

ROSEBUD SIOUX SUPREME COURT )  
ROSEBUD SIOUX RESERVATION ) SS  
ROSEBUD, SOUTH DAKOTA )  
\*\*\*\*\*  
CA2006-10

ED CHARGING ELK, ET AL,  
Plaintiff/Appellee  
VS.  
TRIBAL LAND ENTERPRISE and,  
ROSEBUD SIOUX TRIBE,  
Defendant/Appellant(s)  
NOTICE OF ENTRY  
OF ORDER

\*\*\*\*\*  
TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 8<sup>th</sup> day of March, 2007, the Honorable Chief Justice FRANK POMMERSHIEM presiding, The Court entered a MEMORANDUM OPINION AND ORDER. A certified copy of said Judgment of ORDER is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 10<sup>th</sup> day of May, 2007.

*Dorothy Nelson*  
Clerk of Courts

CERTIFICATE OF SERVICE  
I, Dorothy Nelson, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

Steven D. Sandven, Law Offices, 300 North Dakota Avenue, Suite 106, Sioux Falls, SD 57104  
Robert Reutter, Esq., PO Box 218, Dalton, MN 56324  
Stephanie Pochop, Esq., Johnson Eklund Law Office, PO Box 149, Gregory, SD 57533

Dated this 10<sup>th</sup> day of May, 2007.

*Dorothy Nelson*  
Clerk of Courts

ROSEBUD SIOUX TRIBE  
SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

ROSEBUD SIOUX TRIBE 2007 MAY 10 PM 12:31

ED CHARGING ELK, ET AL.,  
Plaintiffs/Appellants,  
vs.  
ROSEBUD SIOUX TRIBE and  
TRIBAL LAND ENTERPRISES,  
Defendants/Appellees.

MEMORANDUM OPINION  
AND ORDER

CA # 2006-101LED

Per curiam (Before Chief Justice Frank Pommersheim and Associate Justices Charles

Abourezk and Patrick Lee).  
I. INTRODUCTION

This action began in July 2002 when Ed Charging Elk, a member of the Rosebud Sioux Tribe, and numerous other Tribal member plaintiffs filed a civil action in the Tribal trial court against the Rosebud Sioux Tribe and the Tribal Land Enterprises (TLE) program.<sup>1</sup> The gravamen of the complaint asserted numerous alleged wrongdoings by the Tribe and TLE and its directors and managers in carrying out their responsibilities under the Rosebud Sioux Constitution, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, and By-laws of TLE and that these wrongdoings caused harm to the Plaintiffs as holders of TLE certificates. The Plaintiffs sought both declaratory and injunctive relief relative to their rights as TLE certificate holders and an accounting of TLE

<sup>1</sup> Tribal Land Enterprises is a Tribal entity organized pursuant to the Tribe's Constitutional authority to "charter subordinate organizations for economic purposes" Article IV, § n, Rosebud Sioux Tribe Constitution. The purpose and objectives of TLE are:

1. to effect a plan to remedy the situation of increasing fractionation of ownership interests in allotted lands resulting from probate procedure;
2. to provide a plan to consolidate individual ownership interest in restricted land in furtherance of economic enterprises;
3. to develop a land management plan for the economic interests of members who participate in this plan;
4. to provide for the preservation and safeguarding of the values in individual ownership equities in land;
5. to provide a simplified process by which an individual may exchange his landholdings;
6. to utilize lands under the control of the Tribe for the development of economic enterprises within the various communities of Indians on the reservation;
7. to provide for an adequate system of keeping records and accounting in connection with the operation and management of this plan; and
8. to provide a long-term land-buying program which would benefit members of the Tribe.

lease rentals and other income since 1947. The Plaintiffs also sought injunctive relief against the

Defendants ordering them to refrain from engaging in certain alleged illegal activities and to

undertake other activities allegedly required by TLE's By-laws.

The Defendants subsequently filed a motion to dismiss the action in its entirety based on

various grounds including the sovereign immunity of both the Rosebud Sioux Tribe and TLE, as a

Tribal enterprise, and the indispensable party status of the Rosebud Sioux Tribe. Special Judge B.J.

