

Rosebud Sioux Tribe

Supreme Court Digest

2011

Dakota Plains Legal Services
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57555-0727

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Appeals:

1: In General:

It is a fundamental axiom of appellate jurisprudence that no appeal may be taken except from a final judgment. The final judgment rule is grounded in the essential underlying policy that piecemeal appeals are inefficient, costly, and often unfair to the

parties. Despite this fundamental practice, there are several well-known exceptions to the final judgment rule including: the collateral order doctrine, interlocutory appeals, and Rule 54 judgments that result in cases where multiple parties or multiple claims are litigated. *Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc.*, CA 2004-06, p. 3, (2004). *Ed Charging Elk, et al.*, v. *Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, pp. 4-5, (2006).

Rule 2 of the Rosebud Sioux Tribe Supreme Court Rules of Procedure provides that: appeals may only be taken from a final judgment. 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. *Ed Charging Elk, et al.*, v. *Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, p. 4, (2006). The Rosebud Sioux Tribe Supreme Court upheld the thirty (30) day provision for appeals of all civil matters. This appeal was filed in response to a divorce action. Appellant failed to file timely and was not allowed to raise the issue. *DuBray v. Hein*, CA 2009-04, P. 2, (2010).

Rule 5 of the Rules of Civil Procedures of the Rosebud Sioux Tribe provides that service of process is to be by first class mailing and is complete upon mailing. However, first class mail without return receipt requested creates a rebuttable presumption that the first class mail reached its destination. The Court found that the RST Rules of Civil Procedure should be changed and ordered that actual notice is required in all civil actions after service of the Complaint and Summons though service upon the parties by the use of either a process server or certified mail with return receipt requested. *Jones v. Makes Room For Them*, CA 2007-03, p. 2 (2007).

The appropriate standard of review for an appellate review determining whether a trial court erred in concluding there was not genuine issue of material fact is de nova. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 3 (2007).

2: Criminal:

A: Conflicting Evidence:

Where two versions of evidence conflict, the Court is bound to accept the view most favorable to the Tribe, if there is substantial evidence tending to support the verdict. Upon review of the transcript of evidence, the Supreme Court found that there was substantial evidence to support the lower court=s finding. *Rosebud Sioux Tribe v. Schmidt*, CA 88-04 p. 4 (1988).

B: Sufficiency of Evidence:

In determining the sufficiency of evidence in a criminal appeal, the question is whether there is evidence in the record which, if believed by a jury (or judge in a bench trial), is sufficient to sustain a finding of guilt beyond a reasonable doubt. In making such a determination, this Court must accept that evidence and such reasonable inferences that can be fairly drawn therefrom, which will support the verdict. A fact finder=s verdict will be upheld if the evidence and reasonable inferences therefrom sustain a rational theory of guilt. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, p. 3 (1992).

3: 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. *Ed Charging Elk, et al.*, v. *Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, p. 5, (2006).

4: Interlocutory Appeals:

A: Authorization/ Prohibition:

The tribal code and the rules of this court prior to date of amendment (September 19, 1988) neither explicitly authorized nor prohibited interlocutory appeals. In the absence of direct tribal law on point, this court will look to federal practice. Rule 5 of the Federal Rules of Appellate Procedure permit interlocutory appeals upon petition of the appellant in accordance with the requirements established by the statute at 28 U.S.C. 1292 (b). *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 5-6, (1988) (Look at Rules of Court, this opinion predates current law). *Dubray-Cordier v. St. Francis Mission*, CA 2004-02 (2004).

Rule 2 of the Procedure for the Rosebud Sioux Tribal Court of Appeals provides that:

Any interlocutory appeals shall be allowed 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 finding of fact, conclusions of law and ruling entered by the Tribal Judge upon the Appellant=s Motion to file an interlocutory appeal. *Rosebud Housing Authority v. Brandis and Brandis*, CA 88-06, p. 1 (1989). *Ed Charging Elk, et al.*, v. *Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, p. 4, (2006).

B: Dismissal by Stipulation:

Upon stipulation of the parties and good cause appearing an Interlocutory Appeal will be dismissed and the case remanded to trial court for further proceedings on the merits. *Running Horse v. Murray*, CA 88-01 (1990).

C: Order Denying Motion for Interlocutory Appeal:

Since the requirements of Rule 2 of the Appellate Rules of Civil Procedure, and Rule 54 of the Rules of Civil Procedure have not been complied with and since the appeal time has not yet begun to run, the Motion for Interlocutory Appeal is denied. *Rosebud Housing Authority v. Murray*, CA 91-03 (1991).

D: Propriety:

Interlocutory appeals are not proper to the Rosebud Sioux Tribal Appellate Court when such issues may be appealed after final judgment is entered. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 2-5 (1989).

E: Requirements:

In order to be granted an interlocutory appeal, three conditions must be met to come within the collateral order doctrine:

- 1) conclusively determine the disputed questions
- 2) resolve an important issue completely separate from the merits of the action; and
- 3) be effectively unreviewable on appeal from a final judgment. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, p. 4 (1989).

5: RST Rule of Civil Procedure 54(a):

RST Rule of Civil Procedure 54(a) provides the trial judge with a discretionary option under the proper conditions, to treat a judgment on a particular claim within a multi-claim lawsuit as final for purposes of appeal. The core of Rule 54(a) is its requirement that the court enter an "Order severing such decided claims from the remaining claims." The mere granting of partial summary judgment orders or scheduling orders setting a hearing date does not make such orders appealable. *Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc.*, CA 2004-06, pp. 4, 5, (2004).

5:

Rule 5 of the Rules of Civil Procedures of the Rosebud Sioux Tribe provides that service of process is to be by first class mailing and is complete upon mailing. However, first class mail without return receipt requested creates a rebuttable presumption that the first class mail reached its destination. The Court found that the RST Rules of Civil Procedure should be changed and ordered that actual notice is required in all civil actions after service of the Complaint and Summons though service upon the parties by the use of either a process server or certified mail with return receipt requested. *Jones v. Makes Room For Them*, CA 2007-03, p. 2 (2007).

12 (c) and 56:

Rule 12(c) and 56 of the Rosebud Sioux Law and Order Code states that a motion for summary judgment is appropriately granted when it appears there is no genuine issue as to any material fact. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 3 (2007).

12 (b) and (c):

The RST Rules of Civil Procedure provide that a party be afforded with an opportunity to respond before a court rules on a motion. RST Rules of Civil Procedure 12(b) and (c) provide that there can not be a ruling an answer or motion "unless there is a 'hearing' and a 'reasonable opportunity to present all material pertinent to such a motion.'" *Burnette v. Wooden Knife*, CA 2008-01, p 4 (2008).

6: Withdrawal of appeal:

A: Motion to Withdraw Appeal:

A motion to withdraw appeal will be granted when a request to withdraw is made on the grounds that the parties have worked out a deal. *Bordeaux v. Kindle, Rosebud Sioux Tribe and Council*, CA 96-03 (1996).

A motion to withdraw appeal will be granted when a request to withdraw is made on the grounds that present, personal circumstances have made the remedy sought through appeal unobtainable. *Red Hawk v. Rosebud Sioux Tribe*, SC 2001-02 (2002).

B: Voluntary Motion to Dismiss Appeal:

Plaintiff and Appellant moved to voluntarily dismiss her appeal. The Court ordered it dismissed. *Hutchinson v. Halligan*, CA 92-04 (1993).

Appellate Review:

1: Absence of Findings of Facts and Conclusions of Law:

If an order providing for the dismissal of the petition for adjudication and termination of Appellee's parental rights provides no findings of fact or conclusions of law or any other memorandum explanation for the trial court's decision, the record on appeal

is impossible to review for adequacy as a matter of fact or law. The absence of findings of fact and conclusions of law or any other memorandum discussion clearly violates Rule 41(c) of the Rosebud Sioux Rules of Civil Procedure and therefore requires that the decision of the trial court be reversed. *The People of the Rosebud Sioux Tribe in the Interest of J.E.* CA 91-06, p. 6 (1992).

2: Remand When Only the Court's Findings of Facts and Conclusions of Law Available (No Transcript Available):

With only the court's findings of facts available, we find that the court was clearly erroneous and that the findings of facts are insufficient to support the judgment. With only the court's conclusions of law available, we are not able to conduct a *de nova* review of the courts conclusions of law on the issue of why Appellant's replevin complaint was rejected or not ruled upon by the court. *Short Bull v. Stover*, CA 10-04, p. 4 (2010).

Again the only record of the hearing held in this matter is the lower court's Findings of Fact and Conclusions of Law. There is no decipherable transcript of the hearing. There is no way for this court to determine on review what analysis, if any, the lower court used to rule that the Appellees' answer to be construed as an answer and counterclaim. *Short Bull v. Stover*, CA 10-04, p. 5 (2010).

3: Issues on Appeal:

A: Issue not raised in trial court:

It is a cardinal rule of appellate review that an issue not properly raised before the trial court is not subject to review by an appellate court. *Rosebud Housing Authority v. Young, Sedlmajor, and Burnette*, CA 87-03, CA 87-04, CA 87-05, p. 5 (1987).

Failure to submit evidence before the trial court effectively waives the issue of admissibility on an appeal. *Leader Charge v. Leader Charge*, CA 2009-01 (2009).

B: Subject Matter Jurisdiction:

The issue of subject matter jurisdiction may be raised for the first time on appeal. *Young v. Zimmerman & Parsons Furniture Barn*, SC 20001-07, p. 2 (2002).

4: Failure to comply with Appellate Rules of Procedure:

A: Failure to file Designation of Record as requested by Rule 6:

Without some record on appeal, there is nothing for the appellate court to consider and therefore it cannot properly carry out its reviewing function. *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, pp. 2-3 (1992).

Applicable Law:

1: Choice of Law:

Rosebud Sioux Tribal Code, §4-2-8, provides for the use of state law when there is no applicable federal or tribal law (including "customs and usages of the tribe"). However, if the trial court applied state law principles in the past, those state precepts of law became tribal (common) law. Tribal custom is a potentially rich source of tribal law, but cannot become part of tribal (common) law until it is asserted and established in a specific case. The mere potential of tribal custom cannot be used to defeat existing tribal law. *In the Matter of the Commitment of Lawrence Lee Jr.*, CA 99-03, pp. 2-4 (2000).

2: Interlocutory Appeal:

The tribal code and the rules of this court prior to date of amendment (September 19, 1988) neither explicitly authorized nor prohibited interlocutory appeals. In the absence of direct tribal law on point, this court will look to federal practice. Rule 5 of the Federal Rules of Appellate Procedure permit interlocutory appeals upon petition of the appellant in accordance with the requirements established by the statute at 28 U.S.C. 1292 (b). *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 5-6 (1988) (Look at Rules of Court, this opinion predates current law).

Burden of Proof:

1: Civil:

A: Issue of Fact:

General Rule: issues of fact in civil cases are to be determined in accordance with the preponderance of the evidence standard. *Farmer's State Bank of Mission v. Boyd and Boyd*, CA 89-03, p.4 (1990).

Rule 12(c) and 56 of the Rosebud Sioux Law and Order Code states that a motion for summary judgment is appropriately granted when it appears there is no genuine issue as to any material fact. The appropriate standard of review for an appellate review determining whether a trial court erred in concluding there was not genuine issue of material fact is *de nova*. Whether a Congressional Act actually provides funding for the Tribal entity is an issue of material fact. The sovereign immunity of a

Tribal entity is subject to the law under which funding was obtained for that entity where that law specifically addresses sovereign immunity. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 3-4 (2007).

B: Jurisdiction:

Plaintiff must establish the jurisdictional facts by a preponderance of the evidence. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 10 (1996).

C: Relationship to child:

If a party asserts that according to Lakota genealogy and relational custom, they are related to the child in question, and these assertions are true, the Court will recognize this relation and confirm the party's standing and bring the party within the ambit of the Indian Child Welfare Act (the person making these claims has the burden of proof and must establish these claims by a preponderance of the evidence). *The People of the Rosebud Sioux Tribe in the Interest of J.E.* CA 91-06, pp. 3-4, (1992).

2: Criminal:

A: Beyond a reasonable doubt:

In determining the sufficiency of evidence in a criminal appeal, the question is whether there is evidence in the record which, if believed by a jury (or judge in a bench trial), is sufficient to sustain a finding of guilt beyond a reasonable doubt. In making such a determination, this Court must accept that evidence and such reasonable inferences that can be fairly drawn therefrom, which will support the verdict. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, p. 3 (1992).

Child Support:

1: Contempt:

The doctrine of contempt is the most common remedial device used to enforce payment of delinquent, inadequate, or back child support. The only issue in applying the court's contempt power is whether the defaulting party cannot or will not pay. If the party cannot pay, that is he or she lacks the financial ability to pay, the strictures of the due process and equal protection clauses of the Rosebud Sioux Tribal Constitution prevent incarceration of the party for contempt. If the party can pay, incarceration is proper for failure to comply with a lawful order of the court. *Schmidt v. Medearis*, CA 87-08, p. 6 (1989).

2: Doctrine of Laches:

Even when there is the necessary factual basis for asserting the doctrine, most courts have rejected the applicability of the doctrine in the context of support payments. Most courts view past due child support as an absolute debt based on a judgment to which the doctrine of laches does not normally apply. *Schmidt v. Medearis*, CA 87-08, p. 5 (1989).

