

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

\* \* \* \*

IN THE MATTER OF THE ESTATE	)	ORDER GRANTING MOTION
OF CHARLES C. COLUMBE,	)	TO STRIKE APPELLANT'S BRIEF
Deceased.	)	and
	)	GRANTING APPELLEE'S MOTION TO
ROSEBUD SIOUX TRIBE,	)	TOLL BRIEFING SCHEDULE
Plaintiff and Appellee,	)	and
vs.	)	DIRECTING THE CLERK TO FILE
	)	APPELLANT'S AMENDED BRIEF
	)	
WESLEY COLUMBE, as Personal	)	#27587
Representative for the	)	
Charles C. Columbe Estate,	)	
Defendant and Appellant.	)	

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Appellee having served and filed motions to strike  
appellant's brief on the ground it fails to comply with SDCL 15-26A-  
60(5), and to toll appellee's briefing schedule and appellant having  
served and filed a response thereto and served and submitted an  
amended appellant's brief, and the Court having considered the motions  
and response and being fully advised in the premises, now, therefore,  
it is

ORDERED that said motion to strike be and it is hereby  
granted and appellant's brief filed on November 16, 2015 is hereby  
struck.

IT IS FURTHER ORDERED that the Clerk of the Court is  
directed to file appellant's amended brief.

IT IS FURTHER ORDERED that appellee's motion to toll  
briefing schedule is granted and the Clerk of the Court is directed to  
file appellee's brief.

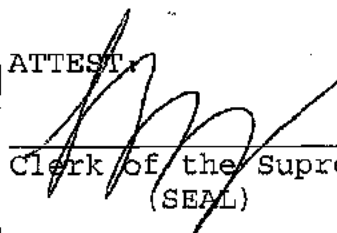
#27587, Order


IT IS FURTHER ORDERED that appellant's reply brief (if filed) shall be due for service and filing no later than February 8, 2016.

DATED at Pierre, South Dakota this 22nd day of January, 2016.

BY THE COURT:

ATTEST,

  
Clerk of the Supreme Court  
(SEAL)

  
David Gilbertson, Chief Justice

PARTICIPATING: Chief Justice David Gilbertson and Justices Steven L. Zinter, Glen A. Severson, Lori S. Wilbur and Janine M. Kern.

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

JAN 22 2016

  
Clerk

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 27587

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**IN THE MATTER OF THE ESTATE OF CHARLES C.  
COLOMBE, DECEASED.**

**Rosebud Sioux Tribe,**  
Plaintiff and Appellee,

v.

**Wesley Colombe, as Personal Representative for the Charles C.  
Colombe Estate,**  
Defendant and Appellant.

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Appeal from the Circuit Court, Sixth Judicial Circuit  
Todd County, South Dakota

The Honorable Kathleen F. Trandahl  
Circuit Court Judge

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AMENDED APPELLANT'S BRIEF

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Notice of Appeal filed on the 30th day of September, 2015

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUES .....	1
I. Did the Trial Court commit error when it found that the April 19, 2012 Rosebud Sioux Tribal Court “Order Regarding Motion for Summary Judgment” satisfied the requirements for comity under SDCL § 1-1-25? .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
STANDARD OF REVIEW .....	7
ARGUMENT .....	8
I. April 19, 2012 Tribal Court Order Improperly Granted Comity by Circuit Court.....	8
a. Standard.....	8
b. RST Laws, Ordinances, and Regulations Disregarded In Pursuit and Receipt of April 19, 2012 Tribal Court Order .....	9
i. Judicial Appointments Controlled by RST Constitution and RST Code of Law and Order .....	10
ii. Tribal Law Controls; “Custom and Usage” Only Applicable In Absence of Applicable Tribal Law .....	16

c. Partiality & Problems .....	17
d. Enforcement of Tribal Court Judgment Results in Economic Windfall for RST, Contrary to South Dakota Public Policy .....	23
II. Totality of the Circumstances Illustrate Judge Trandahl’s Clearly Erroneous Findings and Necessitate Reversal of Order Granting Comity .....	27
CERTIFICATE OF SERVICE .....	30
CERTIFICATE OF COMPLIANCE.....	31
APPENDIX.....	32

## TABLE OF AUTHORITIES

### Cases

<i>Colombe v. Rosebud Sioux Tribe</i> , 747 F.3d 1020 (8 <sup>th</sup> Cir. 2014).....	7
<i>First National Bank of Philip v. Temple</i> , 2002 SD 36, 642 N.W.1d 197 .....	9
<i>Gesinger v. Gesinger</i> , 531 N.W.2d 17 .....	10
<i>Kansas Gas &amp; Electric Co. v. Ross</i> , 521 N.W.2d 107 (S.D. 1994).....	27
<i>Martinmaas v. Engelmann</i> , 2000 S.D. 85, 612 N.W.2d 600.....	14
<i>Mexican v. Circle Bear</i> , 370 N.W.2d 737 (S.D. 1975).....	9
<i>Mobridge Cmty. Indus., Inc. v. Toure, Ltd.</i> , 273 N.W.2d 128 (S.D. 1978).....	27
<i>One Feather v. O.S.T. Pub. Safety Com’n.</i> , 482 N.W.2d 48 (S.D. 1992).....	2, 9
<i>Parker v. Western Dakota Insurors, Inc.</i> , 2000 SD 14, 605 N.W.2d 181 .....	28
<i>RST v. Keith Horse Looking Sr, Rosebud Sioux Supreme Court CA2006-12</i> .....	15
<i>Sabhari v. Sapari</i> , 1998 SD 35, 576 N.W.2d 886 .....	8
<i>State v. Wright</i> , 2009 SD 61, 754 N.W.2d 56.....	8
<i>Wells v. Wells</i> , 451 N.W.2d 402 (S.D. 1990).....	1, 30

### Statutes

SDCL § 1-1-25.....	passim
SDCL § 29A-3-806.....	2
SDCL §15-26A-3(1) .....	1

## **JURISDICTIONAL STATEMENT**

In this appeal, Wesley Colombe, as Personal Representative for the Charles C. Colombe Estate, seeks review of the following orders: (1) July 22, 2015 Findings of Fact and Conclusions of Law; (2) August 13, 2015 Order Granting Comity; and (3) August 31, 2015 Notice of Entry of Order Granting Comity.

Colombe respectfully submits that jurisdiction exists pursuant to SDCL §15-26A-3(1) (appeal from final judgment as a matter of right).<sup>1</sup>

## **STATEMENT OF THE ISSUES**

### **I. Did the Trial Court commit error when it found that the April 19, 2012 Rosebud Sioux Tribal Court “Order Regarding Motion for Summary Judgment” satisfied the requirements for comity under SDCL § 1-1-25?**

Relevant Cases and Statutes:

SDCL § 1-1-25

Rosebud Sioux Tribal Constitution Article XI

Rosebud Sioux Tribe Code of Law and Order Title 9

*Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990)

*One Feather v. O.S.T. Pub. Safety Com’n.*, 482 N.W.2d 48 (S.D. 1992)

*In the Matter of the Commitment of Lawrence Lee Jr., Supreme Court of the Rosebud Sioux Tribe*, CA99-03

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<sup>1</sup> For purposes of this brief, references are as follows: (1) “CR” designates the certified record; (2) “MH” designates the Motions Hearing Transcript held on January 8, 2015; (3) App. Designates Appellant’s Appendix.

## STATEMENT OF THE CASE

On June 26, 2013, a Petition for Informal Probate and Appointment of Personal Representative was filed in Todd County, Sixth Judicial Circuit, South Dakota, commencing *In the Matter of the Estate of Charles C. Colombe*. An Acceptance of Appointment of the Personal Representative role was filed by Wes Colombe that same day. Todd County Clerk of Court Marsha Hodge issued Letter of Appointment of Personal Representative on June 27, 2013. Thereafter, Colombe filed the requisite Notice to Department of Social Services of Appointment of Personal Representative and Notice of Appointment of Personal Representative. He also published a Notice to Creditors in the Todd County Tribune and personally served a Notice to Creditors upon RST and two financial institutions.

On February 21, 2014, the Rosebud Sioux Tribe filed a Notice of Creditor's Claim *In the Matter of the Estate of Charles C. Colombe*. An Amended Notice of Creditor's Claim was filed on February 28, 2014. RST's Creditor's Claim alleged it was owed \$527,146.76 from an April 2012 tribal court order. Colombe filed a Notice of Disallowance of Claim of Rosebud Sioux Tribe on March 12, 2014, pursuant to SDCL § 29A-3-806, citing the tribal court order's failure to comply with South Dakota's comity provisions enumerated in SDCL §1-1-25. Colombe also filed a Notice to Rosebud Sioux Tribe of Duty to File Petition on Disallowed Claim on April 1, 2014.

On April 17, 2014, RST filed a Motion to Dismiss for lack of subject matter jurisdiction and a Summons and Complaint seeking dismissal of the probate action on jurisdictional grounds or enforcement of the tribal court judgment. Colombe filed an Answer on May 15, 2014.



An evidentiary hearing on the Notice of Disallowance of Claim of Rosebud Sioux Tribe was held on January 8, 2015 before the Honorable Kathleen Trandahl. Closing briefs and proposed Findings of Fact and Conclusions of Law were submitted by the parties in February 2015. Judge Trandahl issued Findings of Fact and Conclusions of Law concluding that the RST April 2012 tribal court order satisfied South Dakota's comity requirements under SDCL §1-1-25. An Order Granting Comity to the April 19, 2012 RST court order entitled "Order Granting Motion for Summary Judgment" was issued on August 13, 2015. Notice of Entry of Order Granting Comity was filed on August 31, 2015.

### **STATEMENT OF THE FACTS**

Charles C. Colombe tragically and unexpectedly passed away on June 9, 2013, as the result of an ATV accident. Following Wes Colombe's Appointment as Personal Representative of the Estate of Charles C. Colombe, the required Notice to Creditors was published in the Todd County Tribune and personally served upon known creditors. C.R. 22, 23, 33. RST filed its Notice of Creditor's Claim and Amended Notice of Creditor's Claim in February 2014. C.R. 26, 28. RST submitted a claim for \$527,146.76 based upon an April 19, 2012 RST court order entitled "Order Regarding Motion for Summary Judgment." C.R. 26, 28.

The tribal court order granted comity by Judge Trandahl is the product of more than nine years of litigation between Colombe and RST. C.R. 86. In June 1994, RST entered into a five-year casino management contract ("Contract") with BBC Entertainment, Inc. ("BBC"), a then Minnesota corporation. C.R. 89. The late Charles C. Colombe was an owner and shareholder of BBC Entertainment, Inc. The Contract,

approved by the National Indian Gaming Commission Charmain and drafted pursuant to the Indian Gaming Regulatory Act of 1998 (“IGRA”), 25 U.S.C. §§ 2701, et seq., authorized RST to operate a Class III Gaming casino on reservation land. C.R. 89. Pursuant to the Contract, BBC provided all of the funds for the construction and operation of the casino and as consideration for the funds BBC received the right to a management fee of 35% of the net gaming revenue for a five year period. C.R. 89. As a portion of its commitment for operating capital BBC was to loan funds for an initial Operating Expense Reserve account. C.R. 90. Despite BBC’s willingness to do so, RST desired to avoid paying interest on the funds so RST and BBC orally agreed to instead each make monthly contributions of 7.5% of each party’s share of the net profits to the operating expense reserve. C.R. 90.

At the Contract’s conclusion in August 1999, BBC withdrew \$415,857.00 as its share of the Contract’s division of net profits which had not been immediately paid to BBC and had instead been set aside in the reserve for operating expenses. C.R. 90. Although the outside casino auditors confirmed the amount of funds payable to BBC, RST disputed BBC’s withdrawal on the grounds that the contract had been impermissibly modified, despite the modification being at the request and direction of RST. C.R. 90.

In its August 2001 Tribal Court suit, RST asserted that BBC was not entitled to its share of profits because of the contract modification. C.R. 90. Although RST claimed it was owed the money BBC had withdrawn, RST was not actually out any money. C.R. 91. Rather, RST’s Tribal Court suit was designed to force BBC to forfeit its admittedly earned but unpaid net profits. C.R. 90-91.

The Honorable B.J. Jones was appointed as Special Judge to hear the case. Judge Jones sided with BBC, stating “nothing in the agreement prohibited the parties from using their respective earnings to fund an account such as the OER account . . .” C.R. 91. RST appealed. C.R. 91. Ultimately, however, the RST Supreme Court sided with RST and held that RST and BBC’s oral agreement to fund the operating reserve account through monthly mutual contributions was void for failure to obtain NIGC approval. C.R. 93. Judge Jones’ decision was reversed and the case was remanded for an accounting which disregarded the NIGC mandated accrual accounting system in the Contract. C.R. 96.

Judge Jones’s accounting decision was filed with the clerk of the tribal court on October 16, 2007. C.R. 102. The Tribe received a judgment against BBC in the amount of \$399,353.61, plus interest accrued from August 15, 1999, in the amount of \$127,793.15, for a total of \$527,146.76. C.R. 102. BBC did not receive a copy of the judgment until October 24, 2007. The Tribal Attorney General sent a notice to the Clerk of the Rosebud Sioux Supreme Court stating that BBC should not be allowed to file an appeal unless BBC filed a statement of financial responsibility, cash or surety in the amount equal to the \$527,146.76 judgment. C.R. 200.

After more than six years of litigation BBC was insolvent and was unable to meet the financially onerous requirements the Tribe had placed on BBC as a prerequisite to appeal. C.R. 200. BBC filed a motion for a new trial which was summarily denied. C.R. 103.

On February 17, 2009, RST filed an action to pierce the corporate veil of BBC. C.R. 111-126. RST claimed that shareholders Wayne Boyd and Colombe were personally

liable for the October 16, 2007 judgment it had received against BBC. C.R. 111-126. On March 24, 2009, Colombe filed a Motion to Dismiss. C.R. 111-126. It was denied. C.R. 126.

On March 13, 2012, a hearing was held in RST tribal court regarding RST's Motion for Summary Judgment. The Honorable Patricia Meyers presided. C.R. 215. Judge Meyers had been appointed as Special Judge to preside over the matter by Chief Judge Sherman Marshall in November 2011. C.R. 215. Judge Meyers replaced Judge Ziegler on the matter. Neither Colombe nor his counsel were informed of the judge change. C.R. 211, 214. A motion to recuse was made at the March 2012 hearing. It was denied. C.R. 132. Judge Meyers subsequently granted summary judgment piercing BBC's corporate veil and held Colombe personally liable for the October 16, 2007 judgment. C.R. 134-135. Colombe filed a request for Interlocutory Appeal to the Supreme Court of the Rosebud Sioux Tribe on the jurisdictional grounds raised in his Motion to Dismiss. C.R. 150. Colombe's request was denied. C.R. 150.

On January 12, 2011, Colombe sought de novo review of the tribal court's decisions in Federal District Court pursuant to Article 21 of the Management Agreement. RST moved to dismiss Colombe's complaint for failure to exhaust tribal court remedies. It was denied. RST and Colombe later filed joint Motions for Summary Judgment. RST's Motion was granted. Colombe and RST both appealed. The 8<sup>th</sup> Circuit reversed the district court's denial of RST's "motion to dismiss the complaint for failure to exhaust tribal court remedies pertaining to BBC's challenge of the tribal court's jurisdiction [over the Contract]." *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014).

The case was remanded with instructions to enter an order dismissing Colombe's complaint. *Id.*

During the pendency of the federal appeal, RST's Creditor's Claim was filed *In the Matter of the Estate of Charles C. Colombe*. The Estate disallowed RST's claim on the grounds that the April 19, 2012 tribal court order failed to satisfy South Dakota's well-settled comity principles for recognition in state court. Specifically, the Estate disallowed the claim because the tribal court lacked jurisdiction due to its failure to comply with Article XI of the Rosebud Constitution and Title 9 of the Rosebud Law and Order Code. SDCL § 1-1-25 (a), (c), (d) and (e).

On January 8, 2015, Judge Trandahl heard witnesses and received evidence from both Colombe and RST regarding the enforceability of the April 19, 2012 tribal court order in South Dakota circuit court. Specifically, the Court admitted the Rosebud Constitution, the RST Rules of Appellate Procedure, and RST Law and Order Code into evidence and received testimony from Colombe's tribal court attorney O.J. Semans, and Tribal Court Attorney Eric Antoine. Both parties filed closing briefs and proposed Findings of Fact and Conclusions of law outlining what each believed was factually established at trial and appropriate under South Dakota's comity law. The Court issued its Findings and a subsequent Order Granting Comity in August 2015.

### **STANDARD OF REVIEW**

On appeal, this Honorable Court will "review findings of fact under the clearly erroneous standard." *State v. Wright*, 2009 SD 61, ¶ 26, 754 N.W.2d 56, 64. "Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo." *Id.* "Under a de novo review, we give no deference

to the trial court’s conclusions of law.” *Sabhari v. Sapari*, 1998 SD 35, ¶ 12, 576 N.W.2d 886, 891 (quoting *Landstrom v. Shaver*, 1997 SD 25, ¶ 37, 561 N.W.2d 1, 7).

## **ARGUMENT**

### **I. April 19, 2012 Tribal Court Order Improperly Granted Comity by Circuit Court**

#### **a. Standard**

South Dakota Circuit Court will recognize a tribal court order under the principle of comity. *First National Bank of Philip v. Temple*, 2002 S.D. 36, ¶ 16, 642 N.W.1d 197, 203 (citing *Wells v. Wells*, 451 N.W.2d 402, 403 (S.D. 1990)).

The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call “the comity of nations.” ...

“Comity,” in the legal sense, is ... the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Mexican v. Circle Bear*, 370 N.W.2d 737, 740 (S.D. 1975) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1894)).

Comity, however, is not automatic. *One Feather v. O.S.T. Pub. Safety Com’n.*, 482 N.W.2d 48, 49 (S.D. 1992). The burden rests on the “party seeking recognition” of a tribal court order or judgment in South Dakota Circuit Court to establish by “clear and convincing evidence that:

- (a) The tribal court had jurisdiction over both the subject matter and the parties;
- (b) The order or judgment was not fraudulently obtained;

- (c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
- (d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained;
- (e) The order or judgment does not contravene the public policy of the State of South Dakota.”

SDCL § 1-1-25(1).

“Comity is a question of jurisdiction which is reviewed de novo.” *Gesinger v. Gesinger*, 531 N.W.2d 17, 19 (S.D. 1995) (citing *Red Fox v. Hettich*, 494 N.W.2d 638, 642 (S.D. 1993)).

**b. RST Laws, Ordinances, and Regulations Disregarded In Pursuit and  
Receipt of April 19, 2012 Tribal Court Order**

The RST courts are governed by Article XI of the Rosebud Constitution and Title 9 of the RST Code of Law and Order. In RST’s Constitution, judges are identified as either a chief judge or an associate judge, appointed by the Tribal Council, and appointed for a set term of years. App. 6 - *Rosebud Sioux Constitution Article XI, Section 2 and Section 5*. Nowhere within the Constitution is the term “special judge” used.

In RST’s Code of Law and Order, Section 9-1-5-(2)(c) states “*All Tribal Court Judges shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval.*” (emphasis supplied).

On November 7, 2011, Chief Judge Sherman J. Marshall appointed Patricia A. Meyers as Special Judge to preside over RST's action to pierce BBC's corporate veil.

App. 8 - *Trial Exhibit G – Motion Appointing Judge Meyers*. Despite Title 9's mandate, neither the Judiciary Committee nor the Tribal Council was involved in Judge Meyers' appointment.

1. That I was the Chairman of the Rosebud Sioux Tribal Judiciary during the last five years through the end of my term in September 2012.
2. That as the Chairman of the Judiciary Committee, it was my duty to present to the Tribal Council any motions made that would require their action to approve.
3. That at no time do I recall the appointment of Patricia Meyers ever coming before the Judiciary to be appointed as a judge for the Rosebud Sioux Tribal Court.

App. 9 - *Trial Exhibit E: 2012-10-19 Affidavit of Lenard (Shadow) Wright*.

To Whom It May Concern,

According to the records of the Tribal Secretary's Office, there is no mention of Patricia Meyers in Judiciary Committee or RST Tribal Council Meeting Minutes.

App. 10 - *Trial Exhibit D: 2012-10-17 Letter from Linda L. Marshall, Secretary of the Rosebud Sioux Tribe*.

#### **i. Judicial Appointments Controlled by RST Constitution and RST**

##### **Code of Law and Order**

Although Judge Trandahl recognized that Judge Meyers was not appointed pursuant to Title 9's provisions and that RST's Constitution does not use the term "special judge," Judge Trandahl found that Article XI of the RST Constitution, Section 4 allowed Judge Meyers' appointment.

FOF 19. Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 2, as amended in 2007 provides that:



The Tribal Court shall consist of one chief judge and such associate judges and staff, as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council. All tribal court personnel shall be subject to the supervision of the Chief Judge. The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.

FOF 20. Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 4, as amended in 2007 provides that:

The Chief Judge shall promulgate rules of pleading, practice, and procedures applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law.

FOF 21. It is a long-established and regular practice of the Tribal Court for the Chief Judge to appoint special judges, who are not full-time salaried associate judges of the Tribal Court, to preside over particular cases when the Chief Judge and associate judges must recuse themselves or are otherwise unavailable to preside over a particular case, due to conflicts of interest or other good cause. Pursuant to this long-standing court practice, the Chief Judge does not seek or require Tribal Council for his appointment of special judges.

...

FOF 24. The Constitution of the Tribe does not use the term “special judge.” Section 4-2-8 of the Tribe’s Law and Order Code mandates that any matter not expressly covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe.

FOF 25. The Court finds that the appointment of special judges by the Chief Judges is a long established and accepted custom and usage of the Tribe and its Tribal Court system.

...

COL 2. The regular practice of the Tribal Court where by the Chief Judge appoints special judges to preside over particular cases when the Chief Judge and the associate judges not available to do so is authorized by the Tribe's Constitution: Article XI, section 2 authorizes the Chief Judge to create staff positions in the tribal court that he deems to be necessary to the efficient functioning of the court; Article XI, section 4 authorizes the Chief Judge to establish court practices and procedures that he deems necessary for the efficient functioning of the tribal court.

COL 3. Chief Justice Marshall had authority from the Tribe's Constitution, laws and customs and practices to appoint Patricia Meyers as a special tribal court judge.

COL 4. The tribal court, acting by and through Special Judge Meyers, had full jurisdictional authority to preside over and adjudicate the Tribe's pierce the corporate veil action.

*App. 3 - 2014-07-22 Findings of Fact and Conclusions of Law.*

Despite Judge Trandahl's acknowledgment, inclusion and reference to RST Law and Order Code Section 4-2-8 in FOF 24 she disregarded its plain meaning and control over the issues before the Court in her grant of comity. Judge Trandahl's ruling flouts Law and Order Code Section 9-1-5(2)(c) assigning Tribal Council control over all judicial appointments and directly contradicts Law and Order Code Section 4-2-8 mandating that custom only applies if there are no applicable laws.

The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. *Any matter not covered by applicable tribal or federal laws* shall be decided according to the custom and usage of the Tribe...

*App. 7 - Trial Exhibit L: RST Law and Order Code, § 4-2-8 (emphasis supplied).*

RST Code of Law and Order section 9-1-5(2)(c) requires “*All Tribal Court Judges shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval.*” § 9-1-5(2)(c) (emphasis supplied). This reality goes unaddressed by Judge Trandahl. Nothing within the RST Constitution or RST Law and Order Code provides an exception or exemption to this requirement. “All Tribal Court Judges” means *all* Tribal Court Judges. Subsection 9-1-5(2)(c) could have been written to state “all full time judges” or “all salaried judges.” Article XI, Section 2 could have been written to state “The Chief Judge shall establish such staff positions, including the appointment of special judges, within the Tribal Court as may be necessary for efficient operation.” Neither provision was written in such a manner.

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the state. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. *Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.* Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject.

*Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson*, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17)) (emphasis added).

“All Tribal Court Judges” means *all* Tribal Court Judges must be selected by the Judiciary Committee and approved by the Tribal Council. Neither RST’s Chief Judge, nor Judge Trandahl, is authorized to reconstruct or reinterpret the plain meaning employed in the provisions of RST’s Constitution and RST Law and Order Code.

Further, Colombe submits that a Special Judge must be an Associate Judge to have any jurisdiction because only “one chief judge and such associate judges and staff as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council” are permitted by the Rosebud Constitution. App. 6 - Article XI, Sec. 2. Both the Rosebud Constitution and the Law and Order Code, Title 9 expressly state a consistent intent that all tribal court judges must be approved by the Tribal Council.

Nothing in Article XI, Section 4 grants broad authority to circumvent “applicable tribal” law, nor does it authorize Title 9 or any provision of the RST Constitution to be ignored. This includes Article XI, Section 2, upon which Judge Trandahl has relied in her findings that Judge Sherman Marshall was authorized to appoint Judge Meyers without the requisite Tribal Council authority.

The Chief Judge’s authorization to “establish staff positions” and to promulgate rules for tribal court procedure is not synonymous with inherent authority to establish judgeships not provided for in the RST Constitution. The Court’s allowance of such an extrapolation is inconsistent with both the RST Constitution and established tribal law. “In a constitutional democracy, the concept of inherent power – especially in the domestic law and order arena – is generally understood to be minimal to nonexistent.”

*RST v. Keith Horse Looking Sr., Rosebud Sioux Supreme Court CA2006-12.*

RST posited that a budget line item for Special Judges validated Judge Meyers’ appointment. “In fact the Tribal Council has effectively approved of this practice, because they approve a line item every single year in the budget for the appointment of special judges. So, the court has the authority from the statutes, and from the Constitution – from

the Chief Justice, I should say – to create practices and procedures of the court.” MH. 57:9-11.

A budget line item does not allow RST to circumvent the appointment process codified by the RST Constitution and the RST Law and Order Code. Colombe has never contended that Special Judges cannot be appointed. Rather, Colombe’s position has consistently been that Judge Meyers’ appointment did not conform to the explicit requirements of the RST Constitution and RST Code of Law and Order. A line item allowance for Special Judge funds is an understandable necessity when RST follows its own ordinances, rules and Constitution. Just as this case provides an example in Judge Meyers of an invalid special judge appointment, it also provides an example of the proper manner in which a special judge appointment can be made in the appointment of Special Judge B.J. Jones. Special Judges Jones was appointed pursuant to the then existing RST Law and Order Code Tribal Gaming Ordinance at § 13-6-109(b) which was also included in the contract management agreement. Unlike Judge Meyers’, Judge Jones’ appointment was valid and authorized because of the protocol and procedure followed. There is no dispute that special judges can be appointed...but only in the manner authorized by the RST Constitution and the RST Code of Law and Order.

Lastly, the “line item” conclusion was simultaneously offered by RST with its contention that the appointment of special judges is an allowable custom. The very definition of custom and its authority in the absence of tribal law illustrates RST’s inconsistent and irreconcilable positions. RST’s mutually exclusive evidence eliminates RST’s ability to satisfy SDCL § 1-1-25(1)’s requirements by clear and convincing

evidence. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be **REVERSED** and **VACATED**.

**ii. Tribal Law Controls; "Custom and Usage" Only Applicable In  
Absence of Applicable Tribal Law**

Judge Trandahl's finding that the appointment of special judges was allowable as a longstanding custom and practice is directly contradicted by RST's Constitution and Law and Order Code. App. 7 - *Trial Exhibit L: RST Law and Order Code, § 4-2-8*. RST's Law and Order Code does not permit prior "tribal court practice" to trump expressly stated tribal law. The fact that a policy or custom may be longstanding does not cleanse it of its unlawful taint. *Id.*

It goes without saying that tribal custom is a potentially rich source of tribal law. Yet it cannot become part of the braid of tribal (common) law until it is asserted and established in a specific case. *The mere potential of tribal custom cannot be used as a kind of charm or talisman to defeat existing tribal law.*

*In the Matter of the Commitment of Lawrence Lee Jr., Memorandum of Opinion and Order, Supreme Court of the Rosebud Sioux Tribe, CA99-03.*

The Rosebud Sioux Tribal Court has to be held to the same standards and requirements of any other court system. Just as South Dakota and the United States derives its authority from its organic originating document, the Constitution, so too does RST.

The Tribe's Constitution and Bylaws are the supreme governing documents of this Nation. Further, the Tribe's Constitution and Bylaws are the organic documents that enumerates the authorities of RST Tribal Council.

App. 11 - *Trial Exhibit O: RST Attorney Sandven Letter re: Election Results.*

Colombe was a lifelong RST member. As an individual tribal member he was entitled to and should have been able to rely upon the protection afforded by his Constitution. The admitted and recognized failures of RST's Tribal Court system in followings its Constitution and ordinances illustrate the disservice to the late Charles Colombe and all of RST's tribal members. The Circuit Court's award of comity condones, encourages, and enables this injustice to continue.

Judge Sherman Marshall was not authorized to appoint Judge Meyers and, as a result, Judge Meyers' subsequent actions as Special Judge are jurisdictionally void. The trial court's finding that Judge Meyers' appointment did not comply with RST's "laws, ordinances and regulations" vitiates RST's ability to satisfy by "clear and convincing evidence" the requirements for comity. SDCL § 1-1-25(d). Judge Trandahl's factual finding to the contrary is clearly erroneous. The justification offered by the Court in its grant of comity is further evidence of the violations requiring the relief provided by SDCL § 1-1-25. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be **REVERSED** and **VACATED**.

### **c. Partiality & Problems**

At the time Judge Marshall appointed Judge Meyers he was a defendant in a federal lawsuit initiated by Colombe and pending. In short, the Judge Colombe sued appointed the individual to hear the case Colombe was attempting to stop.

Despite Judge Meyers' November 7, 2011 appointment as Special Judge to oversee *Rosebud Sioux Tribe v. BBC Entertainment v. Charles Colombe & Wayne Boyd*, Civ. 09-069, neither Colombe nor his counsel, Oliver J. Semans, was informed of Judge Meyers' appointment until they appeared before her at the March 13, 2012 Summary Judgment Hearing.

Colombe made an oral motion for recusal. It was denied "as being untimely and made without notice to opposing counsel and not in conformance with the rules of procedure." App. 12 - *Trial Exhibit H: Order on Motion to Recuse*. Judge Meyers subsequently granted summary judgment and issued the order in question.

Question by Attorney Clint Sargent: ...Did you get notice there was going to be a hearing?

Answer by Oliver J. Semans: I did receive notice there would be hearing; on a motion brought by the Tribe, yes.

Q. Did you get notice as to who the judge would be?

A. No – well, at that time, I thought it would be Ziegler.

Q. So, the last notice you had received, as to who the judge would be, was Judge Ziegler?

A. Yes.

...

Q. So, when you appeared at the hearing on March 13, 2012, and saw who was sitting behind the bench – let me ask the question this way: Was Judge Ziegler a man or woman?

A. A man.

Q. So, when you came in for the hearing on March 13, 2012, and saw the judge was in fact a woman, what were your thoughts?

A. I was completely surprised.

Q. Why was that?

A. Because I had no notice whatsoever that another judge was assigned.



Q. Once you realized that Judge Meyers was the judge hearing the case, did you make any motions?

A. Yes. I made a motion, under Rule 7(b), asking that she remove herself.

Q. There's been some discussion in this case – and I can refer you to the civil-procedure code, if you like – that there's a provision in the civil procedure code, under 63(b), governing recusal of judges. Is that different from the 7(b) that you're talking about?

A. Yes. 7(b) basically requires a motion to be considered by the court without it being in writing.

...

Q. Yes. So, you made an oral motion, and what was your oral motion?

A. For her to remove herself from hearing the case.

Q. And what happened once you made your oral motion?

A. She went in to recess. She left. She conferred with Chief Judge Marshall, came back, and denied my motion, stating that I didn't do it in writing.

Q. Did you have any opportunity prior to the hearing to know that she was going to be there to prepare a writing?

A. This took place in a couple of minutes. I had no opportunity whatsoever. Once she left, she was only gone for maybe a minute.

Q. Had Mr. Colombe at any time in the piercing-the-corporate-veil matter, previously asked for a judge to be recused?

A. No.

Q. That was his first request?

A. Yes.

Q. And you made it on his behalf?

A. Yes.

Q. Did the judge then just go forward with the hearing?

A. Yes.

MH. 74:7-77:4.

RST Rules of Civil Procedure provide:

All applications to the Court for an Order shall be made by motion which shall be in writing and shall state with particularity the grounds therefore and shall set forth the relief or Order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of a hearing on the motion. *The Court may also allow oral motions during the course of a hearing or a trial.* The rules applicable to captions, signing, and other matters of the form of pleadings apply to all motions and other papers provided for in these rules.

*App. 13 Trial Exhibit M:* RST Rules of Civil Procedure, Rule 7(b) (emphasis supplied).

Whenever a party to an action or proceeding or his attorney shall make and file an affidavit to the effect that he believes that he may not receive a fair trial before such Judge before whom such action is pending, such Judge shall automatically disqualify himself and shall proceed no further in the matter except to call in another Judge to hear and determine the case. No reasons need be stated in the affidavit. However, an affidavit can only be filed by a party once in any proceeding.

*App. 13 - Trial Exhibit M:* RST Rules of Civil Procedure, Rule 63(b) (emphasis supplied).

It was impossible for Colombe to file an affidavit for Judge Meyers' recusal in advance of the March 2012 because neither Colombe nor his counsel was ever informed that Judge Meyers had been appointed or that Judge Ziegler had been replaced. The absent affidavit, however, was not intrinsically fatal to Colombe's request. RST's Rules of Civil Procedure allow a Court to hear oral motions. RST Civ. Pro. R. 7(b). Oral requests for recusal have been considered and granted by tribal court in the past. MH. 45:18-48:12. Because a Rule 63(b) request for recusal requires nothing more beyond a litigant's statement "that he believes that he may not receive a fair trial before such Judge before whom such action is pending," Judge Meyers should have automatically recused herself upon Counsel Semans' oral motion. Instead, however, Judge Meyers denied Colombe a fair opportunity to exercise his rights under Rule 63(b). Judge Meyers subsequently rendered summary judgment in RST's favor.

Colombe's opportunity to appeal Judge Meyers' decision was similarly thwarted due to the financial burdens of Rule 2 of the RST Rules of Appellate Procedure. App. 14 - *Trial Exhibit N: Rules of Appellate Procedure*. Again, RST failed to follow its established laws in its promulgation of its appellate rules. The Rules of Appellate Procedure were passed by resolution and allow for their amendment or modification by unilateral action by the appellate court judges. *Id.* Article XI of the RST Constitution, however requires that appellate rules be passed by ordinance. RST Attorney Eric Antoine explained that this difference is substantive, not semantics.

Question by Attorney Clint Sargent: Mr. Antoine, there's been use of the terms "resolution" and "ordinance" and "statute."

Is there a difference between a resolution of the Tribal Council and ordinance that's passed by the Tribal Council?

Answer by Eric Antoine: The Rules of Tribal Council Procedure or order, it established a priority of enforcement of rules of law in the Tribal Council. It goes Roberts Rules of Order; motions; resolutions; ordinances; and then the Constitution. So, it established a priority of enforcements.

Q. Okay. So, you have – flip it around and start at the Constitution, then, the order of priority, that would be at the top of the order of priority, right?

A. Yes.

Q. Then under that is ordinances?

A. Yes.

Q. Then under that would be resolutions?

A. Resolutions and then motions.

Q. What is required to pass an ordinance?

A. Well, there are different kinds of ordinances. What's in the Law and Order Code can be considered an ordinance, but the rules of what's in the Law and Order Code require several readings and a majority to repeal; I think two-thirds or three-fourths, I can't recall specifically.

But another ordinance, for example a stand-alone ordinance, that would be similar to a regulation on animal control, like dog-catching, that's not part of the Law and Order Code, but would still be tribal law that would say require licensing of animals. That would be an ordinance.

But it would be subject to – whatever is in the law and order code would be enforced first, and that that ordinance. So, there would be an ordinance that wouldn't be part of the law and order code.

Q. What's required to pass an [ordinance] in the Law and Order Code?

A. If you were going to amend?

Q. If you were going to amend it, or change it, or you were going to pass an ordinance that applied to law and order.

A. There is a provision in the Law and Order Code, if you have it in front of you, that it has a procedure for amending what's in the Law and Order Code. But that's only for amendments to the Law and Order Code.

There are other ordinances; for example, there is no dog-control ordinance. If there was one, then any rules regarding its enactment or repeal would be contained in the ordinance.

And that would be – it would require a simple majority to pass.

Q. What if you were passing a legal ordinance?

A. You mean a brand-new ordinance, separate from the Law and Order Code?

Q. Yeah.

A. Then the rules – then I think the Rules of Council Procedure say you just need a simple majority.

Q. But if you're going to change the Law and Order Code, I believe you referenced that it requires some readings and possibly -- .

A. Two readings, separated by a certain number of days, and has to be published.

And then there's I think it's a two-thirds or three-fourths, like I said. it's more than a simple majority to amend the Law and Order Code, or change.

Q. What's required of a resolution?

A. A resolution is a majority.

Q. Just majority of the Council.

A. Yes.

Q. If something comes up at one Council meeting, they could pass it by resolution. it doesn't need to be read on multiple occasions and be published to the public?

A. Yeah, it's different from the Law and Order Code. It's a separate ordinance. It's a stand-alone ordinance, in other words.

MH. 108:12-111:8.

Passage of Appellate Rule 2 by resolution, which is accomplished by a majority vote at a council meeting, is insufficient and improper under tribal law. MH. 108:12-111:8. Unless and until Appellate Rule 2 is passed by ordinance its requirements are jurisdictionally void. Again, and on trend, RST's failure to follow its Constitution denied Colombe the protection he was entitled to as a tribal member.

This undisputed fact coupled with Judge Meyers' brief recess to confer with Judge Marshall during the March 2012 Summary Judgment Hearing and the lack of notice of Judge Meyers' appointment provided to Colombe calls the April 19, 2012 Order into question as to whether it was "obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing." SDCL § 1-1-25(1)(c). RST's inability to offer any evidence or testimony to the contrary eliminates RST's ability to satisfy SDCL § 1-1-25(1)(c) by clear and convincing evidence. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be **REVERSED** and **VACATED**.

**d. Enforcement of Tribal Court Judgment Results in Economic Windfall for RST, Contrary to South Dakota Public Policy**

RST has never disputed that it agreed to modify the casino management contract to finance the operating reserve account through mutual monthly contributions instead of an initial contribution by each party. RST's disagreement with BBC's withdrawal was premised on a technicality that RST created. RST Special Judge Jones acknowledged that principles of equity would be offended if BBC was denied monies it had earned but had deferred payment on.

The Plaintiff [RST] argues that the contract itself prohibited any modification, absent written indicia of the same, and that any modification of the contract had to be approved by the National Indian Gaming Commission under the Indian Gaming Regulatory Act. The Court notes, however, that nothing in the agreement prohibited the parties from using their respective net earnings to fund an account such as the OER account. It appears that the Plaintiff attempted to fund the OER account referenced in the management agreement, but the Tribe opted against it doing so. *Instead, the parties later agreed to place a certain portion of net revenue into an alternative OER account. To deny this reality, and to hold the joint actions of the parties against only the Defendant, would visit an inequity upon the Defendant herein.*

...

The Court cannot conclude, therefore, as urged by the Plaintiff, that the Defendant breached the implied covenant of fair dealing with the Tribe by acquiescing to the 7.5% deduction from the net revenue urged by the Tribe. It appears that the Defendant was willing to fund the OER account sufficiently at commencement, but the Tribe requested that it not. This failure to fund the OER sufficiently at commencement led to the Tribe requesting that the account be funded out of net revenue and the resulting conflict between the parties.

*It would also result in unjust enrichment to the Tribe were the Court to rule that because the Defendant contributed to the OER account from net revenue, rather than gross profit, the Defendant should not be entitled to any of the monies contributed to the account. The Defendant was entitled to 35% of the net revenue under the contract. If the Court were to award the Plaintiff all the monies contributed to the OER account, it would in essence deny to the Defendant its share of the net revenue it was entitled to under the contract. It should also be noted that the Court has already ruled, contrary to the testimony of Thorstenson, that the contract itself provides that the OER account was to be maintained as a liability account and not as an equity account. Therefore, even were the Court to find that the Defendant breached the contract by not contributing monies to the*

*account out of gross receipts, rather than net profits, the Defendant is still entitled to receive its share of the monies contributed to that account.*

In light of all the circumstances surrounding the OER account, the Court cannot conclude that there has been a breach by the Defendant withdrawing certain monies from the OER account.

App. 15 - 2004-01-16 RST Tribal Court Memorandum Decision, Special Judge B.J. Jones (*emphasis supplied*).

Certainly, the *Plaintiffs' [RST's]* argument that the Defendant was not entitled to reimburse itself any of the monies from the account upon termination must be rejected, but a dispute exists as to whether the Defendant was entitled to withdraw all the amounts it did.

App. 16 - 2003-04-30 RST Tribal Court Order, Special Judge B.J. Jones (*emphasis supplied*).

Even the Rosebud Supreme Court initially recognized that BBC was owed money despite its finding that the contract modification was void.

The Tribe continually asserts that the cases of *U.S. ex rel Bernard v. Casino Magic Corp. (Bernard)*, 293 F.3d 419 (8<sup>th</sup> Cir. 2002); and *U.S. ex rel Bernard v. Casino Magic Corp. (Bernard II)*, 384 F.3d 510 (8<sup>th</sup> Cir. 2004) require a finding that BBC is entitled to nothing. This Court disagrees. The *Bernard* cases involve a management contract that was never approved by NIGC and was thus void *ab initio* and *in toto*. This case is different. It involves a management contract that was approved by NIGC and a modification that was not approved by NIGC. Only part of the management contract is void – the modification of OER funding mechanism. The more appropriate case as noted in our prior opinion is *Turnkey Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092, 1095-96 (8<sup>th</sup> Cir. 2002), which did *not* foreclose a potential unjust enrichment action.

For all the above-stated reasons, this Court's previous opinion is affirmed and this case is remanded for the "detailed accounting" described therein.

App. 17 - 2006-10-02 RST Supreme Court, Chief Justice Frank Pommersheim Summary Order (*emphasis in original*).