Jones ruled on this motion on February 10, 2004 and dismissed the action in its entirety against the

Rosebud Sioux Tribe based on its sovereign immunity and dismissed all claims against TLE – with

one exception – based on its sovereign immunity as a Tribal enterprise. Judge Jones described the

exception as follows:

[I]n this case, the Court concludes that the property right allegedly taken by the Plaintiffs' actions, which the Court must construe as being those described in the Plaintiff's complaint, is much more than a contractual claim but instead is an interest in allotted and tribal land, which the United States Supreme Court has declared in two cases rises to the level of a property right that cannot be taken without due process of law or just compensation. *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987); *DuMarce v. Norton*, 277 F.Supp.2d 1046 (D.S.D. 2003). If the Plaintiffs can demonstrate a deprivation of this right without due process of law or without just compensation the Court feels that the TLE should be not permitted to rest on sovereign immunity of the Tribe as a defense in this case.<sup>2</sup>

Subsequently, an amended complaint was filed in July 2005 that expressly claimed a "taking" by

TLE in violation of the Rosebud Sioux Constitution<sup>3</sup> and the Indian Civil Rights Act, 25 U.S.C. §

1302 (5) and § 1302 (8).<sup>4</sup> Soon after counsel<sup>5</sup> for TLE and counsel for the Plaintiffs entered into an

<sup>2</sup> Judge Jones' order further intimated potential remedial issues:

Even if the Plaintiffs could prove this allegation, sovereign immunity may bar the Court from granting any relief other than declaratory or injunctive relief. Even that type of relief could be barred, however, if the result of the grant of relief could be to force the Tribe to disgorge monies or other things of value. *Id.*, n. 1.

<sup>3</sup> Art. X, Sec. 3 of the Rosebud Sioux Tribe Constitution provides:

Section 3. No person shall be subject for the same offense to be twice put in jeopardy; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be denied equal protection of law. (Amendment No. XI, May 2, 1966.)

extensive stipulation that among other things stayed the action in Tribal court pending

“Congressional review, analysis, recommendation and solution until such time as Congress has completed its review, analysis, recommendation, and submitted its solution to the parties.”

Despite the stipulation, no such Congressional review materialized and the Plaintiffs came to the further conclusion that the Defendant TLE had otherwise breached the stipulation. As a result, Plaintiffs properly noticed depositions pursuant to Rosebud Sioux Tribe Civil Procedure Rule 26(c) and subpoenaed several members of the TLE Board<sup>6</sup> and administration for their depositions. TLE, represented by new counsel, filed a motion to quash the subpoenas. The motion to quash was denied by Judge Jones on August 8, 2006.

The Defendant filed a notice of appeal on August 9, 2006. A stay was granted on the same date. Oral argument was held before this Court on January 3, 2007.<sup>7</sup>

## II. ISSUES

This appeal raises two issues, one procedural and one substantive, of significant merit and import. They are:

A. Whether the denial of the motion to quash is an appealable order that is properly before the Court *at this time*; and

B. Whether there are any adequate substantive grounds on which to quash the subpoenas.

Each issue will be discussed in turn.

<sup>4</sup> 25 U.S.C. § 1302 (5) and § 1302 (8) provide:

No Indian tribe in exercising powers of self-government shall-

(5) take any private property for a public use without just compensation;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

<sup>5</sup> Current counsel for TLE, Mr. Steven Sandven, did not begin representing TLE until 2006.

<sup>6</sup> The TLE Board of Directors is made up of seven members that include the Tribal President, three members of the Tribal Council, and three other certificate holders, who are Tribal members. TLE Bylaw § 12.

<sup>7</sup> Counsel for TLE subsequently moved to recuse Justice Greaves for an alleged conflict of interest. The motion was granted. Counsel for TLE subsequently moved to recuse Justice Valandra, who was named to replace Justice Greaves, for an alleged conflict of interest. This motion was granted as well. Justice Abourzk was named to replace Justice Valandra.

### III. DISCUSSION

#### A. Appealability

##### 1. Final Judgment Rule

The general rule of appellate jurisprudence is that appeals may only be taken from a final judgment. *See e.g., Erwin Chemerinsky, Federal Jurisdiction* 664-65 (4<sup>th</sup> Ed., 2003); Rule 2,

Rosebud Supreme Court Rules of Procedure. This general rule is supported on the grounds that it promotes judicial efficiency, provides expeditious resolution of issues, and benefits the reviewing court by providing a fully developed record, including the reasoning and conclusions of the lower court judges. *Chemerinsky, id.*

There are, of course, exceptions to this general rule. The most common is the provision that allows for interlocutory review, especially in the context of granting, modifying, or denying injunctions, or when a (district) judge "is of the opinion such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C.

#### § 1292 (b).

Rule 2 of the Rosebud Supreme Court Rules of Procedure specifically authorizes

interlocutory appeals:

No interlocutory appeals shall be authorized in either criminal or civil matters unless expressly authorized by the Presiding Justice. The decision of whether or not to accept interlocutory appeals shall be based upon the findings of fact, conclusions of law and ruling entered by the Tribal Judge upon Appellant's motion to file an interlocutory appeal.