3: Modification:

A: Adverse:

It is necessary that the best interests of Indian children be protected from potentially adverse child support modifications that are not carefully scrutinized and approved in writing by the trial court. *Schmidt v. Medearis*, CA 87-08, p. 3 (1989).

B: Court guidelines:

The court cannot adopt laws to determine the amount of child support that is to be paid by non-custodial parents. That is the responsibility of the legislative branch of the RST. Also, the court chose to not rely on South Dakota's laws for guidance. *DuBray v. Hein*, CA 09-04, p. 3 (2010).

C: Ability to pay:

Incarceration in a federal correctional facility was validated as a sufficient economic factor to modify child support. Appellant's order was reduced from \$350 each month to \$125. *DuBray v. Hein*, CA 09-04, p. 3-4 (2010).

4: Paternity:

The trial court did not err in finding that the male was the natural father of the children when, immediately after swearing to the court that the testimony he was about to give in the matter was the truth so help him God, he admitted on two occasions that he was the father of the children. He did not present any evidence to the contrary. Also, the trial court was correct in granting child support based upon admitted paternity of the children and the fact that father is able bodied and suffers from neither a physical nor mental disability. *Joseph v. Joseph*, CA 87-01, pp. 3-4 (1987).

5: Standard of Review:

When the trial court makes no affirmative finding as to the existence of any agreement between the parties to reduce or dissolve arrearage, the finding of child support ought not be set aside unless the trial court abused its discretion in entering its judgment. Such a rule seems particularly pertinent in the tribal court context where a tribal court judge must weigh many social and cultural, as well as, economic and legal factors, when deciding child support. As a matter of tribal law adjudication, in which many parties will not be represented by counsel and will proceed pro se or with the assistance of a tribal advocate, this court

does not approve child support modifications of divorce decrees absent court amendment in the form of written orders. *Schmidt v. Medearis*, CA 87-08, p. 3 (1989).

6: Statute of Limitations:

The Rosebud Sioux Tribal Code at Chapter 2, Section 4-2-4 provides for a two year statute of limitations for all causes of action. Also, the recent (October 1985) statute of limitations is not to be applied retroactively. The previous statute of limitations was six years. It is also recognized law where a decree or order awards installment payments for the support of children, the statute of limitations begins to run as against each installment as it becomes due. *Schmidt v. Medearis*, CA 87-08, p. 4 (1989).

7: Support payments:

A high unemployment rate in a particular geographical region is not an excuse for not providing support for children. *Joseph v. Joseph*, CA 87-01, p. 4 (1987).

Constitutional Law:

1: Child Support:

The doctrine of contempt is the most common remedial device used to enforce payment of delinquent, inadequate, or back child support. The only issue in applying the court's contempt power is whether the defaulting party cannot or will not pay. If the party cannot pay, that is he or she lacks the financial ability to pay, the strictures of the due process and equal protection clauses of the Rosebud Sioux Tribal Constitution prevent incarceration of the party for contempt. If the party can pay, incarceration is proper for failure to comply with a lawful order of the court. *Schmidt v. Medearis*, CA 87-08, p. 6 (1989).

2: Right to a Fair and Impartial Trial:

Where one attorney withdrew the day before the trial and the new attorney was denied a continuance, there was apparent antagonism displayed by the judge toward the new attorney. At the outset of trial a judge accused the attorney of placing documents in the court file without following procedures. Although he later recanted the accusation, the animosity of the judge toward the attorney appears to have had a prejudicial effect on the client. The relationship between the trial judge and the attorney should not be allowed to prejudice a party's right to a fair and impartial trial. The Supreme Court concluded that the trial court displayed inappropriate antagonism toward the party's counsel, abused its discretion in denying the request for a continuance, and abused its discretion by ignoring the expert opinion of the party's expert witness. The abuses constituted reversible error because the party was deprived of effective legal counsel as well as her right to due process of law. *In the Matter of the Guardianship of A.S.*, CA 99-04, pp. 4-5 (2000).

3: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Contempt:

1: Child Support:

The doctrine of contempt is the most common remedial device used to enforce payment of delinquent, inadequate, or back child support. The only issue in applying the court's contempt power is whether the defaulting party cannot or will not pay. If the party cannot pay, that is he or she lacks the financial ability to pay, the strictures of the due process and equal protection clauses of the Rosebud Sioux Tribal Constitution prevent incarceration of the party for contempt. If the party can pay, incarceration is proper for failure to comply with a lawful order of the court. *Schmidt v. Medearis*, CA 87-08, p. 6 (1989).

Contracts:

1: Authority to enter a contract with the Tribe:

25 U.S.C. §81 states that Any agreement shall be made by any person with any tribe of Indians ..., for the payment... of any money,... unless such contract or agreement be executed and approved as follows:

... Second. It shall bear the approval of the Secretary of the Interior...

...Third. It shall contain the names of all parties in interest,... and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, *shall be given specifically*.

Furthermore, §81 states: "All contracts or agreements made in violation of this section shall be null and void..." . Also, the Code of Federal Regulations, Title 25, Part 165, Section 5, subpart (a), states that "all leases...shall be in the form approved by the Secretary and submit to his written approval." When contract entered into with Tribe is in violation of 25 U.S.C. § 81, it is void and unenforceable. *First Computer Concepts, Inc. v. Rosebud Sioux Tribe*, CA 89-02, pp. 6-7 (1990).

2: Dismissing Jurisdiction:

Before dismissing in light of a 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. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, pp. 5-6 (1992).

3: Jurisdiction:

The employer-employee relationship is contractual at its core and under the rules determined by *Montana* it is properly governed by tribal law and regulation.

Dubray-Cordier v. St. Francis Mission; Rosebud Education Society; Father Strzok, CA 2004-02, p. 5, (2004).

4: Venue selection clause:

In the case of a venue selection clause in a contract, unless the Tribe has knowledge of the venue selection clause and waives the application of Business Code 16-1-201, which requires consent to tribal court jurisdiction, the venue selection clause would seem to contravene tribal policy that requires submission to tribal court jurisdiction as a condition of doing business on the Rosebud Sioux Indian Reservation. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, p. 3 (1992).

5: Indian Gaming Regulatory Act:

A: Contract Modifications:

A primary thrust of the Indian Gaming Regulatory Act and duty of the National Indian Gaming Commission, is to protect tribes from improvident management contracts. Contract modifications, including oral agreements, expressly require approval of the National Indian Gaming Commission. 25 U.S.C. § 2711. Failure to obtain the required NIGC approval for any management contract modification renders the modification "void." 25 C.F.R. 535.1. *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092 (8th Cir. 1999). *Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc.*, CA 2004-06, p.5 (2006).

B: Remedies:

It is not possible to identify or to fashion the necessary remedy without a detailed accounting and a set of findings on all issues presented. The court requires such an under taking as without such, the requirements of law and justice will remain unfulfilled and a disservice will be rendered to all concerned. *Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc.*, CA 2004-06, pp. 6, 8 (2006).

Custody:

1: Considerations/Guide for trial court in determining Best Interests of Children:

1. Trial court must insure that testimony and evidence is presented from professional and disinterested persons such as teachers, counselors or social workers.
2. Trial court should authorize the receipt of testimony from neighbors and members of the extended family. It is Lakota tradition and custom that placement be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children. These guidelines are meant to be suggestive rather than exhaustive. *Spotted Tail, B. v. Spotted Tail, D.*, CA 88-07, pp. 3-4 (1989).

2: Effect of one party filing for divorce in a state court before other party files for divorce in tribal court:

The fact that one filed for divorce in a state court before the other filed in Tribal Court is not controlling when the latter violated no law or court order when she returned her children to the reservation. The state court order was issued ex parte and served on a tribal member who was present on the Rosebud Reservation when it was issued. That proceeding contravenes the public policy of the Rosebud Sioux Tribe which is one that asserts exclusive jurisdiction over Indian children found on the reservation. *LaPointe v. Oldman*, CA 2000-02, pp. 4-5 (2001).

3: Fitness/Unfitness of parent:

The fact that trial court did not expressly find unfitness does not avail the parent the conclusion that he/she is a fit parent. The court implicitly found parent to be unfit. Any father who beats the mother, especially in the presence of the children, is unfit as a parent whether or not the court expressly finds or states such a conclusion. Abuse inflicted upon the mother under these circumstances is also inflicted on the children, and such is a direct attack on their best interests. *Broken Leg v. Kills in Water*, SC 2001-04, pp. 2-3 (2002) (The Court Ordered a remand after the opinion was filed because two judges involved at the trial level which resulted in a denial of procedural due process).

4: Habeas Corpus Relief:

Potential habeas corpus relief in child custody proceedings shall only apply when there has not been a preliminary hearing within a reasonable amount of time (48-72 hours), supported by a finding of probable cause for the removal of the minors when it is clear that the parent-petitioner is not a danger to the minor children. *Swalley v. South Dakota Dept. of Social Services*, SC 2001-06, p. 6 (2002).

5: Modification:

A: Petition to change custody order/Defenses:

Once the petition for re-hearing is submitted and an action is commenced, it is then the Respondent's responsibility in pleading to a preceding pleading to set forth affirmatively accord and satisfaction and res judicata defenses. *Barrera v. Poorman*, CA 87-02, p. 4 (1987).

6: Standard for determining custody:

A: In General:

It is beyond dispute that the applicable tribal court standard for the determination of the custody of a minor child is the best interest of the child. In awarding custody of minors, the trial court must be guided by what appears from all the facts and circumstances to the best interest of the child's temporal, mental, and moral welfare. Although the trial court is accorded broad discretionary powers in awarding custody of minor children, that discretion is not uncontrolled; it must have a sound and substantial basis in the testimony. The court's primary consideration is the best interest of the children, not the shortcomings of the parents. *Spotted Tail, B. v. Spotted Tail, D.*, CA 88-07, pp. 2-3 (1989).

B: In divorce action:

Title 2-1-18 of Rosebud Sioux Tribal Law and Order Code sets forth the trial court test in the making of a child custody award as the result of a divorce action. The best interests of the child are to govern the custody determination. Fault is not to be considered in determining custody of minor children except to the extent that the fitness of either parent is in question. *Ford v. Ford*, CA 87-07, p. 1 (1989).

7: Standard of Review:

RST Code, Sec. 2-1-18 unequivocally states that the welfare and best interests of the minor children are of paramount consideration in the award or change of custody of minor children. The Trial Court has broad discretion in the award of custody and will not be reversed on appeal unless the record presents a clear case of abuse of such discretion. *Spotted Tail, G. v. Spotted Tail, A.*, CA 92-01, p. 2 (1993).

In child custody matters, South Dakota law clearly establishes that the trial court has broad discretionary power in deciding child custody matters and that determination shall not be disturbed on appeal absent a showing of abuse of discretion. The "abuse of discretion" standard must have a sound and substantial basis in the testimony. *Ford v. Ford*, CA 87-07, pp. 1-2 (1989).

8: Standing:

A: ICWA:

Under the Indian Child Welfare Act, three parties have the right to initiate transfer proceedings from state court to tribal court: the parents, the Indian custodian and the Indian child's tribe. Only two of these parties may oppose or prohibit transfer: either parent or the tribal court of such tribe may decline. Because an Indian custodian's interests do not rise to that of the parent or tribe, an Indian custodian has no standing to oppose the petition for transfer. They do, however, have standing to participate in tribal court hearings; they are afforded a full and complete opportunity to participate in any hearing relative to the placement of the children. *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 10-11 (1988).

9: State Court v. Tribal Court:

When Indian children are removed from tribal to state jurisdiction in parental custody disputes, the reservation-based party is at a serious disadvantage. The children are placed in a foreign jurisdiction beyond the reaches of the tribal court, and some states do not recognize the decisions of tribal courts. For the tribal court to stay its hand so that a state court could assert jurisdiction of the case deprives members of the tribe of their right to be governed by their own laws. For these reasons it is of utmost importance that the requirements of RSTC 4-2-9 be met before ordering the removal of children from the reservation. *LaPointe v. Oldman*, CA 2000-02, pp. 4,6 (2001).

Custom and Tradition:

1: Choice of law:

Rosebud Sioux Tribal Code, §4-2-8, provides for the use of state law when there is no applicable federal or tribal law (including "customs and usages of the tribe"). However, if the trial court applied state law principles in the past, those state precepts of law became tribal (common) law. Tribal custom is a potentially rich source of tribal law, but cannot become part of

tribal (common) law until it is asserted and established in a specific case. The mere potential of tribal custom cannot be used to defeat existing tribal law. *In the Matter of the Commitment of Lawrence Lee Jr.*, CA 99-03, pp. 2-4 (2000).

2: Custody:

A: Best Interests of Child:

It is Lakota tradition and custom that placement be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children. *Spotted Tail, B. v. Spotted Tail, D.*, CA 88-07, pp. 3-4 (1989).

3: Indian Custodians:

Maternal grandparents, as members of the extended family and as Indian custodians[®] under the Indian Child Welfare Act, must be afforded a full and complete opportunity to participate in any hearing relative to the placement of the children and the adjudicatory disposition of the dependency and neglect petition. Recognition of this right is in full accord with the traditional custom of Lakota people to respect the rights of members of the extended family.

In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd. CA 88-03, p. 11 (1988).

