

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Plains Commerce Bank,)	CIV 05-3002
)	
Plaintiff,)	
)	
vs.)	DEFENDANTS’ BRIEF IN
)	SUPPORT OF DEFENDANTS’
Long Family Land and Cattle Company,)	MOTION FOR SUMMARY JUDGMENT
Inc., and Ronnie and Lila Long,)	AND IN OPPOSITION TO PLAINTIFF’S
)	MOTION FOR SUMMARY JUDGMENT
Defendants.)	

Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long (the Longs) submit this Brief in Support of Defendants’ Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment.

The Defendant, Long Family Land and Cattle Company, Inc., is referred to as the Company, and the Company and the Defendants, Ronnie and Lila Long, are sometimes collectively referred to in this Brief as the Longs. Ronnie and Lila Long are referred to as Ronnie and Lila Long. Plaintiff, Plains Commerce Bank, is referred to in this Brief as the Bank. Attachments to Defendants’ Brief in Support of Defendants’ Motion for Summary Judgment are referred to as (Att. [1] ____), and Attachments to the Second Affidavit of Ronnie and Lila Long are referred to as (Att. [2] ____). Attachments to the Third Affidavit of Ronnie and Lila Long are referred to as (Att. [3] ____).

1. Jurisdiction:

The Cheyenne River Sioux Tribe properly exercised jurisdiction over this action. In Montana v. United States, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258 (1981), the Supreme Court set out rules concerning tribal civil jurisdiction over non-Indians. After stating the general rule of no jurisdiction over nonmembers, the Court in Montana cautioned that “[t]o be sure, Indian

tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” 450 U.S. at 565, 101 S. Ct. at 1258. Under the two exceptions established by the Court, tribes retain jurisdiction over: (1) “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” and (2) “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 50 U.S. at 565-66, 101 S. Ct. at 1258.

a. First Exception:

It is clear in this case that the Bank entered into numerous consensual relationships with the Longs’ Indian-owned company and the individual CRST members, Ronnie, Lila, and Maxine Long. The Bank conducted discussions, negotiations, collateral inspections, and other activities on the CRST Reservation on both fee and trust land. The Bank entered into commercial dealing, contracts, leases, and other consensual relationships with CRST members, Ronnie, Lila, and Maxine Long.

The Bank was the lender for the Company since 1989. (Simon Aff. para. 4) The Bank also loaned money to Ronnie and Lila Long. Some of the Bank’s loans to the Company were guaranteed by the Bureau of Indian Affairs (referred to in this Brief as the BIA) (Simon Aff. para. 4; Long Aff. para. 10)

The Bank entered into consensual relationships with the Company and with Tribal members, Maxine, Ronnie, and Lila Long. The Bank loaned money to Ronnie and Lila Long which involved loan agreements, promissory notes, and security agreements. The Bank stated in its Brief in Support of Motion for Summary Judgment in the Tribal Court, dated September 24, 2002, that:

Plains Commerce Bank, formerly Bank of Hoven, has been doing business with various members of the Long Family and entities owned by them since approximately 1989. Kenneth and Maxine Long, husband and wife, as well as their son, Ronnie Long, and his wife, Lila Long, and Long Family Land and Cattle Company, Inc., the corporation owned by them, all did business with Plains Commerce Bank.

The Bank made numerous loans to Long Family Land and Cattle Company, Inc. Kenneth Long and Maxine Long mortgaged all of the land which they owned in Dewey County, which was approximately 2,230 acres, to the Bank as collateral for these loans. Both Kenneth Long and Maxine Long personally guaranteed the debt of Long Family Land and Cattle Company, Inc. to the Bank.

The Bank has admitted consensual relationships with the Company and with CRST members, Maxine, Ronnie, and Lila Long. The Bank made loans to the Company, which was at all times an Indian owned and controlled corporation, with at least 51% of the stock owned by Indian members of the CRST. (Att. [1] 20, Tr. Ex. 1, Article IX) The Bank required the Company to grant the Bank a security interest in its livestock, machinery, crops, and feed. (Att. [2] 2) The Bank entered into contracts and agreements with the Company such as loan agreements, promissory notes, security agreements, a lease with option to purchase, and other consensual relationships. (Att. [1] 3, Tr. Exs. 6 and 7)

The Bank required Kenneth Long and CRST member, Maxine Long, to mortgage their 2,230 acres and house to the Bank for collateral for loans to the Company. (Att. [2] 5, 6, 7) The Bank required Kenneth Long and CRST members, Maxine, Ronnie, and Lila Long, to personally guarantee loans to the Company. (Att. [2] 2, 3, 4) Kenneth Long, and CRST members, Maxine, Ronnie, and Lila Long, were required by the Bank to grant a security interest in their personal property including their livestock, machinery, crops, and feed. (Att. [2] 1) The Bank required Ronnie Long in connection with the Lease With Option to Purchase to assign to the Bank payments of \$44,000 per year received from Kenneth Long's CRP contract bequeathed to Ronnie Long under his will. (Att. [1] 3, Tr. Exs. 6, 7) Over the years, such consensual

agreements included loan agreements, personal guarantee agreements, promissory notes, mortgages, and other arrangements.

