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PLAINS COMMERCE BANK V. LONG FAMILY LAND AND CATTLE COMPANY, INC.: AN INTRODUCTION WITH QUESTIONS

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I. INTRODUCTION

The Plains Commerce Bank1 case began as a routine case in the Cheyenne River Sioux Tribal Court system between a rancher and a bank that had been doing business together for "many years"2 on the Cheyenne River Sioux Reservation. The rancher was an Indian family and its Indian controlled corporation. The bank was a local, non-Indian off reservation bank. The case ended with a decision by the United States Supreme Court that carved out a new jurisdictional rule for tribal courts. This new rule is likely to have significant legal and economic impact for doing business on the reservation and it is these ramifications that are the basis for the Symposium that is being sponsored by the South Dakota Law Review.

The ruling of the U.S. Supreme Court is best understood by reviewing the factual background of the case, as well as the decision of each of the lower courts. Such a review demonstrates a rather ordinary case in which the jurisdictional challenge clearly falls within the well-known proviso of the "pathmarking"3 case of Montana v. United States.4 Despite the consistent analytical approach of the lower courts, both tribal and federal, the U.S. Supreme Court fashioned a new rule, which completely removed the case from the doctrinal reach of Montana. In so doing, the Court appeared more inhospitable than ever to the possibility of any tribal court jurisdiction over non-Indians.

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4. 450 U.S. 544 (1981). The classic Montana 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 nonmembers 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 lands 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 565-66 (internal citations omitted).
II. FACTUAL BACKGROUND

Plains Commerce Bank, "formerly known as the Bank of Hoven, is a South Dakota banking corporation with its principal place of business" located in Potter County, South Dakota.\(^5\) Potter County is located directly adjacent to Dewey County, which is located completely within the exterior boundaries of the Cheyenne River Sioux Reservation. The Long Family Land and Cattle Company, Inc. "is a South Dakota chartered family farm corporation with its principal place of business" located on the Cheyenne River Sioux Reservation.\(^6\) Ronnie Long is the son of Kenneth and the late Maxine Long. Ronnie’s wife is Lila Long. Ronnie and Lila are both members of the Cheyenne River Sioux Tribe, as was Maxine prior to her death. The deceased Kenneth Long was a non-Indian and not a member of the Cheyenne River Sioux Tribe.\(^7\)

Plains Commerce Bank provided the Longs and the Long Family Land and Cattle Company with various operating loans over the years for their cattle ranching operation that took place on land located solely within the Cheyenne River Sioux Reservation. This included land owned in fee by the Longs and trust land leased from the Cheyenne River Sioux Tribe. Prior to the death of Kenneth on July 17, 1995, he owned 2,230 acres of deeded agricultural land located within the Cheyenne River Sioux Reservation. At the time of his death, this land was mortgaged to Plains Commerce Bank to secure various operating loans. Kenneth also owned 49\% of the stock in the Long Family Land and Cattle Company. In his will, Kenneth devised all his land and shares in the Long Family Land and Cattle Company to his four children, all of whom are tribal members. Ronnie’s three siblings assigned all of their interests to Ronnie. As a result, Ronnie and Lila owned 100\% of the stock in the Long Family Land and Cattle Company.

The Bank continued to do business with Ronnie and Lila Long and the Long Family Land and Cattle Company. It is these subsequent transactions that are at the heart of this case. In the spring of 1996, an officer of the Bank came on the reservation to inspect the land and machinery and to continue discussions with Ronnie and Lila Long and tribal officials about the best way to proceed. In lieu of foreclosure, the Long estate agreed to deed Kenneth’s land to the Bank for a credit of $478,000 against the $750,000 debt of Kenneth Long and the Long Family Land and Cattle Company. The Bank agreed to sell the land back to the Longs via a twenty year contract for deed, but subsequently reneged on its offer in a letter dated April 26, 1996, citing “possible jurisdictional problems if the bank ever had to foreclose on [the] land when it contracted or leased to an Indian owned entity on the reservation.”\(^8\) There were also discussions about

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6. Id.
7. Id. Kenneth’s estate was probated in state court and was still open at the time this litigation began. Id. at 1073.
8. Id. at 1072 (internal quotations omitted).
additional operating loans.  