4: Injunctions:

An injunction barring one's entrance to a housing area where one's elders reside seems to cut at the heart of the Lakota commitment to, and emphasis on, elders and the extended family or tiyospaye. *Moran v. Rosebud Housing Authority*, CA 90-03, p. 9 (1991).

5: Natural parents/extended family:

A universal right exists of natural parents' right to have custody of their own children absent any clear showing of gross misconduct or unfitness or some sound and compelling reason for denying it and that right is superior even in Lakota custom and belief. There do exist certain customs and beliefs that children are raised in the context of the extended family relationship. Lakota custom and belief is centered around natural law which ascribes to the belief, absent severe reasons, a natural parent has superior right to their natural children. *Barrera v. Poorman*, CA 87-02, pp. 5-6 (1987).

6: Relationship to child:

If a party asserts that according to Lakota genealogy and relational custom, they are related to the child in question, and these assertions are true, the Court will recognize this relation and confirm the party's standing and bring the party within the ambit of the Indian Child Welfare Act (the person making these claims has the burden of proof and must establish these claims by a preponderance of the evidence). *The People of the Rosebud Sioux Tribe in the Interest of J.E.*, CA 91-06, pp. 3-4, (1992).

7: Presidential Pardon Powers:

While the Rosebud Sioux Tribal Council possesses the power under the Tribal

Constitution to establish a process to grant pardons, it has chosen not to exercise that power. The issue of Tribal tradition and custom as a potential source for the Tribal President's power to pardon is not presented in a fully developed manner in this appeal. As a result, this court cannot make a definitive precedential ruling on this issue based on the sparse record before the court. Despite this limitation, tradition and custom is a valid, even vital, source of Tribal law expressly recognized in the Tribal Law and Order Code at § 4-2-8. The proponent of any such "custom and usage" has the burden of proof by a preponderance of the evidence to persuade the court that such "custom and usage" existed in the past, continues to exist today, and is applicable to the case at bar. As a result of the unusual poverty and absence of evidence, this Court has no choice but to affirm the decision below. Nevertheless, as noted at the outset, this ruling is limited to the record before the Court and does not foreclose more thorough attempts in the future to prove the existence of such "custom and usage." There is also the further caveat that any such "custom and usage" relevant to the authority of Tribal officials (as opposed to private parties in private disputes) could only be exercised within the parameters of due process and equal protection as set out in Art. X, Sec. 3 of the Rosebud Sioux Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302 (8). *Rosebud Sioux Tribe v. Keith Horse Looking*, CA 06-12 (2006).

8: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Divorce:

1: Determining custody when one party files in state court before the other files in tribal

court:

The fact that one filed for divorce in a state court before the other filed in Tribal Court is not controlling when the latter violated no law or court order when she returned her children to the reservation. The state court order was issued ex parte and served on a tribal member who was present on the Rosebud Reservation when it was issued. That proceeding contravenes the public policy of the Rosebud Sioux Tribe which is one that asserts exclusive jurisdiction over Indian children found on the reservation. *LaPointe v. Oldman*, CA 2000-02, pp. 4-5 (2001).

2: Property disposition:

Parties may by stipulation withdraw property issues from the court's consideration and reserve the issues for subsequent action. *Burnette v. Burnette*, CA 97-04, p. 3 (1998).

3: Timely appeal:

The Rosebud Sioux Tribe Supreme Court upheld the thirty (30) day provision for appeals of all civil matters. This appeal was filed in response to a divorce action. Appellant failed to file timely and was not allowed to raise the issue. *DuBray v. Hein*, CA 2009-04, P. 2, (2010)

Doctrine of Laches:**1: Child support:**

Even when there is the necessary factual basis for asserting the doctrine, most courts have rejected the applicability of the doctrine in the context of support payments. Most courts view past due child support as an absolute debt based on a judgment to which the doctrine of laches does not normally apply. *Schmidt v. Medearis*, CA 87-08, p. 5 (1989).

2: Elements:

There are fundamentally three elements to the laches defense:

- 1) That the plaintiff had full knowledge of facts upon which the action is based.
- 2) Regardless of such knowledge, he engaged in unreasonable delay before commencing suit.
- 3) Allowing plaintiff to maintain the action would prejudice other parties.

Even if a Court finds that a suit is not barred by the statute of limitations, but the elements of the doctrine of laches are satisfied, the doctrine of laches controls. *Rosebud Housing Authority v. Young, Sedlmajor, and Burnette*, CA 87-03, CA 87-04, CA 87-05, pp. 6-7 (1987).

Due Process:**1: Conflict of Interest:**

When it appeared to the Court that there was a conflict of interest in the handling of an employment action raising a question of due process, the Court remanded to the lower court for further consideration advising the lower court that further evidence and action should be taken and then resubmitted. *McLean v. Rosebud Housing Authority*, CA 99-01 (2001).

2: Due Process Clause:

The Due Process Clause requires that all methods of service of process must give "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objectives." *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, p. 6 (1989).

3: Denial:**A: Two Judges Presiding with Transcript Unavailable to Second Judge:**

The fact that a verbatim transcript of the initial hearing was unavailable to the second judge deprived a party of the benefits of evidence presented at the initial hearing when the party's case in chief was heard. After much deliberation, the Court concluded that the involvement of two judges at the trial level has resulted in a denial of procedural due process. The Court orders that previous orders entered are set aside, and the case is remanded to trial court with instructions to the trial court to assign this case to a single Judge for a *de novo* hearing and adjudication. *Broken Leg v. Kills in Water*, SC 2001-04, Order of Remand (2003).

4: Deprivation as a result of doctor not testifying in person:

A party was deprived of due process when the admitting doctor did not testify in person as to the condition of the patient at the hearing on the petition for a writ of habeas corpus. The Court ordered that the person is not a danger to himself or others and is released from the custody. *In the Matter of the Commitment of Richard Charles Young*, CA 91-02 (1991).

5: Deprivation as a result of Officer not testifying:

Due process is guaranteed by both the Indian Civil Rights Act of 1968 and Act X of the Rosebud Sioux Tribal Constitution. The core of due process is essential fairness, which includes the opportunity to be heard. The courts denial of a continuance to

allow the investigating officer to testify was a denial of due process. *Leader Charge v. Leader Charge*, CA 2009-01 (2009).

6: Effective Assistance of Counsel Deprived by Trial Judge:

Where one attorney withdrew the day before the trial and the new attorney was denied a continuance, there was apparent antagonism displayed by the judge toward the new attorney. At the outset of trial a judge accused the attorney of placing documents in the court file without following procedures. Although he later recanted the accusation, the animosity of the judge toward the attorney appears to have had a prejudicial effect on the client. The relationship between the trial judge and the attorney should not be allowed to prejudice a party's right to a fair and impartial trial. The Supreme Court concluded that the trial court displayed inappropriate antagonism toward the party's counsel, abused its discretion in denying the request for a continuance, and abused its discretion by ignoring the expert opinion of the party's expert witness. The abuses constituted reversible error because the party was deprived of effective legal counsel as well as her right to due process of law. *In the Matter of the Guardianship of A.S.*, CA 99-04, pp. 4-5 (2000).

7: Erroneous application or interpretation of substantive law:

An erroneous application or interpretation of substantive law by a trial court is reviewable *de novo* in accordance with the appropriate standard of review, but it does not constitute a denial of due process. *In the Matter of the Commitment of Lawrence Lee Jr.*, CA 99-03, p. 5 (2000).

8: Minimum Contacts:

Due Process exists as an individual guarantee against the federal government pursuant to the Fifth Amendment, against state governments pursuant to the Fourteenth Amendment, and against tribal governments pursuant to the Indian Civil Rights Act of 1968 and any tribal constitutional guarantee. Normally, the strictures of the United States Constitution do not apply against tribes. Federal courts have also ruled that the substantive content of the due process clause and other guarantees of ICRA need not exactly mirror that of the United States Constitution. Since traditional notions of due process provide everyone the opportunity to be heard before making a decision, it is necessary to also apply the federal due process "minimum contacts" analysis. The reason is because tribal court jurisdiction is a matter of federal common law. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.* CA 95-01, pp. 15-16 (1996).

9: Denial When Transcripts are Unavailable:

When tribal members cannot adequately appeal their cases for lack of a transcript, their rights to appeal is either lost or seriously jeopardized. The Court, *sua sponte*, ordered that all appellate cases presently on the docket be continued until further notice. The Court was concerned that tribal members' rights to due process of law are deprived when they could not appeal their cases in a timely manner. Exact same Order was in all three records. *Iron Shell v. Rosebud Sioux Tribe*, CA 95-04; *Waln v. Waln*, CA 96-06; *In the Matter of the Guardianship of B.G.*, CA 96-05 (1996).

10: Remand When Only the Court's Findings of Facts and Conclusions of Law Available (No Transcript Available):

With only the court's findings of facts available, we find that the court was clearly erroneous and that the findings of facts are insufficient to support the judgment. With only the court's conclusions of law available, we are not able to conduct a *de nova* review of the courts conclusions of law on the issue of why Appellant's replevin complaint was rejected or not ruled upon by the court. *Short Bull v. Stover*, CA 10-04, p. 4 (2010).

Again the only record of the hearing held in this matter is the lower court's Findings of Fact and Conclusions of Law. There is no decipherable transcript of the hearing. There is no way for this court to determine on review what analysis, if any, the lower court used to rule that the Appellees' answer to be construed as an answer and counterclaim. *Short Bull v. Stover*, CA 10-04, p. 5 (2010).

11: Denial of Administrative Due Process:

The Rosebud Sioux Tribe has instituted an employee grievance procedure. As such, the Tribe must extend due process pursuant to that procedure. A court may find proper denial of a hearing where the potentially aggrieved party failed to comply with the Tribe's grievance process. Conversely, if the such grounds to dismiss do not exist, the case is properly remanded to the Tribal Grievance committee for an administrative hearing. *Burnette v. Wooden Knife*, CA 2008-01, pp. 3-4 (2008).

12: Requirements for a due process hearing in criminal court:

The court held that a due process hearing be within 72 hours if the defendant is not released from custody. The hearing need not be adversarial and does not require that defendant have the right to call witnesses or cross-examine any witnesses of the prosecution. A probable cause hearing and arraignment may be combined as long as both are timely. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 4 (2009).

13: Suppression:

There is a right to a suppression hearing in tribal court. The court has the right to set the procedural parameters of the suppression hearing. Following the uniform rule suppression is a pre-trial matter, and absent the most extreme set of circumstances, it cannot be raised at trial. Failure to properly file a motion for a suppression hearing is deemed attorney error. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 4-5 (2009).

14: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Effective Assistance of Counsel:

1: When Counsel Withdraws on Day before Trial:

When moving party's counsel had withdrawn the day before trial, her new counsel had no time to prepare. It was incumbent on the trial court to allow new counsel a reasonable time to prepare for trial, especially when client had offered to offset any economic loss suffered by the moving (sic) party. It thus deprived the moving party of effective assistance of counsel. The facts and circumstances are a clear justification and good cause for granting the request for a continuance. The Court has the power to grant continuances upon a showing of good cause. The abuses constitute reversible error because the party was deprived of effective legal counsel as well as her right to due process of law. *In the Matter of the Guardianship of A.S.*, CA 99-04, pp. 2-4 (2000).

Employment:

1: Exhaustion of Remedies:

If a grievance committee decision binding on all concerned parties is not recognized by a concerned party, the aggrieved may file with the Secretary of Interior or file in Tribal Court whichever the case may be, provided all remedies have been exhausted. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 95-04, p. 4 (1996).

2: Grievance Committee Findings:

Rosebud Sioux Tribal Council enacted Ordinance 86-06 and specifically mandated that the decisions of the Grievance Committee are binding upon all of the parties concerned. If the decision is not recognized by the parties concerned, the aggrieved may file in Tribal Court. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 95-04, p. 3 (1996).

3. Due Process Afforded by the Grievance Committee:

The Rosebud Sioux Tribe has instituted an employee grievance procedure. As such, the Tribe must extend due process pursuant to that procedure. A court may find proper denial of a hearing where the potentially aggrieved party failed to comply with the Tribe's grievance process. Conversely, if the such grounds to dismiss do not exist, the case is properly remanded to the Tribal Grievance committee for an administrative hearing. *Burnette v. Wooden Knife*, CA 2008-01, pp. 3-4 (2008).

4. Jurisdiction:

The employer-employee relationship is contractual at its core and under *Montana* it is properly governed by tribal law and regulation. *Dubray-Cordier v. St. Francis Mission; Rosebud Education Society; Father Strzok*, CA 2004-02 (2004).

5: Writ of Mandamus:

In the absence of an appropriate mandamus remedy, the Court is directed by the Rosebud Sioux Tribal Council, via Title 9-3-8, to refer to relevant federal law granting such relief. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 95-04, p. 3 (1996).

While mandamus might be used to compel disbursement of a damage or financial award properly awarded to a party, it is an unlikely vehicle for compelling an award of damages in the first instance. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 97-05, p. 6, FN 5 (1998).

6: Wrongful Termination: Back pay and benefits:

If the remedy for improper termination of tribal employment is to be extended beyond reinstatement to include back pay or other monetary relief that is a task for the Tribal Council, not this Court. Despite the Court's inability to award back pay, a reinstated employee is entitled to reimbursement for any annual or sick leave which may have accrued at the date of termination in accordance with the relevant policies and procedures in effect at that time. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 97-05, p. 5 (1998).

