The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back (Part III of South Dakota Law Review Trilogy)
THE CRAZY HORSE MALT LIQUOR CASE: FROM TRADITION TO MODERNITY AND HALFWAY BACK*

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I. INTRODUCTION AND BACKGROUND

Tasunke Witko, or Crazy Horse as he is known in English, is a revered nineteenth century warrior and spiritual leader of the Oglala Band of the Lakota (or Sioux) Nation. He is renowned for both his skills as a warrior and his high

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1. Lakota is the traditional name of the Sioux people within the framework of their own language and culture. The other two related linguistic and cultural groups are the Dakota and the Nakota. The Lakota people represent the most western bands of the Brule or Western Sioux. The Oglalas are one of the Brule bands:

The nation is comprised of three groups, two eastern and one western. The names of the groups mean “an alliance of friends” and represent a dialectical as well as a geographic distinction. All three groups understand one another’s dialects. Each has subgroups or divisions.

Dakota
The Dakota are also known as the Isanti. The name comes from the Dakota words isan or knife and i, meaning “to live or dwell.” Long ago the Isanti encamped in areas where they gathered stone for making knives, primarily across the Missouri River to the northeast. Isanti eventually became Santee, and their subgroups are:

Mdewakantunwan-people of Spirit Lake;
Wahpekute-leaf shooters (or to shoot among the leaves);
Wahpetunwan-people living among the leaves, or people of Lake Traverse; and
Sissetunwan-people of the marsh.

Nakota
The Nakota are also known as Ihanktun, loosely meaning “village at the end” because their villages were far to the southeast across the Missouri River. Ihanktun was anglicized into Yankton, and their subgroups are:

I Hank tun wan-people of the end; and
I Hank tun wanna-little people of the end (meaning a smaller group).

Lakota
The Lakota were also known as Titun wan, meaning “to live where they can see” and also “people of the prairie.” Titun wan was anglicized into Teton. The Lakota lived west of the Missouri River, and their subgroups are also known as Oceti Sakowin or “Seven Fires,” popularly referred to as the Seven Council Fires:

Oglala-to scatter;
Sicangu-burnt leg or thigh;
Hunkpapa-those who camp at the end;
Mniconjunto plant by the water;
Oohenumpa-two boilings or two kettles;
spiritual concern for the welfare of his people. He also often seems to stand apart as a mysterious, even mystical, individual. His picture was never taken by a photographer. He never went to Washington, D.C. to meet the “white fathers.” He never signed a treaty with the United States government. He never claimed to be a chief or tribal leader. He was ultimately killed in 1877, when he was held captive pursuant to his “surrender” at Camp Robinson in Nebraska. This, too, is shrouded in mystery.3

Near mythic to his own people, he also became an icon of the Plains' Indians to society at large. He was the glorious embodiment of mystery and resistance that met his tragic demise at the end of the trail. Such national icons,
especially those minted in romantic stereotypes, often become figures that are expropriated by the dominant society to support advertising and to enhance commercial profit. It is, in part, the quintessential American way.

Such was the fate\textsuperscript{4} of Crazy Horse until his modern day descendants, acting through his Estate, took dramatic legal action to halt such practices, especially in the notorious context of using the name “Crazy Horse” to promote a malt liquor product\textsuperscript{5} allegedly named in his honor.\textsuperscript{6} This multifaceted legal history involves significant litigation in both tribal and federal court involving both tribal and federal law issues. These diverse forums had varying conceptions of substantive law that were often complementary, but were mostly oppositional in nature. More striking, however, is the significant interplay between modern law, especially in regard to jurisdiction, and traditional Lakota law, reaching all the way back to 1877 for rules of descendancy and inheritability. Modernity and tradition came together in an uneasy and cautious embrace. This essay tracks that unease and caution.

\textsuperscript{4} At the time of the lawsuit, the name Crazy Horse adorned hundreds of products including “a Liz Claiborne line of clothing and a chain of American strip clubs.” It is also the name of a well-known Paris night club and dance hall known as the Crazy Horse Saloon. Kihm Winship, \textit{A Story Without Heroes: The Cautionary Tale of Malt Liquor}, \textbf{ALL ABOUT BEER}, May 2005, Vol. 26, Number 2, available at http://home.earthlink.net/~ggghostie/maltliquor.html. It is also the name of rocker Neil Young’s band. See also the new documentary film about the Parisian Crazy Horse Saloon called “Crazy Horse” and directed by Frederick Wiseman. A.O. Scott, \textit{The Agony Behind an Erotic Club’s Ecstasy}, \textit{N. Y. Times}, Jan. 18, 2012, at C-1.

\textsuperscript{5} The history of malt liquor itself is fascinating. Developed in the aftermath of the repeal of prohibition (Amendments XVIII and XXI to the United States Constitution) in 1933, it was designed to produce a beer that would use less malt, but have more of a “kick.” Most often, malt liquor is defined as an American beer characterized by high alcohol content (usually more than 7.5%), thin body, light color, very little hop character, and a variety of sweetish flavors and off-flavors. Originally envisioned as an upscale product for those with “champagne” tastes (e.g. 8-ounce cans of Country Club Malt Liquor), it never quite caught on. Only subsequently, with the focus on the “kick” (e.g. Colt 45 Malt Liquor), did the product begin to sell in substantial quantities. Marketing also began to target minority communities (e.g. Budweiser’s “Soul Grabber” Malt Liquor). The size of the product also expanded from the demure 8 ounce cans to 40 ounce bottles. And then, of course, it decided to go West with Crazy Horse Malt Liquor. Kihm, \textit{supra} note 4.

\textsuperscript{6} The G. Heileman Brewing Company was the bottler and distributor of Crazy Horse Malt Liquor, manufactured by the Hornell Brewing Company, and owned by the Vultaggio brothers of Brooklyn, New York. See illustration of bottle’s label following Section I.
II. THE NAME CRAZY HORSE AND COMMERCIAL FREE SPEECH

This modern legal and cultural saga began in 1992, when the Federal Bureau of Alcohol, Tobacco and Firearms (BATF) issued a Certificate of Label Approval (COLA) to the G. Heileman Brewing Company as the bottler and distributor of Crazy Horse Malt Liquor.\(^7\) The certification process includes considerations as to whether the label is "misleading, fraudulent, or obscene."\(^8\)

In March of 1992, Hornell introduced Crazy Horse Malt Liquor in fourteen

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7. Hornell Brewing Co. Inc. v. Brady, 819 F. Supp. 1227, 1229 (E.D.N.Y. 1993). Plaintiff Don Vultaggio is Chairman and Co-owner of Hornell Brewing Company. Pursuant to BATF regulations, the COLA is issued to the bottler of the product. Id.
8. Id.
Eventually, the liquor was distributed through over 200 wholesalers and 100,000 retailers to thirty-one states. The introduction of Crazy Horse Malt Liquor into commercial markets drew sharp criticism both inside and outside of Indian country, especially in South Dakota, the traditional homeland of the Great Sioux Nation. This indignation soon reached Congress. Both (then) South Dakota Senators Larry Pressler and Tom Daschle wrote to Hornell expressing their displeasure.

