IN THE SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

JAY ANTOINE and NANNETTE ANTOINE, Plaintiffs/Appellees v. CHERRY-TODD ELECTRIC COOPERATIVE and THE BOARD OF DIRECTORS FOR CHERRY-TODD ELECTRIC COOPERATIVE; J.R. REAGLE, PRESIDENT; DICK SCHNEIDER, VICE-PRESIDENT; CLAUDIA SHARKEY, SECRETARY; LONNIE LENSEN, TREASURER; BOARD MEMBERS JIM EPKE, LOREN BUETTNER, ROD J. BORDEAUX, WHITNEY MEEK, and TIM GRABLANDER, MANAGER, in their official capacities, Defendants/Appellants.	Case No. CA13-07 MEMORANDUM OPINION AND ORDER

Per curiam (Chief Justice Patrick Donovan and Associate Justices Charles Abourezk and Frank Pommersheim)

I. Introduction

Despite the fact that the underlying substantive cause of action in this case is no more than a routine billing dispute between a customer and its provider of rural electric services, this case is before the Court for the second time on procedural and jurisdictional grounds. A simple adjudication on the merits does not appear close at hand.

In round one, Cherry-Todd Electric, defendants/appellants, filed a motion to dismiss the plaintiffs', Jay and Nannette Antoine's, complaint in the Rosebud Sioux Tribal Court based on a lack of subject matter jurisdiction as articulated by *Montana v. United States*, 450 U.S. 544

(1981) and its progeny. This motion was denied by Special Judge Warren Argenbreit on February 14, 2012.

The Cherry-Todd appellants immediately filed an appeal to this court seeking interlocutory relief. This court denied the request for interlocutory relief because it was procedurally defective in that it failed to comply with Rule 2 of the Rosebud Sioux Tribe's Rules of Appellate Procedure. Specifically, the Appellants did not file their original motion for interlocutory relief with the Tribal (trial) judge. Rule 2 states in its entirety:

> No interlocutory appeal shall be allowed in either criminal or civil matters unless expressly authorized by the Presiding Justice. The decision whether or not to accept interlocutory appeals shall be based on the finding(s) of fact, conclusions of law entered by the Tribal Judge upon the Appellant's motion to file [an] interlocutory appeal.

This court further noted that Rule 2 contained no *substantive* guidance as to the standard for granting an interlocutory appeal. The court cautiously adopted the substantive standards contained in 28 U.S.C. § 1292 (b). Memorandum Opinion (April 2, 2013) at 12. The case was remanded to the trial court for a trial on the merits.

Despite this, (interlocutory appeal) round two began. Cherry-Todd filed another motion for an interlocutory appeal with the trial court. After a hearing, this motion was again denied in a written order including findings of fact and conclusions of law.

The core of the trial court's order of September 30, 2013, was its finding that the requirements of *Montana v. United States*, were satisfied, specifically that there was a consensual agreement between the parties – i.e., vendor/customer relationship involving the provision of electricity. In addition, the trial judge found that the three requirements of 28 U.S.C. § 1292(b) were not satisfied. Slip opinion at 6-7.

This timely appeal followed. Oral argument was heard before this court on March 28, 2014.

II. Issues

This appeal raises a single issue, namely whether the trial judge erred as a matter of law in his decision to deny the defendants/appellants motion for an interlocutory appeal. This issue includes both a procedural and a substantive component. There is also the overarching issue whether this appeal is properly before this Court.

Each issue will be discussed in turn.

III. Discussion

A. Interlocutory Appeal

1. Procedural Component

Whether Rule 2 has been fully complied with remains an issue in this case. Specifically, that portion of Rule 2 which states "no interlocutory appeals shall be allowed in either criminal or civil matters unless *expressly authorized by the Presiding Justice*." (emphasis added). Cherry-Todd stated in oral argument before this court that it was unclear about how to make its interlocutory appeal request to the 'Presiding Justice.' Instead, it simply filed a general notice of appeal with this Court.

This court responds with two observations to the course of action taken by appellants Cherry-Todd. First, for purposes of Rule 2, the 'presiding justice' is the Chief Justice of the Rosebud Sioux Supreme Court. The notice of appeal should be filed directly by name with the clerk of the Rosebud Sioux Supreme Court and by direct mail to the Chief Justice at his *professional* address. Second, in this case, and this case only, given the already unseemly delay, the sitting panel of the Rosebud Sioux Supreme Court will serve as the 'presiding justice.'

