

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No. 13-1382 & 13-1512

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

Appellant,

v.

Rosebud Sioux Tribe; Rosebud Sioux Tribal Court; Judge Sherman  
Marshall, in his Official and Individual Capacities,

Appellees and Cross-Appellants

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

HONORABLE ROBERTO LANGE  
UNITED STATES DISTRICT COURT JUDGE

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APPELLEES' BRIEF

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## **SUMMARY OF THE CASE**

In 2007, in a breach of contract action, the Rosebud Tribal Court entered judgment against BBC, a casino management company, and ordered BBC to pay a money judgment to the Rosebud Sioux Tribe. BBC did not appeal that judgment to the Tribe's Supreme Court. In 2009, the Tribe filed an action in Tribal Court to pierce the corporate veil of BBC and hold its owner, Appellant Colombe, personally liable for the 2007 money judgment. Challenging tribal court jurisdiction, Colombe filed an action in federal court seeking to vacate the 2007 judgment against BBC and to enjoin the Tribe, its Court and Chief Judge ("Tribal parties") from proceeding with the pending tribal court case. The Tribal parties moved to dismiss for failure to exhaust tribal remedies. The district court granted the motion in part and denied it in part, ruling that even though BBC had not appealed to the appellate court, BBC had exhausted tribal remedies as to its claim that the Tribal Court had no jurisdiction. Ruling on the merits as to that issue, the district court ruled that the Tribal Court had properly exercised jurisdiction in the case and granted summary judgment to the Tribal parties.

The questions in this appeal focus on whether Colombe and BBC exhausted tribal appellate court remedies and on tribal court jurisdiction.

## **REQUEST FOR ORAL ARGUMENT**

The Rosebud Sioux Tribe, the Rosebud Sioux Tribal Court, and Chief Judge Sherman Marshall request 30 minutes of oral argument, which is necessary in view of the fundamental importance of the legal questions in this case to the federal policy of supporting Indian tribal sovereignty and strengthening tribal courts.

## **CORPORATE DISCLOSURE**

No non-government corporation is an Appellee and therefore no corporate disclosure is required under FRAP Rule 26.1

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## **JURISDICTIONAL STATEMENT**

The district court had subject matter jurisdiction under 28 U.S.C. §1331.

The Court of Appeals has jurisdiction under 28 U.S.C. §1294.

## **STANDARD OF REVIEW**

The legal scope of the tribal exhaustion doctrine is a matter of law to be reviewed *de novo*. *Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8<sup>th</sup> Cir. 2003). All issues raised in this appeal and cross-appeal are questions of law to be reviewed *de novo*.

*Wal-mart Stores, Inc. v. Crist*, 855 F.2d 1326, 1330 (8<sup>th</sup> Cir. 1988).

## **STATEMENT OF ISSUES**

1. Whether a party that did not challenge tribal jurisdiction by appealing or cross-appealing to the Tribe's Supreme Court exhausted tribal remedies before bringing an action to challenge tribal court jurisdiction in federal court.

*National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985)

*Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987)

*Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8<sup>th</sup> Cir. 2003)

2. Whether the Indian Gaming Regulatory Act (IGRA) gives exclusive



jurisdiction to determine the legal validity of an oral modification of a casino management contract to the National Indian Gaming Commission (NIGC).

*Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8<sup>th</sup> Cir. 1996)

*Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092 , 1094 (8<sup>th</sup> Cir. 1999)

3. Whether a party that did not appeal either of two final judgments to the tribal appellate court has exhausted tribal remedies before seeking relief in federal court based on his claim that the tribal court lacks jurisdiction to act as a court.

*Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987)

*National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 105 S.Ct. 2447 (1985)

*In re Sac and Fox Tribe of the Mississippi In Iowa/Meskwaki Casino*

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*Runs After v. United States*, 766 F.2d 347, 352 (8<sup>th</sup> Cir. 1985)

4. Whether a party's claim that it lacked the financial resources to appeal excuses that party's failure to exhaust tribal court remedies on the grounds of futility.

*National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856, n. 21, 105 S.Ct. 2447, 2454, n. 21 (1985)

*Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8<sup>th</sup> Cir. 1997)

*Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990 (8<sup>th</sup> Cir.

1999)

## **STATEMENT OF THE CASE**

In 2011, Appellant Colombe filed a complaint in federal district court against the Rosebud Sioux Tribe, the Rosebud Sioux Tribal Court and the Chief Judge of the Tribal Court. In his federal complaint, Colombe challenged tribal court jurisdiction in two separate but related civil cases in the tribal court, one of which had concluded in 2007, the other of which was still pending in the tribal court. He sought an order from the federal court permanently enjoining the Tribal parties from proceeding with the case pending in tribal court in which the Tribe sought to collect a money judgment against Colombe's company, BBC, from Colombe. Colombe also sought an order vacating the money judgment that the tribal court had entered against BBC in 2007, a judgment which BBC had not appealed to the Tribe's Supreme Court.

The Tribal parties moved to dismiss Colombe's complaint on the grounds that Colombe and BBC had not exhausted tribal court remedies before challenging tribal jurisdiction in the federal court.

The federal court granted the Tribal parties' motion to dismiss in part and

denied it in part, ruling that even though BBC had not appealed the final judgment to the Tribe's Supreme Court in 2007, BBC had nevertheless exhausted tribal remedies as to its jurisdictional claim.

The case proceeded in the district court on Colombe's jurisdictional challenge. Both sides filed motions for summary judgment.

The federal district court ruled that the tribal Supreme Court did have jurisdiction to determine the legal validity of an oral modification of a casino management contract and to rule that the oral modification was void. The district court granted summary judgment to the Tribal parties and dismissed the final claim in Colombe's complaint.

Colombe appealed on the dismissal of his complaint and the Tribal parties cross-appealed on the court's denial of its motion to dismiss.

