

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

**Charles Colombe, Individually and as an Officer of BBC
Entertainment, Inc., a dissolved Minnesota corporation,**
Appellant,

v.

**Rosebud Sioux Tribe, Rosebud Sioux Tribal Court, and
Judge Sherman Marshall, in his Official and Individual
Capacities,**
Appellee.

On Appeal from the United States District Court
for the District of South Dakota
Central Division

**Appellant's Reply Brief & Cross-
Appellee Brief**

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Summary of the Case

BBC Entertainment and the Rosebud Sioux Tribe entered into a casino management agreement in June 1994. In accordance with the Indian Gaming Regulatory Act (“IGRA”) the agreement was approved by the National Indian Gaming Commission (“NIGC”) Chairman. The Tribe and BBC agreed to mutually delay payment of 7.5% of net income payable monthly to each party to fund a reserve for operating expenses. When the contract concluded, the Tribe disputed BBC’s withdrawal of its share of the agreement’s net profits that had been set aside for a reserve. Despite the NIGC’s exclusive jurisdiction of such matters, the Tribal Court rendered a judgment against BBC on October 16, 2007. Another Tribal Court action was instituted to pierce BBC’s corporate veil and hold Charles Colombe personally liable. After exhausting all available tribal court remedies, Colombe sought de novo review by the Federal District and asked that the October 16, 2007 judgment be vacated. He also sought an injunction prohibiting the Tribe from continuing litigation to recover on the October 16, 2007 judgment.

Appellant renews its request for oral argument.

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Statement of the Issues

1. Whether the District Court properly concluded that BBC satisfied the Tribal Exhaustion doctrine by challenging the Tribal Court's improper exercise of jurisdiction over issues exclusively reserved to the NIGC multiple times and to multiple judges prior to seeking *de novo* review in District Court consistent with the express terms of the Management Agreement?

Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987)

National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985)

Argument

I. Tribal Exhaustion Doctrine Exhausted by BBC in Its Multiple Assertions of Jurisdictional Arguments Ignored by the Rosebud Sioux Tribe Supreme Court and BBC's Inability to Provide the Financially Onerous Bond Demanded by the Rosebud Sioux Tribe Supreme Court for Appeal

Colombe maintains that BBC exhausted its tribal court remedies prior to seeking *de novo* review in Federal District Court. “At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.”

Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 16-17 (1987).

Multiple times and before multiple appellate judges BBC raised its jurisdictional arguments. BBC's jurisdictional arguments fell on deaf ears at the Rosebud Sioux Tribe Supreme Court. It was only after BBC exhausted all adequate opportunities to challenge the tribal court's invalid judgment, arguing that the tribal court had exceeded its jurisdiction, that BBC, consistent with the procedure outlined in the Management Agreement, filed suit in District Court.

Appellees' attempt to minimize BBC's effort in having its jurisdictional arguments addressed by the tribal appellate court is thwarted by the express language BBC employed in its briefs alerting the Rosebud

Sioux Tribe Supreme Court as to its jurisdictional contentions. As early as the table of contents in BBC’s Brief on Appeal, BBC made its jurisdictional arguments known. App. 216. Jurisdictional issues are also the first and second legal arguments articulated in BBC’s Brief. App. 216, 225-226.

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App. 216 (emphasis added).

Both of these arguments were express challenges by BBC to the tribal court exercising jurisdiction on matters that were within the sole province of the NIGC. Despite three pages of explanation by BBC as to the jurisdictional restraint the Rosebud Sioux Tribe Supreme Court should exercise in deference to and pursuant to the IGRA, the Court ignored BBC’s arguments, placed itself in the position of the NIGC, ruled that the mutual agreement between BBC and the Tribe was a modification of the approved Management Agreement, and ruled the “modification” void. App. 280.