2. Substantive Component

As noted in our previous decision concerning Rule 2, the substantive component of Rule 2 shall be interpreted as set out in 28 U.S.C. § 1292 (b). This statute reads as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

The essence of the statute requires that the trial judge make three particular findings, namely that (1) there is a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Even if the trial judge so finds, the court of appeals may 'in its discretion' deny the appeal. The trial judge did not find that these three conditions were satisfied. It found, for example, that there was no "'substantial ground for difference of opinion" and "no likelihood that such an appeal would materially advance the ultimate termination of the litigation." Slip opinion at 6-7.

Given the posture of the case, there is no basis for an interlocutory appeal to be granted by this Court. The reviewing court can only exercise its discretion to accept an interlocutory appeal when the trial judge himself recommends such an appeal. The trial court said no to an interlocutory appeal. That ends it.

The appellants want yet another bite of the (interlocutory) apple, but the Court cannot grant it. The appellants just assumed (incorrectly) it could make another *de novo* plea to this Court with no deference to the trial court, no mention of any standard of review, and no mention of the *discretionary* nature of interlocutory review. That's not the way it works.

B. Propriety of Appellate Review

The appellants in this matter have blithely proceeded in (extreme) pursuit of an interlocutory appeal. In so doing, knowingly or not, Cherry-Todd has completely disregarded this Court's earlier decision in this matter. This Court stated:

> The failure to comply with the procedural requirements of Rule 2 by not filing any request with the Tribal trial court judge for an interlocutory appeal requires this Court to deny the request for an interlocutory appeal and to remand this case for an immediate trial on the merits of plaintiff's complaint. (footnotes omitted). Memorandum Decision at 12-13.

Despite the quite specific language to proceed to a trial on the merits, what did Cherry-Todd do? It filed another motion for an interlocutory appeal! When its motion for an interlocutory appeal was denied by the trial judge, what did it do? It filed another (improper) appeal to this court seeking some kind of *de novo* review of the trial court's denial of interlocutory review. Such *de novo* review is not permissible.

The interlocutory appeal process pursuant to 25 U.S.C. § 1292 (b), as well as Rule 2 of the Rosebud Sioux Rules of Appellate Procedure, does not permit or envision any appeal from the trial court's *denial* of an interlocutory appeal. The whole structure of interlocutory appeals under both tribal and federal law is premised on their *discretionary* nature. It is just a matter of common sense. If they were not discretionary and non-appealable, time and efficiency would be significantly compromised by the delay of any trial on the merits. *See, e.g. Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674 (9th Cir. 2000).

Such a delay, as in this very case, chokes the merits; almost suffocating what appears, as set out in the original complaint and answer filed back in 2012, nothing more than a routine billing dispute between Cherry-Todd and one of its customers.

It is extremely doubtful that the principles of exhaustion and respect for tribal courts set out in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) are honored or fulfilled by the incessant attempt to circumvent them. Specifically, the Court stated:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. *Id.* at 856.

The Court also noted in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), that

> Tribal courts play a vital role in tribal self-government, . . . and the Federal Government has consistently encouraged their development. *Id* at 14-15.

It is the view of this Court that in no way does the procedure to date in this matter constitute "exhaustion" as envisioned by *National Farmers Union*. To permit federal review at this point would only 'reward' repeated failure to comply with tribal law on interlocutory appeals, that is Rule 2 of the Rosebud Sioux Supreme Court Rules of Appellate Procedure, as well as 28 U.S.C. § 1292 (b) as previously adopted by this Court. In essence, permitting interlocutory review at this time would not only condone 'bad' behavior but encourage traducing tribal law (even when it adopts federal law!) by asserting greater prerogative than the federal law itself permits.

To be clear, as mentioned in our earlier memorandum decision in this matter, defendants/appellants have preserved their jurisdictional challenge under *Montana*. If they do not prevail on the merits, this Court is available to consider that issue on a proper appeal to this Court.

IV. Conclusion

For all the above-stated reasons, the decision of the trial judge to deny interlocutory review in this case is affirmed. The case is hereby remanded to the trial court (for the second time) for an immediate trial on the merits.

IT IS SO ORDERED.

FOR THE COURT

Frank Pommersheim

Associate Justice Frank Pommersheim

Dated this 27th day of May, 2014.