Error:

1: Plain Error:

A: Failure to give Jury Instruction:

The proper standard of review on questions of law regarding jury instructions is limited to plain error, that the error is one that has substantially affected a defendant's rights, resulting in a miscarriage of justice. Under this standard the court can grant relief if the error would result in a miscarriage of justice if left uncorrected. However, this does not mean the failure to provide any jury instruction is automatically grounds for reversal. *Waln v. Rosebud Sioux Tribe*, CA 97-02, pp. 3-4 (1999).

2: Reversible Error:

A: Articulated or indicated legal standard not shown:

If a trial court does not articulate or indicate any legal standard it applied or used to guide its analysis on a motion to dismiss, it constitutes reversible error. Therefore, if there are any subsequent questions of credibility or fact, the trial court has the discretion to take evidence at a preliminary hearing in order to resolve the same. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.* CA 95-01, p. 9 (1996).

B: When a party is deprived of effective legal counsel and due process:

Where one attorney withdrew the day before the trial and the new attorney was denied a continuance, there was apparent antagonism displayed by the judge toward the new attorney. At the outset of trial a judge accused the attorney of placing documents in the court file without following procedures. Although he later recanted the accusation, the animosity of the judge toward the attorney appears to have had a prejudicial effect on the client. The relationship between the trial judge and the attorney should not be allowed to prejudice a party's right to a fair and impartial trial. The Supreme Court concluded that the trial court displayed inappropriate antagonism toward the party's counsel, abused its discretion in denying the request for a continuance, and abused its discretion by ignoring the expert opinion of the party's expert witness. The abuses constituted reversible error because the party was deprived of effective legal counsel as well as her right to due process of law. *In the Matter of the Guardianship of A.S.* CA 99-04, pp. 4-5 (2000).

Eviction:

1: By Governmental Entity:

When suing for eviction and rent arrearages, the governmental entity is acting as a private landlord and is not acting in its sovereign capacity. RST Code §8-3-1.5(h) makes no distinction between private landlord and Rosebud Housing Authority. It gives tenants the same rights against RHA as it does private landlords. *Rosebud Housing Authority v. Young, Sedlmajor, and Burnette*, CA 87-03, CA 87-04, CA 87-05, p. 5 (1987).

2: Jurisdiction:

Rosebud Sioux Landlord-Tenant Code at section 8-3-1.2: Jurisdiction: "This code shall apply to any and all arrangements, formal, written, or agreed to orally or by the practice of the parties, in selling, renting, leasing, or occupying or using any and all housing, dwellings or accommodations for human occupation residence." This court has jurisdiction over an action to evict and terminate the lease, as well as collect money due and owing. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 10-13 (1989).

3: Naming Tenants in Complaint:

There is no requirement in the Tribal Landlord/ Tenant Code that a landlord name any (or all) known or unknown occupants of a unit in an eviction proceeding. The only Code requirement is that such an action be brought against the tenant(s) named in the lease. *Sicangu Wicoti Awanyakape v. Stone*, CA 2004-03, p.3, (2004).

4: Reasons:

A tenant may be properly evicted from a Rosebud Housing Authority unit for any of the following reasons:

- 1) Causing or permitting guests and/or relatives to cause injury to tenants in the unit area;
- 2) Causing or permitting guests and/or relatives to cause physical damage to RHA units in the unit area; and
- 3) Failing to pay a required security deposit for the premises.

A claim of insufficient evidence for eviction must overcome the burden of clearly demonstrating error in the trial court's findings, i.e. clearly erroneous. *Moran v. Rosebud Housing Authority*, CA 90-03, pp. 3-4 (1991).

Evidence:

1: Conflicting Evidence:

Where two versions of evidence conflict, the Court is bound to accept the view most favorable to the Tribe, if there is substantial evidence tending to support the verdict. Upon review of the transcript of evidence, the Supreme Court found that there was substantial evidence to support the lower court's finding. *Rosebud Sioux Tribe v. Schmidt*, CA 88-04 p. 4 (1988).

2: Hearsay Exceptions:

A statement made for the purpose of seeking medical diagnosis or treatment describing symptoms and sensory perceptions of the general cause or external source of the injury, which is pertinent to diagnosis or treatment can be admitted into evidence under FRE 803(4). The witness may offer her own prognosis/opinion of her condition, which is not offered as an expert medical opinion, but allowed in under FRE 803(4). *Leader Charge v. Leader Charge, CA 2009-01 (2009)*.

3: Past Recollection Recorded Rule 803(5):

Admission into evidence of telephone records directly from the Alltel Wireless website are admissible for the purpose of refreshing a witness's recollection, according to FRE 803(5). It must be shown that the statement accurately reflects knowledge that the witness once had, the witness now lacks present recollection of the matter, he made or adopted the statement and he did so while the matter was fresh in his mind. If admitted, the record may be read in to evidence but may not itself be received as an exhibit unless offered by an adverse party. *Leader Charge v. Leader Charge, CA 2009-01 (2009)*.

4: Custody:

A: Best Interests of Child:

In awarding custody of minors, the trial court must be guided by what appears from all the facts and circumstances to the best interest of the child's temporal, mental, and moral welfare. Although the trial court is accorded broad discretionary powers in awarding custody of minor children, that discretion is not uncontrolled; it must have a sound and substantial basis in the testimony. The court's primary consideration is the best interest of the children, not the shortcomings of the parents.

1. Trial court must insure that testimony and evidence is presented from professional and disinterested persons such as teachers, counselors or social workers.
2. Trial court should authorize the receipt of testimony from neighbors and members of the extended family. It is Lakota tradition and custom that placement be made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children. These guidelines are meant to be suggestive rather than exhaustive. *Spotted Tail, B. v. Spotted Tail, D., CA 88-07, pp. 2-4 (1989)*.

5: Eviction:

A claim of insufficient evidence for eviction must overcome the burden of clearly demonstrating error in the trial court's findings, i.e. clearly erroneous. *Moran v. Rosebud Housing Authority, CA 90-03, pp. 3-4 (1991)*.

6: Motion for Judgment of Acquittal:

In reviewing a motion for judgment of acquittal, the trial court must view the evidence in a light most favorable to the nonmovant. A motion for judgment of acquittal is properly denied if the State has introduced evidence which, if believed by the jury, they may reasonably find the defendant guilty of the crime charged. The state, in proving all the elements of the crime may rely on circumstantial evidence. When the Tribe is the nonmovant, the evidence must be deemed "believed by the jury" and viewed in a light most favorable to the Tribe with all reasonable inferences from that evidence likewise resolved in the Tribe's favor.

Rosebud Sioux Tribe v. Bettelyoun, CA 89-06, p. 4 (1992).

The fact that an accident has occurred does not *ipso facto* translate to an accident recklessly caused. On this reservation, a reckless driving conviction requires much more than a driver going a little faster than 25 miles per hour on a road in good condition on a clear night. As a result of this being the only evidence offered, the Tribe has proved nothing more than the existence of a collision which, at best, amounts to negligence, and, at worst, establishes an accident-neither one of which amounts to a crime of reckless driving. *Rosebud Sioux Tribe v. Burnette, CA 89-07, pp. 4-5 (1992)*.

7: Privilege:

The concept of privilege plays a unique role within the law of evidence. "...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 (5th 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. 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. *Ed Charging Elk, et al., v. Rosebud Sioux Tribe and Tribal Land Enterprises, CA 2006-10, p. 9, (2006)*.

8: Sufficiency of Evidence:

In determining the sufficiency of evidence in a criminal appeal, the question is whether there is evidence in the record which, if believed by a jury (or judge in a bench trial), is sufficient to sustain a finding of guilt beyond a reasonable doubt. In making

such a determination, this Court must accept that evidence and such reasonable inferences that can be fairly drawn there from, which will support the verdict. A fact finder's verdict will be upheld if the evidence and reasonable inferences there from sustain a rational theory of guilt. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, p. 3 (1992).

Where the trial court in a civil case granted summary judgment though evidence was inadequately developed, the case is properly remanded to allow for further discovery and development. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 4 (2007).

With only the court's findings of facts available, we find that the court was clearly erroneous and that the findings of facts are insufficient to support the judgment. With only the court's conclusions of law available, we are not able to conduct a de nova review of the courts conclusions of law on the issue of why Appellant's replevin complaint was rejected or not ruled upon by the court. *Short Bull v. Stover*, CA 10-04, p. 4 (2010).

Again the only record of the hearing held in this matter is the lower court's Findings of Fact and Conclusions of Law. There is no decipherable transcript of the hearing. There is no way for this court to determine on review what analysis, if any, the lower court used to rule that the Appellees' answer to be construed as an answer and counterclaim. *Short Bull v. Stover*, CA 10-04, p. 5 (2010).

Forcible Entry and Detainer:

1: Right to possession:

A forcible entry and detainer action tries only the right to possession of land and not title to property. In some circumstances title may be considered as an incident to the right of possession, but only for the purpose of determining that question. The proper means to determine ownership of real property is a quiet title action. *Baird v. Ward, Ward and Wright*, CA 92-03, pp. 5-6 (1993).

Housing:

1: Eviction:

A tenant may be properly evicted from a Rosebud Housing Authority unit for any of the following reasons:

- 1) Causing or permitting guests and/or relatives to cause injury to tenants in the unit area;
- 2) Causing or permitting guests and/or relatives to cause physical damage to RHA units in the unit area; and
- 3) Failing to pay a required security deposit for the premises.

A claim of insufficient evidence for eviction must overcome the burden of clearly demonstrating error in the trial court's findings, i.e. clearly erroneous. *Moran v. Rosebud Housing Authority*, CA 90-03, pp. 3-4 (1991).

Indian Child Welfare Act:

1: Indian Custodians:

The ICWA provides at 25 U.S.C. 1911(c) that in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child shall have the right to intervene at any point in the proceeding. It clearly follows that if an Indian custodian may intervene at any point in a state proceeding, such a right to participate in a tribal court proceeding is axiomatic. The statutory scheme of the ICWA appropriately endorses the right of Indian custodians to participate in child custody determinations involving Indian children as a necessary condition to achieve and to protect the best interests of Indian children. *The People of the Rosebud Sioux Tribe in the Interest of J.E.*, CA 91-06, pp. 4-5 (1992).

Maternal grandparents, as members of the extended family and as Indian custodians under the Indian Child Welfare Act, must be afforded a full and complete opportunity to participate in any hearing relative to the placement of the children and the adjudicatory disposition of the dependency and neglect petition. Recognition of this right is in full accord with the traditional custom of Lakota people to respect the rights of members of the extended family.

In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd, CA 88-03, p. 11 (1988).

2: Relationship to child:

If a party asserts that according to Lakota genealogy and relational custom, they are related to the child in question, and these assertions are true, the Court will recognize this relation and confirm the party's standing and bring the party within the ambit of the Indian Child Welfare Act (the person making these claims has the burden of proof and must establish these claims by a preponderance of the evidence). *The People of the Rosebud Sioux Tribe in the Interest of J.E.*, CA 91-06, pp. 3-4, (1992).

3: Transfer to tribal court:

Motion to transfer case of dependency and neglect from state court to tribal court may be obtained pursuant to Indian Child Welfare Act § 1911(b) (1983) if the minor child(ren) meets the definition of "Indian Child" within the meaning of the act at § 1903(4); and that the dependency and neglect petition seeking removal and termination of rights is a "child custody proceeding" as defined in § 1903(1). These two requirements are the necessary predicate for ICWA to apply. The guidelines, 44 Fed. Reg.

67584-67595 (Nov. 26, 1979), provide the court with ample guidance to construe the phrase requiring transfer from state to tribal court “absent good cause to the contrary”, as well as the “appropriateness” of such transfer. *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 2-4, 12-14, (1988).

Indian Civil Rights Act:

1: Due Process:

A: Minimum Contacts:

Due Process exists as an individual guarantee against the federal government pursuant to the Fifth Amendment, against state governments pursuant to the Fourteenth Amendment, and against tribal governments pursuant to the Indian Civil Rights Act of 1968 and any tribal constitutional guarantee. Normally, the strictures of the United States Constitution do not apply against tribes. Federal courts have also ruled that the substantive content of the due process clause and other guarantees of ICRA need not exactly mirror that of the United States Constitution. Since traditional notions of due process provide everyone the opportunity to be heard before making a decision, it is necessary to also apply the federal due process “minimum contacts” analysis. The reason is because tribal court jurisdiction is a matter of federal common law. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 15-16 (1996).

2: Right to Jury Trial:

A: Civil:

Neither the Constitution of the Rosebud Sioux Tribe nor the Indian Civil Rights Act of 1968 mandate the right to a jury trial in any civil cause of action brought in tribal court. Rule 38 of Rosebud Sioux Tribe’s Rules of Civil Procedure governs jury trials in civil actions. Right to jury trial must be mentioned in notice of appeal, or it may be held as waived. *Farmer’s State Bank of Mission v. Boyd and Boyd*, CA 89-03, pp.6-7 (1990).

3: Miranda:

It is the intentions of the Court that despite the differences of the text between the applicable language of the Tribal Constitution and the *Miranda* warning there are to be understood the same. The Court found there to be no evidence suggesting the Tribe’s constitutional intent to have its amendment extend beyond the limits of *Miranda*. The Court thus concluded it was Tribal intent to adopt *Miranda* as the constitutional standard. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 8-10 (2009).

