

# IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIVIL CASE NOS. 91-163 AND 91-168

CIV. APP. DOCKET NO. 92-30

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**JACK LANDE,**  
**Plaintiff-Appellee**

*vs.*

**GLEN SCHWEND,**  
**Defendant-Appellant, and**  
**DENNIS, JACOB, TRUNSON, ALOYSIUS, AND VELMA BIG HAIR,**  
**Defendants.**

Decision entered March 4, 1999

[Cite as 1999 CROW 1]

Before Birdinground, C.J., Gros-Ventre, J., and Watt, J.

## OPINION AND ORDER

[¶1](#) This is an appeal from the judgment in favor of plaintiff-appellee Jack Lande entered by the Tribal Court (Stewart, J.) on August 20, 1992, in a dispute arising from the competition for a competent agricultural lease on Crow trust lands.

[¶2](#) The record in this appeal consists of the “Record on Appeal and Statement of Proceedings” submitted by appellant Schwend pursuant to Rule 7(b) of the Crow Rules of Appellate Procedure, together with the other materials submitted by appellant during

briefing and oral argument.

¶3 On August 5, 1986, First Continental Corporation entered into a “competent” farming and grazing lease on Crow Allotment No. 3059 with the five Big Hair defendants. The Big Hairs are members of the Crow Tribe, and are the heirs and owners of equal undivided beneficial interests in the Allotment, which consists of 1,020.84 acres of land located on the Crow Indian Reservation and in which legal title is held in trust by the United States of America. By special Act of Congress (41 Stat. 751) and as provided in the Bureau of Indian Affairs regulations at 25 C.F.R. § 162.15, Crow Indians are presumed competent in certain circumstances (including this case) to grant agricultural leases on their trust allotments without the approval of the Secretary of the Interior.

¶4 The preprinted language of the First Continental lease form, a copy of which was first provided to this Court at oral argument, states that the lease was “for a term of five (5) years commencing August 5, 1986” (with the underlined date having been a blank filled in by typewriter). The immediately following provision of the lease states that “rental for said premises for the term of the lease shall be as follows: \$ 1,531.26 per year for 1 years for 1020.84 acres commencing August 1, , 1986 ;” (again, the underlined items were blanks filled in by typewriter). Other blank lines provided on the form for four subsequent years were not filled in. These blanks are followed by the statement: “Lessor acknowledges that all rentals are paid up to December 1, 1989.” Following that acknowledgment, a box is checked referring to a “Farm Attachment” as being incorporated into the lease.

¶5 The “Attachment to Lease” concerns additional rental for the 701.32 acres converted from grazing to cultivation, and provides that “[t]he date and payment of cash rental for each acre plowed and farmed by Lessee shall be as follows:

December 1, 19 <u>86</u>	\$ <u>7.75</u>
December 1, 19 <u>87</u>	\$ <u>9.00</u>
December 1, 19 <u>88</u>	\$ <u>9.00</u> [.]”

Again, the underlined figures were apparently blanks filled in by typewriter. Following the entry for December 1, 1988, two more lines on the form for two additional years are obliterated by rows of typewritten X’s across the page.

¶6 In connection with its defaults on various obligations owing to defendant-appellant Schwend, First Continental assigned the lease to “Schwend Ranch” on February 12, 1988. On that date, Schwend and First Continental executed an “Assignment of Lease” that conveyed all the latter’s interest in “that certain lease agreement made and entered into by the undersigned the 12th day of February A.D. 1988, with Allot. No. 3059 . . . together with said lease agreement on file at the Crow Indian Agency Office at Crow Agency, Montana, as Lease No. 3059.” Schwend is a non-Indian who resides within the Crow Reservation.

¶7 On or about January 1, 1989, the five Big Hairs entered into another competent

lease for Allotment 3059 with plaintiff-appellee Jack Lande. Lande is a member of the Crow Tribe who also resides on the Reservation. The stated term of the Lande lease was “Five (5) years . . . commencing on 3/1/89 to 3/1/93.” The lease specifies cash rental for grazing at the rate of \$2.50 per acre for all 1020.84 acres, plus \$3.00 per acre for the 320 acres not in cultivation, and the extended amounts stated in the “Total” column for the first year (1989) that year are equal to five years’ payments at those rates. Except for filling in the years 1990 through 1993, the blanks for rental payment in the following years were not filled in. The last page of the Lande lease stated “WILL PAID ON FARMLAND (701.84 acres) AT A LATER DATE.”

¶8 Lande paid the total 5-year grazing lease rental of \$17,560.50 by cashier’s checks dated January 10, 1989, in the amount of \$3,512.10 to each of the five Big Hairs. Lande apparently made an additional payment of \$609.50 on the lease sometime later.

¶9 Lande’s secretary delivered his lease document to the Bureau of Indian Affairs office in Crow Agency for filing. However, sometime later, Lande received the lease back from the Bureau together by mail with a letter apparently signed by the acting Realty Officer stating:

We are returning, without filing, the proposed lease on Allotment Number 3059. There is an existing lease on this tract to the First Continental Corporation that does not expire until August 5, 1991.

The letter, introduced as defendant Schwend’s Exhibit A, is not dated, but the copy in the record includes the handwritten notation “Mailed 6/18/90[.]”

¶10 It is undisputed that Mr. Lande never took possession of Allotment 3059, never derived any benefit from the land, and never received any reimbursement of the \$18,170 he paid to the Big Hairs.

¶11 About this same time, Mr. Lande and Mr. Schwend were involved in another dispute concerning other trust lands that wound up in the Crow Tribal Court during 1989. *Lande v. Schwend and Milan*, Civ. 89-106 (Crow Tribal Court) (Appellant’s Brief at Tab 11; Appellee’s Response at 1). The case apparently went to trial before a special judge that year, but no transcript, pleadings or judgment from that case have been made available to this Court. There is no serious dispute, however, that the fact of Lande’s 1989 lease payment to the Big Hairs came up during the course of that trial.