Such consensual relationships extended over a period of years beginning in 1989. The Bank became the owner of the Longs' 2,230 acres and house located on the CRST Reservation in December 1996. (Simon Aff. Ex. 3) The Bank was a landowner of the 2,230 acres located on the Reservation through 1999, and is still the owner of approximately 945 acres to the present date. The Bank entered into the Loan Agreement (Att. [1] 3, Tr. Ex. 6) and the Lease With Option to Purchase (Att. [1] 3, Tr. Ex. 7) with the Company in December 1996. Such lease with the Bank as the landlord and the Company as the tenant with option to purchase existed by its terms through December 1998.

The loans of the Bank to the Company were guaranteed by the BIA solely because the Company was an Indian owned and controlled business. The Bank benefited from the BIA guarantees. After the Longs' cattle died, the Bank submitted a claim on the BIA guarantees, and the Bank received \$392,968.55 from the BIA. (Tr. Ex. 16) In addition, the Bank received \$88,000 in CRP payments on the land under the Lease With Option to Purchase, received the deed to the house and land valued by the Bank at \$478,000 in the Loan Agreement, received \$100,000 from the life insurance of Kenneth Long, and the Bank received FSA farm program payments as owner of the land. Clearly the Bank benefited from the consensual relationships with the Indian owned Company and the CRST members.

Such activity of the Bank may be properly characterized as a nonmember landowner on the CRST Reservation. In addition, the Bank came into CRST Tribal Court and filed a Notice to Quit addressed to CRST member, Ronnie Long, to remove him and his wife and CRST member,

Lila Long, and their children from the land that was leased to the Company by the Bank. At the Bank's request, the Tribal Court served the Notice to Quit on Ronnie Long.

In addition to the consensual agreements entered into by the Bank with the Longs, there were consensual agreements entered into by the Bank and the BIA concerning the Longs' loans. The Bank purchased the Longs' loans with BIA guaranty from the Dewey County Bank in 1988. Transfer of the loans to the Bank was acknowledged and approved by the BIA. (Att. [3] p. 0735, Simon depo. Ex. 37) The Bank requested modification of the BIA Guaranty in 1992. The modification was approved and signed by the BIA, and signed by the Bank. (Att. [3], Simon depo. Ex. 35) The Loan Guaranty states, "This certificate is evidence of the loan described herein being guaranteed under the Indian Financing Act of 1974 (25 U.S.C. sec. 1451, et seq.) and regulations of the Department of the Interior (25 CFR sec. 93, et seq.) (Att. [3], Simon depo. Ex. 37)

The Bank would not make loans to the Longs unless the BIA agreed to a guaranty of the loans. For example, the Bank made the loan for \$60,000 "contingent upon receiving an 80% BIA guaranty." (Att. [3], p. BH 0449) The Bank paid the premium to the BIA. (Att. [3], Simon depo. Ex. 36) Each BIA guaranty loan involved a three party agreement. The Bank agreed to enter into a loan agreement with the Longs, and the BIA agreed to a BIA guaranty of the loan.

The BIA Guaranty of Longs' loans involved a consensual agreement entered into by the Bank. The Bank and the Longs entered into a loan agreement, and the BIA agreed to a BIA guaranty of the loan. The process involved Bank approval of a loan contingent upon BIA guaranty, a request by the Bank to the BIA for a loan guaranty, approval of the loan guaranty signed by the BIA upon conditions set out by the BIA, signature of the Bank accepting the conditions, and payment of the premium by the Bank to the BIA. (Att. [3], Simon depo. 38) The

Bank entered into many such consensual agreements with CRST Indian members and Indian-owned entities located on the CRST Reservation, with consensual BIA guaranty loan agreements entered into between the Bank and the BIA. (Att. [3], p. BH 0459, 0462)

The Bank paid money to the BIA under the terms of the guaranty agreement. (For example, see Att. [3], pp. 00684, 00685, 00678, BH 0458) The BIA sent interest subsidy payments to the Bank under the terms of the Guaranty Agreement. (For example, see Att. [3], pp. 0086, 00688, 00691)

The purpose of the BIA guaranty loan program is stated in 25 CFR sec. 13.2, “. . . for financing economic enterprises which contribute beneficially to the economy of an Indian reservation,” and “This program will provide Indians with additional sources of financing needed to develop and manage their reservation resources to a higher degree.” (Att. [3] 2) The Longs’ family farm and ranch economic enterprise contributed beneficially to the economy of the CRST Reservation. For example, their lease payment was approximately \$17,000 a year to the Tribe and the BIA for lease of their CRST Range Unit of approximately 6,400 acres of trust land. They have leased this same range unit for 20 years.

Without the BIA guaranty, the Longs would not have been able to obtain bank loans to operate their family farm and ranch business. They were able to be self employed and make their own income to raise and care for their family on the reservation where good jobs are in short supply. The BIA Guaranty Program has benefited their family business and other Indian-owned farm and ranch businesses on the reservation.