These concerns and the alleged failure of Hornell to adequately respond led Congress to consider (and ultimately adopt) remedial legislation. Enacted on October 1, 1992, Section 633 of Public Law 102-393 read as follows:

Upon the date of enactment of this Act, the Bureau of Alcohol, Tobacco, and Firearms (ATF) shall deny any application for a certificate of label approval, including a certificate of label approval already issued, which authorizes the use of the name Crazy Horse on any distilled spirit, wine, or malt liquor product; Provided, that no funds appropriated under this Act or any other Act shall be expended by ATF for enforcement of this section and regulations thereunder, as it related to malt beverage glass bottles to which labels have been permanently affixed by means of painting and heat treatment, which were ordered on or before September 15, 1992, or which are owned for resale by wholesalers or retailers.

A federal lawsuit followed with Hornell Brewing Company seeking declaratory and injunctive relief. Hornell claimed that the statute violated the First Amendment, the equal protection guarantee and due process guarantee of the Fifth Amendment, constituted an unconstitutional bill of attainder, and effectuated a taking of property without just compensation in violation of the Fifth Amendment. On cross motions for summary judgment, the district court granted summary judgment in favor of the plaintiffs based on its finding that Section 633 of Public Law 102-393 violated the First Amendment.

The district court’s First Amendment analysis considered Section 633 of Public Law 102-393 as an attempt to regulate commercial speech and therefore applied the four prong test drawn from Central Hudson Gas & Electric Corp. v.

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9. Id.
10. Id. at 1230. According to Hornell, Crazy Horse Malt Liquor was intended as the first in a series of Hornell beverages designed to “celebrate the American West.” Id. Crazy Horse Malt Liquor is no longer manufactured or distributed.
11. Id.
12. Id. Contending that “defamation of this hero is an insult to Indian culture,” Senator Pressler urged Hornell to either change the malt liquor name or donate proceeds from the sale of the product to Native American causes.
15. Id.
16. Id.
17. Id. at 1228. Summary judgment was granted in favor of the defendant federal government on claims alleging violations of the due process and equal protection clauses of the Fifth Amendment, the taking of property without just compensation in violation of the Fifth Amendment, Bill of Attainder Clause of Article I, and separation of powers principle. Id.
18. Id. at 1233.
First, the expression must be protected by the First Amendment; that is, it must concern lawful activity and not be misleading. Second, the government must establish a substantial interest. Third, the regulation must directly advance the governmental interest asserted. Finally, the regulation must be no more extensive than necessary to serve the interest asserted.

In this broad context, the district court made several basic legal and factual determinations. As an initial matter, the court noted that the Crazy Horse label was entitled to First Amendment protection because it was legitimate commercial speech that concerned lawful activity and was not misleading. Despite this general protection of commercial speech, it is not absolute and may be limited if the government has a substantive interest in regulating the commercial speech. Such regulation may not be premised on the mere offensiveness of the speech relative to the name or label of the product.

The district court recognized a substantial governmental interest in "protecting citizens from the problems associated with alcohol." Given the empirical studies demonstrating particularly harmful effects of alcohol found within Native American society, the court found that "the government's interest in preventing further alcohol abuse and its resultant problems is most certainly substantial."

Such substantial governmental interest is a necessary but not sufficient condition for placing limits on commercial free speech. After determining that the government had met the substantial interest prong, it continued its inquiry by addressing additional elements, including the requirements that the planned regulation directly advance the government's (substantial) interest and that it be proportional to the interest asserted.

These more nuanced demands were not met by the government's ban on Crazy Horse Malt Liquor. The direct advancement prong is essentially a means and ends question, one that must be adequately answered by the party seeking to restrict the speech. The court found that the asserted nexus between the marketing and sale of Crazy Horse Malt Liquor and its adverse effects on Native Americans lacked empirical confirmation, which made the government's theory "too remote and speculative" to satisfy the third prong.

The district court also found that the statute did not satisfy the fourth prong's proportionality requirement. While there is usually considerable

21. Id. at 1233.
22. Id. at 1234. See e.g., Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686 (6th Cir. 1981).
24. Id. at 1235-36.
25. Id. at 1236-38.
26. Id. at 1236 (citing Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 95-96 (1977)).
28. Id. at 1238.
deference accorded to the government in this area, it is not infinite and in this instance the government’s prohibition was not sufficiently limited to reservations or other geographic areas with a highly concentrated Native American population.29

III. LITIGATION IN THE ROSEBUD SIOUX TRIBAL COURT

A. ROSEBUD SIOUX TRIAL COURT

With the failure of federal legislation to halt the production, advertising, or sale of Crazy Horse Malt Liquor, the descendants of Crazy Horse turned to litigation in the Rosebud Sioux Tribal Court. This litigation was brought in the name of the Estate of Tasunke Witko.30 Mr. Seth Big Crow,31 a descendant of Crazy Horse, was appointed by the Rosebud Sioux Tribal Court – pursuant to his application – as the Administrator of Crazy Horse’s Estate.32

Mr. Big Crow, on behalf of the Estate, brought an action against Heileman Brewing and Hornell Brewing in the Rosebud Sioux Tribal Court seeking a declaratory judgment, monetary damages, culturally appropriate damages, an accounting, and injunctive relief.33 The essence of the Estate’s claims was that the defendants’ actions, as the manufacturers and distributors of Crazy Horse Malt Liquor, invaded the Estate’s traditional Lakota right to control the use of the name Crazy Horse and negligently and intentionally inflicted emotional distress on the members of the Estate through its sale and distribution of “Original Crazy Horse Malt Liquor.”34 The Estate also asserted two federal causes of action based on the Indian Arts and Crafts Act35 and the Lanham Act.36

The defendants made a special appearance and moved to dismiss the

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29. Id. at 1239.
30. Tasunke Witko is the name of Crazy Horse in the Lakota language.
31. Mr. Big Crow is now deceased.
33. Id. at 1-2. More specifically:
   The complaint alleged that the damages arose from the Defendant’s manufacturer, sale and distribution of the “Original Crazy Horse Malt Liquor.” The claim of Plaintiffs were [sic] premised on an ownership right in the nickname “Crazy Horse” which Plaintiffs allege belongs to the estate of Tasunke Witko. The Plaintiffs also asserted that the use of the appellation “Crazy Horse” on Crazy Horse Malt Liquor constitutes defamation, violates Plaintiffs’ right of publicity, and constitutes negligent and intentional infliction of emotional distress. The complaint also alleges that the use of the brand name “Crazy Horse” malt [liquor] and the product’s packaging falsely suggest that the beer product is of Indian origin and therefore, violates the Indian Arts and Crafts Act and also violates the Federal Lanham Act by being false and misleading so as to suggest an affiliation with the heirs of Tasunke Witko.

Id.
34. Id. at 2.
complaint for lack of both personal and subject matter jurisdiction. Judge Stanley Whiting, sitting pro tem, ultimately ruled that the tribal court did not possess personal jurisdiction over the defendants and dismissed the complaint filed by the Estate of Crazy Horse.

1. Personal Jurisdiction

The trial court’s personal jurisdiction analysis turned on its interpretation of the Rosebud Sioux Tribal Law and Order Code’s provision on long arm jurisdiction. The trial court noted that the defendants did not transact any business on the Rosebud Sioux Indian Reservation, nor did they own any property there. The trial court therefore focused its attention on whether the defendants committed tortious acts within the Rosebud Sioux Reservation.