On December 5, 1996, a meeting took place at the Bank’s office in Hoven, South Dakota. Various documents were signed by the Bank and Ronnie and Lila Long. They included a two year lease on the 2,230 acre parcel of land with an option to purchase the land for $468,000 at the conclusion of the lease, the conveyance by the Long estate, acting through its representative, of the 2,230 acre Long property to the Bank, and two operating loans in the amounts of $70,000 and $37,500.

The Longs claimed that because of the harsh winter and blizzards of 1996-97 they were in dire need of the agreed-upon loans, but the loans were never forthcoming. As a result, the Longs suffered substantial financial loss and were unable to exercise their option to purchase the land. Upon expiration of the lease, the Longs did not vacate the land. Nevertheless, in March 1999, the Bank sold 320 acres to Mr. and Mrs. Ralph Pesicka. On June 16, 1999, the Bank sold the remaining 1,905 acres to Edward and Mary Jo Mackjewski on a contract for deed. Both the Pesickas and the Mackjewskis are non-Indians.

III. PROCEEDINGS IN THE CHEYENNE RIVER SIOUX TRIBAL COURT

The Bank initiated legal proceedings against the Longs in state court by requesting the Cheyenne River Sioux Tribal Court serve a state Notice to Quit on the Longs. This odd request was nevertheless approved by Judge Bluespruce and the Longs were served by the tribal court on June 16, 1999.

The Longs and the Long Family Land and Cattle Company subsequently filed their own action against the Bank in tribal court. The Longs sought “a temporary restraining order restraining the bank from selling the land ...” Subsequently, “[t]he bank moved to dismiss, claiming that the tribal court lacked subject matter jurisdiction.” Both motions were denied. The Longs subsequently amended their complaint to include several causes of action that sought money damages and other relief. The Bank counterclaimed seeking to evict the Longs and to obtain an award of damages.

A two day jury trial was held on December 6 and December 11, 2002, before Special Judge B.J. Jones. The six person tribal member jury returned a general verdict of $750,000 plus prejudgment interest in favor of the Longs. The jury found in favor of the Longs on three of four of their claims, namely that the Bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith in regard to its dealings with the

9. Id. at 1073-74. The bank asserted that these loans were contingent on BIA loan guarantees, which were never forthcoming. Id. at 1074.
10. Id.
11. Id. at 1074-75.
12. Id. Federal District Judge Charles Kornman found this request of the tribal court to serve state process “not understandable.” Id. There were no further proceedings in state court.
13. Id. at 1075.
14. Id.
15. Id.
Longs. The jury found against the Longs in their claim that the Bank improperly used self-help remedies in an attempt to remove the Longs from the land. In a supplemental judgment, Judge Jones denied the Bank's counterclaim to evict the Longs and gave the Longs the option to purchase the 960 acres they continued to occupy.

IV. PROCEEDINGS BEFORE THE CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

Both parties appealed to the Cheyenne River Sioux Tribal Court of Appeals. The Tribal Court of Appeals affirmed the trial court decision on all issues. The two most important issues were the Bank's challenge to the tribal court's jurisdiction over the Longs' claim of discrimination under principles of federal Indian law and its challenge to the existence of any tribal anti-discrimination law. The Bank did not challenge the tribal court's jurisdiction over the contract/loan causes of action under either federal Indian law principles or tribal law.

A. JURISDICTION CHALLENGE

The jurisdictional analysis by the Cheyenne River Sioux Tribal Court of Appeals involved a straightforward application of the well-known Montana proviso. The Court found that the lease/purchase agreement signed by the Longs and the Bank was a quintessential "consensual" agreement signed by Montana and that the agreement provided the necessary predicate for tribal court jurisdiction.

16 Id.
17 The appeal involved seven issues raised by the Defendant/Appellant and two issues raised by the Plaintiffs/Appellees.

Defendant/Appellant

Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off reservation bank.

Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiff's breach of contract claim.

Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiff's separate cause of action based on bad faith.

Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.

Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.