Following the Tribe’s successful petition for a rehearing and a rehearing en banc, BBC again brought its jurisdictional arguments to the

Court’s attention in its Optional Brief on Rehearing. The issue on rehearing, as framed by the Rosebud Sioux Tribe, was “What is the appropriate remedy for the illegal modification of the Rosebud Sioux Casino’s management contract provision dealing with the establishment and funding of the Operation Expense Reserve account?” BBC’s first argument was that the Supreme Court of the Rosebud Sioux Tribe “did not discuss the jurisdictional issues raised by BBC in its Appeal Brief. That is unfortunate because BBC understands that the IGRA does not create jurisdiction for any Court to determine that issue. This Court’s reasoning on how it has jurisdiction to rule on that issue would thus have been helpful in framing this memorandum.” App. 285. Once more, BBC explained its jurisdictional argument to the Supreme Court of the Rosebud Sioux Tribe. App. 285-89. And, like the time previously, the Rosebud Supreme Court refused to address BBC’s jurisdictional arguments in rendering its October 2, 2006 Summary Order decision. App. 296.

The Rosebud Supreme Court ruled – over BBC’s multiple objections and assertions as to the court’s lack of jurisdiction – that the tribal court could decide what modifications to the Management Agreement were permissible and what were not. Pursuant to the high court’s order, Judge

Jones rendered judgment in favor of the Rosebud Sioux Tribe for \$527,146.76 on October 16, 2007. App. 299-300

By this time, BBC was no longer an active company. After six years of litigation it was financially vanquished and it was incapable of coming up with cash or surety in the amount of \$527,146.76 as required by Rule 2 of the Rosebud Sioux Tribal Court Rules of Appellate Procedure and demanded by the Tribal Attorney General. App. 336. Caught in a Scylla and Charybdis dilemma, BBC filed a motion for a new trial. App. 336. BBC's motion was summarily denied. App. 351.

Although the Appellees contend that an additional appeal to the Supreme Court of the Rosebud Sioux Tribe was required, the Tribal Exhaustion Doctrine, “[does] not suggest that exhaustion would be required...where exhaustion would be futile because of lack of an adequate opportunity to challenge the court’s jurisdiction.” *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 n. 21 (1985). After six years of litigation, BBC, a now defunct company, had raised its jurisdictional argument numerous times without acknowledgement or discussion by the Supreme Court of the Rosebud Sioux

Tribe. BBC challenged the tribal court's invalid assertion of jurisdiction to the highest level and lost.

Even absent financial impossibility, it would have been an exercise in futility to require Colombe and BBC to appeal the October 16, 2007 Judgment after the Rosebud Supreme Court implicitly ruled on BBC's jurisdictional claims in its determination that the Management Agreement had been modified and that the modification was void for failure to obtain NIGC approval in July 2006. App. 279-80; *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 fn. 21, 105 S. Ct. 2247, 2454 (1985).

The Rosebud Sioux Tribe Supreme Court was provided with "the opportunity to review the determinations of the lower tribal courts." *Iowa Mutual*, 480 U.S. at 16-17. The Court refused that opportunity in its silent reply to BBC's jurisdictional arguments, raised in 2006 and 2007, and in its total disregard for the IGRA comments, findings, and Order issued by Tribal Court Judge Jones on April 18, 2003. App. 251 and App. 274. The Court's July 2006 sua sponte holding that the Management Agreement had been modified and that said modification was illegal under IGRA was the *first* time an IGRA violation had been found in the litigation. App. 280-283.

Both Appellees and the Rosebud Sioux Tribe Supreme Court intentionally overlook the fact that the Tribal trial court originally rejected the claim that there was a modification that violated IGRA.¹ App. 251. The Rosebud Supreme Court's willful ignorance and blanket refusal to provide any level of acknowledgment to BBC's jurisdictional arguments, much less deference to Judge Jones' original ruling, illustrates the fact that, as the District Court found, BBC exhausted all available tribal court remedies.

Furthermore, concerns related to tribal sovereignty and impaired tribal self-government that serve as the foundation for the tribal exhaustion doctrine are not present in the current matter. Rather, the Federal District Court's recognition that BBC exhausted all tribal court remedies available and was entitled to proceed to federal court epitomizes how the tribal exhaustion doctrine is designed to and does work in practice.