Judge Whiting answered this question in the negative based on his analysis of the “minimum contacts” requirement of International Shoe Co. v. Washington. More specifically, he focused on the elements articulated in Burger King Co. v. Rudzewicz, that due process is satisfied if a non-resident defendant has “purposefully directed” his activities within the forum and that alleged injuries arise out of or relate to those activities. Judge Whiting found that no ongoing business relationships or contracts existed between the plaintiff and defendants. He also found that Crazy Horse Malt Liquor was neither marketed nor sold in South Dakota or on the Rosebud Sioux Reservation. Therefore, there were insufficient minimum contacts to satisfy due process and to uphold any finding of personal jurisdiction.

2. Subject Matter Jurisdiction

Judge Whiting also provided a glancing analysis of Montana v. United

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38. Id. at 22.
39. Rosebud Sioux Tribal Law and Order Code Sec. 4-2-7(A) provides:
   A) To the greatest extent consistent with due process of law, any person, whether or not a citizen, resident, or present on the reservation, who in person or through an agent does any of the acts enumerated in this section, thereby submits said person or his personal representative to the jurisdiction of the Tribal Court as to any cause of action arising from doing any of the following acts within the Rosebud Indian Reservation:
      1) The transaction of any business;
      2) The commission of a tortuous [sic] act;
      3) The ownership, use or possession of any property, real or personal.
   Id.
41. Id. Both the Tribal Code and the trial court’s opinion consistently use the word “tortuous” instead of “tortious.”
42. Id. at 12 (citing 326 U.S. 310 (1945)).
44. Estate of Tasunke Witko, Slip Opinion at 13 (Rosebud Sioux Tr. Ct. 1994).
45. Id. at 13.
46. Id.
47. Id. at 14.
the seminal decision of the United States Supreme Court on tribal court (civil) subject matter jurisdiction over non-Indians. Judge Whiting apparently thought that Montana was an offshoot of (long arm) personal jurisdiction and concluded that "Montana and its protégé [sic] does not grant jurisdiction to the tribal court under the existing factual scenario." Judge Whiting dismissed the case for a lack of personal jurisdiction, but made no express finding on the issue of subject matter jurisdiction.

B. ROSEBUD SIOUX SUPREME COURT

The Crazy Horse Estate appealed the dismissal to the Rosebud Sioux Supreme Court. The Court heard the case en banc with all six of its justices participating and unanimously reversed the decision of Judge Whiting. The

50. Id. at 15-16. In addition, Judge Whiting ruled that the plaintiff estate did not satisfy its evidentiary burden in regard to the federal causes of action under the Lanham Act and the Indian Arts and Crafts Act. Id. at 16-20.
51. Id. at 22.
53. The Rosebud Sioux Supreme Court usually sits as a panel of three judges. The court on its own motion ordered that the appeal be heard en banc. See Rules of Procedure Rosebud Sioux Tribal Court of Appeals, Rule 20. (Amended Sept. 19, 1988). The Rule provides:
(a) When Hearing or Rehearing en Banc Will be Ordered. A majority of the Rosebud Sioux Appellate Justices who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. (b) Suggestion of a Party for Hearing or Rehearing en Banc. A party may suggest the appropriateness of a hearing or rehearing en banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard en banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such suggestion made by a party. Such a request must be in writing and shall be filed with the Notice of Appeal or in the case of a rehearing with the petition for rehearing.
Id. This appeal clearly involved "a question of exceptional importance." Id.
54. Estate of Tasunke Witko, 23 INDIAN L. REP. at 6113 (Rosebud Sioux Sup. Ct. 1996). As a result, all six of the Justices participated in the hearing and decision of the case. Oral argument was heard on March 29, 1996 at the University of South Dakota School of Law in Vermillion, South Dakota. Id. Two amicus briefs were also filed by Professors Nell Jessup Newton and Joseph Singer and Professors Oliver R. Goodenough and Nathan Bruce Duthu. Id. at nn 14-15. See Rosebud Sioux Supreme Court Appellate Rule 7 "Contents and Form of Briefs," which provides (in part):
All briefs shall be served and filed in accordance with the applicable provisions of the Law and Order Code of the Rosebud Sioux Tribe, governing the action. The brief of the Appellant shall contain:
1. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes or other authorities cited, with reference to the pages of the brief where they are cited;
2. A statement of issues presented for review;
3. A statement of the case, indicating the nature of the case, the course of proceedings in Tribal Court, and its disposition in Tribal Court;
court’s opinion identified two essential issues, namely jurisdiction, both personal and subject matter, and the lower court’s analysis of the federal causes of action.\textsuperscript{56}

1. Personal Jurisdiction

Before addressing the issue of personal jurisdiction, the court reviewed the appropriate standard to be applied by a trial court when presented with a motion to dismiss for lack of jurisdiction.\textsuperscript{57} Inasmuch as the Rosebud Sioux Tribal Court Rules of Civil Procedure are directly patterned on the Federal Rules of Civil Procedure, the court identified and applied the appropriate federal standard namely “that the plaintiff needs to make only a \textit{prima facie} showing of jurisdictional facts to avoid a dismissal and all factual questions are resolved in the plaintiff’s favor.”\textsuperscript{58}

In light of this standard, the court found the following factual assertions of the plaintiff/administrator Seth H. Big Crow in the complaint, personal affidavit, and various exhibits as particularly relevant to the personal jurisdiction issue:

These include, but are not limited to, the following: assertions that the defendants continuously advertised and sold other alcoholic beverages such as “Old Style,” “Schmidt’s,” and “Special Export” in South Dakota and on the Rosebud Sioux Reservation; that the defendants continuously advertised and sold other non-alcoholic beverages such as “Arizona Iced Tea,” “Arizona Mucho Mango Cowboy Cocktail,” and “Arizona Strawberry Punch Cowboy Cocktail” in South Dakota and on the Rosebud

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4. An itemization of all assignments of error or legal or factual issues desired to be considered in the appeal[.]
5. An argument, which shall contain the contentions of the Appellant with respect to the issues presented, the reasons therefore, with citations to the authorities, statutes and parts of the record relied upon;
6. A short conclusion stating the precise relief sought; and
7. A request for oral argument, if argument is desired, after the conclusion stating the reasons why argument is needed and why the Court should not decide the matter based on briefs and record. Or, the Court may on its own motion, grant oral argument. The decision to grant oral argument shall be discretionary with the Chief Justice.

The brief of the Appellee shall conform to the requirements outlined above for Appellant’s brief. The Appellant shall be entitled to file a reply brief within fifteen (15) days subsequent to service of Appellee’s brief.

All briefs filed with this Court shall be limited to twenty-five (25) pages, exclusive of pages containing the table of contents, tables of citations, and any addendum included as exhibits, unless otherwise ordered by the Court. All briefs shall be submitted on 8 1/2 X 11” paper only and shall be typed and double spaced and shall be attached at the left margin.

\textit{Amicus Curiae} Briefs, which may be filed with leave of the Court, shall be served and filed after leave is granted. \textit{Amicus Curiae} shall conform to the requirements of Appellant’s brief.