After six years of litigation with BBC proved financially fruitless, RST went after BBC's shareholders for payment with an action to pierce BBC's corporate veil. "The general rule is that the corporation is looked upon as a separate legal entity until there is sufficient reason to the contrary." *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 132 (S.D. 1978).

There are a number of factors that may justify piercing the corporate veil, including: (1) fraudulent misrepresentation by corporation directors, (2) undercapitalization, (3) failure to observe corporate formalities, (4) absence of corporate records, (5) payment by the corporation of individual obligations, and (6) use of the corporation to promote fraud, injustice, or illegality.

*Kansas Gas & Electric Co. v. Ross*, 521 N.W.2d 107, 112 n. 6 (S.D. 1994).

Although Judge Meyers stated in her in her Memorandum Decision that she "has utilized cases determined by the Courts of the State of South Dakota", none of the above-mentioned factors are referenced in her Order Granting Summary Judgment and piercing BBC's corporate veil. BBC's corporate formalities are summarily disregarded with little more than a citation to RST Rule of Civil Procedure 56, which allows a summary judgment motion to be brought 30 days after commencement of any action.

The Court having considered the pleadings, Affidavits, Briefs and other evidence presented by the parties and having listened to the argument of counsel and it appearing there is no genuine issue of material fact and that [RST] is entitled to a Judgement as a matter of law. . .

*2012-04-19 Order Regarding Motion for Summary Judgment.*

An "order or judgment" is only to be granted comity if it does not "contravene the public policy of the State of South Dakota." SDCL § 1-1-25(1)(e). Judge Meyers' Order Granting Summary Judgment made Colombe financially responsible for a judgment rendered against a corporate entity for its share of unpaid net profits it had withdrawn under mutually agreed upon terms with RST. Special Judge Jones foreshadowed, and



condemned, this inequitable result for BBC. Such inequity is only exacerbated by Judge Meyers' Order.

Affording comity to the April 19, 2012 tribal court judgment results in (1) RST receiving money it was not owed under its mutually agreed upon terms with BBC and (2) RST receiving money from the estate of shareholder in direct disregard of corporate formalities. In short, the circuit court's grant of comity provides RST "a windfall contrary to the familiar principle that equity will not tolerate unjust enrichment." *Parker v. Western Dakota Insurors, Inc.*, 2000 SD 14, ¶ 31, 605 N.W.2d 181, 193 (citing *People ex rel. Palmer v. Peoria Life Ins. Co.*, 34 N.E. 2d 829, 834 (Ill. 1941)). This reality forecloses RST's ability to satisfy SDCL § 1-1-25(1)(e) by clear and convincing evidence. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be **REVERSED** and **VACATED**.

## **II. Totality of the Circumstances Illustrate Judge Trandahl's Clearly Erroneous Findings and Necessitate Reversal of Order Granting Comity**

SDCL § 1-1-25 is in place to deal with exactly the type of situation we have here. The difference between this case and most other cases is that Charles Colombe was a RST member whose family is now seeking protection from the unlawful acts of the tribal court. Normally it is a non-reservation company or individual asking a state court not to honor a tribal court order or judgment. In this case, the court is faced with the family of a lifelong tribal member asking this court to protect him from the unauthorized actions of his tribe and his tribal court system.

South Dakota law specifically requires the tribe to establish by clear and convincing evidence that it follow the laws of its jurisdiction. SDCL § 1-1-25(1)(d). Moreover, it must establish that it has jurisdiction by a validly appointed court. Satisfying these minimum requirements before granting comity to a tribal court order or judgment does not violate any concept of federal, state or tribal law. It is what should be expected of any court.

*Wells v. Wells* explicitly states that it is a circuit court's job to review the decision of a tribal judge. 451 N.W.2d 402 (S.D. 1991). "[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree." *Id.* at 404 (quoting *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691, 705 (1982)). Under South Dakota law, the circuit court is required to double-check the tribal court's decisions to ensure that all jurisdictional prerequisites have been met before recognizing a tribal court order or judgment. SDCL § 1-1-25(1).

## **CONCLUSION**

It was RST's burden at the January 8, 2015 Hearing to prove by "clear and convincing evidence" that Judge Meyer's April 19, 2012 tribal court order satisfied all five specifically enumerated requirements of SDCL § 1-1-25 (1). The only evidence proffered by RST as to the validity of the order was its assertion that it is a "long-standing practice and tradition" of its Chief Judge to appoint Special Judges, such as Judge Meyers. RST's evidence is an admission that RST's purported judgment does not meet the requirements of SDCL § 1-1-25.

RST's failure and inability to make the requisite evidentiary showing mandated by SDCL § 1-1-25 is further illustrated in RST's admissions that nothing in the RST Tribal Constitution Article XI provides for the appointment of Special Judges and that Title 9's explicit provisions regarding appointment of judges was not followed in the appointment of Judge Meyers. SDCL § 1-1-25 is further violated by Judge Meyer's refusal to recuse herself because the request for such action was oral and in the improper passage of Appellate Rule 2 which financially barred Charlie from appealing Judge Meyer's decision. The April 19, 2012 tribal court order was not rendered by "a process that assures the requisites of an impartial administration of justice" nor does the order comply "with the laws, ordinances and regulations of the jurisdiction from which it was obtained." SDCL § 1-1-25(1)(c) and (d). Lastly, recognition of the tribal court order "contravene[s] the public policy of the State of South Dakota." SDCL § 1-1-25(1)(e).

No legal basis existed for the Court to find that RST "satisfied that all the foregoing conditions exist" so as to "recognize the tribal court or judgment . . ." SDCL § 1-1-25(2). South Dakota law requires Judge Trandahl's August 13, 2015 Order Granting Comity be REVERSED and VACATED.

Respectfully submitted this 4<sup>th</sup> day of January, 2016.

/s/ Raleigh Hansman

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Amended Appellant's Brief and all appendices were mailed by first class mail, postage prepaid to:

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On this 4th day of January, 2016.

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## **CERTIFICATE OF COMPLIANCE**

In accordance with SDCL § 15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 8,157 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 4th day of January, 2016.

/s/ Raleigh Hansman

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## APPENDIX

Tab 1 - Trial Exhibit J – April 19, 2012 Order Regarding Motion for Summary Judgment (Rosebud Sioux Tribe) .....	1-2
Tab 2 - 2014-03-12 Notice of Disallowance by Estate of Charles C. Colombe .. .....	3-6
Tab 3 - 2015-07-22 Findings of Fact and Conclusions of Law.....	7-15
Tab 4 - 2015-08-2015 Order Granting Comity .....	16
Tab 5 - 2015-09-02 Notice of Entry of Order Granting Comity .....	17-19
Tab 6 - Trial Exhibit A – Rosebud Sioux Tribe Constitution .....	20-35
Tab 7 - Trial Exhibit L – RST Law and Order Code.....	36-39
Tab 8 - Trial Exhibit G – Order Appointing Judge Meyers.....	40
Tab 9 – Trial Exhibit E – Affidavit of Lenard Shadow Wright .....	41-42
Tab 10 – Trial Exhibit D – 2012-10-17 Letter from RST Secretary .....	43
Tab 11 – Trial Exhibit O – 2008-02-22 Letter from RST Attorney Sandven .....	44-45
Tab 12 – Trial Exhibit H – Order on Motion to Recuse .....	46
Tab 13 – Trial Exhibit M – RST Rules of Civil Procedure .....	47-85
Tab 14 – Trial Exhibit N – RST Rules of Appellate Procedure .....	86-94
Tab 15 – 200401-16 RST Tribal Court Memorandum Decision, Special Judge B.J. Jones .....	95-109
Tab 16 – 2003-04-30 RST Tribal Court Order, Special Judge B.J. Jones	110-119
Tab 17 – 2006-10-02 RST Supreme Court, Chief Justice Frank Pommersheim Summary Order.....	120-121

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Tab 2 - 2014-03-12 Notice of Disallowance by Estate of Charles C. Colombe .. .....	3-6
Tab 3 - 2015-07-22 Findings of Fact and Conclusions of Law.....	7-15
Tab 4 - 2015-08-2015 Order Granting Comity .....	16
Tab 5 - 2015-09-02 Notice of Entry of Order Granting Comity .....	17-19
Tab 6 - Trial Exhibit A – Rosebud Sioux Tribe Constitution .....	20-35
Tab 7 - Trial Exhibit L – RST Law and Order Code.....	36-39
Tab 8 - Trial Exhibit G – Order Appointing Judge Meyers.....	40
Tab 9 – Trial Exhibit E – Affidavit of Lenard Shadow Wright .....	41-42
Tab 10 – Trial Exhibit D – 2012-10-17 Letter from RST Secretary .....	43
Tab 11 – Trial Exhibit O – 2008-02-22 Letter from RST Attorney Sandven .....	44-45
Tab 12 – Trial Exhibit H – Order on Motion to Recuse .....	46
Tab 13 – Trial Exhibit M – RST Rules of Civil Procedure .....	47-85
Tab 14 – Trial Exhibit N – RST Rules of Appellate Procedure .....	86-94
Tab 15 – 200401-16 RST Tribal Court Memorandum Decision, Special Judge B.J. Jones .....	95-109
Tab 16 – 2003-04-30 RST Tribal Court Order, Special Judge B.J. Jones	110-119
Tab 17 – 2006-10-02 RST Supreme Court, Chief Justice Frank Pommersheim Summary Order.....	120-121

**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

**ROSEBUD SIOUX TRIBE**

**Plaintiff,**

**vs.**

**BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD**

**Defendants.**

**CASE NO: CIV 09-069**

**ORDER REGARDING MOTION  
FOR SUMMARY JUDGMENT**

The above captioned action came before the Court on March 13, 2012 for a hearing on the Plaintiff Rosebud Sioux Tribe's ("Tribe") Motion for Summary Judgment filed pursuant to Rule 56 of the Rosebud Sioux Tribe Rules of Civil Procedure that provides:

At any time 30 days after the commencement of an action any party may move the Court for summary judgment as to any or all issues presented in the case, and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Such motion shall be served not less than 10 days prior to the hearing on said motion and may be supported by affidavits, discovery material, or memorandum, all of which must be made available to the opposing parties at least 10 days prior to the hearing. The opposition shall have full opportunity to respond to such motion at the time fixed for hearing.

The Tribe's Motion for Summary Judgment was filed on January 22, 2011 and notice for the March 13, 2012 hearing was mailed to interested parties on February 23, 2012.

Plaintiff appeared through its attorney Steven Sandven and Defendant BBC and Charles Colombe appeared through their attorney O. J. Seamans, Defendants Wade Boyd and John Boyd did not appear either personally or through their attorney. The Court having considered the pleadings, Affidavits, Briefs and other evidence presented by the parties and having listened to the argument



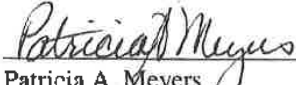
Rosebud Sioux Tribe v. BBC Entertainment, Inc et al  
Case No: Civ 09-069  
Order Regarding Motion to Dismiss

of counsel and it appearing there is no genuine issue of material fact and that the Plaintiff is entitled to Judgment as a matter of law it is hereby:

**ORDERED** that Plaintiff's Motion for Summary Judgment is **GRANTED**.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge

STATE OF SOUTH DAKOTA     )  
  SS  
COUNTY OF TODD            )

IN CIRCUIT COURT  
  
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE OF  
CHARLES C. COLOMBE

PRO. 13-

**NOTICE OF DISALLOWANCE OF  
CLAIM OF ROSEBUD SIOUX TRIBE**

TO:   ROSEBUD SIOUX TRIBE, by and through its attorney, Al Arendt

Notice is hereby given that Wes Colombe, Personal Representative of the Estate of Charles C. Colombe, pursuant to SDCL § 29A-3-806, has disallowed the claim of Claimant Rosebud Sioux Tribe for the reasons set forth herein:

1. A 2009 action in the Rosebud Tribal Court, *Rosebud Sioux Tribe v. BBC Entertainment, Inc., Charles Colombe and Wayne Boyd*, Rosebud Tribal Court Civ. 2009-069, seeks to pierce the corporate veil of BBC and hold the individual defendants liable for a Rosebud judgment against BBC in the amount of \$399,353.61 plus interest.
2. The Rosebud Sioux Tribal Court does not comply with Article XI of the Rosebud Constitution and has not complied with the Rosebud Constitution since Article XI became effective on September 20, 2007.
3. The Rosebud Tribal Court has no jurisdiction over the aforementioned cause of action because of its failure to comply with Article XI of the Rosebud Constitution.
4. The Rosebud Tribal Court Chief Judge in denying a motion to dismiss ruled in Civ. 2009-069 that the tribal court created under Title 9 of the Rosebud Law and Order

Code was the effective tribal court. The replacement judge who entered the Orders against Charles Colombe in this litigation was not validly appointed pursuant to the requirements of Title 9 which are set forth in Rosebud Law and Order Code § 9-1-5(c). The tribal court replacement judge has no authority to act as a Rosebud Tribal Court Judge even if Rosebud could prove its court is valid.

5. No final judgment has ever been entered in Civ. 2009-069; a Rule 60(b) motion raising the above issues has been pending in Rosebud Tribal Court since February 2013.

SDCL § 1-1-25 establishes when a tribal court judgment may be recognized as a matter of comity in the state courts of South Dakota. Before the Sixth Judicial Circuit Court can even consider recognizing, the Rosebud Sioux Tribe as Claimant has the duty pursuant to SDCL § 1-1-25 to establish by clear and convincing evidence that:

- a) The tribal court had jurisdiction over both the subject matter and the parties;
- b) The order or judgment was not fraudulently obtained;
- c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
- d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and
- e) The order or judgment does not contravene the public policy of the State of South Dakota.

Wes Colombe, by and through his attorneys, alleges that Claimant Rosebud Sioux Tribe cannot make the requisite showing under SDCL § 1-1-25 and the claim is thus disallowed.

Dated this 13<sup>th</sup> day of March, 2014.



Clint Sargent  
MEIERHENRY SARGENT, LLP  
315 South Phillips Avenue  
Sioux Falls, SD 57104  
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605-336-2593 facsimile  
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*Attorney for Wesley Colombe,  
Personal Representative for the  
Estate of Charles C. Colombe*

STATE OF SOUTH DAKOTA     )  
  SS  
COUNTY OF TODD            )

IN CIRCUIT COURT  
  
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE OF  
CHARLES C. COLOMBE

PRO. 13-

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Notice of Disallowance of Claim of Rosebud Sioux Tribe was served by depositing the same in the United States Post Office in Sioux Falls, South Dakota, with first-class postage thereon fully prepaid this 13<sup>th</sup> day of March, 2014.

Al Ahrendt  
Ahrendt Law Office  
PO Box 1077  
Pierre, SD 57501

MEIERHENRY SARGENT, LLP



For the Firm  
315 South Phillips Avenue  
Sioux Falls, SD 57104  
605-336-3075  
605-336-2593 facsimile



CIRCUIT COURT OF SOUTH DAKOTA  
SIXTH JUDICIAL CIRCUIT

200 EAST THIRD, P.O. BOX 311  
WINNER, SOUTH DAKOTA 57580-0311

KATHLEEN F. TRANDAHL  
CIRCUIT JUDGE  
TELEPHONE: 605-842-3856  
FACSIMILE: 605-842-2267  
Kathleen.Trandahl@ujs.state.sd.us

COURT REPORTER:  
ED MIDGLEY  
605-842-3552  
Ed.Midgley@ujs.state.sd.us

July 22, 2015

Clint L. Sargent  
Attorney at Law  
[clint@meierhenrylaw.com](mailto:clint@meierhenrylaw.com)

Al Arendt  
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Dana Hanna  
Attorney at Law  
[dhanna@midconetwork.com](mailto:dhanna@midconetwork.com)

RE: Estate of Charles Colome, Todd County 60PRO13-7

Dear Counsel:

Attached please find the Findings of Fact and Conclusions of Law signed by the court today. The court signed the findings and conclusions proposed by the Rosebud Sioux Tribe.

Mr. Arendt or Mr. Hanna is directed to prepare the order in accordance with this decision.

Sincerely yours,

  
Kathleen F. Trandahl  
Circuit Judge

STATE OF SOUTH DAKOTA     )  
  :SS  
COUNTY OF TODD            )

IN CIRCUIT COURT  
  
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE OF  
CHARLES C. COLOMBE,

Deceased.

ROSEBUD SIOUX TRIBE,

Plaintiff,

vs.

WESLEY COLOMBE, as Personal  
Representative for the Charles C. Colombe  
Estate,

Defendant.

PRO. 13-7

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

An evidentiary hearing was held on January 8, 2015 at the Tripp County Courthouse, the Honorable Kathleen F. Trandahl presiding. Plaintiff Rosebud Sioux Tribe appeared through its attorneys, Dana Hanna and Al Arendt. Defendant Wesley Colombe, as Personal Representative for the Charles C. Colombe Estate, appeared personally and through his attorney, Clint Sargent.

The court received the final submission from counsel on June 3, 2015. The Court having heard the evidence presented by the parties and having taken judicial notice of the facts and rulings contained in *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D., 2011) and *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014), hereby makes the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. During his life, Charles Colombe was a member of the Rosebud Sioux Tribe and a resident of the Rosebud Sioux Tribe reservation.
2. On October 16, 2007, Special Judge B.J. Jones of the Rosebud Sioux Tribal Court granted the Rosebud Sioux Tribe a judgment against BBC Entertainment, Inc. ("BBC") in the amount of \$399,353.61, plus interest in the amount of \$127,793.15. At that time, Colombe was the sole owner of BBC Entertainment, Inc.
3. BBC did not pay any part of that judgment.
4. On February 17, 2009, the Tribe filed a tribal court complaint against BBC, Wayne Boyd and Charles Colombe. The Tribe sought an order to pierce BBC's corporate veil and to hold Boyd and Colombe personally liable for the money judgment against BBC. Initially, Chief Judge Sherman Marshall presided over the case.
5. Wayne Boyd was later dismissed from the lawsuit.
6. At all times in the tribal court case, Colombe was represented by counsel. He retained O.J. Seamans, a lay advocate and member of the tribal court bar association who was licensed to practice law in the tribal court.
7. The first time Colombe raised the argument that he now raises in this Court, that the Tribe's alleged failure to comply with an amendment to its constitution divested tribal courts of jurisdiction over him, was in a March 24, 2009 motion to dismiss the tribal court action to pierce BBC's corporate veil. On April 26, 2010, Judge Sherman Marshall issued an order denying Colombe's motion to dismiss. Colombe then made a request to bring a discretionary interlocutory appeal, which was denied by Judge Marshall.



8. While the action to pierce the corporate veil was pending in tribal court, Colombe filed an action in federal court, challenging the jurisdiction of the tribal court, and seeking injunctive relief to prevent the tribal court from adjudicating the Tribe's lawsuit to pierce the corporate veil of BBC. He named the Tribe, the Tribal Court, and Chief Judge Marshall as defendants.
9. After Colombe made the Tribal Court and its Chief Justice named defendants in his federal lawsuit, Chief Judge Marshall recused himself and the associate judges of the Tribal Court from presiding over the Tribal Court case. Pursuant to the regular and necessary practice of the Tribal Court, Chief Judge Marshall appointed Patricia Meyers, an attorney admitted to the State Bar of South Dakota, as a special judge of the Tribal Court to preside over the pierce the corporate veil action.
10. The Tribe eventually filed a motion for summary judgment in the tribal court. Colombe and Mr. Seamans received notice that there would be a hearing on the motion on April 19, 2012. At that hearing, Colombe appeared with his counsel, Mr. Seamans.
11. At the hearing, Mr. Seamans made an oral motion to recuse Special Judge Meyers, on the grounds that he had not received notice of her appointment as Special Judge. Judge Meyers denied the motion on the ground that it did not comply with tribal law.
12. Judge Meyers then ruled in favor of the Tribe and granted its motion for summary judgment, which ruling made Colombe personally liable for the judgment against BBC Entertainment, Inc.
13. Colombe filed a notice of appeal of that judgment with the Rosebud Sioux Tribe Supreme Court, but because he failed to provide proof of financial responsibility, as required by the Tribe's Rules of Appellate Procedure, his appeal was dismissed.

14. The federal district court dismissed Colombe's complaint, basing its ruling in large part on failure to exhaust tribal appellate court remedies. *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D., 2011).
15. Colombe appealed the district court's ruling to the United States Court of Appeals for the Eighth Circuit. That Court affirmed the dismissal of Colombe's complaint, and ruled that Colombe's argument that the tribal court lacked jurisdiction because of an alleged failure to comply with the 2007 amendment to the Tribe's constitution was precluded because Colombe had failed to exhaust tribal court remedies. *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014).
16. To date, because of Colombe's failure to appeal the final judgment entered by Judge Meyers, the Rosebud Sioux Tribal Supreme Court has not had an opportunity to review or consider Colombe's claim that the Chief Judge of the Tribal Court had no authority to appoint a special judge or his claim that the Tribe's alleged failure to comply with the 2007 amendment deprived the Tribal Court of jurisdictional authority.
17. The Rosebud Sioux Tribe is a federally recognized Indian tribe whose reservation is within the exterior boundaries of the State of South Dakota. The governing body of the Tribe is its Tribal Council.
18. The Rosebud Sioux Tribe has a constitution that was adopted by the Tribe in 1935. The tribal constitution was last amended in 2007. Pursuant to the Tribe's constitution, there is a Tribal Court that adjudicates civil and criminal legal matters on the Rosebud Sioux Reservation.
19. Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 2, as amended in 2007, provides that:

The Tribal Court shall consist of one chief judge and such associate judges and staff, as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council. All tribal court personnel shall be subject to the supervision of the Chief Judge. The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.

20. Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 4, as amended in 2007, provides that:

The Chief Judge shall promulgate rules of pleading, practice, and procedures applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law. \* \* \*

21. It is a long-established and regular practice of the Tribal Court for the Chief Judge to appoint special judges, who are not full-time salaried associate judges of the Tribal Court, to preside over particular cases when the Chief Judge and associate judges must recuse themselves or are otherwise unavailable to preside over a particular case, due to conflicts of interest or other good cause. Pursuant to this long-standing court practice, the Chief Judge does not seek or require Tribal Council approval for his appointments of special judges.

22. The Rosebud Sioux Tribal Council has long been aware of this tribal court practice whereby the Chief Judge appoints special judges, without seeking Tribal Council approval of the appointment. There is no evidence that the Tribal Council has ever questioned or disapproved of this practice. To the contrary, every year, for many years, the Tribal Council has implicitly approved of this practice when it approves the Tribal Court's budget, which always contains a line item amount budgeted for money to pay appointed special judges.

23. The practice of appointing special judges to preside over individual cases has been a regular and routine practice in the Rosebud Sioux Tribal Court for at least twenty years.

24. The Constitution of the Tribe does not use the term "special judge." Section 4-2-8 of the Tribe's Law and Order Code mandates that any matter not expressly covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe.
25. The Court finds that the appointment of special judges by the Chief Judges is a long established and accepted custom and usage of the Tribe and its Tribal Court system.
26. Wesley Colombe ("Wes") is the Personal Representative of the Charles C. Colombe Estate ("Estate").
27. The Rosebud Sioux Tribe filed an Amended Notice of Creditor's Claim against the Estate on February 26, 2014.
28. RST's claim against the Estate was based on a judgment against Colombe from the Rosebud Sioux Tribal Court totaling \$527,146.76 issued by Special Judge Patricia Meyers on April 19, 2012.
29. On March 13, 2014, Wes Colombe filed a Notice of Disallowance of Claim of Rosebud Sioux Tribe pursuant to SDCL § 29A-3-806 stating that the claim was disallowed because RST could not make the required showing under SDCL § 1-1-25 for enforcement of its tribal court judgment.

### **CONCLUSIONS OF LAW**

1. This Court incorporates all of its Findings of Fact in support of its Conclusions of Law.
2. The regular practice of the Tribal Court whereby the Chief Judge appoints special judges to preside over particular cases when the Chief Judge and the associate judges not available to do so is authorized by the Tribe's Constitution: Article XI, section 2 authorizes the Chief Judge to create staff positions in the tribal court that he deems to be necessary to the efficient functioning of the court; Article XI, section 4 authorizes the Chief Judge to establish court practices and procedures that he deems necessary for the efficient functioning of the tribal court.
3. Chief Justice Marshall had authority from the Tribe's Constitution, laws and customs and practices to appoint Patricia Meyers as a special tribal court judge.
4. The tribal court, acting by and through Special Judge Meyers, had full jurisdictional authority to preside over and adjudicate the Tribe's pierce the corporate veil action.
5. Article IX, Section 1 of the Tribe's Constitution, as amended in 2007, provides for separation of powers. It also directs the Tribal Council to pass legislation to provide for sanctions for the violation of the separation of powers.
6. Both before and after the Tribe's constitution was amended in 2007 to make separation of powers part of the constitution, the statutes and ordinances of the Rosebud Sioux Tribe have required separation of powers between the Tribal Council and executive branch from the tribal judiciary.
7. There was no need for the Tribal Council to enact additional legislation to comply with the 2007 amendment, since the Tribe's laws and ordinances already provided for

separation of powers and for sanctions for attempts to violate separation of powers,  
including criminal sanctions.

8. The evidence has proven by clear and convincing evidence that:
- a. The tribal court had jurisdiction over both the subject matter and the parties;
  - b. the order and judgment of the court was not fraudulently obtained; The order and judgment was obtained by a process that assured the requisites of an impartial administration of justice including but not limited to the due process requirements of adequate notice and a hearing, with the assistance of counsel;
  - c. the order and judgment complied with the laws, ordinances and regulations of the Rosebud Sioux tribe;
  - d. the order and judgment did not and does not contravene the public policy of the State of South Dakota;
9. The Tribe has met all the requirements of SDCL 1-1-25;
10. And therefore, the order of the Tribal Court is entitled to full faith and credit, and comity in this Court.

Dated this 22<sup>nd</sup> day of July, 2015.

BY THE COURT:

  
HON. KATHLEEN F. TRANDAHL  
Circuit Court Judge

Attest:

\_\_\_\_\_  
Clerk of Courts

(SEAL)

IN CIRCUIT COURT

: SS

COUNTY      OF      TODD)

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE  
OF CHARLES C. COLOMBE,

60PRO13-7

**Deceased.**

ROSEBUD SIOUX TRIBE,

**Plaintiff,**

ORDER GRANTING COMITY

**VS.**

**WESLEY COLOMBE, As Personal Representative for the Charles C. Colombe Estate,**

**Defendant,**

\* \* \* \* \*

COMES NOW the Honorable Kathleen Trandahl, Judge of the Sixth Judicial Circuit, Todd County, South Dakota, and based on the Court's previously entered July 22, 2015 Findings of Fact and Conclusions of Law, does now make and enter the following order.

It is hereby ORDERED, ADJUDGED AND DECREED that the Rosebud Sioux Tribal court order, dated April 19, 2012, entitled "Order Regarding Motion For Summary Judgment" awarding a judgment to the Plaintiff herein in the amount of \$399,353.61, plus accrued interest in the amount of \$127,793.15, is hereby granted comity pursuant to SDCL 1-1-25 and constitutes a valid judgment against the Defendant herein, Wesley Colombe, as personal representative for the Charles C. Colombe estate.

DATED this 13<sup>th</sup> day of August, 2015.

BY THE COURT:

ATTEST: '

~~Clerk~~

(SEAL)

**Judge**

State of South Dakota } ss.  
County of \_\_\_\_\_ }  
Filed in this office

AUG 13 2015

Jodi Calhoun  
Clerk of Courts  
By JCS Deputy

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS  
COUNTY OF TODD )

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE )  
OF CHARLES C. COLOMBE, )

60PRO13-7

Deceased. )

ROSEBUD SIOUX TRIBE, )

Plaintiff, )

NOTICE OF ENTRY OF  
ORDER GRANTING COMITY

v. )

WESLEY COLOMBE, As Personal )  
Representative for the )  
Charles C. Colombe Estate, )

Defendant. )

\* \* \* \* \*

TO: Wesley Colombe, Defendant herein, and his counsel of  
record, Clint Sargent, Attorney at Law, of 315 South Philips  
Ave., Sioux Falls, SD 57104:

You are hereby notified that the attached Order Granting  
Comity was signed by the Honorable Kathleen Trandahl on August  
13, 2015, and filed in the office of the Todd County Clerk of  
Courts, in Winner, South Dakota on same said date.

You are referred to the Court's file on this matter for  
further details.

DATED this 31st day of August, 2015.

ARENDT LAW OFFICE



Al Arendt, Attorney  
For the Rosebud Sioux Tribe  
P.O. Box 1077  
Pierre, SD 57501  
(605) 224-7700  
Email: al-arendtlaw@qwestoffice.net



NOTICE OF ENTRY OF ORDER GRANTING COMITY  
In Re.: Estate of Charles C. Colombe, 60PRO13-7

**CERTIFICATE OF SERVICE**

Al Arendt hereby certifies that I served a true copy of the foregoing Notice of Entry of Order Granting Comity, with attached Order Granting Comity, on the persons next designated either by first class mail, postage prepaid, or via Odyssey File & Serve:

Clint Sargent  
Attorney at Law  
315 South Philips Ave.  
Sioux Falls, SD 57104

Dated this 31st day of August, 2015.



---

Al Arendt, Attorney for  
Rosebud Sioux Tribe

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
: SS	
COUNTY OF TODD)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF THE ESTATE )	60PRO13-7
OF CHARLES C. COLOMBE, )	
Deceased. )	
ROSEBUD SIOUX TRIBE, )	
Plaintiff, )	ORDER GRANTING COMITY
vs. )	
WESLEY COLOMBE, As Personal )	
Representative for the Charles C. )	
Colombe Estate, )	
Defendant, )	
*****	



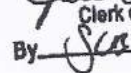
COMES NOW the Honorable Kathleen Trandahl, Judge of the Sixth Judicial Circuit, Todd County, South Dakota, and based on the Court's previously entered July 22, 2015 Findings of Fact and Conclusions of Law, does now make and enter the following order.

It is hereby ORDERED, ADJUDGED AND DECREED that the Rosebud Sioux Tribal court order, dated April 19, 2012, entitled "Order Regarding Motion For Summary Judgment" awarding a judgment to the Plaintiff herein in the amount of \$399,353.61, plus accrued interest in the amount of \$127,793.15, is hereby granted comity pursuant to SDCL 1-1-25 and constitutes a valid judgment against the Defendant herein, Wesley Colombe, as personal representative for the Charles C. Colombe estate.

DATED this 13<sup>th</sup> day of August, 2015.

BY THE COURT:

ATTEST:   
 Clerk  
 (SEAL)

  
 Judge  
 State of South Dakota } ss.  
 County of \_\_\_\_\_ }  
 Filed in this office  
 AUG 13 2015  
  
 Clerk of Courts  
 By  Deputy

# **Rosebud Sioux Tribe Constitution**

## **Preamble**

Under and by virtue of our Creator and His divine providence, we, the enrolled members of the Rosebud Sioux Tribe of Indians of the Rosebud Indian Reservation in the State of South Dakota, in order to establish a united tribal organization, to establish justice, to insure tranquility and enjoy the blessings of freedom and liberty, to conserve our tribal property, to develop our common resources, and to promote the best welfare of the present generation and our posterity, in education and industry, do hereby adopt and establish this Constitution and By-Laws.

## **Article I - Territory**

The jurisdiction of the Rosebud Sioux Tribe of Indians shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the Act of March 2, 1889, and to such other lands as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

## **Article II – Membership**

### **Section 1.**

Membership of the Rosebud Sioux Tribe shall consist as follows:

- (a) All persons of Indian blood, including persons born since December 31, 1920, who names appear on the official census roll of the Tribe as of April 1, 1935.
- (b) All persons born after April 1, 1935, and prior to the effective date of this amendment, to any member of the Rosebud Sioux Tribe who was a resident of the reservation at the time of the birth of said persons. *(Amendment V effective May 2, 1966)*
- (c) All persons that can provide three (3) generations of lineal descent born after April 1, 1935, to a member of the Rosebud Sioux Tribe, regardless of the residence of the parent. *(Amendment C effective September 20, 2007 - vote 508 for; 281 against; 17 ballots spoiled or mutilated)*

### **Section 2.**

The Tribal Council shall have the power to promulgate ordinances covering future membership and the adoption of new members. *(Amendment XVI effective September 23, 1985)*

## **Article III – Governing Body**

### **Section 1.**

The governing body of the Rosebud Sioux Tribe shall consist of a Council known as the Rosebud Sioux Tribal Council.

### **Section 2.**

The President and Vice President of the Rosebud Sioux Tribe shall be elected at large for a term of three years. The Secretary and Treasurer of the Rosebud Sioux Tribe shall be elected at large for a term of two years and shall have no vote in matters before the Rosebud Sioux Tribe. The Community Representatives of the Rosebud Sioux Tribe shall be elected for terms of three years.

The offices of the President, Vice President, Council Representatives, Secretary, and Treasurer shall be subject to limits of two consecutive terms. The terms of Community Representatives shall be staggered terms commencing with the next election. Elections for ten Community Representatives will be for the first three year term, the remaining ten Community Representative elections will be for an initial term of two years, and then it will revert to a three year term at the next general election in 2009. The decision of which ten communities will hold the first three year and two year terms will be made by the Rosebud Sioux Tribal Election Board. Each community of the reservation, as follows, shall be entitled to representation on the Rosebud Sioux Tribal Council as hereinafter provided:

- |                   |                    |
|-------------------|--------------------|
| 1. Antelope       | 11. Okreek         |
| 2. Black Pipe     | 12. Parmelee       |
| 3. Bull Creek     | 13. Ring Thunder   |
| 4. Butte Creek    | 14. Rosebud        |
| 5. Corn Creek     | 15. St. Francis    |
| 6. Grass Mountain | 16. Soldier Creek  |
| 7. He Dog         | 17. Spring Creek   |
| 8. Horse Creek    | 18. Swift Bear     |
| 9. Ideal          | 19. Two Strike     |
| 10. Milks Camp    | 20. Upper Cut Meat |

*(Amendment F effective September 20, 2007 - vote 459 for; 339 against; 8 ballots spoiled or mutilated)*

### **Section 3.**

All Council members and the President and Vice-President shall be of at least  $\frac{1}{4}$  degree Indian blood. *(Amendment E effective September 20, 2007 - vote 557 for; 246 against; 3 ballots spoiled or mutilated)*

### **Section 4.**

The Tribal Council shall have authority to make changes in the foregoing list according to future community needs. *(Amendment XVII effective September 23, 1985)*

### **Section 5.**

Each recognized community shall have one Community Representative to the Tribal Council. Each Community Representative of the Tribal Council shall be elected at large by the registered voters of the Rosebud Sioux Tribe. *(Amendment G effective September 20, 2007 - vote 538 for; 258 against; 10 ballots spoiled or mutilated)*

### **Section 6.**

Any member of the Sicangu Lakota Oyate at least 30 years of age, who has not been found guilty by the Tribal Council of misconduct in tribal affairs, or who has not been found guilty in a court of law of felony offense involving violence and who can provide affidavits(s) that prove some history of leadership shall be qualified to seek and hold membership on the Tribal Council. Candidates for the position of President or Vice President of the Sicangu Lakota Oyate must be at least 45 years of age and meet all requirements of qualification for membership on the Tribal

Council. *(Amendment H effective September 20, 2007- vote 535 for; 261 against; 10 ballots spoiled or mutilated)*

**Section 6.**

Any enrolled member of the Rosebud Sioux Tribe possessing at least one fourth (1/4) or more Sicangu blood degree and at least twenty five (25) years of age, who has not been found guilty of any major crimes by any jurisdiction, or who has not been found guilty by the Rosebud Sioux Tribal Council of misconduct in tribal affairs, or who has not been found, by any tribal, state, or federal court of law, or by the Tribal Ethics Commission or by the Rosebud Sioux Tribal Council, to have performed any act containing an element of perjury, forgery, bribery, dishonesty or abuse of public office compromising the welfare of the Rosebud Sioux Tribe or any of its members shall be qualified to seek and hold membership on the Rosebud Sioux Tribal Council. A candidate for President, Vice-President, Secretary and Treasurer must have been living within the boundaries of the Rosebud Sioux Indian Reservation for at least one year preceding the date of the Primary Election, and a candidate for Community Representative must have been living in the community of candidacy for at least one year next preceding the date of the Primary Election.

If for any reason a Community Representative is absent from the community for a period exceeding 90 days, the position shall become immediately vacant and filled according to the Constitution and By-Laws of the Rosebud Sioux Tribe. *(Amendment I effective September 20, 2007- vote 584 for; 212 against; 10 ballots spoiled or mutilated)*

**Section 7.**

If the Office of President becomes vacant before the expiration of the term and one year or more of the term remains, the Tribal Council, within thirty (30) days after the vacancy, shall order a special election. If less than one year of the term remains, the Vice President shall fill the unexpired term; provided, that the tenure of office of any person elected to fill the vacancy shall not extend beyond the term of office of the original incumbent. If the Office of Vice President becomes vacant by reason of succession, or any other cause and one year or more remains in the term, the Tribal Council, within (30) days after the vacancy, shall order a special election. If less than one year of the term remains, the Tribal Council shall elect a Vice President from its own number to fill the vacancy until the next general election; provided, that the tenure of office of any person elected to fill the vacancy shall not extend beyond the term of office of the original incumbent.

If the office of any Community Representative becomes vacant before the expiration of the term and one year or more of the term remains, the Tribal Council, within thirty (30) days after the vacancy, shall order a special election to allow all registered voters to vote for the vacant position. If less than one year of the term remains, the community council of the affected community, within thirty (30) days from the date of the vacancy shall appoint a Community Representative for the unexpired term; provided, that the tenure of office of any person elected to fill the vacancy shall not extend beyond the term of office of the original incumbent.

If the Office of Secretary becomes vacant before the expiration of the term and one year or more remains in the unexpired term, the Tribal Council shall order a special election to fill the vacancy. If less than one year remains in the term, the Tribal Council shall advertise the vacancy

and fill the term from those qualified tribal applicants. The tenure of office of any person elected to fill this vacancy shall not extend beyond the term of office of the original incumbent.

If the Office of Treasurer becomes vacant before the expiration of the term and six months or more remain in the unexpired term, the Tribal Council shall order a special election to fill the vacancy. If less than one year remains in the term, the Tribal Council shall advertise the vacancy and fill the term from those qualified tribal applicants. The tenure of office of any person elected to fill this vacancy shall not extend beyond the term of office of the original incumbent.

*(Amendment J effective September 20, 2007 – 590 for; 210 against; 6 ballots spoiled or mutilated)*

#### **Section 8.**

The Secretary and Treasurer of the Rosebud Sioux Tribe shall be elected at large for a term of two years by the registered voters from within the twenty (20) communities of the Rosebud Sioux Tribe. The Office of Sergeant-at-Arms shall be elected by the Tribal Council from within or without its members. The Tribal Secretary and Treasurer officers elected shall have no vote in matters before Tribal Council. *(Amendment K effective September 20, 2007 – 533 for; 263 against; 10 ballots spoiled or mutilated)*

#### **Section 9.**

Any person elected to these positions shall be of at least ¼ degree Indian blood. *(Amendment L effective September 20, 2007 – vote 549 for; 251 against; 6 ballots spoiled or mutilated)*

#### **Section 10.**

The Electorate of the Rosebud Sioux Tribe shall determine the qualifications of its officers, council members, and community officers. *(Amendment M effective September 20, 2007 – vote 549 for; 243 against; 14 ballots spoiled or mutilated)*

#### **Section 11.**

There shall be a Primary Election and a General Election for President and Vice-President held every three years, and there shall be a Primary Election and a General Election for Secretary and Treasurer of the Rosebud Sioux Tribal Council held every two years, and there shall be a Primary Election and General Election for Community Representatives to the Rosebud Sioux Tribal Council held at the end of three years terms as specified in Article III, Section 2. The Primary Election shall be held on the fourth Thursday in July and the General Election shall be held on the fourth Thursday in August. If the election Thursday is a legal holiday, the election shall be held on the first subsequent day, which is not a holiday. The terms of Council Representatives and officers in office on the effective date of this amendment shall expire three (3) days following certification of results of the General Election. *(Amendment N effective September 20, 2007 – vote 435 for; 353 against; 8 ballots spoiled or mutilated)*

#### **Section 12.**

Newly elected tribal officers and community representatives shall begin their official duties on the first business day of the first week following their certification by the Tribal Election Board. *(Amendment XVII effective September 23, 1985)*

### **Article IV – Powers of the Rosebud Sioux Tribal Council**

## **Section 1.**

Enumerated powers – The Council of the Rosebud Sioux Tribe shall exercise the following powers subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and attached By-Laws. (*Amendment I effective June 19, 1962; Yes-346; No-296*)

(a) To negotiate with the federal, state and local governments on behalf of the Tribe and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Rosebud Sioux Reservation.

(b) To employ legal counsel for the protection and advancement of the rights of the Tribe and its members. (*Amendment O effective September 20, 2007 – vote 472 for; 322 against; 12 ballots spoiled or mutilated*)

(c) To purchase and to otherwise acquire lands and other property for or on behalf of the Tribe and to manage, permit, assign, lease, sell, exchange, encumber, or otherwise deal with tribal lands and property as authorized by law; provided that there shall be no sales of tribal or TLE managed lands and no land trades to any non-Indians within the original boundaries of the 1868 Treaty without the consent of tribal members, and to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in tribal lands or other tribal assets without the consent of the Tribe; provided, that in leasing tribal land for grazing or agricultural purposes preference shall be given to any member of the Tribe who is the economic head of the family. (*Amendment XXI effective September 23, 1985*)

(d) To advise the Secretary of the Interior with regard to all appropriation estimates or federal projects for the benefit of the Tribe prior to the submission of such estimates to any departments of the United States Government and to Congress. (*Amendment XVIII effective September 23, 1985*)

(e) To make assignments of tribal land to members of the Tribe in conformity with Article VIII of this Constitution.

(f) To make all economic affairs and enterprise of the Tribe in accordance with the terms of a charter which may be issued to the Tribe by the Secretary of the Interior.