Whether the trial court erred in granting Plaintiff's motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a contract for deed.

Whether the trial court erred in allowing pre-judgment interest on certain damages absent specific instructions to the jury.

Plaintiffs/Appellees/Respondents

Whether the trial court erred in its calculation of prejudgment interest.

Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.


jurisdiction over the discrimination claim that was rooted in the terms of the lease/purchase agreement.\(^\text{19}\)

The Tribal Court of Appeals also found that the actions of the parties in the case, which included participation by both the Cheyenne River Sioux Tribe and the Bureau of Indian Affairs in the purchase and loan negotiations, necessarily involved the "economic security" of the Tribe to such a degree as to satisfy the second prong of the *Montana* proviso.\(^\text{20}\)

**B. DISCRIMINATION CAUSE OF ACTION**

In a related, but somewhat different manner, the Bank claimed that the tribal court lacked jurisdiction over the Longs' discrimination claim. The essence of this claim was that the discrimination claim was grounded in *federal* law and this fell within the prohibition established in *Nevada v. Hicks*\(^\text{21}\) that tribal courts did not have jurisdiction over federal causes of action.

The Court of Appeals disagreed. It did not accept the assertion that the Longs' discrimination claim was federal in nature. For example, the Long Family's amended complaint made no reference to federal law. In addition the jury instruction provided to the tribal jury made no reference to federal law.\(^\text{22}\) Rather, the Cheyenne River Sioux Tribal Court of Appeals regarded the discrimination cause of action to be grounded in principles of tribal common law.

The Tribal Court of Appeals noted that the Tribal Law and Order Code expressly granted the tribal court jurisdiction over claims involving "tortious conduct" and that a claim of discrimination was essentially a tort action.\(^\text{23}\) In addition, such a discrimination cause of action arose directly from Cheyenne River Sioux Tribal tradition and custom, also referred to as tribal common law. Basic Lakota principles of fairness, respect, and decency were articulated in previously reported decisions of the Cheyenne River Sioux Tribal Court of Appeals.\(^\text{24}\)

**V. PROCEEDING BEFORE THE FEDERAL DISTRICT COURT**

The Bank filed an action in federal district court seeking declaratory relief against the Longs under the principles articulated in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*\(^\text{25}\) and *Montana v. United States*.\(^\text{26}\) The Bank raised two issues, namely that the tribal court lacked subject matter jurisdiction over the discrimination claim and that the tribal court denied the

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\(^{19}\) *Plains Commerce Bank*, No. 03-002-A, slip op. at 9-10.

\(^{20}\) *Id.* at 10.


\(^{22}\) *Id.* at 6.

\(^{23}\) *Id.* at 7 n.3.

\(^{24}\) *Id.* at 8.


Bank due process.

**A. JURISDICTION**

The federal district court, with Judge Charles Kornman writing, applied the basic jurisdictional analysis set out in *Montana v. United States* and affirmed the Cheyenne River Sioux Tribal Court of Appeals. Judge Kornman initially noted that the Bank was *not* challenging the tribal court’s jurisdiction over any of the breach of contract claims involving the loans, but only the discrimination cause of action. The core of Judge Kornman’s opinion focused on whether jurisdiction over the discrimination claim was a permissible “other means” articulated in *Montana’s* famous proviso.\(^\text{27}\)

Since there was no doubt that there was a “consensual agreement” as a result of the lease (with option to purchase), the analytical focus necessarily rested on identifying the scope of tribal authority in this context. Judge Kornman concluded that there was a sufficient nexus between the consensual contractual dealings between the Longs and the Bank and the discrimination claim—the discrimination claim derived directly from the contract-lease negotiations—to support jurisdiction.\(^\text{28}\)

**B. DUE PROCESS**

The Bank also contended that it was not afforded fundamental due process rights by the Cheyenne River Sioux Tribal Court. The basic assertion in this regard was that the Longs’ discrimination claim was treated by the trial court as essentially “based upon federal law” rather than the notion of Lakota tradition, custom, and tribal common law articulated by the Tribal Court of Appeals and that this change in rationale offended due process. Although Judge Kornman agreed with the Bank’s characterization, he did not find it to be an error of law.\(^\text{29}\)

Judge Kornman noted that despite numerous opportunities the Bank never challenged the source of law for the Longs’ discrimination claim during the trial court proceedings. He also concluded that a basic principle of appellate jurisdiction permits a reviewing court to affirm the judgment on any ground supported by the record, whether or not that ground was urged or ruled upon below.\(^\text{30}\) As a result, summary judgment was granted in favor of the Longs.