### **STATEMENT OF FACTS<sup>1</sup>**

In 1994, the Rosebud Sioux Tribe entered into a written management agreement ("the Contract") with BBC Entertainment, Inc. ("BBC") whereby BBC agreed to manage the Tribe's Rosebud Casino on the Rosebud reservation for five years in return for 35% of the casino's net profits. [App. 130-197]. BBC was a

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<sup>1</sup> Herein, "App." refers to pages in the Appellant's Appendix. "RST App." references pages in the Appellees' Appendix.

Minnesota corporation owned and operated by Appellant Charles Colombe, a member of the Rosebud Sioux Tribe who resided on the Rosebud reservation. As required by the Indian Gaming Regulatory Act (25 U.S.C. §§2701-2721) (“IGRA”), the Contract became valid and enforceable after it was approved by the Chairman of the National Indian Gaming Commission (“NIGC”). [App. 128-129]

The Contract provided that there would be an Operating Expense Reserve fund (“the OER fund”) out of which casino operating expenses would be paid.<sup>2</sup> In the Contract, the parties agreed that BBC, in its discretion, could make an initial contribution to fund the OER fund and that BBC’s initial contribution would continue to be the property of BBC, but apart from any initial contribution to the fund made by BBC, the OER fund would be funded entirely from the casino’s gross revenue, which under the Contract was the property of the Tribe; the Contract provided that at the conclusion of the Contract term, BBC would be entitled to withdraw an amount equal to its initial contribution to the OER fund, if any such contribution had been made, and no more. [App. 159-169 ]

The Contract, as well as NIGC federal regulations, provided that the

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<sup>2</sup> Section 6.4 (c)(5)

Contract could not be modified orally.<sup>3</sup> [App. 190]. The Contract also provided that any modification had to be in writing and approved by the Chairman of the NIGC.<sup>4</sup> [App. 190-191]

The parties agreed in the Contract that any lawsuit arising from the Contract would be litigated in the Rosebud Sioux Tribal Court. [App. 185] Article 21 of the Contract provided that neither party could seek relief in federal court until exhausting remedies in the Tribal appellate court. [App. 186]

BBC made no initial contribution to the OER fund. Under the terms of the written, NIGC-approved Contract, BBC would not have been entitled to recover any money from the OER fund at the conclusion of the Contract term.

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<sup>3</sup> Article 24.4 of the contract stated that the written contract contained the entire agreement between the parties and that it “may not be changed orally, but only by an instrument in writing signed by the party against whom enforcement is sought. Any such amendment.....must be approved in advance and agreed upon and approved in writing by the Tribe and submitted by the Tribe to the same Governmental Agency required for the initial approval of this Agreement or such other person or entity as may and exercise its powers, for its written approval.” [App. 190].

<sup>4</sup> Article 24.5 states: “This agreement may not be amended, modified, superceded or canceled, nor may any of the terms, covenants, representations, warranties, or conditions be waived, except by written instrument executed by the party against whom such amendment, modification, supersedure, cancellation or waiver is charged.” [App. 190-191].

In 1999, in the last days of the Contract, Charles Colombe, without giving the Tribe any prior notice of his intention to do so, authorized the issuance of two checks to be drawn from the Rosebud Casino's bank account to be paid to BBC. Those two checks totaled \$415,856. That sum was equal to 35% of the money that was in the Rosebud Casino's OER fund at the conclusion of the Contract. [App. 447-459]

At trial, Colombe claimed that BBC was entitled to take 35% of whatever amount was in the OER fund at the conclusion of the Contract pursuant to an oral agreement he had made with the Tribe. [App. 321] It was undisputed that no such oral agreement to modify the Contract had been submitted to or been approved by the NIGC.

In 2001, the Tribe, through its President, William Kindle, brought a civil suit for money damages against BBC in the Rosebud Sioux Tribal Court for breach of the Contract.<sup>5</sup> [RST App. 001-012] The Tribe argued that the Contract provided that BBC was only entitled to take back its initial contribution to the OER fund and since it had made no initial contribution, BBC was not entitled to take any money

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<sup>5</sup> Initially, the Tribe brought a number of claims in its Complaint for breach of the Contract, some of which were dismissed prior to trial. The only claim relevant to this appeal is the claim regarding the OER fund.

at all from the OER account. The Tribe claimed that it had suffered \$415,856 in damages as a result of BBC's breach of Contract by taking 35% of the OER money.

BBC's defense at trial was that Colombe had entered into an oral agreement with the Tribal Council to fund the OER fund from net profits, rather than gross revenue as provided by the Contract, and that BBC could take 35% of the money in the OER fund when the Contract term ended, rather than just its initial contribution as provided by the Contract. BBC argued that the \$415,856 Colombe had paid out to BBC was BBC's property pursuant to a legally valid oral agreement with the Tribe.

The main contested issue at trial was a question of law—whether Colombe's unapproved unwritten agreement with the Tribe was legally valid. To refute BBC's theory of defense, the Tribe cited federal regulations<sup>6</sup>, Eighth Circuit case law and the terms of the Contract, all of which stated that an oral agreement to modify a casino management contract that was not approved by the NIGC was void.

The case went to trial in January 2004. Special Tribal Court Judge B.J. Jones determined that it would “visit an inequity” on BBC if it were held to the terms of the written Contract; he ruled that the oral agreement was legally valid and that

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<sup>6</sup> 25 CFR §535.1(f) provides: “Any attempted modification of an approved contract that does not comply with the regulations and does not receive approval is void.”

BBC had not breached the Contract when it paid itself 35% of the funds in the tribal casino's OER fund. [App. 200-214]

The Tribe appealed Judge Jones' ruling to the Rosebud Supreme Court. BBC did not cross-appeal. In its Appellee's brief [App. 215-241], under "Assignments of Error", BBC did not assign as error the tribal court's exercise of jurisdiction or any decision of the lower court. [App. 219] In its Appellee's brief, in the Statement of Issues, BBC did not identify lack of tribal jurisdiction as an issue to be decided. [App. 218]. BBC did not ask the Supreme Court to void the judgment of the court below for lack of jurisdiction. BBC asked the Supreme Court to affirm the trial court's ruling. [App. 239].

