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

GENERAL SESSION
CIVIL APPELLATE COURT

Bank's Second Appellate Brief

BANK OF HOVEN, NOW KNOWN AS
PLAINS COMMERCE BANK,
APPELLANT,

vs.

03-002-A
R-120-99

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

APPEAL FROM
THE CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION
CIVIL COURT, GENERAL SESSION

THE HONORABLE B.J. JONES, SPECIAL JUDGE

APPELLANT'S REPLY BRIEF

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Appendix:

Bank's brief & calculation of interest (attachment 1)
Long Company's Motion to Include Interest (attachment 2)
Long Company's Reply brief & calculation of interest (attachment 3)
Long Company's trial exhibit #23 (attachment 4)
Trial Court Order (attachment 5)
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STATEMENT OF THE ISSUES

1. Did the trial court err in calculating interest at the rate of 8.5%?

2. Did the trial court err in permitting the Long Company to exercise its option to purchase all of the real estate?

STATEMENT OF THE FACTS

The facts as stated in Appellant's original brief are herein incorporated by reference. Some of the facts as they appear in Respondent's brief are inaccurate or incomplete and are correctly stated as follows:

1. Ronnie Long did not inherit the 2,225 acres of Kenneth Long's real estate. Kenneth Long, a non-tribal member, had mortgaged that real estate to the Bank and it was deeded to the Bank in lieu of foreclosure through the Kenneth Long Estate. Ronnie Long nor Long Family Land and Cattle Company, Inc. never did own the real estate.

2. The land was deeded to the Bank during the fall of 1996. The Lease With Option to Purchase, which was prepared by the Bank, was not entered into until December 5, 1996. That agreement did not mention that the 2,225 acres and the house in Timber Lake would be deeded to the Bank as the Bank already had received the deed from the Kenneth Long Estate.

3. The loan agreement did not state that the Bank would make any loans to Long Company. It stated that if the BIA increased its guarantee to 90% and rescheduled the existing loans and guaranteed a $70,000.00 operating loan, then the Bank would make an additional loan for $37,500.00 for the purchase of calves. The BIA did not increase the guarantee on the existing loans nor guarantee a new operating line. The Bank was not under any obligation to make any additional loans pursuant to the loan agreement.

4. The Bank received approximately $88,000.00 of CRP payments as rental payments under the two-year Lease With Option to Purchase. Prior to receiving those payments, however, the Bank had to pay off the State of South Dakota CRP enhancement program for $82,447.88. It had the first mortgage. Had the Bank not paid off the state, the CRP payments of approximately $44,000.00 per year would have gone to the state since it held the assignment of those payments.

5. The Long Company requested a sixty-day extension on the Lease With Option to Purchase a few days prior to its expiration. The request was denied by the Bank. The lease provided that if the Long Company exercised its option to purchase and paid 5% of the purchase price it had sixty days to make the final payment. The Long Company never did exercise its option to purchase nor provide 5% of the purchase price. Nothing in the Lease With Option to Purchase entitled the Long Company to a sixty-day extension on that agreement. The Long Company had two years to purchase the land but it did not do so.

6. The Long Company did not hold over on the entire 2,225 acres. It held over on about 960 acres, which it is still in possession of since the lease expired December 5, 1998. The Long Company has paid no rent, real estate taxes or any other reimbursement to the Bank. It has simply squatted on the land without paying anything for about five years.

ARGUMENTS AND AUTHORITY

1. Did the trial court err in calculating interest at the rate of 8.5%?

Long Company, in its brief and statement of the issues, erroneously is alleging that the trial court awarded interest at the rate of 2.7% on the jury verdict. The trial court calculated interest at 8.5%. There is absolutely no indication whatsoever that the trial court used 2.7% in its calculation of interest.

The Bank and Long Company both submitted briefs after the trial calculating pre-judgment interest. A copy of the Bank's brief and calculation of interest is hereto attached and marked as (Attachment 1). A copy of the Long Company's Motion to Include Interest and Reply brief are hereto attached and marked as (Attachments 2 and 3) respectively. After the briefs were submitted, the trial court adopted the calculation of interest submitted by the Bank, which was a calculation at the rate of 8.5% per annum.

There is no specification as to the rate for pre-judgment interest under the Cheyenne River Sioux Tribe Law and Order Code. Under South Dakota Law, SDCL 21-1-13.1, pre-judgment interest may be awarded on damages arising from a contract at the contract rate, if so provided in the contract; otherwise, if pre-judgment interest is awarded, it shall be at the Category B rate of interest as specified in § 54-3-16. The Category B rate is 10%. In this case, however, the trial court awarded interest at 8.5%. The trial court had previously ruled that the Lease With Option to Purchase and Loan Agreement comprised one contract. The lease agreement gave the Long Company credit, against the option purchase price, for the amount paid as rent each year, in the event the purchase option was exercised. Interest at the rate of 8.5% on the option purchase price was to be deducted from the annual rent payment and the balance would lower the purchase price. By that contract, the interest rate of 8.5% was set forth and the trial court adopted this rate of interest.

The Bank reiterates its arguments in its Appellant's Brief wherein it opposes the awarding of pre-judgment interest whatsoever. Pre-judgment interest is impossible to accurately calculate in this case since we do not know how the jury arrived at their verdict of $750,000.00. Damages for which the Long Company presented evidence happened over a period of years. The jury's verdict was substantially less than the damage evidence presented

by the Long Company in their trial exhibit #23. (Attachment 4) Pre-judgment interest may, in certain cases, be awarded from the date the damages were incurred. It is a question of fact what the damages were and on which date they occurred. In this case we do not know what the jury decided as to amounts and on what dates. Since the jury returned a verdict of $750,000.00, well under the $1,236,792.00 which Long Company requested, we now have no way of knowing how the jury calculated damages.

Interest should not be awarded in this case. The trial court submitted special interrogatory #6 to the jury. Special interrogatory #6 asked the jury what the amount of the damages was and whether interest should be added. It did not set forth an individual line for each loss incurred and the respective time for each loss. This special interrogatory was submitted with no objection from counsel for the Long Company. No other special interrogatory was proposed by the Long Company.

In Alvine v Mercedes-Benz 620 N.W. 2d 608 (S.D. 2001) pre-judgment interest was denied. The jury was instructed that pre-judgment interest was in its discretion. There were no special interrogatories where the jury could answer the damage award for each individual damage and the respective time that the loss occurred. The court stated at pg 614:

"Under SDCL 21-1-13.1 any person who is entitled to recover damages . . . is entitled to recover interest thereon from the date that the loss or damage occurred . . . If there is a question of fact as to when the loss or damage occurred, pre-judgment interest shall commence on the date specified in the verdict or decision . . . If necessary, special interrogatories shall be submitted to the jury. Pre-judgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if pre-judgment interest is awarded, it shall be at the Category B rate specified in § 54-3-16. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

Pre-judgment interest is now mandatory, not discretionary. However, in this case, the jury was instructed that the allowance of pre-judgment interest was in its discretion. Also, the instruction did not set forth an individual line for each loss incurred (vehicle, storage, and rental replacement) and the respective time of loss (for each). This instruction

rate. If interest were calculated at 10%, the Category B rate, a simple multiplication of the total interest awarded by the trial court of $123,131.81 can be multiplied by 117.6471%. In the event this court decides pre-judgment interest is allowable, this Court should affirm the trial court.

2. Did the trial court err in permitting the Long Company to exercise its option to purchase a portion of the real estate as opposed to all of the real estate?

The Bank, in Appellant's Brief, has argued that the trial court erred in granting the Long Company an option to purchase approximately 960 acres of the real estate which was the subject of the Lease With Option to Purchase. Those same arguments are incorporated by reference in this reply brief. The additional question which will be addressed in this brief is whether the trial court should have allowed the Long Company the option to purchase all of the real estate as opposed to approximately 960 acres which it allowed.

