

In the  
ROSEBUD SIOUX TRIBAL  
COURT OF APPEALS

-Contract  
dispute  
-jurisdiction selection  
clause

HAL JASON FULLER, and  
DAVID PAXTON, doing  
business under the  
firm name and style of  
Lakota Electric,

Plaintiffs and Appellants,

vs.

BLAZE CONSTRUCTION CO. INC.,  
A Corporation, and SEABOARD  
SURETY COMPANY,

Defendants and Appellees.

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APPEAL FROM THE  
ROSEBUD SIOUX TRIBAL COURT

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Hon. Sherman Marshall  
Presiding Judge

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Before Justices  
Grey Eagle, Lee, and Pommersheim

Dated December 30, 1992

Per Curiam (CA91-04)

I. Introduction

Jason Fuller and David Paxton, doing business as Lakota Electric, the Plaintiffs/Appellants herein, entered into a (sub)contract with Blaze Construction, Inc., the Defendant/Appellee herein, on Sept. 9, 1988 for construction of housing units on the Rosebud Sioux Reservation pursuant to Rosebud Sioux Housing Project SD 2-27. Lakota Electric is a Rosebud Reservation based entity and Jason Fuller is a member of the Rosebud Sioux Tribe. Blaze Construction is a non-Indian, non-reservation corporation with its corporate headquarters located in Yakima, Washington.

Disputes concerning performance under the contract ensued and Lakota Electric subsequently brought a breach of contract action against Blaze Construction in the Rosebud Sioux Tribal Court in May of 1990. Blaze Construction ultimately filed a motion to dismiss based on a venue selection clause in the (sub)contract. This clause provides that "venue of any litigation arising from the subcontract shall at the sole option of Blaze be either in Tribal Court or the Federal District Court, Eastern District of Washington."

The trial court granted Blaze's motion and issued a

memorandum decision. The decision of the trial court properly noted that it did have both subject matter and personal jurisdiction over the parties and that neither party contended otherwise. Nevertheless, the trial court dismissed the action based on its finding that the venue selection clause was valid and enforceable and that the Defendant/Appellant Lakota Electric failed to show that the venue selection clause either offended the public policy of the forum in which the suit was brought or would otherwise gravely inconvenience the party seeking to defeat the venue selection clause. A timely notice of appeal was subsequently filed.

## II. Issues

This appeal raises one significant issue:

1) Whether the trial court properly enforced the venue selection clause in the contract between Lakota Electric and Blaze Construction.

## III. Discussion

The trial court's decision is premised largely on its reading of the standards for the enforcement of venue selection clauses set out in the case of M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The trial court correctly noted there

are generally two (potential) obstructions to such enforcement namely that such a clause either offends the public policy of the forum in which lawsuit was originally brought or would otherwise gravely inconvenience the party seeking to defeat the venue selection clause. The trial court found that neither condition had been met by the Plaintiff/Appellant. However, this Court finds the trial court's reasoning flawed and the record on appeal fatally incomplete. For example, the Rosebud Sioux Tribe has unequivocally expressed its policy of requiring all persons engaged in business on the Rosebud Sioux Indian Reservation to obtain a business license and to consent to the jurisdiction of the Tribal Court. (See RST Business Code Section 16-1-201) The exemptions in the tribal code make no reference to venue selection clauses. It therefore appears to us that the venue selection clause does in fact contravene a public policy of the Rosebud Sioux Tribe, which vests its Tribal Court with jurisdiction over disputes arising between business contractors and tribal members. Unless the Tribe had knowledge of the venue selection clause and waived the application of Business Code 16-1-201, the venue selection clause would seem to contravene tribal policy that does require the Defendant-Appellee to submit to tribal court jurisdiction as a condition of doing business on the Rosebud Sioux Indian Reservation.

The U.S. Supreme Court has ringingly endorsed the importance of tribal courts in resolving civil disputes that occur on the

reservation. See e.g. National Farmers Union Insurance Cos. vs. Crow Tribe of Indians, 471 U.S. 845 (1985), and Iowa Mutual Insurance Co. v. La Plante, 480 U.S. 9 (1987). As Justice Marshall wrote in Iowa Mutual case "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."<sup>1</sup>

These cases also established an exhaustion rule that federal courts stay their hand to allow a tribal court a full opportunity to determine its own jurisdiction and to rectify any error it may have made.<sup>2</sup> According to the Supreme Court, "[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."<sup>3</sup>

The case at bar presents a unique variation on the jurisdictional theme that is at the heart of the National Farmers Union and Iowa Mutual cases. The issue here is not whether the tribal court has subject matter and personal jurisdiction in this matter (which it clearly does), but whether another court, here the Federal District Court for the Eastern District of

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<sup>1</sup> Iowa Mutual, 480 U.S. at 14-15.

<sup>2</sup> National Farmers Union, 471 U.S. at 857.

<sup>3</sup> Id.

washington, might have concurrent jurisdiction and whether private litigants can stipulate to its jurisdiction so as to effectively to defeat tribal court jurisdiction.

Obviously, only the Federal District Court for the Eastern District of Washington can properly determine whether it has jurisdiction, but such a determination out to be properly informed by cogent tribal court articulation and analysis of the relevant law and public policy at both the tribal and federal level. In addition, of course, even if the Federal District Court for the Eastern District of Washington does have (concurrent) jurisdiction, it could deny enforcement of the venue selection provision and defer as a matter of comity to tribal court jurisdiction in recognition of appropriate tribal and federal Indian law policy. See e.g. Stock-West, Inc. v. Confederated Tribes, 873 F.2d 1221 (9th Cir. 1989). Relevant, too, as noted in the Stock-West opinion is the observation that federal courts are courts of limited jurisdiction. The record to date in this case provides no basis whatsoever for any likely finding that there is a federal court jurisdiction over this garden variety contract dispute.

Before dismissing in light of the venue selection provision, the tribal trial court must be satisfied by an affirmative showing that the public policy of the United States and the Rosebud Sioux Tribe is not contravened when parties apparently

contract to avoid tribal court jurisdiction, and that the venue selection clause is not merely a ploy to circumvent tribal court jurisdiction which would otherwise lie. In that regard, a more complete evidentiary and legal record<sup>4</sup> is essential to determine whether Rosebud Sioux tribal public policy would favor the relinquishment of tribal court jurisdiction pursuant to a contract between private parties. Given the general policy of the United States and the Rosebud Sioux Tribe favoring tribal jurisdiction, we reverse and remand this case to the trial court for additional findings on the following issues:

1. Whether the Federal District Court, Eastern District of Washington would have subject matter jurisdiction over the case and if so, whether it should defer to tribal court jurisdiction.
2. Whether the public policy of the Rosebud Sioux Tribe favors venue selection clauses contracted by private parties that effectively divest the tribal court of jurisdiction it would otherwise have.

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<sup>4</sup> Evidence relative to the "gravely inconvenience" standard of the Bremen case is also potentially pertinent here. For reasons that are unclear from the record, apparently no evidence (as distinguished from the assertions of counsel) was received on this issue.

Accordingly, we also invite the Rosebud Sioux Tribe to file an amicus curiae brief with the trial court for its review in considering this matter.

IT IS SO ORDERED.

*Frank Pommersheim*

Frank Pommersheim  
Chief Justice

Patrick Lee  
Associate Justice

Robert Grey Eagle  
Associate Justice

Dated December 30, 1992

FILED  
in the

ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above-entitled action by this Clerk on the 4th day of January, 1993.

*DeWita Marshall*  
Clerk of Courts