In 2006, the Rosebud Supreme Court reversed Judge Jones's ruling that no illegal modification of the Management Contract had occurred. [App. 283] The Supreme Court ruled that the parties' oral agreement was void because it had not been approved by the NIGC, that the approved Contract controlled and that BBC had breached the Contract. [App. 276-283] That Court remanded for a trial limited to an accounting to determine damages.

The Tribe petitioned the Supreme Court for *en banc* rehearing on the remand order, arguing there was no need for a hearing on damages because the damages were all the money BBC had taken from the OER fund—\$415,856. BBC filed a



brief opposing the Tribe's petition for a rehearing.[App. 285-295]. In that brief opposing a rehearing, BBC also claimed that the Tribe's Supreme Court had no jurisdictional authority to determine the legal validity of a modification to a management contract because IGRA had given the NIGC exclusive jurisdiction to make such determinations. [App. 285-289] BBC did not petition the Court for a rehearing on the issue of tribal jurisdiction.

The tribal Supreme Court did not rule or discuss that issue of tribal jurisdiction in its Summary Order re-affirming the panel's decision. [App. 297-298]

After a trial on the issue of damages, the Rosebud Sioux Tribal Court entered its final judgment against BBC on October 16, 2007, awarding money damages to the Tribe in the amount of \$399,353.61 plus \$127,793.15 in interest for BBC's breach of the Contract. [App. 300]

BBC did not appeal that judgment to the Rosebud Sioux Tribe Supreme Court.

Neither did it pay the judgment or any part of it.

In February 2009, the Rosebud Sioux Tribe filed an action in the Tribal Court against BBC and Colombe seeking to pierce the corporate veil of BBC, which would allow the Tribe to seek to collect the 2007 judgment against BBC

from Colombe.<sup>7</sup> [App. 042-054]

In January 2011, while that case was pending in the Tribal Court, Colombe filed an action in the federal district court seeking a permanent injunction against the Tribe, the Tribal Court, and its Chief Judge that would prohibit them from proceeding with the Tribal Court case to pierce the corporate veil of BBC. [App. 001-015] In his complaint, Colombe also sought *de novo* review by the federal court of the 2007 judgment against BBC and an order to vacate that Tribal Court judgment. Colombe argued the Rosebud Supreme Court had no jurisdiction to determine the legal validity of an unapproved modification to a management agreement; in his view, IGRA had given the NIGC exclusive jurisdiction to make such determinations.

The Tribal parties moved to dismiss Colombe's federal action on the grounds that Colombe and BBC had not exhausted available tribal court remedies because BBC had not appealed the 2007 judgment and the case Colombe was asking the federal court to enjoin was still pending in the Tribal Court.

On September 23, 2011, the district court granted the Tribal parties' motion to dismiss in part and denied it in part [App. 367-385; also attached in Appellees'

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<sup>7</sup> Wayne and John Boyd, former partners of Colombe in BBC, were originally named as defendants but was later dismissed from the lawsuit.

addendum]. The court dismissed Colombe's claim for a *de novo* review of the 2007 judgment because BBC had not appealed that judgment to the Tribe's appellate court and therefore had not exhausted available tribal court remedies. However, rather than dismissing the complaint in its entirety, the district court denied the motion to dismiss as to Colombe's claim that the Tribal Court lacked jurisdiction to determine the legal validity of a modification of a management contract. The district court ruled that BBC had exhausted tribal court remedies as to the issue of the "tribal court's jurisdiction to find an illegal modification of the contract" [App. 382], in spite of the fact that BBC had not appealed or cross-appealed any order or judgment of the lower court to the tribal Supreme Court, because BBC had raised the issue in two briefs and the Supreme Court had not discussed the issue. The court ruled that "[a]lthough the Rosebud Supreme Court never specifically addressed BBC's jurisdictional claims, the Court nevertheless made an implicit ruling on the issue when it exercised jurisdiction to find that the Contract had been modified and that the modification was void for failure to obtain NIGC approval." [App. 383]

The parties proceeded to litigate the issue of tribal court jurisdiction in the federal district court. Both Colombe and the Tribal parties moved for summary judgment.

Meanwhile, the Tribe's action to pierce the corporate veil of BBC proceeded in the Rosebud Tribal Court. On April 19, 2012, the tribal court granted summary judgment for the Tribe, thus holding Colombe personally liable for the 2007 judgment against BBC. [RST App. 013-014 ]. Colombe filed a notice of appeal in the Rosebud Supreme Court, but on October 18, 2012 that court dismissed his appeal for his failure to comply with the Tribe's Rules of Appellate Procedure. [RST App. 015-016].

The federal district court ruled that the Rosebud Sioux Tribe Supreme Court did have jurisdiction to determine that the unapproved oral modification of the Contract was legally void. The court granted summary judgment for the Tribal defendants on January 18, 2013 [App. 471-486] and dismissed Colombe's complaint on January 23, 2013. [App. 487]

## **SUMMARY OF THE ARGUMENT**

1. Because BBC did not appeal or cross-appeal to the Tribe's Supreme Court, the district court erred in ruling that BBC had exhausted its tribal appellate court remedies before challenging tribal jurisdiction in the federal court.

A tangential jurisdictional argument raised in a brief without development of argument, or raised within the body of another argument, is not sufficient to satisfy the tribal exhaustion requirement. To satisfy the tribal exhaustion doctrine, a party

must exhaust *all* available tribal appellate remedies. Here, an appeal was available to BBC but BBC did not appeal any final judgment to the Tribe's Supreme Court. Therefore, the district court erred in not dismissing Colombe's complaint in its entirety.

*Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987) is dispositive of the question.

2. The Rosebud Sioux Tribe Supreme Court had subject matter jurisdiction to determine whether an oral modification of the Contract was valid or void. IGRA does not strip tribal courts of jurisdiction to determine the legal validity of a modification of a management agreement. IGRA does not give the NIGC exclusive jurisdiction or any jurisdiction to rule on the legal validity of an unapproved oral agreement to modify a casino management contract in a breach of contract lawsuit between a Tribe and a casino management company.

*Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8<sup>th</sup> Cir. 1996) is dispositive of this issue.

3. Colombe did not exhaust tribal court remedies before challenging tribal jurisdiction on the grounds that a purported failure by the Tribe to comply with an amendment to the Tribe's Constitution has stripped the Rosebud Sioux Tribal Court of lawful authority to act as a court. Colombe did not present that challenge

to appellate court jurisdiction to the Rosebud Supreme Court before bringing his federal action. Therefore, the tribal exhaustion doctrine prohibits the federal court from considering that claim.

4. Since there was a functioning tribal appellate court at all times relevant to this appeal, BBC's claim that it lacked the financial resources to appeal does not excuse BBC's failure to exhaust tribal remedies on grounds of futility.

## **ARGUMENT**

### **I.**

#### **A PLAINTIFF THAT HAS NOT CHALLENGED A TRIBAL APPELLATE COURT'S JURISDICTION BY APPEALING OR CROSS-APPEALING A FINAL JUDGMENT TO THE TRIBAL APPELLATE COURT HAS NOT EXHAUSTED ALL AVAILABLE TRIBAL COURT REMEDIES**

The issue to be decided on the Appellees' cross-appeal is whether BBC exhausted all available tribal appellate remedies on its claim that the tribal Supreme Court lacked jurisdiction to rule on the legal issue that BBC had raised as its defense in the Tribe's breach of contract suit—the legal validity of an unapproved oral modification of a management contract.

The district court ruled that BBC had exhausted available tribal court remedies as to its claim that the Tribal Court lacked jurisdiction, even though BBC had never presented that jurisdictional challenge to the Tribe's Supreme Court by

bringing an appeal or a cross-appeal. That ruling was error. A party who would seek relief from a federal court for a claimed lack of tribal jurisdiction must exhaust *all* available tribal court remedies. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987). An appeal of the final judgment in 2007 to the Tribe's Supreme Court offered a remedy that was available to BBC. BBC did not avail itself of that available remedy. Therefore, BBC failed to exhaust all available tribal remedies and Colombe's complaint should have been dismissed in its entirety.

The tribal exhaustion doctrine was first enunciated by the Supreme Court in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447 (1985) and was further developed in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987). The doctrine requires exhaustion of all remedies available in tribal court before a collateral or parallel federal court action may proceed. The tribal exhaustion doctrine requires the federal court to "stay [ ] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *National Farmers Union Insurance Company*, 471 U.S. at 857, 105 S.Ct. 2447. "It is now settled that principles of comity require that tribal-court remedies *must* be exhausted before a federal district court should consider relief in a civil

case regarding tribal-related activities on reservation land.” *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8<sup>th</sup> Cir. 1997)(emphasis in the original). Federal court restraint is “especially appropriate” where, as here, the issues between the parties grow out of “[t]ribal government activity involving a project located within the borders of the reservation.” *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8<sup>th</sup> Cir. 1996).

There are three primary reasons and purposes for the tribal exhaustion rule. Exhaustion furthers the federal policy of tribal self-government and self-determination, an important part of which is the integrity of the tribal court system. Exhaustion promotes the orderly administration of justice. Exhaustion provides other courts with the tribal courts’ expertise in tribal jurisdictional matters. *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985).

Complete exhaustion of tribal court remedies requires review by tribal appellate courts. “The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including tribal appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of lower tribal courts.” *Iowa Mutual Insurance Co.*, 480 U.S. at 16-17.



Here, the district court ruled that, in spite of BBC's failure to appeal the final judgment, the exhaustion requirement was satisfied because when the Tribe appealed Judge Jones' first decision, in BBC's Appellee's brief, "reading the brief generously to BBC," BBC had maintained that jurisdiction to determine the legality of the Contract modification rests with the NIGC rather than tribal courts and had raised the issue again in its Optional Brief on Rehearing. Even though the Supreme Court did not discuss tribal jurisdiction in its opinion reversing Judge Jones' first decision or in its order granting the Tribe's petition for a rehearing, the district court found that the Rosebud Supreme Court had had an opportunity to address the issue and had made an implicit ruling on the issue by exercising its jurisdiction. [App. 382-383]

It is not difficult to see why the Supreme Court did not discuss or rule on BBC's jurisdictional argument. Jurisdiction was not identified by BBC in its Appellee's brief as an issue to be decided in the appeal. Appellate courts as a general rule are under no duty to address every legal contention made in passing in a brief or rule on every tangential argument that a party may raise or mention in a brief. If a party writing an appellate brief wants to claim error and have an appellate court rule on that claim, the party has a duty to clearly and unequivocally identify the issue as a question to be decided and to expressly ask the court for specific

relief as to that claimed error. An oblique or tangential claim mentioned within the body of another argument, which fails to put the appellate court on notice that the issue raised is an issue to be decided on appeal, coupled with a lack of discussion of such argument by the appellate court, without an appeal of a final judgment, is not sufficient to satisfy the tribal exhaustion requirement.

Here, although it made tangential jurisdictional claims in two briefs, BBC did not actually petition the Supreme Court to vacate its prior opinion for lack of jurisdiction or to grant a rehearing on the issue of tribal court jurisdiction.

Essentially, the district court's ruling would create a new exception to the tribal exhaustion requirement, one that would allow a party to bring a federal claim if the party raised the issue at some time during the course of the litigation in the appellate court even though that party did not seek redress by seeking reversal through an appeal. Neither the Supreme Court or this Court has recognized such an exception.

Even if a party could theoretically exhaust tribal remedies without filing an appeal or cross-appeal, any party that would present lack of tribal jurisdiction as an issue to be decided by an appellate court must expressly and clearly put the court on notice that the party was challenging that court's jurisdiction and was requesting a ruling from the appellate court on that issue. BBC did not do that.