56. \textit{Id. at} 6106.
57. \textit{Id. at} 6107.
58. \textit{Id.} Presenting such a \textit{prima facie} case does not guarantee jurisdiction over the defendants at trial. The court retained discretion to take further evidence at a pretrial hearing, whereon the plaintiff must prevail by a preponderance of the evidence. \textit{Id.} (citing Lake v. Lake, 817 F.2d 1416, 1420 (9th Cir. 1987)).
Sioux Reservation; that defendants made at least one telephone call to, and sent at least one package of allegedly defamatory materials to plaintiff/administrator on the Rosebud Sioux Reservation, and that the defendants’ advertising label on each bottle of “Original Crazy Horse Malt Liquor” specifically exalted and targeted the forum reservation which was the home of the decedent Crazy Horse and is the home of the plaintiff/administrator.59

With these facts in hand, the court analyzed them to determine if they satisfied the “minimum contacts” due process test60 set out in Calder v. Jones,61 and Burger King Corp. v. Rudzewicz.62 From these cases, the court identified the key questions as whether the defendant engaged in acts that were “purposefully directed” to the forum, whether the defendant knew the plaintiff would suffer the “effect” of defendant’s activities within the forum, and whether all of this was reasonably foreseeable to justify “haling” the defendant into the forum’s jurisdiction.63

The court answered yes to all these questions and stated that when assessing personal jurisdiction, the inquiry focuses on “the relationship among the defendant, the forum, and the litigation.”64 The court noted that three elements are considered in such an analysis.65 First, the non-resident defendant’s activities are purposefully directed toward the forum or the forum’s residents. Next, the claims must arise out of or relate to the defendant’s forum-related activities. Finally, the exercise of jurisdiction must be reasonable in that it “must comport with fair play and substantial justice.”66

Applying these elements, the court found several ways in which defendants availed themselves of the forum. The defendants sold and advertised their non-

59. Id. at 6107-08 (footnotes omitted). See the Crazy Horse Malt Liquor label following Section I, which expressly states:

Id.

60. Id. at 6108-09. The Court applied the federal due process standard based on its reasoning that:
   And while this court has no doubt that traditional Lakota notions of due process that provide everyone the opportunity to be heard before making a decision are met in this case, it is, nevertheless, necessary to also apply the federal due process “minimum contacts” analysis. This is so because as the Supreme Court announced in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, the proper extent of tribal court jurisdiction is ultimately a matter of federal (common) law and therefore as to matters of jurisdiction, federal standards — including “minimum contacts” due process analysis — are applicable.

Id. (internal citations omitted). The Court also noted that such an interpretation was consistent with the Tribe’s own long arm statute which stated in relevant part, the intent of asserting jurisdiction “to the greatest extent consistent with due process of law.” Id.

64. Id. at 6110 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).
65. Id.
66. Id. (citing Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986); Burger King, 471 U.S. at 472-76).
alcoholic and alcoholic products in South Dakota and on the Rosebud Sioux Reservation. Defendants also made at least one phone call and sent allegedly defamatory material to the plaintiff or plaintiff's attorney on the Rosebud Sioux Reservation. Furthermore, the defendants continually targeted the forum through "each label affixed to a bottle of 'Original Crazy Horse Malt Liquor,'" despite being informed by non-parties of the products' offensiveness within the forum and other South Dakota reservations. The court further pointed out that the jurisdiction in local tribal forum was "reasonable and comport[ed] with fair play and justice" in that it was the most convenient forum for all the parties concerned.68

2. Subject Matter Jurisdiction

The court then shifted its focus to the issue of subject matter jurisdiction.69 It noted that while the trial court did not even mention the term, it nevertheless had provided a glancing reference to Montana v. United States,70 the leading precedent in tribal court subject matter jurisdiction, within its analysis of personal jurisdiction.71

The Rosebud Sioux Supreme Court indicated that the Montana analysis was inapposite in the instant case because the alleged harm that occurred to the plaintiff's estate had not occurred on fee land, but rather on trust land.72 Montana did not apply to events that occurred on tribal trust land.73 In addition, the court noted, even if it did apply, both prongs of its famous proviso would be satisfied.74

The court found that the trial court's recognition of a "right of publicity" in the Crazy Horse Estate necessarily required a consensual arrangement for the defendants to use the name of Crazy Horse and their failure to obtain one could

67. Id. at 6110.
68. Id. at 6110-11.
69. Id. at 6111.
72. Id. at 6111-12.
73. This aspect of Montana was subsequently changed by Nevada v. Hicks, 533 U.S. 353 (2001), which expressly extended Montana analysis to all land – whether trust or fee – within the reservation.
74. Estate of Tasunke Witko, 23 INDIAN L. REP. at 6112 (Rosebud Sioux Sup. Ct. 1996). The proviso provides:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 6112 (quoting Montana, 450 U.S. at 565-66 (1981) (internal citations omitted)). As of 2011, the Supreme Court has yet to uphold tribal court civil jurisdiction over non-Indians on fee land, except on the limited and unique zoning facts of County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992).
not have the "beneficial" effect (from the defendant’s point of view) of stripping the tribal court of subject matter jurisdiction to determine if the right of publicity was violated by the defendant. The court also found that tribal court jurisdiction was necessary to protect the health and welfare of the Tribe.

3. Federal Statutory Causes of Action

The Rosebud Sioux Supreme Court concluded its review of the trial court’s decision by examining the viability of the asserted federal statutory causes of action pursuant to the Indian Arts and Crafts Act and the Lanham Act. The court affirmed the lower court’s decision to dismiss the Estate’s claim pursuant to the Indian Arts and Crafts Act in that it agreed that the statute did not create a private cause of action in individual Indians, but only a representative cause of action that could be brought by either the United States Attorney General and/or the aggrieved individual Indian’s Tribe.

The court, however, reversed the dismissal of the Lanham Act claim. The court reasoned that because the trial court recognized a “right of publicity” in the name of “Crazy Horse,” that said right might be (potentially) infringed by the defendants’ “false advertising” or “false association.” Therefore the assertions of the Estate to this effect in its complaint were sufficient to survive a motion to dismiss. The court concluded by remanding the case to the trial court for a prompt trial on the merits.

IV. LITIGATION IN THE FEDERAL COURTS

Despite the remand order of the Rosebud Sioux Supreme Court, no trial ever took place within the Rosebud Sioux Tribal Court system. Promptly filing suit in the federal district court of South Dakota, the tribal court defendants sought declaratory and injunctive relief against the Estate of Tasunke Witko, the Rosebud Sioux Tribal Court, and the tribal court judge. As a result, the

76. Id. Specifically:
   It is a touchstone of tribal "health and welfare" to be able to provide a forum for the resolution of alleged harms suffered by tribal members (or any person) on the reservation. This is particularly, even glaringly, true in the context of allegations of the tortious interference with, and the misappropriation of, the image and reputation of a venerated cultural hero and political and spiritual leader. If the tribe cannot successfully provide a forum in this dispute of wide-ranging individual and collective tribal import, Montana will have indeed run over its fee-lined banks and inundated the tribal jurisdictional landscape far beyond that which is justifiable.
77. Id. at 6113.
78. Id.
79. Id.
80. Id.
81. Id. Note, of course, that the United States Supreme Court’s decision in Nevada v. Hicks, 533 U.S. 353 (2001) cast serious doubt about the viability of any federal cause of action in tribal court.
82. Id.
83. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1090 (8th Cir. 1998).
Rosebud Sioux Tribal Court was enjoined from conducting any further proceedings on the case.84