TLE, the Defendant/Appellant in this case, did not file a motion with this Court to take an

interlocutory appeal and no such interlocutory appeal was expressly authorized by the Presiding

Justice. Therefore the notice of appeal filed in this matter is insufficient as a matter of Tribal law to qualify as a permissible interlocutory appeal.

There is however another relevant exception to the final judgment rule and that is the collateral order doctrine. The collateral order doctrine refers to the authority of an appellate court to review a lower court ruling that is unrelated to the merits of the case, but allegedly threatens an important right. *Chemerinsky supra* at 681. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Such is the case at bar. Both the potential immunity of those individuals served with subpoenas and its relevance to meaningful discovery in this case are important rights that are not directly tied to the merits of Plaintiffs' case. See, e.g., *Moreno v. Small Business Administration*, 877 F.2d 715 (8<sup>th</sup> Cir. 1989), *Osage Tribal Council v. Department of Labor*, 187 F.3d 1174 (10<sup>th</sup> Cir. 1999).

2. Scope of the Appeal

This appeal is therefore properly before us under the collateral order doctrine, but that does not end the inquiry. There is intense dispute between the parties as to the legitimate scope of this appeal. Appellant asserts that the scope of the appeal is extensive enough to permit it to revisit TLE's broad initial assertion of sovereign immunity in *addition* to the immunity of the subpoenaed individuals, as well as indispensable party claims relevant to both the United States and the Rosebud Sioux Tribe. Plaintiffs/Appellees assert that the scope of the appeal is limited to the immunity claims available to subpoenaed individuals and no more.

Resolution of this issue turns, in large part, on identifying what order is being appealed. To date, Judge Jones has issued two orders in this case, namely his order of February 10, 2004 and his order of August 8, 2006. In the February 10, 2004 order, Judge Jones granted the motion to dismiss against the Tribe based on its sovereign immunity and dismissed all other claims against TLE based on its sovereign immunity except for the "takings" claim, which alleged that TLE had taken the property of TLE certificate holders without due process of law in violation of the Rosebud Sioux Constitution and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (8).

No appeal was taken from that order and thus none of the issues decided in that motion to dismiss can be revisited in this subsequent (narrow) appeal of Judge Jones August 8, 2006 order – made more than two years subsequent to his earlier order – denying Defendant’s motion to quash the subpoenas served on several individuals, who serve on TLE’s Board of Directors. Thus the only proper issue before this Court is whether these *individuals* have any meritorious defense such as qualified immunity to the enforcement of those subpoenas.

At oral argument, counsel for TLE vigorously argued that it was entitled to assert (again) the broad claim of TLE’s sovereign immunity, because of the essential rule that jurisdictional issues (including sovereign immunity) are never waived and may be raised at any time. While this observation is true, the Appellant misapplies its applicability at this stage of the case. Appellant TLE did raise broad issues of TLE’s sovereign immunity and had its day in court on that issue. As a result, that issue is not available to be reasserted in this narrow appeal. To be sure, when and if there is a *final judgment* in this case against TLE, TLE will have every right to raise the issue of TLE’s sovereign immunity in its full and final appeal before this Court. To use a metaphor, TLE is entitled to one bite of the apple to raise the sovereign immunity issue (which it had), not as many bites as it would like. To rule otherwise would permit a party to continually revisit an issue without the benefit of a final judgment. Such a rule would result in substantial inefficiency, unfairness, and delay. To be clear, and at the risk of being repetitive, this is a limited, intermediate appeal, not any ultimate and final appeal because there has been no final judgment on the merits of this case.

In addition, counsel for the Appellant made significant reference at oral argument (but not in his brief) to this Court’s decision in the Crazy Horse Malt Liquor case, *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. Heileman Brewing Co.* (Civ. 93-2004), for the proposition that standard of review on questions of jurisdiction is *de novo*. This proposition, while accurately stated by counsel, is unavailing in this narrow appeal. In the *Crazy Horse* case, the appeal was a

Since there is no TLE sovereign immunity to "share" on this particular claim, it necessarily follows that there is no qualified immunity available to the subpoenaed individuals. Qualified immunity refers to the notion that "government officials, performing discretionary functions generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Judge Jones may have been right or wrong in so holding, but that decision is not before this Court at this time. is the core of Judge Jones' order of February 10, 2004, which is not before this Court. Of course, immunity for TLE officials to "share" because there is no sovereign immunity for TLE itself. This particular of this case. In this case, in the single surviving "takings" claim, there is no Tribal (9<sup>th</sup> Cir. 1989). While this statement is true at some global level of abstraction, it is not true in the representative capacity and within the scope of their authority." *Evans v. McKay*, 869 F.2d 1341 capacity "share" (Appellant's brief at 15) the Tribe's immunity from suit when "acting in their claims against it and its officers partake in that immunity. Tribal officials acting in their official The essence of Appellant's claim is that TLE possesses complete sovereign immunity in all