¶12 The record is conflicting as to when Mr. Schwend entered into his next lease with the Big Hairs. Schwend’s motion for reconsideration, filed shortly after the judgment was entered, states that “the record will indicate that the Big Hair Defendants entered into a lease on competent Indian land on January 16, 1990,” and that “the lease dated January 16, 1990 was filed at the office of the Crow Indian Agency on March 19, 1990” (Motion for Reconsideration dated September 10, 1992, ¶ 4 at p. 3). However, the copy of the lease to “G S Partnership” in the record submitted by appellant is dated February 19, 1991.

¶13 The form of the GS Partnership lease is very similar to the 1986 First Continental lease, providing for a term of “five (5) years commencing December 1, 1990,” grazing rental

of \$1.50 per acre or “\$1,002.00 for 5 years for 668.0 acres commencing December 1, 1990 [.]” There is an acknowledgment that the all “grass” rentals are paid up to December 1, 1995, and the Farm Attachment provides for payment of \$12.00 per acre for 352.84 cultivated acres on each December 1 for the years 1990 through 1994. The record includes a letter dated April 25, 1991 from the BIA Realty Officer stating that the GS Partnership lease was filed under file number 3059-A-90, and reviewed pursuant to 25 CFR § 162.15(d).

¶14 It is undisputed that Mr. Schwend retained uninterrupted possession of the Allotment for agricultural purposes from the First Continental lease assignment in 1988 through the term of the GS Partnership lease, and that Schwend made all the payments specified in that latter lease to the Big Hairs.

¶15 Mr. Lande filed a complaint in the Tribal Court on June 28, 1991, which requested injunctive relief and alleged that defendant Schwend conspired with the Big Hairs to deny Lande the benefits under his 1989 lease (Appellant’s Statement of Proceedings at 2). Trial was held on November 5, 1991, before the Hon. Donald A. Stewart, Sr., with defendant Schwend represented by counsel, plaintiff Lande appearing *pro se*, and either Trunson or Aloysious appearing on behalf of the Big Hair family. Lande and Schwend both testified, and witnesses included Lande’s secretary and Schwend’s leasing agent. It is not apparent from the record that any of the Big Hairs testified or called any witnesses.

¶16 After the hearing, Schwend and Lande both submitted detailed proposed findings of fact and conclusions of law. The Tribal Court adopted Lande’s proposed findings, conclusions, order and judgment verbatim.

¶17 The judgment awarded to Lande a total of \$27,488.63, consisting of the \$18,170 Lande paid the Big Hairs for the lease in 1989, along with \$9,318.63 in “punitive damages” in the form of 12.5 percent interest compounded annually through July 10, 1992. The judgment also awarded additional interest accruing at \$8.98 per day after July 10, 1992 until the judgment is satisfied, and the sum of \$250 as costs. The judgment in favor of Lande was rendered against all the defendants (Schwend and the five Big Hairs) “to be paid by the six named defendants as they may decide[.]”

¶18 The judgment was entered in the Tribal Court on or about August 20, 1992. Mr. Schwend’s counsel filed a Motion for Reconsideration on or about September 10, 1992, citing specific errors in various findings and conclusions adopted by the Tribal Court. Lande filed an opposition later that month, and then filed a “Request for Hearing” on November 10, 1992. Schwend renewed his request for a hearing on his motion in the Tribal Court on November 19, 1992. However, no further proceedings or filings occurred in the Tribal Court until 1997.

¶19 Also on September 14, Schwend filed a Notice of Appeal. On November 17, 1992, Chief Appeals Court Justice Ron Arneson issued an order dismissing Schwend’s appeal with prejudice for failure to prosecute, based on his failure file transcripts or statements of proceedings and his brief within the times provided in Rules 7 and 8 of the Crow Rules of Appellate Procedure.

¶20 On March 10, 1997, Lande obtained an order requiring all the defendants to appear for an a judgment debtors' examination which is provided for in Rule \_\_\_ of the Crow Rules of Civil Procedure (Appellant's Statement of Proceedings at 5). Schwend appeared before the Tribal Court through counsel on April 3, 1997, to object to the examination on the ground that the judgment never became final, and to renew his request for a hearing on the 1992 motion for reconsideration. The Tribal Court continued proceedings. Thereafter, Lande obtained an amended writ of execution, Schwend filed a Motion to Vacate, and Lande filed an opposition. On August 25, 1997, the Tribal Court issued an order denying Schwend's Motion to Vacate and granting Lande's opposition.

¶21 Schwend filed a Notice of Appeal from this latter order, and from the Tribal Court's order of August 20, 1992, on September 18, 1997. The Tribal Court granted an extension for Schwend's late filing time over Lande's objection, and thereafter appellant Schwend timely filed a Record on Appeal and Statement of Proceedings and his principal brief. Appellee Lande filed his Response brief on January 26, and oral argument was heard by this Court on August 28, 1998.

### **A. *Timeliness of Appeal***

¶22 The first question is whether this Court has jurisdiction under Crow Tribal law to hear this appeal more that 5 years after the judgment and after being dismissed for failure to prosecute. In this regard, appellant Schwend first argues that the time for an appeal was suspended or tolled by his Motion for Reconsideration filed around September 10-14, 1992, which the Tribal Court did not act upon until it denied Schwend's motion to vacate the writ of execution in August, 1997 (which also, in effect, denied the motion for reconsideration).

¶23 The only postjudgment motion provided for in the Crow Tribal Code is a motion for judgment *non obstante verdicto* pursuant to Rule 19(c) of the Crow Rules of Civil Procedure. According to that rule, the procedure for requesting the Tribal Court to enter judgment notwithstanding the verdict is governed by Rule 50 of the Federal Rules of Civil Procedure. This Court has recognized that a timely motion for judgment n.o.v., along with an alternative motion for new trial under Fed. R. Civ. P. 50(b) and 59, extends the period for filing a notice of appeal until the motion has been decided by the Tribal Court in the same manner as provided under Rule 4(a)(4) of the Federal Rules of Appellate Procedure. [\*Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co., Civ. App. Dkt. No. 94-91 \(Crow Ct. App., April 24, 1996\) \[1996 CROW 4\]\*](#) (Order remanding to Tribal Court for decision on postjudgment motion). However, that rule does not apply in the present case because no jury verdict was involved.