The Bank sent payments to the Tribe and the BIA to pay the lease payments for the trust land. Ronnie Long and his daughter, Bonita Ritcher, have leased this CRST Range Unit of

approximately 6,400 acres from the Tribe and the BIA for 20 years. (Att. [3], p. 00594) All of the Longs' cattle are located year around on the Range Unit.

On April 16, 1996, a bank officer came on the Reservation and inspected the 2,230 acres of land, hay, and machinery. Ronnie Long and a CRST credit and financial planning officer were there also. Ronnie Long, the credit and financial planning officer, and the Bank officer went on the Range Unit trust land to inspect the cattle and feed conditions there. Discussions concerning a new loan agreement were had at the residence of the Longs with Ronnie and Lila Long, the Bank officer, and the CRST credit and financial planning officer. (See Simon Second Aff., p. 4, para 4) The home site of the Longs is contiguous with the 2,230 acres, and consists of ten acres of trust land and five acres of deeded land. Discussions on the new loan agreement with CRST Tribal officer, Harley Henderson; CRST credit and financial planning officer, John Lemke; Bank officers; and the Longs, took place at the CRST Tribal offices, which are located on Tribal trust land.

The specific consensual agreement involved in this case is the Loan Agreement and Lease With Option to Purchase. (Tr. Exs. 6, 7) The Longs claimed in Tribal Court that the Bank breached the Loan Agreement, breached the implied covenant of contractual good faith, and discriminated against the Longs in connection with the Lease With Option to Purchase and the Loan Agreement.

The jury decided that (a) the Bank breached the Loan Agreement; (b) the breach of contract prevented the Longs from performing under the Lease With Option to Purchase; (c) the Bank intentionally discriminated against the Longs based solely upon their status as Indians or tribal members in the Lease With Option to Purchase; and (d) the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA as referenced in the Loan Agreement

dated December 5, 1996. (Att. [1] 1) The Longs' claims and the jury verdicts are closely tied to and arise from the Bank's conduct in connection with the consensual agreements: the Loan Agreement and the Lease With Option to Purchase.

Trial Exhibit 23 shows the damages the Longs claimed at trial. All of the damages claimed were for loss of the cattle that died and loss of income from the cattle and land because the Bank breached the Loan Agreement. The Bank breached the Loan Agreement because it did not make any part of the \$70,000 operating loan, did not make an emergency loan as provided by CFR 103.22 (Att. [3] 2, Tr. Ex. 12) (Att. [3] 11, Tr. 166), and failed to make the \$37,500 loan for the Longs to buy 110 calves. (Att. [3] 11, Tr. 166) The Longs suffered loss of income from the loss of the cattle and loss of the land sold by the Bank. (Tr. Ex. 23) The Longs requested damages for breach of contract and breach of contractual good faith. The Longs did not request any damages for discrimination and did not request punitive damages.

The Longs submit that the facts of this case fit the Montana first exception, and the Tribal Court had jurisdiction to decide Longs' claims, which are basically contract dispute claims.

The discrimination claim arose from the negotiations and discussions concerning formation of the Loan Agreement and Lease With Option to Purchase, which took place on the CRST Reservation on the 2,230 acres of fee land, and at the CRST Tribal offices, which is Tribal trust land. The proposed plan of financing changed direction, and that change is reflected in Trial Exhibit 4. Also, Longs claimed at trial that the Bank switched the October cash flow which everyone agreed would work, including the BIA, and replaced it with a three page cash flow, which is attached to the letter, which would not work. (Tr. Ex. 8) The three page cash flow was sent to the Bank from the CRST Tribal office on December 11, 1996, without Longs' knowledge or approval, six days after the Loan Agreement and Lease With Option to Purchase was signed.

The purpose of the letter (Tr. Ex. 8) was to obtain BIA signature approval, however, the December cash flow sent to the BIA showed that the plan would not work. Of course, the BIA would not approve such modified request. The BIA requested a more complete application. (Tr. Ex. 11) The Bank never prepared or submitted a more complete application to the BIA.

It is evident from the jury verdicts above, that the discrimination claim was directly tied to and arose out of the formation and approval process involved with the Loan Agreement and Lease With Option to Purchase. All of the damages awarded by the jury were based solely on the Longs' loss of cattle because the operating loan was not made, loss of income from their cattle, loss of income from the 110 calves that could not be purchased because the cattle purchase loans were not made, and loss of use and income from their land. (Tr. Ex. 23) The jury determined that because the Bank breached the Loan Agreement, the Longs could not perform under the Lease With Option to Purchase. (Att. [1] 1) All of the Longs' damages presented to the jury were directly connected to the breach of the Loan Agreement, which resulted in loss of cattle and cattle income and loss of land and income from the land.

The CRST Law and Order Code, Chapter IV, Jurisdiction, provides the jurisdictional basis for the CRST Tribal Court in this case. It provides in applicable part:

Sec. 1-4-1.