(g) To appropriate for public purposes of the Rosebud Sioux Tribe available Tribal Council funds. (*Amendment XVIII effective September 23, 1985*)

(h) To levy taxes upon members of the Tribe and to require the performance of reservation labor in lieu thereof, and to levy taxes or license fees upon non-members doing business within the reservation. (*Amendment XVIII effective September 23, 1985*)

(i) To exclude by ordinance from the restricted lands of the reservation persons not legally entitled to reside therein (*Amendment XVIII – September 23, 1985*)

(j) To enact resolutions or ordinances not inconsistent with Article II of the Constitution governing the adoption and abandonment of membership.

(k) To purchase lands of members of the Tribe for public purposes, under condemnation proceedings in courts of competent jurisdiction.

- (l) To promulgate and enforce ordinances providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and power. *(Amendment XVIII effective September 23, 1985)*
- (m) To safeguard and promote the peace, safety, morals and general welfare of the Tribe by regulating the conduct of trade and the use and disposition of property upon the reservation and provided further that non-restricted property of members which was obtained without any help or assistance of the government or the Tribe may be disposed of without restrictions. *(Amendment XVIII effective September 23, 1985)*
- (n) To charter subordinate organization for economic purposes and to regulate the activities of all cooperative associations of members of the Tribe.
- (o) To regulate the inheritance of property, real and personal, other than allotted land, within the territory of the reservation. *(Amendment XVIII effective September 23, 1985)*
- (p) The domestic relations of the Tribe shall be regulated by the Judiciary Department who shall be empowered by the Rosebud Tribal Council for a separation of powers. All laws legislated by the Rosebud Tribal Council shall be enforced by this department to ensure fair and equal justice for all people without the interference of political power or pressure. *(Amendment Q effective September 20, 2007 – vote 554 for; 243 against; 9 ballots spoiled or mutilated)*
- (q) To provide for the protection of all minors, mentally incompetent and any others who need protection or assistance for reason of health, age, or other extenuating circumstances. The Judiciary Department shall provide whatever services are needed to fulfill their needs. *(Amendment R effective September 20, 2007 – vote 630 for; 160 against; 16 ballots spoiled or mutilated)*
- (r) To exchange and foster the arts, crafts, traditions and culture of the Sioux.
- (s) To regulate the manner of making nominations and holding elections for tribal offices.
- (t) To adopt resolutions regulating the procedure of the Council itself and of other tribal agencies and tribal officials.
- (u) To delegate to subordinate boards or tribal officials, to the several communities, or to cooperative associations, which are open to all members of the Tribe any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.
- (v) The Tribal Council shall develop plans and consider implications of the decisions they make on the next seven generations. *(Amendment S effective September 20, 2007 – vote 528 for; 262 against; 16 ballots spoiled or mutilated)*

## **Section 2.**

Future Powers – The Tribal Council may exercise such further powers as may in the future be delegated to the Tribe by the Secretary of the Interior or, by a duly authorized official or agency of the state or federal government.

## **Section 3.**

Reserved Powers – Any rights and powers heretofore vested in the Rosebud Sioux Tribe but not expressly referred to in this Constitution shall not be abridged by this article but may be



exercised by the people of the Rosebud Sioux Tribe through the adoption of appropriate by-laws and constitutional amendments.

#### **Section 4.**

Limitations of Powers – The powers vested in the Rosebud Sioux Tribal Council shall not be vested in individual council members, but shall be exercised only by the collective body of the Council. Any authority exercised by any member of the Council shall be designated by collective decision of the Council. Exercising the powers of the Council as an individual and without the collective knowledge and approval of the Council shall constitute abuse of Council powers. *(Amendment T effective September 20, 2007 – 615 for; 181 against; 10 ballots spoiled or mutilated)*

### **Article V – Community Organization**

Each community established under this Constitution shall elect annually, a president and such other officers as may be advisable. The president shall call and preside over popular meeting of the community whenever necessary for the consideration of matters of local interest. The various communities may consult with representatives of the Interior Department on all matters of local interest and make recommendations thereon to the Tribal Council or the Superintendent or Commissioner of Indian Affairs, may undertake and manage local enterprises for the benefit of the community, may levy assessments upon members of the community, may expend moneys in the community treasury for the benefit of the community, may keep a roll of those members of the Tribe affiliated with the community, and may exercise such further powers as may be delegated to the communities by the Tribal Council. The actions of the community councils shall not be inconsistent with the Constitution, By-Laws and ordinances of the Tribe.

### **Article VI – Elections**

#### **Section 1.**

Any enrolled member of the Rosebud Sioux Tribe, at least eighteen (18) years of age, who has resided for at least thirty (30) days immediately prior to the election day in the district in which he anticipates to vote, is qualified to vote. *(Amendment XIV effective September 4, 1973)*

### **Article VII - Initiative, Referendum, Recall and Removal**

#### **Section 1.**

Initiative. Upon receipt and verification by the Tribal Secretary of a petition of thirty (30) percent of the number of persons who voted in the last tribal election, a proposed ordinance or resolution made by the people shall be submitted to a vote of the people at a regular or special election to be held within sixty days of verification of the petition by the Election Board. The vote of a majority of those actually voting shall be conclusive and binding upon the Tribal Council.

#### **Section 2.**

Referendum. Upon receipt and verification by the Tribal Secretary of a petition of thirty (30) percent of the number of persons who voted in the last tribal election or upon the request of two-thirds of the total membership of the Tribal Council, any proposed or previously enacted ordinance or resolution of the Tribal Council shall be submitted to a vote of the people at a

regular or special election to be held within sixty days of verification of the petition by the Tribal Secretary. The vote of a majority of those actually voting shall be conclusive and binding upon the Tribal Council.

**Section 3.**

Recall. Upon receipt and verification by the Tribal Secretary of a petition of thirty (30) percent of the number of persons who voted in the last tribal election, it shall be the duty of the Tribal Council to call a special election to consider the recall of the elected tribal official named in the petition. The election shall be held within thirty days of verification of the petition by the Tribal Secretary, provided that if the petition is submitted within six months of the next annual election the Tribal Council may direct that the matter be placed on the ballot for that election. If a majority of those actually voting in favor of the recall of the official, the office shall be declared vacant and filled in accordance with this Constitution.

**Section 4.**

Removal. The Tribal Council may by a two-thirds vote of the total members of the Tribal Council, after due notice and an opportunity to be heard, remove any Tribal Council member for neglect of duty or gross misconduct. The decision of the Tribal Council shall be final.

**Section 5.**

Ordinance. Initiative, referendum, recall, and removal procedures shall be set by ordinance by the Tribal Council, provided that such procedures shall be in accordance with the Election Article of this Constitution where appropriate. *(Amendment U effective September 20, 2007 – vote 596 for; 197 against; 13 ballots spoiled or mutilated)*

**Article VIII – Land**

**Section 1.**

In any assignment of tribal lands, preference shall be given to heads of families which are entirely landless. Assignments under this section shall be known as “home assignments” and shall be granted for the purpose of giving opportunity to homeless Indians for establishing a home. Any assignment under this provision shall not exceed ten (10) acres in area.

**Section 2.**

If any persons holding a “home assignment” of land shall for a period of six months fail to use the land so assigned or shall use the land for any unlawful purpose, his assignment may be cancelled by the Tribal Council after due notice and opportunity to be heard. Such land may then be available for reassignment.

Upon the death of any Indian holding a “home assignment”, his heirs or other individuals designated by him by will or written request shall have preference in the reassignment of the land, provided such persons are eligible to receive a “home assignment.”

**Section 3.**

Any member of the Rosebud Sioux Tribe who owns an allotment of land or any share in heirship land or any deeded land, may, with the approval of the Secretary of Interior, voluntarily transfer his interest in such land, including or excluding mineral rights therein, to the Tribe and receive

therefore an assignment in the same land or other land of equal value or he may receive a proportionate share in a unit of grazing land.

Assignments made under this section shall be known as “exchange assignments.”

**Section 4.**

A member receiving an “exchange assignment” shall receive the right to lease such assigned lands or interest under the same terms as governing the leasing of allotments.

**Section 5.**

Upon the death of a holder of an “exchange assignment,” such lands shall be reassigned by the Tribal Council to his heirs or devisees, subject to the following conditions:

1. Such lands may not be reassigned to any heir or devisee who is not a member of the Rosebud Tribe, except that a life assignment may be made to the surviving spouse or child of the holder of such assignment.
2. Such lands may not be reassigned to any heir or devisee who already holds more than 1,920 acres of land on the reservation. (*Amendment IV effective June 19, 1962*)
3. Such land may not be subdivided into units too small for practical use. No area of grazing land shall be subdivided into units smaller than one hundred sixty (160) acres. No area of agricultural land shall be subdivided into smaller units than two and one half (2 ½) acres. When interests in assignments shall involve smaller areas than the amounts herein set out, the Tribal Council may issue to such heir or devisee a proportionate share in other grazing units or other interest in land of equal value.
4. If there are no eligible heirs or devisee of the decedent, the land shall be eligible for reassignment the same as other tribal lands.

**Section 6.**

Improvements of any character made upon assigned land may be willed to and inherited by members of the Rosebud Tribe. When improvements are made possible of fair division, the Tribal Council shall dispose of them under such regulations as it may provide. No permanent improvements may be removed from any tribal or assigned land without the consent of the Tribal Council.

**Section 7.**

No member of the Rosebud Tribe may use or occupy tribal land except under assignment or lease.

**Section 8.**

Unassigned land shall be managed by the Tribal Council for the benefit of the members of the entire Tribe.

**Section 9.**

Applications for assignments of lands shall be made in writing. Such applications shall be submitted to the Council at regular or special sessions. The applications will be placed in the hand of a proper committee who will call the matter up for action at the next regular meeting of the Council. Any member of the Tribe may object, in writing, to a proposed assignment. In the

event of objection, the Chairman of the Council shall set a date for a hearing, advising both the applicant and objector. The action of the Council shall be final.

The Secretary of the Council shall furnish the Superintendent or other officer in charge of the agency a complete record of all action taken by the Council on applications for assignment of land, and a complete record of assignments shall be kept in the agency office and shall be open for inspection by members of the Tribe.

The Council shall draw up one or more forms for standard and exchange assignments, which shall be subject to the approval of the Secretary of the Interior.

## **Article IX – Amendments**

### **Section 1.**

This Constitution and By-Laws may be amended by a majority vote of the qualified voters of the Rosebud Sioux Tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of Interior to call an election on any proposed amendment, upon receipt of a written resolution signed by at least three-fourths (3/4) of the membership of the Council. (*Amendment XIX effective September 23, 1985*)

### **Section 2.**

Upon receipt of a petition that contains the signatures of at least thirty (30) percent of the voters in the last tribal election, the Tribal Secretary shall refer this petition to the next Tribal Council meeting which shall call a Tribal Constitution Convention to commence within thirty (30) days and to appoint a seven-member Tribal Constitutional Task Force, consisting of tribal members outside the Tribal Council, to conduct this convention for the purpose of hearing proposed amendments and to approve those of which shall be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above. (*Amendment XIX effective September 23, 1985*)

## **ARTICLE X – BILL OF RIGHTS**

### **Section 1.**

Bill of Rights. The government of the Tribe including the community shall not:

- (a). Infringe upon religious beliefs or prohibit the free exercise thereof;
- (b). Abridge the freedom of speech, press, expression, conscience, association, or the right of the people peaceably to assemble, and to petition the government;
- (c). Violate the right of the people to be secure in the privacy of their persons, houses, papers, vehicles, and effects against unreasonable searches and seizures, nor issue warrants but upon probable cause, supported by oath or affirmation signed by a judge, and particularly describing the place, person, house, papers, vehicle, or effects to be searched, the object and scope of such search, and the person or thing to be seized, and any search or seizure taken in violation of this provision shall be excluded;

- (d). Search or arrest any person without informing them of their right to remain silent, to have access to an attorney, to be informed that anything they say can be held against them in a court of law, to have these rights explained at the time of the search or arrest, and to ask them if they understand these rights;
- (e). Take any private property or possessor interest in private property for public use, without due process and just compensation; deny to any person within its jurisdiction the equal protection, application, or opportunity of the laws;
- (f). Deny to any person in a criminal or civil proceeding the right to a speedy and public trial which shall be initiated no more than six months from the filing of criminal charges or a civil complaint and which shall be decided by the courts within one year, and in a criminal proceeding to be informed of the nature and cause of the accusation, to be presumed innocent until proven guilty, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, to have the assistance of counsel for his or her defense including the right to have counsel provided subject to income guidelines; nor deprive any person of liberty or property without due process of law;
- (g). Require excessive bail, impose excessive fines, or inflict cruel and unusual methods of interrogation or punishment;
- (h). Pass any bill or attainder or a law, which punishes conduct after the fact;
- (i). Deny to any person the access to his or her own personal information maintained by the Tribe, or to public information, which shall include but not be limited to financial records maintained by the Tribe.

## **Section 2.**

Retained Powers. Powers not granted to the government shall be reserved to the people.  
(*Amendment V effective September 20, 2007 – vote 552 for; 234 against; 19 ballots spoiled or mutilated*)

## **Article XI – Tribal Court**

### **Section 1.**

The Rosebud Sioux Tribal Court shall be separate and distinct from the legislative and executive branches of tribal government. No person, including any tribal official or person acting in behalf of a tribal official, shall induce or attempt to induce a favorable decision, or interfere in any manner whatsoever with any decision of any judge of the Tribal or Supreme Court. The Tribal Council shall pass legislation which shall denote sanctions for the violation of this section.

### **Section 2.**

The Tribal Court shall consist of one chief judge and such associate judges and staff as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council. All tribal court personnel shall be subject to the supervision of the Chief Judge. The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.

**Section 3.**

The authority of the Tribal Court shall include but is not limited to the power to review and overturn tribal legislative and executive actions for violations of this Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other judicial and court functions.

**Section 4.**

The Chief Judge shall promulgate rules of pleading, practice, and procedure applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law. In case of failure of the Chief Judge to establish such rules, the Tribal Council shall have the authority to establish them.

**Section 5.**

The Tribal Council shall set forth qualifications for Tribal Court Chief Judge, Associate Judges, and staff positions by ordinance. The Tribal Council shall appoint a Chief Judge for a term of not less than four years and associates for terms not less than two years.

**Section 6.**

During the tenure of his or her appointment, the Chief Judge, or an Associate Judge may be suspended or dismissed by the Tribal Council only for cause, as defined by the Judicial Code of Ethics, upon due notice and an opportunity for a hearing open to tribal members.

**Section 7.**

There is hereby established the Rosebud Sioux Tribe Supreme Court. The Supreme Court shall take appeals from the Rosebud Sioux Tribal Court that are deemed meritorious under rules and standards set by the Rosebud Sioux Tribal Council by ordinance. The authority of the court shall include the power to review and overturn tribal legislative and executive actions for violations of this Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other appellate court functions. The Tribal Council shall determine the number of Supreme Court Justices as well as their qualifications and tenure. No Supreme Court Justice may be removed before the end of their tenure, except for cause. (*Amendment W – September 20, 2007 – vote 612 for; 176 against; 18 ballots spoiled or mutilated*)

## **BY-LAWS OF THE ROSEBUD SIOUX TRIBE**

### **Article 1 – Duties of Officers**

#### **Section 1.**

The President shall manage and administer the affairs of the Rosebud Sioux Tribe, including the supervision of tribal employees, subject to the resolutions, ordinances and instructions of the Rosebud Sioux Tribal Council. No tribal employee or tribal member shall be subjected to unfair and political repercussions and/or retaliation by the President or any of his/her representatives in any matter. Such action will be documented and referred to the Ethics Commission of the Rosebud Sioux Tribe. The President shall preside at all meetings of the Tribal Council. The President shall vote only in case of a tie. (*Amendment X effective September 20, 2007 – vote 585 for; 150 against; 71 ballots spoiled or mutilated*)

#### **Section 2.**

The Vice-President shall assist the President when called upon to do so, and, in the absence of the President, he shall preside. When so presiding, he shall have all the rights, privileges, duties, as well as the responsibilities, of the President. The Vice-President shall not have a vote except in case of a tie when acting as President under Section 1 of this Article. (*Amendment XIII effective May 2, 1966*)

#### **Section 3.**

The Council Secretary shall keep a full report of all proceedings of each regular and special meetings of the Tribal Council and shall perform such other duties of like nature as the Council shall from time to time by resolution provide, and shall transmit copies of the minutes of each meeting to the Council, to the Superintendent of the Reservation, and to the Commissioner of Indian Affairs.

#### **Section 4.**

The Treasurer shall be custodian of all moneys which come under the jurisdiction or in the control of the Sicangu Council. He shall pay out money in accordance with the orders and resolutions of the Sicangu Council. He shall keep account of all receipts and disbursements and shall report the same to the Sicangu Council at each regular meeting. He shall provide such bond to be satisfactory to the Sicangu Council. The books of the Treasurer shall be subject to audit or inspection at the discretion of the Sicangu Council. The Treasurer shall cause the financial statements of the Sicangu Nation to be published in a manner that is available to all members within thirty (30) days after a Sicangu Council has reviewed and approved them. (*Amendment Y effective September 20, 2007 – vote 582 for; 210 against; 14 ballots spoiled or mutilated*)

### **Articles II – Duties of the Councilmen**

#### **Section 1.**

It shall be the duty of each member of the Tribal Council to make reports to the community from which he was elected concerning the proceedings of the Tribal Council.

#### **Section 2.**

It shall also be the duty of each member of the Tribal Council, including any elected or appointed officers of the Tribal Council, to attend any duly called special or regular meeting of the Tribal

Council unless excused by motion of the Tribal Council in session, to present to the Tribal Council in a timely manner any duly approved community resolution or any legitimate petition of tribal members, and to abide by the Tribal Code of Ethics adopted by the Tribal Council.  
(Amendment XX – September 23, 1985)

### **Article III - Oath of Office**

Each member of the Sicangu Council and each officer or subordinate officer, elected or appointed hereunder shall take an oath of office prior to assuming the duties thereof; by which oath, he shall pledge himself to support and defend the Constitution and By-Laws of the Sicangu nation and the Treaties entered into with the United States Government or other Governments.

(Oath) I, \_\_\_\_\_, do hereby solemnly swear that I will support and defend the Constitution of the Sicangu Nation against all enemies as identified in treaties or by the Sicangu People and I will carry out faithfully, and impartially, the duties of my office to the best of my ability; and will cooperate, promote and protect the best interests of my Tribe, the Sicangu Nation, in accordance with this Constitution and By-Laws. (Amendment Z effective September 20, 2007 – vote 504 for; 269 against; 33 ballots spoiled or mutilated)

### **Article IV – Salaries**

#### **Section 1.**

The Tribal Council may prescribe such salaries of tribal officers, employees, or members of the Council, as it deems advisable from such funds as may be available.

#### **Section 2.**

No compensation shall be paid to any councilman, president, vice-president, secretary, treasurer, tribal council, or any officer out of the tribal funds obtained from the federal government, except upon a resolution stating the amount of compensation and the nature of services rendered, and said resolution shall be of no effect until published as a public notice in a publication for a period of 30 days. (Amendment AA effective 20, 2007 – vote 605 for; 191 against; 10 ballots spoiled or mutilated)

### **Article V – Meetings of Council**

#### **Section 1.**

Regular meetings of the Tribal Council shall be held once a month on days and places designated by the Tribal Council by resolution, provided special meetings may be called by a majority of Council members in writing or by the Tribal President in writing with at least three days notice in either case. A quorum for the Tribal Council to transact business shall be a majority of the Tribal Council membership, unless a larger number is required elsewhere in this Constitution and By-Laws. (Amendment XX effective September 23, 1985)

#### **Section 2.**

A designated room or place shall be set-aside for the Tribal Council, where all records and Tribal Council property shall be kept.

### **Article VI – Sioux Councils**

The Tribal Council shall have the power to select delegates to sit in National Sioux Councils.



## **Article VII – Adoption of Constitution and By-Laws**

This Constitution and By-Laws, when ratified by a majority of the qualified voters of the Rosebud Sioux Tribe voting at a special election called for the purpose by the Secretary of Interior, provided that at least thirty percent (30%) of those entitled to vote shall vote in such elections, shall be submitted to the Secretary of the Interior, and, if approved, shall be effective from date of approval.

## **CERTIFIED OF ADOPTION**

Pursuant to an order, approved November 1, 1935, by the Secretary of the Interior, the attached Constitution and By-Laws were submitted for ratification to the members of the Rosebud Sioux Tribe of the Rosebud Reservation and were on November 23, 1935, duly approved by a vote of 992 for and 643 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat, 984), as amended by the Act of June 15, 1935 (Public, No. 147, 74th Cong.)

/s/ George Kills in Sight, Chairman of Election Board

/s/ George Whirlwind Soldier, Vice Chairman, Rosebud

Sioux Tribe

/s/ Wallace A. Murray, Secretary, Rosebud Sioux Tribe

/s/ W.O. Roberts, Superintendent

I, Harold I. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934, (48 Stat. 984), as amended, do hereby approve the attached Constitution and By-Laws of the Rosebud Sioux Tribe.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-Laws are hereby declared inapplicable to the Rosebud Sioux Tribe.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-Laws.

Approval recommended December 16, 1935.

John Collier, Commissioner of Indian Affairs

Harold I. Ickes, Secretary of the Interior  
(SEAL)

Washington, D.C., December 20, 1935



[Back to Table of Contents](#)

## Law and Order Code of the Rosebud Sioux Tribe

Additions to code received: 2004

### TITLE NINE - ADMINISTRATIVE PROVISIONS OF TRIBAL COURT

[Chapter 1 - Courts, Judges and Court Personnel](#)

[Chapter 2 - Attorneys and Lay Counsel](#)

#### CHAPTER ONE

#### COURTS, JUDGES AND COURT PERSONNEL

The Tribal Court system established by this Code shall consist of a Tribal appellate Court, Tribal Court, Tribal Juvenile Court and Tribal magistrate Court.

**9-1-1 APPELLATE COURT--** The Tribal appellate Court shall consist of three (3) Justices and shall handle appeals from the Tribal Court and the Tribal Juvenile Court, and the procedures for such appeal shall be determined by the Appellate Court Justices.

**9-1-2 TRIBAL COURT--** The Tribal Court shall be the Court of general criminal and civil jurisdiction on the Rosebud Reservation and shall hear all matters of a judicial nature not specifically placed with the exclusive jurisdiction of some other judicial forum by this Code. The Tribal Court shall also hear appeals from the decisions of any Magistrate Court and all other Tribal Administrative bodies and agencies.

**9-1-3 TRIBAL JUVENILE COURT--** The Tribal Juvenile Court shall handle all matters set forth in the Tribal Juvenile Code and shall be subordinate to and subject to the supervision and jurisdiction of the Tribal Code.

**9-1-4 TRIBAL MAGISTRATE COURT--** At the discretion of the Tribal Judiciary Committee there may be established in each recognized community on the Rosebud Reservation, a magistrate Court to be presided over a lay Magistrate said Court to have jurisdiction over all criminal matters involving offense of the C class. Magistrate Court shall have civil jurisdiction over no matters.

#### **9-1-5 COURT PERSONNEL--**

1. There shall be appointed three (3) appellate Court Justices consisting of two (2) or more attorneys licensed to practice before the Federal Courts and may include one (1) lay person, who shall have the same qualifications as those hereinafter specified for Associate Judges of the Tribal Court. All Appellate Justices are to be selected by the Tribal Judiciary Committee and approved by the Tribal Council.

2. There shall be appointed for the Tribal Court one (1) Chief Judge and two (2) or more associate Judges as the Judiciary Committee and the tribal Council see fit.

(a) To be eligible to hold the office of Chief Judge or Associate Judge, a Person

1. Must be at least 30 years of age and not more than 70 years of age.
2. Must be of high moral character and integrity.
3. Must have a high school education or equivalent thereof and be capable of preparing the papers and reports incident to the office of Judge.
4. Must be physically capable of carrying out the duties of the office.
5. A member of the Rosebud Sioux Tribe shall be given preference.
6. At least one (1) Associate Judge shall be bilingual in English and Lakota.

(b) Notwithstanding any other provisions in this code to the contrary, no person is eligible to hold the position of Chief Judge of the Rosebud Sioux Tribe unless such person is an attorney at law and admitted to practice in the United States District Courts for the District of South Dakota.

(c) All Tribal Court Judges shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval. Appointments of Tribal Judges shall be for a probationary period of one (1) year during which time such appointment can be terminated by written notice from the Judiciary Committee or the Tribal Council. Following the one (1) year probationary period, Tribal Judges shall be appointed for a term of two (2) years.

**9-1-6 JUVENILE COURT--** There shall be appointed for the Juvenile Court One (1) Juvenile Judge whose qualifications shall be the same as those of Associate Judges of the Tribal Court. The appointment of the Juvenile Judge shall be for a probationary period of one (1) year during which time such appointment can be terminated by written notice from the Judiciary Committee or the Tribal Council. Following the one (1) year probationary period Juvenile Judges shall be appointed for a term of two (2) years.

**9-1-7 MAGISTRATES--** Magistrates to serve in the community shall be selected by the Judicial Committee and approved by the Tribal Council. The Judiciary Committee shall in its discretion, determine which persons are suitable to serve as Magistrates. Magistrates shall be appointed for a term of one (1) year and may be terminated by written notice from the Judiciary Committee or the Tribal Council.

**9-1-8 CLERK OF COURTS--** There shall be a Clerk of the Tribal Court, which Clerk shall also act as the Clerk of the Appellate Court. The Clerk of Courts shall be selected by the Judiciary Committee and approved by the Tribal Council. There may also be appointed additional Deputy Clerks of Court and a Clerk of the Juvenile Court if such are deemed necessary.

(a) The appointment, qualifications, term of office and compensation of such Clerk shall be determined by the Judiciary Committee and the Tribal Council.

**9-1-9 ADDITIONAL COURT PERSONNEL--** If such are deemed necessary by the Judicial Committee and the Tribal Council there may also be appointed a Court Reporter; a Process Server, a Probation Officer; a Bailiff, a Typist to assist the other Court personnel. The appointment, qualifications, terms of office and compensation of such additional Court personnel shall be determined by the Judicial Committee and the Tribal Council.

**9-1-10 SALARIES--** The compensation to be received by all Court personnel shall be determined by the Judiciary Committee and the Tribal Council and shall be negotiated and agreed upon at the time of the appointment of the individual officers of the Court. Court personnel shall not have their compensation decreased during their term of office. Court personnel may be appointed to successive terms of office and salary may be renegotiated with each successive appointment.

**9-1-11 REMOVAL OF JUDGES--** Any Judge may be removed from office prior to the expiration of his term by a majority vote of the Tribal Council and upon recommendation of the Judiciary Committee. The grounds for such removal shall be neglect of duty, gross misconduct, incompetence, or other just cause, and only after the holding of a public hearing before the Tribal Council, by giving such Judge not less than five (5) days notice of such hearing. At the hearing the Judge shall be given the opportunity to answer all charges and present evidence in his own behalf. After such hearing removal of a Judge may only be accomplished by a two-thirds (2/3) vote of the Tribal Council members present at the hearing and constituting a quorum. The Judiciary Committee shall have the power to suspend a Judge, after investigation and hearing, for a period not to exceed thirty (30) days pending a hearing before the Tribal Council for dismissal of such Judge.

#### **9-1-12 POWERS AND DUTIES OF JUDGES**

(1) Judges shall administer justice and discharge all duties imposed upon them by law and shall hear and decide matters of a Judicial nature and enter judgements and orders disposing of such matters. In the absence of the Court Clerk, a Judge may perform the Clerk's duties in addition to his own and may receive cash bail or bonds whenever a Clerk or other authorized person is not available.

(2) The Chief Judge shall be responsible for the administration of all Courts, including the Tribal Juvenile Court, which shall be administered by the Juvenile Court Judge under the supervision of the Chief Judge. The Chief Judge shall supervise all probation and parole officers. In addition, the Chief Judge shall be responsible for the assignment of cases and the management of the court's calendar and business. The Chief Judge shall designate and Associate Judge to act as Chief Judge in his absence.

(3) All Judges of the Courts of the Rosebud Sioux Tribe shall conform their conduct to the Code of Judicial Conduct as adopted by the American Bar Association.

(4) Every Judicial Officer has Power to:

(a) Preserve and enforce Order to his immediate presence, and in proceedings before him, when he is engaged in the performance of his official duty;

(b) Compel obedience to his lawful orders;

(c) Compel the attendance of persons to testify in a proceeding before him as provided by law;

(d) Administer oaths to persons in proceedings before him and in any other case where such shall be necessary in the exercise of his powers and duties;

(e) Punish for contempt to assure the effectual exercise of these powers.

(5) A Judge shall disqualify himself from hearing any matter in which he has a direct interest or in which any party to the matter is a relative by blood, in the fourth degree (first cousin, or where he feels that he will not be able to render a just decision.

(6) Any party to a legal proceeding may request a change of assignment of Judges to hear the proceedings by filing a written affidavit of Prejudice giving sufficient reasonable grounds why the Judge assigned should not hear the case. Such affidavit shall be presented to the Judge assigned to hear the case, who shall rule on the sufficiency of the Affidavit, and if sufficient, either disqualify himself or turn the Affidavit over to the Chief Judge or some other Judge for a decision as to whether a different Judge should be assigned.

#### **9-1-13 OATH OF OFFICE OF JUDGE**

(1) Every Judge, prior to taking office or acting in such office, shall take the following oath or affirmation:

I, \_\_\_\_\_, do solemnly swear (affirm) that I will support and defend the laws and the Constitution of the United States; that I will support, defend, and uphold the Constitution, By-laws and Treaties of the Rosebud Sioux Tribe; that I will support, uphold and enforce the Law and Order Code of the Rosebud Sioux Tribe, and that I will faithfully and impartially discharge the duties of my office to the best of my ability.

(2) Said oath may be administered by a member of the Tribal Council or a Judge of the Court.

**9-1-14 DUTIES OF THE CLERK--** It shall be the duty of the Clerks of the Tribal Courts to supervise and keep all records, files, dockets or other records required to be kept by this Code, by rule of the Court, tribal Resolution or as otherwise established, and further to keep a written record of all proceedings of the Court, to administer oaths, to collect and account for all fines, bail or bond money, fees or other charges which cause money to come into the Court, to deposit and account for all such moneys in the manner prescribed by the Tribal Council, and to disburse such money as authorized by law. The Clerks shall further assist the Court in any way required to facilitate the performance of its duties, to aid the police or private citizens in their dealings with the Court, and may render and assistance to individual members of the tribe or their counsel in the drafting of documents incidental to proceedings in the Court.

#### **9-1-15 OATH OF CLERKS**

(1) Every Clerk shall take the following oath upon assuming office:

I, \_\_\_\_\_ having been appointed Clerk of the Rosebud Sioux Tribal (Juvenile) Court, do solemnly swear (affirm) that I will truly, faithfully, honestly, and impartially discharge all the duties of my office to the best of my ability and understanding.

(2) Such oath shall be administered by a Judge of the Tribal Court.

### **CHAPTER TWO ATTORNEYS AND LAY COUNSEL**

**9-2-1** Any professional attorney or lay counsel who desires to practice before the Courts of the Rosebud Sioux Tribe shall first be admitted to practice before such Courts.

**9-2-2** Any professional attorney who is an active member; in good standing, of the South Dakota State Bar; or any attorney certified to practice before the highest Court of any other State or the Supreme Court of the United States is eligible to be admitted to practice before the Rosebud Sioux Tribal Court. An admission fee of \$100.00 shall be paid by professional attorneys to practice before the Tribal Courts.

**9-2-3** All counsel shall also take and pass a Tribal Bar Examination testing their knowledge of tribal law and Professional ethics. No counsel shall practice in Tribal Court without having first passed such examination, and paying the appropriate admission fee. The Chief Tribal Judge shall be responsible to set up the testing mechanism for all counsel. All attorneys, both lay and professional, shall abide by a Code of Professional Responsibilities which from time to time shall be adopted by the American Bar Association.

**9-2-4** Both professional attorneys and lay counsel shall make application for admission to practice before the Courts of the Rosebud Sioux Tribe to the Chief Tribal Judge who shall review the applications and if satisfied that the applicant meets the qualifications necessary to practice before the Court, the Chief Judge shall upon the paying of the proper fees and subscribing and swearing to the following oath issue the proper license to the applicant.

"I, \_\_\_\_\_, do solemnly swear that I will support and defend the Constitution and laws of the Rosebud Sioux Tribe against all enemies, foreign and domestic, that I have studied and am familiar with the laws of the Rosebud Sioux Tribe, and that I will conduct myself with honor towards those whom I represent and with respect for the Courts of the Rosebud Sioux Tribe".

**9-2-5** Any person denied admission to practice before the Tribal Court shall the right to appeal and to have a due process hearing before the Tribal Council.

**9-2-6** Every person appearing as a party in any judicial procedure before a Tribal court shall have the right to be represented either by lay counsel or professional attorneys and have such counsel and attorneys assist in the preparation and presentation of his case. The Rosebud Sioux Tribe shall have no obligation to provide or pay for such lay counsel or professional attorneys and only those persons who have first obtained admission to practice before the Tribal Courts shall appear therein.

**9-2-7** Any person admitted to practice before the Tribal Court will accept and represent indigent clients without compensation or without full compensation when directed to do so by a Judge of the Tribal Court.

**9-2-8** Any Judge of the Tribal Court who finds an attorney admitted to practice before the Tribal Courts to be in contempt of Courts may, in addition to any other sanction imposed, order the attorney to appear within five (5) days and show cause why he should not be suspended from practicing before the Courts of the Rosebud Sioux Tribe.

**9-2-9** The Chief Judge of the Tribal Court may, upon receiving a written, verified Complaint which indicates that an attorney admitted to practice before the Tribal Court has acted in an unethical or otherwise improper manner while functioning as an attorney, order such attorney to appear and defend himself at a hearing to hear all evidence relevant to the matter and may order the suspension of such attorney, if it appears necessary or appropriate.

**9-2-10** All suspensions from practicing before the Courts of the Rosebud Sioux Tribe shall be for an indefinite period unless the Judge ordering such suspension specifically orders otherwise. Any attorneys suspended from practice before the Tribal Court may appeal to the Tribal Council and the action of the Tribal Council on said matter shall be final.

[Back to Top](#)

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ROSEBUD SIOUX TRIBAL COURT )  
ROSEBUD INDIAN RESERVATION )  
ROSEBUD, SOUTH DAKOTA )

\*\*\*\*\*

IN THE MATTER OF THE )  
APPOINTMENT OF: )

CIV. 09-069

PATRICIA A. MEYERS )

ORDER

AS SPECIAL JUDGE )  
)

\*\*\*\*\*

IT IS ORDERED that Patricia A. Meyers is hereby appointed as Special Judge to preside over the above entitled matter and to administer justice and discharge all duties imposed upon her by law pursuant to the Constitution and Law and Order Code of the Rosebud Sioux Tribe.

Dated this 7<sup>th</sup> day of November, 2011.

BY THE COURT:

Sherman J. Marshall  
Chief Judge

ATTEST:

\_\_\_\_\_  
Clerk of Courts

County of Todd )

ss:

State of South Dakota )

**COMES NOW Affiant** Lenard (Shadow) Wright and states and affirms as follows:

- 1 That I was the Chairman of the Rosebud Sioux Tribal Judiciary during the last five years through the end of my term in September 2012.
- 2 That as the Chairman of the Judiciary Committee, it was my duty to present to the Tribal Council any motions made that would require their action to approve.
- 3 That at no time do I recall the appointment of Patricia Meyers ever coming before the Judiciary to be appointed as a judge for the Rosebud Sioux Tribal Court.
- 4 The while Chairman of the Judiciary Committee Affiant was never notified that the required ordinances to implement the Rosebud Tribal Court required by Article XI of the Rosebud Constitution was approved by Tribal Council.
- 5 That while I was Chairman of the Judiciary Committee we understood that appointment of judges had to comply with TITLE NINE - ADMINISTRATIVE PROVISIONS OF TRIBAL COURT, CHAPTER ONE, COURTS, JUDGES AND COURT PERSONNEL Section 9-1-5 COURT PERSONNEL, (c)  
All Tribal Court Judges shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval. Appointments of Tribal Judges shall be for a probationary period of one (1) year during which time

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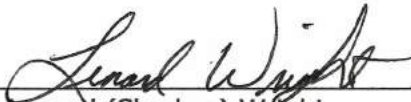
EXHIBIT



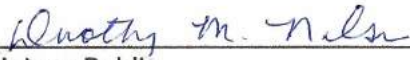
such appointment can be terminated by written notice from the Judiciary Committee or the Tribal Council. Following the one (1) year probationary period, Tribal Judges shall be appointed for a term of two (2) years

6. That based upon the forgoing it is my understanding that Patricia Meyers cannot be recognized as a judge in the Rosebud Sioux Tribal Court.

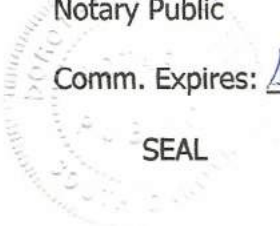
Dated this 19 day of October, 2012.

  
\_\_\_\_\_  
Lenard (Shadow) Wright

Subscribed and sworn to before me this 19 day of October, 2012.

  
\_\_\_\_\_  
Notary Public

Comm. Expires: Sept-2, 2017





**ROSEBUD SIOUX TRIBE**

PO Box 430

Rosebud, SD 57570

Phone: 605.747.2381

Fax: 605.747.2243

Website: [rosebudsiouxtribe-nsn.gov](http://rosebudsiouxtribe-nsn.gov)

Cyril Scott, President  
Willie Kindle, Vice President  
Linda L. Marshall, Secretary  
L. Wayne Boyd, Treasurer  
Glen Yellow Eagle, Sergeant-at-Arms

October 17, 2012

To Whom It May Concern,

According to the records of the Tribal Secretary's Office , there is no mention of Patricia Meyers in Judiciary Committee or RST Tribal Council Meeting Minutes.

If you have any further questions, please contact the Tribal Secretary's Office.

Linda L. Marshall, Secretary  
Rosebud Sioux Tribe

# STEVEN D. SANDVEN

L A W   O F F I C E S

PRINCIPAL  
STEVEN D. SANDVEN

*Admitted in South Dakota,  
Minnesota & Washington D.C.*

300 NORTH DAKOTA AVENUE, SUITE 106  
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February 22, 2008

Rosebud Sioux Tribe  
P.O. Box 430  
Rosebud SD 57570

**RE: JULY 26, 2007 SECRETARIAL ELECTION /CERTIFICATION ON AUGUST 8, 2007**

Dear President Bordeaux:

This memorandum is provided in response to your February 18<sup>th</sup> directive to meet with Tribal Council regarding the failure to incorporate 23 of 27 amendments to the Rosebud Sioux Tribe Constitution and Bylaws that were approved via secretarial election by the BIA on August 8, 2007. The secretarial election was conducted pursuant to Article IX – Amendments:

Section 1. This Constitution and By-Laws may be amended by a majority vote of the qualified voters of the Rosebud Sioux Tribe voting at the election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) per cent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of Interior. It shall be the duty of the Secretary of Interior to call an election on any proposed amendment, upon receipt of a written resolution signed by at least three-fourths (3/4) of the membership of the council.

Section 2. Upon receipt of a petition that contains the signatures of at least thirty (30) per cent of the voters in the last tribal election, the Tribal Secretary shall refer this petition to the next Tribal Council meeting which shall call a Tribal Constitution convention to commence within thirty (30) days consisting of tribal members outside the Tribal Council, to conduct this which shall be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above.  
(Amendment No. XIX - September 23, 1985)

<u>Amendment</u>	<u>Article</u>	<u>Votes For/Against/Spoiled</u>	<u>Status</u>
A	name change	327 – 468 – 11	Rejected
B	preamble	326 – 470 – 10	Rejected
C	enrollment	508 – 281 – 17	Adopted
D	governing body	322 – 476 – 8	Rejected

E	pres/vp blood quantum	557 – 246- 3	Adopted
F	EC – Tribal Council rep.	459 – 339 – 8	Adopted
G	governing body	538 – 258 – 10	Adopted
H	governing body	535 – 261 – 10	Adopted
I	candidate qualifications	584 – 212 – 10	Adopted
J	governing body	590 – 210- 6	Adopted
K	governing body	533 – 263 – 10	Adopted
L	governing body	549 – 251 – 6	Adopted
M	governing body	549 – 243 – 14	Adopted
N	governing body	435 – 363 – 8	Adopted
O	powers	472 – 322 – 12	Adopted
P	powers	351 – 433 – 22	Rejected
Q	powers	554 – 243 – 9	Adopted
R	powers	630 – 160 – 16	Adopted
S	powers	528 – 262 – 16	Adopted
T	powers	615 – 181- 10	Adopted
U	removal	596 – 197 – 13	Adopted
V	bill of rights	553 – 234 – 19	Adopted
W	tribal court	612 – 176 – 18	Adopted
X	duties	585 – 150 – 71	Adopted
Y	duties	582 – 210 – 14	Adopted
Z	oath	504 – 269 – 33	Adopted
AA	salaries	605 – 191 -10	Adopted

The Indian Reorganization Act authorizes the Secretary of the Interior to conduct referendum elections to amend tribal constitutions pursuant to "rules and regulations" determined by the Secretary. 25 U.S.C. §§ 476(a)(1). Those regulations are set forth in the Code of Federal Regulations. 25 C.F.R. pt. 81. The regulations are entirely procedural in nature and govern only the mechanism by which tribal constitutions may be amended. Once the Secretary receives a qualifying request to hold an election to ratify proposed amendments, the Secretary reviews the legality of the proposed amendments and calls an election within 90 days. 25 U.S.C. § 476(c)(1)(B); 25 C.F.R. § 81.5(d). ***The election results are not binding until the Secretary approves them, and any qualified voter may contest the results to the Secretary within three days of the election. 25 C.F.R. § 81.22. The Secretary has 45 days to resolve these election contests, conduct an independent review, and approve or disapprove the election. 25 U.S.C. § 476(d)(1).*** As you know, over six months have already elapsed and my office has not been provided notice of any contests to the described secretarial election(s).

The Tribe's Constitution and Bylaws are the supreme governing documents of this Nation. Further, the Tribe's Constitution and Bylaws are the organic documents that enumerates the authorities of RST Tribal Council. In conclusion, it is essential that any approved amendments be incorporated into the Tribe's Constitution and Bylaws in a timely manner. This should have been completed shortly after the contest period was exhausted. I will wait for further direction.