A. FEDERAL DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

Judge Kornmann disagreed with the opinion of the Rosebud Sioux Supreme Court in one significant respect, namely that the tribal court possessed subject matter jurisdiction over the defendant manufacturers and distributors of Crazy Horse Malt Liquor.85 The district court’s opinion found that Montana applied directly to the case at bar and because neither of Montana’s exceptions were met, the Rosebud Sioux Tribal Courts did not have subject matter jurisdiction over the claims of the Estate.86

Despite this jurisdictional conclusion reached by Judge Kornmann, he did not dismiss the case. Rather, he concluded that the defendant manufacturers and distributors of Crazy Horse Malt Liquor had not exhausted their tribal court remedies as required by National Farmers Union87 and therefore remanded: “[b]ecause the tribal court should be given the first full opportunity to determine whether [the Estate] has established the jurisdictional facts by a preponderance of the evidence, as distinguished from merely establishing a prima facie case of jurisdiction.”88 Judge Kornmann also enjoined the tribal court from proceeding on the merits. Before this remand could be effectuated, however, both sides appealed.89

B. EIGHTH CIRCUIT COURT OF APPEALS

The Eighth Circuit expressly found that the Rosebud Sioux Tribal Court lacked subject matter jurisdiction over the Estate’s claims.90 The core of the Eighth Circuit’s Montana analysis was that potential tribal court subject matter jurisdiction was not present because it was precluded on the basis of the tribal court’s lack of subject matter jurisdiction over non-Indians.91

Presumably this action was brought pursuant to the exhaustion of tribal court remedies required by National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

84. Hornell Brewing Co., 133 F.3d at 1090. It is significant to note that Judge Kornmann’s unpublished district court opinion cannot be located. Inquiries to the district court, the Eighth Circuit, and the participating attorneys failed to produce a copy. No one seems to have a copy of the opinion or knows where one might be obtained. Therefore the discussion in the text draws solely on the discussion in the Eighth Circuit opinion. Despite its citation to Judge Kornmann’s opinion in the Joint Appendix, as noted, said Joint Appendix is nowhere to be found.

85. Hornell Brewing Co., 133 F.3d at 1090.

86. Id. Unfortunately, the absence of the district court opinion prevents any review and analysis of Judge Kornmann’s reasoning, inasmuch as the Eighth Circuit opinion merely restates the opinion’s conclusions. Note, however, that the Eighth Circuit opinion does indicate that Judge Kornmann rejected the Rosebud Sioux Supreme Court analysis of the second exception because it was so broad “that the tribal courts would always have civil subject matter jurisdiction over non-Indians.” Id. at 1093.


88. Hornell Brewing Co., 133 F.3d at 1090-91. Although Judge Kornmann’s statements that there was no Tribal Court subject matter jurisdiction but nevertheless remanding for further exhaustion proceedings in the Rosebud Sioux Tribal Court appear contradictory, they are not. Presumably the remand order envisions the possibility that a more complete hearing (beyond the pleadings) in Tribal Court might change the result, or at a minimum, provide a more complete record.

89. Id. at 1091.

90. Id. at 1093.
jurisdiction over non-Indians was only possible if the controverted events took place on the Reservation. 91 Specifically, the opinion stated that Indian tribes do, however, "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations" (emphasis added). The operative phrase is "on their reservations." Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations. 92

Again, not unlike Judge Kornmann’s opinion, despite the finding of no subject matter jurisdiction pursuant to the failure to satisfy Montana’s (purported) predicate requirement of on reservation conduct by non-Indians, the court did engage a Montana analysis. It found (not surprisingly) that neither exception was satisfied. 93 There was no “consensual relationship” between the Estate and any of the defendants. 94 In addition, there were insufficient effects on the health and welfare of the Tribe to trigger the second exception. 95

The Eighth Circuit opinion ends rather abruptly, leaving a number of important issues hanging without complete explanation. For example, the court never analyzes whether the tribal court had (long arm) personal (as opposed to subject matter) jurisdiction over the defendants. 96 This is unfortunate in that the Montana analysis is solely concerned with subject matter jurisdiction, yet its sole objective is to determine whether jurisdiction can be asserted over a particular non-Indian person or entity. The opinion suggests, potentially, that in Indian law, personal and subject matter jurisdiction over non-Indians are the same thing. Given that personal and subject matter jurisdiction are historically and conceptually quite distinct, 97 how can they potentially converge and meld in

91. Id.
92. Id. at 1091 (quoting Montana, 450 U.S. at 565, (1981).
93. Id. at 1093.
94. Hornell Brewing Co., 133 F.3d at 1093.
95. Id.
96. As a technical matter, having decided that there was no subject matter jurisdiction, there was no necessity to analyze any other issue. See e.g. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999): [t]here is no unyielding jurisdictional hierarchy. Customarily, a federal court first resolves doubts about its jurisdiction over subject matter, but there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry.
97. Id. at 578.

The Montana framework appears ill-suited to the case at hand. Perhaps the court is suggesting, without actually saying so, that tribal courts are courts of limited or narrow jurisdiction and since Montana does not discuss or envision these facts of off-reservation actions causing harm on the reservation, the tribal court has no jurisdiction because it is beyond the parameters of Montana:

On appeal, the tribal court also asserts that although Crazy Horse Malt Liquor was not sold on the Rosebud Sioux Reservation, it was advertised outside the Reservation and on the Internet (available to tribal members on the Reservation), and therefore, it had a direct effect upon tribal members. We find this contention specious.

Hornell Brewing Co., 133 F.3d at 1093.
97. Subject matter jurisdiction and personal jurisdiction are core inquiries:

The Court of Appeals accorded priority to the requirement of subject-matter jurisdiction because it is nonwaivable and delimits federal-court power, while restrictions on a court’s jurisdiction over the person are waivable and protect individual rights . . . . The character of the two jurisdictional bedrocks unquestionably differs. Subject-matter limitations on federal jurisdiction
Indian law without any judicial identification or exegesis? In addition, the Court somewhat blithely informs the Estate that it “may assert these claims in federal district court.” On what basis? Certainly, the primary causes of action asserted by the Estate do not involve federal questions, and thus diversity jurisdiction is all that there is. Yet it would be problematic, especially in the context of the choice of law issue created by Erie Railroad Co. v. Tompkins. In the context of Erie, the choice of law is always state law, seemingly required by the Rules of Decision Act. Yet several of the causes of action claim to be based on tribal customary or common law. Do we need an exception to Erie or does the Rules of Decision Act forbid any departure from the application of state law?

The court also failed to address whether the Estate’s claims under the Lanham Act were still viable in tribal court. As indicated earlier, the issue was likely mooted by the Supreme Court’s subsequent decision in Nevada v. Hicks. As a result of the avoidance of these prickly diversity and supplemental jurisdiction issues, much was left unresolved and hanging in the balance.
C. FEDERAL DISTRICT COURT FOR SOUTH DAKOTA: ROUND II

The Estate, likely following the advice of the Eighth Circuit, subsequently filed its lawsuit against Hornell Brewing Company in federal district court in South Dakota. In its complaint, the Estate asserted violations of privacy, the Indian Arts and Crafts Act, the Lanham Act, and the Federal Trademark Dilution Act of 1995, as well as defamation, misappropriation and misuse of inheritable property rights, and negligent and intentional infliction of emotional distress. Damages, as well as injunctive and declarative relief, were sought.