. . . that the public interest and the interests of the Cheyenne River Sioux Tribe demand that the Tribe provide itself, its members . . . with an effective means of redress in . . . civil cases against members and non-Tribal members who through their . . . presence, business dealings, other actions or failures to act . . . incur civil obligations to persons or entities entitled to the Tribes protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, . . . and other persons and entities over which the Tribe has previously elected to exercise jurisdiction. The jurisdictional provisions of this Code . . . should be applied equally to all persons, members and nonmembers alike.

Sec. 1-4-3, Personal Jurisdiction.

(1) . . . the word “person” shall include any individual, firm, company, association, or corporation.

(2) . . . the Courts of the Cheyenne River Sioux Tribe shall have civil . . . jurisdiction over the following persons:

- A. Any person . . . located or present within the Reservation for:
 - 1. Any civil cause of action.
 - B. Any person who transacts, conducts, or performs any business activity within the Reservation, for any civil cause of action. . . .
 - C. Any person who owns . . . any property within the Reservation, for any cause of action
 - D. Any person who commits a tortious act or engages in tortious conduct within the Reservation. . . for any civil cause of action.

Sec. 1-4-4, Jurisdiction Over Property

The CRST Court “shall have jurisdiction over any real or personal property located on the Reservation to determine the ownership thereof or of rights therein or to determine the application of such property to the satisfaction of a claim for which the owner of the property may be liable.”

Sec. 1-4-5, General Subject Matter Jurisdiction.

The CRST Court “shall have jurisdiction over all civil courses of action” which involve “the Tribe” . . . “or a member of the Tribe.”
(Att. [3] 3)

b. Second Exception:

The Montana second exception applies in this case because the conduct of the Bank threatens or has some direct effect on the economic security or welfare of the Tribe.

It is in the best interest of the economic security or welfare of the Tribe to assist its members and their businesses on the Reservation to stay in business and remain economically healthy. The Tribe was directly involved with the financial affairs of the Longs and other members over the years through its credit and financial planning officers. They work with the members and the BIA to obtain BIA guaranty for loans.

The purpose of the BIA guaranty loan program is stated in 25 CFR sec. 13.2, “. . . for financing economic enterprises which contribute beneficially to the economy of an Indian reservation,” and “This program will provide Indians with additional sources of financing needed

to develop and manage their reservation resources to a higher degree.” (Att. [3] 2) The Longs’ family farm and ranch economic enterprise contributed beneficially to the economy of the CRST Reservation. Their lease payment was approximately \$17,000 a year to the Tribe and the BIA for lease of their Range Unit of approximately 6,400 acres of trust land. Ronnie Long and his daughter, Bonita Ritcher, have leased this Range Unit from the Tribe and the BIA for 20 years. (Att. [3], p. 00594) All Longs’ cattle are located year around on the Range Unit.

Without the BIA guaranty, the Longs would not have been able to obtain bank loans to operate their family farm and ranch business. The Longs were able to be self employed and make their own income to raise and care for their family on the CRST Reservation where good jobs are in short supply. The CRST involvement and the BIA Guaranty Program has benefited the Longs’ family business and other Indian-owned farm and ranch businesses on the reservation.

Because of the Bank’s breach of the Loan Agreement, all of the efforts of the Longs, the Tribe, and the BIA to maintain the Longs’ business on the Reservation is ruined, and the Longs are barely able to operate. Such conduct of the Bank threatens the economic security and welfare of the Tribe. The BIA paid the Bank under the guaranty, but now the Longs owe the BIA, and the Longs do not have the financial ability to pay the BIA. Such conduct and such results present serious adverse effects on the economic security and welfare of the CRST. Therefore, this case fits within the Montana second except, and the Tribal Court had jurisdiction over the breach of contract and related claims presented by the Longs against the Bank.

c. The Bank’s Claim Against the Longs:

The facts in this case provide a further jurisdictional basis. The Bank filed a counterclaim against the Longs demanding damages for Longs’ alleged wrongful possession of

the 2,230 acres, demanding that the Longs be evicted, and that the Bank have immediate possession of the land. The Bank presented its claims for damages as stated on Def.'s Tr. Ex. 12.

The Court in Montana cited Williams v. Lee, as an example of both the first and second exceptions. Non-Indian Lee filed suit in state court against Williams, who was an Indian. Williams bought goods at Lee's store on the reservation and failed to pay for them. Williams argued that the tribal court had jurisdiction, and the Supreme Court agreed, noting that tribal courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." The court found that it was "immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 222, 223. Williams is a case involving claims brought by a nonmember against tribal members. Williams is analogous to the instant case. The Bank, through its counterclaim, claimed Longs were wrongfully retaining the land, and brought claims for damages and eviction against the Longs. The Bank filed a Notice to Quit in Tribal Court, and also filed a counterclaim alleging wrongful possession and damages against the Company and Ronnie and Lila Long in Tribal Court. The Bank chose to appear first in Tribal Court requesting the Tribal Court file and serve its Notice to Quit on the Longs. The Longs then filed their complaint, and the Bank filed its counterclaim against the Longs. Williams v. Lee applies because the Bank is a nonmember outsider filing claims in Tribal Court against members. Thus, the CRST has jurisdiction over this case.