Instead, when the Tribe appealed Judge Jones' first ruling, BBC expressly and affirmatively advised the Supreme Court that BBC was raising no issues to be decided and assigning no errors. In its Appellee's brief, under "Assignments of Error" BBC stated: "BBC has not filed a cross appeal, and assigns no error." [App. 219] In the "Statement of Issues", BBC identified only one legal issue to be decided, whether there had been a breach of the management contract, and it did not present lack of tribal jurisdiction as an issue to be decided in the appeal. [App. 218]

The appellate court cannot be faulted for not deciding or ruling on a question of jurisdiction when BBC expressly advised the court in its brief that it was assigning no errors for the court to consider and the only question the appellate court had to decide was whether BBC had breached the Contract.

This Court has ruled that a party has an obligation to raise issues it wants decided in the appellant's opening brief, to list those issues it was raising on appeal and to present arguments in support of those issues. Failure to follow that rule constitutes abandonment and waiver of the issues. *Nelson v. J.C. Penny Co.*, 75 F.3d 343, 348 (8<sup>th</sup> Cir. 1996).

An appellate court has no obligation to consider an issue mentioned or raised in a brief if a party fails to provide reasons and logical argument for that issue,

*Freeman United Coal Mining Co. v. Office of Compensation Programs*, 957 F.2d 302 (7<sup>th</sup> Cir. 1992), or only makes collateral allusions to arguments, *Bonds v. Coca-Cola Co.*, 806 F.2d 1324 (7<sup>th</sup> Cir. 1986), or asserts the issue in a perfunctory manner without developing argument, *Welsh v. Derwinski*, 14 F.3d 85 (1<sup>st</sup> Cir. 1994), or, as here, mentioning the issue in the body of another argument, *Rotskoff v. Cooley*, 438 F.3d 852, 854 (8<sup>th</sup> Cir. 2006). In its Appellees' brief, BBC made a tangential argument that IGRA had stripped the tribal court of jurisdiction within a brief whose main argument was that the tribal trial court had correctly exercised its jurisdiction by ruling in favor of BBC.

Given the purposes of the tribal exhaustion doctrine, if this Court were to rule that a party can satisfy the requirements of that doctrine without filing an appeal or expressly raising the issue of tribal jurisdiction in a cross-appeal it would seriously undermine the tribal exhaustion doctrine.

The failure of BBC to appeal the final judgment by Judge Jones is, in and of itself, dispositive of the exhaustion question and should have resulted in dismissal of the complaint. By failing to appeal that 2007 judgment, BBC did not give the tribal appellate court a full opportunity to consider and address the issue of its own jurisdiction. Therefore BBC did not exhaust all available tribal appellate remedies.

To allow Colombe to come to federal court and challenge tribal court

jurisdiction when he did not appeal a final judgment to the Tribe's appellate court would frustrate the federal policy of tribal self-government, encroach upon the Tribe's sovereignty, and seriously undermine the authority of the Rosebud Sioux Tribal court.

The trial court erred in ruling that BBC had exhausted tribal court remedies as to the question of the Tribal Court's jurisdiction.

This Court should reverse and dismiss Colombe's complaint in its entirety for failure to exhaust tribal remedies.

## II

### **THE TRIBAL COURT, NOT THE NATIONAL INDIAN GAMING COMMISSION, HAS JURISDICTION TO DETERMINE WHETHER AN ATTEMPT TO ORALLY MODIFY A CASINO MANAGEMENT CONTRACT IS LEGALLY VALID**

If this Court were to determine that BBC did exhaust tribal remedies on its jurisdictional challenge, this Court would then have to decide whether the Rosebud Supreme Court had subject matter jurisdiction to determine the legal validity of an unapproved oral agreement to change an NIGC-approved management contract or whether IGRA had stripped tribal courts of jurisdiction to make such determinations.<sup>8</sup>

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<sup>8</sup> In the Appellant's brief, Colombe frames the issue as: "Whether the District Court erroneously concluded that the Rosebud Supreme Court had

“Tribal courts presumptively exercise civil jurisdiction over the activities of non-Indians on reservation lands ‘unless affirmatively limited by a specific treaty provision or federal statute.’” *Gaming World International, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8<sup>th</sup> Cir. 2003), quoting *National Farmers Union Insurance Company*, 471 U.S. at 853-57, 105 S.Ct. 2447.

Since the tribal court is presumed to have civil jurisdiction over civil disputes involving tribal business arising on the tribe’s reservation unless a treaty or federal statute affirmatively limits tribal court jurisdiction in the matter, the Tribal court had subject matter jurisdiction over this dispute unless IGRA affirmatively eliminates or restricts the tribal court’s jurisdiction.

Colombe contends that IGRA gives the NIGC exclusive jurisdiction to determine whether an unapproved oral agreement to modify a management contract is legally valid. He contends that no court, particularly no tribal court, has jurisdiction to make that determination. In its brief to this Court, BBC contends: “If the Tribe wished to recover money from BBC under the theory that it’s [*sic*] admitted mutual agreement regarding the OER was void for want of NIGC

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jurisdiction to consider whether a mutual agreement to fund an operating expense reserve by setting aside 7.5% of each party’s share of net earnings prior to distribution in replacement of a discretionary operating reserve was a modification of the Management Contract that did not comply with the Indian Gaming Regulatory Act and its regulations?”

approval, then the Tribe's remedy was to request a hearing before the NIGC Chairman." In fact, IGRA did not strip tribal courts of jurisdiction to determine the legal validity of modifications to management contracts and IGRA would not provide the Tribe with any remedy for BBC's breach of contract.

In the Appellant's brief, Colombe is consistently vague as to which particular section or sections of IGRA would give NIGC any jurisdictional authority, let alone exclusive jurisdictional authority, to determine the legal validity of a modification to a management agreement. However, BBC was specific in its Optional Brief on Rehearing to the tribal Supreme Court: BBC contended that 25 U.S.C. §2713 of IGRA provided the only remedy available to the Tribe. [App. 286] (A copy of the statute is included in the Tribal Appellees' Addendum.)