¹ It is important to note that the Tribal Court also recognized: "The Defendant [BBC] 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 the Defendant its share of the net revenue it was entitled to under the contract." App. 210. Additionally, in a footnote, the Tribal Court acknowledged "that by denying any of the OER account monies to the Defendant it would in essence by [sic] modifying the provision of the contract entitling the Defendant to 35% of the net profit." App. 211.

Additionally, it is important to note that the appeal Appellees are vehement that BBC needed for exhaustion purposes had no place to be heard. On July 26, 2007, Amendment W passed in a “Secretarial Election” conducted under the supervision of the Bureau of Indian Affairs, resulting in a new article to the Rosebud Constitution. The new Article XI to the Rosebud Constitution provided at 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 legislative and execution 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.

App. 397.

Article XI was certified by the Secretary and became effective on September 20, 2007. App. 391. Pursuant to the Indian Reorganization Act, 25 U.S.C. § 476, the Rosebud Sioux Tribal Council was required to implement the new tribal court system, which included establishing judicial qualifications and both rules and standards for appeal acceptance, by

September 20, 2007. *Id.* It is undisputed that the Tribe failed to do so. App. 392 and App. 431-32.

At the time Appellees claim BBC needed to have filed an appeal, the appellate branch of the Rosebud Sioux tribal court system was not constitutionally organized. The tribal exhaustion doctrine requires exhaustion of all *available* tribal court remedies. The Appellees' contention that BBC failed to satisfy the exhaustion doctrine is stymied by the reality that the Tribe's failure to implement the constitutional amendments passed in the Secretarial Election rendered the Supreme Court of the Rosebud Sioux Tribe authority less.

The District Court's ruling that BBC exhausted tribal court remedies on the question of the Tribal Court's jurisdiction to determine whether a modification to the Management Agreement occurred should be **AFFIRMED.**

II. Initial Questions Regarding Mutual Oral Agreement Must be Exclusively Decided by the NIGC

Appellees' arguments have consistently morphed from motion to motion and from brief to brief throughout this litigation. Most recently, in Appellees' Brief, Appellees attempt to transform the issue from whether,

under IGRA, the oral agreement was a modification to the Management Agreement to be determined by the NIGC into a contract validity question. There is no dispute by Colombe or BBC that questions of contractual validity are ripe for determination by the Tribal Court. But, the question of the validity of the Management Agreement under tribal law is not, and has not-until now raised by Appellees, been at issue. Appellees' effort to reshape the litigation at the eleventh-hour to be *only* a question of contract validity blatantly ignores the substance of BBC and Colombe's jurisdictional arguments regarding what entity has the authority to determine whether the Management Agreement was modified. Specifically, Appellees ignore the Eighth Circuit's agreement with Colombe that "the NIGC has exclusive jurisdiction to determine a contract's compliance with IGRA and its regulations," *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420-21 (8th Cir. 1996), and that the IGRA allows for modification to already approved contracts provided such modifications that do not comply with the regulations are later approved by the NIGC. *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (*citing* 25 C.F.R. §§ 533.7, 535.1(f)) (8th Cir. 1996). Appellees also sidestep the holding in *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, requiring the

Tribe to pursue the administrative remedy prescribed by IGRA in challenging a contract not approved by the NIGC, 451 F. 3d 44 (2d Cir. 2006).

The Management Agreement between BBC and Appellees was approved by the NIGC Chairman on June 14, 1994. App. 102. The parties mutually agreed, after BBC was orally persuaded by the Tribe, to each make monthly contributions to an Operating Expense Reserve (“OER”) in the amount of 7.5% of each party’s share of the net profits in lieu of BBC making an initial contribution to the OER as enunciated in the Management Agreement. App. 279, 324-25. None of this is in dispute. The question of whether that decision and subsequent performance in that manner constituted a modification of the Management Agreement is the epitome of a contract compliance issue of which, as Appellees agree, the NIGC has exclusive jurisdiction to decide. Appellees’ Brief 26. Pursuant to the administrative scheme memorialized in IGRA, the proper forum to address whether a modification to the Management Agreement occurred is the NIGC.