Shortly after the expiration of the term of the Lease With Option to Purchase, which was December 5, 1998, the Bank sold approximately 320 acres to Ralph and Norma J. Pesicka for cash. The remaining real estate was then sold to Edward and Mary Maciejewski under a Contract for Deed in two parcels. Approximately 960 acres was sold as Parcel 1 and the other one half as Parcel 2. Parcel 1 was not being occupied by the Long Company. The Long Company continued to occupy Parcel 2 after the expiration of the Lease With Option to Purchase. Parcel 1 had been paid for in full by the Maciejewskis and was deeded to them by the Bank. The trial court granted the Long Company an option to purchase Parcel 2 at the purchase price listed in the Contract for Deed between the Bank and the Maciejewskis. Since the jury found that the Bank did not use self-help in obtaining possession of the real estate

sold to the Pesickas and Parcel 1, which was sold to the Maciejewskis, the court did not grant the Long Company an option to purchase that real estate.

The Pesickas purchased the 320 acres having no knowledge of any interest by the Long Company. The Maciejewskis purchased Parcel 1 of the remaining real estate having no knowledge of any interest of the Long Company in that real estate. Neither the Pesickas nor the Maciejewskis are tribal members. They were good faith purchasers. The trial court in its discretion did not grant the equitable remedy of specific performance allowing the Long Company an option to purchase all of the real estate. Its decision was not clearly erroneous and should not be reversed by this court.

The Long Company's counsel has quoted a portion of the trial court Order dated January 3, 2003 (Attachment 5) wherein it stated that the Lease With Option to Purchase remains intact. The remaining portion of the court's Order, however, in not allowing the Long Company an option to purchase, is very pertinent. It is as follows:

> "However, the jury concluded that the Bank did not violate the tribal law prohibiting self-help remedies when it conveyed parcels of the land covered by the lease with an option to purchase to the other Defendants. The court has no authority therefore to set aside the land conveyances to the other Defendants."

Neither the Pesickas, the Maciejewskis, nor the Bank are tribal members. The land involved in those transactions was deeded land. The Bank, nor either of the other Defendants, used self-help in obtaining possession of the land. The court therefore ruled that it lacked authority to set aside these transfers. Even if the court did have authority to set aside those transfers, it certainly has discretion to not grant the remedy of specific performance. This is especially true in light of the fact that Long Company's pleadings did not state a cause of action requesting specific performance. The trial court properly ruled that it would not set aside the transfers to the Pesickas and the Maciejewskis. The Long

Company definitely should not be granted an option to purchase that real estate now, approximately five years after the option expired.

Long Company erroneously argues that it should be granted an option to purchase all of the real estate for a reduced purchase price of $363,125.36. The original option to purchase price was to be $468,000.00. Had the Long Company exercised its option, which it did not, it would have been reduced by approximately $16,000.00 for the sale of the house in Timber Lake. It would also have been reduced by about $3,500.00 per year for two years when the balance of the lease payment, which exceeded interest at 8.5%, was applied to the purchase price. The entire lease payment of $44,198.00 per year was never to be credited against the purchase price. Interest accrued on the purchase price of $468,000.00 from December 5, 1996 if the Long Company exercised its option to purchase.

Long Company's argument of a reduced purchase price of $363,125.36 is completely without merit. If the purchase price was lowered, and no interest charged, the Long Company would have had use of all of the real estate for the two-year lease period at no cost whatsoever. This is completely contrary to the terms of the lease. The use of all the land for a two-year period at no cost would unjustly enrich the Long Company and should not be allowed. The court should also be reminded that the Long Company has had the use of 960 acres of the land which was not deeded to the other Defendants continuously since the lease expired and has paid nothing.

Counsel for Long Company in its brief erroneously alleges that the Bank breached the loan agreement immediately when it was signed on December 5, 1996 by failing to make an immediate advance of $70,000.00 for an operating loan and failing to make a $37,500.00 loan for the purchase of 110 head of additional cattle. A reading of the loan agreement,

however, did not indicate that the Bank would immediately make a $70,000.00 operating loan whatsoever. The loan agreement stated that the Bank would request, among other things, a $70,000.00 BIA guaranteed operating note. The Bank did so and heard absolutely nothing back from the BIA until February 13, 1997. By that time Long's cattle were already deceased. The Bank, in the loan agreement, did not state that it would make a $37,500.00 loan to purchase 110 additional head of cattle. That would only happen if the BIA guaranteed the operating loan and increased the guarantee on other existing loans. The BIA did not do so.

Counsel also is erroneously alleging that the Bank was required to make a $40,000.00 emergency loan to Long Company to preserve its collateral pursuant to 25 CFR 103.22 (d). Nothing in that regulation, however, requires the Bank to make an emergency loan whatsoever. That regulation simply authorizes such a loan if the Bank decides to do so. In this case, the Bank did make a number of emergency loans to Long Company. One loan was made for approximately $17,000.00 for pre-payment of the tribal leases for the next year. A second loan was made for $5,000.00 for operating. A third loan was made for $2,250.00 to purchase a snowmobile so that Ronnie Long could get to the cattle to feed them. The Bank, thought it was not required to do so, did make approximately $24,250.00 of emergency loans to attempt to help the Long Company and to preserve the Bank's collateral. Nothing in the law requires a bank to make unlimited loans. 25 CFR 103.22 (d) limits the maximum amount of emergency loans that a bank can make and still be covered by the BIA guarantee. It does not require any loans to be made whatsoever.

Counsel for the Long Company also makes false allegations that the Bank substituted a "bad" cash flow, which would not work, for the one prepared by Dennis Huber. The fact

is, however, that the cash flow submitted to the BIA by the Bank in requesting the increase in guarantee and a BIA guaranteed operating line was not prepared by the Bank. It was prepared by John Lemke with the help of Ronnie Long. It was faxed from the Cheyenne River Sioux Tribe Chairman's office on December 12, 1996. The reason that this cash flow was necessary was that Mr. Huber's cash flow was incorrect. It substantially inflated the income which the Long Company could expect. His cash flow duplicated the sale of calves. Mr. Huber, under cross-examination, acknowledged that he had made a mistake in calculating the income from the sale of calves and yearlings. His cash flow listed the sale of calves in year one and then mistakenly again listed those same calves as yearlings to be sold for $187,000.00 in year two. Those yearlings however would have been sold the previous year as calves. For this reason, a second cash flow was required. The Bank had absolutely nothing to do with the preparation of any of the cash flows submitted to the BIA.

Lastly, counsel for Long Company in its brief at paragraph 11. has alleged that there is a title insurance policy and that if this court would allow Long Company to purchase all of the real estate, Maciejewskis nor Pesickas would be damaged. Firstly, there is absolutely no evidence in the record that there is a title insurance policy. Secondly, whether there is or is not a title insurance policy is completely irrelevant and immaterial. Allegations of a title insurance policy being in existence should absolutely not have been brought before this court.

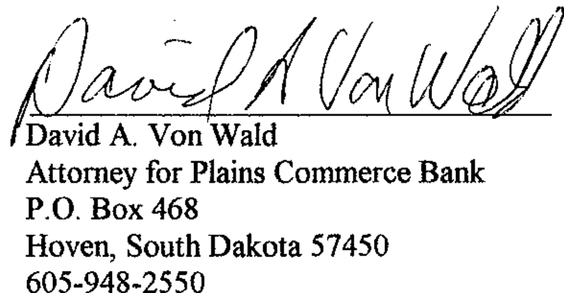
Additionally, counsel cites CRST Law and Order Code § 10-1-5 for the proposition that Long Company were to be given notice before the property was sold. That code section, however, is not applicable. It pertains to land that was foreclosed upon. The land sold to the Maciejewskis and the Pesickas was not foreclosed. The Bank never did foreclose against the

property. Kenneth Long's personal representative deeded the Bank the property. Secondly, counsel cites § 10-2-6 (6) for the proposition that the Long Company held over and retained possession for more than sixty days after the expiration of the term of the lease without any demand of possession or notice to quit. Long Company was given a notice that the lease would expire and possession was demanded. Ronnie Long wrote a letter to Steve Hageman, CEO of the Bank, dated December 1, 1998 requesting a sixty-day extension on the lease. A response letter written by Charles Simon, Vice-President of the Bank, which was Plaintiff's exhibit 18, notified Ronnie Long that there would be no extension of time from the December 5, 1998 deadline for the option to purchase. Possession of this property by the leasee, Long Family Land and Cattle Company, Inc., would terminate on December 5, 1998. (attachment 6) That letter plainly demanded possession of the property by the leasee on December 5, 1998. Additionally, Long Family Land and Cattle Company, Inc. did not hold over on the property sold to the Pesickas and Parcel 1 of that property sold to the Maciejewskis. It continued to hold over only on Parcel 2. CRST 10-2-6(6) is not applicable.