¶24 Even if our rules implied that other types of postjudgment motions should be allowed in the same manner as Fed. R. Civ. P. 59 (e.g., a motion to alter or amend the judgment), Schwend's motion would not qualify, because it was not filed within 10 days following entry of the judgment on August 20, 1992. The 10-day deadline for postjudgment motions which toll the appeal time is jurisdictional under the federal rules which the Tribal Code has adopted in this area, and may not be extended. *See Historical Research v. Cabal,*



80 F. 3d 377, 379 (9th Cir. 1996)(Rule 59(e) motion was untimely and therefore did not extend the time for appeal).

¶25 Mr. Schwend also argues that the judgment never became final, because no “notice of entry of judgment” was ever served on him. It is true that such a notice, usually served by the prevailing party sometime after the judgment is entered, is necessary to trigger the running of the time periods for postjudgment motions and appeals in the Montana courts (see M. R. Civ. P. 77(d)). However, that step does not apply here. Although Rule 15 directs the Clerk to send a notice of judgment to the parties,<sup>11</sup> the Crow Rules of Civil Procedure (and the Federal rules) provide for all time deadlines to begin running automatically from the date of *entry* of the judgment. Crow R. Civ. P. 15; Crow R. App. P. 3; see also, Fed. R. Civ. P. 50, 59 and 77(d); Fed. R. App. P. 4(a)(1) and (4).

¶26 The Crow Rules of Civil Procedure do contain an additional requirement, not present in the Montana rules, that “[e]very judgment shall be set forth on a separate document and signed by the presiding judge.” Crow R. Civ. P. 16(b). Applying the similar Fed. R. Civ. P. 58, the Supreme Court has attempted to establish a mechanical “bright line” requirement for a “separate document,” because it reduces uncertainty as to when a final appealable judgment has been entered. See, e.g., *United States v. Indrelunas*, 411 U.S. 216 (1973) (district court clerk entered jury verdict on docket, but appeal time did not begin to run until separate judgment document was entered two years later at Government’s request). However, the Court later found that “it could not have been intended that the separate-document requirement of Rule 58 be such a categorical imperative that the parties are not free to waive it.” *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 382 (1978)(although no document was ever found that looked like a judgment, the parties proceeded on the assumption that the dismissal was a final appealable decision). Similarly, the Ninth Circuit has not required a separate document entitled “judgment” when there is no question regarding the finality of the lower court’s order. See *Spurlock v. FBI*, 69 F.3d 1010, 1015 (9th Cir. 1995) (order directing judgment in favor of defendant).

¶27 In this case, the document entered by the Tribal Court on August 20, 1992 included findings of fact and conclusions of law, and the word “judgment” did not appear in its caption. However, the document also expressly ordered “Judgment . . . for Plaintiff and against the six named Defendants,” and was clearly intended by the Tribal Court to dispose of the entire action.

¶28 This Court holds that the form of the judgment entered on August 20, 1992 was sufficient to indicate it was final, and that Schwend’s motion for reconsideration filed on September 10 or 14, 1992 was not timely filed. Having received a full bench trial of the claims against him, Schwend was not entitled to a hearing on his ineffective motion.

¶29 Schwend’s remedy at that point was thus limited to his appeal, which he filed on September 14, 1992, and which was dismissed for failure to prosecute on November 17, 1992, by order of a single judge on his own motion. Although the practice is not specifically provided for in the Rules of Appellate Procedure, the attorney-judge on the Crow Court of Appeals has routinely handled procedural orders in the interest of sound judicial

administration. There is also precedent in this Court for a single judge to dismiss an appeal with prejudice for failure to prosecute. *See Castro v. Castro*, Civ. App. Dkt. No. 94-398 (Jan. 29, 1996)(Watt, J.). However, as distinguished from the present case, the *Castro* appeal was dismissed on the opposing party's motion after the appellant missed the time for filing her brief which was specified in a scheduling order, missed the extended time granted on the motion of her lay counselor, and failed to respond to an order to show cause why the appeal should not be dismissed. In addition, the fact that Schwend had also filed a motion for reconsideration, that both parties had requested a hearing on that motion, and that the judgment was not labeled as such, all further tend to excuse Schwend's failure to diligently pursue parallel proceedings in the Court of Appeals.

¶30 The full Court of Appeals therefore holds that Judge Arneson erred in dismissing Schwend's appeal with prejudice and without warning under the circumstances. Schwend's notice of appeal filed September 14, 1992 is deemed timely,<sup>21</sup> and this Court has jurisdiction to review the judgment entered in favor of Mr. Lande on August 20, 1992 under the docket number originally assigned to that appeal.

### **B. Subject Matter Jurisdiction**

¶31 On appeal, Mr. Schwend argues that the Tribal Court lacked jurisdiction to render the judgment against him, a non-member of the Crow Tribe, on three separate grounds. These arguments apparently were not made in the Tribal Court. Neither Schwend's Proposed Findings of Fact, Conclusions of Law, and Order, or his Motion for Reconsideration raise any question concerning the Tribal Court's jurisdiction. Nevertheless, the issue of lack of subject matter jurisdiction can be raised any time, and this Court will therefore review the facts and the law pertaining to jurisdiction on a *de novo* basis.