Sincerely,

STEVEN D. SANDVEN  
Attorney for Rosebud Sioux Tribe

**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

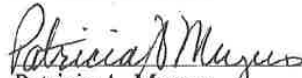
**ORDER**

The above captioned action came before the Court on the motion of BBC to recuse Judge Patricia A. Meyers pursuant to Rule 63b of the Rosebud Sioux Tribal code. Defendant BBC did not request a hearing on its Motion. Defendant BBC's Motion was made in writing on March 14, 2012. Defendant BBC appeared by and through its attorney, O.J. Seamans, on March 13, 2012 at 3:00 p.m. at a hearing on the Motion of the Plaintiff for Summary Judgment. Defendant BBC made an oral Motion requesting Patricia A. Meyers to recuse herself at the time of the hearing on the Plaintiff's Motion. The Court orally denied the Defendant BBC's Motion to Recuse as being untimely and made without notice to opposing counsel and not in conformance with the rules of procedure. The parties then argued the merits of Plaintiff's Motion for Summary Judgment and the Court granted the Plaintiff's Motion for Summary Judgment. The Court then received the written Motion of BBC asking for its recusal, based upon the foregoing and having considered the written Motion of the Defendant BBC, the Court hereby:

**ORDERS**, that the motion to recuse is denied.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge

## CHAPTER ONE

### RULES OF CIVIL PROCEDURE GENERAL PROVISIONS

#### RULE 1 Scope of Rules

This Chapter governs the procedure in the Tribal Courts of the Rosebud Sioux Tribe in all actions of a civil nature, except where different rules are specifically prescribed in this Code. These rules shall be liberally construed to secure a just, speedy and inexpensive determination of every civil action.

#### RULE 2 One Form of Action

The distinctions between actions at law and suits at equity and the common law forms of all such actions and suits are hereby abolished in the Tribal Courts. All actions to which these rules apply will be known as civil actions.

#### RULE 3 Commencement of Action

(a) A civil action is commenced by filing a written Complaint and Summons with the Clerk of the Tribal Court and by delivery of copies of the Summons and Complaint by the Plaintiff or his attorney to the appropriate officials for purpose of service on the Defendants.

(b) The Summons shall be legibly signed by the Plaintiff or his attorney and directed to the Defendant and shall require the Defendant to answer the Complaint and serve a copy of his Answer on the person signing the Summons at a place within this State specified in the Summons at which there is a post office within 30 days after service of the Summons and Complaint exclusive of the day of service. The Summons shall further notify the Defendant that in case of his failure to file an Answer, judgment by default may be rendered against him for the relief requested in the Complaint.

#### RULE 4 Service of Process

(a) Summons and Complaint may be served within the exterior boundaries of the Rosebud Indian Reservation by any law enforcement officer or Tribal member who is a resident of the Rosebud Indian Reservation of the age of 18 years or older and who is not a party to the litigation. Service of Summons and Complaint upon any party outside the boundaries of the Rosebud Indian Reservation may be made in the manner prescribed for service of process in that jurisdiction.

(b) The Summons and Complaint shall be served by delivering copies thereof. Service in the following manner shall constitute personal service:

(1) If the action is against a corporation, service shall be made on the President, Secretary, Cashier, Treasurer, a Director, or managing or registered agent thereof and such service may be made within or outside this jurisdiction. In case the process server shall return the Summons with his certificate that no such officer, director or agent can

conveniently be found, service may be made by leaving a copy of the Summons and Complaint at any office of the corporation with the person in charge of such office.

(2) If the action be against a minor, service shall be made on a parent or person having custody and if the minor be over the age of 14 years, then also upon the minor personally, and in any event, on the legally appointed general guardian if one exists. If a guardian ad litem has been appointed, service shall also be made on the guardian ad litem.

(3) If the action is against a person judicially declared to be of unsound mind or who is an inmate of any institution or mentally incompetent or for whom a general guardian has been legally appointed, service shall be made on such guardian and upon the superintendent of such institution or person having custody of the Defendant and also upon the incompetent Defendant.

(4) Whenever the manner of service of process is specified in any statute or rule specifically relating to the action, remedy or special proceeding, the manner of service there specified shall be followed.

(5) In all other cases on the Defendant personally.

(c) Service in the following manner shall also constitute personal service. If the Defendant cannot be conveniently found, service may be made by leaving a copy of the Summons and Complaint at the Defendant's dwelling house and delivered to a member of the Defendant's family or household over the age of 14 years.

(d) Proof of the regular service of a Summons and Complaint or any other legal document must state the time, place and manner of such service and must be made as follows:

(1) If served by a law enforcement officer or other process server, his certificate thereof.

(2) If served by any other person, his affidavit thereof.

(3) If admitted by the party upon whom service may have been made, then by the written admission of such party or his attorney, or

(4) If served by publication, by the affidavit of the publisher of the newspaper or other employee showing such regular publication and an affidavit of the party or his attorney showing regular mailing of copies to the party to be served at his last known post office address.

(e) Personal service shall be deemed completed if the person to be served is informed of the purpose of the service and provided copies of the papers being served and said copies are either received by the person to be served or left within his reach. Whether the person accepts or refuses to accept said copies is immaterial.

(f) If the Plaintiff can establish to the satisfaction of the Court by affidavit that he has made a diligent effort to obtain personal service as provided by these rules upon a Defendant both within and without this jurisdiction, and that despite such diligent effort, personal service cannot be obtained on a Defendant, then and in such event, the Court may authorize service by publication of the Summons Service by publication shall constitute publishing the contents of the Summons in a local newspaper of general circulation at least once a week for four consecutive weeks and by mailing by first class mail, postage prepaid, a copy of the Summons and Complaint to the Defendant at his last known post office address.

(g) The Court may in its discretion on such terms as it deems proper at any time allow any Summons or other process or proof of service to be amended unless it clearly appears that the substantial rights of the person against whom the process was issued would be prejudiced thereby.

#### RULE 5 Service and Filing of Pleadings and Other Papers

(a) Except as otherwise provided by these rules, every Order required by its terms to be served, every pleading subsequent to the original Complaint, every motion other than one which may be heard ex parte and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against Defendants in default shall be served upon them in the same manner as provided for service of Summons and Complaint.

(b) Whenever service of a legal document other than the Summons and Complaint is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the Court. Service upon the attorney or upon a party shall be made either by service in the manner provided for Summons and Complaint or by mailing a copy of the legal document to the party or his attorney at the last known post office address. Service by mail shall be by first class mail and is complete upon mailing. An attorney's certificate of service, the written admission of service by the party or his attorney, or an affidavit of mailing shall be sufficient proof of service. The provisions of this Rule 5 are not intended to change the rules for Service of Summons and Complaint. Further, any process or other legal paper designed or with the purpose to bring a party into contempt shall be served by personal service only.

(c) In any action in which there are unusually large numbers of Defendants, the Court may order that service of documents between Defendants upon each other and replies thereto may be made in some summary fashion other than by service by each Defendant on each other Defendant. A copy of any such order of the Court shall be served upon all parties in such manner and form as the Court directs.

(d) The originals of all papers served upon a party or presented to any Court or to any Judge shall either be filed with the Court prior to service or filed with the Court together with the proof of service immediately upon service. If such papers are not to be served, they must be filed with the Court at the time of their presentation to the Court for action or consideration. In the event of failure to file any paper required to be filed under this rule, the adverse party shall be entitled without notice to an order requiring such paper to be filed within a reasonable time as specified by



the Court. The Court may likewise order that upon failure to file such paper, the action or proceeding shall be dismissed without prejudice and no new action or proceeding may be commenced without payment of reasonable terms to be fixed by the Court. If any such process or other paper has been lost or withheld by any person, the Court may authorize a copy thereof to be filed and substituted for the original. A legal document is deemed filed with the Court as required by this Chapter if the same has been presented to the Clerk of Court or to the Judge assigned to handle the proceeding. The Clerk or the Judge will note thereon the filing date and assure that the document is placed in the original Court file.

#### RULE 6 Time

(a) In computing any period of time set forth in these rules, the day the time period is to commence shall not be counted and the last day of the period shall be counted, provided however, that any period which would otherwise end on a Saturday, Sunday, or a legal holiday will be deemed to end on the next day which is not a Saturday, Sunday, or a legal holiday.

(b) Whenever under these rules or by an Order of the Court an act is required to be done or a notice given within a specified time, the Court may for good cause shown, in its discretion at any time, with or without motion or notice, enlarge the time period if a request is made for enlargement before the expiration of the period originally prescribed or as extended by a previous order. If the time as originally prescribed or as previously enlarged has expired, the Court shall require written motion for enlargement of the time and appropriate notice be given to the adverse party. If the time period has expired prior to the application being made, the Court should not enlarge the time if such action will do substantial prejudice to the adverse party. Nothing in this rule shall be deemed to authorize the Court to enlarge the time for making motions for judgment notwithstanding the verdict, motions for new trial, or motions for relief from a final judgment or Order except under such circumstances as are set forth in those specific rules.

(c) Any written motion, other than one which may be heard ex parte, and notice of hearing thereon or an Order to Show Cause shall be served not less than five days before the time specified for the hearing unless a different time period is fixed by these rules or by an Order of the Court. Application for an Order to fix a hearing date may be made ex parte. Whenever any motion is supported by an affidavit, the affidavit shall be served with the motion except as otherwise provided in these rules. Responding or opposing affidavits may be served not later than one day before the hearing unless the Court permits by Order affidavits to be served at some other time.

(d) Whenever a party has the right or is required to do some act within a specified period after the service of a notice of other paper upon him, or whenever such service is required to be made a specified period before a specific event, and the notice or paper is served by mail, three days shall be added to the prescribed period.

#### RULE 7 Pleadings and Motions

(a) The pleadings which shall be allowed shall be a Complaint and an Answer, a Counterclaim, a Crossclaim, a reply to a Counterclaim, an answer to a Crossclaim if the Answer con-

tains a Crossclaim, a third party Complaint, and a third party Answer if a third party Complaint is served. No other pleadings shall be allowed except that the Court may order a reply to an Answer or a third party Answer.

(b) All applications to the Court for an Order shall be made by motion which shall be in writing and shall state with particularity the grounds therefore and shall set forth the relief or Order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of a hearing on the motion. The Court may also allow oral motions during the course of a hearing or a trial. The rules applicable to captions, signing, and other matters of the form of pleadings apply to all motions and other papers provided for in these rules.

#### RULE 8 General Rules of Pleading

(a) Any pleading which sets forth a claim for relief whether it be called a Complaint, a Counterclaim, a Crossclaim, or a Third Party Claim shall contain a short, plain statement of the claim showing that the pleader is entitled to relief and a demand for judgement for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) A party shall state in plain, concise terms the grounds upon which he bases his defense to claims pleaded against him and shall admit or deny the claims and statements upon which the adverse party relies. If he is without information or knowledge regarding a statement or claim, he shall so state. Such shall be deemed a denial. Denials shall fairly meet the substance of the claim or statement denied and may be made as to specific parts but not all of a claim or statement. A general denial shall not be made unless the party could in good faith deny each and every claim covered thereby. A claim to which a responsive pleading is required except for the amount of damages shall be deemed admitted unless denied. If no responsive pleading is required, the claims of the adverse party shall be deemed denied.

(c) In responding to a pleading, a party shall set forth affirmatively all matters constituting an avoidance or affirmative defense including accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the Court, if justice so requires, shall treat the pleadings as if the designation had been a proper one.

(d) Each paragraph of a pleading shall be simple, concise, and direct. A party may set forth two or more statements of claim or defense alternatively or hypothetically, either in one count or in separate counts. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based upon legal or on equitable grounds or both.

(e) All pleadings shall be construed so as to do substantial justice.

#### RULE 9 Pleading Special Matters

(a) A party need not plead or prove the existence, status or capacity of the following matters unless the same are called into issue by the responsive pleading or timely motion of the adverse party, namely:

- (1) Capacity to be sued or to sue in an individual or in a representative capacity;
- (2) The legal existence of a corporation or organized association of persons being made a party;

(b) All allegations of fraud or mistake must be pled factually and with particularity. Malice, intent, knowledge, or other state of mind of a person may be alleged generally.

(c) The performance of a condition precedent may be pled generally. The non-performance of a condition precedent must be pled specifically and with particularity.

(d) In pleading an official document or official act, it is sufficient to allege that the document was issued or the act done in compliance with the law. In pleading any statute or ordinance, it is sufficient to refer to the statute by its number and the ordinance by its title or number and the date of its approval.

(e) In pleading a judgment or decision of a Court or a judicial or quasi-judicial body or of a board or hearing officer, it is sufficient to allege the judgment or decision without setting forth any matters showing the jurisdiction to render it.

(f) For the purpose of testing the sufficiency of a pleading, allegations of time and place are material and shall be considered like all other allegations of material matters.

(g) When items of special damage are claimed, they should be specifically alleged.

(h) When a party is ignorant of the name of an opposing party, and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered, the process and all pleading in the action shall be amended by substituting the true name.

(i) In any action for libel or slander it shall not be necessary to allege any facts for the purpose of showing the application to the Plaintiff of the defamatory matter upon which the cause of action is based, but it shall be sufficient to state generally that the same was published or spoken concerning the Plaintiff. If such allegation be controverted, the Plaintiff shall be bound to establish at trial that the matter was published or spoken.

#### RULE 10 Form of Pleadings

(a) Every pleading shall have a caption setting forth the name of the Court, the title of the action, and an identification of the type of pleading. In the Complaint, the title of the action shall include the names of all the parties, but in all subsequent pleadings, it is sufficient to state the name of the first party on each side with an appropriate indication that other parties are involved.

(b) All allegations of fact or defense shall be made in numbered paragraphs, the contents of each paragraph to be limited in as far as is practical to a statement of a single set of circumstances. A paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than a denial shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters alleged.

(c) Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part of the pleading for all purposes.

#### RULE 11 Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address except when otherwise specifically provided by rule or statute. Pleadings need not be verified or accompanied by affidavits. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief, there is good ground to support it, and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and action may proceed as though the pleading had not been served.

#### RULE 12 Defenses and Objections

(a) A Defendant shall serve his Answer within 30 days after the service of the Complaint and Summons upon him. Any party served with a pleading stating a counterclaim or crossclaim against him shall serve an Answer within 20 days after service of the Answer, or if a reply is ordered by the Court, within 20 days after service of the Order unless modified by the Court. The service of any motion permitted under Rule 12 alters these periods of time as follows unless a different time is fixed by order of the Court:

(1) If the Court denies the motion or postpones a decision until the trial on the merits, the responsive pleadings shall be served within 10 days after notice of the Court's action.

(2) If the Court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(3) If an appeal is taken from an Order sustaining a motion to dismiss and such Order is thereafter reversed, the responsive pleading shall be served within 20 days after the judgment or Order of reversal is filed in the trial Court.

(b) Every defense to a claim for relief in any pleading whether a Complaint, Counterclaim, Crossclaim, or Third Party Claim shall be asserted in the responsive pleading if one is required, except that the following defenses may at the option of the pleader be made prior to

the filing of a responsive pleading by motion, namely, lack of jurisdiction over the subject matter, lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief may be granted, failure to join a party under Rule 19. If the Court is presented a motion for failure to state a claim upon which relief can be granted and matters outside the pleadings are presented to the Court and not excluded, the Court may treat the motion as one for summary judgment, if all parties are provided a reasonable opportunity to present all material pertinent to such motion.

(c) After the pleadings are closed but within such time as to not delay trial, any party may move for judgment on the pleadings. If during a hearing for judgment on the pleadings, matters outside the pleadings are presented and not excluded by the Court, the Court may treat the motion as one for summary judgment and dispose of the same in that fashion if all parties had been given a reasonable opportunity to present any material pertinent to such a motion.

(d) Any of the defenses raised either by pleading or by motion and listed in Rule 12 (a), (b), (c) shall be heard and determined before trial upon application of one of the parties unless the Court orders such hearings to be deferred until the time of trial.

(e) If a pleading to which a responsive pleading is permitted is so vague or ambiguous that the opposing party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before filing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the Order of the Court is not obeyed within 10 days after notice of the Order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such other Order as is deemed appropriate.

(f) Upon a motion made by a party before responding to a pleading, or if no responsive pleading is permitted upon motion made by a party within 20 days after service of the pleading upon him or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived if not raised pursuant to motion under Rule 12 or if not included in a responsive pleading or an amendment thereto as permitted or allowed by these rules. A defense of failure to state a claim upon which relief may be granted, a defense to join an indispensable party, or an objection of failure to state a legal defense to a claim may be raised at the trial on the merits even though not previously raised under Rule 12 or on a responsive pleading. Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

#### Rule 13 Counterclaims and Crossclaims

(a) A responsive pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader had against the opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. The pleader need not state the claim if at the time the action was commenced the claim was the subject of another pending action or the opposing party brought suit on his claim by attachment or other process by

which the Court did not acquire jurisdiction to render a personal judgment on the claim, and the pleader is not stating any counterclaim under Rule 13 or if the claim is not one over which the Court would have jurisdiction if brought as an original action.

(b) A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) A counterclaim may diminish in part or defeat totally the recovery sought by the opposing party. It may claim relief exceeding an amount or different in kind from that sought in the pleading of the opposing party.

(d) A claim which either matured or was acquired by the pleader after serving his responsive pleading may, with the permission of the Court, be presented as a counterclaim by a supplemental pleading.

(e) When a pleader fails to set up a counterclaim through oversight, inadvertance, or excusable neglect or when justice requires, he may with the permission of the Court set up a counterclaim by amendment of his pleading.

(f) A pleading may state as a crossclaim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(g) Persons other than those made parties to the original action may be made parties to a counterclaim or crossclaim in accordance with the provision of Rule 19 and Rule 20.

(h) If the Court orders separate trials pursuant to these rules, then and in such event judgment on a counterclaim or crossclaim may be rendered when the Court has jurisdiction to do so even if the claim of the opposing party has been dismissed or otherwise disposed of.

#### **RULE 14 Third Party Practice**

At any time after commencement of an action and within 10 days of filing an original answer, a defending party may without permission of the Court cause Summons and Complaint to be served upon any person not a party to the action who is or may be liable to the defending party for all or part of the Plaintiff's claim against him. After 10 days from service of the original answer, the defending party must obtain permission of the Court to join a third party. Any person so served with Summons and Complaint shall be called a third party Defendant and shall be allowed to file responsive pleadings including answers, counterclaims, and crossclaims as provided in Rule 12 and 13. A third party Defendant may also proceed under Rule 14 against any person not a party to the claim made in the action against the third party Defendant. The Court may render such judgments, one or more in number, as may be suitable. When a counterclaim is asserted against a Plaintiff, he may cause a third party to be brought in under such circumstances which would entitle a Defendant to do so under this rule.

#### RULE 15 Amended and Supplemental Pleadings

(a) A party may amend his pleadings once as a matter of right before the opposing party has replied, or, if no reply is required, within 20 days after the pleading was served. Other amendments shall be allowed only upon motion and order of the Court or permission of the adverse party. Any party served with an amended pleading has an additional 10 days from the service date or the original expiration date for the answering, whichever is longer, within which to respond to the amended pleading.

(b) When issues not raised in the pleadings are presented at trial and tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The Court may allow amendments of the pleadings at trial such as may be necessary to cause them to conform to the evidence and the issues actually raised at trial. An issue presented and tried may not be represented and retried in a subsequent proceeding even though it was not raised in the pleading.

(c) All amendments of pleadings related back to the date of the original pleading.

(d) The Court may upon motion and notice permit a party to serve a supplemental pleading setting forth occurrences or events which have happened since the date of the pleading sought to be supplemented. If such permission is granted to file supplemental pleadings, the Court shall fix the response time for the adverse party.

#### RULE 16 Pretrial Conferences

In any action, the Court may in its discretion direct the attorneys or the parties or appear before it in a conference to consider the following:

- (1) Simplification of issues
- (2) Amendments to the pleadings
- (3) Stipulations as to facts or admissibility of documents
- (4) The limitation of numbers of expert and other witnesses
- (5) Jury instructions
- (6) Any other matters which may aid in the disposition of the action

Following a pretrial conference the Court may make such Orders with relationship to the conference as is appropriate.

#### RULE 17 Parties

(a) Every action shall be prosecuted by the real party in interest except that a personal representative or other person in a fiduciary capacity may sue in his own name without joining the party for whose benefit the action is being maintained.

(b) When two or more persons associated in business together and transacting such business under a common name are sued by such common name, the Summons and Complaint in such case may be served on one or more of the associates but need not be served upon all. A judgment in such action shall bind the joint property of all the associates and the individual property of the party

or parties actually served a Summons and Complaint in the same manner as if all have been named Defendants and have sued upon their joint liability. This section will not apply to corporations.

(c) When an infant or other incompetent person without a general guardian is made a party to a lawsuit, the Court shall appoint a guardian ad litem to represent such person in the proceeding. Unless the Court otherwise orders, no guardian ad litem shall be permitted to receive any money or other property from the ward. Such guardian ad litem may settle or compromise the litigation only with the approval of the Court and shall make application to the Court for payment of any fees or expenses incurred by him, which fees and expenses shall be the responsibility of the ward.

#### RULE 18 Joinder of Claims and Remedies

(a) Any party asserting a claim to relief as an original claim, counterclaim, crossclaim, or third party claim may join either as independent or as alternate claims as many claims either legal or equitable as he has against an opposing party.

(b) Whenever a claim is one cognizable only after another claim has been prosecuted to a successful conclusion, the two claims may be joined in a single action, but the Court shall grant relief in said action only after determining that the right to relief has been established in the proper manner and in the proper order. For example, a Plaintiff may state a claim for money damages and a claim to have set aside a fraudulent conveyance as to him without first having obtained a judgment establishing the claim for money damages.

#### RULE 19 Joinder of Persons Needed for a Just Adjudication

(a) Certain persons shall be made parties to pending litigation if possible. Those persons are as follows: persons in whose absence complete relief cannot be accorded among those persons already parties; or persons who claim an interest in the subject of the action and are situated so that the disposition of the action in their absence may impair their ability to protect their interest or leave one of the parties subject to a substantial risk of incurring multiple or inconsistent obligation. If such person exists, the Court shall order that he be made a party.

(b) If any person described in Rule 19(a) above cannot be made a party because he is beyond the jurisdiction of the Court or otherwise, then and in such event, the Court shall determine whether the absent person is indispensable. If the Court determines that the person is indispensable, the Court shall dismiss the action. If not, the Court shall allow the action to proceed and take such protective measures by the shaping of relief or appropriate provisions of the judgement as will protect the rights of the person not joined and those persons who are parties to the lawsuit

#### RULE 20 Permissive Joinder of Parties

(a) All persons may join in one action as Plaintiff if they assert any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions, and if any question of law or fact is common to all those persons and will arise in the proceeding. All persons may be joined in one action as Defendants if the common element exist as to all Defendants as stated in the previous sentence. Judgment may be given for one or more of the Plaintiffs according to their respective rights to relief and against one or more of the Defendants according to their respective liabilities.



(b) The Court may make such orders as will prevent the party from being embarrassed, delayed, or put to additional expense by the inclusion of a party against whom he asserts no claim or who asserts no claim against him. The Court may order separate trials or make other Orders to prevent delay or prejudice.

#### RULE 21 Misjoinder and Non-joinder of Parties

Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the Court on motion of any party or on its own initiative at any stage of the proceeding and on such terms as are just. Any claim against any party may be severed and proceeded with separately by Court Order.

#### RULE 22 Interpleader

Any party to a lawsuit who believes that he is or may be exposed to double or multiple liability may make application to the Court for permission to join as parties those people whom he believes expose him to inconsistent or multiple liability by way of interpleader. Interpleader will be liberally granted by the Court to the extent that it does not deprive the Court of Jurisdiction over the proceeding.

#### RULE 23 Class Actions and Stockholder Actions

No class action shall be allowed to be brought in the Tribal Court without prior permission of the Tribal Council. No stockholder derivative action may be brought in Tribal Court without prior permission of the Tribal Council.

#### RULE 24 Intervention

Upon timely application, any person shall be permitted to intervene in an action if he was otherwise qualified to be a party to the proceeding pursuant to Rule 19, Rule 20, or Rule 22. Any person desiring to intervene shall serve a motion to intervene upon the parties, which motion shall state the grounds for intervention and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. Upon hearing or stipulation of the parties, the Court shall determine whether or not intervention will be allowed.

#### RULE 25 Substitution of Parties

If a party dies and the claim is not thereby extinguished or if a party becomes incompetent or transfers his interest or separates from some official capacity, the Court may allow substitute parties to be joined in the proceeding as justice requires.

#### RULE 26 Discovery

(a) Parties may obtain discovery regarding any matter not privileged which is relevant to the pending action, whether or not such is or may be admissible at trial, if the request appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may not be had of the work product of the party's attorney. Discovery may be had by any or all of the following methods. The frequency of use of these methods is not limited unless the Court so orders.

(b) Interrogatories--Any party may submit interrogatories to any other party who must answer the same in writing under oath within 30 days of receipt.

(c) Any party may take the oral deposition of an adverse party or any witness under oath upon not less than 10 days notice specifying the time and place when and where such deposition will occur. A deposition may be taken at any place by agreement of the parties. If no agreement as to location can be reached, such deposition will be performed at the Tribal Court building in Rosebud, South Dakota.

(d) Any party may request any other party to produce any documents or physical evidence in his custody or possession for inspection or copying or request permission to enter and inspect real property reasonably related to the case. The party to whom the request has been presented shall within 30 days reply as to whether or not such will be allowed, and if not, state the reason. If production or inspection is not agreed to, or allowed, then the party requesting the same shall move the Court for a determination by the Court of whether or not inspection or production of documents will be allowed. The Court shall order such inspection if it is reasonably relevant to the case at hand.

(e) A party against whom discovery is sought may move the Court for protective order to prevent annoyance, harrassment, embarrassment, oppression, undue burden of expense, or protection of trade secrets or other confidential material. The Court may make such orders as are reasonably necessary to protect the confidentiality of the material yet still allow such discovery as is appropriate. The Court may grant the protective order in its entirety or deny the same in its entirety or grant partial relief to either party.

(f) If a party fails to respond or appear for discovery as provided in these rules, the opposing party may move the Court for an Order to compel the non-performing party to perform. The Court may award costs or attorney fees to the non-defaulting party for the necessity of bringing the matter before the Court. If a party fails to perform after being ordered to do so by the Court, the Court may upon motion and notice order that a certain fact, claim, or defense be deemed established or strike part of a claim or defense or dismiss the action or render a judgment by default against the non-complying party in an aggravated case.

(g) Answers to interrogatories and depositions may be used at any hearing or at trial to impeach or contradict the testimony of a person deposed or discovered. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds that the witness is dead, or that the witness is outside the jurisdiction of the Court unless it appears that the absence of a witness was procured by the party offering the deposition, or that the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment, or occupational commitments, or if the party offering the deposition has been unable to procure the attendance of the witness by subpoena. In the event that a deposition is offered in lieu of the testimony of a witness, the Court shall prior to allowing such deposition to be offered, review the same and make rulings on such objections to admissability of questions as are in such deposition or as are made in writing by either party. The Court shall then edit the deposition based upon such objections and the deposition as edited shall be read to the jury in lieu of the witness's testimony.

7 RULES 27 through 37 are reserved for future use.

## RULES 38 Trials

(a) Trials of all civil actions shall be to the Court without a jury unless a party to the action files a request for a jury trial and pays a fee of \$100 at the time of filing his initial pleadings. Court will then fix the time and place for hearing the request for a jury trial which the Court may postpone until the pleadings have been completed and the issues formulated. The Court shall make the determination of whether or not a jury trial shall be granted upon whether significant issues of fact are presented which will be determinative of the issues which are inappropriate for the Court to decide. No jury trial will be allowed unless such significant factual issues are determined by the Court to exist.

(b) Unless the requesting party or the Court specified otherwise, all factual issues properly triable by a jury shall be decided by the jury at trial.

(c) A Judge may, upon his own motion, order a trial by jury of any or all of the factual issues of a case regardless of whether or not the parties have requested the same. A Judge may hear and decide any or all of the issues at trial without a jury if either party fails to appear for trial regardless of whether a jury trial was requested or ordered.

(d) The failure of a party to demand or request a jury trial at the time of filing his initial pleadings together with the appropriate filing fee shall constitute a waiver by him of any rights which he may have to trial by jury.

## RULE 39 Right to Trial by Jury

No absolute right of jury trial exists in a civil case in the Rosebud Sioux Tribal Court. Whether a request for jury trial be granted is within the sound discretion of the Judge assigned to hear the case.

## RULES 40 Assignment of Cases for Trial

(a) The Chief Judge shall be responsible to assign civil cases to the various Judges and shall be responsible to maintain a separate Court calendar for civil jury cases and civil Court cases. The Chief Judge shall review both calendars on a regular basis, but at least every six months to assure himself and the Tribal Judiciary Committee that all pending civil actions are being disposed of as expeditiously as possible. In the event that the Chief Judge determines that no activity has occurred in a pending civil case beyond two calendar reviews, the Court may fix a hearing time pursuant to Order to Show Cause why the action should not be dismissed without prejudice for failure to prosecute the claim. If the Court finds that no good cause exists, the Court may in its discretion, giving due regard for the interests of justice, dismiss the case without prejudice for failure to prosecute.

(b) Any party wishing to secure a trial date in a civil jury or non-jury case where a responsive pleading has been filed shall make his application for trial date by a certificate of readiness. A certificate of readiness shall be served on the opposing party or his counsel and shall contain substantially the following information.

- (1) That all responsive pleadings have been filed and that the case is ready for trial in all respects.
- (2) That all necessary discovery has been completed.

- (3) That sufficient time has elapsed to afford all parties the reasonable opportunity to be ready for trial.
- (4) The case is either for jury trial or for trial by the Court.
- (5) There either is or is not a possibility of settlement of the case.
- (6) That a pretrial conference either is or is not requested for the purpose of disposing of pretrial motions, jury instructions, or any other pertinent matter.

If the opposing party feels in good faith that the case is not in a posture for trial, he shall file a resistance to the certificate of readiness within 10 days after the receipt of the same and serve a copy of the same on all parties establishing by specific facts the reasons why the case is not ready for trial. He may request a hearing date on the question of whether or not a trial date should be set. If a hearing date is requested, the Court shall fix a hearing date on the question of whether the case is ready for trial and make appropriate Orders. If no hearing is requested, or no response or resistance is made to the certificate of readiness, the Court shall determine whether the case is ready for trial, and if so, enter an Order fixing a trial date. If the Court determines that the case is not ready for trial, the Court shall attempt to ascertain what items need to be completed before the case is ready for trial and enter an Order directed to the parties or their attorneys to complete such items within a reasonable time fixed by the Court so that the matter can be moved forward for trial. Once a case has been approved by the Court for trial and a trial date has been fixed, no other certificate of readiness need be filed in order to fix trial dates if the initial trial date is postponed for any reason. Once a certificate of readiness has been filed and the Court has fixed a trial date, no trial date shall be postponed without at the same time fixing a new trial date.

#### RULE 41 Dismissal of Action

(a) Any civil action may be dismissed by the Plaintiff without Order of the Court by filing a notice of dismissal at any time before service by the adverse party of a responsive pleading or of a motion for summary judgment, or by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(b) Except as provided in Rule 41(a), no action shall be dismissed at the Plaintiff's request except on Order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim, crossclaim, or third party claim has been pleaded prior to the service upon such person of the Plaintiff's motion to dismiss, the action shall not be dismissed over the Defendant's objection or the third party's objection unless the counterclaim or third party claim can remain pending for independent adjudication by the Court. Unless otherwise specified in the Order, a dismissal under this paragraph is without prejudice.

(c) If the Plaintiff fails to prosecute or substantially comply with this chapter or any Order of the Court, a Defendant may move for dismissal of an action or any claim against him. After the plaintiff in an action tried to the Court has completed presentation of his case, the Defendant may move for dismissal on the grounds that upon the facts presented or the law, the Plaintiff has shown no right to relief. The Court may rule on the motion at that time or may decline to rule on the motion until the close of all the evidence. If the Court renders Judgment on the motion against the Plaintiff, the Court shall enter findings of fact and Conclusions of law establishing the reason for his ruling. A dismissal under this section, other than a dismissal for lack of jurisdiction or failure to join a party, operates as an adjudication on the merits.

(d) The Court on its own motion may dismiss any action where the records of the Clerk of Courts indicate that the case has been inactive for a period of two years.

#### RULE 42 Consolidation or Severance of Trials

(a) The Court may, upon motion of any party or upon its own initiative, order any or all of the issues of separate actions tried together when there is a common issue of fact or law relating to the actions or if consolidation will tend to avoid unnecessary cost or delay.

(b) The Court may to avoid prejudice or in furtherance of convenience, order severance or separate trials of any claims or issues which are pled in one action.

#### RULE 43 Evidence

At all hearings and trials, the testimony of witnesses shall be taken orally under oath unless otherwise provided in these rules. All evidence admissible under the Federal Rules of Evidence or as specified as admissible under Tribal law shall be admissible. The competency of witnesses to testify shall be similarly determined.

#### RULE 44 Proof of Official Records

(a) An official record kept within the United States or any territory thereof or any State thereof or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested or certified by the officer having the legal custody of the record or his deputy together with a certificate that such officer has custody of the original record. The certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office. It may also be proved by the testimony of the official having custody of the record.

(b) In any action tried to a jury, excluded evidence may upon request be included in the record for purposes of appeal and excluded oral testimony shall be put into evidence by means of an offer of proof made outside the hearing of the jury. In actions tried to the Court, the Judge may receive such excluded evidence and testimony into the record for appeal purposes.

(c) A written statement that after diligent search, no record or entry of a specified tenor is found to exist in the records designated by the statement and authenticated as provided in Rule 44 (a) is admissible as evidence that the records contain no such record or entry.

#### RULE 45 Subpoenas

(a) The Clerk of Courts or any Tribal Judge upon application of any party or their attorney in a civil case may issue a subpoena for a witness or witnesses to attend any hearing or trial or for the purpose of taking a deposition pursuant to the discovery rule.

(b) A subpoena shall state the name of the Court, title of the action, and shall command the person to whom it is directed to attend and give testimony or produce documents, books, papers, or other tangible pieces of evidence stated in the subpoena at a time and place specified in the subpoena. It shall state the name of the party or parties for whom the testimony or documents are required.

(c) A subpoena may be served by any officer or person qualified to make service of a Summons and Complaint. A subpoena shall be served in the same manner as a Summons and Complaint is served except that no service by publication is allowed. A subpoena must be served sufficiently in advance of the date when the appearance of the witness is required to enable the witness to reach the appearance place by the ordinary or usual method of transportation which he may use.

(d) Any person requesting the issuance of subpoenas shall tender to the Clerk or Judge the sum of \$5 for each and every subpoena which he requests be served, which sum shall be deemed to cover the cost of the service fees to the process servers. The person requesting the subpoena shall at the same time tender to the Clerk or Judge the sum of \$10 which sum shall be tendered to the witness fees for one day's attendance at Court pursuant to the subpoena. If such fees are not paid at the time of the request for issuance of the subpoenas, the Clerk of Courts or the Tribal Judge shall not issue such subpoena. At the commencement of each day of trial or hearing after the first day, a witness under subpoena may demand an additional daily fee from the party who subpoenaed him for each subsequent day's attendance, and if the same is not paid immediately, the witness shall not be required to remain. When any subpoena is requested to be issued on behalf of the Rosebud Sioux Tribe or any of its political or official subdivisions or any officer of agency thereof, no fees for service or fees for attendance on such subpoenas shall be required to be paid, but such subpoena shall be issued and attendance pursuant to those subpoenas shall be required.

(e) A person who has been properly served with a subpoena and fails to appear or produce such documents as were required may be deemed in contempt of Court and punished accordingly.

(f) A person present in Court or before a judicial officer may be required to testify in the same manner as if he had been served with a subpoena even though no subpoena has actually been issued for him.

#### RULE 46 Exceptions

Formal exceptions to rulings or Orders of the Court are unnecessary for the purposes of appeal, but for all purposes where an objection is proper and the party has an opportunity to object to a ruling or Order at the time it is made, such party should do so in order to assure that such objection or ruling is preserved for appeal purposes.

#### RULE 47 Juries

(a) Each year, preferably in January, but in any event, as soon after the first of the year as can reasonably be done, the Judiciary Committee of the Tribal Council or such other committee as the Council may direct shall compile from the Rosebud Sioux Tribe Tribal census rolls a list of not less than 50 persons who shall be designated as the jury list for that year until their successors are selected. The committee selecting the jury list shall select resident members of the Rosebud Sioux Tribe at least 18 years of age who in the opinion of the committee shall be able to regularly attend Court as required and shall not have been convicted of any felony. When the jury list is completed, the list shall be delivered to the Chief Judge and the Clerk of Courts. The Clerk shall then notify in writing each member of the jury list that they have been selected for jury duty for that year and advise them to be prepared for jury service during the succeeding year.

(b) At any time when a jury trial has been scheduled and a trial date has been fixed, at least one week prior to the date fixed for trial, the Clerk shall draw by lot from the jury list the names of 20 jurors which 20 jurors shall be deemed the jury panel for the succeeding jury trial which is scheduled. Those persons shall be notified at least seven days prior to the date set for trial by first class mail that their presence is required at the time and place fixed for said jury trial and that they may be punished as being in contempt of Court for their wilful failure to appear.

(c) Jurors shall be paid the sum of \$10 plus road trip mileage at the prevailing tribal rate per day for each day that they are required to appear and do appear for jury service.

(d) The Court shall permit the parties or their counsel, but not both, to conduct an examination of prospective jurors. The Court may also examine the prospective jurors for the purpose of establishing challenges.

(e) A challenge is an objection made to a potential juror. Challenges are of two types, namely, challenges for cause or preemptory challenges. Challenges for cause must be based upon statements or status of the potential juror that the juror is familiar with the case, has formed an opinion regarding the outcome, is sufficiently related to one of the parties or one of the witnesses that it would be impossible or difficult for the juror to render a fair and impartial verdict, or for any other reason that the juror could not render a fair and impartial verdict. The Judge shall immediately rule on any challenges for cause. Preemptory challenges are challenges made for no reason. Each side of a case shall have three preemptory challenges. Where there are multiple Plaintiffs or multiple Defendants, the Plaintiffs and the Defendants must divide the preemptory challenges among them or work out some other agreeable arrangement for exercising of the challenges. No more than three preemptory challenges will be exercised on each side.

(f) The Clerk shall draw lots and seat 12 potential jurors from the panel and shall replace jurors for whom a challenge for cause is allowed until a full panel of 12 is passed for cause. The parties shall then exercise preemptory challenges. Each side must exercise the full three preemptory challenges allowed to them. After exercise of the preemptory challenges, the Clerk shall administer an oath to the jury selected for the trial that they will fairly deliberate on the case before them and render a true verdict according to the Court's instructions.

(g) The Court may allow an alternate juror or jurors to be chosen in such manner as the Court may direct. If after the proceedings begin but before the case is submitted to the jury for their verdict, a juror becomes unable or disqualified to perform his duties, and alternate juror shall take his place. If no alternate juror had been selected, the parties may agree to complete the action with the remaining jurors. If no agreement can be reached, the Judge shall declare a mistrial, discharge the jury, and the case shall be tried with a new jury.

(h) The Court may, in its discretion, allow the jury to view a location or piece of property or place of occurrence of a disputed or otherwise relevant fact or event.

(i) At any time prior to their verdict, when the jurors are allowed to leave the Courtroom, the Judge shall admonish them not to converse with or listen to any other person on the subject of the trial and further admonish them not to form or express any opinions on the case until the case is submitted to them for their decision.

(j) Once the case is submitted to the jury, they shall retire to deliberate in private under the charge of an officer of the Court called the bailiff. He will refrain from communicating with them or allowing any other person to communicate with them except to inquire whether they have reached a verdict and he shall prevent others from improperly communicating with the jury.

(k) The jury may take into the jury room during deliberation the Court's instructions, all documents received in evidence, and any notes taken by the jurors themselves.

(l) If the jury has any questions on an instruction or other point of law or other area of inquiry, the jury may request additional instructions of the Court. Such questions shall be answered by the Court after notice to the parties or their counsel.

(m) If the jury is unable after a reasonable length of time to reach a verdict under these rules, the Court shall declare a mistrial and set the action for a new trial.

#### **RULE 48 Jury Verdicts**

(a) There shall be six jurors chosen to hear a case. In addition, the Court may allow the selection of one or more alternate jurors in the event the Court anticipates a lengthy trial. In the event an alternate juror is chosen and hears the case, he shall be dismissed at the time the case is submitted to the jury if he is not needed.

(b) When all or at least five of the six jury members have agreed on a verdict, they shall so inform the bailiff who shall notify the Court. The jury shall return to the Courtroom, and the Clerk shall call the jury roll. The verdict shall then be given in writing to the Clerk who shall read the same to the Court. The Judge shall then inquire of the jury foreman as to whether the verdict just read is the true verdict of the jury. Either party may request that the jury be polled individually to determine if such, in fact, is the jury verdict. If insufficient jurors agree with the verdict, the jury shall be sent out again to reconsider. Otherwise, the verdict is complete and the jury shall be dismissed.

#### **RULE 49 Special Verdicts**

A Court may, in its discretion, require the jury to return a verdict or verdicts in the form of specific findings on specified issues. The Court may require the jury to return a general verdict accompanied by answers to questions related to the issues under consideration.

#### **RULE 50 Motions for Directed Verdict and for Judgment Notwithstanding the Verdict**

(a) A party who moves for a directed verdict at the close of the evidence offered by the opposing side may offer evidence as if no motion has been made in the event that the motion is denied. A motion for directed verdict shall state the grounds therefore, and may be granted by the Court without the consent of the jury.

(b) A party who has moved for a directed verdict at the close of all the evidence which motion has been denied, or not ruled upon, may within 10 days after entry of judgment move to have the verdict and any judgment thereon set aside and entered according to his motion for directed



verdict or if there has been a verdict, the party may so move within 10 days after the jury has been discharged. A motion for a new trial may be made in the alternative under the same restrictions. The Court shall enter judgment or make any Orders consistent with his decision on the motions.