CONCLUSION

Pre-judgment interest should not be allowed and the trial court should be reversed, however if this court allows pre-judgment interest, interest should be calculated as ordered by the trial court. The trial court's decision to not allow the Long Company to purchase that real estate previously deeded to the Pesickas and the Maciejewskis should be affirmed.

Dated this 27th day of February, 2004.



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Attachment 1

File

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

IN CIVIL COURT

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

vs.

DEFENDANT PLAINS COMMERCE BANK'S OPPOSITION TO ASSESSMENT OF INTEREST

EDWARD AND MARY MACIEJEWSKI AND RALPH H. AND NORMA J. PESICKA, AND THE BANK OF HOVEN, NOW PLAINS COMMERCE BANK,
Defendants.

R-120-99

1. Although the jury instructed that interest should be assessed on damages, we now have no way of knowing how the jury derived at damages of $750,000.00. Had the jury awarded damages of $1,236,792.00, which was presented by Plaintiff's Exhibit 23, we could have assumed that the jury accepted the damages presented by Plaintiff. They did not, however. SDCL 21-1-13.1, which became effective in 1990, requires interest be assessed damages are calculable. Interest is not allowed when damages are intangible, including injury to financial standing. In this case, damages were certainly intangible. The statute also requires written interrogatories be submitted to the jury to calculate when the damages were incurred and the amount when they are calculable. No such interrogatories were submitted nor did Plaintiff request any. Plaintiff made no objection to

the Court's interrogatories, and especially since the jury did not award damages as calculated by Plaintiff's Exhibit 23, interest should be barred.

2. It is pure speculation to think that the jury awarded damages, as set forth in Plaintiff's Motion For Interest, of the exact amount requested for the years 1997, 1998, 1999, 2000 and only a portion of the damages requested for 2001. We have absolutely no idea how it is that the jury derived at the damages of $750,000.00. Without knowledge as to the jury's way of calculating damages, we simply cannot calculate interest. Additionally, it is unknown which cause of action the jury found that the damages were derived from. If the damages, or a portion of them, were from the discrimination action, the damages certainly would be incalculable and intangible, not subject to interest. Interest should simply not be allowed in this case.

3. Even if the Court decides that interest should be allowed, however, it should certainly not be calculated as proposed by Plaintiff. Interest would not start until damages occurred. If we assume that the death of the cows and yearlings in January and February of 1997 were a part of the damages assessed, interest would not start on the date of their loss. Likewise, interest would not start on the date of loss of the yearlings. Plaintiff's evidence was that he would have

sold them on or about October 1, 1997. His figures for loss damages were when sold as yearlings in the fall. As to interest on damages for the death of the cows, it should not accrue prior to judgment. Plaintiff's evidence at trial was that he lost profits from the calves the dead cows would have produced. This assumes that the cows, if living, would <u>not</u> have been sold and would continue to have calves. Plaintiff would be placed in a better position by assessing interest as of the date of death of the cows plus loss of profits from their offspring, than he would have been in had the contract not been breached. Under contract law, one is not to be placed in a better position by a breach of a contract than he would have been in had no breach occurred. The value of the cows listed on Plaintiff's Exhibit 23 was $142,000.00. That amount should bear no interest until the date of judgment.

4. Beginning in the year 1999 through 2002, Plaintiff's damages were more speculative in nature than for 1997 and 1998. Although it is impossible to know how the jury reduced damages asked for, it is likely that damages were reduced beginning in 1999. Plaintiff's damage calculations in Exhibit 23 for the year 1999 assumed he would have had another one hundred head of cows. These cows were to be purchased by a loan he alleged the Bank should have made of $37,500.00. The loan agreement only required this loan if the guarantees were increased by the BIA.

Since those guarantees were not increased, the jury likely found these additional damages from the loss of profits from the 100 head of cows should not be awarded. Additionally in the calculation of damages, there is no repayment of the $37,500.00 loan, nor interest on that loan. Plaintiff's calculations of losses for all of 1999 through 2002 included the loss of profits from testimony of how much he thought he could have made from the use of the land. Plaintiff's losses also included not receiving ASC payments, which evidence existed were much lower than set out on exhibit 23. For the last four years of damages, on Exhibit 23, there is no offset calculation of rent, interest or taxes Plaintiff would have had to pay if it had bought the land or continued to rent it. The last four years of damages presented by Plaintiff are very likely the years for which the jury reduced the damages.

5. Although interest should definitely not be assessed as a matter of law, if the Court finds that interest should be assessed, Plaintiff's calculations of interest should not be used. The evidence indicated that Plaintiff's normal operation for cattle was the sale of the yearlings approximately October 1st of each year. The first income Plaintiff would have derived from the sale of yearlings, which had died, would have been October 1, 1997. That would be the first date which interest should start to accrue. Plaintiff's Exhibit 23 showed damages

in 1997 of $174,856.00. From that damage calculation, interest should not be included on $142,600.00 for the cows that died since loss of future profits from the sale of their calves was asked for. This would leave a net amount of $32,256.00 commencing October 1, 1997. For 1998, assuming that the jury accepted Plaintiff's calculation, interest would commence on an additional $87,972.00 from October 1, 1998. This would leave damages of $629,772.00, which had been awarded by the jury. ($750,000.00 - $32,256.00 - $87,972.00) Taking away the $142,600.00 for the value of the dead cows would leave a net of $487,172.00. If one averaged that amount for the next four years, an additional $121,793.00 would be added each year commencing October 1' 1999 and interest would be assessed on that amount.

6. Plaintiff has erroneously compounded interest in its calculation. Interest on interest is not obtainable under South Dakota Law. Plaintiff calculated the Category B rate of interest pursuant to SDCL 54-3-16 at the rate of 10%. No interest rate is actually set forth in the Cheyenne River Sioux Tribe Law and Order Code. In this case, however, the written document which Defendant is alleged to have breached is a Lease With Option To Purchase wherein interest at the rate of 8.5% was to be charged to the Plaintiff if the land was purchased. The rate of interest the written agreement designated to be

charged Plaintiff should also be charged Defendant for damages from a breach of that agreement. Interest at the rate of 8.5% on the damages as set forth above are attached as Exhibit A. In the event the Court would accept Defendant's method of calculating interest, but decide the interest rate should be 10% rather than 8.5%, a simple multiplication of the final figure of $123,131.81 times 117.6471% would accomplish that. (Example $1,000.00 x 10% = $100.00; $1,000.00 x 8.5% = $85.00; $85.00 x 117.6471% = $100.00)

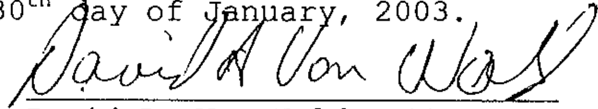
CONCLUSION

Interest should not be assessed since damages for loss of profits are intangible damages not subject to prejudgment interest under South Dakota Law. We have no way of determining how the jury derived at their damage figure. Likewise we do not know whether the damages were awarded under the contract action, or under the discrimination action, nor how they were calculated. Considering the speculative nature of any calculation of interest, no interest as a matter of law should be assessed.