4: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Injunctions:

1: Equitable remedy:

Injunctions are a remedy in equity and, therefore, are not available if a substitute legal remedy would be adequate. Rule 65(c) requires:

- 1) That the party making application has no adequate legal remedy;
- 2) That the party making application has exhausted all administrative remedies;
- 3) That irreparable harm will result which cannot be solved by the awarding of money damages unless the injunction or temporary restraining order is granted, and
- 4) That greater harm will be done to the party making application by the refusal of the injunctive relief than will be occasioned to the opposing party by the granting of such relief. *Moran v. Rosebud Housing Authority*, CA 90-03, pp. 7-8 (1991).

2: Scope and Modification:

In determining the scope of an injunction, the court must remember that equitable remedies are a special blend of what is necessary, fair, and workable. Injunctive relief can be modified where a change of facts occurs, new facts come to light or when the order is found ambiguous or over broad.

Moran v. Rosebud Housing Authority, CA 90-03, pp. 7-8 (1991).

3: Not addressed under RST Court of Appeals Rules of Procedure:

Rule 15 of the RSTCA Rules of Procedure specifically directs, in the absence of any explicit tribal law on point, the Court to apply the applicable Federal Rule of Civil Procedure. *Moran v. Rosebud Housing Authority*, CA 90-03, p. 4 (1991).

Insurance:

1. Motor Vehicle Insurance:

For jurisdictional purposes, a motor vehicle insurance policy issued to a Tribal member (and any “named driver”) residing on

the Reservation is considered a contract that is performed on the Reservation and therefore it satisfies the “consensual agreement” prong of the required *Montana* analysis when an accident occurs on trust land within the Reservation. In addition, this “consensual agreement” is also sufficient jurisdictional predicate to support subject matter jurisdiction over any related bad faith tort claim growing out of the same incident and motor vehicle insurance policy. *Waln v. Progressive Insurance Co.*, CA 2005-02, p.7, (2005).

Indian Gaming Regulatory Act (IGRA):

1: Contract Modifications:

A primary thrust of the Indian Gaming Regulatory Act and duty of the National Indian Gaming Commission, is to protect tribes from improvident management contracts. Contract modifications, including oral agreements, expressly require approval of the National Indian Gaming Commission. 25 U.S.C. § 2711. Failure to obtain the required NIGC approval for any management contract modification renders the modification “void.” 25 C.F.R. 535.1. *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092 (8th Cir. 1999).
Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc., CA 2004-06, p.5 (2006).

2. Remedies:

It is not possible to identify or to fashion the necessary remedy without a detailed accounting and a set of findings on all issues presented. The court requires such an under taking as without such, the requirements of law and justice will remain unfulfilled and a disservice will be rendered to all concerned. *Rosebud Sioux Tribe v. B.B.C. Entertainment, Inc.*, CA 2004-06, pp. 6, 8 (2006).

Ineffective Assistance of Council

1: Standard:

The court adopted the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This standard consists of a two-part test. “First, the defendant must show that counsel’s performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defendant.” 466 U.S. at 687. A conviction may be set aside only if both parts of the test are satisfied. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 2-3 (2009).

A: Deficient Performance:

Deficient performance is measured by an “objective standard of reasonableness.” Reasonableness includes deference and flexibility relevant to the “prevailing norms of practice.” It must be centered on the facts of the particular case and viewed as of the time of the conduct. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 3 (2009).

1: Cross-Examination:

The defense counsel’s cross-examination in this case was found to be not particularly probing. This was still deemed sufficient performance by the court. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 7 (2009).

B: Prejudice:

Deficient performance must be found before prejudice is addressed. The standard for prejudice was addressed in *Strickland v. Washington*. That standard is such that, “the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland v. Washington*, 466 U.S. at 674. The Court upheld that plain view, public safety, and automobiles qualify as exceptions to search warrant requirements and can defeat a claim of prejudice. *Rosebud Sioux Tribe v. Luxon*, CA 09-03, p. 7-8 (2009).

Jurisdiction:

1: Authority:

The authority to assume jurisdiction over causes of action is implicit within the concepts of sovereignty of a Tribal Government. Federal statutes and the precepts of sovereignty recognize that Tribal Courts play a significant and vital role in a Tribal government’s ability to self govern. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 7-8 (1989).

2: Between reservations:

When a party enters into a contract while residing within the boundaries of the Rosebud Reservation and violates that lease and is in turn served personally with process on a different Indian Reservation, a claim that this Court lacks personal jurisdiction over that party will not prevail. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, p. 5 (1989).

3: Burden of Proof:

Plaintiff must establish the jurisdictional facts by a preponderance of the evidence. *In the Matter of the Estate of Tasunke*

Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co., CA 95-01, p. 10 (1996).

4: Consent:

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. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, p. 3 (1992) (See RST Business Code Section 16-1-201).

5: Due Process:

A: Service of Process:

The Due Process Clause requires that all methods of service of process must give “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objectives.” *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, p. 6 (1989).

6: Election Board (Subordinate Boards created by Tribal Council):

Rosebud Sioux Tribal Ordinance 86-10 creates the Rosebud Sioux Tribe Election Board and authorizes the Board to review challenges to Tribal Council elections. Although the Tribal Court has previously exercised limited jurisdiction to review abuses of due process by the Board in matters involving compliance with Tribal Constitutional standards and the Indian Civil Rights Act (ICRA), the ordinance provides that the Board’s decisions are not subject to review. Article III, Section 8 of the Rosebud Sioux Tribal Constitution provides that the “Rosebud Sioux Tribal Council shall be the sole judge of the constitutional qualifications of its members.” Article IV, Section 1 (u) gives the Tribal Council powers to delegate authority to subordinate boards and reserves the right to review any action taken by virtue of such delegated power. The creation of the Election Board is constitutional in nature. In the absence of proof of constitutional or ICRA violations, tribal courts will not review decisions of the Election Board and will “tread cautiously” when hearing challenges to the authority of boards created by the Tribal Council in the absence of any express grant of jurisdiction to the court. *Valerie Crazy Bull v. Patricia Big Crow, et al.*, CA 06-02, pp.1-3 (2006).

7: Extent:

Jurisdiction includes not only the power to hear a cause of action, but the power to enter a particular judgment. It also includes the power to determine whether it has, in fact, the authority to hear and determine a controversy presented and the right to decide whether the state of facts exist which confer jurisdiction. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, p. 6 (1989).

8: Federal Statutory Causes of Action:

A: Indian Arts and Crafts Act:

Where the Defendant claimed that the Plaintiff Estate lacked standing to bring a claim under the Act, pointing to 25 U.S.C. 305(e)(c)(1) as a bar, the Court determined that an individual Indian lacks standing to bring a claim under the Indian Arts and Crafts Act. The Court relied on the plain meaning of the relevant statutory language which provides that a claim may be brought by: AA) by the Attorney General of the United States...on behalf of an Indian who is a member of an Indian Tribe or on behalf of an Indian tribe or Indian arts and crafts organization;@ or AB) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization.@ Each section permits lawsuits to be filed by representative parties. As for jurisdiction, there is not a limitation in tribal law to preclude tribal court jurisdiction as a matter of local law. There are no jurisdictional bars to the assertion of these federal statutory causes of action in tribal court. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 37-38 (1996).

B: Lanham Act:

The Plaintiff Estate asserted that the actions of the Defendants involved both false advertising and false association in violation of Section 43 (a) of the Lanham Act as set forth at 15 U.S.C. 1125 (a). The Court determined that this is something to be developed at the trial on the merits. The Court did conclude that this statute does not limit its jurisdiction to federal court. Nor is there any limitation in tribal law to preclude tribal court jurisdiction as a matter of local law. There are no jurisdictional bars to the assertion of this federal statutory cause of action in tribal court. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 37,39-40 (1996).

9: General jurisdiction:

RST Code, Title IV, Chapter 2, Section 6: Jurisdiction over persons: “RSTC will exercise civil and criminal jurisdiction over all persons within its territorial jurisdiction to the extent allowed by federal statutory law and Federal Court decisions. It is recognized that decisions such as *Oliphant* limit the jurisdiction of this court over certain non-Indians. However, the RSTC will continue to exercise all of the civil and criminal jurisdiction over all persons allowed to it by federal statute and federal judicial court decisions.” Federal law acknowledges that jurisdiction does exist over non-Indians for transactions arising within the exterior boundaries of the Reservation where there are vital interests of the Tribal Government. Even though

criminal jurisdiction of Tribal Courts is substantially limited by federal law, civil jurisdiction is not similarly restricted. Any claim that the established law is that Tribal Courts do not have jurisdiction over non-Indians is not recognized by this Court. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 8-10 (1989).

10: Issues on Appeal:

Jurisdictional issues are never waived and may be raised for the first time on appeal. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 11, FN 18 (1996).

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 did raise broad issues of 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 rule otherwise would permit a party to continually revisit an issue without the benefit of a final judgment. *Ed Charging Elk, et al., v. Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, p. 6, (2006).

11: Long Arm Statute/Territorial Jurisdiction:

The RST Constitution asserts that its jurisdiction shall extend to the territory within the original confines of the Rosebud Reservation boundaries, which emphasizes the internal integrity of the tribe's legal authority as a matter of tribal law. The fact that the tribe has a "long arm" statute set out at Rosebud Sioux Tribal Law and Order Code § 4-2-7 indicates the Tribe's clear intent, consistent with notions of due process, to assert jurisdiction over non-residents who, for example, commit tortious acts that have effects within the reservation. There are essentially two issues involved in construing a long arm statute: whether the intent of the long arm statute is to maximize its possible jurisdiction and if so, whether such assertion meets the requirements of due process. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 11-13, 16 (1996).

12: Motion to Dismiss for Lack of Jurisdiction:

The proper standard to apply in the context of a motion to dismiss is that the Plaintiff needs to make only a *prima facie* showing of jurisdictional facts to avoid a dismissal and all factual questions are resolved in the Plaintiff's favor. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 13 (1996).

13: Personal:

The proper extent of tribal jurisdiction is ultimately a matter of federal (common) law and therefore as to matters of jurisdiction, federal standards-including minimum contact due process analysis are applicable. The court analyzed three elements: 1) that the nonresident defendant purposefully directs its activities toward the forum or its residents; 2) the claim must be one which arises out of or relates to the defendant's forum related activities; and 3) the exercise of jurisdiction must comport with fair play and substantial justice. The court found it had personal jurisdiction over a nonresident defendant selling beverages on the Rosebud Reservation. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 15-19 (1996).

The Rosebud Sioux Tribal Court is a court of general jurisdiction. It is therefore presumed that the tribal court has personal (as well as subject matter) jurisdiction over all controversies brought before it. Sec. 4-2-6 of the Rosebud Sioux Tribal Law and Order Code asserts civil jurisdiction over all persons within its territorial jurisdiction consistent with applicable federal law. As a result of this tribal statutory scheme, any alleged (personal) jurisdictional defect must be raised by the Defendant, and is not an affirmative element of the prosecution's case. The issue once raised properly by the Defendant will, of course, be fully adjudicated by the trial court and if appealed, reviewed by this Court. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, pp. 5-6 (1992).

14: Personal Service:

A challenge to jurisdiction of trial court based upon failure of service with order to show cause is without merit when appellant was present at the hearing on appellee's petition for child support and appellant admitted he received notice of such hearing. Service of a notice of hearing is not jurisdictional. *Joseph v. Joseph*, CA 87-01, p. 3 (1987).

Rule 5 of the Rules of Civil Procedures of the Rosebud Sioux Tribe provides that service of process is to be by first class mailing and is complete upon mailing. However, first class mail without return receipt requested creates a rebuttable presumption that the first class mail reached its destination. The Court found that the RST Rules of Civil Procedure should be changed and ordered that actual notice is required in all civil actions after service of the Complaint and Summons though service upon the parties by the use of either a process server or certified mail with return receipt requested. *Jones v. Makes Room For Them*, CA 2007-03, p. 2 (2007).

15: Specific jurisdiction:

Rosebud Sioux Landlord-Tenant Code at section 8-3-1.2: Jurisdiction: “This code shall apply to any and all arrangements, formal, written, or agreed to orally or by the practice of the parties, in selling, renting, leasing, or occupying or using any and all housing, dwellings or accommodations for human occupation residence.” This court has jurisdiction over an action to evict and terminate the lease, as well as collect money due and owing. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 10-13 (1989).

16: Standard of review:

The proper standard of review on questions of law concerning jurisdiction is *de novo*. If the trial court does not articulate or indicate any legal standard it applied or used to guide its analysis on a motion to dismiss, it constitutes reversible error. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 9 (1996).

17: Subject Matter:

A: In General:

A tribal judicial forum can hear a tort case which arose out of non-Indian conduct on non-fee land. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 33 (1996).

There is a rebuttable presumption against tribal jurisdiction over a case involving a tribal member plaintiff suing non-Indian defendants for actions that took place on fee land within the exterior boundaries of the reservation. This presumption can be overcome by satisfying either prongs of the *Montana* proviso:

- 1) “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.”
- 2) “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.” *Dubray-Cordier v. St. Francis Mission; Rosebud Education Society; Father Strzok*, CA 2004-02, p. 4, (2004).