Section 2713 of IGRA does not give NIGC exclusive authority, or any authority, to determine the legal validity of a management contract or an agreement to modify such contract in a breach of contract suit. Section 2713 gives the Chairman authority to impose a civil fine up to \$25,000 on a management company that violates any provision of IGRA. It also gives the NIGC authority to close a tribal casino. It does not affirmatively deprive a tribal court of jurisdiction to resolve civil disputes arising from a claim of breach of a management contract.

In fact, nothing in IGRA nor the accompanying regulations (25 C.F.R.

§§531.1-533.7) gives the Chairman or the NIGC any authority to determine the legal validity of an agreement to modify a management contract in a breach of contract dispute. As this Court recognized in *Bruce H. Lien Co. v. Three Affiliated Tribe*, the “sole focus” of the NIGC Chairman’s “paper review” of a management contract is to determine whether the contract contains the requisite contents of such agreements as set forth by IGRA. *Bruce H. Lien Co.*, 93 F.3d at 1418

IGRA would not give the Tribe any remedy at all for BBC’s breach of the Contract because IGRA does not empower the Chairman or the NIGC to award money damages to a party.

*Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8<sup>th</sup> Cir. 1996) is dispositive of Colombe’s claim that NIGC has exclusive jurisdiction to determine the legal validity of a modification to a management contract. In *Bruce H. Lien Co. v. Three Affiliated Tribes*, this Court expressly ruled that tribal courts, not the NIGC, have jurisdiction to determine the legal validity of a management agreement.

Our interpretation of IGRA and the regulations promulgated thereunder lead to the conclusion that disposition regarding the legal validity of the management contract is beyond the authority of the NIGC. . . . [T]he issue becomes where the decision regarding the contract’s validity is to be made. In the end we are convinced that the question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.



*Bruce H. Lien Co.*, at 1417.

That ruling would necessarily also apply to determinations of the legal validity of a modification of a management contract.

Although IGRA gives the NIGC exclusive authority to determine a contract's compliance with IGRA and its regulations, insofar as determining whether the contract in question meets the statutory requirements of a management agreement, that does not mean, as Colombe argues, that IGRA gives NIGC any authority to determine whether an oral agreement to modify a management contract is legally enforceable. This Court has ruled that tribal courts have jurisdiction to make such determinations, not the NIGC.

As previously indicated, we agree with the District Court's assessment that the NIGC has exclusive jurisdiction to determine a contract's compliance with IGRA and its regulations, but we disagree (as do both parties) that said agency has "exclusive jurisdiction" regarding a contract's legal validity. These are distinct inquiries, and the NIGC itself is on record that it will not resolve the issue of the contract's validity as the matter "is properly before the tribal court." Questions regarding whether IGRA or the NIGC divest the Tribal court of authority to rule on the issues regarding the contract's validity, whether IGRA is applicable to the tribal court action, and whether the validity of the management contract can be affected by an interpretation of Tribal law, are issues relating to the Tribal Court's jurisdiction which should be dealt with first by the Tribal Court itself.

*Bruce H. Lien Co.*, at 1420-21.

Similarly, in *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092 ,

1094 (8<sup>th</sup> Cir. 1999), a casino management company contended that it had made a legally valid oral agreement with the Tribe to modify an approved management contract. This Court ruled that federal regulations and the no-oral-modifications clause in the contract precluded consideration of any subsequent attempts to modify a management agreement without approval by the Chairman of the NIGC, and therefore “these other agreements can have no effect with respect to any of the subject matter encompassed by the Management Agreement.” *Turn Key Gaming, Inc.*, at 1094-95.

If IGRA gave exclusive jurisdiction to the NIGC to decide whether an unapproved management contract or modification of such contract is void, then that would necessarily mean that IGRA stripped all courts, not just tribal courts, of jurisdiction to consider those questions. If Colombe were correct, it would mean that this Court would have to over-rule *Bruce H. Lien Co.* and *Turn Key Gaming*, because in those cases this Court ruled that an unapproved management contract and an unapproved oral agreement to modify a management contract were legally void, without referring the question to the NIGC. Under Colombe’s reasoning, this Court would have ruled on those questions without having had jurisdiction to do so.

The case upon which Colombe primarily relies is *United States. ex. rel. St.*

*Regis Mohawk Tribe v. President R.C. - St. Regis Management Co.*, 451 F.3d 44 (2d Cir. 2006 ), which involved a qui tam action brought by the Tribe seeking a declaratory order from the federal court to void a management contract for an alleged violation of IGRA. The issue in *St. Regis Mohawk* was “whether a district court may exercise original jurisdiction over a declaratory judgment action brought pursuant to the former 25 U.S.C. §81 to void a contract for lack of approval alleged to be required under the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §2701 *et seq.*” *St. Regis Mohawk* at 45-46. In that case, the 2nd Circuit Court held that the Tribe had to exhaust NIGC administrative remedies before seeking declaratory relief for a violation of the Indian Gaming Regulatory Act in federal court.

The facts and legal issues in *St. Regis Mohawk* are clearly distinguishable from those in this case. The St. Regis Mohawk Tribe was seeking relief in federal court for a claimed violation of IGRA. The Rosebud Sioux Tribe was not seeking relief from a federal court. It was seeking relief in Tribal Court, as agreed by the parties in the Contract. Most importantly, unlike the St. Regis Mohawk Tribe, the Rosebud Sioux Tribe was not seeking relief for a violation of IGRA. The Rosebud Sioux Tribe was seeking relief—money damages—for a breach of a contract. The St. Regis Mohawk Tribe sought a declaratory judgment from the federal court to void

a management contract. The Rosebud Sioux went to the tribal court to enforce the terms of a Contract.