True to form, the defendants filed a motion to dismiss for lack of personal jurisdiction. While the court's opinion does not indicate the basis for federal jurisdiction, Judge Piersol applied the same basic analytical framework used by the Rosebud Sioux Supreme Court when it considered personal jurisdiction and reached the same result—it had personal jurisdiction over the defendants.

Judge Piersol applied the "effects" test of Calder v. Jones, finding that, "[h]aving spent thousands of hours in research and development of the product [Crazy Horse Malt Liquor] and its introduction into the marketplace, the defendants had to know that their actions were uniquely aimed at residents in South Dakota." In addition, he found that in light of the purposefulness of defendants' actions, the fair play and substantial justice requirements of due process were also satisfied. The defendants' claims that they were never physically in South Dakota and their product was never sold there were to no avail.

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105. Estate of Witko v. Hornell Brewing Co., 156 F. Supp. 2d 1092 (D.S.D. 2001) [hereinafter Hornell Brewing II]. It is important to note that Heileman Brewing Company was not a named defendant in this lawsuit. Heileman Brewing Company had been acquired by SBC Holdings Inc., formerly Stroh Brewing Company, and was in active negotiations to settle with the Estate of Crazy Horse. See infra notes 117-122 and accompanying text.


110. Hornell Brewing II, 156 F.Supp.2d at 1094.

111. Id.

112. Id. at 1101.


114. Id. at 1100.

115. Id. at 1100-01. Notice how the exact same reasoning of the Rosebud Sioux Supreme Court was rejected by the Eighth Circuit Court of Appeals, supra note 86, at 1093.

116. The lawsuit was dismissed by Judge Piersol in January 2004 because of a pending settlement. Crazy Horse Malt Liquor Case to be Settled Out of Court, WIND RIVER NEWS, Jan. 15, 2004, at 5. No such settlement appears to have ever been finalized.
V. SETTLEMENT OF THE CRAZY HORSE ESTATE WITH HEILEMAN BREWING CO.

Heileman Brewing Co. took a different approach in dealing with the claims of Crazy Horse's Estate. This was the approach of respect and negotiated settlement. This conciliatory tact was adopted upon the acquisition of Heileman Brewing Co. by SBC Holdings Inc. (formerly Stroh Brewing Co.).

The settlement took place in a public event held on the Rosebud Sioux Reservation in South Dakota. The settlement involved the reading of a public apology by John Stroh III, chairman of SBC Holdings Inc. and a presentation by Mr. Stroh of 32 Pendleton blankets, 32 braids of sweetgrass, 32 twists of tobacco, and seven thoroughbred horses to Mr. Seth Big Crow, administrator of the Crazy Horse Estate. No money was involved.

An attorney for the Estate said, "It's a step toward clearing the name for Crazy Horse and his descendants and restoring the spirit of Crazy Horse as a strong Indian leader." An attorney for the brewery stated that his client "is thrilled it is able to resolve this matter in a way that is fair and more importantly, culturally significant to the estate." The settlement reflects a strong Lakota cultural sentiment that focuses on the concept that one ingredient of respect is the willingness to apologize and to seal the apology with a gift.

VI. BACK TO TRIBAL COURT AND TRADITION

The case did not come completely to an end with the settlement, but rather took another step forward by having to look back even further into Lakota tradition and custom. As the settlement aspect of the case concluded, another began. The Estate of Crazy Horse now held some (unique) property as a result of the settlement and likely would have to continue to make future decisions about the legacy of Crazy Horse, including the (potential) use of his name, as well as other questions of patrimony and inheritance. In essence, it was going to be necessary to determine who the (living) heirs of Crazy Horse were and what the rules of descendancy were. The past is never past. It is always there. It comes full circle.

This daunting process began when a new action to probate the Estate of Crazy Horse was filed in the Rosebud Sioux Tribal Court. The probate action sought two things, namely a determination of who the (living) heirs of Crazy Horse were and an inventory of his estate. Obviously, this was a case of first

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118. Id. See also Brewer to Apologize to Indians, CHICAGO TRIBUNE, at 3 (April 27, 2001); Brewery Settles Crazy Horse Beverage Suit, NEW YORK TIMES, at A14 (April 27, 2001).
119. Gale, supra note 117 at C11.
120. Id.
121. Id.
122. See e.g., LEWIS HYDE, THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD (Vintage, 2007) on the importance of gifts for establishing bonds of reciprocity.
123. See Petition filed In re Probate of Tasunke Witko, a.k.a. Crazy Horse, deceased (2004).
impression and as there was no direct positive Tribal law on point. The case
would be decided by the "custom and usages of the Tribe."124 When such law is
in doubt, "the Court may request the advice of persons generally recognized in
the community as being familiar with such customs and usages."125

Judge Whiting's findings of fact and conclusions of law focused on two
issues, namely the practicalities of administering the Estate of Crazy Horse and
discerning the law to govern that administration.126 As to the former, Judge
Whiting found that Crazy Horse's purported heirs likely were living on three
reservations in South Dakota and he named a co-administrator from each one,
Seth Big Crow (previously named) for the Rosebud Sioux Reservation, Harvey
White Man for the Pine Ridge Reservation, and Floyd Clown, Sr. for the
Cheyenne River Sioux Reservation.127 Judge Whiting also found that as the
Estate of Crazy Horse had incurred expenses and made payments in regard to the
Crazy Horse Malt Liquor litigation and received payments in the (partial)
settlement of the case and he ordered that Seth Big Crow, the current
administrator of the Estate "provide a full accounting of the finances" involved
there.128

In the trial court probate proceeding, only one witness was called, namely
Victor Douville, the long-time chairperson of the Lakota Studies department at
Sinte Gleska University, which is located on the Rosebud Sioux Reservation.129
Based on the testimony of Mr. Douville as the sole witness (and sole source of
evidence) in the case, Special Probate Judge Stanley Whiting concluded as a
matter of law that Lakota society was "patriarchal in nature" and kinship was
determined through both the father's and mother's bloodlines.130 With this
conclusion in hand, Judge Whiting entered proposed findings of fact and
conclusions of law.

As to the second question, pursuant to a hearing of January 5, 2006, Judge
Whiting entered findings of fact and conclusions of law on July 21, 2006.131
These findings of fact and conclusions of law are noteworthy in two respects, for
both what they say and what they do not say. They are also unique in that all of

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124. Rosebud Sioux Tribal Law and Order Code, Sec. 4-2-8 which provides:
The Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in
actions before it. Any matter not covered by applicable tribal or federal laws shall be decided
according to the customs and usages of the Tribe. Where doubt arises as to custom and usages
of the Tribe, the Court may request the advice of persons generally recognized in the community
as being familiar with such customs and usages. In any matter in which the rule of law is not
supplied by any of the above, the Court may look to the law of any Tribe or state which is
consistent with the policies under tribal law, custom and usages.