B: Remanded because not litigated in tribal court:

In a car accident tort case between an Indian and a non-Indian, the case was remanded to establish the necessary factual basis and sufficient legal rationale for a proper finding and conclusion as to subject matter jurisdiction. *Young v. Zimmerman & Parsons Furniture Barn*, SC 2001-07, p. 2 (2002).

C: State Court or Tribal Court:

When addressing the issue of state court versus tribal court jurisdiction, the US Supreme Court suggests that the first examination should be conducted by the tribal court itself. The next step in the analysis is an examination of the relevant code sections of the tribe. Where the tribal court clearly has jurisdiction, it is the statutory duty of the Court to uphold and enforce such laws. *LaPointe v. Oldman*, CA 2000-02, p. 3 (2001).

D: Waiver/Creation:

Since subject matter jurisdiction constitutes the core element of any court’s ability to adjudicate a case, it is black letter law that is not waivable and cannot be created by consent of the parties. As a necessary corollary, the issue of subject matter jurisdiction may be raised for the first time on appeal. *Young v. Zimmerman & Parsons Furniture Barn*, SC 2001-07, p. 2 (2002).

18: Transfer to Tribal Court:

Motion to transfer case of dependency and neglect from state court to tribal court may be obtained pursuant to Indian Child Welfare Act § 1911(b) (1983) if the minor child(ren) meets the definition of “Indian Child” within the meaning of the act at § 1903(4); and that the dependency and neglect petition seeking removal and termination of rights is a “child custody proceeding” as defined in § 1903(1). These two requirements are the necessary predicate for ICWA to apply. The guidelines, 44 Fed. Reg. 67584-67595 (Nov. 26, 1979), provide the court with ample guidance to construe the phrase requiring transfer from state to tribal court “absent good cause to the contrary”, as well as the “appropriateness” of such transfer. *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 2-4, 12-14, (1988).

19: Tribal court jurisdiction:

The exhaustion rule states 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. According to the US Supreme Court, “exhaustion 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.” *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, p. 4 (1992).

Jury Instructions:

1: Standard of Review:

A: Question of Law:

The proper standard of review on questions of law regarding jury instructions is limited to plain error, that the error is one that has substantially affected a defendant's rights, resulting in a miscarriage of justice. Under this standard the court can grant relief if the error would result in a miscarriage of justice if left uncorrected. However, this does not mean the failure to provide any jury instruction is automatically grounds for reversal. *Waln v. Rosebud Sioux Tribe*, CA 97-02, pp. 3-4 (1999).

Juveniles:

1: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Moot Issue:

1: Failure to obtain a stay of execution or other restraining order:

In an *in rem* proceeding, it is well established that where the *res* may be transferred or disposed of pending appeal, the failure to obtain a stay of execution or secure other orders restraining distribution of the property renders an appeal moot. In addition, mootness is jurisdictional in nature. *LeRoy v. Rosebud Sioux Tribe Tribal Land Enterprise*, CA 92-02, pp. 3-4 (1993).

Motions:

1: Motion for Continuance:

In deciding whether or not to grant a continuance, a trial court must consider (1) whether the delay resulting from the continuance would be prejudicial to the opposing party; (2) the prejudice caused by the moving party by the trial court's refusal to grant a continuance. When moving party's counsel had withdrawn the day before trial, her new counsel had no time to prepare. It was incumbent on the trial court to allow new counsel a reasonable time to prepare for trial, especially when client had offered to offset any economic loss suffered by the moving (sic) party. It thus deprived the moving party of effective assistance of counsel. The facts and circumstances are a clear justification and good cause for granting the request for a continuance. The Court has the power to grant continuances upon a showing of good cause. *In the Matter of the Guardianship of A.S.*, CA 99-04, pp. 2-4 (2000).

2: Motion for Judgment of Acquittal:

In reviewing a motion for judgment of acquittal, the trial court must view the evidence in a light most favorable to the nonmovant. A motion for judgment of acquittal is properly denied if the State has introduced evidence which, if believed by the jury, they may reasonably find the defendant guilty of the crime charged. The state, in proving all the elements of the crime may rely on circumstantial evidence. When the Tribe is the nonmovant, the evidence must be deemed "believed by the jury" and viewed in a light most favorable to the Tribe with all reasonable inferences from that evidence likewise resolved in the Tribe's favor. *Rosebud Sioux Tribe v. Bettelyoun*, CA 89-06, p. 4 (1992).

The fact that an accident has occurred does not *ipso facto* translate to an accident recklessly caused. On this reservation, a reckless driving conviction requires much more than a driver going a little faster than 25 miles per hour on a road in good condition on a clear night. As a result of this being the only evidence offered, the Tribe has proved nothing more than the existence of a collision which, at best, amounts to negligence, and, at worst, establishes an accident-neither one of which amounts to a crime of reckless driving. The motion for judgment of acquittal should have been granted. The conviction is hereby reversed. *Rosebud Sioux Tribe v. Burnette*, CA 89-07, pp. 4-5 (1992)

3: Motion to Dismiss:

A: Lack of Jurisdiction:

The proper standard to apply in the context of a motion to dismiss is that the Plaintiff needs to make only a *prima facie* showing of jurisdictional facts to avoid a dismissal and all factual questions are resolved in the Plaintiff's favor. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, p. 13 (1996).

B: Order Striking Motion to Dismiss:

An Order striking Motion to dismiss was entered because the Court found that the Motion to Dismiss was filed without attaching relevant pleadings and without supporting brief or memoranda. *Running Horse v. Murray*, CA 88-01 (1988).

C: Voluntary dismissal:

Plaintiff and Appellant moved to voluntarily dismiss her appeal. The Court ordered it dismissed. *Hutchinson v. Halligan*, CA

92-04 (1993).

4: Motion For Reconsideration:

A motion for reconsideration is subject to denial when the appropriate rules of appellate procedure are not followed. When the failure to comply with the applicable appellate rules is neither cured nor adequately explained, that is grounds for denial. *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, pp. 2-4 (1992).

5: Motion to Transfer from State Court to Tribal Court:

Motion to transfer case of dependency and neglect from state court to tribal court may be obtained pursuant to Indian Child Welfare Act § 1911(b) (1983) if the minor child(ren) meets the definition of “Indian Child” within the meaning of the act at § 1903(4); and that the dependency and neglect petition seeking removal and termination of rights is a “child custody proceeding” as defined in § 1903(1). These two requirements are the necessary predicate for ICWA to apply. The guidelines, 44 Fed. Reg. 67584-67595 (Nov. 26, 1979), provide the court with ample guidance to construe the phrase requiring transfer from state to tribal court “absent good cause to the contrary”, as well as the “appropriateness” of such transfer. *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. and Concerning Wayne Boyd*, CA 88-03, pp. 2-4, 12-14, (1988).

6: Motion to Withdraw Appeal:

A motion to withdraw appeal will be granted when a request to withdraw is made on the grounds that the parties have worked out a deal. *Bordeaux v. Kindle, Rosebud Sioux Tribe and Council*, CA 96-03 (1996).

A motion to withdraw appeal will be granted when a request to withdraw is made on the grounds that present, personal circumstances have made the remedy sought through appeal unobtainable. *Red Hawk v. Rosebud Sioux Tribe*, SC 2001-02 (2002).

National Historic Preservation Act:

1: Applicability:

Section 106 of the National Historic Preservation Act was made applicable to the Tribal Historic Preservation Office pursuant to 30 CFR 800. Under 1(a), consultation is required among agency officials and other parties with an interest in the undertaking on historic properties. The goal is to identify historic properties that would potentially be affected, make an assessment of the effects, and to seek ways in which to avoid, minimize or mitigate any adverse effects on the historic properties. Section 2(a) an agency official must be selected to bare legal and financial responsibility. That official has approval authority for any undertaking. The agency official under 13(a) may develop programmatic agreements to govern action to be taken when historic properties are discovered during implementation of an undertaking. Also, under 13(a)(2), the official has the authority to make findings of no adverse effects or develop a process to resolve any adverse effect an undertaking will have upon historic properties. *Rosebud Sioux Tribe Revenue Department v. First Dakota Enterprises, Inc.*, CA 08-02, p. 5-6 (2010).

Parental Rights:

1: Custody of Deceased Body:

This Court does not dispute the general rule giving superior rights to custody of the dead body to the parents of the decedent when the decedent is unmarried, has left no will designating another custodian, and has left no surviving children. When the parents of the deceased are in conflict as to who shall exercise control over the body, the Court will look at many factors and condition. Those factors include: the relationship the deceased had during his lifetime with the Tribe, his contacts outside the Reservation, the particular ties and relationship the deceased had with the respective paternal and maternal sides of his family, the expressed desires of the deceased, and finally, the condition and state of mind of the individual at the time the wishes were made. *In Re Body of Aloysius Two Elk, Jr.*, CA 87-06, pp. 4-5 (1988).

2: Natural parents:

A universal right exists of natural parents’ right to have custody of their own children absent any clear showing of gross misconduct or unfitness or some sound and compelling reason for denying it and that right is superior even in Lakota custom and belief. There do exist certain customs and beliefs that children are raised in the context of the extended family relationship. Lakota custom and belief is centered around natural law which ascribes to the belief, absent severe reasons, a natural parent has superior right to their natural children. *Barrera v. Poorman*, CA 87-02, pp. 5-6 (1987).

3: Termination:

A: Absence of Findings of Facts or Conclusions of law:

If an order providing for the dismissal of the petition for adjudication and termination of Appellee’s parental rights provides no findings of fact or conclusions of law or any other memorandum explanation for the trial court’s decision, the record on appeal is impossible to review for adequacy as a matter of fact or law. The absence of findings of fact and conclusions of law or any other memorandum discussion clearly violates Rule 41(c) of the Rosebud Sioux Rules of Civil Procedure and therefore requires that the decision of the trial court be reversed. Rule 41(c) provides in applicable part that after the plaintiff in an action tried to the Court has completed presentation of his case, the Defendant may move for dismissal on the grounds that upon the

facts presented or the law, the Plaintiff has shown no right to relief. The Court may rule on the motion at that time or may decline to rule on the motion until the close of all the evidence. If the Court renders Judgment on the motion against the Plaintiff, the Court shall enter findings of fact and Conclusions of law establishing the reason for his ruling. @
The People of the Rosebud Sioux Tribe in the Interest of J.E., CA 91-06, p. 6 (1992).

Paternity:

1: Affidavit admitting paternity:

Upon finding that the child was born prior to marriage, the trial court should have considered RST Code Chapter Two, Sec. 2-2-3 STATUS OF CHILDREN BORN TO UNMARRIED WOMEN. The signing of a paternity affidavit accomplishes all of the provisions of that section. Husband becomes the father of the child for all purposes as if he had been married to the mother. *Stewart v. Stewart*, CA 2000-03, pp. 2-3 (2001).

Probate:

1: Classification:

A: Real Property or Personal Property:

The Rosebud Sioux Tribal Law and Order Code contains no statutory definition of real and personal property. At Sec. 1-1-22, the Tribal Court is directed to apply general principles of probate as enunciated in the statutory rules of the State of South Dakota except where such rules conflict with specific enactments of this code or other Tribal Code enactments. *In the Matter of the Estate of Charles Broken Leg*, CA 88-05, p. 2 (1989).

B: Transitional House:

It is significant that the Dept. of Interior in probating Indian estates has treated Indian homes as personalty. As homes are important to any family, it would seem that if decedent intended improvements to go with the land he would have stated so, in view of his specificity in other parts of the Will. A transitional home under all facts and circumstances of this case must be considered to be personal property, particularly due to its transitional status, similar to a mobile home. *In the Matter of the Estate of Charles Broken Leg*, CA 88-05, pp. 5-8 (1989).

Procedure:

1: Absence of Findings of Fact and Conclusions of Law:

If an order providing for the dismissal of the petition for adjudication and termination of Appellee's parental rights provides no findings of fact or conclusions of law or any other memorandum explanation for the trial court's decision, the record on appeal is impossible to review for adequacy as a matter of fact or law. The absence of findings of fact and conclusions of law or any other memorandum discussion clearly violates Rule 41(c) of the Rosebud Sioux Rules of Civil Procedure and therefore requires that the decision of the trial court be reversed. Rule 41(c) provides in applicable part that after the plaintiff in an action tried to the Court has completed presentation of his case, the Defendant may move for dismissal on the grounds that upon the facts presented or the law, the Plaintiff has shown no right to relief. The Court may rule on the motion at that time or may decline to rule on the motion until the close of all the evidence. If the Court renders Judgment on the motion against the Plaintiff, the Court shall enter findings of fact and Conclusions of law establishing the reason for his ruling. @
The People of the Rosebud Sioux Tribe in the Interest of J.E., CA 91-06, p. 6 (1992).

2: Remand When Only the Court's Findings of Facts and Conclusions of Law are Available (No Transcript):

With only the court's findings of facts available, we find that the court was clearly erroneous and that the findings of facts are insufficient to support the judgment. With only the court's conclusions of law available, we are not able to conduct a de nova review of the courts conclusions of law on the issue of why Appellant's replevin complaint was rejected or not ruled upon by the court. *Short Bull v. Stover*, CA 10-04, p. 4 (2010).

Again the only record of the hearing held in this matter is the lower court's Findings of Fact and Conclusions of Law. There is no decipherable transcript of the hearing. There is no way for this court to determine on review what analysis, if any, the lower court used to rule that the Appellees' answer to be construed as an answer and counterclaim. *Short Bull v. Stover*, CA 10-04, p. 5 (2010).