The characterization of the jurisdictional issue as one of contract validity is incorrect and improper. Accordingly, the District Court’s Order

Dismissing Colombe's Claim should be **REVERSED** and **REMANDED** with an Order vacating the Judgment against BBC and ordering the dismissal of the Tribe's tribal court claims.

III. Supreme Court of the Rosebud Sioux Tribe "Authority-Less" As Matter of Federal Law

Both Appellants and the Federal District Court incorrectly characterize Colombe's jurisdictional arguments derived from the Rosebud Sioux Tribe's failure to implement constitutional amendments properly approved in a Secretarial Election as questions of Tribal constitutional interpretation. Although Appellees rely on the tribal exhaustion doctrine and implied tribal sovereignty to cloak their position, Appellees never address Colombe's argument as to the purpose, scope, application, and authority of Secretarial Elections.

Colombe's argument is not and has never been about the language employed in the Rosebud Sioux Tribe's Constitution or Constitutional amendments. App. 093-96, App. 097-98, App. 354-57 and App.

417. Rather, Colombe has consistently and specifically argued that the Tribe failed, as required by the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476, to "implement amendments to the tribal constitution that have been put to a vote and approved by the secretary." *Thomas v. United States*, 189 F.3d

662, 668 (7th Cir. 1999); App. 093-96, App. 097-98, App. 354-57 and App. 417. Appellees have previously acknowledged that Colombe’s claim regarding the failure to implement constitutional amendments approved in the Secretarial election is jurisdictional in nature.App. 403.

Despite Appellees’ obvious attempt and intent to protect the decisions and orders of the Rosebud Sioux Tribe Supreme Court since 2007, Appellees’ seemingly conciliatory refusal to refute the Rosebud Sioux Tribe’s obligation to implement constitutional amendments approved in a Secretarial Election condones and perpetuates the Tribe’s violation of federal law.*Thomas*, 189 F.3d at 668.

Here the decision of Congress to privilege federal control over tribal interests in tribal constitutional elections is unmistakable. The language and structure of the statute leave no doubt where authority lies. . . One can question the wisdom of retaining federal control over matters of such fundamental importance to the tribe as its own constitutional ratification and amendment process. Nonetheless the balance of power that Congress struck in this context is the compass we must follow ...”

Id. at 667-68 (internal citations omitted).

As previously addressed in Section I, the Rosebud Sioux Tribal Council failed to implement Article XI to the Rosebud Constitution, after it went into effect on September 20, 2007. App. 391 and App. 392.As of May 10, 2012, the Tribe had still failed to both enact “ any amendments to those

statutes [establishing duties and qualifications for judges of the Rosebud Sioux Tribal Court and court personnel] or enacted any new ordinances setting forth qualifications for the Tribal Court Chief Judge, Associate Judge, or staff positions on or after July 26, 2007” and “any amendments to the Rules of Procedures of the Rosebud Sioux Tribe Court of Appeals or enacted any new ordinances setting rules or standards for appeals to the Rosebud Supreme Court on or after July 26, 2007.” App. 431 and App. 432.

The October 16, 2007 judgment rendered against BBC came nearly one month after the Tribe was federally mandated to have implemented the constitutional amendments approved in the Secretarial election. The Tribe’s failure to do so voided the subsequent October judgment against BBC and, after the Tribe’s action to pierce BBC’s corporate veil, voided the judgment against Colombe as well. Colombe waged this jurisdictional challenge in his motion to dismiss the corporate veil action, citing the court’s divestiture of jurisdiction due to the Tribe’s failure to comply with federal law. App. 060. The motion to dismiss, as well as Colombe’s motion for an interlocutory appeal on the jurisdictional argument, was denied. App. 092, App. 358-59 and App. 360-66.

Consistent with the procedure envisioned by the *Thomas* court, Colombesought an injunction in Federal District Court to protect himself from the Tribe’s continued violation of federal law in its refusal to implement properly approved constitutional amendments. “[T]he tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary.” *Thomas*, at 668. Just as Appellees did in its Brief, the District Court refused to acknowledge the *Thomas* decision and the principle, purpose, and power of a Secretarial election. App. 411-18.