Id.

125. Id.

126. In re Probate of Tasunke Witko, a/k/a Crazy Horse, #P93-03 (Rosebud Sioux Tr. Ct. Apr. 16,
2004).

127. Id.

128. Id.

129. In re Probate of Tasunke Witko, a/k/a Crazy Horse, #P93-03 at 1 (Rosebud Sioux Tr. Ct. July
21, 2006).

130. Id. at 4.

131. Id. at 1.
the findings and conclusions are based solely on the expert testimony of Victor Douville, a respected member of the Rosebud Sioux Tribe, who “has taught for more than twenty years at Sinte Gleska University as a Lakota Studies Professor, having published many works regarding Lakota language and history.”132 Mr. Douville was the sole witness to testify. There was no additional documentary evidence of any kind proffered or received into evidence.

Judge Whiting’s key findings of fact were that

5. The Court finds as fact based upon Mr. Douville’s testimony that the Lakota claimed kinship through both the father’s and mother’s blood lines.

6. The Court finds as fact based upon Mr. Douville’s testimony that the Lakota society was based upon a patriarchal system.

14. The Court finds as fact based upon Mr. Douville’s testimony that Lakota tradition held that a widow was not considered an heir of her deceased husband, and could only inherit the female household items and tipi.

15. The Court finds as fact based upon Mr. Douville’s testimony that a deceased warrior’s property was passed to his children, if any, and if not, then to his father, if still living.

16. The Court finds as fact based upon Mr. Douville’s testimony that in the event that his father did not survive him, a deceased warrior’s property would be passed to his family members, following degree of blood.

The central conclusions of law included the following:

2. The Court concludes as a matter of law that traditional Lakota society was patriarchal in nature, and that tiospayes were governed by the Naka(s), or patriarchs of the tiospaye.

10. The Court concludes as a matter of law that a deceased Lakota warrior’s name stays within his ‘blood line, passing only to his relatives by blood.

11. The Court concludes as a matter of law that only the deceased Lakota Warrior Tasunke Witko’s blood relatives shall be considered heirs and shall inherit the property of his estate, based upon traditional degree of Lakota kinship.

The central gaps in these findings of fact and conclusions of law are the failure to determine whether Crazy Horse was married, widowed, or “divorced” when he was killed in 1877 and whether he had fathered any children (in or out of wedlock) who survived him (or who had issue, who survived him). The findings of fact and conclusions of law were such that the Estate of Crazy Horse could still not be probated to ascertain heirs and effectuate any potential distribution of assets.

These findings of fact and conclusions of law contained no affirmative order about what was to happen next. In any event, a notice of appeal was

132. Id. at 1-4.
133. Id. at 2-3.
134. Id. at 4-5.
timely filed by co-administrators Seth Big Crow and Harvey White Man. The primary issue raised on appeal was whether Judge Whiting’s findings of fact and conclusions of law were precise enough to clarify the traditional Lakota inheritance law applicable for determining the eligible heirs of Tasunke Witko and the property that should be distributed.

The Rosebud Supreme Court applied a de novo standard of review “for questions of law or an erroneous application or interpretation of substantive law by a tribal court.” Application of this standard of review led the Court to conclude that errors of law and application of the law were made by Judge Whiting. Specifically, the Court noted that Judge Whiting did not adequately consider any transitional developments in the Lakota kinship system that likely occurred during the reservation period of the 1870’s and their potential effect on the traditional rules of descendancy. Nor did he clearly delineate what “property” of Crazy Horse could have been inherited at that time.

Ordinarily, the Court would simply reverse and remand back to the trial court for further hearing and consideration. Yet in this case, the Court took a bold and innovative approach. It decided, pursuant to the authority recognized in the Rosebud Sioux Law and Order Code at Sec. 4-2-8, to “request the advice of persons generally recognized in the community as being familiar with such customs and usages.” The Court decided that the important issues before it required “a more traditional process, including following a consensus approach rather than an adversarial approach in making a decision of what the traditional inheritance laws were and how they should be applied to determine the rightful heirs of Tasunke Witko.”

The Court remanded the case and ordered the trial court to administer mediation conducted by qualified experts “well-versed in Lakota tradition and custom during the period of 1877 and who have no interest in the case.” This process was to be supervised by the Chief Judge of the Rosebud Sioux Tribal Court. The number of mediators and the method of selection was to include:

[T]hree (3) experts in Lakota tradition and custom selected to serve as mediators. The appellants and appellees in this case shall select a

135. *In re* Probate of Tasunke Witko, a/k/a Crazy Horse, CA 2006-09, (Rosebud Sioux Sup. Ct. 2007).
136. *Id.*
137. *Id.* at 2 (citing *In re* Commitment of Laurence Lee, Jr., CA 99-03 at 5, (Rosebud Sioux Sup. Ct. 2000); *First Computer Concepts, Inc. v. Rosebud Sioux Tribe*, CA 89-02 at 5, (Rosebud Sioux Sup. Ct. 1990)).
138. *Id.* at 2-3.
139. *Id.*
140. *Id.* at 3.
141. While I participated in this decision, the innovative approach taken by the Court was first suggested and articulated by Justice Cheryl Three Stars Valandra. Thus, I am not engaging in self-praise.
142. See supra note 124.
144. *Id.* at 4.
145. *Id.*
mediator and those two (2) mediators shall, in turn, choose the third. The names and qualifications of the selected mediators shall be submitted to the Chief Judge who shall present such to the Supreme Court for certification.

Additionally, the Court ordered the mediation panel to consider specific questions, including (but not limited to) the following:

1. Who would have been the eligible heirs of Tasunke Witko in 1877 and who would be the eligible heirs today?
2. How was it determined who would have inherited the property of Tasunke Witko?
   A. Was there a process involved in making this determination?
   B. If there was a dispute or disagreement, how were such disputes handled?
3. What would have been considered “property” during that period?
   A. What were the types or categories of property that could have been inherited in 1877 Lakota society? For example, were there distinctions made as to real, personal, spiritual, ceremonial, or intellectual property?
   B. Was the name of a person considered property that could be passed on or inherited by another person? If so, what was the process or law in determining who was eligible to receive the name?
   C. Similar to the above question, were there certain types of property that passed on to a particular person or persons? For example, were there specific individuals entitled to inherit certain property, such as a decedent’s ceremonial items or clothing?

As these questions indicate, there are issues beyond identifying who the heirs of Crazy Horse are that extend into determining what the various heirs may inherit. This process was to culminate in a final written report containing the mediators’ findings, submitted to the Court by May 15, 2008.

As this process slowly moved forward, it began to take on a slightly different structure. On remand, it became clear that the contending potential heirs fell into three groups – those from the Pine Ridge Sioux Reservation (Oglala Sioux Tribe), those from the Rosebud Sioux Reservation, and those from the Cheyenne River Sioux Reservation. In light of this configuration, Chief Judge Sherman Marshall authorized each of the three groups to name its own “qualified expert.”

This process—for numerous reasons—has taken a great deal of time.

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146. *Id.*

147. *Id.* at 4-5.

148. *Id.* In fact, there may be different rules of inheritance for different kinds of property (e.g. descendant’s name, property of a warrior, property of spiritual leader).