3: Appellate Bond:

The posting of bond is governed by Rule 2 Notice of Appeal and Bond-Rules of Procedure, Rosebud Sioux Tribal Court of Appeals. However, Rule 2 does not provide in Forma Pauperis proceedings in civil cases. Waiver of Rule 2 bond requirement requires the consent of the Plaintiff and the Court may deny the Defendant's request to waive the required bond. *Beck Motors, Inc. v. Fuller*, CA 96-02 (1996).

4: Dismissal:

A: Failure to comply with Court's Appellate Rules of Procedure:

The orders of dismissal are not specific as to which Rules were not complied with. Dismissed for non-compliance in general. *Waln v. Waln*, CA 96-04 (1998). *Rosebud Sioux Tribe v. Gregg*, CA 97-06 (1998). *Left Hand Bull v Rosebud Sioux Tribe*, CA 99-02 (2000). *Wright v. Sanchez*, CA 2000-01 (2000). *Cloudman v. Rosebud Sioux Tribe*, CA 2001-01 (2001).

B: Failure to comply with Court's Briefing Schedule:

Order of Dismissal entered for failure to comply with the Court's Briefing Schedule since the time has expired for filing such a brief. *Ed Charging Elk v. Marshall and Wilson*, CA 98-01 (1998). *Frederick v. Frederick*, CA 93-02 (1994). *McClellan v. Shaw*, CA 93-01 (1993). *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, Order (1992).

C: Failure of Notice of Appeal to comply with Rule 5 of Appellate Procedure and Rule 54 of Civil Procedure:

Notice of Appeal is dismissed. *Rosebud Housing Authority v. Murray*, CA 91-03 (1991).

D: Failure to file Appellate Bond:

If a party fails to file an appellate bond consistent with the rules of the Court of Appeals but has notice of the necessity of filing the bond, the case is subject to possible dismissal. This procedural requirement remains in effect even if the parties are bringing their actions Pro Se in order to efficiently administer justice. *In the Matter of the Guardianship of S.L.R.*, CA 89-01, CC 87-368 (1989).

E: Failure to identify a standard of review:

Because Appellants failed to identify the standard of review to be applied by the Court to trial court's findings, the appeal was dismissed by the Supreme Court. *Farmer's State Bank of Mission v. Boyd and Boyd*, CA 89-03, p. 5 (1990).

F: Failure to file Designation of Record as requested by Rule 6:

Without some record on appeal, there is nothing for the appellate court to consider and therefore it cannot properly carry out its reviewing function. *McClellan v. Shaw*, CA 93-01 (1993). *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, pp. 2-3 (1992).

G: Failure to Prosecute in timely manner:

Dismissal may result for failure to prosecute in a timely manner. *In the Matter of the Guardianship of B.G.*, CA 96-05 (1997). *Fuller v. Beck Motors, Inc.*, CA 96-02, Order (1997).

H: Notice of Appeal:

1: Itemization of Errors/Factual and Legal Issues:

An appeal is subject to dismissal if the general notice of appeal is in violation of Rule 5(4) of the Rules of Procedure of the RST Court of Appeals in that it does not provide an itemization of all assignments of error or legal or factual issues desired to be considered in the appeal. *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, pp. 1-2, 4 (1992). *McClellan v. Shaw*, CA 93-01, (1993).

2: Untimely filed:

Notice of Appeal was filed on April 6, 1988, appealing a Trial Court order entered January 15, 1988. Service was made upon Appellant by mail of a Notice of Entry of Judgment on January 15, 1988. The Court ordered a dismissal for untimely filing Notice of Appeal. *Running Horse v. Murray*, CA 88-01 (1988). The court upheld that appeals must be filed in a timely manner in regards to divorce decrees. In all civil matters Notice of Appeal must be filed with the Clerk of the Tribal court within 30 days of the Notice of Entry of Judgment. *Dubray v. Hein*, CA 09-04, p. 2 (2010)

I: Voluntary dismissal:

Plaintiff and Appellant moved to voluntarily dismiss her appeal. The Court ordered it dismissed. *Hutchinson v. Halligan*, CA 92-04 (1993).

5: Forma Pauperis:

A: Civil:

If the Court determines from the face of the application that the applicant is not indigent and is able to pay the necessary fees for appeal, the application to proceed on appeal in forma pauperis is denied. *Shaw v. Wright*, CA 90-07 (1990).

Rule 2 does not provide in Forma Pauperis proceedings in civil cases. Waiver of Rule 2 bond requirement requires the consent of the Plaintiff and the Court may deny the Defendant's request to waive the required bond. *Beck Motors, Inc. v. Fuller*, CA 96-02 (1996).

B: Criminal:

When it appears to the Court pursuant to a Motion to Proceed In Forma Pauperis, and it appears that the provisions of the

Rules have been fully complied with, and it appears there is good cause, the party will be granted leave to Proceed In Forma Pauperis. *Rosebud Sioux Tribe v. L. Fast Horse*, CA 90-03 (1990).

6: Order Striking Motion to Dismiss:

An Order striking Motion to dismiss was entered because the Court found that the Motion to Dismiss was filed without attaching relevant pleadings and without supporting brief or memoranda. It was struck from the file for failure to follow Rules 11 and 12 of the Rosebud Sioux Tribal Court of Appeals Code of Procedure. *Running Horse v. Murray*, CA 88-01 (1988).

7: Brief Submission after Oral Argument:

A brief will not be accepted or considered if offered after hearing oral arguments. The Appellee requested and received an extension of time to file and failed to file the brief when due. The filing of the brief after the opposing party has briefed its arguments and presented them orally would result in unfair disadvantage to the Appellant. *Swalley v. South Dakota Dept. of Social Services*, SC 2001-06, Order (2002).

Professional Responsibility:

1: Appearance of Impropriety:

A: Judiciary:

The Law and Order Code of the Rosebud Sioux Tribe mandates that all judges should avoid impropriety and the appearance of impropriety in all activities. This failure to recuse one's self results in a void judgment. A void judgment is regarded as a nullity and thus leaves the parties in the same positions they were in prior to trial. The result of the judge's failure to disqualify himself is that the Judgment and Decree of Divorce are void. The prior judgment and decree is reversed and the case is remanded to the trial court for a new trial. *Spotted Tail, G. v. Spotted Tail, A.*, CA 90-01, pp. 3-10 (1991).

2: Lay Advocates and Attorneys:

The Sicanu Oyate Bar Association provides standards for anyone practicing in the Rosebud Sioux Tribal Court. It requires licensing for lay advocates, as well as continuing legal education to maintain their license. Creating a different standard for lay advocates would create confusion in the court system and it would be inherently unfair to hold a lay advocate to a different standard than a professional attorney practicing in the same court. Therefore, lay advocates are not held to a lesser standard than professional attorneys. *Waln v. Rosebud Sioux Tribe*, CA 97-02, p. 3 (1999).

3: Sanctions:

A: Failure to file brief in timely manner:

For Failure to file a brief in a timely manner, the Supreme Court will not hesitate to impose the sanctions available under Rule 8 of the Rules of Procedure of the RST Court of Appeals as well as the Court's inherent authority. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, p. 6 (1992); *Rosebud Sioux Tribe v. Walsh, et al.*, CA 91-05, p. 3 (1992). *McClellan v. Shaw*, CA 93-01, (1993).

Property:

1: Forcible entry and detainer:

A: Right to possession:

A forcible entry and detainer action tries only the right to possession of land and not title to property. In some circumstances title may be considered as an incident to the right of possession, but only for the purpose of determining that question. The proper means to determine ownership of real property is a quiet title action. *Baird v. Ward, Ward and Wright*, CA 92-03, pp. 5-6 (1993).

2: Classification:

A: Personal Property or Real Property:

The Rosebud Sioux Tribal Law and Order Code contains no statutory definition of real and personal property. At Sec. 1-1-22, the Tribal Court is directed to apply general principles of probate as enunciated in the statutory rules of the State of South Dakota except where such rules conflict with specific enactments of this code or other Tribal Code enactments. *In the Matter of the Estate of Charles Broken Leg*, CA 88-05, p. 2 (1989).

B: Transitional House:

It is significant that the Dept. of Interior in probating Indian estates has treated Indian homes as personalty. As homes are important to any family, it would seem that if decedent intended improvements to go with the land he would have stated so, in view of his specificity in other parts of the Will. A transitional home under all facts and circumstances of this case must be considered to be personal property, particularly due to its transitional status, similar to a mobile home. *In the Matter of the Estate of Charles Broken Leg*, CA 88-05, pp. 5-8 (1989).

3: Disposition in Divorce action:

Parties may by stipulation withdraw property issues from the court's consideration and reserve the issues for subsequent action. *Burnette v. Burnette*, CA 97-04, p. 3 (1998).

4: Failure to obtain a stay of execution or other restraining order:

In an *in rem* proceeding, it is well established that where the *res* may be transferred or disposed of pending appeal, the failure to obtain a stay of execution or secure other orders restraining distribution of the property renders an appeal moot. In addition, mootness is jurisdictional in nature. *LeRoy v. Rosebud Sioux Tribe Tribal Land Enterprise*, CA 92-02, pp. 3-4 (1993).

Prosecution:

1: Timely Manner:

Appeals must be prosecuted in a timely manner. Prosecutor must not fail to submit any brief whatsoever. The Court will not hesitate to impose the sanctions available under Rule 8 of the Rules of Procedure of the Rosebud Sioux Tribal Court of Appeals. Individual attorneys may be subject to additional sanctions in their professional capacity. *Rosebud Sioux Tribe v. Crow Good Voice*, CA 89-05, pp. 6-7 (1992).

2: "Speedy" Trial Guarantee Applies to Juvenile Proceedings:

The Court finds that there is a speedy trial guarantee for juveniles charged with acts of delinquency. Such right is grounded in the due process guarantee of the Rosebud Sioux Tribe Constitution and Lakota tradition and custom. The specific time frame for the guarantee is 45 days if the juvenile is detained and 70 days if the juvenile is not detained. All delay beyond these time limits shall be evaluated in accordance with the four part test set out in *Barker v. Wingo*. "Escape from custody," unless there are extenuating circumstances, tolls the running of these time limits. R.K. III, 10-01, p. 8 (2010).

Public Policy:

1: Business Licensing:

A: Requirements:

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. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, p. 3 (1992) (See RST Business Code Section 16-1-201).

B: License Revocation:

Business licenses that have been properly obtained may be revoked for noncompliance with tribal laws. However, the trial court's decision cannot be arbitrary, capricious an abuse of discretion, or otherwise contrary to law. *Rosebud Sioux Tribe Revenue Department v. First Dakota Enterprises, Inc.*, CA 08-02, p. 7 (2010)

2: Contracts/Venue Selection:

A: Dismissing Jurisdiction:

Before dismissing in light of a 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. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, pp. 5-6 (1992).

B: Venue Selection Clause:

In the case of a venue selection clause in a contract, unless the Tribe has knowledge of the venue selection clause and waives the application of Business Code 16-1-201, which requires consent to tribal court jurisdiction, the venue selection clause would seem to contravene tribal policy that requires submission to tribal court jurisdiction as a condition of doing business on the Rosebud Sioux Indian Reservation. *Fuller and Paxton v. Blaze Construction Co. Inc., and Seaboard Surety Company*, CA 91-04, p. 3 (1992).

3: In re Indian Children:

It is public policy of the Rosebud Sioux Tribe to assert exclusive jurisdiction over Indian children found on the Rosebud Indian Reservation. *LaPointe v. Oldman*, CA 2000-02, p. 5 (2001).

Recusal/Withdrawal:

1: Appearance of Impropriety:

In a case where Appellant had visited the office of the presiding judge and attempted to retain the services of the judge (as counsel), the judge failed to recuse himself from hearing the case at a later time. The Law and Order Code of the Rosebud Sioux Tribe mandates that all judges of the Tribal Court, Section 9-1-12(3), adopted by the American Bar Association. This

code of Judicial Conduct is also in force in the courts of the State of South Dakota, and appears at SDCL 16-2 Appx. Canon 2 provides: A: A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B: A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 3 provides in part that:

1) A Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: ***

b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law, served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

Spotted Tail, G. v. Spotted Tail, A., CA 90-01, pp. 3-4 (1991).

2: Withdrawal:

In the absence of a showing of actual misconduct, prejudice or relationship as defined in the Rosebud Sioux Tribal Code, there is nothing in the tribal code or laws to prevent an appellate judge from practicing in the trial court of the Rosebud Sioux Tribe. In the case of appeal, the judge has the duty of immediately withdrawing from all representation, thereby removing themselves from all appearance of impropriety. Therefore, a trial court does not err, as a matter of law in allowing the RHA to be initially represented by the chief appellate court judge for the Rosebud Sioux Tribe.

Rosebud Housing Authority v. Greaves and Reifle, CA 88-02, p. 16 (1989).

3: When no Findings of Fact or Conclusions of law by trial court:

If an order providing for the dismissal of the petition for adjudication and termination of Appellee=s parental rights provides no findings of fact or conclusions of law or any other memorandum explanation for the trial court=s decision, the record on appeal is impossible to review for adequacy as a matter of fact or law. The absence of findings of fact and conclusions of law or any other memorandum discussion clearly violates Rule 41(c) of the Rosebud Sioux Rules of Civil Procedure and therefore requires that the decision of the trial court be reversed. *The People of the Rosebud Sioux Tribe in the Interest of J.E.*, CA 91-06, p. 6 (1992).