3. Tribal Court Adjudication of Contract and Tort Claims:

Tribal Court adjudication of contract and tort claims is a well-established method, under Montana's first exception, of regulating the activities of non-Indians who enter consensual relationships with tribal members.

For the first time in this case, in its memorandum of law in opposition to the Longs' motion for summary judgment, the Bank argues that tort law – or to be more precise, the adjudication of common law tort claims in tribal court – is not an appropriate mechanism for Indian tribes to regulate the activities of non-Indians who enter consensual relationships with Indian tribes or their members. See Pl. Mem. Opp. [doc. 43], pp. 4-5.

In support of this proposition, the Bank cites dicta from the Ninth Circuit's recent split decision in Ford Motor Co. v. Todecheene, 394 F.3d 1170 (9th Cir. 2005). In Todecheene, the court stated that “[t]he consensual relations exception recognizes that tribes have jurisdiction to regulate consensual relations ‘through taxation, licensing, or other means.’” 394 F.3d at 1180 (quoting Montana v. U.S., 450 U.S. 544, 565-566, 101 S. Ct. 1245, 1258 (1981)). The court considered – but did not decide – whether tort law is included within the “other means” by which tribes may regulate non-Indian transactions with tribal members. The court recognized that “[t]ort law does constitute a form of regulation,” 394 F.3d at 1180, but suggested in a footnote that regulating non-Indian transactions “through the prolonged and uncertain vehicle of litigation is worlds apart from taxation and licensing mechanisms.” Id., at 1180 n.6.

Relying on this language, the Bank appears to argue that, even if it entered a consensual relationship with the Longs, it cannot be subjected to tort litigation in tribal court since tort law is not “‘similar in nature to taxation and licensing’” and, therefore, is not a valid means of tribal regulation under Montana's first exception. Pl. Mem. Opp. [doc. 43] at 4 (quoting Todecheene, 394 F.3d at 1180 n.6).

The Bank reads too much into the Ninth Circuit's dicta in Todecheene. The court's decision in Todecheene did not turn on the question of whether tort law is a legitimate form of tribal regulation of non-Indians who enter consensual relationships with tribes or tribal members.

Rather, the case turned on the question of whether there was a sufficient nexus between the alleged tortious conduct and the consensual relationship at issue. The case involved a product liability claim filed by the parents of a tribal law enforcement officer who was killed in a one-car accident while driving a Ford Expedition on the Navajo Indian Reservation. The vehicle had been leased by the Navajo Nation from the Ford Motor Credit Company, a wholly-owned subsidiary of the Ford Motor Company. This lease was the consensual relationship upon which the Todecheene family asserted tribal jurisdiction under the first Montana exception. The Ninth Circuit rejected the argument, holding that, “one would be hard-pressed to argue convincingly that the product liability action has a direct nexus to the lease itself.” 394 F.3d at 1180.

Although the Ford Expedition was financed through the contract, Todecheene was not a party to the contract and this action involves her parents’ lawsuit against Ford, not any lawsuit initiated by the Tribe. In addition, although “but for” the lease agreement Todecheene would not have been driving the Ford Expedition, this product liability action is considerably removed from the agreement itself.

Id., at 1180. The court held that a “direct link between the asserted commercial relationship and the lawsuit is required to support the assertion of tribal jurisdiction.” *Id.* at 1178. Finding no such “direct link” or nexus, the court denied the tribe’s jurisdiction.¹

The Todecheene court did not say that tort law is an inappropriate method of regulating the activities of non-Indians who enter consensual relationships with tribes or their members. Such a holding would be absurd. If that were the case, tribal members would be barred forever from suing non-Indians in tribal court for fraud, misrepresentation, coercion, unconscionability, duress, discrimination, or other tortious conduct committed by those non-Indians in the course of

¹ While it is true that the lease contained a forum selection clause favoring tribal court, the Ninth Circuit found that this clause was “directed toward contract disputes” and did “not appear to cover a product liability tort action.” 394 F.3d at 1180. Thus, the court likely would have upheld tribal jurisdiction over a contract dispute arising concerning the lease or its formation, since there would have been a sufficient nexus between the litigation and the contract.

their commercial dealings, contracts, or other transactions with tribal members. This, clearly, is not the Montana rule.

To somehow elevate the Ninth Circuit's dicta concerning the availability of tort law as a method of tribal regulation to the status of a rule of law, as the Bank would have this Court do, is at odds with the Supreme Court's decision in Montana, its later decisions applying Montana, and the decisions of the lower federal courts applying Montana. As will be seen, under these precedents, tribal court adjudication of common law causes of action, including tort claims, is an appropriate method by which tribes may regulate the activities of non-Indians who enter consensual relationships with the tribes or their members.

A. The *Montana* Court Recognized Tribal Adjudication of Common Law Claims as a Valid Method of Regulating the On-Reservation Conduct of Non-Indians.