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\(^{28}\) *Plains Commerce Bank*, 440 F. Supp. 2d at 1080-81. The Court also found it “significant” that the bank originally sought relief in the tribal court. *Id.* at 1080. Having found a basis for tribal court jurisdiction under *Montana’s* first prong, the court found it unnecessary to examine the second prong of the *Montana* proviso.

\(^{29}\) *Id.* at 1081-82.

\(^{30}\) *Id.* at 1082.
VI. PROCEEDINGS BEFORE THE EIGHTH CIRCUIT COURT OF APPEALS

The Bank appealed to the Eighth Circuit Court of Appeals. It raised the same two issues that it did in the district court, namely that the Cheyenne River Sioux Tribal Court did not have subject matter jurisdiction over the discrimination cause of action filed by the Longs against the Bank and that the Bank was denied due process in the course of the adjudication of the discrimination claim.

A. JURISDICTION

The unanimous decision authored by Judge Murphy essentially tracked the analytical reasoning of Judge Kornman’s decision. In accordance with Montana principles, there clearly was a consensual agreement—the lease/option to purchase—between the parties. No real disagreement there. The sticking point (again) was whether the discrimination claim was a permissible “other means” of regulation as set out in the Montana proviso.

The Bank, however, did make a novel argument on the consensual agreement issue. It argued that it did not have any consensual relationship with “the tribe or its members,” but with the Long Family Land and Cattle Company, a South Dakota corporation. The Eighth Circuit rejected the extreme formalism of this argument stating that: “Because the bank not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged in the kind of consensual relationship contemplated by Montana.”

The court also found that the discrimination claim fell within the legitimate zone of “other means.” The court noted that the Longs’ discrimination claim: arose directly from their preexisting commercial relationship with the bank. While the personal injury tort at issue in Strate defined the duties of one stranger to another, the tribal tort in this case provided a standard of conduct to govern the bank’s preexisting relationship with the Longs. . . . [T]his case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.

B. DUE PROCESS

The Bank renewed its due process claim before the Eighth Circuit. The due process claim consisted of three interrelated assertions, namely that the tribal appellate court should have been constrained to address the discrimination claim.

33. Plains Commerce Bank, 491 F.3d at 886.
34. Id. at 887 (emphasis added).
"under the federal law mentioned by the trial judge," that the Bank lacked proper notice "that it was facing a tribal rather than a federal claim for discrimination," and lastly that "it should not have been subject to liability for a tort that had not previously been recognized." 35

The circuit panel found no violation of due process. Judge Murphy's opinion indicated that it is standard (federal and state) appellate practice to uphold a judgment on grounds not decided or discussed by the lower court so long as those grounds are supported by the record. It also indicated that there was no deficiency in notice or the opportunity to defend. The Longs never asserted a violation of federal law, the Bank never sought dismissal on grounds of vagueness, and the jury instructions made no reference to federal law. 36 Finally, Judge Murphy noted that although the discrimination claim was a case of first impression within the Cheyenne River Sioux Tribal Court system, such was the nature of common law development:

Tort law has historically developed incrementally in the courts. If the encouragement of tribal self governance through the development of legal institutions is to remain a federal priority, then tribal appellate courts must be given latitude to shape their own common law to respond to the cases before them, as our own courts have done over the centuries. 37

VII. PROCEEDINGS BEFORE THE UNITED STATES SUPREME COURT

The Bank filed a petition for review by the Supreme Court. Interestingly, it sought review only of its jurisdiction claim, not its due process claim. The U.S. Supreme Court granted review on the jurisdiction issue. In at 5-4 decision, the Court reversed the Eighth Circuit. The reversal was not based on any error of law or fact, but rather on creating a new rule of law—a rule of law unknown in Indian law and very much at odds with the plain meaning of core precedents in the field.