Even if interest should be assessed, interest should not be compounded as Plaintiff has proposed. Additionally there is nothing in the evidence to assume the jury would have awarded damages for the first four years of damages presented, a portion of the fifth year, and nothing for the last year, as

Plaintiff suggests. This would obviously load interest on the earlier years and thus inflate the interest calculation. Although interest should not be assessed, Defendant's calculation of interest, although admittedly speculative, is a more accurate approach using the evidence presented and should be adopted over Plaintiff's Attachment A.

Respectfully submitted this 30th day of January, 2003.



David A. Von Wald, Attorney
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(605) 948-2550

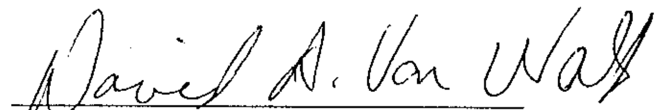
CERTIFICATE OF SERVICE

Comes now David A. Von Wald, Attorney for Defendant, Plains Commerce Bank, and hereby certifies that I served by first class mail, postage prepaid, a true and correct copy of the foregoing DEFENDANT PLAINS COMMERCE BANK'S OPPOSITION TO ASSESSMENT OF INTEREST on the 30th day of January, 2003, addressed to the following:

James P. Hurley
P.O. Box 2670
Rapid City, SD 57709-2670

Kenneth E. Jasper
P.O. Box 2093
Rapid City, SD 57709-2093

Dated this 30th day of January, 2003.



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Damages for 1997 (10-01-97)

	$32,256.00
	x 8.5%
	2,741.76
10-01-99	2,741.76
10-01-00	2,741.76
10-01-01	2,741.76
10-01-02	2,741.76
01-31-03	923.73
	14,632.53

Damages for 1998 (10-01-98)

	$87,972.00
	x 8.5%
10-01-99	7,477.62
10-01-00	7,477.62
10-01-01	7,477.62
10-01-02	7,477.62
01-31-03	2,519.86
	32,430.34

Damages for 1999 (10-01-99)

	$121,793.00
	x 8.5%
10-01-00	10,352.41
10-01-01	10,352.41
10-01-02	10,352.41
01-31-03	3,488.62
	34,545.85

Damages for 2000 (10-01-00)

	$121,793.00
	x 8.5%
10-01-01	10,352.41
10-01-02	10,352.41
01-31-03	3,488.62
	24,193.44

Damages for 2001 (10-01-01)

	$121,793.00
	x 8.5%
10-01-02	10,352.41
01-31-03	3,488.62
	13,841.03

Damages for 2002 (10-01-02)

	$121,793.00
	x 8.5%
01-31-03	3,488.62

Interest On Damages	1997	$ 14,632.53
	1998	32,430.34
	1999	34,545.85
	2000	24,193.44
	2001	13,841.03
	2002	3,488.62
	Total Interest as of 01-31-03	$123,131.81

EXHIBIT A

Attachment 2

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

IN CIVIL COURT

****

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

Plaintiffs,

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA, and THE BANK OF HOVEN,

Defendants.

PLAINTIFFS' MOTION TO INCLUDE INTEREST IN THE JUDGMENT

R-120-99

****

Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long, move the Court to include in the judgment the amount of prejudgment interest in addition to the jury verdict damages of $750,000, upon the following grounds:

1) The Court instructed the jury in Instruction 10a that if the jury returns a verdict for the Plaintiffs, then the jury must decide whether Plaintiffs are entitled to prejudgment interest.

2) In special interrogatory six, the jury awarded damages in favor of Plaintiffs and against Defendant Bank in the sum of $750,000, and advised the Court that prejudgment interest should be added to the judgment.

3) SDCL 21-1-13.1 provides that "when prejudgment interest is awarded, it shall be at the Category B rate specified in § 54-3-16 (10%). "The Court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs." SDCL 21-1-13.1 provides that Plaintiffs are entitled to recover interest and damages "from the day that the loss or damage occurred."

4) The trial evidence established when the Plaintiffs' loss or damage occurred. The bank breached the Loan Agreement as soon as it was signed December 5, 1996, by failing to advance the $70,000 in operating costs to the Plaintiffs, as promised, and in failing to loan $37,500 to Plaintiffs to purchase 110 additional cattle, as promised, to increase their income to enable them to buy their land back under the option to purchase. The Plaintiffs would not have had the catastrophic cattle losses they experienced if the $70,000 operating loan had been made by the bank, because the Plaintiffs would have been able to move their hay twenty miles to feed their livestock. Plaintiff, Ronnie Long, testified that had the bank made the operating loan as agreed, prior to the cattle losses, the cattle losses would have been prevented. He also testified that the loan to buy 110 additional cattle would have increased Plaintiffs' income. These were questions of fact for the jury to resolve, and the jury resolved these questions against the bank.

The Loan Agreement (Exh. 6) and the Lease With Option to Purchase (Exh. 7) were both signed December 5, 1996. The testimony of Ronnie Long was clear and uncontroverted at trial. He testified that the bank breached the Loan Agreement (Exh. 6) right after it was signed. The bank breached the implied contract covenant of good faith and fair dealing by failing to timely make a complete application to the BIA to increase the percent of BIA guarantee, by failing to timely make the $70,000 operating loan, as promised, to enable the Longs to feed and care for their cattle, by failing to timely make an emergency loan of up to $40,000 to preserve collateral and get feed to the Longs' cattle as authorized by the BIA and 25 CFR 103.22, and by failing to make the cattle purchase loan, as promised. Ronnie Long testified based on his years of experience caring for cattle, that if the bank had loaned him the $70,000 operating money or an emergency protection loan in December of 1996, he could then have moved his hay 20 miles from the fields where it was baled to the winter pastures where the

cattle were located some 20 miles away, and the cattle would have survived the winter weather. The jury apparently agreed.

Ronnie Long testified that his cattle died in winter storms in late January and early February of 1997. He testified that 230 cows and 260 yearlings died. The death losses were verified by the FEMA inspectors (Exh. 14).

Thus, the evidence is clear that the Longs' damages, caused by the bank's breach of contract and covenant of good faith, happened in late January and early February of 1997. The losses continued each year thereafter because the cows that died would have continued to produce calf crops each year after 1996.

6) Based on the trial evidence, it is clear that prejudgment interest should begin to accrue on February 1, 1997, because that is when the Longs suffered the loss or damage caused by the bank's breach of contract and the covenant of good faith.

7) The Longs claimed damages each year for 1997 through 2002, in the total amount of $1,236,792 (Exh. 23). The jury awarded damages of $750,000. Thus, it appears that the jury awarded the Longs the damages they claimed for 1997, 1998, 1999, 2000, and part of 2001, as follows:

Year	Amount
1997	$174,856
1998	87,972
1999	183,634
2000	244,814
2001	58,724
	$750,000

Interest accrues at the Category B rate of 10% as specified in SDCL 54-3-16. The interest accrued on the damages of $750,000 as shown on Attachment A is $367,210.

WHEREFORE, Plaintiffs move the Court to include in the judgment damages of $750,000 and accrued judgment prejudgment interest of $367,210.

Respectfully submitted this 24 day of January, 2003.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: [signature]
JAMES P. HURLEY
Attorneys for Plaintiffs
818 St. Joe St.; P.O. Box 2670
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(605) 343-1040 (phone)
(605) 343-1503 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Plaintiffs' Motion to Include Interest in the Judgment upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to said addressee, to wit:

Mr. David A. Von Wald
Attorney at Law
P.O. Box 468
Hoven, SD 57450

which address is the last address of the addressee known to the subscriber.

Dated this 24 day of January, 2003.