#### RULE 51 Instructions and Arguments to the Jury

(a) At the close of the evidence or at such earlier times as the Court may direct, any party may file proposed written instructions for the Court to give to the jury. Copies shall be served on the other parties. At the close of the evidence, the Court and the parties or their counsel shall settle instructions at which time out of the hearing of the jury the Court shall hear arguments on the instructions which the Court proposes to make and offer the parties the opportunity to except to the instructions of the Court. No grounds of objection or exception to the giving or the refusing of all instruction shall be considered on motion for new trial or appeal unless specifically presented to the Court upon the settlement of such instruction.

(b) Final arguments for the parties to the jury shall be made by the parties or their counsel, but not both, after the jury has been instructed. The Plaintiff, having the burden of proof, will open and close the argument. Each side shall be allotted the same amount of time for opening and closing, and the Plaintiff may not use more than half his time for closing argument. The Court shall not comment on the evidence of the case.

#### RULE 52 Findings by the Court

(a) In all actions tried upon the facts without a jury, the Court shall, unless otherwise provided in these rules, find the facts specially and state separately its Conclusions of Law thereon, and judgment shall thereafter be entered pursuant to Rule 58. In granting or refusing temporary restraining orders or preliminary injunctions, the Court shall similarly set forth the Findings of Fact and Conclusions of Law which constitute the grounds of its action. If an opinion or memorandum of decision is filed, the facts and legal conclusions stated therein need not be restated, but may be included in the Findings of Fact and Conclusions of Law by reference, or the Court may adopt its written decision as Findings of Fact and Conclusions of Law.

(b) Findings of Fact and Conclusions of Law are waived by failing to appear for trial, by consent in writing filed with the Clerk, by oral consent in open Court, or by entering into a stipulation of facts for consideration by the Court. Findings of Fact and Conclusions of Law are not necessary and need not be entered when granting or denying a temporary restraining order or preliminary injunction in a divorce proceeding or other domestic relations type dispute or on decisions on motions under Rule 12 or Rule 56 or any other motion except under Rule 41 for involuntary dismissal of a lawsuit.

#### RULE 53 Reserved

#### RULE 54 Judgments

(a) A judgment is any Order which finally and conclusively determines the rights of the party. When more than one claim for relief is presented in an action, however designated, a final judgment may be entered on less than of such claims. If the Court enters an Order severing such decided claims from the remaining claims, then the appeal time will commence to run as to the

claim decided in the same manner in which the appeal time would begin to run if the claim had been sued out separately. Otherwise, the appeal time will not commence to run until all of the claims in the litigation are decided.

(b) A judgment by Default shall not award relief different in kind from or exceed the amount which was specifically prayed for in the Complaint. Otherwise, every final judgment shall grant the relief to which the party in whose favor the same was rendered is entitled even if such relief was not demanded in the pleadings. It may be given for or against one or more or several persons, and it may, if justice requires, determine the ultimate rights of the parties on either side as between themselves.

(c) The Court may award costs and disbursements to the prevailing party or order that each party shall bear its own costs. The prevailing party shall file with the Court an affidavit of his costs and necessary disbursements within five days of the entry of the judgment and serve a copy on the opposing party. If such are not objected to within five days after receipt of the affidavit of costs, they shall be deemed to be part of and included in the judgment rendered. The costs which are allowable are filing fees, fees for service of process, publication fees, fees for subpoena and attendance of witnesses and costs of depositions. No other fees shall be allowed.

(d) The Court shall not award attorney's fees in any case except the Court may in its discretion award a reasonable attorney's fee in divorce or other domestic relations type cases.

#### **RULE 55      Default Judgments**

(a) When a party against whom a judgment for affirmative relief is sought has failed to make an appearance or plead or otherwise defend as provided by these rules, his default shall be proved by affidavit and judgment by default may be granted to the opposing party.

(b) If the party against whom judgment by default is sought has appeared in the action, he or his counsel shall be served with written notice of the application for default judgment at least three days prior to the hearing on such application. The same notice shall be given if the person against whom default judgment is sought is an infant or incompetent, regardless of whether he has appeared or not.

(c) Judgment by default without evidence may be entered by the Court if a party's claim against the opposition is for a sum of money which is or can by computation be made certain. Judgment by default for any other type relief shall be entered only upon receipt of such evidence as the Court may deem necessary to establish the validity and amount of the claim. Notice of an entry of a default judgment shall be served upon the party against whom it is taken and such default judgment shall not be effective until such service has been accomplished and proof thereof has been filed with the Court.

(d) The Court may, for good cause shown, set aside either an entry of default or a default judgment under this rule or under Rule 60.

#### **RULE 56      Summary Judgment**

At any time 30 days after commencement of an action any party may move the Court for summary judgment as to any or all issues presented in the case, and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Such motion shall be served not less than 10 days prior to the hearing on said motion and may be supported by affidavits, discovery material, or memorandum, all of which must be made available to the opposing parties at least 10 days prior to the hearing. The opposition shall have full opportunity to respond to such motion at the time fixed for hearing.

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**RULE 57 Declaratory Judgments**



The remedy of declaratory judgment is not available in the Tribal Court.

**RULE 58 Entry of Judgment**

(a) A money judgment upon a verdict of a jury shall be signed by the Clerk and filed. All other judgments shall be signed by the Judge and filed with the Clerk. A judgment is complete and shall be deemed entered and effective for all purposes when it is signed and filed as provided herein and when proof of service of notice of entry of judgment on the opposing party has been filed with the Clerk.

**RULE 59 New Trials**

(a) Any party may petition for a new trial on any or all of the issues presented by serving a motion not later than 10 days after entry of judgment for any of the following reasons:

- (1) Error or irregularity in the Court proceedings or misconduct by one of the adverse parties which prevented one of the parties from receiving a fair trial.
- (2) Misconduct of the jury or jury members or a finding that any question submitted to them was determined by a resort to chance.
- (3) Accident or surprise or newly discovered evidence which ordinary prudence could not have guarded against or produced at trial.
- (4) Damages so excessive or inadequate that they appear to have been given under the influence of passion or prejudice.
- (5) Insufficiency of the evidence to justify the verdict or other decision or that it is contrary to law.
- (6) Error of law occurring at the trial, provided however, that the claimed error was accompanied by an objection, an offer of proof, or a motion to strike at the time the alleged error was made.

(b) A new trial shall not be granted on the basis of any claim which is determined to be harmless in that it did not result in a substantial injustice.

(c) All requests for new trial shall be summarily dismissed unless they are accompanied by affidavits establishing the particular facts in detail upon which the motion is based. Arguments of law may also be included.

(d) The Court may on its own initiative within 10 days after entry of judgment order a new trial on any grounds assertable by a party to the action and shall specify the reasons for so doing.

(e) A motion to alter or amend a judgment shall be served with 10 days after the entry of judgment.

#### RULE 60 Relief from Judgments or Orders

(a) Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time on its own initiative or on motion of any party and after such notice as the Court may direct. Mistakes may be corrected before an appeal is docketed in the Appellate Court and thereafter while the appealing is pending, but only with the permission of the Appellate Court.

(b) On motion and upon such terms as are just, the Court may, in the furtherance of justice, relieve a party or his counsel from a final judgment, Order, or proceeding for the following reasons:

(1) Mistake, inadvertance, surprise, or excusable neglect.

(2) Newly discovered evidence, which, by the exercise of due diligence, could not have been discovered in time to move for a new trial.

(3) Fraud.

(4) The judgment is void.

(5) That the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application, or,

(6) Any other reason justifying relief from the operation of the judgment.

The motion should be made within a reasonable time and for reasons 1, 2, and 3 not more than 30 days after the judgment order or proceeding was entered upon or taken. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, Order, or proceeding, or to grant relief to a Defendant not actually personally notified as provided by statute or to set aside a judgment for fraud upon the Court.

#### RULE 61 Harmless Error

No error in either the admission or exclusion of evidence or in any ruling or Order or in anything done or omitted by the Court or by any of the parties is grounds for granting a new trial or otherwise disturbing a judgement or Order unless refusal to grant relief appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding shall disregard any error or defect which does not adversely affect the substantial rights of the parties.

RULE 62 Stay of Proceedings to Enforce a Judgment

(a) Except as ordered by the Court for good cause shown, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry unless otherwise ordered by the Court. A judgment in an action for injunction shall not be stayed during the period after its appeal and until an appeal is taken or during the pendency of an appeal. The other provisions of this rule shall govern the suspending, modifying, or restoring, or granting of an injunction during the pendency of an appeal.

(b) In its discretion and on such conditions for security of the adverse party as are proper, the Court may stay the execution of or any proceeding to enforce a judgment pending the disposition of a motion for new trial under Rule 59 or of motions under Rule 50 or 60.

(c) When an appeal is taken from a judgment granting, dissolving, or denying an injunction, the Court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as deems proper for the security of the rights of the adverse party. The Court may require a cash or surety bond be posted by the appropriate parties.

(d) When an appeal is taken, the appellant by giving a bond in an amount fixed by the Court of at least an amount sufficient to pay any judgment which may be rendered against him on appeal, may obtain a stay unless such stay is otherwise prohibited by law or by these rules. The stay is effective when the bond is approved and received by the Court, but not until such time.

(e) When an appeal is taken by the Tribe or an officer or agency of the Tribe, a stay shall be granted by the Tribal Court automatically upon request and no bond or other security shall be required from the Tribe or its officers or agencies.

(f) Nothing in this rule shall be construed to limit the power of the Appellate Court to grant such stays or other proceedings or make such Orders appropriate to preserve the status quo or the effectiveness of any judgment subsequently to be entered.

(g) When a Court has ordered a final judgment on some but not all claims presented in an action, the Court may stay enforcement of that judgment until the entering of a remaining judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(h) No stay, injunction, or other relief from a judgment or Order pursuant to this rule shall be granted by the Court without notice to the opposing party and the opportunity to be heard.

RULE 63 Disability or Disqualification of a Judge

(a) If by reason of death, sickness, or other disability a Judge before whom an action has been tried is unable to perform the duties under these rules after a verdict is returned, or Findings of Fact and Conclusions of Law are filed, then in such event, any other Judge assigned or sitting in the Court may perform those duties. However, if such other Judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(b) Whenever a party to an action or proceeding or his attorney shall make and file an affidavit to the effect that he believes that he may not receive a fair trial before such Judge before whom such action is pending, such Judge shall automatically disqualify himself and shall proceed no further in the matter except to call in another Judge to hear and determine the case. No reasons need be stated in the affidavit. However, an affidavit can only be filed by a party once in any proceeding.

#### RULE 64 Execution of Judgments

(a) At any time 30 days after entry of judgment awarding money or costs against a party, it is made to appear to the Court that the judgment debtor has been served notice of entry of judgment and has not paid the judgment in full or is not current in making installment payments in a manner agreed to by the parties in writing and filed with the Court, the Court shall, upon motion of the judgment creditor heard ex parte, order the Tribal Police to levy and execute upon the personal property of the judgment debtor as provided herein.

(b) The Tribal Police shall forthwith attempt to locate all personal property of the judgment debtor within the jurisdiction of the Court and seize the same and transport it to a safe, convenient place. The Tribal Police shall then, as soon as reasonably be done, make arrangements to sell the same at public auction. Sale of the seized property shall be at a public action conducted by the Tribal Police after having given at least 10 days public notice posted in three conspicuous public places on the reservation together with a notice of sale published in a local newspaper of general circulation at least seven days prior to the date fixed for the sale. The property shall be sold to the highest bidder for cash at the time of the sale. The person conducting the auction may postpone such in his discretion if there is an inadequate response to the auction or the bidding and may reschedule such upon giving the required notice. The person conducting the sale shall make a return of sale to the Court including an inventory of the items taken into his possession, the amount received therefore, the person who brought the same, and deposit the proceeds thereof with the Court for distribution to the judgment creditor and to be credited against the judgment. The Tribal Police may also levy and execute upon items of personal property which cannot be conveniently moved such as bank accounts, accounts receivable, and other such items. The levy and execution shall be made by serving upon the holder of such item of personal property a copy of the Order of the Court. Upon receipt of such Order of the Court, the person in whose possession the property then is shall execute whatever legal instruments are necessary to transfer the property to the Tribal Police for either public auction sale or crediting on the judgment creditor, the Court shall order the judgment debtor to appear in Court and answer questions under oath regarding all of his personal property. The Court shall then determine what property of the judgment debtor is available for execution and order the Tribal Police to take appropriate measures to convert the property to cash and apply the same to the judgment. Failure of the judgment debtor to appear or fully answer questions shall be deemed a contempt of Court.

(c) The judgment debtor may claim as exempt from levy and execution the sum of \$1500 worth of property selected from all the property of the judgment debtor in the sole discretion of the judgment debtor. The judgment debtor may only claim the exemptions by filing with the Court an affidavit and inventory listing all the judgment debtor's property wheresoever and howsoever situated and a reasonable estimate of the value of such property and identifying in said affidavit the specific items of property claimed as exempt and the values of said property. Such affidavit and inventory

shall be filed at least five days prior to the date fixed for levy execution sale and shall be deemed waived if the same is not filed on time. The property claimed as exempt shall be offered at public auction at the time and place previously fixed. If the property claimed as exempt does not bring at public auction the amount of value as estimated by the judgment debtor, the same shall be no sale and returned to the judgment debtor. If the property claimed as exempt brings a higher bid than the value stated by the judgment debtor, then the same shall be sold and the value established by the judgment debtor in his affidavit shall be withheld from the proceeds of the sale and paid to the judgment debtor. Any such sums paid to the judgment debtor shall be exempt from levy and execution for a period of 90 days following such payments. All sales shall be subject to prior valid liens of records.

(d) A judgment may be satisfied in whole or in part by the owner thereof or his attorney executing under oath and filing an acknowledgement of satisfaction specifying the amounts paid and whether such is in full or partial satisfaction. A Judge may order the entry of satisfaction upon proof of payment and failure of the judgment creditor to file a satisfaction. A judgment satisfied in whole with such fact entered in the judgment record shall cease to operate as a lien on the judgment debtor's property. A partially satisfied judgment or an unsatisfied judgment shall continue in effect and become and remain a lien upon the judgment debtor's property for a period of 10 years or until satisfied, whichever occurs first. An action to renew a judgment may be maintained anytime prior to the expiration of 10 years and will extend the period of limitations an additional 10 years and may be thereafter extended once more by the same procedure.

*(e) see Ord. 88-14 - 1988 amendment*

#### RULE 65 Temporary Restraining Orders and Injunctions

(a) No preliminary injunction shall be issued without written application and notice to the adverse party. Before or after the commencement of the hearing for an application for a preliminary injunction, the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even if this consolidation is not ordered, any evidence received on an application for a preliminary injunction which would be admissible on the trial of the merits becomes part of the record on the trial and need not be repeated at the trial. This paragraph shall be construed and applied to save the parties any rights they may have to a trial by jury.

(b) No temporary restraining order shall be granted without written or oral notice to the adverse party or his counsel unless

(1) It clearly appears from specific facts shown by affidavit or by the verified Complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and,

(2) The applicant's attorney or the applicant certifies to the Court in writing under oath the efforts, if any, which have been made to give notice or the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the Clerk's office and entered of record, shall define the injury and state why it is irreparable and why the Order was granted without notice, and except in actions arising in a divorce proceeding or other domestic relations type litigation, shall expire by its terms

within 10 days after entry unless the Court fixes a shorter time period for expiration. For good cause shown, the Court may extend the temporary restraining order for an additional 10 days unless the party against whom the Order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a Temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the Order shall proceed with the application for preliminary injunction. If he does not do so, the Court shall dissolve the temporary restraining order. On two days notice to the party who obtained the temporary restraining order without notice or upon such shorter notice period as the Court may prescribe, the adverse party may appear and move its dissolution and modification. In such event, the Court shall proceed to hear and determine such motion as expeditiously as possible. Temporary restraining orders by their very nature may not be appealed.

(c) Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except by the posting of a bond by the applicant in an amount approved by the Court for the payment of such costs and damages as may be incurred by the opposing party who is found to have been wrongfully enjoined or restrained. No security shall be required of the Rosebud Sioux Tribe or any officer or agency thereof. Bond may or may not be required in a divorce proceeding or other domestic relations litigation in the discretion of the Court. Any surety upon a bond under this rule submits himself to the jurisdiction of the Court and irrevocably appoints the Clerk of Tribal Court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and notice of motion may be served upon the Clerk of Courts who shall forthwith mail copies to the sureties at their last known post office addresses.

(d) Every Order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not be reference to the Complaint or other documents, the acts or act sought to be restrained. It is binding only upon the parties to the action, their officers, agents, servants, employees, and counsel and upon those persons in active concert or active participation with them who receive actual notice of the Order by personal service or otherwise. In addition, the Court shall set forth the Findings of Fact and Conclusions of Law which constitute the grounds of its actions.

(e) No injunction or restraining order shall be issued unless the Court finds from the pleadings, affidavits, or testimony presented to it as follows:

- (1) That the party making application has no adequate legal remedy;
- (2) That the party making application has exhausted all administrative remedies;
- (3) That irreparable harm will result which cannot be solved by the awarding of money damages unless the injunction or temporary restraining order is granted and,
- (4) That greater harm will be done to the party making application by the refusal of the injunctive relief than will be occasioned to the opposing party by the granting of such relief.



## CHAPTER TWO

### LIMITATION OF ACTIONS AND SOVEREIGN IMMUNITY

**4-2-1 SOVEREIGN IMMUNITY**—Except as required by federal law or the Constitution and bylaws of the Tribe or specifically waived by a resolution or ordinance of the Tribal Council making specific reference to such, the Rosebud Sioux Tribe and its officers and employees shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

**4-2-2 ACTIONS BY OR AGAINST THE TRIBE OR ITS OFFICERS OR EMPLOYEES**—In any action otherwise authorized by or against the Tribe or its officers or employees arising from performance of their official duties, the following modifications to the rules and procedures set forth in this Code shall apply.

(1) The periods of time specified for civil cases for appeals of either a civil or criminal nature for which an answer, reply, or other pleading or response of any kind shall be required shall be double the normal period.

(2) Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be liable for the payment of costs or expenses of the opposing parties.

(3) Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their duties either as Plaintiff or Defendant shall be required to post security bond or otherwise for any purpose.

**4-2-3 ADOPTION BY REFERENCE DOES NOT CONSTITUTE A WAIVER OF SOVEREIGN POWER**—The adoption of any law, code or other document by reference into this Code shall in no way constitute a waiver or secession of any sovereign power of the Rosebud Sioux Tribe to the jurisdiction whose law or code is adopted or in any way diminish such sovereign power, but shall result in the law or code thus adopted becoming the law of the Rosebud Sioux Tribe.

**4-2-4 STATUTE OF LIMITATIONS**—Unless otherwise specifically provided in this Code, the following limitations on bringing of a civil action will apply.

(1) Any action arising against the Tribe or its officers or employees arising of their official duties must be commenced within one year of the date the cause of action accrued.

(2) Any other cause of action must be commenced within two years the cause of action accrued provided, however, that any cause of action based upon fraud or misrepresentation shall not be deemed to have accrued until the aggrieved party has discovered the facts constituting fraud or misrepresentation.

**4-2-5 PRINCIPLES OF CONSTRUCTION**—The following principles of construction shall apply to this Code unless a different construction is obviously intended.

(1) Masculine words shall include the feminine and singular words shall include the plural and vice versa.

## CHAPTER THREE

### AMENDMENTS TO LAW AND ORDER CODE

4-3-1 **DEFINITION OF TERMS**--For the purposes of this Chapter the word "Ordinance" shall mean a permanent legislative act of the Tribal Council of the Rosebud Sioux Tribe, within the limits of its powers.

The word "resolution" as used in this Chapter shall mean any determination, decision, or direction of the Tribal Council of the Rosebud Sioux Tribe of a special or temporary character for the purpose of initiating, affecting, or carrying out its administrative duties and functions under the law and ordinances governing the Rosebud Sioux Tribe.

4-3-2 **AMENDMENTS BY ORDINANCE ONLY**--No amendments shall be made to this Tribal Law and Order Code of the Rosebud Sioux Tribe by resolution. The only amendments which shall be effective and recognized by the Tribal Council or the Courts of the Rosebud Sioux Tribe to this Tribal Law and Order Code shall be those amendments which are made by ordinance pursuant to this Chapter.

4-3-3 **READING, PASSAGE AND PUBLICATION OF ORDINANCES**--All ordinances shall be presented to the Tribal Council in writing and shall be read twice with at least seven (7) days intervening between the first and second reading. If amendments are offered to the ordinance during the reading process, such shall be offered in writing. If such amendment is allowed by the Council, the reading process must begin again. Under no circumstances shall an ordinance be effective unless it has had the two readings required by this Chapter in its final unamended form.

4-3-4 **PASSAGE OF RESOLUTIONS**--A resolution may be passed after one reading. It shall be recorded at length in the minutes of the meeting at which it was passed with a statement of the number of votes for and against the same. It shall be published in full as part of the minutes.

4-3-5 **RECORDING OF VOTES ON ORDINANCES**--The vote upon all ordinances after the second reading shall be taken individually and entered upon the minutes of the meeting.

4-3-6 **PUBLICATION AND EFFECTIVE DATE OF ORDINANCES**--Following the second reading and adoption of an ordinance under this Chapter, the Secretary of the Tribal Council shall within (10) days thereafter cause such ordinance to be published in a newspaper designated by the Tribal Council for that purpose. The Tribal Secretary shall also, within the same (10) day period, submit the ordinance to the agency superintendent pursuant to the Tribal Constitution if BIA approval is required for that particular ordinance, the ordinance shall become effective after publication and the completion of the approval process by the Bureau of Indian Affairs. If approval is not required, the ordinance shall become effective ten (10) days after publication.

4-3-7 **RECORDING OF ORDINANCE IN ORDINANCE BOOK**--After an ordinance takes effect, the Secretary of the Tribe shall record the same, together with a certificate of the date of its publication in a book to be known as the Tribal Ordinance Book and file the original Affidavit of Publication with the ordinance.

ROSEBUD SIOUX TRIBE  
Resolution No. 96-05

WHEREAS, the Rosebud Sioux Tribe is a federally recognized Indian Tribe organized pursuant to the Indian Reorganization Act of 1934 and all pertinent amendments thereof; and

WHEREAS, the Rosebud Sioux Tribal Council is duly empowered to establish a reservation court and define its duties powers pursuant to Article IV, Section 1(k) of the Rosebud Sioux Tribal Constitution; and

WHEREAS, the Rosebud Sioux Tribal Council is duly empowered to and responsible for safeguarding the general welfare of the people of the Rosebud Reservation pursuant to Article IV, Section 1 (m) of the Rosebud Sioux Tribal Constitution; and

WHEREAS, the Rosebud Sioux Tribal Council enacted the Rosebud Sioux Tribe Law & Order Code, hereafter referred to as the Code; and

WHEREAS, the intended effective date of such Code was November of 1985; and

WHEREAS, a question exists as to whether all sections of the Code, as proposed, were properly adopted as intended; and

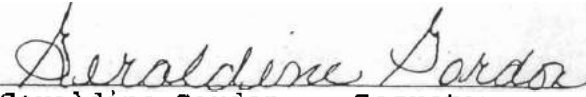
WHEREAS, the Tribal Judiciary Committee has reviewed this matter and recommends Tribal Law Ordinance 96-01 to the Tribal Council; now

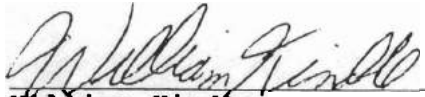
THEREFORE BE IT RESOLVED, the governing body hereby adopts Tribal Law Ordinance 96-01.

\* \* \* C E R T I F I C A T I O N \* \* \*

This is to certify that the above Resolution No. 96-05 was duly passed by the Rosebud Sioux Tribal Council in session for a first reading on January 10, 1996, the vote was Sixteen (16) in favor, None (0) opposed and One (1) not voting. A second reading was held on April 12, 1996 and approved by a vote of Fourteen (14) in favor, None (0) opposed and None (0). The said resolution 96-05 introducing Ordinance No. 96-01 was adopted pursuant to authority vested in the Council. A quorum was present.

A T T E S T :

  
Geraldine Gordon, Secretary  
Rosebud Sioux Tribe

  
William Kindle, President  
Rosebud Sioux Tribe

ROSEBUD SIOUX TRIBE  
ORDINANCE NO. 96-01

Be it enacted by the governing body of the Rosebud Sioux Tribe to amend the Tribal Law and Order Code, Title 2, Chapter 2, Section 5, Subsection (3), Consent of Parents, which presently reads, to wit:

2-2-5 CONSENT OF PARENTS - No child can be adopted without the consent of both of the natural parents, if living, provided that in the following cases consent shall not be necessary:

(1) From any parents whose paternal rights have been judicially determined and terminated, provided that such terminations shall be final on appeal or that the time for such an appeal shall have expired; or

(2) From any parent who has been adjudged by a Court of competent jurisdiction to be mentally incompetent or mentally ill; or

(3) From any parent who has abandoned his or her child for a consecutive period in excess of one year from the date of filing of the petition of adoption.

BE AMENDED TO READ:

2-2-5 CONSENT OF PARENTS - No child can be adopted without the consent of both of the natural parents, if living, provided that in the following cases consent shall not be necessary:

(1) From any parent whose paternal rights have been judicially determined and terminated, provided that such terminations shall be final on appeal or that the time for such an appeal shall be expired; or

(2) From any parent who has been adjudged by a Court of competent jurisdiction to be mentally incompetent or mentally ill.

(3) From any parent who has abandoned his or her child for a consecutive period in excess of one year prior to the date of filing of the Petition of adoption.

EFFECTIVE DATE OF AMENDMENT. This amendment shall be effective upon approval of the governing body of the Rosebud Sioux Tribe pursuant to Title 4, Chapter 3 of the Rosebud Sioux Tribe Law and Order Code.

## TITLE 4

### CHAPTER 4

#### ALTERNATIVE REMEDY

##### 4-4-1 Alternate Remedy to a Civil Action

In any dispute between persons within the Rosebud Sioux Tribal Court's civil jurisdiction over a claim of a personal debt, not incurred from an established business, or child support owed or a dispute over ownership of personal property, any adverse party may petition the Tribal Court for an alternative remedy to a civil action as hereinafter provided.

##### 4-4-2 Informal Hearing

Upon petition by any adverse party, a judge of the Rosebud Sioux Tribal Court may issue a subpoena to any named adverse respondents requiring that person or persons to appear before the Tribal Court at a stated time and place for an informal hearing aimed at working out the dispute in the Indian way.

##### 4-4-3 Persons Present

At the informal hearing there may be present the petitioner, the respondent to the summons, a judge of the Rosebud Sioux Tribal Court, the tribal defender, the tribal prosecutor and any other person requested to be present by either the petitioner or the respondent.

##### 4-4-4 Objectives of the Informal Hearing

At the informal hearing, both parties shall have a chance to discuss in the Indian way any disputed facts and shall be guided by the Court officials present to reach a mutual agreement that is satisfactory to both the petitioner and the respondent.

##### 4-4-5 Court Approval of Agreement

If both the petitioner and the respondent reach a mutual agreement it shall be transcribed and approved by the judge of the Tribal Court. A mutual agreement approved by the Court shall have the force of a civil judgement of the Tribal Court and if not adhered to may be enforced as a civil judgement under Section 5 of this Chapter or by any appropriate order issued by the Court.

##### 4-4-6 Failure to Reach Agreement


If no agreement can be reached in the Indian way by the parties, the only remaining remedy is a civil action as provided by Chapter I above. If there is a civil action, the tribal judge who sat in on the informal hearing shall not preside.

ROSEBUD SIOUX TRIBE  
RESOLUTION NO. 88-207

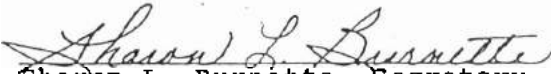
THEREFORE BE IT RESOLVED, that the Rosebud Sioux Tribal Council hereby adopts Ordinance 88-13, entitled "ALTERNATIVE REMEDY" as Chapter 4 of Title 4 of the Rosebud Sioux Tribe Law and Order Code, after a first reading on December 15, 1988, and a second reading in unamended final form on January 11, 1989.

CERTIFICATION

This is to certify that the above Resolution No. 88-207 establishing Ordinance 88-13 was duly passed by the Rosebud Sioux Tribal Council in session on December 15, 1988, by a vote of fourteen (14) in favor, zero (0) opposed and three (3) not voting for a first reading. The second reading was held on January 11, 1988, and passed by a vote of fourteen (14) in favor, one (1) opposed and two (2) not voting. The said Resolution was adopted pursuant to authority vested in the Council. A quorum was present.

  
Alex G. Danderman, President  
Rosebud Sioux Tribe

ATTEST:

  
Sharon L. Burnette, Secretary  
Rosebud Sioux Tribe

ROSEBUD SIOUX TRIBE  
RESOLUTION NO. 88-208

- WHEREAS: the Rosebud Sioux Tribe is recognized by the United States of America pursuant to the Indian Reorganization Act of 1934 as amended by an Act of June 15, 1935, which states: "Nothing in the Act...shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe..." including the Treaty of 1868; and
- WHEREAS: the Rosebud Sioux Tribe is also a successor in interest to the sovereign and independent bands of the Sioux Nation who separately entered into the multi-lateral Treaties of 1851, 11 Stat. 749 and of 1868, 15 Stat. 635, and the U.S. Supreme Court decision of June 30, 1980; and
- WHEREAS: the tribal governing body is the Tribal Council exercising power and authority under a Tribal Constitution adopted by a vote of tribal people on November 23, 1935; and
- WHEREAS: the Tribal Constitution authorizes the Council by Article IV, Section 1(k) to pass and enforce ordinances to keep law and order and administer "justice by establishing a reservation court and defining its duties and power" and (5) to adopt "resolutions regulating... other tribal agencies and tribal officials"; and
- WHEREAS: the Rosebud Sioux Tribe believes that there needs to be a procedure whereby final judgments of other Indian nations and foreign courts can be recognized and enforced by the Rosebud Sioux Tribe in its favor; and
- WHEREAS: the Tribal Judiciary Committee pursuant to Tribal Ordinance 80-03 adopted February 19, 1980, and amended June 6, 1988, has subject matter review and recommending authority under Section 8, K. "Revisions and codifications of the statutes of the Rosebud Sioux Tribe"; and
- WHEREAS: the Tribal Law and Order Code, Title IV, Section 3, contains provisions on how to amend it, including: (1) by ordinances; (2) first and second readings at least seven days apart; (3) written amendments during readings to restart the process; (4) resolution for its final unamended form on a roll call vote; (5) publication within 10 days in a newspaper designated for such legals; (6) approval by the Agency Superintendent if necessary; (7) effective date of 10 days

ROSEBUD SIOUX TRIBE  
RESOLUTION NO. 88-208

after publication or completion of Superintendent approval as appropriate; (8) recording and certificate of publication by the Tribal Secretary in the Tribal Ordinance Book; and

WHEREAS: the Rosebud Sioux Tribal Judiciary Committee, in session with a quorum present on September 20, 1988, is now recommending to the Tribal Council the acceptance of a "Doctrine of Comity" by recognizing any and all judgments of other Indian Nations and Foreign Courts, now

THEREFORE BE IT RESOLVED that the Rosebud Sioux Tribal Council, through its court system, committees, boards and commissions, gives official notice that the Rosebud Sioux Tribe is recognizing under its own "Doctrine of Comity" any and all judgments of other Indian Nations and Foreign Courts and will use these in its own intent; and

BE IT ALSO RESOLVED that any of the sub-entities of the Rosebud Sioux Tribe using any judgment of finality shall send notice of such to the Tribal Secretary; and

BE IT ALSO RESOLVED that the Rosebud Sioux Tribal Council hereby adopts Ordinance 88-14, entitled "CIVIL AMENDMENTS OF 1989" including a "Doctrine of Comity" to amend the Rosebud Sioux Tribe Law and Order Code, after a first reading on December 15, 1988, and a second reading in unamended final form on January 11, 1989, which shall read as follows:

ORDINANCE 88-14 CIVIL AMENDMENTS OF 1988

Title IV, Chapter One, Rule 57, Declaratory Judgments, is repealed in its entirety and in its place the following shall be inserted:

★ Rule 57: Declaratory Judgments

In the case of an actual controversy, the Tribal Court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title IV, Chapter One, Rule 64, Execution of Judgments, is amended and supplemented by the addition of subsection (e) which shall read as follows:



- (e) Notwithstanding the availability of tribally commissioned police to exercise the powers of levy and execution described in this Rule, the Tribal Court may appoint suitable tribal members as Judgment Enforcement Commissioners having all the powers to levy and execute upon the property of the judgment debtor described in subsections (a) through (d) of this Rule.

Title Four, Chapter Two, Limitation of Actions and Sovereign Immunity, is amended and supplemented by the addition of 4-2-7, 4-2-8, and 4-2-9 which shall read as follows:

4-2-7. Personal Service Off of Reservation - Acts Submitting Non-resident Persons to Jurisdiction of Court.

- A. To the greatest extent consistent with due process of law, any person, whether or not a citizen, resident, or present on the Reservation, who in person or through an agent does any of the acts as enumerated in this Section, thereby submits said person or his personal representative to the jurisdiction of the Tribal Court as to any cause of action arising from doing any of the following acts within the Rosebud Indian Reservation:
1. The transaction of any business;
  2. The commission of a tortious act;
  3. The ownership, use or possession of any property, real or personal;
  4. Contracting to insure any person, property or risk;
  5. The act of sexual intercourse within this Reservation;
  6. Living in a marital relationship, notwithstanding the subsequent departure from this Reservation, as to any action for divorce or separate maintenance so long as the petitioning party has continued to reside within the Reservation.
- B. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.
- C. Nothing in this Section limits or affects jurisdiction over persons now or hereafter provided by law or the right to serve any process in any other manner now or hereafter provided by law.

4-2-8. Law Applicable to Actions in Tribal Court - The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according

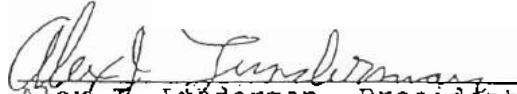
to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advise of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by any of the above, the Tribal Court may look to the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usages.

4-2-9. When Order or Judgment of Other State, Tribal or Foreign Court may be Recognized in Tribal Court. No order or judgment of a state, tribal or foreign court may be recognized as a matter of comity in the Rosebud Sioux Tribal Court except under the following terms and conditions:

- (1) Before the Rosebud Sioux Tribal Court may consider recognizing a state, tribal or foreign court order or judgment, the party seeking recognition shall establish by clear and convincing evidence that:
  - a. The court had jurisdiction over both the subject matter and the parties;
  - b. The order or judgment was not fraudulently obtained;
  - c. The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;
  - d. The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and
  - e. The order or judgment does not contravene the public policy of the Rosebud Sioux Tribe.
- (2) If a Court is satisfied that all of the foregoing conditions exist, the Court may recognize the court order or judgment in any of the following circumstances:
  - a. In any child custody or domestic relations case;
  - b. In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgment of the Rosebud Sioux Tribal Courts;
  - c. In other cases if exceptional circumstances warrant it; or
  - d. Any order authorized to be recognized pursuant to 25 USC 1911 (d) or 25 USC 1919.

CERTIFICATION

This is to certify that the above Resolution No. 88-208 establishing Ordinance 88-14 was duly passed by the Rosebud Sioux Tribal Council in session for a first reading on December 15, 1988, with a vote of seventeen (17) in favor, zero (0) opposed and zero (0) not voting. A second reading was held on January 11, 1988, when said Resolution was duly passed with a vote of seventeen (17) in favor, zero (0) opposed and two (2) not voting. The said Resolution establishing Ordinance 88-14 was duly adopted pursuant to authority vested in the Council. A quorum was present.

  
Alex J. Lunderman, President  
Rosebud Sioux Tribe

ATTEST:

  
Sharon L. Burnette, Secretary  
Rosebud Sioux Tribe

- (2) Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.
- (3) Whenever a term is defined for a specific part of this Code, that definition shall apply in all parts of the Code unless a contrary meaning is clearly appropriate.
- (4) This Code shall be construed as a whole to give effect to all of its parts in a logical and consistent manner.
- (5) If any provision of this Code or the application of any provision to any person or circumstance is held invalid, the remainder of this Code shall not be affected thereby, and to the extent possible, the invalid provisions of this Code are declared to be severable.
- (6) Any typographical errors or omissions shall be ignored whenever the meaning of the provision containing the error or omission is otherwise reasonably obvious to the Court.
- (7) Any other questions of construction shall be handled in accordance with the generally accepted principles of construction giving due regard for the underlying principles and purposes of this Code.

**4-2-6 JURISDICTION OVER PERSONS**—The Rosebud Sioux Tribal Court will exercise civil and criminal jurisdiction over all persons within its territorial jurisdiction to the extent allowed by federal statutory law and Federal Court decisions. It is recognized that decisions such as *Oliphant* (55 Lawyers Ed 2nd 209) limit the jurisdiction of this Court over certain non-Indians. However, the Rosebud Sioux Tribal Court will continue to exercise all of the civil and criminal jurisdiction over all persons allowed to it by federal statute and federal judicial Court decisions.

( See Resol. No. 98-208

9/26/88  
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## RULES OF PROCEDURE

## ROSEBUD SIOUX TRIBAL COURT OF APPEALS

## SCOPE OF RULES

These rules govern all appeals to the Rosebud Sioux Tribal Court of Appeals and shall take effect upon adoption by Resolution of the Rosebud Sioux Tribal Council. Upon such adoption, these Rules shall govern only those appeals filed thereafter.

## NAME OF COURT

Rule 1. This Court shall be referred to in the caption of all proceedings filed with the Clerk of Courts as the Rosebud Sioux Tribal Court of Appeals.

## NOTICE OF APPEAL AND BOND

Rule 2. A timely filing of a Notice of Appeal commences the appellate process. The Notice of Appeal shall be filed with the Clerk of Court of Tribal Court. Notice of Appeal shall be filed within thirty days of notice of entry of judgment in all civil cases; and shall be filed within ten days of notice of entry of the final judgment or other appealable order in all criminal cases. No extensions of these deadlines will be granted. The Clerk of Court of the Tribal Court shall within ten (10) days transfer a certified copy of the Notice of Appeal to the Clerk of the Court of Appeals.

Upon the filing of the Notice of Appeal, the Appellant shall also be required to post an appellate bond. In civil matters, bond shall be set at \$50, plus the appellant shall be required to file a statement of financial responsibility equal to the amount of the Judgment in Tribal Court. If the appellant is unable to file the required financial statement, they shall be required to post cash or other sureties equal to the amount of the Tribal Court judgment.

In all criminal matters, bond shall be in the amount set in the Trial Court bond schedule for each offense being appealed. Additionally, appellants who have proceeded in the lower court, In Forma Pauperis, shall be allowed to proceed In Forma Pauperis through the appellate proceedings, upon application. The Chief Justice shall also be allowed to consider and grant In Forma Pauperis petitions for the first time in the appellate court. All petitions for leave to file In Forma Pauperis shall be accompanied by an Affidavit, sworn to under penalties of perjury, that the appellant is indigent.

No interlocutory appeals shall be allowed in either criminal or civil matters unless expressly authorized by the Presiding Justice. The decision of whether or not to accept interlocutory appeals shall be based upon the findings of fact, conclusions of law and ruling entered by the trial Judge upon the Appellant's motion to file an interlocutory appeal.

#### CLERK OF COURT

Rule 3. The Clerk of the Rosebud Sioux Tribal Court of Appeals shall take an oath of office and shall be bonded. The Clerk shall not practice as an attorney or counselor in any court while he or she continues in office. Nor shall he or she give any legal advice/counseling concerning the merits of the Appeal. The office of the Clerk of Court shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, unless otherwise ordered by the Court.

The Clerk shall keep a docket and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket. A numbered case file shall be created for each case with a case activity sheet appended inside the case folder. All papers filed with Clerk for each case and all process, orders or judgments shall be entered chronologically on the docket and case activity sheet for that case. Entries shall be brief but shall show the date, nature and title for each document entered. The Clerk shall also keep an alphabetical index of cases contained in the docket by Appellant and Appellee names so that the case number can be cross referenced.

The Clerk shall prepare, under the direction of the Court, a calendar of cases pending argument. Preference shall be given to criminal or juvenile court appeals.

Immediately upon the entry of an Order of Judgment by the Rosebud Sioux Tribal Court of Appeals, the Clerk shall serve -- Notice of Entry of Order/Judgment by certified mail upon each party to the proceeding with a copy of any opinion respecting the Order or Judgment and shall note the date of Mailing on the case activity sheet for that case including a copy of all cover letters in the file. Service on a party represented by an attorney or counselor of record shall be made on the attorney or counselor. Certified mail return receipts shall be stapled to the copy of the document mailed when returned by the postal service.

The Clerk shall have custody of the records and papers of the Court. He or she shall not permit any original record or paper to be taken from his or her custody except as authorized by Order of the Court. Original record transmitted from the Lower Court shall be returned to that Court upon disposition of the case appeal. The Clerk shall preserve copies of all briefs and documents filed.

## COUNSELORS AND ATTORNEYS

Rule 4. Any counselor or professional attorney (qualified) admitted to practice before the Rosebud Sioux Tribal Court shall be eligible for admission to the bar of the Rosebud Sioux Tribal Court of Appeals. An applicant shall file with the Clerk of the Court of Appeals, on a form prescribed by the Clerk, an application for admission containing his or her personal statement showing eligibility for membership along with an application fee of one hundred dollars annually. At the foot of the application the applicant shall take and subscribe to the following oath:

I, \_\_\_\_\_, do solemnly swear that I will support and defend the Constitution of the Rosebud Sioux Tribe against all enemies, foreign and domestic, that I have studied and am familiar with the laws of the Rosebud Sioux Tribe, and that I will conduct myself with honor toward those whom I represent and with respect for the Courts of the Rosebud Sioux Tribe.

Thereafter, upon written or oral motion of a member of the bar of this court, or upon the Court's own motion, the Court will act upon the application.