¶32 Mr. Schwend first argues that the Crow Tribe's organic documents, including Article VI Section 10 of the Tribal Constitution, withhold Tribal Court jurisdiction over him in this case because no federally-approved Tribal ordinances authorize regulation of non-members' conduct in leasing trust lands. This argument is without merit. The cited provision of the Constitution by its terms only applies to taxes and license fees on non-members, and there is no reason to infer that it was intended to extend to every form of tortious conduct of non-members whose regulation would otherwise be within the Tribe's inherent sovereign powers. The Tribal Code itself, for at least 20 years, has provided for Tribal Court jurisdiction over all lands and property within the Reservation, except as limited by federal law. Crow Tribal Code §§ 3-2-202 and -204. In any event, after the detailed review directed by the Supreme Court in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), the Crow Court of Appeals long ago held that the statutes, treaties and ordinances applicable to the Crow Tribe imposed no special limitations that restrict the Crow Tribal Court's jurisdiction over non-member torts to a greater extent than general principles of federal Indian law. [\*Sage v. Lodge Grass School Dist. No. 27\*, Civ. No. 82-287 \(Crow Ct. App. July 30, 1986\)\[1986 CROW1\].](#)

¶33 Next, Mr. Schwend argues that general principles of federal Indian law, as clarified in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), bar Tribal Court jurisdiction of claims

against him as a non-member. This jurisdictional challenge is also without merit. Unlike *Strate*, which involved claims arising from an automobile accident on the equivalent of non-Indian fee land (*i.e.*, the state highway right-of-way), the dispute in the present case arose on Crow trust land located on the Crow Reservation. Crow trust land was the subject matter of the competing leases which are at the center of this dispute. “When a contact concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant.” *R.J. Williams C. v. Fort Belknap Housing Authority*, 719 F.2d 979, 985 (9th Cir. 1983)(locus of dispute was on the reservation where housing was to be built); see also [Warren v. Gardner, Civ. App. Dkt. No. 95-095, Opinion at 7 \(Crow Ct. App. Aug. 11, 1997\)\[1997 CROW 1\]](#) (dispute involving contract claim for appraisal of trust land arose on the trust land).

¶34 The *Strate* opinion makes it very clear that its result, and the “main” *Montana* rule generally denying Tribal court civil jurisdiction over non-members, only apply on non-Indian fee land. *Strate*, 117 S. Ct. at 1413.<sup>131</sup> The unanimous *Strate* Court could “readily agree, in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over non-member conduct on tribal land.” *Id.* Thus, if anything, the *Strate* opinion reinforces the Tribal Court’s jurisdiction in this case involving Crow trust land.

¶35 Finally, Mr. Schwend argues that jurisdiction of a lawsuit by a Tribal member for redress against a non-member under a lease contract for trust lands is a power “reserved to the United States” (Appellant’s Brief at 2). Mr. Schwend further contends that it was the action of federal law and a federal agency that resulted in Mr. Lande’s lease not being filed (Appellant’s Brief at 9-11). Thus, according to Schwend, the Tribal Court lacked jurisdiction to question this action because that would amount to limiting or restricting federal employees in the performance of their official duties, *citing Louis v. United States*, 967 F. Supp. 456 (D. New Mexico 1997) and *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986).

¶36 Certainly, there is an extensive general framework of federal law, integral to the United States’ trust responsibility, that governs the leasing of allotted Indian trust lands. See 25 U.S.C. §§ 380, 393, 394, 395 and 415; 25 C.F.R. Part 162. As a result, there no little doubt that State courts lack jurisdiction to adjudicate any kind of dispute involving Indian trust land. See, *e.g.*, *Krause v. Neuman*, 943 P.2d 1328 (Mont. 1997)(federal law preempted state court jurisdiction of non-members’ tort claims arising from a contract to sell trust land on Flathead Reservation).

¶37 However, the authorities Mr. Schwend relies on are not dispositive of the question of whether Tribal courts have jurisdiction over disputes like the present one. The case of *Louis v. United States*, *supra*, involved a medical malpractice claim against the United States itself, which can only be brought in a U.S. District Court pursuant to the waiver of the United States’ sovereign immunity in the Federal Tort Claims Act. The present case does not involve any monetary claims against the United States.

¶38 The *Yakima Tribal Court* case involved a trust allotment owned by two sisters of the Yakima Nation. In that case, despite a settlement between the sisters and the Interior



Department two years earlier, the Tribal court permanently enjoined BIA irrigation project officials from entering the allotment to finish the relocation of an irrigation canal. *United States v. Yakima Tribal Court*, 806 F.2d at 856. The Ninth Circuit affirmed that, even though the federal project engineer may have violated federal law in relocating the canal without the allottees' written consent, the United States' sovereign immunity prevented a Tribal court from impeding federal employees' management and operation of the federal irrigation project. *Id.* at 859-60. The present case, however, does not involve any injunction or other order directed at federal officials. No federal official or entity is a party to this case, and the Tribal Court's judgment does not direct the Bureau to award a lease to Lande, or to take or change any other official action or record. Thus, the *Yakima* case also does not control here.

¶39 Our review of the caselaw indicates that even in trust land matters involving express grants of federal court jurisdiction, the federal courts have generally not interpreted the federal law as precluding Tribal court jurisdiction. In *United States v. Plainbull*, 957 F.2d 724, 725 (9<sup>th</sup> Cir. 1992), the Government brought an action in the federal district court pursuant to 25 U.S.C. § 201 and 28 U.S.C. § 1355 to collect federal-law penalties from Tribal members who grazed their cattle on Tribal lands adjacent to their allotment without a valid grazing permit. The Court of Appeals affirmed that Section 1355 only grants federal court jurisdiction exclusive of state courts, and did not divest the Tribal court of concurrent jurisdiction over such actions. *Id.* at 726-727. Recognizing that jurisdiction over activities and transactions on Tribal lands was fundamental to the federal policy promoting Tribal self-government, the Ninth Circuit affirmed the district court's decision to dismiss in deference to Tribal court's "first opportunity to resolve this case." *Id.* at 729.