[signature]
JAMES P. HURLEY

ATTACHMENT A

	1997		1998		1999		2000		2001
2-1-97	$174,856	2-1-98	$ 87,972	2-1-99	$183,634	2-1-00	$244,814	2-1-01	$58,724
	x 10%		x 10%		x 10%		x 10%		x 10%
	17,486		8,797		18,363		24,481		5,872
	+174,856		+ 87,972		+183,634		+244,814		+58,724
2-1-98	192,342	2-1-99	96,769	2-1-00	201,997	2-1-01	269,295	2-1-02	64,596
	x 10%		x 10%		x 10%		x 10%		x 10%
	19,234		9,677		20,200		26,930		6,460
	+192,342		+ 96,769		+201,997		+269,295		+64,596
2-1-99	211,576	2-1-00	106,446	2-1-01	222,197	2-1-02	296,225	2-1-03	$71,056
	x 10%		x 10%		x 10%		x 10%		
	21,158		10,645		22,220		29,623		
	+211,576		+106,446		+222,197		+296,225		
2-1-00	232,734	2-1-01	117,091	2-1-02	244,417	2-1-03	$325,846		
	x 10%		x 10%		x 10%				
	23,273		11,709		24,442				
	+232,734		+117,091		+244,417				
2-1-01	256,007	2-1-02	128,800	2-1-03	$268,859				
	x 10%		x 10%						
	25,601		12,880						
	+256,007		+128,800						
2-1-02	281,608	2-1-03	$141,680						
	x 10%								
	28,161								
	+281,608								
2-1-03	$309,769								

Summary

1997	$ 309,769	
1998	141,680	
1999	268,859	
2000	325,846	
2001	71,056	
	1,117,210	Principal and Interest
	- 750,000	Principal
	$ 367,210	Interest

INTEREST ACCRUAL - COMPUTATIONS

	Principal and Interest	Interest	Principal
1997	$ 309,769	$134,913	$174,856
1998	141,680	53,708	87,972
1999	268,859	85,225	183,634
2000	325,846	81,032	244,814
2001	71,056	12,332	58,724
	$1,117,210	$367,210	$750,000

Attachment 3

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

IN CIVIL COURT

****

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

Plaintiffs,

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA, and THE BANK OF HOVEN,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANT BANK OF HOVEN N/K/A PLAINS COMMERCE BANK'S OPPOSITION TO INCLUDING INTEREST ON THE JUDGMENT

R-120-99

****

Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long (the Longs), respond to the Opposition of the Bank of Hoven n/k/a Plains Commerce Bank (the Bank) to the Longs' Motion for the Court to include in the judgment the amount of prejudgment interest, as follows:

A. Prejudgment Interest:

1. The Bank argues in paragraph 1 of the Bank's Opposition that the Court should not include prejudgment interest in the judgment because Longs' damages were intangible. This argument has no merit because the Longs did not even claim any intangible damages. SDCL 21-1-13.1 defines intangible damages, and states: "intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life or loss of society and companionship." The Longs did not make any claim to the jury for such intangible damages.

The Longs' claim for damages was based on cattle that died mid-January 1997, through early February 1997. Cattle are, of course, tangible property. Defendant's trial exhibits show that cattle have tangible value. The Bank's financial statement for the Longs shows that the Longs owned 410 cows worth $750 each for a tangible value of $307,500, and 275 calves worth $200 each for a tangible value of $55,000. Thus, the Bank's argument that the Longs' damages were "intangible," and therefore interest should not be allowed on Longs' damages, has no merit.

The Bank also argues in paragraph 1 of its Opposition, that the interrogatory submitted to the jury concerning whether interest should be added to the judgment, did not require the jury to "calculate when the damages were incurred and the amount when they are calculable." This argument is also without merit.

The South Dakota Supreme Court has held that plaintiffs are entitled under SDCL 21-1-13.1 to prejudgment interest for economic losses such as medical care and lost wages sustained prior to trial. Miller v. Hernandez, 520 N.W.2d 266 (S.D. 1994). The Supreme Court has held that after SDCL 21-1-13.1 was enacted in 1990, prejudgment interest on damages awarded by a jury to a plaintiff is mandatory. "Prejudgment interest is now mandatory, not discretionary." Alvine v. Mercedes-Benz of North America, 2001 SD 3, ¶29, 620 N.W.2d 608, 614. Prejudgment interest is allowed from "the day that the loss or damaged occurred." Fritzel v. Roy Johnson Const., 1999 S.D. 59, ¶12, 594 N.W.2d 336, 339 (quoting SDCL 21-1-13.1).

SDCL 21-1-13.1 provides that when the jury awards a party damages, that party "is entitled to recover interest thereon." Prejudgment interest is mandatory, not discretionary.

The Bank's argument is that the jury verdict concerning interest should have required the jury to determine when the loss occurred. The applicable statute does not support

this argument. SDCL 21-1-13.1 provides: "If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision. . . ." If there is a question of fact as to when the loss or damage occurred, the date of loss may be determined by the jury in its verdict, or by the trial judge in his verdict.

In this case, however, there was no issue of when the Longs' claimed damage or loss occurred. The testimony of Ronnie Long was clear and uncontroverted. The Longs' cattle died in mid-January and early February of 1997. The Bank did not produce any testimony or exhibits that contradicted Ronnie Longs' testimony as to the date of the Longs' claimed loss of cattle.

The verdict form concerning whether interest should be added to the judgment did not require the jury to determine the date of Longs' loss, because there was no question of fact as to when the loss or damage occurred. Thus, SDCL 21-1-13.1 does not require the jury to determine the date of loss.

In addition, the jury verdict form concerning whether interest should be added to the judgment was shown to Bank's counsel before it went to the jury. The Bank did not object to the jury form, and did not request that the jury form require the jury to determine the date of the loss.

Also, SDCL 21-1-13.1 requires the Court, and not the jury, to compute the interest. The statute provides: "The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs." The South Dakota Supreme Court has approved the trial court determining the date of loss and computing the interest under SDCL 21-1-13.1. Fritzel v. Roy Johnson Const., 594 N.W.2d 336 (S.D. 1999).

The statute provides that the date of loss may be determined "in the verdict or decision" of the court. There is no question that the trial court, by its decision, has the authority to establish the date of loss in calculating the prejudgment interest, in accordance with the evidence presented at trial. This is especially true when, as in this case, no issue was raised by the Bank at trial as to the date of Longs' loss.

2. The Bank argues in paragraph 2 of the Bank's Opposition that it is speculation to try and determine how the jury decided the damages of $750,000, and therefore, the Court cannot calculate the interest to add to the judgment. This argument is also without merit because under the statute, SDCL 21-1-13.1, it makes no difference how the jury arrived at its decision to award the Longs damages of $750,000.

As discussed above, there was no issue of when the Longs' cattle died; the only issue was whether the Bank was liable for the loss. The jury determined this question in favor of the Longs and against the Bank. Thus, the Bank is liable for $750,000 of the Longs' cattle losses which happened in late January and early February of 1997. Under the statute, it really makes no difference on which cause of action the jury determined the Bank liable for such loss. The jury determined that the Bank breached the Loan Agreement (Jury Interrogatory One), that the Bank intentionally discriminated against the Longs based solely on their status as Indians or tribal members in the Lease with Option to Purchase (Jury Interrogatory Four), and that the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA as required by the Loan Agreement (Jury Interrogatory Five). The Bank is correct that it is impossible to determine which one cause of action, or perhaps all of these causes of action, that the jury relied on to reach its decision that the Bank is liable to the Longs for $750,000 of the Longs' damages. However, under the statute, it makes no difference.

Once the jury decides on the amount of the damages, and there is no question of fact as to when the loss or damage occurred, the Court shall calculate the interest "from the day that the loss or damage occurred, at the Category B rate specified in § 54-3-16" (10%). SDCL 21-1-13.1.

3. The Bank argues in paragraph 3 of the Bank's Opposition, that even though the Longs' cattle died in late January and early February of 1997, "interest would not start on the date of their loss." The Bank argues, as to the 277 yearlings that died in January of 1997, the Longs did not plan to sell the yearlings until October of 1997, thus the loss of the yearlings should not be recognized until then, and interest should not be recognized until then, and interest should not begin until then. As to the 230 cows that died in January of 1997, the Bank argues that the Longs did not intend to sell the cows, thus, there should be no prejudgment interest added to the judgment at all.