149. *Id.* at 5.

150. Time itself is a cultural variable. Three years for a mediation process to take hold may indeed seem (too) long from a legal docket perspective, but from a cultural perspective of respect, continuation, and survival such a time frame would cause little or no concern. Indeed, none of the parties have registered a complaint concerning the length of time taken to date. The Court originally envisioned the submission of a report by May 15, 2008. This was far too optimistic. It is now more than three years later (February 2012). Yet time is not a critical factor; substance is.
Regardless, all three “qualified experts” or “mediators” were finally named in late 2009.151 This group, under the direction of Chief Judge Sherman Marshall, began to meet in December 2010. To date (February 2012), the group has met four times.

These various “mediation” sessions were moderated and facilitated by Judge Marshall and were largely conducted in Lakota. Judge Marshall, who is bilingual and was raised in accordance with traditional cultural ways, is particularly well-suited to assist in this attempt to bridge two worlds, with due respect for each.

Judge Marshall also used additional methods to enhance the body of relevant cultural information. He recruited a University of South Dakota law student152 to write a research memorandum response to the “specific questions” addressed to the traditional mediation panel. Judge Marshall has indicated that the research memorandum was quite helpful and appears to support and to converge with the ongoing discussions of the traditional mediators.

Given the enormity of this undertaking as a matter of both (traditional) culture and law, the “experts” have moved forward with extreme care and due commitment. Chief Judge Sherman Marshall has informally communicated to the justices of the Rosebud Sioux Supreme Court that progress is being made—however slowly—and that he remains cautiously optimistic that the “experts” will produce the written report identified in the Rosebud Sioux Supreme Court’s order of November 9, 2007; sometime within the 2012 year.

Of course, the clarity (and consensus) of the report will be critical in its application to the case at bar. Tradition must live, if it is to survive. Can the nineteenth century rules of Lakota inheritance and descendancy be identified and brought forward to the twenty-first century to guide the probate of the Estate of Crazy Horse? What is the likelihood of bringing Lakota tradition forward from 1877 to 2012 and beyond? Is it a tradition that breathes across the span of time and years? Or is it the opposite, that sometimes the law of long ago tradition is lost in the modern era? Such is the challenge in the probate of the Estate of Tasunke Witko.

VII. CONCLUSION

The trajectory of the Crazy Horse Malt Liquor case graphically traces the history of modern Indian law, moving forward, but always looking back. The initial litigation in the Rosebud Sioux Tribal Court raised the classic subject matter jurisdiction issue and the application of the “pathmarking” Montana test.153

Yet the case had a unique factual posture that posed a conceptual challenge about the boundaries of Montana analysis. The (tribal) causes of action asserted

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151. These three individuals are Karen Lone Hill of the Oglala Sioux Tribe; Marilyn Circle Eagle of the Cheyenne River Sioux Tribe; and Webster Two Hawk of the Rosebud Sioux Tribe.

152. Bradley Richardson, Class of 2013.

153. United States v. Montana, supra notes 70-74 and accompanying text.
by the Estate of Crazy Horse were concerned primarily with alleged (tortious) acts of the defendants, that took place off the Reservation, but which caused harm on the Reservation to the Lakota heirs of Crazy Horse, who resided on (trust) land within the Reservation. Given the (minimum) contacts and foreseeability involved, all of this potentially provided both subject matter and (long arm) personal jurisdiction. This is basically how the Rosebud Sioux Supreme Court approached its jurisdictional analysis.

The federal courts approached the jurisdictional issues quite differently. Finding no identifiable presence or activities of the defendants on the reservation, the federal courts found no basis for subject matter jurisdiction.1 Yet such analysis is most pertinent for (long arm) personal jurisdiction, not subject matter jurisdiction. In the contexts of torts, subject matter jurisdiction turns on effects within the jurisdiction, and personal jurisdiction turns on “minimum contacts.”

The federal courts did not make this distinction. They equated the physical “absence” of the defendants from the reservation as an absolute bar to subject matter jurisdiction. Yet this physical absence analysis is most relevant to personal jurisdiction. This not unexpected lapse of fundamental understanding is easy to understand. Subject matter jurisdiction under Montana focuses on whether the court has jurisdiction over a particular (non-Indian) person, which is normally the conceptual province of personal jurisdiction.155

The federal court's finding that the Rosebud Sioux Tribal Courts did not have subject matter jurisdiction over the Crazy Horse Estate’s claim against the defendants had other collateral consequences. It prevented the Rosebud Sioux courts from developing significant Tribal common law as to whether various asserted causes of action were (or were not) part of Lakota tradition and custom. These causes of action included the right of publicity in the Estate of Crazy Horse to control the use of his name and whether the defendants negligently and intentionally inflicted emotional distress on the heirs of the plaintiff Estate.

The second round of litigation in the Rosebud Sioux Tribal Courts focuses directly on whether it is possible to discern the 1877 Lakota rules of inheritance and apply them in a 2012 context, 135 years later. That process has begun and is ongoing. All parties are fully committed to the possibilities of such traditional law being discerned and applied in a modern context. At this point, only time will tell whether the collaborative, traditional, consensus approach set in motion by the Rosebud Sioux Supreme Court will prove successful. Regardless, the commitment of the court, the parties, and the traditional Lakota experts is itself a vindication of tradition; a tradition that understands culture not as a static artifact but rather as a dynamic reality with which to meet the ongoing challenges of the future.

154. See supra notes 85-95 and accompanying text.
155. It may well also be true that the lower federal courts, following the lead of the Supreme Court, seek to circumscribe and to limit tribal jurisdiction over non-Indians as much as possible. This is particularly likely in cases that do not fit easily into the Montana paradigm.
VIII. POSTSCRIPT

Just as this article was about to be sent to the printer for publication, the traditional mediators submitted their oral findings to Chief Judge Sherman Marshall. In turn, Judge Marshall prepared the Written Findings of the Mediation Panel. On the key questions posed by the Rosebud Sioux Supreme Court, Judge Marshall’s Findings of the Mediation Panel noted that the traditional, customary practice of determining heirs was a matter completely within the control of the extended family or tiyospaye. It was further understood that inheritable, personal property of a man included clothing, weapons, tools, horses, spiritual property, and a person’s name. Perhaps, most critically, the Findings note that a Lakota person’s name could be passed on, but that Crazy Horse’s name was never passed on. While these findings are obviously not precise in the conventional language of the law, they speak with dignity and continuity across a long historical and cultural journey. Indeed, this is a journey that is likely to continue as part of the mapping of the contemporary legacy of Crazy Horse within both the modern and traditional worlds of Lakota law and custom.

157. Id. at 2.
158. Id. at 3.
159. Id. at 4. Judge Marshall also indicated how this traditional practice took place in his own family life; how he received the Lakota name “Otakutepi” (Many Shot Him) as a young child in honor of his father who served in the U.S. Army in World War II in Europe. He was also given the name “Oyakapi” (They Tell Him) as the result of a ceremony put on by his grandmother before he went to Vietnam. In addition, he and his wife, Marilyn, gave traditional Lakota family names to their two sons in traditional public naming ceremonies sponsored by the family. The two names were “Mato Wahancanka” (Bear Shield) and “Hoiyekiyapi” (They Called Him). Id at 5.