¶40 Similarly, in *El Paso Natural Gas Co. v. Neztosie*, 136 F.3d 610 (9<sup>th</sup> Cir. 1998), the Court of Appeals held that the Price-Anderson Act, 42 U.S.C. § 2210, which grants federal court jurisdiction over claims arising from a "nuclear incident," did not necessarily preclude Navajo Tribal Court jurisdiction of personal injury actions by Tribal members against non-member companies who operated uranium mines on the Reservation. The *Neztosie* court directed the federal district court to dismiss or stay its proceedings pending the Navajo Tribal Courts' determination "in the first instance, whether it has jurisdiction over the Navajo Court Plaintiffs' claims." *Id.* at 620; *see also id.* at 613-615, reviewing the requirement for exhaustion of Tribal court remedies pursuant to *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

¶41 There is conflicting authority in the Eighth Circuit with regard to Tribal courts' jurisdiction to directly adjudicate interests in allotted trust lands, matters over which the federal courts also have jurisdiction pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1353. *See Conroy v. Conroy*, 575 F.2d 175 (8<sup>th</sup> Cir. 1978)(Tribal court jurisdiction to divide trust lands in tribal divorce action); *contra, Fredericks v. Mandel*, 650 F.2d 144 (8<sup>th</sup> Cir. 1981)(Tribal court lacked jurisdiction to grant easement across trust allotment). In a case involving a disputed boundary between trust land and non-Indian fee land, the Tenth Circuit recently held that the Tribal courts' findings with regard to their own jurisdiction were entitled to substantial deference, and would only be disturbed if they were "clearly erroneous." *Enlow v. Moore*, 134 F.3d 993, 997 (10<sup>th</sup> Cir. 1998).

¶42 In summary, this Court is also not aware of any controlling federal statutory or decisional law which recognizes federal courts and administrative tribunals as having jurisdiction, exclusive of Tribal courts, to resolve all disputes relating to leases of trust allotments. In the absence of any express prohibition against Tribal court jurisdiction, and with the locus of the dispute being Reservation trust land not covered by *Montana's* main rule, the general rule applies and “the proper inference from silence. . . is that the [Tribe’s] sovereign power . . . remains intact.” *Neztsosie, supra* at 619, quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). Against the backdrop of the strong federal policy promoting Tribal self-government, the Crow Tribe’s inherent sovereign authority thus provides a sound basis for its assertion of jurisdiction to adjudicate disputes involving Reservation trust lands pursuant to Crow Tribal Code §§ 3-2-202, -204 and -205 (jurisdiction). In such actions, the Tribal Court has the authority and responsibility to apply both pertinent federal law and non-conflicting Tribal law, including common law and equity. *United States v. Plainbull, supra*, 957 F.2d at 728; Crow Tribal Code § 3-1-104.

¶43 Our conclusion above, based on general principles of federal Indian law, is strongly reinforced by the special federal statutes and regulations which govern competent leases of Crow trust lands. As alluded to above, the 1926 amendment to the Crow allotment act allows competent Crows to lease their family’s lands for agricultural purposes without approval by the Secretary of the Interior. Act of May 26, 1926 (44 Stat. 658, 659), amending Section 1 of the Act of June 4, 1920 (41 Stat. 751). A further amendment in 1948 limits this right to tracts owned by no more than 5 heirs and devisees, and expressly provides “[t]hat any Crow Indian classified as competent shall have the *full responsibility of obtaining compliance* with the terms of any lease made.” Act of March 15, 1948 (62 Stat. 80)(emphasis added). This specific statutory language contradicts Mr. Schwend’s contention that all matters related to leases of Crow trust lands are controlled exclusively by the Bureau of Indian Affairs.

¶44 The same responsibility on the part of the individual allotment owner to enforce compliance with the lease terms is carried through essentially verbatim to the Bureau’s special regulations governing competent Crow leases.<sup>41</sup> 25 C.F.R. § 215(e). This provision governing enforcement of competent Crow leases contrasts markedly with the Bureau’s general regulations covering other types of Indian trust land leases, which specify detailed procedures for the Bureau’s enforcement of lease violations, including federal administrative appeals and Secretarial approval of damages settlements. 25 C.F.R. § 162.14.

¶45 If competent Crow lessors are charged with the responsibility for enforcing their own leases without the Bureau’s assistance, there is no basis for inferring that they are limited to federal administrative and judicial remedies. Accordingly, Crow Tribal members and descendants are entitled to seek enforcement of their competent leases in the Crow Tribal Court. Similarly, there is no basis for inferring that putative lessees who have contracted for competent Crow leases are confined to federal forums for enforcement of their lease contracts and related legal and equitable rights. Indeed, nothing in the Bureau’s leasing regulations mention claims against lessors, and the Tribal Court is the exclusive forum for adjudicating Reservation debt claims against Tribal members. *Williams v. Lee*, 358 U.S. 217 (1959), cited in *Strate, supra*, 117 S. Ct. at 1415. Finally, as discussed above in connection

with Schwend's jurisdictional challenge under *Strate, supra*, Schwend's status as a non-member does not preclude Tribal Court jurisdiction of related claims against him in a dispute arising on Crow trust land.

¶46 Therefore, consistent with general principles of federal Indian law, the specific federal statutes and regulations governing competent Crow leases, and the Crow Tribal Code, this Court holds that the Tribal Court had jurisdiction to adjudicate Mr. Lande's claims against both Mr. Schwend and the Big Hairs in the present case.

### **C. Merits**

#### **1. Standard of Review**

¶47 This Court reviews the Tribal Court's findings of fact under a "clearly erroneous" standard. [Warren v. Gardner, Civ. App. Dkt. No. 95-095 at 11 \(Crow Ct. App., Aug. 21, 1997\) \[1997 CROW 1\]](#). Analogous to Fed. R. Civ. P. 52(a), the Tribal Court's findings "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 witnesses." Under this standard, if the trial court's findings are plausible based on all the evidence in the record, the appeals court may not reverse even if it would have reached a different conclusion, especially with regard to findings involving the credibility of witnesses. See *Amadeo v. Zant*, 486 U.S. 214 (1988); *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). The same "clearly erroneous" standard applies when the trial court adopts the successful party's proposed findings verbatim, as it did in this case. *Id.* at 572. However, the appeals court is still obliged to reverse if it "is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573.