It is obvious that these arguments ignore the command of SDCL 21-1-13.1, which provides: "Any person who is entitled to recover damages . . . is entitled to recover interest thereon from the day that the loss or damage occurred. . . ." It is clear that interest begins on "the day that the loss or damage occurred," not, as the Bank argues, on the day that Longs planned to sell the cattle.

4. In paragraph 4 of the Bank's Opposition, the Bank argues that the Longs' damages are "speculative in nature for 1997 and 1998," because such damages include 100 head of cows to be purchased by a loan of $37,500 that the Bank promised to make to the Longs on December 5, 1996, in the Loan Agreement (Exh. 6). The Bank argues that the Bank did not have to make this loan unless the "guarantees were increased by the BIA."

The Bank's arguments are factually incorrect, contradict the testimony of the bank's witness, and are essentially arguments to the jury. The jury has decided against the Bank. At trial, Bank's witness and officer, Charles Simon, testified on cross-examination that the Bank's promise to loan the Longs $37,500 to purchase 110 cattle set out in the Loan Agreement (Exh. 6) was to be a direct loan from the Bank of the Longs, and was not dependent on approval by the BIA. In a letter to Dennis Huber, ND/SD Indian Business Development Center, Charles Simon for the Bank stated that the loan promised by the Bank to the Longs to buy 110 cattle, was a "direct bank loan." At trial Charles Simon explained that a "direct bank loan" is not dependent on BIA approval because it is not guaranteed by the BIA. Rather, it is a direct loan by the Bank to the Longs which could have been made anytime after the Loan Agreement was signed on December 5, 1996. Charles Simon agreed in his trial testimony that the promised cattle loan was never made to the Longs. He also agreed that the $70,000 annual operating loan the Bank promised to the Longs in the Loan Agreement (Exh. 6) was never made to the Longs. Without these loans promised to them by the Bank, the Longs could not perform under the Loan Agreement or the Lease With Option to Purchase. The Bank's statements in its Opposition are contrary to the trial testimony of the Bank's witness, Charles Simon. The Bank cannot now claim a version of the facts more favorable to the Bank than the testimony of the Bank's officer and Bank's witness at trial. Waddell v. Dewey County Bank, 471 N.W.2d 591, 595 n.3 (S.D. 1991); Miller v. Stevens, 256 N.W.2d 152, 155 (S.D. 1934); Swee v. Myrl & Roys Paving, Inc., 283 N.W.2d 570 (S.D. 1979).

Contrary to the trial testimony, the Bank now states on the last three lines of page 3 of its Opposition that: "These cows were to be purchased by a loan he alleges the Bank should have made of $37,500. The loan agreement only required this loan if the guarantees were

increased by the BIA." The Bank cannot now refute the trial testimony of its officer and trial witness, Charles Simon. The Bank's statement in its Opposition are factually incorrect, and are essentially a rehash of the Bank's arguments to the jury.

5. In paragraph 5 of its Opposition, the Bank again restates is arguments set out in paragraph 3 of its Opposition, that interest should not accrue on the loss of the yearlings until they normally would have been sold in October of 1997, and that no interest should be added to the judgment on the loss of the cows because the Longs never intended to sell the cows. The Longs' response to these Bank arguments are the same as the Longs' response to paragraph 3 above. The Longs' sustained their loss and damage when their cattle died on or about February 1, 1997. Under SDCL 21-1-13.1, interest begins from the date of the loss.

6. In paragraph 6 of its Opposition, the Bank argues that interest should not be compounded in calculating the interest to be added to the judgment. The Bank argues in paragraph 2 of its Opposition that it is impossible at this point to determine how the jury arrived at awarding the Longs' damages of $750,000. The Bank cites no authority for either argument. As stated above, it legally makes no difference how or why the jury arrived at their decision to award the Longs damages of $750,000. The trial evidence supports the jury verdict. Whether the jury relied more on one cause of action or the other is legally irrelevant. The jury made its decision to award damages to the Longs of $750,000 based on their loss of cattle, and the trial testimony of Ronnie Long was clear and uncontroverted that the Longs suffered the loss of their cattle in late January and early February of 1997. Then on cross-examination, Ronnie Long again reiterated his direct testimony. Bank counsel asked Ronnie Long, isn't it correct that most of your cattle died in mid to late January of 1997, and Ronnie answered, yes.

Taken together, the jury award of $750,000, and the date that the Longs' cattle died in late January and early February of 1997, means that under SDCL 21-1-13.1 interest should begin to accrue on the jury award of $750,000 from and after February 1, 1997.

The Bank mentions in paragraph 6 of its Opposition that compound interest should not be used in calculating the amount of interest to be added to the judgment. The Bank cites no authority for this position. As the Court is aware, compounding interest is an acceptable practice in computing interest. Every amortization statement of monthly or annual payments involves compounding of interest where the term runs over a period of years. There is nothing unfair or illegal about the method of calculating interest as shown on Attachment A to the Plaintiffs' Motion to Include Interest in the Judgment.

As to the Bank's argument that interest should not be compounded, the Longs note that the Bank has compounded interest as a matter of usual business practice with the Longs over the years. For example, every time the principal and accrued interest of an existing promissory note was paid by an advance from another note, or by rolling it into a new promissory note, the accrued interest on the old note was rolled into the new note as principal, and interest accrued on interest. An example of this is shown on the Bank's comment sheets dated April 7, 1997 (Def. Exh. 1). Also, the Bank's letter dated January 16, 1997, shows a debt of $343,874 owed by the Longs to the Bank, that the Bank agreed to reschedule into a new note over a 20-year term (Exh. 10). The Bank's letter dated December 12, 1996, shows that the new principal balance after adding accrued interest of $71,126, made a new balance of $415,000 for the new note. Interest at 9.25% accrued on the previously accrued interest amount of $71,126 (Exh. 8).

Plaintiffs Longs, in Plaintiffs' Motion to Include Interest in the Judgment, propose that interest be calculated as set out in Attachment A to their Motion. Plaintiffs believe that the

Court could calculate interest as shown on Attachment A to the Motion, and that such calculation of interest would be in accordance with the verdicts of the jury and the testimony of this case.

In view of the Bank's argument concerning compound interest, however, the Court could calculate interest in a different manner. Accordingly, the Longs propose the following alternate method of calculating interest. The Longs propose the following calculation of interest on the jury verdict of $750,000, without compounding interest, from and after the date of Longs' loss, February 1, 1997:

$ 750,000	date of loss 2/1/97
10%	interest rate Category B, § 54-3-16
75,000	interest accrued 2/1/97 to 2/1/98
75,000	interest accrued 2/1/98 to 2/1/99
75,000	interest accrued 2/1/99 to 2/1/00
75,000	interest accrued 2/1/00 to 2/1/01
75,000	interest accrued 2/1/01 to 2/1/02
75,000	interest accrued 2/1/02 to 2/1/03
$1,200,000	as of 2/1/03
	After 2/1/03, interest accrues at $205.48 per day ($75,000 ÷ 365 = $205.48)

Also, the Bank complains that the Category B rate of SDCL 54-3-16 is too high. Rather, the Bank argues that the interest rate of 8.5% set out in the Lease With Option to Purchase should apply. Where the jury determined that the Bank breached the Loan Agreement (Jury Interrogatory Six) and that the Bank's breach prevented the Longs from performing under the Lease With Option to Purchase (Exh. 7) (Jury Interrogatory Two), the Longs submit that the Bank should not be permitted to benefit from the lower interest rate of 8.5% set out in the Lease With Option to Purchase, without considering the higher interest rates which are part of the promissory notes set out in the Loan Agreement (Exh. 6).

