

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[7] The Tribal Court also discussed the possibility that another federal discrimination statute, 42 U.S.C. § 2000d, barring discrimination in federally assisted programs, including lending, was the basis of the discrimination claim. Like § 1981 cases, suits arising under § 2000d are removable to federal court if commenced in state court, Linker v. Unified School District, 344 F.Supp. 1187, 1195 (D. Kan. 1972), and therefore, the anomaly recognized in Nevada – that a defendant sued in tribal court would "inexplicably"

those claims. See Goss v. Lopez, 419 U.S. 565, 578-79, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975)(fundamental requirements of due process include providing fair notice of charges and allegations and an opportunity to present a defense); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)("notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Futrell v. Brown, 45 F.3d 1534, 1540 (Fed.Cir. 1995)(the provision of notice and an opportunity to respond are fundamental to due process); John v. Baker, 30 P.3d 68, 74 (Alaska 2001)(in determining whether a tribal court proceeding complied with due process a reviewing court should consider whether the parties received notice of the proceedings and a full and fair opportunity to be heard).

Here, throughout the proceedings in the Tribal trial court all parties and the Court proceeded under the assumption that the discrimination claim was based upon federal law. For example, prior to submitting the case to the jury, the Tribal Court considered Bank's motion to dismiss. The Bank, citing Nevada, argued that the Tribal Court did not have jurisdiction to hear the discrimination claim because it was based upon federal law. See (CS Exh. 25, p. 437, l. 6-17). In deciding the motion, the Tribal Court asked the Long Company attorney if the discrimination law he claimed was violated was the federal law regarding "private lending" and the attorney answered "yes." Id. At p. 437, l. 19-22. The Tribal Court then determined that it had authority to enforce federal laws. Id. at p. 438, l. 3-17. At no time did anyone argue or state that the discrimination claim was based upon tribal law and/or custom.

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lack the right to remove which Congress afforded state court defendants – exists as to tribal court

Subsequently, while discussing jury instructions, the Court again made clear that the discrimination claim was being considered under federal law. The Court stated that offering "a contract for deed to non-Indians but not to Indians. That violates federal law." Id. at p. 551, l. 15-17.

Finally, after the trial the Bank moved for Judgment NOV or a new trial. In its motion, the Bank again argued that under Nevada, the Tribal Court had no jurisdiction to hear a discrimination claim brought under federal law. See (CS Aff. Exh. 26 p. 6-7). The Long Company responded that the Tribal Court had jurisdiction over a federal claim of discrimination. See (CS Aff. Exh. 27, p. 10-14). The Tribal Court denied the motion, holding that it had jurisdiction over the discrimination claim (which the court characterized as a federal anti-discrimination claim). See (CS Aff. Exh. 22, p. 8). In doing so, the Tribal Court stated that because the Tribe did not "have specific code provisions prohibiting private discrimination" the Court was required "to look to relevant federal law." Id. at p. 9.

It was not until the Bank appealed the judgment to the Tribal Court of Appeals that tribal law was cited as the basis for the discrimination claim. But it was not the Long Company that made this argument. Instead, the argument was made by the CRST, in its Amicus Curiae brief.

Responding to Plains Bank's argument that the Tribal Court did not have jurisdiction to enforce federal discrimination laws, the Tribe argued that the discrimination claim was based on tribal, not federal law. The Tribe then spent ten pages of its brief explaining and developing the argument that tribal tradition and

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jurisdiction over § 2000d claims also.

custom support a claim of discrimination separate and apart from any federal claim of discrimination. See (CS Aff. Exh. 28, p. 14-24). The Tribe specifically noted that the tribal tradition and customs supporting such a claim could be "adduced by expert testimony and/or a wealth of written material located in libraries and archives throughout the United States." Id. at 15.

Deciding the appeal, the Tribal Court of Appeals acknowledged that if the discrimination claim was based upon federal law then it was "likely true" that the Tribal Court would have no jurisdiction over the claim. See (CS Aff. Exh. 24, p.6). The Court of Appeals, however, adopted the Tribe's argument and held that the discrimination claim was based upon tribal, not federal, law. Id.

This holding creates Plains Bank's denial of due process claim. The discrimination claim was based upon federal law. The case was tried on that theory. The jury instructions were fashioned on that understanding. The verdict was upheld on motion for judgment NOV or new trial on that basis. Tribal law was never pled, asserted or introduced into the proceeding in the trial court. The Bank did not have adequate notice of the tribal law basis of the discrimination claim. Nor was the Bank afforded a full and fair opportunity to defend itself and be heard on a tribal law claim of discrimination.

As the Tribe acknowledged in its Amicus Curiae brief, tribal law is complex and varied and can be adduced only through expert testimony and/or a review of the wealth of written material located in libraries and archives throughout the United States. See (CS Aff. Exh. 28, p. 14-15). The Bank was never on notice that this complex law and interplay of traditions and customs was at issue and, therefore, never had an

opportunity to present expert testimony, evidence or arguments within the context of that law, tradition and/or customs.

This judgment would almost certainly not be recognized by a South Dakota state court. See First National Bank of Phillip, 642 N.W.2d at 203 (S.D. 2002)(comity denied because "First National Bank was not afforded the requisite 'due notice and hearing' as required by the statute"). It should not be recognized by this Court either. The Bank's fundamental due process rights were denied by the CRST Tribal Court.

F. POWER OF COURT PURSUANT TO 28 U.S.C. § 2201-02

Upon reaching a determination that a declaratory judgment should be entered pursuant to 28 U.S.C. 2201 with respect to the lack of subject matter jurisdiction and denial of due process in the Tribal Court, this Court has the power to grant "[f]urther necessary or proper relief, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Such relief may include damages, Mercer Intern., Inc. v. U.S. Fidelity and Guar. Co., 938 F.Supp.680 (W.D. Wash. 1996); Braun Medical Inc. v. Abbott Laboratories, 892 F.Supp.115 (E.D. PA 1995), injunctive relief, Mitchum v. Hurt, 73 F3d 30 (3rd Cir. 1995), or other coercive relief, Shumaker v. Utex Exploration Co., 157 F.Supp.68 (D. Utah 1957).

The Court has the power to retain jurisdiction after providing declaratory relief to entertain a motion for additional proper relief pursuant to 28 U.S.C. § 2202. The Court should do so here so that the Bank may present an appropriate motion for injunctive relief to remove the Long defendants from the property and for damages.

CONCLUSION

For the foregoing reasons this Court should enter its Order for declaratory relief, granting summary judgment to plaintiff Plains Bank and retaining jurisdiction for subsequent proceedings pursuant to 28 U.S.C. § 2202.

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