Appellee’s reliance on the Supreme Court of the Rosebud Sioux Tribe’s continued operation as an appellate court does not confer, nor create, jurisdiction in the shadow of the Tribe’s failure to implement the constitutional amendments approved in the Secretarial election nearly six years ago. If anything, the Supreme Court of the Rosebud Sioux Tribe’s uninterrupted reign is indicative of the exercise in futility it would have been for Colombe to attempt any further appeals prior to seeking *de novo* review in Federal District Court.

Additionally, any reliance Appellees place on language from the Management Agreement demanding Colombe bring his jurisdictional

arguments related to the Secretarial election to the Rosebud Sioux Tribe Supreme Court first is negated by the Tribe's failure to adhere to the IRA. Colombe's obligation under the Rosebud Sioux Tribal Court Rules of Appellate Procedure in 1999, when the Rules were valid and jurisdiction of the Rosebud Sioux Tribe Supreme Court was authorized, evaporated in the wake of the Tribe's refusal to implement constitutional amendments properly approved in a Secretarial election. Although nothing in the Management Agreement provided for the situation at issue, the language employed contemplated a legally legitimate tribal appellate court existence. With the Tribe's continued failure to implement the Secretarial election approved constitutional amendments properly authorizing its tribal trial and appellate courts, a proper appeal is just as impossible for Colombe now as it was in October 2007 and March 2009.

The District Court's holding that Colombe failed to exhaust available tribal court remedies by not raising his jurisdictional arguments born from the Tribe's failure to implement constitutional amendments approved in Secretarial elections to, what is undisputed under IRA, an authority-less appellate court is in direct contradiction of federal law and subject matter jurisprudence. Accordingly, and consistent with the precedent and vision

established in *Thomas*,Colombe's Motion for Reconsideration and Motion for Trial on Permanent Injunction should be **REVERSED** and **REMANDED**.

IV.Futility and Financial Insolvency ExceptColombe from Further Tribal Exhaustion Requirements

Appellees have placed substantial reliance upon the tribal exhaustion doctrine and its exceptions throughout its Brief. Colombe has addressed, and satisfied, the tribal exhaustion doctrine and enumerated how and why he and BBC met the doctrine itself and its exceptions in sections I, II, and III of its Reply Brief and in sections II and III in Colombe's original Appellant's Brief. Out of consideration for the Court's time and in lieu of unnecessary repetition, Colombe would direct the Court's attention to those specific sections and the arguments therein.

Conclusion

Appellant Charles Colombe respectfully requests that this Court **AFFIRM** the District Court's Partial Denial of Defendant's Motion to Dismiss, **REVERSE** the District Court's Denial of Motion for Trial on Permanent Injunction, **REVERSE** the District Court's Granting of Defendant's Motion for Summary Judgment, **REVERSE** the District Court's Dismissal of Colombe's Claims concerning the October 16, 2007 Judgment, **REVERSE** the Judgment of Dismissal, and **REMAND**.

Respectfully submitted this 18th day of June, 2013.

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Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7). This brief contains 3,338 words from the jurisdictional statement through the conclusion. And excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I have relied on a word count tool in a software program in making this certificate. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface in Microsoft Word 2007 using “Times New Roman”, 14 point font.

On this 18th day of June, 2013.

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Certificate of Compliance with Technical Requirements

I hereby certify that the electronic version of this brief complies with the Technical Requirements of 8th Cir. R. 28A(h). The brief has been submitted to the CM/ECF system as a single document file. 8th Cir. R. 28A(h)(1). The electronic version of the brief has been created in a manner which allows searching and copying. 8th Cir. R. 28A(h)(3). Finally, the electronic version of the brief and addendum have been scanned for viruses using “Trend Micro Security Agent” software and is believed to be virus-free. I have relied upon the scan report of the anti-virus software program in making this certificate.

On this 18th day of June, 2013.

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the **Appellant's Reply Brief & Cross-Appellee Brief** was served via US Mail upon

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