¶48 Consistent with the Tribal Code's adoption of Fed. R. Civ. P. 56 as governing the standard for reviewing of questions of law on summary judgment, see [Crow Tribe v. Gregori, Civ. App. Dkt. No. 94-151 \(Crow Ct. App. April 2, 1997\)\[1998 CROW 2\]](#) at pp. 31-32, this Court will make its own independent review of the Tribal Court's legal conclusions under a "de novo" standard. This Court may affirm on any ground supported by the evidence. *Id.*

#### **2. Liability**

¶49 In this case, the stated basis for the Tribal Court's judgment against all the defendants is unjust enrichment. Conclusion of Law No. 2 (Judgment at 4). This equitable theory of recovery clearly applies to the Big Hair defendants, who received a total of \$18,170 from Mr. Lande for which they gave nothing in return. Having been deemed competent by federal law to lease their allotment, the Big Hairs are not shielded from responsibility for their actions in this regard.

¶50 The concept of unjust enrichment does not so readily apply to the claim against Mr. Schwend, who received nothing directly from Mr. Lande, and also paid the Big Hairs for the GS Partnership lease. The basis for Mr. Schwend's liability as asserted in the complaint, and consistent with the Tribal Court's findings, was his conspiracy with the Big Hairs to deny Lande the benefit of the latter's 1989 lease contract while obtaining a similar benefit

for himself.

This Court therefore reviews the Tribal Court's findings to determine if they support a judgment against Mr. Schwend under a theory of "interference with contract." If the evidence is consistent with recovery under such a theory, then any technical deficiency in the pleadings may be deemed cured by amendments to conform to the evidence. See Fed. R. Civ. P. 15(b).

¶51 Although appellant Schwend correctly recognized the possibility of Lande's claim being characterized as interference with contract, and argued generally that the claim is defective as a matter of law (Appellant's Brief at 3), neither of the parties has provided the Tribal Court or this Court with any authorities to support or reject such a claim. Accordingly, this Court's analysis is confined to reviewing the Tribal Court's findings with respect to Mr. Schwend as they relate to general principles of hornbook law in this area.

¶52 In general, a party to a contract may bring a claim against a third person who has procured a breach or termination of the contract by the other party to the contract. 45 Am. Jur.2d *Interference* § 39 at p. 314. Relief for such an "interference" is available in either law or at equity. *Id.* § 52 at p. 325. In order to recover damages in law for "tortious interference with contract," the following elements must be present:

(1) the contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom.

45 Am. Jur.2d *Interference* § 39 at p. 314.

¶53 In this case, the Tribal Court's Finding No. 4 of the existence of a contract between Lande and the Big Hairs, and Lande's payment in full for the five-year term of the contract, is supported by the 1989 lease document and is not clearly erroneous. The breach by the Big Hair owners, and the damage to Lande resulting therefrom in the form of the lost rental payment and/or the loss of use of the allotment, as described in Finding No. 10, are also beyond dispute.

¶54 With respect to element (2), the Tribal Court found that Defendant Schwend had actual knowledge of Lande's lease contract with the Big Hairs in 1989 (Finding No. 6), before the GS Partnership lease was signed. That finding is based primarily on plaintiff Lande's testimony that the existence of his lease agreement was made known to Mr. Schwend in the course of Tribal Court proceedings during 1989 in Case No. 89-106. The Tribal Court specifically found Lande's testimony "credible on this point[.]" Contrary to Schwend's argument, the fact that another judge presided over the other 1989 case does not, in the absence of complete transcripts showing the contrary, prevent the Tribal Court crediting Lande's testimony in this case. Schwend's knowledge of Lande's lease supports a further inference that Schwend's procurement of the GS Partnership lease was with the intent that the Big Hairs breach their agreement with Lande, thus satisfying element (3) of the requirements for tortious interference. The apparently contentious relationship between the parties at that time, as made evident at oral argument, certainly does not contradict such an inference. This Court will not second-guess the Tribal Court's finding, based on its weighing



of conflicting witness testimony which this Court is not in a position to observe, that Schwend had actual knowledge in 1989 of Lande's lease contract with the Big Hairs.

[¶55](#) Finally, in order to sustain a judgment against Schwend based on tortious interference in this case, there must be an "absence of justification" for Schwend's conduct. This element encompasses Schwend's defense that his conduct was justified because Lande failed to comply with federal law governing competent Crow leases. In this regard, Schwend argues that the Tribal Court's findings that there was no good reason why the BIA Realty Office in Crow Agency failed to record Lande's 1989 lease are contrary to federal law and clearly erroneous (see Appellant's Brief at 9-11; Findings Nos. 6 and 9). According to Schwend, the Bureau's refusal to record Lande's lease executed in January, 1989 was proper under 25 C.F.R. § 162.15(c) because it Lande violated the regulations by was executing the lease more than 18 months before the First Continental lease expired on August 5, 1991.

[¶56](#) The only evidence presented to the Tribal Court on this point was a purported letter from the "acting" realty officer letter stating that Lande's lease was being returned, without filing, because the existing First Continental lease did not expire until August 5, 1991. That letter is not dated, was not certified by the Bureau as being authentic, and there has been no confirmation by foundation testimony, affidavit or otherwise that the letter represented a reasoned, official action. An uncertified copy of the First Continental lease, which was presumably on file with the Bureau at the time Mr. Lande executed his lease, was only produced in response to this Court's inquiry at oral argument.