Despite the unanimous view of the four courts below (four opinions, eight judges) that this case turned on a basic Montana analysis and that the sale of fee land was a quintessential consensual agreement, the U.S. Supreme Court, with Chief Justice Roberts writing, said no: "Montana does not permit Indian tribes to regulate the sale of non-Indian fee land." 38 Somehow, the Court concluded that the "activities" authorized by Montana for tribal regulation in the context of consensual agreements did not include the sale of fee land. It blinks both reality and the plain meaning of words to say that the sale of land is not an "activity" with regard to that land. Such a farfetched claim was not even mentioned by the petitioner in its brief or at oral argument.

35. Id. at 890.
36. Id. at 891.
37. Id. at 892 (internal citations omitted). The Eighth Circuit Court of Appeals also pointed out that the bank was not discriminated against by the tribal court. There was no evidence of bias. The bank made no attempt to request that non-Indian jurors be summoned as permitted under tribal law, challenged no individual Indian jurors for prejudice, and did challenge the composition of the panel. Id.
This “new” and limited rule was sharply criticized by Justice Ginsburg in her dissent. The dissent aptly noted that the majority opinion resolved the case “on a ground neither argued nor addressed below.” In addition, the majority’s ruling appeared to diverge from the plain meaning of the Montana consensual agreement exception. Justice Ginsburg was nonplussed by the majority’s assertion that the sale of land was not a well recognized “activity” within the ordinary sense of the word.

The dissent also pointed out that “this case, it bears emphasis, involves no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court.” The dissent was further perplexed by the notion that although the federal government and every state can make non-discrimination law in regard to contracts and land sales, tribes cannot. In this regard, the dissent approvingly quoted the Cheyenne River Sioux Tribal Court of Appeals: “With regard to checks against discrimination, as the Tribal Court of Appeals observed, ‘there is a direct and laudable convergence of federal, state, and tribal concern.’

VIII. WHAT NEXT?

The decision in the Plains Commerce Bank case in no way ends the litigation and there is definitely more to come. Recall that the $750,000 jury verdict was a general verdict and therefore it is still the law of the case. Unless the parties reach a settlement, the Longs will presumably move forward in tribal court to enforce their judgment against the Bank. The effect, if any, of the dismissal of the discrimination claim on the amount of the judgment remains to be seen. Such an issue would be a question of first impression for the Cheyenne River Sioux Tribal Courts. In addition, if the Longs continue to hold over on the land they occupy, the Bank could initiate state court eviction proceedings against them.

In sum, the Court created a very narrow rule to answer a question that was not asked, showed consummate indifference, if not hostility, to the quality of tribal court decision making, and left the parties with no guidance in resolving the enforcement of the jury verdict in this case. The Court, it would seem, remains adrift from both law and equity, as well as the reality of economic

39. There does not appear to be a single reported case involving the sale of fee land by a non-Indian to an Indian.
40. Plains Commerce Bank, 128 S. Ct. at 2729 (Ginsburg, J., dissenting).
41. Id. at 2729-30.
42. Id. at 2729. The bank regularly filed suit in the tribal court in other cases and conceded jurisdiction to the underlying contract claims in this case. Id.
43. Id. at 2731.
44. Id. at 2732 n.3 (quoting App. to Pet. for Cert. A-55 to A-56). This was the first time in history that the Supreme Court, albeit in a dissent, quoted a tribal court opinion.
45. This very issue came up at oral argument before the U.S. Supreme Court. See Transcript of Oral Argument at 28-32, Plains Commerce Bank, 128 S. Ct. 2709 (2008) (No 07-411), 2008 WL 1710923. Apparently, there is a circuit split about how to deal with the issue in the context of Rule 49(a) of the Federal Rules of Civil Procedure. See, e.g., Gillespie v. Sears, Roebuck & Co., 368 F.3d 21 (1st Cir. 2004); McCord v. Maguire, 885 F.2d 650 (9th Cir. 1989).
development in Indian country, which requires certainty, predictability, and respect for tribal institutions.