The Court believes that the Plaintiffs have the right to try and prove the cause of action arising under the Indian Civil Rights Act and should have the right to reasonable discovery to prove this claim. No appeal was filed from the Court's previous order granting in large part, and denying in small part, the motion to dismiss the Court therefore finds that the officials in question are not immune from reasonable discovery.

In Judge Jones' order of August 8, 2006, he stated:

B. Substantive Grounds for Quashing the Subpoenas

order of August 8, 2006 denying Appellant's motion to quash the subpoenas. lawsuit in its entirety. What is to be reviewed – and it is to be reviewed *de novo* – is Judge Jones grounds. This is not the case at bar because there has been no final judgment dismissing this full appeal pursuant to the trial court's *final judgment* dismissing the entire case on jurisdictional

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity is derivative of sovereign immunity and if there is no sovereign immunity available on a particular claim, it necessarily follows that no qualified immunity is available for (TLE) individuals or that claim. Even if qualified immunity was available, which it is not, it is limited to actions taken within the scope of the individual's authority. See *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1 (1<sup>st</sup> Cir. 1989). The Plaintiffs' complaint contains numerous allegations that the Directors of TLE did not follow their own by-laws and that they acted outside the scope of their authority. It goes without saying that at this state of the proceeding that such averments are considered to be true within the context of a motion to dismiss or a motion to quash. This does not mean in any way that these averments are "findings of fact." Their ultimate factual veracity will have to be determined at trial. It is significant to further note in this regard that any potential qualified immunity pertains only when the individual is a named defendant. Immunity, where applicable, protects *defendants* from being hauled into court and being subject to the burden of defending litigation and facing potential liability. The individuals subpoenaed in this action are not named defendants and thus do not have to defend litigation and do not face any potential liability. Thus they do not satisfy the basic condition precedent of being a named defendant that is necessary to invoke immunity in whole or part. Appellant has not cited a single case (presumably because there are none) in which a non-defendant moved successfully to quash a subpoena on immunity grounds.

In sum, the subpoenaed individuals have no immunity, qualified or otherwise, to assert for three independent and overlapping reasons; namely that the directors have no immunity because they are not named defendants in this instance; that TLE itself has no sovereign immunity on the "takings" claim to 'share' with its directors; and that there is no qualified immunity because the TLE directors are alleged to have acted outside the scope of their duties.

This absence of immunity, however, does not address any potential testimonial privilege that

might exist in whole or in part in the case at bar. The concept of privilege plays a unique role

within the law of evidence. As noted in a leading evidence textbook:

Almost all the rules of evidence other than rules of privilege are designed to enhance the accuracy and efficiency of the factfinding process. Privileges have a different purpose. They are intended to protect certain societal relationships and values, even though such protection may impose significant costs upon the litigation process. Their effect in any given trial may be to impede the search for truth. A primary goal of most privileges is to encourage the free flow of communication in various relationships. Some privileges are intended to prevent governmental interference with certain favored relationships, such as marriage. Others are designed to further the effective functioning of government by limiting the access of litigants to state secrets or confidential communications by public officials. The scope of privilege law is of concern to all citizens because it determines the balance struck between the interest of society in maintaining zones of privacy in human relationships and the right of litigants to obtain evidence needed to prosecute claims or defend themselves in court.

*Evidence Under the Rules*, Christopher Mueller and Laird Kirkpatrick 757 (5<sup>th</sup> Ed., 2004).

For example, within the Federal Rules of Evidence, there are various governmental

privileges, the most important of which pertain to state secrets and executive privilege. Not

surprisingly, there is obvious tension in this area between the right of the public to know what the

government is doing and as against the right of the government to function efficiently and to

minimize separation of powers concerns. As a result of this tension, "the scope of the various

governmental privileges has been difficult to describe, and testing claims of such privileges has

been fraught with difficulties." *Federal Evidence*, Christopher Mueller and Laird Kirkpatrick 505

(2<sup>nd</sup> Ed., Vol. 2 1994). The fact that such value laden and complicated issues are increasingly

confronting tribal courts is a significant marker attesting to the growing stature and sophistication of

tribal courts. The issue of (potential) testimonial privilege has yet to be raised in this litigation and

is not currently before the Court.