The Court of Appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any counselor or attorney who practices before it, for failure to comply with these rules or violation of the above oath for conduct unbecoming a member of the bar of the court. Disciplinary action may consist of either reprimand, suspension or disbarment.

All attorneys or counselors admitted to the bar of this court shall be issued a written certificate by the Chief Appellate Justice.

## CONTENTS OF NOTICE OF APPEAL

Rule 5. A Notice of Appeal shall contain the following information:

1. The name, address, phone number (if applicable) of the party taking the Appeal and their counselor or attorney of record (if represented).
2. The date and title of the Tribal Court Order or Judgment form which the Appeal is taken.

3. The names, addresses, and phone numbers (if known) of all other parties to the Tribal Court action and their counselors or attorneys of record.

4. (An itemization of all assignments of error or legal or factual issues desired to be considered in the Appeal.) A brief statement of issues being appealed.

5. A Certificate of Service indicating service of the Notice of Appeal upon all opposing parties and the date and manner of such service.

#### DESIGNATION OF RECORD

Rule 6. The party taking the appeal shall also file with the Clerk of Court of this Court a Designation of Record indicating all pleadings and papers filed with the Tribal Court which will constitute the record on appeal. Such Designation of Record shall be filed with the Notice of Appeal with a Certificate of Service indicating service upon all opposing parties and the date and manner of such service. Such Designation of Record shall include the date, time, and portion of any Tribal Court hearing which the Appellant believes must be transcribed for purposes of the Appeal.

The Appellee shall have fifteen (15) days after service of the Designation of Record upon him to file an Appellee's Statement of Issues and Designation of Record indicating any additional issues, record documents or transcripts which the Appellee would like included in the appeal.

Copies of the Designation of Appeal and Appellee's Statement of Issues and Designation of Record shall be served upon the Clerk of Court of the Tribal Court who shall within the time allowed, transmit only those portions of the record indicated by the parties. The Tribal Court Clerk shall include a table of contents indicating the names and dates of all documents included chronologically.

#### CONTENTS AND FORM OF BRIEFS

Rule 7. All briefs shall be served and filed in accordance with the applicable provisions of the Law and Order Code of the Rosebud Sioux Tribe, governing the action. The brief of the Appellant shall contain:



1. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes or other authorities cited, with reference to the pages of the brief where they are cited;
2. A statement of issues presented for review;
3. A statement of the case, indicating the nature of the case, the course of proceedings in Tribal Court, and its disposition in Tribal Court;
4. An itemization of all assignments of error or legal or factual issues desired to be considered in the Appeal.
5. An argument, which shall contain the contentions of the Appellant with respect to the issues presented, the reasons therefore, with citations to the authorities, statutes and parts of the record relied upon;
6. A short conclusion stating the precise relief sought; and
7. A request for oral argument, if argument is desired, after the conclusion, stating the reasons why argument is needed and why the Court should not decide the matter based on briefs and record. Or, the Court may on its own Motion, grant oral argument. The decision to grant oral argument shall be discretionary with the Chief Justice.

The brief of the Appellee shall conform to the requirements outlined above for Appellant's brief.

The Appellant shall be entitled to file a reply brief within fifteen (15) days subsequent to service of Appellee's brief.

All briefs filed with this Court shall be limited to twenty-five pages, exclusive of pages containing the table of contents, tables of citations, and any addendum included as exhibits, unless otherwise ordered by the Court. All briefs shall be submitted on 8½ x 11" paper only and shall be typed and double spaced and shall be attached at the left margin.

Amicus Curiae briefs, which may be filed with leave of the Court, shall be served and filed after leave is granted. Amicus Curiae shall conform to the requirements of Appellant's brief.

#### SCHEDULING ORDERS BY THE CLERK OF COURT

Rule 8. Unless otherwise Ordered by the Clerk of Court or the Court, the following schedule as it pertains to briefs shall be in effect:

1. Appellant's brief shall be filed within thirty days after the (last Designation of Record is filed with the Clerk of the Rosebud Sioux Tribal Court of Appeals.) the transcript as designated under Rule 6 has been delivered to the Appellant. Appellants' brief must contain a Certificate of Service, indicating the date, place and manner in which service to the other party was made.

2. Appellee's brief shall be filed within twenty (20) days after receipt of Appellant's brief. Appellee's brief must also contain the Certificate of Service as outlined above.

3. Appellant's reply brief shall be filed with the Clerk of Court within fifteen (15) days after receipt of the Appellee's brief.

4. Work days, weekends and holidays shall be counted as days when computing the time requirements of this Code. Don't count first day, count last day. In computing any period of time prescribed or allowed by this section, by order of Court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Failure of either party to file briefs in a timely manner, as required by this Code, shall be sanctioned by the Court by subjecting the case to summary dismissal, unless the failure to file is specifically excused by the Appellate Panel.

Rule 9. Upon consultation with the Chief Justice, the Clerk of this Court shall have the discretion to enter Orders on behalf of this Court in procedural matters, including but not limited to:

(a) Transmittal of records of the Tribal Court Clerk of Court to the Court of Appeals

(b) Preparation of transcripts. Copies of transcripts shall be set at \$1.50 per page and shall be available upon written request and prepayment of transcript fees by either party. Indigents who have been allowed to proceed In Forma Pauperis shall not be charged costs for copies.

- (c) Briefing Schedules
- (d) Scheduling of oral arguments and other hearings.
- (e) Extensions of brief schedules.

#### ORAL ARGUMENTS

Rule 10. In all cases where oral argument is granted, Appellant and Appellee shall be limited to thirty (30) minutes each to present their case, unless otherwise ordered by the Court. The Appellant is entitled to open and conclude argument by reserving ten (10) minutes of their allocable time for closing.

Arguments shall be limited to those issues to be addressed on Appeal and neither party shall be permitted to attempt to try the case de novo. Nor shall witnesses be allowed to testify unless permission is granted by the Court.

Any request to waive oral arguments must be filed in writing with the Presiding Judge or clerk a minimum of seven (7) days prior to scheduled arguments. Failure to provide such notice shall subject the moving party to sanctions, (including dismissal of the action).

#### MOTIONS

Rule 11. All motions to the Court of Appeals shall be considered only if accompanied by memoranda in support of the Motion. Oral argument on any Motion shall not be allowed unless requested and granted by the Court. The opposing party shall be permitted the opportunity to respond to any Motion made to the Court. An original and three copies of all Motions shall be submitted on 8½ x 11" paper, and shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. Any party may file a response in opposition to a motion within seven (7) days after service of the motion, or unless otherwise ordered by the Court. Motions for procedural orders may be acted upon at any time by the Court without awaiting a response thereto.

A Motion for Stay filed with the Court of Appeals shall not be considered unless the moving party certifies that a Motion for Stay was denied by the Tribal Court, except motions authorized by the Law and Order Code of the Rosebud Sioux Tribe. All Motions for Stay shall include attached thereto a copy of the Tribal Court Order, Decision, Judgment, Decree or Opinion denying the Movant's request for Stay. Motions for Stay may be presented to and considered by any Justice of the Appellate panel. Orders denying or granting the Stay shall be included in the record.

**SUMMARY DISPOSITION**

Rule 12. The parties may at any time, file a Motion for Summary Disposition, i.e., Summary Affirmance or Summary Reversal. Such a Motion shall have attached thereto any relevant pleadings filed in the Tribal Court together with a written memorandum in support thereof. The Appellee must file a Motion to Dismiss for lack of jurisdiction within fifteen (15) days after the Notice of Appeal is filed unless leave to file such Motion is otherwise granted by the Court. Such Motion shall conform to Rule 11.

In addition to the above, the Court may, upon its own Motion summarily dispose of the case.

**EXPEDITED PROCEDURE**

Rule 13. The Court for good cause shown on the Motion of any party, or on its own Motion, may advance any case to be heard and may accelerate the briefing schedule so as to ensure that at a minimum, opening briefs will be filed prior to the date scheduled for oral argument.

The appellate panel shall also be empowered to waive the requirements of filing briefs, if the interests of justice will be served.

**EX PARTE COMMUNICATION**

Rule 14. There shall be no ex parte communication between any Justice of the Appellate Court and any counselor or attorney of record, or other interested party, in regards to any case on appeal. Upon being contacted by any counselor, attorney or interested party regarding such case, the Justice shall promptly inform the party of this Rule and direct any questions or comments to the Clerk of Courts, and such communication shall not be considered an ex parte communication. Conferences may be scheduled with the Justices or a Justice, when appropriate, through the Clerk of Court after all counselors, attorneys or interested parties have been given notice and opportunity to appear.

In addition to the above, there shall be no ex parte communication between any member of the Rosebud Sioux Tribal Council and any Justice of the Appellate Court, in an attempt to influence, by any means, the outcome or decision of the Rosebud Sioux Tribal Court of Appeals.

(Any Justice of the Rosebud Sioux Tribal Court of Appeals shall have Powers of Contempt for a violation of this Rule.)

**RULES OF THE COURT**

Rule 15. In deciding upon any procedural issues that raise defects either in the Tribal Court or the Rosebud Sioux Tribal Court of Appeals process, not covered by the provisions of this Code or the Law and Order Code of the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Court of Appeals shall follow and apply the Federal Rules of Criminal or Civil Procedure, as applicable.

Upon convening, the Rosebud Sioux Tribal Court of Appeals shall meet to determine the costs for filing the Appeal, Waiver of Filing Fee, Bond in Lieu of Filing, Assessment of Costs, etc.

The Rosebud Sioux Tribal Court of Appeals shall convene two (2) times per year at the Rosebud Sioux Tribal Court, at times to be determined by the Chief Justice of the Rosebud Sioux Tribal Court of Appeals. In the event that the Chief Appellate Justice should determine that emergency or additional meetings of the Rosebud Sioux Tribal Court of Appeals are necessary, he shall forthwith notify the remaining Justices of the time and place for such meetings.

Rule 16. The duties of the Chief Justice shall include, but not be limited to: granting oral arguments upon request; designating alternate justices to hear cases in instances of conflict or unavailability of permanent justices; assigning cases to individual justices for opinion writing; scheduling and order of presentation of cases; and, scheduling meetings or additional sessions of the Rosebud Sioux Tribal Court of Appeals.

The Chief Justice shall be nominated and elected by the other members of the Appellate Court. The term of office for the Chief Justice shall be one year.

Rule 17. All Justices of the Rosebud Sioux Tribal Court of Appeals shall have full powers of contempt when acting in the capacity of Appellate Justice of this Court.

Rule 18. These rules may be amended or modified by the Justices of the Appellate Court, but shall not be in effect or binding until ratified by four (4) of the six (6) Justices.

FILED  
MJS

ROSEBUD SIOUX TRIBAL COURT  
ROSEBUD SIOUX INDIAN RESERVATION  
ROSEBUD, SOUTH DAKOTA 2004 JAN 16 AM 11 58 IN TRIBAL COURT

William R. Kindle,<sup>1</sup>  
Rosebud Sioux Tribe,  
PLAINTIFFS,

ROSEBUD SIOUX  
TRIBAL COURT CIV. 01-230

vs.

MEMORANDUM DECISION

BBC Entertainment, Inc.,  
DEFENDANT.

Trial to the Court was held on the 2<sup>nd</sup> day of January 2004, with Special Judge B.J. Jones presiding, on Counts I and III of the Complaint that was filed against the Defendant. The Plaintiffs appeared through RST Vice-Chairman Norman Wilson and counsel Dana Hanna, the Tribe's Attorney General, and Judith Shapiro. The Defendant appeared through its principal owner, Charles Colombe, and counsel, Robert Reutter. The Court heard the testimony of several witnesses and considered the exhibits that were submitted at trial.<sup>2</sup> The Court also considered the closing written arguments of counsel. Based upon the evidence submitted the Court issues the following decision. A supplemental order is being submitted with regard to the motions for summary judgment on the remaining counts.

The Rosebud Sioux Tribe operates a Class III gaming establishment on United States highway 83 in South Dakota on the Rosebud Indian reservation just north of the

<sup>1</sup> William R. Kindle was the President of the Rosebud Sioux Tribe when this action was commenced. During the pendency of the action, Charles Colombe, the principal owner of the Defendant, was elected President of the Tribe. He was not substituted in as successor in interest because of this fact.

<sup>2</sup> The parties stipulated to the admission, without the necessity of foundation testimony, of the exhibits attached to the motions for summary judgment and responses. The Parties also submitted several other exhibits at trial.

Nebraska border. The Tribe and the Defendant entered into a Management Agreement on June 14, 1994 in which the Defendant agreed to manage the Tribe's Class III gaming operation for a period of five years, effective upon approval of the management agreement by the National Indian Gaming Commission pursuant to the Indian Gaming Regulatory Act, see 25 U.S.C. §2711. The agreement provided that the Tribe would receive 65% of the net revenue while the Defendant would garner 35% of the net revenue. The latter amount is actually higher than what was permitted under the Indian Gaming Regulatory Act, but was promoted by both parties as a fair proposition because the Defendant was paying toward the principal on the actual building in which it would not receive any proprietary interest. The approval from the NIGC was gained on August 1, 1994 and Class III gaming commenced immediately on the Rosebud reservation.<sup>3</sup>

The management agreement contained a provision, at section 6.4(c)(5), pertaining to the establishment of an "Operation Expense Reserve" Fund for the Tribal Casino, which various parties testified would be a fund to cover the Plaintiffs' minimum share of the net profit, should that minimum share not be realized in a particular month, and would also pay for emergency expenses that the Casino would encounter. The Defendant secured adequate financing for the construction, initial start-up costs, and \$300,000 for the operation reserve account to fund this account. The Tribe however, when advised that the initial contribution to the Operation Expense Reserve fund would be a loan, advised the Defendant to try and operate the casino on a cash-flow basis only so the Tribe would not be indebted for the loan to fund this account. The management agreement provided

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<sup>3</sup> There was testimony that the Tribe and Defendant hurriedly commenced the operation of a Class III gaming establishment at a temporary site because the South Dakota Supreme Court had just struck down the constitutionality of video lottery in the State making it very fortuitous for the Tribe to commence gaming when it did.

that the Defendant would provide an initial contribution to that fund and also allowed it to recover that contribution upon termination of the contract. It was undisputed at trial that the Defendant never made an initial contribution to the account.

The management agreement provides that the Parties would make contributions to the OER fund out of "gross receipts." Agreement, at §6.4(c)(5). Again, it was undisputed at trial that this did not happen. The Tribe's theory at trial was two-fold: 1) that the management agreement only permitted the Defendant to withdraw its initial contribution to the OER fund and that it withdrew instead 35% of all monies contributed to that account out of net revenue, thus violating the management agreement; and 2) that the Defendant breached the management agreement by permitting monies to be taken out of net revenue and placed into the OER fund, resulting in the Tribe disproportionately funding the account and that therefore the Tribe was entitled to receive all of the monies contributed to that account over the period of the agreement.

The Court already ruled in disposing of a summary judgment motion that §11.1(f) permitted both the Tribe and the Defendant to recover their portions of monies contributed to the operating expenses account, but left the issue of whether the Defendant collected in excess of what it was entitled to for trial. The Court, despite the Plaintiff's insistence that it erred in this respect, is not inclined to revisit its ruling on that issue. This is especially true since the testimony and evidence at trial convinced the Court of the correctness of this ruling and also convinced the Court that the Plaintiff acquiesced to a modification of the contract pertaining to contributions to the OER fund.

The management agreement contained a provision that allowed the Defendant to make an initial contribution to the OER fund in "such sum as the Manager in its



discretion determines to be necessary to provide initial funding for such reserve." The Defendant, through its principal owner, Charles Colombe, testified that the amount it intended to contribute to that account was \$300,000 and that it had obtained financing to make this contribution. The undisputed testimony was that the Tribe requested that this amount not be financed to save the Tribe the interest and instead the Defendant was asked to operate the Casino on a cash-flow basis. The management agreement also required the Defendant to make monthly contributions to the OER, again in an amount it deemed necessary, out of gross receipts in order to secure such things as prize winnings and other contingencies. Although the agreement clearly contemplated some minimum contribution to the OER by the manager, it did not specify that amount.

The Tribe posited the proposition at trial that the Defendant breached the management agreement by not making subsequent contributions to the OER after the inception of gaming and by permitting the contributions to be made out of net revenue instead of gross profit. It is easily discernible how the Tribe was harmed by this action, assuming it was the result of the Defendant's breach. By management not taking the contributions out of gross benefits and instead making them out of net revenues, the Tribe lost net revenue because the Tribe wound up financing more of the OER than it would have had the monies been taken out of gross receipts. For example, if in a given month, the casino had gross receipts of 100,000, actual expenses of \$50,000 and out of that \$7,500 was withheld for OER, the Tribe would realize \$27,625 plus an additional amount it would receive as equity from the OER account at the close of the management agreement, assuming monies were remaining in that account. The method the OER was contributed to, however, resulted in the Tribe receiving the same amount per month, but

the OER account was carried as a liability to the manager because it was taken out of the net revenue, which the management had a 35% interest in, and thus had to be divided between management and the Tribe at the termination of the agreement. In addition, because the account was carried as a liability account, solely the Tribe was funding any distributions from the account for things such as winnings or other unusual expenses because the Defendant was entitled to his 35% share of total contributions, not just the balance in the account at termination.

The Tribe's witness, Paul Thorstenson, a certified public accountant with experience auditing the books of both casinos and management companies, testified that his review of the management agreement, with the aid of counsel for the Plaintiff, convinced him that the OER account should have been carried on the books as an equity account, thereby entitling the Plaintiff to receive all the monies contributed thereto during the balance of the agreement. The auditor that did audit the Casino's financial records, Joseph Eve and Company of Great Falls, Montana, during the term of the agreement carried the account as a liability account resulting in the Defendant being owed 35% of the monies contributed to the OER during the term of the agreement. Thorstenson acknowledged, however, that this opinion was formulated only after he sat down with the Plaintiff's counsel and was "explained" the contract and he admitted that he had not reviewed this Court's summary judgment decision finding that the Defendant was entitled to his share of the OER at termination. He did not express any concern regarding how the OER account was distributed at the end of the contract in a January 15, 2000 letter to the Tribe offering his opinion on the financial statements of the Casino during the term of the contract. Thorstenson's opinion was also premised on the tacit

assumption that the management agreement had not been altered by the Parties in any respect.

The Defendant argued throughout this litigation that the Tribe failed to object to any of the audits submitted by Eve, despite it being able to and required to under the contract, and that Eve's audits are binding on both parties. The Court rejected this contention in denying summary judgment on both Counts I and III of the complaint and will not reconsider that in this decision. It is telling, however, that Eve's audits appear to reflect the agreement that was reached sometime in 1996 that the contributions to the OER would come out of net revenue, while Thorstenson's opinion seems to reflect his understanding that any such agreement, assuming one existed, would run contrary to the management agreement and therefore should not be factored into the ultimate decision whether the OER account should have been considered as an equity account or liability account.

Three witnesses testified to a modification of the actual language in the contract pertaining to the OER. Plaintiff's witness Harold "Sonny" Hill, an internal control auditor for the Tribe during much of the duration of the management agreement, testified that sometime in 1996 there was discussion by the Tribe about the need for a "rainy day" fund to bear expenses when the cash flow would not cover those expenses. He testified to the existence of a tribal council resolution calling for 7.5% of the net revenue to go toward the OER account and to split the remaining monies in the account according to the proportions referenced in the management agreement at the end. He also testified that the Tribe used monies in the account for such things as the purchase of new slots and a new gaming administration building, all of which inured exclusively to the benefit of the Tribe

at the end of the contract.<sup>4</sup> Hill testified that he became alarmed in July and August of 1999 when the monies in that account were zeroed out by the Defendant distributing the monies to itself without advising the Tribe. He also testified that he was not aware whether the Casino's bills were paid prior to this occurring and also that the entire July net revenue went into the OER, according to his best recall.<sup>5</sup> He felt that this was improper because he understood the agreement to be that the OER will be distributed according to the total amount remaining at termination and not according to the amounts contributed.

Paul Valandra, the Chief Gaming Officer Commissioner for the Tribe from May of 1997 to September of 1999, testified that he assumed his position in 1997 aware of the OER account and he understood the account to be used for capital improvements. He also testified that he understood that the Tribe requested that 7.5% of the net revenue go into this account and that the account be used for various things, but primarily capital improvement, and that at the termination of the agreement the management would get its 35% back that it contributed to the OER, and not just the 35% remaining in the account. He understood this because the management would not have an interest in the capital improvements or equity garnered by the expenditures from the OER account and he therefore felt it fair that the manager receive his entire share back.

Charles Colombe testified that when the contract commenced he gained sufficient financing to deposit \$300,000 into the OER but the Tribal Council, and specifically Councilman Mike Boltz, advised against borrowing this amount and depositing it into the

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<sup>4</sup> The Court does not believe that these expenses inured solely to the benefit of the Tribe, however, because obviously new machines increased gross profit and thereby increased the net revenue distribution to the manager.

<sup>5</sup> The Eve audit does not reflect this assertion.

account primarily to save the Tribe the interest payments. Instead, it was agreed to operate on a cash-flow basis only. This worked until January of 1996 when bad weather and other factors led to the Casino not generating enough revenue to pay the Tribe its minimum guarantee under the contract. When the Tribe responded with a letter to Defendant asserting a breach of contract the Parties met and the Rosebud Tribal Council pushed the idea of a 7.5% contribution to the OER out of net revenue. The Defendant testified it was not enamored with this idea, but acquiesced in it because the Tribe was requesting it. He testified that there was never actually an account maintained as the OER account, but it was maintained on the books as a liability account and was used for various purposes including purchasing new machines, building a new gaming administration office, and other primarily capital improvements. He also testified that he understood that the Defendant would receive its 35% of the 7.5% contributed to this account because it was coming out of net revenue to which the Defendant had an interest.

It is telling that no party submitted any written exhibits, in the form of Council resolutions, motions, or minutes, reflecting the actual discussions regarding this OER account. The only written documents pertaining to it were discussed by witness Hill, who referenced a section of the Tribe's internal accounting manual for the Casino which indicates that the new budget approved in October of 1995 for the Casino references a 7.5% operating reserve to be taken from the "split" each month, which Hill explained was the net revenue split, and the Eve audits which consistently referred to the account as a liability account from the time it was created. The Plaintiff did not offer any exhibit or witness that contradicted the testimony of these witnesses that such a modification of the contract had occurred.

Although the law does not permit testimony regarding alleged oral modifications to written contracts under the statute of frauds and parol evidence rule, an exception exists when both parties to a contract acknowledge that there was an oral modification and both parties relied upon that modification. See Truhe v. Turnac Group, 1999 SD 118, 599 N.W.2d 378. The parol evidence rule, argued by the Plaintiff at trial, only prohibits a Court from considering testimony of oral statements made prior to or contemporaneous with the consummation of a contract. Whether a contract has been modified depends upon their objective manifestations and not their subjective understanding. See Cousineau v. Norstan Inc., 322 F.3d 493 (8<sup>th</sup> Cir. 2003). Whether a contract has been modified is a question of law, but depends upon the factual circumstances presented. Id. In this case it is undisputed that the Plaintiff Council requested that the OER be funded with 7.5% of the net revenue and even Plaintiff's witnesses corroborated this.

The Plaintiff argues that the contract itself prohibited any modification, absent written indicia of the same, and that any modification of the contract had to be approved by the National Indian Gaming Commission under the Indian Gaming Regulatory Act. The Court notes, however, that nothing in the agreement prohibited the parties from using their respective net earnings to fund an account such as the OER account. It appears that the Plaintiff attempted to fund the OER account referenced in the management agreement, but the Tribe opted against it doing so. Instead, the parties later agreed to place a certain portion of net revenue into an alternative OER account. To deny this reality, and to hold the joint actions of the parties against only the Defendant, would visit an inequity upon the Defendant herein.

However, for the Court to uphold the Defendant's asserted right to share in the distribution from the OER account, the Court must find that the Defendant's refusal to abide by the contractual terms did not contribute to the Council taking the action to modify the contract that it did. If the Tribe were forced to dictate a new manner in which monies were to be contributed to the OER fund because the Defendant had not contributed sufficient resources, the Defendant should not be permitted to benefit from the modification. However, in this case, the Court concludes that the Defendant was ready, willing, and able to make the initial contribution to the OER in the amount of \$300,000, but was requested not to by the Tribe who did not wish to finance the initial contribution. It should be noted that nothing in the management agreement prohibited the initial contribution to the OER to be borrowed. Had this contribution been made as proposed by the Defendant, the problems that arose in January of 1996 that led to the Tribe requesting a mandatory contribution to the OER out of net revenue could have possibly been avoided. The undisputed testimony is that the Tribe, with the acquiescence of the Defendant, wanted the Casino to operate on a cash-flow basis only meaning that expenses would be subtracted from gross profits and any balance distributed to the parties pro-rata. Deducting an amount from gross profits would result in a lowering of the bottom line for both parties.

The Court cannot conclude, therefore, as urged by the Plaintiff, that the Defendant breached the implied covenant of fair dealing with the Tribe by acquiescing to the 7.5% deduction from net revenue urged by the Tribe. It appears that the Defendant was willing to fund the OER account sufficiently at commencement, but the Tribe requested that it not. This failure to fund the OER sufficiently at commencement led to the Tribe

requesting that the account be funded out of net revenue and the resulting conflict between the parties.

It would also result in unjust enrichment to the Tribe were the Court to rule that because the Defendant contributed to the OER account from net revenue, rather than gross profit, the Defendant should not be entitled to any of the monies contributed to the account. The Defendant was entitled to 35% of the net revenue under the contract. If the Court were to award the Plaintiff all the monies contributed to the OER account, it would in essence deny to the Defendant its share of the net revenue it was entitled to under the contract.<sup>6</sup> It should also be noted that the Court has already ruled, contrary to the testimony of Thorstenson, that the contract itself provides that the OER account was to be maintained as a liability account and not as an equity account. Therefore, even were the Court to find that the Defendant breached the contract by not contributing monies to the account out of gross receipts, rather than net profits, the Defendant is still entitled to receive its share of the monies contributed to that account.

In light of all the circumstances surrounding the OER account, the Court cannot conclude that there has been a breach by the Defendant withdrawing certain monies from the OER account. The Court will now discuss whether the Defendant breached the contract by withdrawing the total amount it contributed, instead of 35% of the account balance.

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<sup>6</sup> In its closing argument the Plaintiff alleges that any finding by this Court that the management agreement was modified by the actions of the parties would violate federal law and regulations prohibiting a modification of a Class III gaming management agreement without NIGC approval. See 25 C.F.R. 533.3(a)(2). The Court finds, however, that by denying any of the OER account monies to the Defendant it would in essence be modifying the provision of the contract entitling the Defendant to 35% of the net profit.



The Court notes and finds that the amount the Defendant paid itself out of the OER account represented more than 35% of the amount in that paper account at termination. The Eve audit demonstrates that the amounts distributed unilaterally by the Defendant prior to termination represent 35% of the total contributed to that account. The result is that the Defendant did not contribute at all to the expenses that were incurred and paid for out of that account. Testimony indicated that the account was tapped for various purposes, including equipment replacement and capital improvement projects. The Plaintiff urges this Court to find that the Defendant, even if it were entitled to a distribution from the OER account at termination, was only entitled to 35% of the remaining balance in the account.

Putting aside the fact that it would be almost impossible, considering the manner in which the Eve firm maintained the OER account, to do an accounting of the OER account in this manner, the Court finds that the agreement reached by the Parties contemplated that the Defendant would be entitled to reimbursement of its 35% at the termination of the contract. The only witness, Paul Valandra, that addressed this issue testified that he understood that the Defendant would be entitled to withdraw its entire contribution at termination. No evidence was submitted to rebut this testimony and it does appear that much of the monies in that account were used to fund capital improvement projects that the Defendant did not have an interest in at the time of termination.<sup>7</sup> The Court believes that the Plaintiff had the burden of demonstrating that the Defendant breached the modified contract pertaining to the OER account and that it failed to do so at trial.

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<sup>7</sup> Although the Defendant did have a security interest in the building and other capital, that interest ended when the management agreement ended.

The Court concludes that judgment should be entered on behalf of the Defendant against the Plaintiff on Count I of the complaint, except insofar as Count I is subsumed into Count III's claims that the Defendant paid itself early under the contract.

On Count III of the Complaint the Plaintiff alleges that the contract required a simultaneous payment of net revenue to both parties and that the Defendant breached this provision when it distributed to itself \$100,000 on August 13, 2003 in violation of sections 6.5(b) and (c), and 11.1(g) of the contract. This Court has already ruled for the Plaintiff on this issue in denying summary judgment to the Defendant on this count. The issue remaining at trial was the amount of damages for this breach.

Plaintiff's witness Thorstenson testified that the Tribe lost \$4,379 in interest from the early distribution, calculating that based upon the interest the \$100,000 would have earned, at prevailing interest rates, from August 13 to the date the Tribe received its August distribution in September of 1999. The Plaintiff also called Jim Wike, the Tribe's Treasurer, who testified to the Tribe's budget for the year 1999-2000 in an apparent attempt to demonstrate revenue shortfalls for necessary programs, but the Plaintiff was unable to tie revenue shortfalls to the early distribution by the Defendant. The Defendant argued at trial that the Tribe was not communicating with it regarding the transition to tribal management and it therefore felt that unless it received its split early it would have not received it. It estimated the amount it would be entitled to in August and therefore withdrew the amount of \$100,000 prior to it departing.

The Court rejects the Defendant's argument that the Plaintiff committed an anticipatory breach of the contract because of its alleged failure to work with the Defendant in the transition. It is clear that the Council went on record June 13, 1999 not

to extend the management contract. The Tribe hired Roger Mudd to be the new general manager of the Casino and there was a transition committee that met on at least two occasions. The Defendant was undoubtedly upset about the refusal of the Tribe to extend the agreement and even offered a consulting contract to continue as the manager. This denial by the Tribe, however, was within its rights under the circumstances and did not represent a refusal to discuss transition. The Court finds that the Plaintiff did not commit an anticipatory breach of the contract and therefore the Defendant was not entitled to accelerate its payments under the management agreement.

Section 6.5(c) required a simultaneous payment of the net profit to the manager and Tribe. The Manager is also charged with issuing the payments under the contract. Section 11.1 required distribution of the OER account "upon termination." Both of these provisions were breached because the Defendant distributed both its share of the net profit in August early and its share of the OER early. The question is how early?

The Plaintiff contends that the "earliness" of the distribution should be gauged by when the Tribe got its August distribution in September. The Court disagrees with this. As witness Paul Valandra testified, the Defendant was "going out the back door at midnight on August 16, 1999 while the Plaintiff was coming through the front door." The Defendant did not have control over the casino accounts after August 15, 1999 and it could not have possibly issued a simultaneous distribution after that date. It would not have been unreasonable, therefore, for the Defendant to have distributed its share to itself on August 15, 1999. It did so on August 13, however, and the Plaintiff should be entitled to interest on the amount of \$100,000 for two days in the amount of \$27.40. The Defendant also distributed to itself its share of the OER account early. It distributed itself

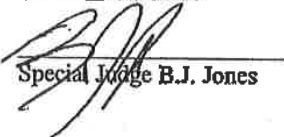
\$401,833 on July 28, 1999 and \$13,963.83 on August 9, 1999. The first distribution was 18 days early entitling the Plaintiff to lost interest in the amount of \$990 and the latter distribution was 6 days early entitling the Plaintiff to interest in the amount of \$11. Judgment shall be entered in this amount for the Plaintiff. No other damages were proven at trial.

This memorandum represents the Court's findings of fact and conclusions of law.

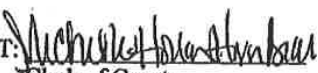
JUDGMENT SHALL BE ENTERED ACCORDINGLY

So entered this 12<sup>th</sup> day of January 2004.

BY THE COURT:

  
Special Judge B.J. Jones

ATTEST:

  
Clerk of Courts

STATE OF SOUTH DAKOTA  
ROSENDO SHOX TRIBAL COURT  
ROSENDO RESERVATION

I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED  
THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE  
ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE  
AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME  
AND THAT THE ABOVE IS A CORRECT COPY OF THE JUDGMENT  
THEREIN, DATED THIS 12 DAY OF JAN 2004

  
CLERK

ROSENDO SHOX TRIBAL COURT

ROSEBUD SIOUX TRIBAL COURT  
ROSEBUD SIOUX INDIAN RESERVATION  
ROSEBUD, SOUTH DAKOTA

William R. Kindle, Rosebud  
Sioux Tribe,

PLAINTIFFS,

vs.

BBC Entertainment, INC.,

DEFENDANT.

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ROSEBUD SIOUX  
TRIBAL COURT  
CIV. 01-230

ORDER

The above-referenced matter came on for hearing before Special Judge B.J. Jones on the 18<sup>th</sup> day of April 2003 on the Defendant's motion for leave to file an amended answer and a motion for partial summary judgment. The Defendant appeared thru Charles Colombe, BBC Entertainment Inc. President, and Robert Reutter, Attorney at Law, and the Plaintiffs appeared thru President William R. Kindle and thru Dana Hanna, the Tribe's Attorney General. The Court heard oral argument on both motions.

LEAVE TO FILE AN AMENDED COMPLAINT

The Defendant requests leave of this Court to file an amended complaint to include the defense of recoupment for damages that would be due it for an alleged breach of the management contract that the Plaintiff claims it breached. Recoupment allows a Defendant to reduce the amount of a Plaintiff's claim against it by asserting a claim against the Plaintiff arising from the same transaction that the Plaintiff sues on to arrive at a fair and equitable amount of damages. See In Matter of Kosadnar, 157 F.3d 1011, 1013-1014 (5<sup>th</sup> Cir. 1998). Recoupment should be compared to a set-off which, although similarly permitting a Defendant to assert a claim against a Plaintiff, does not require that

the claim arise from the same transaction but instead may be extrinsic to that transaction. See In the Matter of Gober, 100 F.3d 1195 (5<sup>th</sup> Cir. 1996).

The Plaintiff did not resist the Defendant's request to include claims of recoupment at hearing, but did object to the proposed amended answer attached to its motion for leave on the ground that the defenses stated therein are too vague to ascertain whether they are related to the alleged breach of the management agreement pled by the Plaintiff. The Court notes that it dismissed the complaint of the Defendant against the Plaintiffs on statute of limitations grounds and the request for leave to file an amended answer appears to be a procedural method of getting the claims asserted in the dismissed complaint back before the Court.

In general, trial courts are vested with the discretion to permit parties to amend their answers. The Federal Rule, FRCP 15(a) provides that a party may amend its pleadings after a responsive pleading has been served "only by leave of the court or by written consent of the adverse party." Although the rule reflects a liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile. Foman v. Davis, 371 U.S. 178, 181-182 (1963).

In this case it appears that the Defendant is attempting to amend its answer to assert claims for recoupment that would be barred by the statute of limitations if brought in an independent action. In such a case, the claim for recoupment must be a compulsory counterclaim to the Plaintiff's complaint and the Plaintiff's complaint must be timely or the statute of limitations would continue to bar the claim. See Reiter v. Cooper, 507 U.S.

258, 264 (1993). A Defendant may not assert a claim for a set-off in an answer if that claim for a set-off is barred by the relevant statute of limitations.

From the face of the Defendant's amended answer it is unclear whether certain of the claims made therein are of the nature of recoupment or set-off. For example, at Paragraph I(d) of the answer the Defendant asserts that the Plaintiffs and their officers made malicious statements about the Defendant to third parties with the intent to harm the Defendant. It is not clear whether this would be a compulsory counterclaim to the Plaintiffs' complaint or whether it relates to other issues not germane to the management contract. Other subparagraphs of the recoupment defense similarly are extremely vague with regard to whether they relate to the management contract or not. The Court will therefore not accept the amended answer attached to the motion for leave to file an amended answer but instead will require the Defendant to file a second amended answer clarifying how the claims of recoupment relate to the management contract at issue in the Plaintiffs' complaint. The Court reserves ruling on whether the second amended answer raises issues of recoupment or set-off.

#### MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant moves this Court for summary judgment on Count I of the Plaintiff's complaint asserting that the Defendant wrongfully converted \$415,857 from an operating expense reserve account prior to the end of the management contract between the Parties. The Defendant contends that the February 11, 1993 Management Agreement between the Parties clearly stipulates how the monies in the operating expense reserve account are to be distributed upon termination of the management contract and that the amounts taken by the Defendant were identical to the amounts he contributed to the

account. The Defendant also contends that the Management Agreement provided that any dispute as to an issue identified in the annual audits be brought to the attention of the auditor within prescribed time-periods and that the failure of the Plaintiffs to timely object to the final audit forecloses Count I of the complaint. The Plaintiff counters by contending that the Management Agreement only permitted the Defendant to withdraw his initial operating expense contribution and that disputes as to material facts exist with regard to whether the contract permitted the Defendant to withdraw his subsequent contributions. The Plaintiff also contends that factual disputes exist regarding whether the amount withdrawn by the Defendant consisted solely of its contributions or whether excessive amounts were withdrawn.

In support of the motion for summary judgment the Defendant included an affidavit from Charles Colombe and excerpts from the Management Agreement and audits performed during the term of the Agreement. The Plaintiffs did not submit any exhibits to rebut the affidavit of Colombe, but instead argued at hearing that they should be permitted additional time for discovery before the Court rules on this summary judgment motion. The Plaintiffs did submit legal argument in opposition to the summary judgment motion in the form of a brief submitted the date of hearing.<sup>1</sup>

In ruling on the motion for partial summary judgment, this Court must construe the facts in a light most favorable to the non-moving party. Summary judgment should not be granted unless the Plaintiffs can prove no set of facts that would entitle them to the relief they request in Count I of the complaint. See *Jensen v. Taco John's Int'l*, 110 F.3d 525,527 (8<sup>th</sup> Cir. 1997). In reviewing the record, the court must view all the facts in the

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<sup>1</sup> The Defendant objected to the submission of the brief because it did not comply with the Court's scheduling order on the motion for summary judgment. The Court will however, in an exercise of its discretion, permit the filing of the brief and has reviewed it prior to making this ruling.



light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. Procedurally, the moving party bears "the initial responsibility of informing the trial court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." Hartnagel v. Norman, 953 F.2d 394, 395 (8<sup>th</sup> Cir. 1993). When a moving party has carried its burden under, the party opposing the summary judgment motion is required to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." See Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment," i.e., are "material." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

The germane dispute with regard to Count I of the Complaint appears to relate primarily to conflicting interpretations of language contained in the Management Agreement. The Defendant contends that the Agreement is clear that the Defendant was entitled to withdraw its contributions to the operating expense reserve account while the Plaintiffs counter that the agreement is ambiguous on its face and therefore genuine disputes as to material facts exist with regard to the issue. The Plaintiffs also contend that genuine disputes as to material facts exist regarding whether the amounts withdrawn by the Defendant represent the amounts that it was entitled to withdraw or whether those amounts also included amounts owed the Plaintiffs.

In general, when construing a written document the Court is confined to examining the language within the four corners of the document and should not look

beyond those four corners to divine the intent of the parties. See Video Update v. Videoland, 182 F.3d 659 (8<sup>th</sup> Cir. 1999). Additionally, a Court must give effect to all language in the contract and attempt to interpret it in an integrated manner. In the Management Agreement before the Court there is a section devoted exclusively to the "Operation Expense Reserve Account", Section 6.4(c)(5), that provides that the Manager may make an initial contribution to the account, in its discretion, and that the initial contribution would remain the property of the manager and could be withdrawn at any time. That subsection also provides that the Manager agrees to make monthly contributions to the account that would be used to fund casino projects. This particular subsection does not discuss the right of the manager to withdraw anything other than the initial investment into the account. Although the subsection does not explicitly provide for it, it appears that the Plaintiffs herein also contributed to this account.

This subsection has to be read in conjunction with other sections of the Agreement, specifically those sections pertinent to the termination of the agreement. This particular agreement was terminated of its own course and not by either party. Article 11 of the agreement discusses the rights of the parties upon termination. Article 11.1(e) provides that upon termination the monies remaining shall be distributed with "all amounts due the Manager for contributions to the Operating Expense Reserve that have not been repaid as provided in Section 6.4(c)(5)." This reference to Section 6.4(c)(5) is not that helpful to the Court because that section again only provides that the manager is permitted to withdraw his initial contribution and does not discuss who owns or is entitled to the remaining monies in the Operating expense account. The reference to the amounts that "have not been repaid" pursuant to that subsection would lead a reasonable

person to conclude that one would have to determine what amounts are subject to repayment from the account under the referenced subsection. The only monies explicitly subject to repayment under Section 6.4(c)(5) are the initial contribution. The Defendant conceded at oral argument and in its brief that it withdrew amounts well in excess of its initial contribution.<sup>2</sup>

The Defendant urges this Court to then apply subsection (f) to find that the Defendant was entitled to withdraw monies other than the initial contribution from the operating expense account upon termination of the agreement. Subsection (f) stipulates that upon termination all "Operating Expenses" and "other amounts" owing to the Manager and Tribe shall be distributed. The Defendant argues that even if subsection (e) did not permit it to withdraw the monies in dispute, this subsection clearly does. The Plaintiffs argue that this subsection does not reference the Operating Expense reserve account and that only from this account was the Defendant entitled to withdraw monies. The Court believes that the latter argument, if accepted, would render subsection (f) superfluous. It is apparent from subsection (f) that the Parties distinguished between the recovery of the Defendant's initial contribution to the Operation Expense reserve account, covered by subsection (e), and the recovery of the remaining monies deposited into the Operation Expense reserve account, covered by subsection (f). If the Court were to conclude that the Defendant was only entitled to recover its initial contribution, the Court would be hard pressed to give meaning to subsection (f) that covers the remaining balance of the operating expenses.

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<sup>2</sup> In addition to a difference of opinion regarding the interpretation of the agreement regarding disbursement of the monies in this account at termination, the Parties also appear to dispute whether the Defendants made an initial contribution.

The definition of "Operating Expenses" under Section 6.4(c)(4) includes those expenses to be paid out of the "Operation Expense reserve account" and the Court concludes that subsection (f) references the balance of the monies left in the Operation Expense reserve account remaining after the Defendant is entitled to withdraw its initial contribution. The Plaintiffs' argument, therefore, that the Defendant was not entitled to withdraw any monies from the Operation Expense reserve account except its initial contribution must be rejected as contrary to the clear language of the Management agreement.