It is important to note the interest rates of the promissory notes listed in the Loan Agreement (Exh. 6), which are part of the Loan Agreement that the jury has determined that the Bank breached (Jury Interrogatory Six). These rates of interest are all part of the contract that was breached by the Bank, and are therefore contract rates of interest agreed upon by the parties. Note #98181, which compounds interest on interest, has a rate of interest of 9.5%; Note #98179 has a rate of interest of 10%; Note #98809 has a rate of interest of 9.5%; and Note #98262 has a rate of interest of 11.25%. Some of these notes have provisions for variable rates of interest. All of these promissory notes are listed in the Loan Agreement (Exh. 6) and are the contract rates of interest. The average rate of interest on these notes is 12.19%. When the 8.5% interest rate set out in the Lease With Option to Purchase is factored in, the average interest rate is 10.35%.

Therefore, the Court could consider all of the various interest rates involved in the Loan Agreement and the Lease With Option to Purchase, or the Court could simply use the interest rate set out in SDCL 21-1-13.1, which is the Category B rate specified in SDCL 54-3-16 (10%).

The foregoing facts and authorities support the conclusion that this Court could include in the judgment interest of $75,000 per year, which is 10% per annum on the jury award of $750,000, from and after the date of loss of February 1, 1997, without compound interest. The judgment should include the jury award of $750,000, and in addition, the judgment should include the interest accrued of $450,000 to February 1, 2003, plus per diem interest accrual of $205.48 per day after February 1, 2003.

B. Conclusion:

1. The Longs' damages are based on their loss of cattle which are tangible, not intangible damages.

2. Interest should begin on February 1, 1997, because, according to the clear and uncontroverted testimony at trial, that is the date that the Longs' cattle died.

3. The Court should determine the date of Longs' loss or damage, which was on or about February 1, 1997, and calculate the amount of interest to be included in the judgment.

4. The jury awarded the Longs $750,000 of their claimed loss or damages. The loss or damage occurred on or about February 1, 1997. In calculating the interest to include in the judgment, the Court could calculate the interest as shown on Attachment A to the Plaintiffs' Motion to Include Interest in the Judgment, or as an alternative, the Court could simply compute interest at 10% each year for the six years that have passed since the Longs' cattle died February 1, 1997. This would avoid the compound interest issue raised by the bank. The interest calculation would be:

$ 750,000	date of loss 2/1/97
75,000	2/1/97 to 2/1/98
75,000	2/1/98 to 2/1/99
75,000	2/1/99 to 2/1/00
75,000	2/1/00 to 2/1/01
75,000	2/1/01 to 2/1/02
75,000	2/1/02 to 2/1/03
$1,200,000	

5. The contract rate of interest involves seven different interest rates on the seven notes listed in the Loan Agreement, which range from 9.5% to 11.75%, as well as the 8.5% rate in the Lease With Option to Purchase. The average interest rate is 10.35%. Because of the various contract rates involved, some of which are variable, the Court should simply use the Category B rate specified in the statute of 10%.

Dated this 25 day of February, 2003.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: [signature]
JAMES P. HURLEY
Attorneys for Plaintiffs
818 St. Joe St.; P.O. Box 2670
Rapid City, SD 57709-2670
(605) 343-1040 (phone)
(605) 343-1503 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Plaintiffs' Reply to Defendant Bank of Hoven n/k/a Plains Commerce Bank's Opposition to Including Interest on the Judgment upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to said addressee, to wit:

Mr. David A. Von Wald
Attorney at Law
P.O. Box 468
Hoven, SD 57450

which address is the last address of the addressee known to the subscriber.

Dated this 25 day of February, 2003.

[signature]
JAMES P. HURLEY

Attachment 4

PLAINTIFFS' DAMAGES

1997

230 bred cows died January & February 1997 @ $620 =	$142,600.00
260 mixed steer & heifer yearlings died January & February 1997 @ $700 =	182,000.00
10 yearling culls @ $700 =	7,000.00
CRP Annual Payment =	4,000.00
	$335,600.00
-FEMA Payment	-48,000.00
	$287,600.00
Operating Expense (34%)	-112,744.00
	$174,856.00

1998

230 bred cows died January & February 1997 @ 90% calf crop = 207 calves which would have been born in 1998	
207 yearlings would have been born in 1997 @ $600 =	$124,200.00
Operating Expenses (34%)	-42,228.00
	$ 81,972.00
CRP Annual Payment =	6,000.00
1998	$ 87,972.00

1999

330 bred cows @ 90% calf crop = 297 calves born 1999	
207 yearlings would have been born in 1998 @ $700 =	$144,900.00
Operating Expenses (34%)	-49,266.00
	$ 95,634.00
FSA Payment =	23,000.00
Use of Land =	65,000.00
	$183,634.00

2000

330 cows @ 90% calf crop = 297 calves that would have been born in 2000		
297 yearlings would have been born in 1999 @ $800 =	$237,600.00	
Operating Expenses (34%)	-80,786.00	
	$156,814.00	
FSA Farm Program Payment =	23,000.00	
Use of Land =	65,000.00	
	$244,814.00	
2000	$244,814.00	Loss

2001

330 cows @ 90% calf crop = 297 calves that would have been born in 2001	
297 yearlings would have been born in 2000 @ $800 =	$237,600.00
Operating Expenses (34%)	-80,784.00
	$156,816.00
FSA Payment =	23,000.00
Use of Land =	55,000.00
	$234,816.00

2001	$234,816.00	Loss

2002

330 cows @ 90% calf crop = 297 calves that would have been born in 2002 @ $420	
330 x $420 =	$138,600.00
297 yearlings would have been born in 2001 @ $700 =	207,900.00
Operating Expenses (34%)	-117,800.00
	$228,700.00
FSA Payment =	23,000.00
Use of Land =	50,000.00
Replace Fences =	9,000.00
	$310,700.00

Summary

1997	$ 174,856
1998	87,972
1999	183,634
2000	244,814
2001	234,816
2002	310,700
	$1,236,792

Attachment 5

CHEYENNE RIVER SIOUX TRIBAL COURT)
CHEYENNE RIVER SIOUX TRIBE : SS
CHEYENNE RIVER INDIAN RESERVATION)

LONG FAMILY LAND and CATTLE COMPANY – RONNIE and LILA LONG
Plaintiff

Vs.

NOTICE OF ENTRY OF ORDER

EDWARD and MARY MACIEJEWSKI,
RALPH and NORMA J. PSICKA,
And THE BANK of HOVEN, nka PLAINS COMMERCE BANK
Defendant

Case No.: C-120-99

TO: David A. Von Wald and Kenneth E. Jasper and James P. Hurley

YOU ARE HEREBY NOTIFIED that a **ORDER** was entered in the above-entitled matter and entered in the office of the Clerk of Court for the Cheyenne River Sioux Indian Reservation, on or about the **07th day of January, 2003** as more fully appears by the attached copy of same **ORDER.**

Dale Charging Cloud

DALE CHARGING CLOUD, CLERK
CHEYENNE RIVER SIOUX TRIBE

CERTIFICATE OF SERVICE

I, **Dale Charging Cloud**, do hereby certify that I served a true and correct copy of the foregoing **ORDER** on the persons next designated by mailing same by first class mail, postage prepaid, addressed as follows:

Mr. David A. Von Wald
Attorney at Law
PO Box 468
Hoven, SD 57450-0468

Mr. Kenneth E. Jasper
Attorney at Law
PO Box 2093
Rapid City, SD 57709-2093

Mr. James P. Hurley
Attorney at Law
PO Box 2670
Rapid City, SD 57709-2670

Dated this 07th day of January, 2003.

Dale Charging Cloud

DALE CHARGING CLOUD, CLERK
CHEYENNE RIVER SIOUX TRIBE

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

IN CIVIL COURT

IN GENERAL SESSION

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

Plaintiffs,

R-120-99

vs.

ORDER

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

Defendants.