BBC mis-characterizes the Tribe's claim against BBC as a claim based on an IGRA violation. The district court was correct in ruling that the Rosebud Tribe's claim and cause of action arose from a violation of the Contract, not from a violation of IGRA. The Rosebud Sioux Tribe did not claim BBC owed it money because BBC had violated IGRA. The Rosebud Sioux Tribe claimed BBC owed it money because BBC took \$415,856 from the Tribe that it had no right to take under the Contract. The *St. Regis Mohawk Tribe* case has no application to this case.

The Tribe agrees that IGRA does not provide the Tribe with a cause of action. The Tribe has never argued, in the tribal court or the federal court, that IGRA creates a private cause of action. The Tribe's cause of action arises from the Contract. As the district court ruled, the Rosebud Sioux Tribe did not seek relief for a violation of IGRA. It sought relief for a violation of the Contract.

As *Bruce H. Lien Co. v. Three Affiliated Tribes* makes clear, the tribal court was the proper body to first consider the legal validity of the oral agreement in question, subject to later review by the federal court after exhaustion of tribal remedies.

The only forum with jurisdiction to consider the legal validity of the modification to the Contract, other than federal court after exhaustion of remedies, was the Rosebud Sioux Tribal Court.

The district court was correct in ruling that there was “no impediment to a Tribal Court’s jurisdiction to declare an unapproved oral modification of a casino management contract void without referring the matter to the NIGC.” [App. 482]

This Court should affirm that ruling.

### **III.**

#### **COLOMBE FAILED TO EXHAUST TRIBAL COURT REMEDIES BEFORE BRINGING HIS CLAIM IN FEDERAL COURT THAT THE ROSEBUD SIOUX TRIBE SUPREME COURT LACKS JURISDICTION TO RULE IN THIS OR IN ANY OTHER CASE**

Colombe seeks a ruling from this Court that an amendment to the Tribe’s Constitution has effectively terminated the authority of the entire Rosebud Tribal Court system and that every decision made by the Rosebud Sioux Tribal Court and Supreme Court since 2007 is invalid and void. Colombe requests this Court to enter a ruling that would nullify the entire tribal court system on the Rosebud Sioux Reservation. He contends that he should be excused from seeking a remedy in the tribal appellate court because he has determined that that court has no jurisdiction to rule in this or any other case. He asserts in his brief that he was not bound to

bring this challenge to the appellate Court whose jurisdiction he challenges because the Rosebud Sioux Tribal Supreme Court is “authority-less”. (Appellant’s brief, page 25).

Based on his own interpretation of tribal law, Colombe contends the Rosebud Sioux Tribal Supreme Court has had no authority to act as a court since 2007. He makes that claim in federal court without first making it in the Tribe’s Supreme Court. The district court ruled that Colombe had failed to exhaust tribal remedies as to that jurisdictional claim.

The issue to be decided is whether Colombe exhausted tribal court remedies before bringing his claim in federal court that the Rosebud Sioux Tribe’s Supreme Court has been ruling on cases for the past six years in violation of the Tribe’s Constitution.<sup>9</sup>

Because Colombe did not bring this jurisdictional claim to the Rosebud Sioux Tribe Supreme Court, the federal court is precluded from considering this jurisdictional challenge by Colombe by the tribal exhaustion rule set forth in *Iowa*

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<sup>9</sup> In the Appellant’s brief, Colombe frames the issue as: “Whether the District Court erroneously concluded that BBC did not exhaust tribal court remedies despite the Rosebud Sioux Tribal Council’s failure to implement constitutional amendments regarding a separate and distinct Tribal Court which included appellate procedure for an appellate court and which were properly approved in a Secretarial election, thus depriving the Supreme Court of the Rosebud Sioux Tribe the constitutional power to act?”

*Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987) and *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856, 105 S.Ct. 2447 (1985).

Colombe first raised the argument that an amendment to the Tribe's Constitution divested the Tribal Court of jurisdiction in a motion to dismiss the Tribe's action to pierce BBC's corporate veil in the Tribal Court [Doc. 5-10]. On April 26, 2010, Chief Judge Sherman Marshall issued an order denying Colombe's motion to dismiss. Colombe then moved the tribal Supreme Court for a discretionary interlocutory appeal. [App. 354-357] That motion was denied.[App. 358-359]

A plaintiff does not exhaust tribal court remedies by filing a request for a discretionary interlocutory appeal. See *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9<sup>th</sup> Cir. 2009)(rejecting plaintiff's argument that she had exhausted Tribal Court remedies by filing an interlocutory appeal to Tribal appellate court where Tribal appellate court had held that rules of Tribal civil procedure prevented it from considering plaintiff's interlocutory appeal.)

Colombe raised his claim that the Rosebud Tribe has no tribal court with any authority in the federal district court in his motion for a trial on a permanent injunction [App. 398-401] and a motion for reconsideration [App. 386-389]. The

court ruled on those motions on February 12, 2012, denying Colombe's motion. The Tribe's action to pierce BBC's corporate veil was still pending in the tribal court and therefore, the court ruled, Colombe had not exhausted tribal remedies as to this jurisdictional claim.

In Colombe's brief to this Court Colombe neglects to advise this Court of certain important material facts: (1) the Tribe's action to pierce the corporate veil of BBC ended in a final judgment against BBC on April 19, 2012, when the court entered summary judgment for the Tribe [RST App. 013-014]; (2) After that final judgment, Colombe filed a notice of appeal, but the tribal Supreme Court dismissed his appeal on October 18, 2012 because he did not file the financial statement required by the Tribe's Rules of Appellate Procedure. [RST App. 015-016]

Those facts mean that Colombe's claim for injunctive relief to stop that case from proceeding in the tribal court is moot. A final judgment has been entered, the appeal was dismissed, and there is no longer any pending case to enjoin. Those facts also mean that Colombe failed to exhaust available tribal appellate remedies before raising this challenge in the district court. Therefore, the federal court cannot consider his claim.

