

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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## 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 (8th 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 My 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 tot he 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

#### 1. 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 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.*  
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 Mobridge, 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 Boyd's 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.

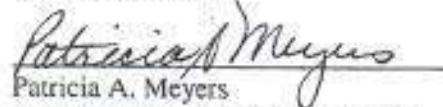
Id.

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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