The Defendant Bank has moved this Court for judgment notwithstanding the verdict, or in the alternative a new trial, on several causes of action asserted in the Plaintiffs' complaint and tried to a seven-member jury[1] on December 6 and 11, 2002. This Court dismissed several counts of the complaint, including one for fraud, one for failure of consideration, one pleading an unconscionable contract, and one praying for rescission of contract, after submission of the Plaintiffs' case, but permitted four counts- breach of contract, bad faith, discrimination, and violation of self-help remedies- to be submitted to the jury.[2] The Defendant's counterclaim for unlawful entry and detainer was heard by the Court at the same time as the legal issues were tried to the jury. The jury returned its verdict in the form of six interrogatories finding for the Plaintiffs on the causes of action alleging breach of contract, bad faith, and discrimination and finding for

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

[2] The Court also dismissed, prior to trial, the count of the complaint alleging fraud in the inducement of a personal representative's deed from the estate of Kenneth L. Long to the Bank prior to trial on the ground that this count was an attempt to collaterally attack state court probate proceedings and should have been brought in the state court.

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

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

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

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

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

BREACH OF CONTRACT ACTION

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

However, the Longs still occupied the land and were receiving the CRP payments on the land. It is impossible to gauge whether valid consideration was given by the Plaintiffs for the loan agreement without also viewing the lease with the option to purchase, which the Court has already ruled, in denying the Defendant's motion for summary judgment on its counterclaim for eviction, was a related document under the integrated document doctrine. See Battery Steamship Corp. v. Refineria Panama S.A.,

513 F.2d 735, 738 n.3 (2d Cir. 1975). It is possible that the jury found consideration in the fact that the Longs were agreeing to continue the operation of their cattle ranch in order to pay the entire amount of principal plus interest instead of having the Bank call the loans and collect the guarantee from the BIA in an amount substantially less than what was owed by the Plaintiffs. In addition, the Longs agreed to assign the CRP payments to the Bank as part of the plan to permit them to get on their feet again and attempt to regain title to the land that was in the Long family name for many years. The Court cannot conclude that there is no evidence that supports the jury's verdict and therefore denies the motion for judgment notwithstanding the verdict on the claim that consideration was wanting.

The Bank also contends that even if consideration existed, no evidence was submitted to the jury to support the Plaintiffs' claim that the Bank breached the loan agreement. The Bank contends that by the time it was required to perform under the loan agreement- late winter of 1997- the Plaintiffs had suffered substantial livestock losses due to the catastrophic winter of 96-97 and could not have possibly met the loan payments under the loan agreement. The Bank also contends that the only thing it promised to do in the loan agreement was to seek an increase in the BIA guarantee, which it did and the BIA delayed action on the request, and the advance of operating monies of $70,000 was contingent upon the increased guarantee by the BIA which never came.

The Plaintiffs' theory at trial was that the guarantee of $70,000 in annual operating loans was breached and that the advances were not contingent upon the increase by the BIA in the guarantee. The Plaintiffs advanced the theory that had the Bank advanced the $70,000 in operating costs to it they would not have had the

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

The Bank also seems to be contending in its motion that it should have been excused from performing the loan agreement after the winter of 96-97 because the catastrophic livestock losses suffered by the Longs precluded them from paying the notes that were consolidated into the loan agreement. This is a legal issue that the Bank did not ask for a jury instruction on and was not therefore properly preserved at trial. Even had it been proposed as a defense, however, the success of this defense would depend upon the jury accepting the premise that the Bank had complied with the loan agreement up to the point when the Longs lost their livestock. The Plaintiffs' theory of the case appeared to be that the operating loan, had it been made prior to the cattle losses, would have prevented those losses and this was a question of fact for the jury to resolve.

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

BAD FAITH CAUSE OF ACTION

The jury also returned a verdict finding that the Bank acted in bad faith when it attempted to gain the increase in the guarantee from the BIA. The Bank contends that there is no evidence to support this conclusion and the verdict should therefore be set aside. Although there is evidence from the record that the BIA was somewhat derelict in delaying a decision on the guarantee until after the Longs had suffered substantial cattle losses,[4] the undisputed evidence presented to the jury was that the Bank failed to respond to a request from the BIA to correct the submission for the increased guarantee in accordance with federal regulations attached to the letter notifying the Bank and the Longs of the insufficient application. The Bank decided not to respond to the request because it apparently had concluded that with the Longs' cattle losses the Longs were no longer able to make the payments on the loan agreement. Admittedly, the Bank did proceed to loan more monies to the Longs and to re-amortize additional loans. However, the jury must have decided that this was not a substitute for the $70,000 in operating monies the Longs needed in order to survive the winter of 96-97.

The Bank argues that the bad faith claim is subsumed into the cause of action alleging breach of contract and a separate cause of action should not have been tried to the jury on this issue. The Court believes that the bad faith claim relates to the failure of the Bank to follow through with the promise to seek an increase in the BIA guarantee, while the breach of contract action relates to the failure of the Bank to make the operating

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

loans as promised in the loan agreement. These are discrete claims and both impacted the ultimate inability of the Longs to purchase back the land of Kenneth Long under the lease with an option to purchase.

DISCRIMINATION

The third verdict returned against the Defendant Bank related to the claim of the Longs for discrimination in the lending practices of the Bank. During the trial a document was admitted into evidence, without objection, wherein the Vice-President of the Bank advised the Longs that the Bank would not sell them the land they obtained from the personal representative of the estate of Kenneth Long by contract for deed because of the "jurisdictional problems if the Bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." (Pl's Exhibit 4). This letter was dispatched after the Parties had apparently reached an understanding that the Bank would resale the Longs the land on a contract for deed. The Bank then proceeded to sell a parcel of the land to the Maciejewskis, non-Indians, on a contract for deed. The Court determined that his was prima facie evidence that the Bank denied the Longs the privilege of contracting for a deed because of their status as tribal members and thus submitted the count to the jury for determination over the objection of the Bank, which timely made a motion for a direct verdict on that issue and objected to the jury instruction and interrogatory on the issue.

The Bank reiterates its argument that this Court has no jurisdiction over a claim of discrimination arising under federal law against a non-Indian entity. Federal law prohibits any entity that receives the benefit of federal financial assistance from discriminating against any person in the delivery of services. See 42 U.S.C. 2000d. This statute has been

held to prevent a bank from "redlining" a certain area because of the racial composition of the residents of that area. See Laufman v. Oakley Bldg and Loan, 408 F.Supp 489 (SD Ohio 1976). The Longs are Indian residents of the Cheyenne River Sioux Indian reservation who claimed that the Bank denied them a privilege of contracting for a deed that was granted non-Indians.[5]There was uncontroverted evidence during the trial that the Bank was receiving the benefit of Department of Interior guarantees and CRP payments under federal programs and thus the Bank appears to be covered by federal law.

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

The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks. It is undisputed in this case, and was conceded by the Bank, that the Bank had a consensual commercial relationship with the Longs, enrolled members of the Cheyenne

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[5] In denying the Bank's motion for a directed verdict on this issue, the Court stated that it did not feel that the mere denial of the contract for deed to the Longs was conclusive evidence of discrimination and thus instructed the jury that it must find that the Bank's decision to deny the contract for deed was based "solely" upon their status as tribal members, thus permitting the jury to return a verdict for the Bank if it determined that the Bank had other non-discriminatory reasons to deny the contract for deed.

BANK OF HOVEN

FAX (605) 948-2198

TELECOPIER COVER LETTER

TO John Lemke or Harley Henderson | DATE 12-2-98

FROM: Charles Simon, BOH | # OF PAGES 1

RECEIVED
DEC 4 1998
C.R.S.T. TRIBAL COURT

RE:

COMMENTS/ACTION This letter will notify you and Ronnie Long that there will be no extension of time from the December 5, 1998 deadline for option to purchase. Possession of this property by lessee, Long Family Land and Cattle Company, Inc., will terminate on December 5,1998.

[signature], VP

REPLY REQUESTED: YES ( ) WHEN:
NO ( )

[illegible] CONFIDENTIALITY NOTE
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PLAINTIFF'S EXHIBIT 18