Even if Colombe had exhausted Tribal court remedies, which he clearly did not, this court would not have jurisdiction to consider or rule on the argument that



he raises. Questions regarding interpretation of Tribal constitutions and amendments thereto are for Tribal courts, not federal courts, to resolve. *In re Sac and Fox Tribe of the Mississippi In Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 763-64 (8<sup>th</sup> Cir. 2003); *Runs After v. United States*, 766 F.2d 347, 352 (8<sup>th</sup> Cir. 1985)(holding that federal district courts lack jurisdiction to resolve disputes involving questions of interpreting of the Tribal constitution and Tribal law.)

The district court correctly ruled that Colombe failed to exhaust tribal court remedies on his jurisdictional claim that the Rosebud Sioux Tribal Court no longer has the constitutional power to act. The district court's ruling on that issue should be affirmed.

#### IV.

##### **A PLAINTIFF'S CLAIM THAT HE LACKED THE FINANCIAL RESOURCES TO APPEAL TO THE TRIBAL APPELLATE COURT DOES NOT EXCUSE HIS FAILURE TO EXHAUST TRIBAL REMEDIES**

Colombe contends that he should be excused from the tribal court exhaustion requirement because BBC was financially unable to comply with a tribal law requiring proof of financial responsibility before filing an appeal to the Rosebud Sioux Tribe Supreme Court. Colombe also contends that an appeal was unnecessary because "BBC challenged the tribal court's invalid assertion of

jurisdiction to the highest level and lost.” (Appellee’s brief, p. 39)

The issue to be decided is whether a federal plaintiff’s claim of insolvency excuses his failure to seek a remedy in the tribal appellate court on the grounds of futility.<sup>10</sup>

In *National Farmers Union*, the Supreme Court noted that exhaustion would not be required “where exhaustion would be futile because of the lack of adequate opportunity to challenge the court’s jurisdiction.” *National Farmers’ Union*, 471 U.S. at 856, n. 21, 105 S.Ct. at 2454, n. 21 (citation and internal quotations omitted).

Failure to exhaust tribal remedies cannot be excused when the absence of appellate review stems from the plaintiff’s own failure to adhere to the Tribe’s rules of appellate procedure. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990 (8<sup>th</sup> Cir. 1999). In *Davis*, a former tribal employee sued her tribe in tribal court. The tribal court ruled against her. She wanted to appeal to the tribal appellate court, but her attorney failed to file a timely notice of appeal and pursuant to tribal law, her appeal was dismissed. She then filed a civil action in the federal district

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<sup>10</sup> BBC frames the issue as: “Whether the District Court erroneously concluded that BBC not exhaust tribal court remedies when BBC’s financial insolvency precluded access to an appeal to the Supreme Court of the Rosebud Sioux Tribe and any further action within the tribal court would have been futile?”

court, arguing that an appeal was not available to her because of her attorney's failure to file a timely notice of appeal, so she had exhausted all tribal remedies that were available to her.

The district court dismissed her federal action for failure to exhaust her tribal appellate remedies and this Court of Appeals affirmed, stating: "We do not think that the exhaustion requirement has been satisfied when the absence of tribal appellate review stems from the plaintiff's own failure to adhere to simple deadlines." *Davis*, at 992.

Similarly, here, the exhaustion requirement has not been satisfied when the absence of appellate review stems from Colombe's own failure to adhere to tribal law.

Colombe's failure to seek a remedy in the Tribe's appellate court cannot be excused on the grounds of futility because he had an opportunity to seek redress in the appellate court but did not do so.

Futility is an exception to other exhaustion requirements. In *Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S.Ct. 18, 19 (1981)(per curiam), a habeas case, the Supreme Court explained that futility exists "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."

Thus, failure to appeal to a tribal appellate court would be excused for futility if no tribal appellate court existed, as was the case in *Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8<sup>th</sup> Cir. 1997). But in this case, the Rosebud Tribe had an appellate court that has been functioning as a court at all times relevant to this case. Colombe and BBC had opportunities to appeal. They just did not take those opportunities.

Colombe also argues that his jurisdictional challenge was already presented to and decided by the Supreme Court and therefore an appeal on this issue of jurisdiction would have been redundant. However, the facts disprove Colombe's claim that "BBC challenged the tribal court's invalid assertion of jurisdiction to the highest level and lost." (Appellee's brief, p. 39).

There were three final judgments in the tribal court and neither BBC or Colombe appealed any of them. First, in the breach of contract action, when the Tribe appealed the first final judgment to the tribal appellate court in 2003, BBC could have cross-appealed, assigning lack of jurisdiction by the tribal court as error and an issue to be decided by the appellate court. BBC did not cross-appeal, or assign any error, or identify tribal jurisdiction as an issue to be decided.

In 2007, after the tribal court entered a final judgment awarding money damages to the Tribe, BBC did not appeal.

Colombe had a third opportunity to appeal a final judgment and challenge tribal court jurisdiction in 2012, after the Tribal Court granted summary judgment to the Tribe on its action to pierce BBC's corporate veil. But the Supreme Court dismissed his appeal because he did not file the financial statement required by tribal law.

Because Colombe and BBC have never appealed or cross-appealed any decision by the lower court to the appellate court, the tribal Supreme Court has never considered or ruled on Colombe's jurisdictional challenges. BBC's assertion that it "challenged the tribal court's invalid assertion of jurisdiction to the highest level and lost" is simply not true.

Neither insolvency or futility can excuse BBC and Colombe's failures to appeal their claims of lack of tribal jurisdiction to the Tribe's Supreme Court. The district court's ruling should be affirmed.

### **CONCLUSION**

This Court should reverse the district court's denial of the Tribal parties' motion to dismiss for failure to exhaust tribal remedies and dismiss the complaint. The district court's rulings on the issues raised by the Appellant should be affirmed.

DATED this 24<sup>th</sup> day of May, 2012.

Respectfully submitted,

BY: /s/ Dana L. Hanna

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

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DATED this 24<sup>th</sup> day of May, 2013.

/s/ Dana L. Hanna

Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on **May 24, 2013**, I electronically filed the foregoing Appellant's Brief with the clerk of the court for the United States Court of Appeal for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Dana L. Hanna

Attorney for Appellant