[¶57](#) As described at the beginning of this opinion, the First Continental lease contains numerous irregularities and inconsistencies with respect to its term and the schedule for lease payments. For example, although the pre-printed term of five years would have expired on August 5, 1991, that date does not appear anywhere on the lease. Rather, the latest date for which lease provided a farming payment was November 1, 1988, and it acknowledged that grazing rentals were paid up only through December 1, 1989.

[¶58](#) By way of contrast, the term and payment schedule in Schwend's 1991 GS Partnership are all consistent, the December 1, 1995 "paid up" date for grazing rentals is consistent with the expiration of its five-year term, and the filing confirmation letter from the BIA Realty Officer is date-stamped April 25, 1991 in the manner we are accustomed to seeing for official correspondence. There is no explanation in the record of how it came to pass that the GS Partnership lease became effective December 1, 1990, when the First Continental lease did not expire until August 5, 1991.

[¶59](#) Despite our serious evidentiary concerns, and without objection from Mr. Lande, this Court will assume that Schwend's documents are valid, and that the Bureau's reading of the First Continental lease was correct (i.e., that it did not expire until August 5, 1991). Based on the evidence available to them, however, the error by Mr. Lande and the Tribal Court (Finding No. 5) in concluding that the First Continental lease expired on December 1, 1989 was understandable.



[¶60](#) Under the facts thus presented, we turn to the question of whether Lande violated the special regulations covering competent Crow leases in 25 C.F.R. § 162.15. Subsection (c) requires that all competent Crow leases be recorded at the Crow Agency. It also implements the statutory 5-year limitation in a manner “intended to afford a protection the the Indians [the competent Crow lessors],” explaining:

The essence of this protection is the right to deal with the property free, clear, and unencumbered at intervals at least as frequent as those provided by law. If lessees are able to obtain new leases long before the termination of existing leases, they are in a position to set their own terms. In these circumstances lessees could perpetuate their leaseholds and the protection of the statutory limitations as to terms would be destroyed.

25 C.F.R. § 162.15(c). The regulation goes on to provide, in pertinent part, that any lease executed more that 12 months (grazing) or 18 months (farming) “prior to the commencement of the term thereof . . . will not be recorded.”

[¶61](#) Clearly, the regulation is intended to regulate the conduct of the current lessee, which in this case was Mr. Schwend as First Continental’s assignee, from unfairly perpetuating his lease. In fact, rather than prohibiting Mr. Lande’s conduct in seeking to lease the allotment after Schwend’s existing lease expired, the regulation attempts to encourage negotiations with potential new lessors by ensuring that the owners can periodically deal with their land “free, clear and unencumbered” of previous leases. This intent is carried out by the precise language of the 12/18-month requirement, which prevents a lease from being executed long before its term commences. In this case, Mr. Lande’s lease was executed on or about January 1, 1989, and its stated term commenced March 1, 1989, a span of only 2 months. Thus, Lande’s lease did not violate either the letter or the spirit of 25 C.F.R. § 162.15(c).

[¶62](#) The regulation specifically provides for the circumstance, as in this case, when one lessor attempts to record a lease on land already covered by somebody else’s lease. Under 25 C.F.R. § 162.15(d)(emphasis added), “leases *will be recorded* but the lessee and lessor will be notified...[when]...(2) There is, of record, a lease on the land for all or a part of the same term.”

Based on this plain language, we agree with the Tribal Court that there was no good reason why the Bureau failed to record Lande’s lease even though a part of its term was the same as for the existing First Continental lease.

[¶63](#) This Court holds that Mr. Lande did not violate 25 C.F.R. § 162.15 when he executed his 1989 lease with the Big Hairs. There was thus no justification for Mr. Schwend, with actual knowledge of Lande’s lease<sup>[5]</sup>, to procure the Big Hairs’ breach so that Schwend could continue leasing the land instead. The Tribal Court’s findings which are not clearly erroneous support imposition of liability on Mr. Schwendf based on tortious interference with contract.

### 3. Damages

¶64 Mr. Schwend contends that any damages based on rentals paid can only be assessed against the owners whom Lande paid. The Tribal Court's judgment apportions damages to "the six named Defendants as they may decide." Finding that language to be confusing, and considering Mr. Schwend's argument, this Court will carefully review the Tribal Court's damages award for consistency with general principles of law or equity.

¶65 At oral argument, the parties conceded that it was possible to interpret the judgment as holding each defendant jointly and severally liable. This would mean that the full amount of the judgment could be collected by Lande from any one defendant (who has that much money), and that defendant would then be left with claims for contribution or reimbursement from the other defendants "as they may decide." However, it is not certain that they would be able to decide how much each other owes, and that controversy could be the subject of another lawsuit.

¶66 Also, we question the fairness of collecting from Schwend all the money paid to the Big Hairs when he also paid them for his lease, or of making one member of the Big Hair family pay all the amounts, with interest, which were actually received by the other four owners. This Court is not convinced that joint and several liability is appropriate in this case, or was intended by the Tribal Court. Rather than joint and several liability, a better rule for apportioning damages in this case is based on the amount of benefit each defendant received at Mr. Lande's expense.

¶67 In a case of tortious interference, "the innocent contracting party [Lande] has been said to have a right in breach of contract against the other contracting party [here, the Big Hairs] and a right in tort against the third party [Schwend]." 45 Am.Jur.2d *Interference* § 54 at p. 326. As to the Big Hairs, there is undoubtedly authority for holding them liable under a contract claim for the full value of the contract, including expected Lande's expected benefits from the lease in addition to the amount he paid for the lease. However, under the theory of unjust enrichment relied on by the Tribal Court in this case, we hold that each of the liability of each of the Big Hair defendants is limited to the amount of the lease money he or she received from Lande, or \$3,634.00 apiece.

¶68 As to Mr. Schwend, "the measure of damages for procuring breach of a contract is the loss either of property or of personal benefit, which, except for such interference, the plaintiff would have been able to attain or enjoy, including such loss of profits as the plaintiff to have resulted directly and proximately from the wrongful acts." 45 Am.Jur.2d *Interference* § 57 at p. 331. It has also been said that:

In actions for procuring breach of a contract, the plaintiff need not produce evidence of damages in any specific amount in order to recover damages in a substantial amount, it being sufficient for him to establish facts from which it properly may be inferred that some damages resulted to him from the interference.