In Montana v. U.S., 450 U.S. 544, 565-566, 101 S. Ct. 1245, 1258 (1981), the Supreme Court held that:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

The Court cited four cases in support of this proposition: Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 (1959); Morris v. Hitchcock, 194 U.S. 384, 24 S. Ct. 712 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905); and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069 (1980). Three of these cases – Morris, Buster, and Washington - concerned tribal authority to tax or license the on-reservation activities of non-

Indians.² The fourth, Williams v. Lee, concerned the authority of Indian tribal courts to adjudicate disputes involving non-Indians. The Court held in Williams v. Lee that, “the right of Indians to govern themselves” includes the right to exercise jurisdiction over civil suits involving non-Indians who transact business with tribal members in Indian country. 358 U.S. at 223, 79 S. Ct. at 272. The suit at issue in Williams v. Lee was a common law breach of contract action between a non-Indian general store proprietor and two tribal members who had entered a consensual relationship for the sale of goods on the Navajo Indian Reservation. 358 U.S. at 217-218, 79 S. Ct. at 269.

The Montana Court’s citation of Williams v. Lee makes clear that tribal court adjudication of common law actions involving non-Indians is included within the “other means” by which tribes may “regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members.” See Montana, U.S. at 565-566, 101 S. Ct. at 1258.

In its dicta in Todecheene, the Ninth Circuit did not interpret the first Montana exception in light of Williams v. Lee or any of the other cases cited in Montana. 394 F.3d at 1180 n.6. Instead, the Todecheene court followed a different “interpretive approach,” Id., construing Montana’s first exception as if it were statutory language. This approach was inappropriate. Even the Todecheene court recognized that “[c]onstruing the Montana exception is obviously not an exercise in statutory construction.” Id. Construing the language of the exception without regard to the cases cited in support of it led the court to suggest that perhaps taxation, licensing, and other similar practices are the only means by which tribes can regulate non-Indians who

² Morris upheld application of the Chickasaw Nation’s annual permit tax and licensing requirements on non-Indians grazing livestock on Chickasaw land under contracts with individual tribal members. 194 U.S. at 393, 24 S. Ct. at 716. Buster upheld the Creek Nation’s annual permit tax on non-Indians engaging in trade with tribal members within limits of the Creek Nation. 135 F. at 950. Washington upheld the imposition by the Colville, Makah, and Lummi tribes of sales taxes on non-Indians purchasing cigarettes from Indian vendors on tribal lands. 447 U.S. at 152-154, 100 S. Ct. at 2080.

enter consensual relationships with tribal members. This, of course, is incorrect, as Montana makes clear and as the later decisions of the Supreme Court and the lower federal courts make clear.

B. Since *Montana*, the Supreme Court Has Continued to Recognize Tribal Adjudication of Common Law Claims as a Valid Method of Regulating the On-Reservation Conduct of Non-Indians.

Since Montana, on four separate occasions, the Supreme Court has addressed the power of Indian tribal courts to adjudicate tort claims brought by tribal members against non-Indians. In none of these cases did the Court suggest that tribal common law – or, to be more precise, the adjudication in tribal court of tort claims against nonmembers – was an inappropriate basis for tribes to regulate the on-reservation conduct of non-Indians.

National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447 (1985), involved a tort claim filed in the Crow Tribal Court by the guardian of a Crow Indian child against a non-Indian insurance company and a state-chartered school district. The child was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation. The child’s guardian sued the school district for damages. The school district and its insurance company filed suit in federal court to challenge the jurisdiction of the tribal court. The Supreme Court declined to rule on the jurisdictional challenge. Instead, the Court remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the Montana exceptions. The Court required the non-Indian litigants to “exhaust the remedies available to them in the Tribal Court system.” 471 U.S. at 857, 105 S. Ct. at 2454. The Court did not reject tribal tort law as a method of regulating the on-reservation activities of non-Indians.

Similarly, in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971 (1987), the Court refused to enjoin a tort suit brought in the Blackfeet Tribal Court by a member of the Blackfeet Indian Tribe against a non-Indian insurance company. The tribal member's tort claim sought compensatory and punitive damages against the insurance company for bad-faith refusal to settle an insurance claim. As in National Farmers Union, the Court remanded the case to allow the tribal court to examine in the first instance the existence and extent of its jurisdiction under the Montana exceptions. The Court did not reject tribal tort law as a basis for regulating the conduct of non-Indians.

In Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404 (1997), the Court again considered "the adjudicatory authority of tribal courts over personal injury actions against defendants who are not members of the tribe." 520 U.S. at 442, 117 S. Ct. at 1407. In this case, Gisela Fredericks, a non-Indian woman brought a tort action against a non-Indian-owned contracting company (and others) in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation for injuries she sustained in an on-reservation motor vehicle collision with one of the contractor's employees. The contractor was present on the reservation pursuant to a contract with a tribally-owned corporation to perform landscaping work related to the construction of a tribal community building. 520 U.S. at 443, 117 S. Ct. at 1408.