Several other matters of clarification are in order. At oral argument as well as in its brief,

Appellant relied extensively on the case of *Larson v. Domestic & Foreign Commerce Corp.*, 337

U.S. 682 (1947) and particularly the language quoted in its brief:

Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.

This reliance is misplaced. *Larson* focused on the issue whether a lawsuit brought against the Administrator (in his official capacity) of the War Assets Administration, a federal agency, but not against War Assets Administration itself was in reality a suit against the sovereign and barred by the sovereign's immunity from suit. The Supreme Court ruled that it was and the case was ultimately dismissed on sovereign immunity grounds.

The facts in the instant case are not similar to those in *Larson*. Indeed, they are the exact opposite. In *Larson*, the officer was sued, but not the sovereign. In this case, the sovereign was sued, but not the officer. Therefore the holding of *Larson* is inapposite to the case at bar because there is no issue of whether the named defendant is actually a placeholder for the unnamed

sovereign. TLE is the named, as opposed to the unnamed (sovereign), defendant and hence outside the rationale of the *Larson* case. In addition, there is language in the *Larson* case that is actually supportive of the Appellee's position in this case. The *Larson* court noted that actions of an officer of the sovereign that involve holding or taking an individual's property contrary to statutory authorization or in contravention of constitutional requirements are not afforded any protection

under the penumbra of the sovereign's immunity. *Id.* at 701-02.

There is also a broader clarification that needs to be made. Appellant repeatedly asserted in both its brief and at oral argument that neither the Tribe nor TLE has waived its sovereign

immunity. This is absolutely true, but it is by no means dispositive. The core in this regard focuses on whether there has been an effective waiver of TLE's sovereign immunity by the decision of the Supreme Court in its interpretation of the Indian Civil Rights Act of 1968 in the case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The seminal case clearly stands for the proposition that ICRA did *not* waive the Tribe's immunity from suit in any ICRA claim (except habeas corpus relief) brought against it in *federal* court. As to ICRA claims brought in *tribal* court, the Court expressly stated:

Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are intended to apply. *Id.* at 65.

It is this language – which is not quoted in either party's brief - that is central to the potential (*federal*) waiver of the tribal sovereign immunity in this case. While there is no uniform line of tribal court decisions in this area, the vast majority of tribal courts have found that this language does constitute a limited federal waiver of tribal sovereign immunity, especially for claims seeking declaratory or injunctive relief, rather than money damages. For example, the leading treatise in the field of Indian law notes that the "interpretation and application of ICRA are largely matters for tribal institutions alone" and that "tribal courts have demonstrated concern for the availability of effective remedies, when tribal actions disregard individual rights." *Cohen's Handbook of Federal Indian Law* 956, 958 (5<sup>th</sup> ed. 2005).

The Rosebud Supreme Court *has yet* to make its own definitive ruling in this important area of law.<sup>8</sup> Thus this lawsuit represents a significant, perhaps momentous, case of first impression for this Court. This is especially true in light of the fact that it does not appear that a single tribal court in Indian country has dealt with the issue of tribal sovereign immunity in the context of a "takings"

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<sup>8</sup> The closest this Court has come is the case of *Rosebud Sioux Tribe v. Cordier* (Rosebud Sup. Ct. 1996), in which it held that the Tribe's sovereign immunity did not protect it from a lawsuit that sought to enforce a decision of the Tribe's Grievance Committee to reinstate a Tribal employee.

claim under ICRA and a tribe's constitution. That is what is ultimately at stake in this litigation, but

as emphasized throughout this opinion, such ultimate issues are not before the Court *at this time*.

The Court believes that it is its duty to decide only what is actually before it and not to engage in

anticipatory jurisprudence by deciding issues without the benefit of a complete record and a

comprehensive final judgment.

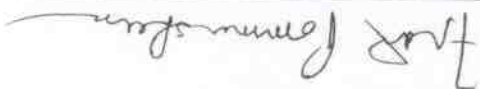
#### IV. CONCLUSION

For all the above-stated reasons, Judge Jones' order of August 8, 2006 is affirmed and the

matter is remanded with directions for appropriate discovery to begin forthwith.

IT IS SO ORDERED.

For the Court:

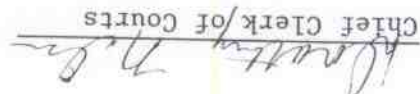


Frank Pommersheim

Chief Justice

Dated May 8, 2007.

ATTEST:

  
Chief Clerk of Courts