The Defendant argues that the contract clearly permitted it to withdraw all the monies it had contributed to the account in dispute. The Plaintiffs contend that the amounts withdrawn by the Defendant exceed that which was permitted under the Agreement. Unfortunately, the Agreement does not contain a governing formula for distribution of the monies in the Operation Expense reserve account upon termination of the contract at term. Article 11.2 appears to govern distributions only if the agreement is terminated prior to term and is not applicable here. The Court cannot determine at this stage that the Plaintiffs could prove no set of facts that would entitle them to recover from the Defendant some of the monies it withdrew from the account in dispute. Certainly, the Plaintiffs' argument that the Defendant was not entitled to reimburse itself any of the monies from that account upon termination must be rejected, but a dispute exists as to whether the Defendant was entitled to withdraw all the amounts it did.

The Defendant argues that even if it withdrew monies from the Operation Expense account in excess of what it was allowed under the agreement the Plaintiffs' failure to object to the audit disclosing said withdrawals forecloses its claims under Count

I of the complaint. This Court disagrees with this contention and finds that the Agreement itself, at Article 21(a), provides that this Court, and specifically a Special Judge of this Court, shall have jurisdiction to resolve "any" dispute arising under the Management Agreement. That Article does not contain a requirement that either party exhaust remedies by contesting an auditor's findings prior to invoking this Court's jurisdiction. Although parties can contract away the right of judicial review of disputes arising in contract, this intent must be clear from the face of the document being construed. The Article of the Agreement pertaining to arbitration, Article 24, at 24.9, does refer to arbitration but only states that minor disputes or disputes over which the federal courts have determined have no jurisdiction shall be subject to arbitration. The instant dispute does not appear to be governed by this section because it is not a minor dispute and would clearly be subject to this Court's jurisdiction under Article 21(a). The Court therefore finds that the Plaintiffs' failure to contest the audit disclosing the Defendant's withdrawal of the amounts in dispute does not deprive this Court of jurisdiction over Count I of the Plaintiffs' complaint.

THEREFORE, for the foregoing reasons it is hereby


ORDERED, ADJUDGED, AND DECREED that the Defendant is granted summary judgment on Count I of the Plaintiffs' complaint insofar as it alleges that the Defendant was not entitled to withdraw any monies from the Operation Expense account upon termination, except the Defendant's initial contribution, but is denied insofar as it alleges that the Defendant converted monies from the Operation Expense account in excess of what is permitted under the Management agreement and it is further

ORDERED, ADJUDGED, AND DECREED that the Defendant shall have 14 days from this order to file a second amended answer including claims for recoupment only, and not set-offs which are barred by the statute of limitations and it is further

ORDERED, ADJUDGED AND DECREED that the Parties shall complete discovery in this case on or before October 18, 2003, dispositive motions shall be filed by November 18, 2003, and this matter shall be tried to the Court in January of 2004 for a total of five days.

So ordered this 28<sup>th</sup> day of April 2003.

BY ORDER OF THE COURT:

  
BJ Jones  
Special Judge

ATTEST:   
Clerk of Courts

STATE OF SOUTH DAKOTA  
ROSELUD SIOUX TRIBAL COURT  
ROSELUD RESERVATION

I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME AND THAT THE ABOVE IS A CORRECT COPY OF THE PLEADING THEREON DATED THIS 28th DAY OF April 2003

CLERK  
ROSELUD SIOUX TRIBAL COURT

BY                
SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

ROSEBUD SIOUX TRIBE,  
Plaintiff/Appellant,  
vs.  
BBC ENTERTAINMENT, INC.,  
Defendant/Appellee.

SUMMARY ORDER

*Per curiam, en banc* (Chief Justice Frank Pommersheim and Associate Justices Charles Abourezk, Leroy Greaves, Patrick Lee and Cheryl Three Stars).

Pursuant to this Court's memorandum opinion and order of July 20, 2006, the Rosebud Sioux Tribe, Plaintiff/Appellant, filed a motion for rehearing and rehearing *en banc*. The motion for rehearing and rehearing *en banc* was granted, but limited to the sole issue of the appropriate remedy for BBC Entertainment Inc.'s, Defendant/Appellant, breach of the management contract in regard to the funding of the Operating Expense Reserve (OER) account. Simultaneous briefs were filed and oral argument was heard on September 18, 2006.

Both the briefs and oral argument extensively revisited what was previously presented to this Court. Both sides made repeated reference to audits, budgets, and "understandings." Unfortunately, none of these audits, budgets, and "understandings" are part of the record in this case. The end result was only to reinforce the necessity of the comprehensive accounting described in our earlier opinion.

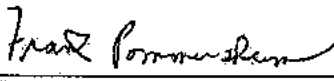
A few clarifications are nevertheless timely. This Court fully understands and has found that BBC Entertainment, Inc. never made any contribution to the OER from its own private, non-casino funds or assets. All contributions to the OER came from casino revenues and/or profits.

The Tribe continually asserts that the cases of *U.S. ex rel. Bernard v. Casino Magic Corp.* (*Bernard I*), 293 F.3d 419 (8<sup>th</sup> Cir. 2002); and *U.S. ex rel. Bernard v. Casino Magic Corp.* (*Bernard II*), 384 F.3d 510 (8<sup>th</sup> Cir. 2004) require a finding that BBC is entitled to nothing. This Court disagrees. The *Bernard* cases involve a management contract that was never approved by NIGC and was thus void *ab initio* and *in toto*. This case is different. It involves a management contract that was approved by NIGC and a modification that was not approved by NIGC. Only part of the management contract is void -- the modification of OER funding mechanism. The more appropriate case as noted in our prior opinion is *Turnkey Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092, 1095-96 (8<sup>th</sup> Cir. 2002), which did *not* foreclose a potential unjust enrichment claim.

For all the above-stated reasons, this Court's previous opinion is affirmed and this case is remanded for the "detailed accounting" described therein.

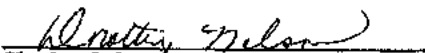
IT IS SO ORDERED.


For the Court:

  
Frank Pommersheim  
Chief Justice

Dated October 2, 2006.

ATTEST:

  
Clerk of Courts

STATE OF SOUTH DAKOTA  
ROSEBUD SIOUX TRIBAL COURT  
ROSEBUD RESERVATION  
I HEREBY CERTIFY THAT I HAVE CAREFULLY EXAMINED  
THE WITHIN DOCUMENT AND COMPARED THE SAME WITH THE  
ORIGINAL NOW ON FILE AND OF RECORD IN THIS OFFICE  
AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME  
AND THAT THE ABOVE IS A CORRECT COPY OF THE FILING  
THEREOF DATED THIS 2 DAY OF Oct 2006  
  
CLERK  
ROSEBUD SIOUX TRIBAL COURT



APPEAL NO. # 27587

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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**IN THE MATTER OF THE ESTATE OF CHARLES C. COLOMBE, DECEASED.**

**Rosebud Sioux Tribe,  
Plaintiff and Appellee,**

**v.**

**Wesley Colombe, as Personal Representative for the Charles C.  
Colombe Estate,  
Defendant and Appellant.**

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APPEAL FROM THE CIRCUIT COURT OF  
TODD COUNTY, SOUTH DAKOTA  
SIXTH JUDICIAL CIRCUIT

HONORABLE KATHLEEN F. TRANDAHL,  
Circuit Court Judge

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**APPELLEE'S BRIEF**

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Date Notice of Appeal was filed: September 30, 2015.

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT.....	1
LEGAL ISSUES TO BE DECIDED.....	1
STANDARD OF REVIEW.....	2
STATEMENT OF CASE AND FACTS.....	3
ARGUMENT.....	10
I. <b>Clear and Convincing Evidence Showed that the Rosebud Sioux Tribal Court Judgment That Pierced the Corporate Veil of BBC Complied with the Laws, Ordinances and Regulations of the Rosebud Sioux Tribe.....</b>	<b>10</b>
A. <b>In a Case Where the Chief and Associate Judges of the Tribal Court Must Be Recused, §9-1-5(2) of the Rosebud Sioux Tribe’s Law and Order Code Does Not Require the Chief Judge to Seek Tribal Council Approval for the Appointment of a Special Judge.....</b>	<b>11</b>
B. <b>In Deciding a Question of Comity, the State Court Shall Inquire Into the Jurisdictional Basis of the Tribal Court’s Order, But the State Court Has No Lawful Authority to Review a Tribal Court’s Interpretation of Tribal Laws.....</b>	<b>16</b>
II. <b>The Tribal Court Judgment that Pierced the Corporate Veil of BBC Does Not Contravene the Public Policy of South Dakota.....</b>	<b>21</b>
CONCLUSION.....	22
REQUEST FOR ORAL ARGUMENT.....	23
CERTIFICATE OF COMPLIANCE.....	24
APPENDIX	

## TABLE OF CASES

### CASES

<i>Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of Mississippi in Iowa</i> , 609 F.3d 927, 943 (8 <sup>th</sup> Cir. 2010).....	2, 17, 18
<i>City of Timber Lake v. Cheyenne River Sioux Tribe</i> , 10 F.3d 554, 559 (8th Cir. 1993)...	17
<i>Colombe v. Rosebud Sioux Tribe</i> , 835 F.Supp. 2d 736 (D.S.D. 2011).....	3, 4, 8
<i>Colombe v. Rosebud Sioux Tribe</i> , 747 F.3d 1020 (8 <sup>th</sup> Cir. 2014).....	3, 4, 8
<i>Discovery Bank v. Stanley</i> , 757 NW2d 756, 762, 2008 SD 111.....	14
<i>Gesinger v. Gesinger</i> , 531 NW2d 17 (SD 1995).....	20
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 US 9, 16, 107 S.Ct. 971 (1986).....	17, 22
<i>Mexican v. Circle Bear</i> , 370 NW2d 737 (SD 1985).....	11, 22
<i>National Farmers' Union Ins. Cos. v. Crow Tribe</i> , 471 US 845, 856, 105 S.Ct. 2447 (1985).....	2, 17, 22
<i>State v. Wright</i> , 2009 SD 61, ¶ 26, 754 NW2d 56, 64.....	3
<i>State ex rel. Joseph v. Redwing</i> , 429 N.W.2d 49, 50 (S.D.1988).....	2, 11, 22
<i>Wells v. Wells</i> , 451 NW2d 402 (SD 1990).....	2, 18, 19
<i>Williams v. Lee</i> , 358 US 217, 79 S.Ct. 269 (1959).....	19

### STATUTES

Rosebud Sioux Tribe Law and Order Code, §4-2-8.....	1, 15
Rosebud Sioux Tribe Law and Order Code, §9-1-5.....	9
Rosebud Sioux Tribe Law and Order Code, §9-1-5(2).....	1, 11, 12, 16, 20
Rosebud Sioux Tribe Law of Order Code, §9-1-5(2)(c).....	13
Rosebud Sioux Tribe Law and Order Code, Rules of Civil Procedure, Rule 63(b).....	6
SDCL §1-1-25.....	1, 2, 9, 11, 16, 22

SDCL §1-1-25(1).....	11
SDCL §15-26A-3(1).....	1

**OTHER**

Rosebud Sioux Tribal Constitution and Bylaws, Article XI, §2.....	15
Rosebud Sioux Tribal Constitution and Bylaws, Article XI, §4.....	14, 15
Rosebud Sioux Tribe Rules of Appellate Procedure, Rule 2.....	8

### PRELIMINARY STATEMENT

In this brief, the state court judge's findings of fact will be referenced as "FOF" and her conclusions of law as "COL." References to the transcript of the hearing on comity will be referenced in brackets as ["T"] followed by page and line numbers. The Rosebud Sioux Tribe Law and Order Code will be referred to as "the RST Code." The Appellant Wesley Colombe, acting as personal representative for the Charles C. Colombe Estate, will be referred to as "the Estate."

### JURISDICTIONAL STATEMENT

This is an appeal from a final judgment. Jurisdiction exists pursuant to SDCL §15-26A-3(1).

### LEGAL ISSUES TO BE DECIDED

**1. Whether there was clear and convincing evidence that the Rosebud Sioux Tribal Court judgment piercing the corporate veil of BBC complied with the laws, ordinances and regulations of the Rosebud Sioux Tribe.**

The state court judge ruled that clear and convincing evidence established that the tribal court order complied with the laws of the Rosebud Sioux Tribe.

RST Code, §9-1-5(2)

RST Code, §4-2-8

SDCL §1-1-25

**2. In deciding a question of comity, to what extent, if any, is a state court authorized to review a tribal court's ruling on a question of tribal law?**

The state court judge ruled that in cases where the Chief and Associate Judges of

the Rosebud Sioux Tribal Court must be recused, the Tribe's Constitution and Code authorize the Chief Judge to appoint special judges to preside over such cases, without obtaining Tribal Council approval of the appointment.

SDCL §1-1-25

*Wells v. Wells*, 451 NW2d 402 (SD 1990)

*Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8<sup>th</sup> Cir. 2010)

**3. Whether the Rosebud Sioux Tribal Court judgment that pierced the corporate veil of BBC contravened the public policy of the State of South Dakota.**

The state court judge ruled that the tribal court judgment piercing the corporate veil of BBC did not contravene the public policy of South Dakota.

SDCL §1-1-25

*State ex rel. Joseph v. Redwing*, 429 N.W.2d 49, 50 (S.D.1988)

*National Farmers' Union Ins. Cos. v. Crow Tribe*, 471 US 845, 856, 105 S.Ct. 2447 (1985)

**STANDARD OF REVIEW**

Although the Appellant Estate makes some vague references in its brief to Judge Trandahl's "clearly erroneous findings," <sup>1</sup> the Estate does not identify or specify any particular finding of fact as being clearly erroneous or unsupported by evidence in the record. Therefore, each of the trial court's findings of fact should be deemed unchallenged by the Appellant.

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<sup>1</sup> See, for example, p. 27.

“Once the facts have been determined . . . , the application of a legal standard is a question of law to be reviewed *de novo*.” *State v. Wright*, 2009 SD 61, ¶ 26, 754 NW2d 56, 64. The question of whether clear and convincing evidence showed that the Rosebud Sioux Tribal Court order complied with the laws of the Rosebud Sioux Tribe is therefore a question of law to be decided *de novo* by this Court, as is the question of whether clear and convincing evidence showed that the tribal court judgment did not contravene the public policy of the State of South Dakota.

### STATEMENT OF THE CASE AND THE FACTS

In the hearing on the comity question, the state trial court took judicial notice of the facts and rulings in two federal cases in which Colombe had unsuccessfully challenged the jurisdiction of the Rosebud Sioux Tribal Court to adjudicate the Tribe’s action to pierce the corporate veil of BBC: *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D. 2011) and *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014).<sup>2</sup> Therefore, those two federal opinions and the facts set forth therein are part of the record in this case. Those opinions detail the long history of the litigation related to this case, which, prior to coming before this Court, has been litigated in the Rosebud Sioux Tribal Court, the Rosebud Sioux Tribe Supreme Court, the United States District Court for the District of South Dakota, the United States Court of Appeals for the Eighth Circuit, and now, the Sixth Judicial Circuit Court of South Dakota.

On October 16, 2007, in a breach of contract action involving a tribal casino management contract, Special Judge B.J. Jones of the Rosebud Sioux Tribal Court ruled

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<sup>2</sup> The Eighth Circuit opinion is contained in the Appellee-Tribe’s Appendix at Tab #B1.

that BBC Entertainment, Inc. (“BBC”) had breached its contract with the Tribe when, in the final hours of BBC’s casino management contract, Charles Colombe, BBC’s sole owner and general manager of the Rosebud Casino, paid BBC \$399,353.61 that belonged to the Rosebud Sioux Tribe. Special Judge Jones granted the Rosebud Sioux Tribe a money judgment against BBC in the amount of \$399,353.61, plus interest in the amount of \$127,793.15. BBC did not appeal that judgment to the Rosebud Sioux Tribe Supreme Court. [FOF 3; *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D. 2011) and *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014).]

BBC did not pay any part of that judgment. On February 17, 2009, the Tribe filed a civil complaint in the Rosebud Sioux Tribal Court against BBC, Wayne Boyd and Charles Colombe. The Tribe sought an order to pierce BBC’s corporate veil and to hold Boyd and Colombe personally liable for the money judgment against BBC. The Honorable Sherman Marshall, Chief Judge of the Rosebud Sioux Tribal Court, presided over the case. [FOF 4]. (Wayne Boyd was later dismissed from the lawsuit.) While the Tribe’s action to pierce BBC’s corporate veil was still pending in the Rosebud tribal court, Colombe filed an action in the United States District Court for the District of South Dakota in which he named the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Court, and Chief Justice Sherman Marshall as defendants. In his federal lawsuit, Colombe challenged the jurisdiction of the Rosebud tribal court and sought an injunction to prevent the tribal court from adjudicating the Tribe’s lawsuit against him and BBC. [FOF 8; *Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D. 2011) and *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014).].



After Colombe made the Tribal Court and its Chief Justice named defendants in his federal lawsuit, Chief Justice Marshall recused himself and the Associate Judges of the Rosebud Tribal Court from presiding over the Tribal Court case. Pursuant to the regular and longstanding practice of the Rosebud Sioux Tribal Court whenever the Chief and Associate Judges of the court must be recused from a case, Chief Justice Marshall appointed Patricia Meyers, an attorney admitted to the State Bar of South Dakota, as a special judge of the Tribal Court to preside over the Tribe's pierce the corporate veil action. [FOF 9].

For at least twenty years, it has been a long-established and regular practice of the Rosebud Sioux Tribal Court for the Chief Judge to appoint special judges, who are not full-time salaried Associate Judges of the Tribal Court, to preside over a particular case when the Chief Judge and Associate Judges must recuse themselves or are otherwise unavailable to preside over a particular case, due to conflicts of interest or other good cause; pursuant to this long-standing court practice, the Chief Judge does not seek or require Tribal Council approval for his appointments of special judges. [FOF 21, 23; testimony of Tribal Attorney Eric Antoine, T27:22-28:18].<sup>3</sup>

The governing body of the Tribe, the Rosebud Sioux Tribal Council, has long been aware of this tribal court practice and every year, for many years, the Tribal Council has implicitly approved of this practice when it approves the Tribal Court's budget,

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<sup>3</sup>Although the Estate, in its brief (p. 16), argues that the state court's finding of fact that the appointment of special judges by the Chief Judge without Tribal Council approval is a longstanding tribal court practice is "contradicted" by tribal law, the Estate does not challenge that finding of fact as clearly erroneous.

which always contains a line item amount budgeted for money to pay appointed special judges. [FOF 22; Testimony of Tribal Attorney Eric Antoine T32:24-33:13].

After Colombe filed his federal lawsuit and the tribal court Chief and Associate Judges were recused from the tribal court case, the tribal court case proceeded. After Colombe repeatedly failed or refused to abide by the tribal court's discovery orders, the Tribe filed a motion for summary judgment in the tribal court. Colombe and his counsel, Mr. O.J. Seamans, received prior written notice that there would be a hearing on the Tribe's motion for summary judgment that would be held on March 13, 2012. They were well aware of the fact that Chief Judge Marshall had recused himself and the court's Associate Judges and that a special judge would be presiding over the case. Colombe appeared with his counsel, Mr. Seamans, at the hearing. [FOF 10]. Special Judge Patricia Meyers, who had been appointed by Chief Judge Marshall, presided over the hearing.

At the March 13, 2012 tribal court hearing, Mr. Seamans made an oral motion to recuse Special Judge Meyers from presiding over the hearing. Judge Meyers denied the motion on the grounds that it was untimely, it was not made in writing, it was made without prior notice to the Tribe, and it did not comply with tribal law.<sup>4</sup> [FOF 11; Order, Tab #13, Appellant's Brief]. The parties' counsel then proceeded to argue the motion for summary judgment.

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<sup>4</sup> Rule 63(b) of the Tribe's Rules of Civil Procedure provides that a party who moves for the recusal of a judge must do so by means of a written motion.

Judge Meyers granted the Tribe's motion for summary judgment, which ruling pierced the corporate veil of BBC and made Colombe personally liable for the judgment against BBC Entertainment, Inc. [FOF 12].

The tribal court judge set out her reasoning and legal authority for her order in a Memorandum Decision, dated April 19, 2012.<sup>5</sup> In her Memorandum Decision, Judge Meyers related the history of Colombe's obstructionist and dilatory tactics, including Colombe's repeated refusals to comply with the tribal court's orders directing him to respond to the Tribe's discovery requests. Because the defendants had refused to comply with any of the court's orders directing them to answer discovery requests, the court granted the Tribe's motion to have all requests for admissions to be deemed admitted for purposes of the Tribe's motion for summary judgment. In the court's Memorandum Decision, the court cited legal authority setting forth the factors that must be considered in an action to pierce a corporate veil, including the legal necessity of finding an element of unfairness, injustice, fraud or other inequitable conduct as a prerequisite to piercing the corporate veil.<sup>6</sup> (Memorandum Decision, Page 6). The tribal court judge found that Colombe had misappropriated corporate assets for his personal use by transferring BBC money to his wife and to another business for his personal use and that Colombe had disregarded the corporate identity and treated the corporation as his alter ego. The court

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<sup>5</sup> The tribal court judge's Memorandum Decision is in the Appellee-Tribe's Appendix at Tab #A1.

<sup>6</sup> The Estate asserts in its brief that none of the legal factors for determining whether to pierce a corporate veil are referenced in Judge Meyers' Order Granting Summary Judgment. (P. 26) In fact, those factors, including a finding of fraud by Colombe, are referenced and analyzed in Judge Meyers' Memorandum Decision. [Appendix A1].

also found that Colombe had re-structured BBC during the course of the management contract without approval from the National Indian Gaming Corporation or notice to the Tribe, all in violation of the contract and federal law. The court found that Colombe then falsely assured the Tribal Council that the Boyds were still owners of BBC, when in fact Colombe had taken over as sole owner, in order to persuade the Tribe to continue the management contract with BBC. The court found that those “facts demonstrated that the Defendants utilized the corporate structure to conduct their own business, and that the liability incurred in the underlying action arises from the fraud and injustice perpetrated on the Tribe.” (Memorandum Decision, Page 10).

Colombe filed a notice of appeal of that order with the Rosebud Sioux Tribe Supreme Court, but because he refused to file proof of financial responsibility, as required by Rule 2 of Tribe’s Rules of Appellate Procedure, the Tribal Supreme Court dismissed the appeal. [FOF 13].

On September 23, 2011, Judge Roberto Lange of the United States District Court dismissed Colombe’s federal lawsuit challenging tribal court jurisdiction, basing his ruling in large part on Colombe’s failure to exhaust tribal appellate court remedies. [*Colombe v. Rosebud Sioux Tribe*, 835 F.Supp. 2d 736 (D.S.D., 2011); FOF 14].

Colombe appealed the district court’s ruling to the United States Court of Appeals for the Eighth Circuit. That Court affirmed the district court’s dismissal of Colombe’s complaint, again citing his failure to exhaust tribal court remedies. [*Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8<sup>th</sup> Cir. 2014); FOF 15].

On February 26, 2014, after Charles Colombe's death, the Rosebud Sioux Tribe filed a claim against the Estate for \$527,146.76. That claim was based on the judgment against Colombe that was issued by Special Judge of the Tribal Court Patricia Meyers on April 19, 2012. On March 13, 2014, Wes Colombe, the personal representative of the Estate, filed a Notice of Disallowance of Claim of Rosebud Sioux Tribe stating that the claim was disallowed because the Tribe could not make the required showing for comity under SDCL §1-1-25.

A hearing on the comity question was held in the state circuit court on January 8, 2015. The Estate argued that the tribal court order should not be granted comity because it had not been issued in compliance with the laws of the Rosebud Sioux Tribe. The Estate claimed that Judge Meyers had no authority to act as a judge because her appointment as a special judge of the tribal court had not been approved by Tribal Council, which the Estate claimed was required by §9-1-5 of the RST Code. Judge Trandahl took documentary evidence and heard witness testimony. The Tribe presented testimony from its in-house attorney, Eric Antoine, who testified that the Chief Judge, with the knowledge and approval of the Tribal Council, had been appointing special judges for more than twenty years and Tribal Council had never required Council approval for such appointments. [FOF 21, 23; T27:22-28:18]. The Tribe's in-house counsel also testified that the Tribal Court and Tribal Council interpreted §9-1-5 of the Tribe's Law and Order Code, which requires Council approval for the Chief Judge and full-time salaried Associate Judges of the tribal court, as not applying to special judges who are appointed by the Chief Judge to preside over one case. He testified that the Tribe

has long viewed the Chief Judge's authority to appoint special judges as deriving from the Tribe's Constitution, which gives the Chief Judge authority to establish court practices and procedures that he deems necessary for the effective functioning of the tribal court. [T29:23-31:4; 41:9-45:9].

Based on the evidence presented in the hearing, the Court made findings of fact and conclusions of law dated July 22, 2015. [Appellant's Brief, Tab 3]. The trial court found that the appointment of special judges by the Chief Judge was a long-established court practice, permitted and authorized by tribal law, and that practice was a tribal custom and usage of the Tribe and the tribal court. The court ruled that Judge Meyers was fully authorized to act as a judge of the tribal court and to enter the order at issue. On August 13, 2015, Judge Trandahl signed an order that granted comity to the Rosebud Sioux Tribal Court order which pierced the corporate veil of BBC and held Charles Colombe personally liable for a judgment to the Rosebud Sioux Tribe in the amount of \$399,353.61, plus interest in the amount of \$127,793.15.

Wesley Colombe, as personal representative for the Charles C. Colombe Estate ("the Estate"), appeals the Order Granting Comity signed by the Honorable Kathleen Trandahl on August 13, 2015.

## ARGUMENT

### I

**Clear and Convincing Evidence Showed that the Rosebud Sioux Tribal Court Judgment That Pierced the Corporate Veil of BBC Complied with the Laws, Ordinances and Regulations of the Rosebud Sioux Tribe**

A.

In a Case Where the Chief and Associate Judges of the Tribal Court Must Be Recused, §9-1-5(2) of the Rosebud Sioux Tribe's Law and Order Code Does Not Require the Chief Judge to Seek Tribal Council Approval for the Appointment of a Special Judge

It is settled law in this state that tribal court orders should be recognized in state courts under the principle of comity (*State ex rel. Joseph v. Redwing*, 429 N.W.2d 49, 50 (S.D.1988)), provided that the party seeking recognition of the tribal court order first establishes that the tribal court order complies with the requirements of SDCL §1-1-25. *Mexican v. Circle Bear*, 370 NW2d 737 (SD 1985).

In her findings of fact and conclusions of law, Judge Trandahl found and ruled that clear and convincing evidence established that the tribal court order met each of the five conditions for comity that are required by SDCL §1-1-25(1): (1) the tribal court had jurisdiction over the subject matter and the parties, (2) the order was not fraudulently obtained, (3) the order was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing; (4) the order or judgment complied with the laws, ordinances and regulations of the tribe, and (5) the judgment did not contravene the public policy of the State of South Dakota.

In this appeal, the Estate of Charles Colombe argues that the state court erred in ruling that there was clear and convincing evidence that Judge Meyers' order complied with the laws of the Rosebud Sioux Tribe. The Estate claims that the tribal court order was issued by a judge who had no lawful authority to act as a judge because her appointment as a special judge was not approved by the Rosebud Tribal Council. The

Estate argues that §9-1-5(2) of the Tribe's Law and Order Code, which requires Tribal Council approval for the appointment of full-time Associate and Chief Judges of the Tribal Court also applies to special judges, who are not mentioned in the statute or anywhere else in the Tribe's Code. The Tribe submits that §9-1-5(2) of the Tribe's Law and Order Code, which requires Tribal Council approval of Chief and Associate Judges, is not applicable for the appointment of special judges, and that the appointment of special judges without Council approval is a lawful court practice, established by the Chief Judge pursuant to the powers provided to the Chief Judge by the Tribe's Constitution and the RST Code.

To the limited degree that a state court may conduct a review of the meaning of tribal statutes (*see*: Point B, herein), there is ample support in the record and in the laws of the Tribe to show that the appointment of Judge Meyers as a special judge fully complied with the laws and established court practices of the Rosebud Sioux Tribe.

Section 9-1-5(2) of the Tribe's Law and Order Code, provides, in relevant part:

(2) There shall be appointed to the Tribal Court one (1) Chief Justice and two (2) or more Associate Judges as the Judiciary Committee and the tribal Council see fit.

(a) To be eligible to hold the office of Chief Judge or Associate Judge, a Person

1. Must be at least 30 years of age and not more than 70 years of age.

2. Must be of high moral character and integrity.

3. Must have a high school education or equivalent and be capable of preparing the papers and reports incident to the office of Judge.



4. Must be physically capable of carrying out the duties of the office.

5. A member of the Rosebud Sioux Tribe shall be given preference.

6. At least one (1) Associate Judge shall be bilingual in English and Lakota.

\* \* \* \*

- (c) All Tribal Court Judges shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval. Appointments of Tribal Judges shall be for a probationary period of one (1) year during which time such appointment can be terminated by written notice from the Judiciary Committee of the Tribal Council. Following the one (1) year probationary period, Tribal Judges shall be appointed for a term of two (2) years.

In its brief, the Estate concedes that the Chief Judge of the tribal court has the lawful authority to appoint special judges.<sup>7</sup> But it argues that under §9-1-5(2)(c), special tribal court judges who are appointed by the Chief Judge must be approved by the Tribal Council. The Estate contends that because the Tribal Council did not approve the appointment of Judge Meyers, Chief Judge Marshall's appointment of her was a violation of tribal law and she had no lawful authority to issue this or any judicial order.

The Estate's reading of that statute is incorrect, because it isolates and takes out of context the words "All Tribal Court judges" in §9-1-5(2)(c) in order to expand the meaning of the statute to require Tribal Council approval for special judges who are appointed to preside over one case, when the statute, read in its entirety, is only intended

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<sup>7</sup> "Colombe has never contended that Special Judges cannot be appointed. . . . There is no dispute that special judges can be appointed." P. 15, Appellant's brief.

to apply to full-time, salaried judges of the tribal court—the Chief Judge and the Associate Judges. “Statutes and court rules must be construed in their entirety.” *Discovery Bank v. Stanley*, 757 NW2d 756, 762, 2008 SD 111 (citation omitted). That statute, which expressly refers only to Chief and Associate Judges, read in its entirety, clearly was not intended to apply to special judges who are appointed to preside over one particular case.

In its findings, the state court found that that the appointment of special judges by the Chief Judge, without seeking Tribal Council approval, is a long-established practice of the Tribal Court that has been regularly used for at least the past twenty years whenever it was necessary to recuse the Chief and Associate Judges of the tribal court from a particular case. [FOF 21]. This court practice is known to, and implicitly approved by, the Tribal Council every year when it approves the annual court budget, which every year includes a line item for the payment of special judges. The state court correctly concluded that this practice of appointing special judges to preside over a particular case, without seeking Tribal Council approval, was authorized by the Tribe’s Constitution and by the Tribe’s Law and Order Code.

Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, §4, as amended in 2007, provides that:

The Chief Judge shall promulgate rules of pleadings, practice, and procedures applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law. \*\*\*

Here, the appointment of special judges when the Chief and Associate Judges must be recused from a particular case is a rule of practice and court procedure promulgated by the Chief Justice that is authorized by §4, Article XI of the Tribe's Constitution.

Furthermore, the Chief Judge's authority to appoint special judges also is found in Article XI, section 2 of the Tribe's Constitution, which authorizes the Chief Judge to create staff positions in the tribal court that he deems necessary for the effective functioning of the court.

Moreover, §4-2-8 of the Tribe's Law and Order Code mandates that any matter not expressly covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe.

Judge Trandahl, recognizing that neither the Tribe's Constitution or its Code expressly covers the appointment of special judges, made a finding of fact that the Chief Judge's appointment of special judges without Council approval is a tribal custom and usage of the Tribe and its court. Based on that finding of fact, the state court concluded that in addition to the Chief Judge's Constitutional authority to appoint special judges without requiring Council approval, that authority is further supported by §4-2-8 of the RST Code, in that, not being expressly covered in the RST Code or Constitution, the appointment of special judges by the Chief Judge is an established custom and usage of the Tribe and its court.

For all those reasons, as the state court correctly concluded, the Chief Judge of the tribal court had authority from the Tribe's Constitution and its Code to appoint Judge Meyers as a special tribal court judge and that Special Judge Meyers had full jurisdictional authority to preside over and adjudicate the Tribe's action to collect BBC's judgment from Colombe. [COL 3 and 4].

B.

In Deciding a Question of Comity, the State Court Shall Inquire Into the Jurisdictional Basis of the Tribal Court's Order, But the State Court Has No Lawful Authority to Review a Tribal Court's Interpretation of Tribal Laws

At its core, the question of whether tribal law authorizes the Chief Judge to appoint special judges without seeking Tribal Council approval involves a question of statutory meaning: does §9-1-5(2) of the Tribe's Law and Order Code, which requires Tribal Council approval for the Chief Judge and Associate Judges, also require Council approval for the appointment of special judges?

This raises a fundamental question of federal Indian law: in deciding a question of comity, to what extent, if any, is a state court authorized to review a tribal court's ruling on a matter of tribal law?

The Estate contends that SDCL §1-1-25, which requires clear and convincing evidence that a tribal court order complied with the laws of the tribe, gives the state Court the lawful authority to conduct a free ranging *de novo* review of, not only the final tribal court judgement for which comity is sought, but of every ruling and every decision made in the course of the litigation by the tribal court judge. Thus, the Estate urges this Court to decide that Judge Meyers misinterpreted a rule of tribal civil procedure in denying a

motion to recuse her. Here, the Estate would have this Court rule on a question of pure tribal law to determine whether the tribal court correctly understood and applied tribal statutes and tribal constitutional provisions. The Estate contends that this Court has a lawful duty to “double check” any and all rulings by a tribal court when a party seeks comity for a tribal court judgment, and if the state court disagrees with a tribal judge’s decision, on a matter of tribal law, then the state court should refuse to grant comity to the tribal court order.

In so doing, the Estate is asking this Court to violate settled principles of federal law involving tribal sovereignty. Neither this Court or any state court, nor any federal court, has any authority to review a tribal court’s interpretation or application of tribal law. “The rule is clear that federal courts do not conduct de novo review over tribal court rulings under tribal law.” *Attorney’s Process and Investigation Services, Inc. v. Sac and Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8<sup>th</sup> Cir. 2010)(citations omitted).

The Supreme Court has repeatedly recognized the United States is committed to “a policy of supporting tribal self-government and self-determination.” *National Farmers’ Union Ins. Cos. v. Crow Tribe*, 471 US 845, 856, 105 S.Ct. 2447 (1985). Consistent with that policy, the Supreme Court has determined that “tribal courts are best qualified to interpret and apply tribal law.” *Iowa Mutual Ins. Co. v. LaPlante*, 480 US 9, 16, 107 S.Ct. 971 (1986). Thus, federal courts must “defer to the tribal courts’ interpretation of tribal law.” *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8<sup>th</sup> Cir. 1993). The Eighth Circuit Court of Appeals has recognized “the rule that federal courts may not re-adjudicate questions—whether of federal, state, or tribal

law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason.”

*Attorney’s Process and Investigation Services, Inc. v. Sac and Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 942 (8<sup>th</sup> Cir. 2010)(Citations omitted).

If federal courts do not have lawful authority to review a tribal court decision involving a matter of tribal law, because of tribal sovereignty, then surely neither do state courts.

The Estate contends that *Wells v. Wells*, 451 NW2d 402 (SD 1990) directs state courts to conduct a de novo review to “double check” any and all decisions made in the tribal court, irrespective of whether those decisions were based on tribal law, and that that case “explicitly states that it is a circuit court’s job to review the decision of a tribal judge.” (P. 28). That is true only insofar as *Wells* directs a circuit court to review the jurisdictional basis of the tribal court’s order, to determine whether the tribal court had subject matter and personal jurisdiction over the parties. “[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree.” *Wells*, at 404 (citation omitted). *Wells* does not direct or allow a state court to review the tribal court’s decision on the merits, and it especially does not direct or allow a state court to review the merits of tribal court’s decision on a matter of tribal law. The *Wells* case focused on a question of whether the tribal court had personal jurisdiction over one of the parties, since he had not been personally served. There was no express ruling on that question by the tribal court. Therefore, this Court looked to tribal law to determine whether the tribal court had jurisdiction over the parties and

concluded it did not. The *Wells* decision stands for the proposition that when deciding questions of comity, it is necessary and proper that the state court should inquire as to whether the tribal court had personal and subject matter jurisdiction. But *Wells* does not stand for the proposition that state courts have any authority to review a tribal court's rulings to determine whether a tribal court correctly interpreted or applied tribal law.

*Wells v. Wells* recognizes the state court's duty to make a *de novo* review of a tribal court's personal and subject matter jurisdiction, but it does not authorize a state court to infringe on the federally recognized sovereignty of an Indian tribe by conducting a *de novo* review of a tribal court's rulings on matters of tribal law.

Whatever authority a state court may have to determine whether a tribal court order complied with the laws of the tribe, if the question involves interpretation of a tribal constitution or a tribe's statutes, then the scope of such authority is very limited. At most, the scope of that authority should not extend beyond a determination by the state court that the tribal court order had a rational basis in law—not whether the state court would have interpreted tribal law in the same way the tribal court did. If the state court were to review the merits of the tribal court's decision to determine whether the tribal court correctly interpreted and applied tribal law, then such state action would seriously infringe on the right of reservation Indians to make their own laws and be ruled by them. See: *Williams v. Lee*, 358 US 217, 79 S.Ct. 269 (1959).

In determining whether the judgment in question complied with tribal law, the focus should properly be on the legal *process* by which the court arrived at the judgment, not on a *de novo* re-litigation by the state court of facts or legal rulings already decided

by the tribal court. This Court's review to determine whether the tribal court judgment complied with tribal law should be a limited review and should be exercised with great caution, giving due deference to the legal conclusions of the tribal court on matters of tribal law, so as not to interfere with or undermine the authority and integrity of tribal courts, which are a fundamental component of tribal sovereignty and self-government.

Particularly in this case, this is only equitable in view of the fact that Colombe could have appealed the question he now raises in the state Court—whether §9-1-5(2) of the Tribe's Code requires Council approval for special judges—to the court most suited to decide that question: the Rosebud Sioux Tribe Supreme Court. But he chose not to do so. Having declined that opportunity to appeal to the tribal appellate court, and having failed to exhaust tribal appellate remedies, he should not now be permitted to have a state court review this question of tribal law. See: *Gesinger v. Gesinger*, 531 NW2d 17 (SD 1995).

With those considerations in mind, the state trial court's ruling that the tribal court's summary judgment order complied with the laws of the Rosebud Sioux Tribe is fully supported by the record.

The Chief Judge's appointment of Judge Meyers as a Special Judge was a lawful act which did not require Tribal Council approval. As discussed above, the Chief Judge's authority for such action is found in the Tribe's Constitution and Code, which give the Chief Judge authority to establish court practices and procedures that he deems to be necessary for the efficient functioning of the tribal court and to create court staff positions.



In passing, the Estate asserts that the Tribe's Rules of Appellate Procedure, which have nothing to do with this case, should be declared null and void by this Court. That claim, which was not raised in the state trial court, lacks any support in the record and is devoid of any legal merit.

Clearing and convincing evidence showed that Special Judge Meyers' order was a lawful order of the Rosebud Sioux Tribal Court.

## II

### **The Tribal Court Judgment that Pierced the Corporate Veil of BBC Does Not Contravene the Public Policy of South Dakota**

The Estate argues that Judge Meyers' order somehow contravenes the public policy of South Dakota because, it asserts, the 2007 tribal court breach of contract case involving BBC (which is not at issue in this case) was wrongly decided by the tribal Supreme Court. In so doing, the Estate is simply trying to re-litigate the original contract dispute case against BBC and is asking this Court to effectively nullify the tribal court's decision. Essentially, the Estate claims that the tribal court judgement to pierce the corporate veil of BBC contravened the public policy of the State because the tribal court ruled against Colombe. That claim is without any merit. Both cases in tribal court, the breach of contract action against BBC and the pierce the corporate veil action, were fully litigated in the tribal court, before qualified judges who are members of the State Bar, with Colombe aggressively defending against the Tribe's claims, through counsel of his choice, in tribal trial and appellate courts, as well as in federal courts. There is no public policy that is contravened by Colombe and his estate being held responsible for his

actions that deprived his tribe of approximately 400 thousand dollars in violation of a contract that he made and agreed to honor.

In fact, the contrary is true. It is the stated public policy of the United States and the State of South Dakota to respect and support the sovereignty of Indian tribes and the integrity of their tribal courts. *National Farmers' Union Ins. Cos. v. Crow Tribe*, 471 US 845, 856, 105 S.Ct. 2447 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 US 9, 16, 107 S.Ct. 971 (1986); *State ex rel. Joseph v. Redwing*, 429 N.W.2d 49, 50 (S.D.1988)); *Mexican v. Circle Bear*, 370 NW2d 737 (SD 1985). SDCL §1-1-25 is actually a codification of the State's policy supporting tribal sovereignty and the State's commitment to supporting the integrity of tribal courts.

There is nothing about the Rosebud Sioux Tribe's legal efforts to collect some of the money that Charles Colombe unlawfully took from it that would contravene the public policy of the State of South Dakota. On the contrary, for the state court to grant comity to a lawful tribal court order is entirely consistent with South Dakota's recognized public commitment to support and respect tribal self-government and tribal courts.

### CONCLUSION

This Court should affirm the circuit court judge's order granting comity to the judgment of the Rosebud Sioux Tribal Court.

### REQUEST FOR ORAL ARGUMENT

The Appellee requests the opportunity to present oral argument to this Court.

Dated this 13<sup>th</sup> day of January, 2016.

Respectfully Submitted,

By: /s/ Dana L. Hanna  
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### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL §15-26A using Times New Roman typeface in 12 point type. Appellee's Brief contains 5,938 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2013.

Dated this 13<sup>th</sup> day of January, 2016.