The Strate Court rejected the jurisdiction of the tribal court under first Montana exception because there was no nexus between the tort action and the contractor's consensual relationship with the tribes:

The first exception to the Montana rule covers activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. The tortious conduct alleged in Fredericks' complaint does not fit that description. The dispute ... is distinctly non-tribal in nature. It arose between two non-Indians involved in a run-of-the-mill highway accident. Although A-1 was engaged in subcontract work on the

Fort Berthold Reservation, and therefore had a “consensual relationship” with the Tribes, Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.

520 U.S. at 456-457, 117 S. Ct. at 1415 (internal quotation marks and citations omitted).

The Strate Court did not hold that tribal tort law is an inappropriate basis to regulate the on-reservation conduct of non-Indians who enter consensual relationships with tribes or tribal members. Instead, like the Ninth Circuit in Todecheene, the Strate Court based its holding on the absence of a nexus between the tort action itself and the underlying consensual relationship.

Unlike Todecheene and Strate, the instant action between the Longs and the Bank involves tribal common law claims that are directly linked to the consensual relationship at issue. These claims, arising under tribal contract and tort law, are inextricably linked to the commercial dealings and the formation and negotiation of the contracts between the Longs and the Bank.

Finally, in Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304 (2001), the Court held that a tribal court did not have jurisdiction over “civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.” 533 U.S. at 355, 121 S. Ct. at 2308. Among the civil claims at issue were the common law tort claims of “trespass to land and chattels” and “abuse of process.” 533 U.S. 357, 121 S. Ct. at 2308. These common law claims were “brought under ... tribal ... law.” 533 U.S. 357, 121 S. Ct. at 2309. The Court concluded that “tribal authority to regulate state officers in executing process related to the violation of off reservation state laws is not essential to tribal self-government or internal relations ...” 533 U.S. 364, 121 S. Ct. at 2313. The Court was careful, however, to note the limited nature of its holding: “Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.” 533

U.S. at 358 n.2, 121 S. Ct. 2309 n.2. The Court did not find – indeed, it has never found as a categorical rule – that tribal courts lack jurisdiction under either Montana exception over common law tort claims brought under tribal law against nonmember defendants in general.

C. The Lower Federal Courts Have Recognized Tribal Court Litigation as a Valid Means To Regulate the On-Reservation Conduct of Non-Indians.

The lower federal courts have routinely upheld the adjudicatory jurisdiction of Indian tribal courts over tribal law causes of action arising out of the commercial dealings, contracts, and other consensual relationships of non-Indians and Indian tribes and tribal members. These courts have not questioned the propriety under Montana's consensual relationship exception of using the mechanism of tribal court litigation, including tribal court litigation of common law tort claims, as a means of regulating non-Indian conduct in Indian country.

Notwithstanding its curious language in Todecheene, the Ninth Circuit has taken the lead in upholding the adjudicatory jurisdiction of Indian tribal courts over tribal law causes of action against nonmembers. For example, in Smith v. Salish Kootenai College, --- F.3d ---, 2006 WL 44317 (9th Cir. 2006), the court invoked Montana's first exception to uphold the authority of an Indian tribal court to hear a tort action between a non-Indian and a tribally-controlled community college. The suit concerned an on-reservation motor vehicle accident and “allegedly tortuous acts committed on tribal lands.” Id., at *8. In Sanders v. Robinson, 864 F.2d 630, 632-633 (9th Cir. 1988), the court cited the first Montana exception and upheld tribal court jurisdiction over a tribal law divorce proceeding filed by a tribal member against her non-Indian spouse. The marriage itself constituted a consensual relationship justifying the exercise of tribal adjudicatory jurisdiction over the divorce. The Ninth Circuit also affirmed the application of tribal tort law against a nonmember defendant in McDonald v. Means, 309 F.3d 530 (9th Cir. 2002).

The federal district courts have reached similar results.³ These lower court precedents – and those of the Supreme Court – make it clear that tribal court adjudication of common law claims, including common law tort claims, is an appropriate method for tribes to regulate the activities of non-Indians who enter consensual relationships with the tribes or their members.

In this case, the Longs’ common law contract and tort claim against the Bank arose directly out of – and were inextricably linked to – their commercial dealings and contracts with the Bank. This case does not suffer from the infirmities present in Todecheene (and Strate). Instead, there was a direct nexus between the Longs’ causes of action and the underlying consensual relationship. This Court should affirm the jurisdiction of the Cheyenne River Sioux Tribal Courts.