Right to Jury Trial:

1: Civil:

Neither the Constitution of the Rosebud Sioux Tribe nor the Indian Civil Rights Act of 1968 mandate the right to a jury trial in any civil cause of action brought in tribal court. Rule 38 of Rosebud Sioux Tribe's Rules of Civil Procedure governs jury trials in civil actions. Right to jury trial must be mentioned in notice of appeal, or it may be held as waived. *Farmer's State Bank of Mission v. Boyd and Boyd*, CA 89-03, pp.6-7 (1990).

2: Criminal:

There is no tribal constitutional or statutory right to a jury trial in a criminal case where the offense charged expressly provides for no jail time. *Rosebud Sioux Tribe v. Covey*, SC 2001-03/SC 2001-04, p. 2 (2002).

Sicangu Oyate Bar Ass'n:

1: Lay Advocates:

The Sicangu Oyate Bar Association provides standards for anyone practicing in the Rosebud Sioux Tribal Court. It requires licensing for lay advocates, as well as continuing legal education to maintain their license. Creating a different standard for lay advocates would create confusion in the court system and it would be inherently unfair to hold a lay advocate to a different standard than a professional attorney practicing in the same court. Therefore, lay advocates are not held to a lesser standard than professional attorneys. *Waln v. Rosebud Sioux Tribe*, CA 97-02, p. 3 (1999).

Sovereign Immunity:

1: Authority to Assume Jurisdiction:

The authority to assume jurisdiction over causes of action is implicit within the concepts of sovereignty of a Tribal Government. Federal statutes and the precepts of sovereignty recognize that Tribal Courts play a significant and vital role in a Tribal government's ability to self govern. *Rosebud Housing Authority v. Greaves and Reifle*, CA 88-02, pp. 7-8 (1989).

2: Scope:

Sovereign immunity does not protect an official who has acted outside the scope of his authority, or where he has acted beyond his authority. *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 95-04, p. 4 (1996). *Rosebud Sioux Tribe and Kindle v. Cordier*, CA 97-05, p. 4 (1998). *Ed Charging Elk, et al., v. Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, p. 7, (2006).

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.” *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 individuals or that claim. Qualified immunity is limited to actions taken within the scope of the individual’s authority. Additionally, qualified immunity pertains only when the individual is a named defendant. *Ed Charging Elk, et al., v. Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, pp. 7-8, (2006).

3: Waiver:

It is an axiomatic proposition in the field of Indian law that tribes possess as an attribute of their inherent sovereignty the protection of sovereign immunity. Tribal sovereign immunity can be waived by either Congress or the tribe itself, but any such waiver must be express rather than implied. In a case involving termination of a tribal employee, there is clearly no relevant federal statute that waives tribal sovereign immunity. Therefore, the issue of the waiver of the tribe’s sovereign immunity in the tribal employment context is to be resolved by examining what the Tribe itself has done in this regard. Look to RST Law and Order Code, Ch. 2, Sec. 4-2-1. *Rosebud Sioux Tribe and Kindie v. Cordier*, CA 97-05, pp. 3-4 (1998).

The sovereign immunity of a Tribal entity is subject to the Congressional Act under which funding was obtained where that law specifically addresses sovereign immunity. Whether a law actually provides funding for the Tribal entity is an issue of material fact. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 4 (2007).

4: Indian Civil Rights Act (ICRA):

In dealing with the issue of tribal sovereign immunity in the context of a “takings” claim under ICRA and a tribe’s constitution, which would be a case of first impression for this court, and it does not appear that a single tribal court in Indian country has dealt with this issue; the question is whether there has been an effective waiver of 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 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 (5th ed. 2005). *Ed Charging Elk, et al., v. Rosebud Sioux Tribe and Tribal Land Enterprises*, CA 2006-10, pp. 11-12, (2006).

Standard of Review:

1: Civil:

A: Abuse of Discretion in Custody Award:

In child custody matters, South Dakota law clearly establishes that the trial court has broad discretionary power in deciding child custody matters and that determination shall not be disturbed on appeal absent a showing of abuse of discretion. The “abuse of discretion” standard must have a sound and substantial basis in the testimony. *Ford v. Ford*, CA 87-07, pp. 1-2 (1989).

RST Code, Sec. 2-1-18 unequivocally states that the welfare and best interests of the minor children are of paramount consideration in the award or change of custody of minor children. The Trial Court has broad discretion in the award of custody and will not be reversed on appeal unless the record presents a clear case of abuse of such discretion. *Spotted Tail, G. v. Spotted Tail, A.*, CA 92-01, p. 2 (1993).

When the trial court makes no affirmative finding as to the existence of any agreement between the parties to reduce or dissolve arrearage, the finding of child support ought not be set aside unless the trial court abused its discretion in entering its judgment. Such a rule seems particularly pertinent in the tribal court context where a tribal court judge must weigh many social and cultural, as well as, economic and legal factors, when deciding child support. As a matter of tribal law adjudication, in which many parties will not be represented by counsel and will proceed pro se or with the assistance of a tribal advocate, this court does not approve child support modifications of divorce decrees absent court amendment in the form of written orders. *Schmidt v. Medearis*, CA 87-08, p. 3 (1989).

When the judge refused to consider the expert testimony offered by a doctor, a clinical child psychologist, it was an abuse of discretion. The judge interjected objections when the doctor attempted to describe the child’s stomach ulcers; he refused to

consider the child's pre-counseling developmental problems, and the progress made by the child through professional counseling and the doctor's recommendations. The trial court's failure to consider expert opinions in determining child custody cases is an abuse of discretion. *In the Matter of the Guardianship of A.S.*, CA 99-04, p. 4 (2000).

B: Abuse of Discretion When Trial Judge Denies Motion for Continuance:

When moving party's counsel had withdrawn the day before trial, her new counsel had no time to prepare. It was incumbent on the trial court to allow new counsel a reasonable time to prepare for trial, especially when client had offered to offset any economic loss suffered by the moving (sic) party. It thus deprived the moving party of effective assistance of counsel. The facts and circumstances are a clear justification and good cause for granting the request for a continuance. The Court has the power to grant continuances upon a showing of good cause. As a result, the trial court abused its discretion by failing to consider the relative hardship that the denial of a continuance created. *In the Matter of the Guardianship of A.S.*, CA 99-04, pp. 2-4 (2000).

C: Clearly Erroneous Standard for sufficiency of evidence:

Although not specifically identified in the Rosebud Sioux Tribal Code, the proper standard of review on the question of the sufficiency of the evidence is the clearly erroneous standard. Rule 52 (a) of the Federal Rules of Civil Procedure define the appropriate factual standard as follows:

Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. It is therefore the trial court's province to evaluate the credibility of witnesses, to assess their demeanor, and to decide what weight, if any, to give each witness's testimony. The Court shall not disturb the trial court's findings of fact unless the court is left with a definite and firm conviction that a mistake has been made. The mere existence of contradictory evidence alone is not sufficient to sustain the clearly erroneous burden. *Moran v. Rosebud Housing Authority*, CA 90-03, pp. 4-5 (1991).

D: Erroneous application or interpretation of law:

Erroneous application or interpretation of substantive law by a trial court is reviewable *de novo* with the appropriate standard of review, but it does not constitute a denial of due process. *In the Matter of the Commitment of Lawrence Lee Jr.*, CA 99-03, p. 5 (2000).

E: License Revocation:

Business licenses that have been properly obtained may be revoked for noncompliance with tribal laws. However, the trial court's decision cannot be arbitrary, capricious an abuse of discretion, or otherwise contrary to law. *Rosebud Sioux Tribe Revenue Department v. First Dakota Enterprises, Inc.*, CA 08-02, p. 7 (2010).

F: Failure to identify a standard of review:

Because Appellants failed to identify the standard of review to be applied by the Court to trial court's findings, the appeal was dismissed by the Supreme Court. *Farmer's State Bank of Mission v. Boyd and Boyd*, CA 89-03, p. 5 (1990).

G: Issue of Fact:

Reversible on appeal only if it is shown that the trial court's determination of dispositive facts was clearly erroneous. *Farmer's State Bank of Mission v. Boyd and Boyd*, CA 89-03, p.4 (1990).

The appropriate standard of review for an appellate review determining whether a trial court erred in concluding there was not genuine issue of material fact is *de novo*. *Bone Shirt v. Schmidt et. al.*, CA 2007-05, p. 3-4 (2007).

H: Issue of Law:

When there is no dispute as to any material fact and the only issue on appeal is a question of law, the appellate court decides questions of law independently, without deference to the trial court. This Court reviews questions of law *de novo*. *First Computer Concepts, Inc. v. Rosebud Sioux Tribe*, CA 89-02, p. 5 (1990).

1: Jurisdiction:

The proper standard of review on questions of law concerning jurisdiction is *de novo*. If the trial court does not articulate or indicate any legal standard it applied or used to guide its analysis on a motion to dismiss, it constitutes reversible error. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.* CA 95-01, p. 9 (1996).

2: Criminal:

A: Question of Law:

1: Jury Instructions:

The proper standard of review on questions of law regarding jury instructions is limited to plain error, that the error is one that has substantially affected a defendant's rights, resulting in a miscarriage of justice. Under this standard the court can grant

relief if the error would result in a miscarriage of justice if left uncorrected. However, this does not mean the failure to provide any jury instruction is automatically grounds for reversal. *Waln v. Rosebud Sioux Tribe*, CA 97-02, pp. 3-4 (1999).

Standing:

1: Custody:

A: Transfer to tribal court:

Under the Indian Child Welfare Act, three parties have the right to initiate transfer proceedings from state court to tribal court: the parents, the Indian custodian and the Indian child's tribe. Only two of these parties may oppose or prohibit transfer: either parent or the tribal court of such tribe may decline. Because an Indian custodian's interests do not rise to that of the parent or tribe, an Indian custodian has no standing to oppose the petition for transfer. They do, however, have standing to participate in tribal court hearings; they are afforded a full and complete opportunity to participate in any hearing relative to the placement of the children. *In the Matter of J.R.B., E.A.B., L.W.B., E.M.B., E.R.B., and F.M.B. Concerning Wayne Boyd*, CA 88-03, pp. 10-11 (1988).

B: Relationship to child:

If a party asserts that according to Lakota genealogy and relational custom, they are related to the child in question, and these assertions are true, the Court will recognize this relation and confirm the party's standing and bring the party within the ambit of the Indian Child Welfare Act (the person making these claims has the burden of proof and must establish these claims by a preponderance of the evidence). *The People of the Rosebud Sioux Tribe in the Interest of J.E.*, CA 91-06, pp. 3-4, (1992).

2: Federal Statutory Cause of Action:

A: Indian Arts and Crafts Act:

Where the Defendant claimed that the Plaintiff Estate lacked standing to bring a claim under the Act, pointing to 25 U.S.C. 305(e)(c)(1) as a bar, the Court determined that an individual Indian lacks standing to bring a claim under the Indian Arts and Crafts Act. The Court relied on the plain meaning of the relevant statutory language which provides that a claim may be brought by: AA) by the Attorney General of the United States...on behalf of an Indian who is a member of an Indian Tribe or on behalf of an Indian tribe or Indian arts and crafts organization; @ or AB) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization. @ Each section permits lawsuits to be filed by representative parties. *In the Matter of the Estate of Tasunke Witko, a.k.a. Crazy Horse v. The G. Heileman Brewing Co.*, CA 95-01, pp. 37-38 (1996).

3: Threatened or actual injury as requisite:

In order to adjudicate the validity of any bequest, a court must have before it the parties adversely interested. The challenger must show threatened or actual injury which is a requisite for standing. *LeRoy v. Rosebud Sioux Tribe Tribal Land Enterprise*, CA 92-02, p. 4 (1993).

Statute of Limitations:

1: Child Support:

The Rosebud Sioux Tribal Code at Chapter 2, Section 4-2-4 provides for a two year statute of limitations for all causes of action. Also, the recent (October 1985) statute of limitations is not to be applied retroactively. The previous statute of limitations was six years. It is also recognized law where a decree or order awards installment payments for the support of children, the statute of limitations begins to run as against each installment as it becomes due. *Schmidt v. Medearis*, CA 87-08, p. 4 (1989).

2: Doctrine of Laches:

There are fundamentally three elements to the laches defense:

- 1) That the plaintiff had full knowledge of facts upon which the action is based.
- 2) Regardless of such knowledge, he engaged in unreasonable delay before commencing suit.
- 3) Allowing plaintiff to maintain the action would prejudice other parties.

Even if a Court finds that a suit is not barred by the statute of limitations, but the elements of the doctrine of laches are satisfied, the doctrine of laches controls. *Rosebud Housing Authority v. Young, Sedlmajor, and Burnette*, CA 87-03, CA 87-04, CA 87-05, pp. 6-7 (1987).

3: Governmental Entities:

Statutes of limitations apply to governmental entities acting in a private/proprietary capacity as opposed to a governmental/public capacity. *Rosebud Housing Authority v. Young, Sedlmajor, and Burnette*, CA 87-03, CA 87-04, CA 87-05, p. 5 (1987).

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