*Id.*, citing Annotation, 84 ALR 43, 94; 26 ALR2d 1227, 1272 § 43.

¶69 In this case, in addition to the \$18,170 Lande paid for the lease, the Tribal Court awarded what it called "punitive damages" calculated at 12.5 percent interest compounded annually. The interest was calculated from the date of Lande's payments (January 10, 1989) through July 10, 1992 in the amount of \$9,318.63, plus \$8.98 per day after July 10, 1992 to the date of entry of judgment (Conclusion of Law No. 8(b), Judgment at 4-5).

¶70 There is a growing trend toward discretionary awards of prejudgment interest as a component of damages, even on unliquidated claims, when necessary to provide full compensation to the plaintiff. See 22 Am.Jur.2d *Damages* §§ 655, 658. The rate of interest is sometimes discretionary, and usually not compounded in accordance with the common-law rule. *Id.*, § 650.

¶71 We believe that the interest award in this case is better characterized as compensatory rather than punitive damages, and that the amount awarded by the Tribal Court was not clearly erroneous as an approximation of Lande's lost profits on the lease he was never able to enjoy. Since these profits were instead obtained by Mr. Schwend, this Court holds that they are the measure of the damages for which Mr. Schwend is liable, in the total amount of \$9,686.81 through August 20, 1992.

#### **4. Costs and Postjudgment Interest**

¶72 The Tribal Court also awarded costs in favor of Mr. Lande in the amount of \$250.00. Allowance of costs is provided for in Rule 16(c) of the Crow Rules of Civil Procedure. However, there is no evidence of Mr. Lande having documented his costs pursuant to the rule, and we therefore vacate that award.

¶73 The Tribal Code does not provide for interest on judgments. At common law, judgments do not bear interest, and the right to postjudgment interest has generally been created by statute. 45 Am.Jur.2d *Interest and Usury* § 59 at pp. 56-57. In the federal courts, postjudgment interest is provided by 28 U.S.C. § 1961, which was adopted to bring about some uniformity between federal and state-court judgments after many states adopted statutes providing for post-judgment interest. See *id.*, § 62.

¶74 In the absence of an authorizing statute, a court of equity may exercise discretion to allow postjudgment interest. *Id.*, § 63. This Court holds that postjudgment interest shall be allowed on all the individual judgments in this case at the rate of 10% simple interest, from the date of the amended judgment entered on remand. See, e.g., *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941) (used same interest rate provided by laws of the state for delay in payment).

¶75 The judgment entered in this case also refers to various liens being imposed. These liens are not provided for in the Tribal Code, and in any event are not necessary because Lande has the right to execute on property owned by the defendants in accordance with the procedures specified in Rule 20 of the Crow Rules of Civil Procedure.

#### **D. Conclusion**

The Tribal Court's holding that it had jurisdiction of this case, and its imposition of liability on all the defendants is AFFIRMED.

¶76 The Tribal Court's judgment awarding damages is REVERSED, and this matter is REMANDED to the Tribal Court to immediately enter a separate "Amended Judgment" awarding to plaintiff Jack Lande the following amounts against the specified defendants:

- (1) Against each of Dennis Big Hair, Jacob Big Hair, Trunson Big Hair, Aloysius Big Hair and Velma Big Hair, the sum of Three Thousand Six Hundred Thirty-Four Dollars (\$3,634.00), plus 10% simple interest from the date of entry of the Amended Judgment; and

(2) Against Glen Schwend, the sum of Nine Thousand Six Hundred Eighty-Six and 81/100 Dollars (\$9,686.81), plus 10% simple interest from the date of entry of the Amended Judgment.

IT IS SO ORDERED.

[¶5](#) [¶10](#) [¶15](#) [¶20](#) [¶25](#) [¶30](#) [¶35](#) [¶40](#) [¶45](#) [¶50](#) [¶55](#) [¶60](#) [¶65](#) [¶70](#) [¶75](#) [Endnotes](#)

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## Endnotes

<sup>1</sup> There is no allegation in this case that the Clerk failed to timely mail a copy of the judgment to Mr. Schwend or his counsel.

<sup>2</sup> Judge Arneson’s dismissal order was not based on Schwend’s failure to file his notice of appeal within 10 days after the entry of judgment; Crow R. App. P. 3(a) allows for a 30-day extension for filing this notice.

<sup>3</sup> Even if this dispute did not involve trust land, there is no doubt that Mr. Schwend entered into qualifying “consensual relationships” for commercial purposes with members of the Tribe involving the subject matter of the dispute, bringing his conduct with the Tribal Court’s jurisdiction under the first *Montana* exception. See, e.g., *Allstate Indemnity Co. v. Stump*, 994 F. Supp. 1217 (D. Mont. 1997).

<sup>4</sup> The regulation also provides that it “shall not preclude action by the Secretary to assure conservation and protection of these trust lands.” 25 C.F.R. § 215(e). We do not read this proviso as being inconsistent in any way with the Crow Tribal Court’s concurrent jurisdiction of disputes involving competent Crow leases.

<sup>5</sup> The Bureau’s error in failing to record Lande’s lease also does not justify Schwend’s conduct when he had actual knowledge of Lande’s lease. For the same reason, the Tribal Court erred in finding the Bureau of Indian Affairs partly responsible for Lande’s damages (Finding No. 10), a question which it may lack jurisdiction to consider in any event.

[¶5](#) [¶10](#) [¶15](#) [¶20](#) [¶25](#) [¶30](#) [¶35](#) [¶40](#) [¶45](#) [¶50](#) [¶55](#) [¶60](#) [¶65](#) [¶70](#) [¶75](#) [Endnotes](#)