³ See Malaterre v. Amerind Risk Management, 373 F. Supp. 2d 980, 985 (D.N.D. 2005) (requiring exhaustion of tribal court remedies concerning common law negligence action brought in tribal court by tribal members against non-Indian insurance company concerning on-reservation building fire covered by insurance policy between company and tribe, since “the case seems to fall squarely within the first Montana exception as Amerind entered into a contract with the tribe”); Fidelity and Guaranty Insurance Company v. Bradley, 212 F. Supp. 2d 163 (W.D.N.C. 2002) (upholding tribal court jurisdiction over action for indemnification between non-Indian insurance company and tribal member, since insurance company “entered into a consensual contractual relationship with an Indian for a performance of a bond” to cover on-reservation construction project); Allstate Indemnity Company v. Stump, 994 F. Supp. 1217, 1221 (D. Mont. 1997) (upholding tribal court jurisdiction under first Montana exception over common law bad-faith insurance claim brought by family of tribal members who died in motor vehicle accident on reservation, since “tribal members who died in the accident were parties ... to the consensual insurance contract”); Warn v. Eastern Band of Cherokee Indians, 858 F. Supp. 524, 527 (W.D.N.C. 1994) (upholding tribal court jurisdiction under first Montana exception over common law breach of contract action between non-Indian operators of a campground on the reservation and tribe, since the campground operators had “actively engaged in commerce with the Tribe”); Tom’s Amusement Company, Inc. v. Cuthbertson, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (upholding tribal court jurisdiction over common law contract dispute between non-Indians operating a gaming establishment on the reservation pursuant to a gaming license issued by tribe, since use of a gaming license constitutes “consensual contractual relationship with the Tribe”). See also Cheromiah v. U.S., 55 F. Supp. 2d 1295, 1304 (D.N.M. 1999) (noting in context of Federal Tort Claims Act against United States that when non-Indian private party enters “consensual relationship” with tribe or tribal member, “it would be appropriate to hold that individual accountable pursuant to the laws and standards of the Tribe,” including tribal tort law).

4. Due Process:

The Bank's due process arguments are without merit. In its memorandum in opposition to the Longs' motion for summary judgment, the Bank asserts as an undisputed, salient "fact" the proposition that the Longs' "claim of discrimination" was "based on federal law." Pl. Mem. Opp. [doc. 43] at 2. The Bank has argued that it was denied due process of law when, in what it would characterize as a surprising development, the tribal court of appeals "held that the claim was based on tribal, not federal law." Id., at 3 (internal quotation marks and citations omitted). The Bank's recitation of the facts is wrong, and its argument concerning a denial of due process is without merit.

The Longs' discrimination claim was brought under the tribal common law, not federal law. The complaint sets forth the elements of a common law claim of intentional discrimination. See Simon Aff. I [doc. 32], Ex. 20, pp. 9-10. The complaint did not cite a single federal anti-discrimination statute, and it never once mentioned federal law as the source of the discrimination claim. The fact that the Bank misconstrued the discrimination claim as one arising under federal law does not mean that the claim was, in fact, a federal cause of action. Nor does the fact that the tribal trial court referred to, and even applied, principles of federal anti-discrimination law in sustaining the judgment on this count.

The tribe's highest court affirmed the trial court judgment on the Longs' discrimination claim on tribal common law grounds. The CRST Law & Order Code permits the tribal courts to exercise jurisdiction over tort actions. C.R.C. § 1-4-3. The tribal court of appeals ruled that intentional discrimination is a tort under tribal common law. The court did not invent this common law rule. Rather, it found that the rule was well-established and well-supported by the reported decisions of the U.S. Supreme Court and the Cheyenne River Sioux Tribe. See Simon

Aff. I [doc. 32], Ex. 24, pp. 7-8. These reported decisions are available to all litigants in the tribal courts, members and nonmembers alike. They make clear that discrimination is a tort and it is prohibited under tribal law.

The Bank is correct that the tribal court of appeals affirmed the judgment on alternate grounds not relied upon by the trial court. This is a routine practice for appellate courts, see, e.g., Smith v. Phillips, 455 U.S. 209, 215, n.6, 102 S. Ct. 940, 945, n.6 (1982); U.S. v. Rowland, 341 F.3d 774, 782 (8th Cir. 2003), cert denied, 540 U.S. 1093, 124 S. Ct. 969 (2003), and, in this case, it was an appropriate exercise of the court's discretion. See Bennet v. Spear, 520 U.S. 154, 166-167, 117 S. Ct. 1154, 1163 (1997). The factual record concerning the Bank's discriminatory conduct was fully developed in the trial court. The jury's verdict that the "Bank intentionally discriminate[d] against [the Longs] based solely on their status as Indians or tribal members," see Long Aff. [doc. 38], Att. 1 [doc. 32, Att. 1], p. 4, was well-supported. The sole issue in dispute on appeal was the source of law for the discrimination claim. The court of appeals, relying on the well-settled precedents of the U.S. Supreme Court and the Cheyenne River Sioux Tribe, found that the claim arose under tribal tort law. This was within the sound province of the court of appeals. No remand to the trial court for consideration of these precedents was required.

The Bank had every opportunity throughout the litigation to challenge or dispute the source of law for the Longs' discrimination. That the Bank failed to do so, assuming all the while that the claim was based solely on federal law, does not give rise to a due process claim.

5. Conclusion:

Based on the above authorities applied to the facts of this case, the Longs respectfully submit that this Court should determine that the CRST Court had jurisdiction to hear the claims of the Longs against the Bank, and the claims of the Bank against the Longs. The Bank's motion

for summary judgment should be denied, and the Longs' motion for summary judgment should be granted. Such decision would allow the decisions of the Tribal Court, the jury, and the Tribal Appellate Court to stand.

Dated this 12th day of January, 2006.

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