/s/ Dana L. Hanna  
Dana L. Hanna

## APPENDIX

1. Memorandum Decision.....A1-A10
2. United States Court of Appeals for the Eighth Circuit, Opinion.....B1-B10

## APPENDIX 1.

**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

**MEMORANDUM DECISION**

**PROCEDURAL HISTORY**

On or about June 14, 1994, the Rosebud Sioux Tribe entered into a management agreement with BBC Entertainment, Inc., a Minnesota corporation owned in part by Charles Colombe, John Boyd and Wayne Boyd - all enrolled members of the Rosebud Sioux Tribe - to manage its gaming operations. The underlying complaint filed in the Tribal Court alleged that BBC Entertainment committed a wide array of actions that resulted in a breach of the parties' agreement. After a trial on the merits, the Tribal Court granted a judgment against BBC Entertainment in the amount of \$399,353.61 plus interest for a total of \$127,793.15.

Unbeknownst to the Tribe, during the course of the litigation the Secretary of State revoked BBC's Articles of Incorporation on November 6, 2006, based upon their failure to file an annual report. Accordingly on February 17, 2009, the Tribe commenced this action against the Defendants seeking to pierce the corporate veil of BBC Entertainment to obtain the judgment ordered in the underlying case.

On or about March 24<sup>th</sup>, 2009, the Tribe requested answers to its Interrogatories, Requests

for Production of Documents and Requests for Admissions from each Defendant. All Defendants were placed on notice that they must respond within thirty (30) days. None of the Defendants responded to the discovery requests nor sought a Protection Order from this Court, and so, on April 29<sup>th</sup>, 2010, the Tribe re-served Defendants with an identical discovery request. Again, the Defendants were informed they must respond within thirty (30) days. Defendants failed to respond. On May 4, 2009, the Tribe filed a Motion to Compel Discovery, but received no response from the Defendants.

All discovery requests were temporarily set aside while the parties argued various Motions to Dismiss filed by the Defendants. Finally, on April 26, 2010, the Court issued an Order Denying Defendant's Motions to Dismiss. Based thereon, the Tribe filed another Motion to Compel Discovery on July 16, 2010. Defendant Columbe filed his Motion in Opposition to Compel Discovery on September 9, 2010. A hearing was conducted on December 13, 2010 and the Court Ordered that the Defendants respond to written discovery by January 22, 2011. Defendants' attorney requested leave to withdraw, because Defendants refused to respond to the Tribe's discovery requests. To date, the Tribe still has not received responses from any of the Defendants and no Protective Order has been issued by this Court.

#### **STANDARD OF REVIEW**

It is well established that a Motion for Summary Judgment should be granted only "if the pleadings, depositions, Answers to Interrogatories and Admissions on file, together with the Affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 222-323



(1986); Dana Corp. v. Belvedere International Inc., 950 F.2d 1555 (Fed. Cir. 1991). Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses..." Anderson, 477 U.S. at 249-50. See also Bowlin v. Mantanez, 446 F.3d 817, 819 (8<sup>th</sup> Cir. 2006) Rule 56 directs the Court to determine "whether there is a need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250. "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment; the requirement is that there be no genuine issue of material fact." Id. At 247.

In analyzing whether there is a genuine issue of material fact, all facts and inferences drawn from the facts must be viewed in the light most favorable to the nonmoving party. The burden is on the moving party to establish the absence of genuine issues of material fact and "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other fact immaterial." Celotex Corp., 477 U.S. at 323. If the movant meets its burden, then the non-moving party must provide the Court with specific facts demonstrating a genuine issue for trial in order to survive summary judgment. Id. At 323.

### ANALYSIS

#### I. REQUESTS FOR ADMISSION.

An initial matter for determination by the Court is whether the Tribe's Requests for

Admissions should be deemed admitted, as the Tribe requests. The Tribe bases its request on the grounds that the Defendants failed to respond to the Requests for Admission within the timer period prescribed b Rule 26(f) of the Rosebud Sioux Tribe's Rules of Civil Procedure that provides as follows:

*If a party fails to respond or appear for discovery as provided in these rules, the opposing party may move the Court for an Order to Compel the non-performing party to perform. The Court may award costs or attorney fees to the non-defaulting party for the necessity of brining the matter before the Court. If a party fails to perform after being ordered to do so by the Court, the Court may upon motion and notice order that a certain fact, claim, or defense be deemed established or strike part of a claim or defense or dismiss the action or render a judgment by default against the non complying party in an aggravated case.*  
Emphasis added.

In fact, the evidence demonstrates that the Defendants have indeed failed to respond in any fashion to the Tribe's discovery requests. A party's failure to respond to a Request for Admissions may result in material fact being deemed admitted and subject the party to an adverse grant of summary judgment. See Carney v. Internal Revenue Service, 258 F. 3d 415, 417-418 (5<sup>th</sup> Cir. 2001); Adventis, Inc. v. Consol. Property Holdings, Inc., 124 Fed. Appx. 169, 173 (4<sup>th</sup> ir. 2005); Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3<sup>rd</sup> Cir. 1992). In this case, the Defendants have wholly ignored the Tribe's discovery requests on three (3) separate occasions. Further, the Defendants have determined there was no need to comply with the Court's December 13, 2010 Order. Under these circumstances, the Court concludes that it is appropriate to deem the unanswered requests admitted for the purpose of the Tribe's Motion for Summary Judgment.

## II. MOTION FOR SUMMARY JUDGMENT.

A firmly entrenched doctrine in corporate society is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors, and shareholders until there is sufficient reason to the contrary. 18 Am. Jur.2d *Corporations* §43 (1985); Mobridge Community Industries v. Toure, 273 N.W.2d 128, 132 (S.D. 1978); Farmers Feed and Seed v. Magnum Enterprises, 344 N.W.2d 699, 702 (S.D. 1984); Ethan Dairy Products v. Austin, 448 N.W.2d 266, 230 (S.D. 1989); Bantz v. Arrow Bar, 452 N.W.2d 138, 141 (S.D. 1990).

This case deals with piercing the corporate veil, and because the doctrine is a matter of state law or tribal law if precedent exists, this Court has utilized cases determined by the Courts of the State of South Dakota as guidance in making its determination. The principal exception to the limited liability rule is the doctrine of "piecing the corporate veil." This doctrine is equitable in nature and is used by the courts to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice. See 18 C.J.S. *Corporations* § 10 at 277-78. The general rule which has emerged is that a corporation will be looked upon as a legal entity separate and distinct from its shareholders, officers and directors unless and until sufficient reason to the contrary appears, but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, then sufficient reason will exist to pierce the corporate veil. 18 C.J.S. *Corporations* § 9.

In deciding whether the corporate veil will be pierced, courts recognize that "each case is sui generis and must be decided in accordance with its own underlying facts." Mobridge, 273 N.W.2d at 132 (quoting Brown Brothers Equipment Co. v. State, 51 Mich. App. 448, 215 N.W.2d 591, 593 (1974)).



Legal precedent has established a number of factors that might justify piercing the corporate veil: (1) was there such unity of interest and ownership that the separate personalities of the corporation and its shareholders, officers, or directors are indistinct or non-existent; and (2) would adherence to the fiction of separate corporate existence sanction fraud, promote injustice or inequitable consequences or lead to an evasion of legal obligations? See N.L.R.B. v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10<sup>th</sup> Cir. 1993); Chergosky v. Crosstown Bell, Inc., 454 N.W.2d 654, 658 (Minn. App. 1990); ALMAC, Inc. v. RJH Development, Inc., 391 N.W.2d 919, 922 (Minn. App. 1986).

The "separate identity" prong is meant to determine whether the stockholder and the corporation have maintained separate identities. The following four factors are used by the courts to determine whether the first prong is satisfied: (1) undercapitalization; (2) failure to observe corporate formalities; (3) absence of corporate records; and (4) payment by the corporation of individual obligations. If these factors are present in sufficient number and/or degree, the first prong is met and the court will then consider the second prong.

Under the fraud, injustice or evasion of obligations prong of the test the court asks whether there is adequate justification to invoke the equitable power of the court. An element of unfairness, injustice, fraud, or other inequitable conduct is required as a prerequisite to piercing the corporate veil. The showing of inequity necessary must flow from the misuse of the corporate form. The mere fact that a corporation breaches a contract does not mean that the individual shareholders of the corporation should personally be liable. To the contrary, the corporate form of doing business is typically selected precisely so that the individual shareholders will not be liable. It is only when the

shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes fraud that the corporate veil may be pierced. Greater Kansas City Roofing, 2F.3d at 1052-1053. The following two factors are considered by the courts in determining whether the second prong has been satisfied: (1) fraudulent misrepresentation by corporate directors; (2) use of the corporation to promote fraud, injustice, or illegalities.

Implicit in the first prong of the test is the idea that the person or persons whom the plaintiff wishes to hold individually liable must have exercised such control over the corporation that the notion of a separate legal identity no longer exists. In other words, the corporation must have been used as the mere alter ego or instrumentality through which the defendant was conducting their personal business. The control which is necessary is that which is normally exercised by the shareholders, officers, or directors of a corporation and must be distinguished from the type of control which may be exercised by a corporate manager or employee who merely acts as an agent of the corporation. Thus, a threshold requirement is that the plaintiff must establish that the person which they seek to hold individually liable was in fact a corporate shareholder, officer, or director or similar corporate representative, such that the person could exercise the type of control over the corporation necessary to satisfy the first prong. In this case, the evidence conclusively demonstrates that Defendants Charles Colombe, John Boyd and Wade Boyd served as the dominant and only shareholders and directors of BBC from its inception to its dissolution.

A. The Separate Corporate Identity Prong.

1. Undercapitalization. "Shareholders must equip a corporation with a reasonable amount of capital for the nature of the business involved." See Mohridge, 273 N.W.2d at 132-33

("An obvious inadequacy of capital, measured by the nature and magnitude of the corporation's undertaking, is an important factor in denying directors and controlling shareholders the corporate defense of limited liability.") Curtis v. Feurhelm, 335 N.W.2d at 576 (Shareholders who equip corporation with a reasonable amount of capital have assumed appropriate proprietary risk for the nature of the business involved, and the law has not required more.) In this case, Defendant Columbe was questioning the Boyds' ability to financially contribute to the corporation within a few months of its incorporation. Indeed, the Boyds' ownership was purportedly terminated, because of their failure to financially contribute to the venture. Accordingly, the Plaintiff has presented evidence demonstrating that the Defendants' amount of contribution was inadequate for the operation of the business.

2. Failure to Observe Corporate Formalities. When corporate owners, by their own acts, show that they have ignored the corporate entity, the courts may do likewise. Annot. *Disregarding Corporate Entity*, 46 A.L.R.3d 428 (1972). The evidence in the record demonstrates that the preparation of minutes was sporadic at best, only one shareholder would attend meetings, and Defendant Columbe had informed the Tribe that he is the only shareholder of the corporation despite evidence demonstrating that the interests of the other shareholders were never legally terminated. Of course, the most telling evidence is the fact that the corporation was administratively dissolved for failing to observe corporate formalities.

3. Commingling of Personal Funds with Corporate Funds. Evidence presented by the Tribe demonstrated that BBC would transfer corporate funds to Defendant Columbe's Wife and business Western Events for personal use.



4. Misappropriate of Corporate Assets for Personal Use. Again, the evidence shows that BBC transferred money to Defendant Columbe's Wife and business Western Events for personal use.

Based on the foregoing, the Tribe has satisfied the first prong of the test because it has presented sufficient evidence showing that the Defendants disregarded the corporate identity and treated the corporation as their alter ego.

B. The Fraud, Injustice, or Inequitable Consequences Prong.

As this Court has stated, the piercing doctrine is an equitable remedy. Therefore, the party seeking to pierce the corporate veil must demonstrate that there has been a substantial disregard for the separate corporate identity, and that there is some material equitable reason for the Court to hold the shareholder, officer or director personally liable. Further, the individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice that is found to satisfy the second prong of the test. Greater Kansas City Roofing, 2 F.3d at 1053. It has been stated that:

The alter ego doctrine is not applied to eliminate the consequences of corporate operations, but to avoid inequitable results; a necessary element of the theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege – the doctrine cannot be applied to prejudice the rights of an innocent third party.


Id.

In this case, the evidence demonstrates that Defendant BBC proposed a management contract with the Tribe who was informed that the corporation consisted of Charles Colome, Wayne Boyd,

and John Boyd. At no time was the Tribe aware that Defendants John and Wayne Boyd had not financially contributed to the corporation. The agreement was submitted to the National Indian Gaming Commission ("NIGC") for its approval. The management agreement itself demonstrated that all three individual Defendants held an ownership interest in BBC. Any change in the corporate structure of BBC would now require the approval of the NIGC. Evidence demonstrates that no submission of such changes was ever made to the federal agency. Without the Tribe's knowledge, the individual Defendants purported to enter into an agreement thereby terminating the ownership interests of Defendants John and Wayne Boyd. When the Tribe discovered the change in corporate structure, the Tribal Council demanded that BBC restructure itself into the corporate structure that existed at the time the management agreement was executed. Evidence demonstrates that the corporation appeared to comply with the Council's directive. However, at the present time, the individual Defendants contend that the Defendant Colombe is, and has been, the sole shareholder, director, and owner of BBC and that the ownership interests of the Boyds was terminated by the agreement executed by the individual shareholders in 1994. In other words, despite the assurances given to the Tribe to induce them to continue with the management agreement, BBC restructured itself without the approval of the Tribe and the NIGC as required by federal law. Surely, this facts demonstrate that the Defendants utilized the corporate structure to conduct their own business, and that the liability incurred in the underlying action arises from the fraud and injustice perpetrated on the Tribe.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge



## APPENDIX 2.

United States Court of Appeals  
For the Eighth Circuit

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No. 13-1382

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Wes Colombe, Personal Representative of Charles Colombe, Individually and as  
an Officer of BBC Entertainment, Inc., a dissolved Minnesota corporation

*Plaintiff - Appellant*

v.

Rosebud Sioux Tribe; Rosebud Sioux Tribal Court; Judge Sherman Marshall, in  
his Official and Individual Capacities

*Defendants - Appellees*

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No. 13-1512

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Wes Colombe, Personal Representative of Charles Colombe, Individually and as  
an Officer of BBC Entertainment, Inc., a dissolved Minnesota corporation

*Plaintiff - Appellee*

v.

Rosebud Sioux Tribe; Rosebud Sioux Tribal Court; Judge Sherman Marshall, in  
his Official and Individual Capacities

*Defendants - Appellants*

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Appeal from United States District Court  
for the District of South Dakota - Pierre

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Submitted: October 23, 2013

Filed: April 4, 2014

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Before GRUENDER, BEAM, and SHEPHERD, Circuit Judges.

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SHEPHERD, Circuit Judge.

Charles Colombe<sup>1</sup> was a member of the Rosebud Sioux Tribe ("the Tribe"), and he was a shareholder, director, and officer of BBC Entertainment, Inc. ("BBC"), which managed a casino on tribal lands. After receiving an adverse ruling from the Rosebud tribal courts regarding a casino management contract, Colombe filed an action in federal court seeking to vacate the tribal court ruling and to enjoin the Tribe from continuing a second action in the Rosebud tribal courts. In the proceeding before the district court, the Tribe moved to dismiss the complaint for failure to exhaust tribal court remedies. The district court granted the motion to dismiss in part and denied the motion in part. The district court later entered summary judgment in favor of the Tribe and its officials on the remainder of the case. Colombe appeals the dismissal in part and the grant of summary judgment. The Tribe cross-appeals, arguing the district court should have dismissed the entire complaint for failure to exhaust tribal court remedies. We agree with the Tribe, and thus we reverse the district court's denial in part of the motion to dismiss. We affirm the district court in all other respects.

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<sup>1</sup>On August 8, 2013, the Court granted, pursuant to Federal Rule of Civil Procedure 43, Wes Colombe's motion to substitute himself in his capacity as Personal Representative of the Estate of Charles Colombe. Charles Colombe died on June 9, 2013. All references in this opinion to "Colombe" pertain to Charles Colombe.



## I.

The Tribe owns and operates a casino on tribal trust land in South Dakota. In 1994, the Tribe entered into a five-year casino management contract with BBC. Article 6.4(c)(5) of the contract required BBC to fund an initial Operation Expense Reserve ("OER") account. BBC, however, never made the initial contribution to the OER account. Instead, BBC and the Tribe orally agreed that BBC would contribute 7.5% of the casino's net profits to the account each month. At the conclusion of the contract, BBC withdrew \$415,857 from the OER account based on its belief that it was entitled to 35% of the remaining OER account balance, a division consistent with the contract's division of net profits. The Tribe brought a breach-of-contract suit in tribal court, arguing that the oral modification was not in compliance with the Indian Gaming Regulatory Act of 1988 ("IGRA") and IGRA's various implementing regulations.

IGRA created the statutory basis for the regulation and operation of gaming by Indian tribes. IGRA established the National Indian Gaming Commission ("NIGC") to oversee Indian gaming. Indian tribes may enter into casino management contracts only after the NIGC Chairman has approved those contracts. Any modifications of the contracts are also subject to the NIGC Chairman's approval. The NIGC Chairman approved the casino management contract entered into by the Tribe and BBC, but the oral modification regarding the funding of the OER account was never presented to the NIGC Chairman.

The Tribe argued to the tribal court that, because the oral modification was not presented to the NIGC Chairman, the modification was void, and because BBC failed to fund the OER account as required by the contract, BBC was not entitled to any of the money in the OER account. The tribal court judge disagreed with the Tribe and found in favor of BBC. The Tribe appealed to the Rosebud Sioux Tribe Supreme Court ("Rosebud Supreme Court"). BBC did not file a cross-appeal or assign any

errors to tribal court's exercise of jurisdiction. BBC stated, however, in their appellate brief that the Tribe could have complained to the NIGC and sought relief from that agency. BBC asserted that 25 U.S.C. § 2713(3) "provides the procedure applicable to violations which replaces the jurisdiction of courts."

The Rosebud Supreme Court reversed the decision of the tribal court, holding that the oral agreement was void because it had not been approved by the NIGC Chairman. The Rosebud Supreme Court remanded the case to the tribal court to determine damages. The Tribe sought rehearing en banc of the Rosebud Supreme Court's decision to remand. The Tribe argued that remand was unnecessary because its measure of damages was the full amount BBC withdrew from the OER account. BBC argued the Rosebud Supreme Court had no jurisdiction to determine the legal validity of an oral modification because IGRA had given the NIGC exclusive jurisdiction to make such determinations. The Rosebud Supreme Court granted the rehearing en banc, but limited that rehearing to the "sole issue" of the appropriate remedy for BBC's breach of the management contract. The Rosebud Supreme Court did not address the issue of tribal jurisdiction in its order re-affirming its prior decision.

The tribal court conducted a hearing on damages, awarding final judgment against BBC in the amount of \$399,353.61, plus interest accrued from August 15, 1999 in the amount of \$127,793.15. BBC did not appeal the judgment to the Rosebud Supreme Court.

Due to insolvency, BBC did not pay the judgment. The Tribe then filed suit in tribal court seeking to pierce BBC's corporate veil and recover the judgment from BBC's owners—Wayne Boyd<sup>2</sup> and Charles Colombe. Colombe moved to dismiss the suit, claiming that the judgment was void because the tribal court had violated IGRA.

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<sup>2</sup>Wayne Boyd was later dismissed from the suit.



He also argued that under an amendment to the Rosebud Sioux Tribe Constitution at the time judgment was entered against BBC, the tribal court had ceased to exist. The tribal court denied the motion to dismiss, and Colombe sought an interlocutory appeal to the Rosebud Supreme Court. The tribal court denied the request for an interlocutory appeal.

While the Tribe's suit seeking to pierce the corporate veil was proceeding, Colombe filed suit in federal court. Count 1 of the complaint sought de novo review of "any controversy litigated in the tribal court" and "an order from [the federal court] vacating the tribal court judgment . . . on the grounds that the tribal court had no jurisdiction to rule that there had been an illegal modification of the Management Agreement." Count 2 sought a permanent injunction against the Tribe, the tribal court, and the Tribal Court Judge Sherman Marshall from proceeding with the action to pierce the corporate veil.

The Tribe moved to dismiss the complaint, arguing, as relevant to this appeal, that Colombe and BBC had failed to exhaust tribal court remedies. The district court held that BBC had exhausted tribal court remedies as to the issue of the tribal court's jurisdiction to find an illegal modification of the management contract. The court held further, however, that BBC had not exhausted any other issues pertaining to the tribal court's order after remand from the Rosebud Supreme Court because BBC failed to appeal that order.

After the district court granted the motion to dismiss in part, Colombe filed motions for reconsideration of the partial grant of the motion to dismiss and for a trial on his request for a permanent injunction. In these motions, he argued for the first time in federal court that the Rosebud tribal courts had failed to comply with certain provisions in the Tribe's amended constitution, and thus the Rosebud Supreme Court lacked authority to hear an appeal from the tribal court. The district court noted that this issue had not been exhausted because it had not yet been considered by the

Rosebud Supreme Court. Accordingly, the district court denied the motions to reconsider and for trial on Colombe's request for a permanent injunction.

Colombe and the Tribe filed competing motions for summary judgment on the "sole remaining issue" following the district court's partial grant of the motion to dismiss: "Whether the Tribal Court had jurisdiction to hold that the oral modification to the NIGC-approved management contract was void." (Doc. 66 at 6.) The district court granted summary judgment to the Tribe, holding that the NIGC chairman's exclusive authority to determine a contract's compliance with IGRA does not encompass the authority to determine the legal validity of a contract.

Colombe appeals, raising three arguments. First, he argues that the district court erred in granting summary judgment to the Tribe because according to IGRA, the Rosebud tribal courts lacked jurisdiction to consider the validity of the oral modification to the management contract. Second, Colombe argues that BBC properly exhausted its tribal court remedies regarding whether the Rosebud Supreme Court was deprived of its constitutional power to act. Finally, Colombe argues that, to the extent the district court found that he had not exhausted tribal court remedies as to some of his claims, exhaustion was impossible because of BBC's financial insolvency and futile because the Rosebud Supreme Court made clear that it was not going to consider his argument that the Rosebud tribal courts lacked jurisdiction.

The Tribe cross-appeals, contending the district court should have dismissed the entire complaint because of failure to exhaust. Specifically, BBC failed to exhaust its claim that the tribal courts lacked jurisdiction under IGRA to consider the validity of the oral modification to the management contract.



## II.

As a threshold issue, we must consider, as presented in the Tribe's cross-appeal, whether the district court erred in denying the Tribe's motion to dismiss on exhaustion grounds. In their motion to dismiss, the Tribe argued, *inter alia*, that BBC had failed to exhaust available tribal court remedies to challenge tribal court jurisdiction to adjudicate the breach-of-contract claims. The Tribe acknowledged BBC made a statutory argument that IGRA did not provide for a private cause of action, however the Tribe contended BBC never made an explicit or implicit challenge to the tribal court's exercise of jurisdiction over the breach-of-contract claim.

The district court rejected the Tribe's argument for dismissal on this basis. It found that, "When the Tribe appealed [Tribal] Judge Jones's first decision to the Rosebud Supreme Court, BBC argued that IGRA did not create a private cause of action and, reading the brief generously to BBC, that jurisdiction to determine the legality of the Contract modification rests with the NIGC rather than [the Rosebud] tribal courts." (Doc. 33 at 16-17.) Thus, the district court held the Rosebud Supreme Court could have determined, based on BBC's contention in its reply brief, it did not have jurisdiction to decide whether the oral modification was void. Instead, the Rosebud Supreme Court decided the oral modification was void for failure to obtain the NIGC Chairman's approval and, according to the district court, "implicit[ly]" rejected BBC's jurisdictional argument.

"[A]s a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself." Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1299 (8th Cir. 1994). Thus, "a federal court should stay its hand in order to give tribal forums the initial opportunity to determine cases involving questions of tribal authority." Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation, 76 F.3d 181, 184 (8th Cir. 1996) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-



16 (1987)). “Allowing tribal courts to make an initial evaluation of jurisdictional questions serves several important functions, such as assisting in the orderly administration of justice, providing federal courts with the benefit of tribal expertise, and clarifying the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation.” DISH Network Serv. L.L.C. v. Laducer, 725 F.3d 877, 882 (8th Cir. 2013) (citing Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985)). “Exhaustion includes both an initial decision by the tribal trial court and the completion of appellate review.” Id. at 882-83 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987) (“Until appellate review is complete, the . . . Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.”)).

We disagree with the district court’s “generous[.]” reading of BBC’s briefs to the Rosebud Supreme Court that BBC adequately raised the jurisdictional question to the Rosebud tribal courts. First, the BBC never raised the jurisdictional challenge in the tribal court in the initial suit brought by the Tribe. Second, after the tribal court ruled in favor of BBC, the Tribe appealed that decision to the Rosebud Supreme Court. BBC did not file an appeal or a cross-appeal challenging whether the tribal court had jurisdiction to consider the contract modification claim. Instead, in its appellee’s brief to the Rosebud Supreme Court, BBC stated, “BBC has not filed a cross appeal, and assigns no error.” Colombe maintains that BBC necessarily raised the Rosebud tribal courts’ lack of jurisdiction through BBC’s arguments related to the IGRA, such as its claim that IGRA does not create a private right of action. We reject this argument, however, because the question of the Rosebud tribal courts’ jurisdiction was, at best, tangentially mentioned and certainly did not “fairly put [the Rosebud Supreme Court] on notice as to the substance of the [jurisdictional] issue.” See Nelson v. Adams USA, Inc., 529 U.S. 460, 469 (2000). Third, while BBC did present a more clear argument as to jurisdiction in its responsive Optional Brief on Rehearing to the Rosebud Supreme Court, the motion for rehearing was brought by the Tribe and was granted by the Rosebud Supreme Court to address the narrow issue of the proper

remedy for BBC's breach of the management contract. BBC failed to file its own motion for rehearing and rehearing en banc raising the jurisdictional question. Thus, we do not have the benefit of the Rosebud tribal courts' expertise and clarification in consideration of the jurisdictional questions. See DISH Network Serv., 725 F.3d at 882. Accordingly, we hold that BBC has failed to exhaust tribal remedies, and the federal complaint should have been dismissed on that basis.

The district court dismissed, on exhaustion grounds, Colombe's argument that the Rosebud tribal courts have failed to comply with the Rosebud Sioux Tribe Constitution. We affirm this dismissal. This argument was first raised by Colombe in response to the Tribe's action in tribal court to pierce the corporate veil. Colombe sought an interlocutory appeal which the tribal court, in its discretion, denied. Therefore, the Rosebud Supreme Court had not addressed this issue when Colombe raised it in federal court, meaning tribal court remedies had not been exhausted. Accordingly, the district court properly dismissed this claim.

Colombe argues that he should be excused from the exhaustion requirements on two grounds. First, he claims that due to his and BBC's insolvency, it was economically impossible to exhaust tribal remedies. Second, he argues that it became obvious that the Rosebud Supreme Court was not going to consider his jurisdictional claims, and therefore it would be futile to require exhaustion of those claims. Colombe has failed to point us to any cases that excuse the exhaustion requirement on the basis of financial insolvency, and we decline to adopt such an exception now. Further, while the Supreme Court has recognized that futility may justify an exception to the exhaustion requirement "because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," see Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985), Colombe and BBC had several opportunities—in the tribal court, on direct appeal to the Rosebud Supreme Court, or in a motion for rehearing and rehearing en banc—to challenge the Rosebud tribal courts' jurisdiction, and they failed to do so. "[S]peculative futility is not enough to



justify federal jurisdiction.” White v. Pueblo of San Juan, 728 F.2d 1307, 1313 (10th Cir. 1984); see Duncan Energy, 27 F.3d at 1300-01 (rejecting argument of futility based on “mere[] alleg[ation] that tribal courts will be incompetent or biased”). Colombe may not be excused from his obligation to exhaust tribal court remedies on the basis of futility.

### III.

Accordingly, we reverse the district court’s denial of the Tribe’s motion to dismiss the complaint for failure to exhaust tribal court remedies pertaining to BBC’s challenge of the tribal courts’ jurisdiction. We remand this part of the claim to the district court with instructions to enter an order dismissing Colombe’s complaint. We affirm the district court’s orders in all other respects.

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 27587

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**IN THE MATTER OF THE ESTATE OF CHARLES C.  
COLOMBE, DECEASED.**

**Rosebud Sioux Tribe,**  
Plaintiff and Appellee,

v.

**Wesley Colombe, as Personal Representative for the Charles C.  
Colombe Estate,**  
Defendant and Appellant.

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Appeal from the Circuit Court, Sixth Judicial Circuit  
Todd County, South Dakota

The Honorable Kathleen F. Trandahl  
Circuit Court Judge

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REPLY BRIEF

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Notice of Appeal filed on the 30th day of September, 2015

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT .....	1
I. Failure to Adhere to RST’s Constitution and RST’s Code of Law and Order Renders the April 19, 2012 Order Unenforceable Under Comity Principles .....	1
II. RST Jeopardizes its Sovereignty in Refusal to Uphold and Apply its Constitution and Law and Order Code.....	4
III. Comity Results in Inequity and Unjust Enrichment; SDCL § 1-1-25(1)(e) Cannot Be Satisfied .....	6
CONCLUSION .....	7
CERTIFICATE OF SERVICE .....	9
CERTIFICATE OF COMPLIANCE.....	10

## TABLE OF AUTHORITIES

### Cases

<i>Board of Regents v. Carter</i> , 228 N.W.2d 621, 625 (S.D. 1975).....	1
<i>Commitment of Lawrence Lee, Jr.</i> , RST Supreme Court, CA 99-03, (2000).....	3
<i>Discovery Bank v. Stanley</i> , 2008 SD 111, 757 N.W.2d 756.....	2
<i>Kansas Gas &amp; Electric Co. v. Ross</i> , 521 N.W.2d 107 (S.D. 1994).....	7
<i>Mobridge Cmty. Indus., Inc. v. Toure, Ltd.</i> , 273 N.W.2d 128 (1978).....	7
<i>RST v Horse Looking</i> , RST Supreme Court, CA 2006-12 (3/30/2007) .....	3

### Statutes

SDCL§ 1-1-25.....	5, 6, 7, 8
-------------------	------------

## ARGUMENT

### **I. Failure to Adhere to RST's Constitution and RST's Code of Law and Order Renders the April 19, 2012 Order Unenforceable Under Comity Principles**

It is undisputed that RST's court system and judicial appointment process is governed by Article XI of the Rosebud Constitution and Title 9 of the RST Code of Law and Order. Simultaneously, however, RST seeks this Court's affirmation of the trial court's decision to disregard the plain language of RST's constitutional and statutory authority in its quest for comity.<sup>1</sup> Just as RST admits that "[s]tatutes and court rules must be construed in their entirety," so too must constitutional and statutory language be afforded its "plain meaning and effect." *Discovery Bank v. Stanley*, 2008 SD 111, 757 N.W.2d 756, 762; *Board of Regents v. Carter*, 228 N.W.2d 621, 625 (S.D. 1975). "When the language of a statute is clear, certain, and unambiguous, there is no occasion for construction, and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." *Petition of Famous Brands*, 347 N.W.2d 882, 885 (S.D. 1984).

The Tribal Court shall consist of one chief judge and such associate judges and staff, as are deemed necessary by the Chief Judge, with the advice and consent of Tribal Council. All tribal court personnel shall be subject to the supervision of the Chief Judge. The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.

Tab 6 - Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 2.

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<sup>1</sup> Appellant relies upon its previously filed Appendix and attachments. Each "Tab" citation refers to Appellant's Appendix.

The Chief Judge shall promulgate rules of pleading, practice, and procedures applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law.

Tab 6 - Article XI of the Rosebud Sioux Tribe Constitution and Bylaws, Section 4.

The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. *Any matter not covered by applicable tribal or federal laws* shall be decided according to the custom and usage of the Tribe...

Tab 7 - RST Code of Law and Order, Section 4-2-8 (emphasis supplied).

All Tribal Court Judge shall be selected by the Judiciary Committee and recommended to the Tribal Council for approval.

Tab 7 - RST Code of Law and Order, Section 9-1-5(2)(c).

Whether a Special Judge is characterized as an associate judge or staff “deemed necessary by the Chief Judge,” approval by the Tribal Council is required under Article XI, section 2. Although section 2 is included in Judge Trandahl’s Findings of Fact, it is inappropriately undermined by an incorrect interpretation of section 4 and a complete disregard for Law and Order Code sections 4-2-8 and 9-1-5(2)(c). The Chief Judge’s authority articulated in Article XI, section 4, should be read subsequent to, not independent of section 2. *FOF 21 and 22*. Under plain meaning and statutory contextual principles, Article XI section 4 does not authorize the Chief Judge to appoint special judges as a “procedure” that can be accomplished without “the advice and consent of Tribal Council.” Additionally, the Chief Judge is not authorized to arbitrarily limit “All Tribal Court Judges” to exclude Meyers’ appointment from being subject to Law and Order Code section 9-1-5(2)(c). RST’s claim of such an interpretation is in direct conflict with its reminder that “[s]tatutes and court rules must be construed in their entirety.”

*Discovery Bank v. Stanley*, 2008 SD 111, ¶ 21, 757 N.W.2d 756, 762.



RST's in-house counsel Eric Antoine testified that "the chief justice's authority, to appoint special judges, derives in part from the constitution," specifically Article XI, section 2 and Article XI, section 4. TT: 29:23-31:4. Antoine claims that such practice has gone on for at least 15 years. TT: 25:19-23; 28:5-17. It is on this basis and testimony that RST claims that both tribal law and tribal custom supports Meyers' appointment. Tribal law and tribal custom, however, are mutually exclusive. If tribal law exists in the context of proper judicial appointments, as it does in RST Constitution Article XI, tribal custom, regardless of where it is supposedly derived, is inapplicable. RST's claim to the contrary directly contradicts Law and Order Code section 4-2-8 and ignores its own Supreme Court precedent.

[I]t [tribal custom] cannot become part of the braid of tribal (common) law until it is asserted and established in a specific case. The mere potential of tribal custom cannot be used as a kind of charm or talisman to defeat existing tribal Law.

*Commitment of Lawrence Lee, Jr.*, RST Supreme Court, CA 99-03, (2000), p. 4.

There is also the further caveat that any such "custom and usage" relevant to the authority of Tribal officials (as opposed to private parties in private disputes) could only be exercised within the parameters of due process and equal protection as set out in Art. X, Sec. 3 of the Rosebud Sioux Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (8).

*RST v Horse Looking*, RST Supreme Court, CA 2006-12 (3/30/2007), p. 7.

RST's irreconcilable legal position is further underscored by its factual misrepresentations. Article XI did not exist until it became effective on September 20, 2007. Tab 6 – *RST Constitution*, pg. 12. The Order appointing Meyers as Special Judge was issued on November 7, 2011. The 20-year-old "custom" claimed by RST is, at best 4 years old at the time Meyers was appointed and had *no* record of establishment in a specific case. *Commitment of Lawrence Lee, Jr.*, RST Supreme Court, CA 99-03, (2000),

p. 4. RST did exactly what its Supreme Court prohibited – it asserted tribal custom “as a kind of charm or talisman to defeat *existing tribal Law*.” *Id.*

RST has attempted to mislead this Court on the contents of Law and Order Code Section 4-2-8, just as it misled Judge Trandahl. RST Law and Order Code Section 4-2-8 demands that tribal law be applied, unless a matter “is not covered by applicable tribal or federal laws.” Section 4-2-8 does not mandate “that any matter not expressly covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe.” *FOF 24*. Absence of the words “special judges” in the RST Constitution or RST Law and Order Code does not exempt Meyers’ appointment from satisfying the explicit requirements of tribal law.

SDCL § 1-1-25(1)(d) required RST to establish by clear and convincing evidence that the April 19, 2012 tribal court order “complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained.” RST’s need to cherry pick from its Constitution and Law and Order Code, *and* supplement with testimony as to previously unaccepted “custom and usage” to validate the April 19, 2012 tribal court order explicitly violates RST’s own “laws, ordinances and regulations.”

Based upon the unambiguous language used in Article XI section 2 and Law and Order Code § 4-2-8’s, RST is unable to satisfy SDCL § 1-1-25(1)(d)’s comity requirement. Judge Trandahl’s August 13, 2015 Order Granting Comity should therefore be REVERSED and VACATED.

## **II. RST Jeopardizes its Sovereignty in Refusal to Uphold and Apply its**

### **Constitution and Law and Order Code**

Under and by virtue of our Creator and His divine providence, we, the enrolled members of the Rosebud Sioux Tribe of Indians of the Rosebud

Indian Reservation in the State of South Dakota, in order to establish a united tribal organization, to establish justice, to insure tranquility and enjoy the blessings of freedom and liberty, to conserve our tribal property, to develop our common resources, and to promote the best welfare of the present generation and our posterity, in education and industry, do hereby adopt and establish this Constitution and By-Laws.

Tab 6 – *Rosebud Sioux Tribe Constitution, Preamble.*

The government of the Tribe including the community shall not: ... (e) ...deny to any person within its jurisdiction the equal protection, application, or opportunity of the laws...

Tab 6 – *Rosebud Sioux Tribe Constitution, Article X.*

The question of comity before this Court is unrelated to the discussion of tribal sovereignty RST raises in its Appellee Brief. In seeking comity, SDCL§ 1-1-25 requires nothing more than for RST to have upheld the tenets and principles memorialized in its Constitution and guaranteed to its citizenry. Tribal sovereignty is not implicated, infringed upon, or interfered with when the question is whether the April 19, 2012 tribal court order was obtained “by a process that assures the requisites of an impartial administration of justice” and “complies with the laws, ordinances and regulations of the [RST].” SDCL § 1-1-25(1)(c) and (d). Such inquiries align with the principles expressly articulated in RST’s Constitution and Law and Order Code.

RST also chose the jurisdiction to which it now questions. After purposefully availing itself to state court jurisdiction, RST is prohibited from challenging this Court’s jurisdiction on tribal sovereignty grounds.

The late Charles Colombe was an enrolled and active member of the Rosebud Sioux Tribe. As such, Colombe was entitled to rely upon the protections and procedures enumerated in the Rosebud Constitutional and its Law and Order Code. Neither Colombe, nor any other RST member, is to be denied “the equal protection, application,

or opportunity of the laws...” Yet, the trial court’s grant of comity to the April 19, 2012 tribal court order has allowed RST to selectively pick and choose which parts of its Constitution and Law and Order Code it wants to apply and follow. It is RST actions and the trial court’s condoning of such actions in its grant of comity that negatively affects RST’s tribal sovereignty - not Colombe’s demand for due process and equal protection.

### **III. Comity Results in Inequity and Unjust Enrichment; SDCL § 1-1-25(1)(e)**

#### **Cannot Be Satisfied**

In August 1999, BBC withdrew its share of the Contract’s division of net profits of which it had deferred payment on and set aside for casino operating expenses. BBC and RST mutually agreed to this arrangement. Despite the confirmation of BBC’s withdrawal amounts by third-party auditors, RST commenced litigation regarding the mutually agreed upon contract modification’s permissibility. RST took the position that BBC was not owed *any* money. RST’s own (properly appointed) Special Judge B.J. Jones and Supreme Court Justice Frank Pommersheim both acknowledged the inequity and unjust enrichment would result if BBC were to receive nothing. Tab 15 – *2004-01-16 RST Tribal Court Memorandum Decision, Special Judge B.J. Jones*; Tab 16 – *2003-04-30 RST Tribal Court Order, Special Judge B.J. Jones*; Tab 17 – *2006-10-02 RST Supreme Court, Chief Justice Frank Pommersheim Summary Order*. The subsequent internal accounting resulted in BBC owing the full amount of what it had withdrawn. In short, RST’s tribal court determined BBC was to receive nothing for its years of work and contribution.

None of this is refuted by RST.

Colombe, however, was not BBC. He was a BBC shareholder entitled to the protections corporate formalities provide. Absent a “sufficient reason to the contrary,”

BBC should have been and remained a separate legal entity. *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.*, 273 N.W.2d 128, 132 (1978). Of the six well-recognized factors that may justify piercing the corporate veil, Judge Meyers' mentioned none of them in her Order Granting Summary Judgment holding Colombe personally responsible. *See Kansas Gas & Electric Co. v. Ross*, 521 N.W.2d 107, 112 n. 6 (S.D. 1994). Instead, Judge Meyers' disregarded RST Law and Order Code Section 4-2-8's mandate on choice of law and, in her Memorandum Decision, stated that she "utilized cases determined by the Courts of the State of South Dakota." None of this is refuted by RST.

Allowing RST to personally collect money from the estate of a shareholder, of which none was owed under RST's mutually agreed upon contract terms with BBC, violates South Dakota's longstanding policy against unjust enrichment. The undisputed facts establish that RST cannot satisfy SDCL § 1-1-25(1)(e) by clear and convincing evidence. Judge Trandahl's August 13, 2015 Order Granting Comity should therefore be *reversed and vacated*.

## **CONCLUSION**

RST admitted both at the Evidentiary Hearing on January 8, 2015 and in its Appellee Brief, that Meyers' appointment and subsequent April 19, 2012 tribal court order is a product of and authorized by a combination of tribal law and tribal custom. The RST Constitution, RST Law and Order Code, and RST Supreme Court precedent all confirm that tribal law and tribal custom are mutually exclusive. The April 19, 2012 tribal court order is therefore unable to satisfy SDCL § 1-1-25(1)(c) or (d).

Recognition of the tribal court order also "contravenes[s] public policy of the State of South Dakota" by condoning RST's refusal to recognize and honor Colombe's

rights to due process and equal protection under tribal law. SDCL § 1-1-25(1)(e). The economic windfall RST would enjoy if the tribal court order was afforded comity is also contrary to South Dakota's intolerance for unjust enrichment.

RST's failure to prove by "clear and convincing evidence" that Meyers' April 19, 2012 tribal court order satisfied all five specifically enumerated requirements of SDCL § 1-1-25(1) results in no legal basis for this Court to "recognize the tribal court order or judgment..." SDCL § 1-1-25(2). Based upon the foregoing, as well as the arguments and authorities provided in Appellant's Brief, South Dakota law requires Judge Trandahl's August 13, 2015 Order Granting Comity be *reversed* and *vacated*.

Respectfully submitted this 8th day of February, 2016.

/s/ Clint Sargent

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing

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## CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word, and contains 2,225 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 8th day of February, 2016.

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