

ROSEBUD SIOUX SUPREME COURT )  
ROSEBUD SIOUX INDIAN RESERVATION ) SS  
ROSEBUD, SOUTH DAKOTA )

\*\*\*\*\*

ROSEBUD SIOUX TRIBE GAMING ) DOCKET # CA <sup>22-01</sup>  
COMMISSION, )  
Plaintiff/Appellee, ) MEMORANDUM OPINION  
vs. ) AND ORDER  
TODD HAY, )  
Defendant/Appellant )

\*\*\*\*\*

Per curiam (Chief Justice Charles Abourezk, Associate Justices Frank Pommersheim and Tom Simmons)

I. Introduction

This case began as an administrative proceeding brought by the Rosebud Sioux Tribe Gaming Commission (RSTGC) against Todd Hay, acting general manager of the Rosebud Sioux Tribe Casino, to terminate his tribal gaming license. At the conclusion of the hearing on February 10, 2020, the RSTGC revoked Mr. Hay's gaming license.

Mr. Hay subsequently filed an appeal from the decision of the RSTGC directly with the Rosebud Sioux Supreme Court. This appeal was denied and remanded to the trial court in a *per curiam* order that noted that such direct appeals from a tribal administrative agency to the Supreme Court are not permitted under Rule 2<sup>1</sup> of the Rosebud Sioux Supreme Court's Rules of Appellate Procedure.

<sup>1</sup> Rule 2. Notice of Appeal and Bond.

A timely filing of a Notice of Appeal commences the appellate process. The Notice of Appeal shall be filed with the Clerk of Court of Tribal Court. Notice of Appeal shall be filed within thirty days of notice of entry of judgment in all civil cases; and shall be filed within ten days of notice of entry of the final judgment or other

On remand to the trial court, the RSTGC filed a motion to dismiss the appeal on the grounds of sovereign immunity. This motion was denied by Chief Judge Sherman Marshall in a signed order dated June 22, 2022.<sup>2</sup>

Subsequently RSTGC filed three different motions in rapid succession with this Court. Two of these motions sought interlocutory review of Judge Marshall's Order. These motions included a motion for interlocutory review pursuant to Rule 2 of the Rosebud Sioux Supreme Court's Rules of Appellate Procedure, a separate motion for interlocutory review pursuant to the collateral order doctrine, and somewhat oddly, a third motion requesting judicial notice be taken of several tribal ordinances in support of the movant's arguments.

Oral argument was heard before this Court on August 26, 2022.

## II. Issues

This appeal raises three *procedural* issues as to whether the RSTGC is entitled to an interlocutory appeal to challenge Judge Marshall's Order denying RSTGC's motion to dismiss Mr. Hay's appeal on the grounds of sovereign immunity.<sup>3</sup>

---

appealable order in all criminal cases. No extensions of these deadlines will be granted. The Clerk of Court of the Tribal Court shall within ten (10) days transfer a certified copy of the Notice of Appeal to the Clerk of the Court of Appeals.

Upon filing of the Notice of Appeal, the Appellant shall also be required to post an appellate bond. In civil matters, bond shall be set at \$50.00, plus the Appellant shall be required to file a statement of financial responsibility equal to the amount of the Judgment in Tribal Court. If the Appellant is unable to file the required financial statement, they shall be required to post cash or other sureties equal to the amount of the Tribal Court judgment.

In all criminal matters, bond shall be in the amount set in the Tribal Court bond schedule for each offense being appealed. Additionally, Appellants who have proceeded in the lower Court In Forma Pauperis, shall be allowed to proceed In Forma Pauperis through the appellate proceedings, upon application. The Chief Justice shall also be allowed to consider and grant In Forma Pauperis petitions for the first time in the Appellate Court. All petitions for leave to file In Forma Pauperis shall be accompanied by an Affidavit, sworn to under penalties of perjury, that the appellant is indigent.

No 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 findings of fact, conclusions of law and ruling entered by the Tribal Judge upon the Appellant's motion to file an interlocutory appeal.

<sup>2</sup> Due to delays caused by COVID-19 restrictions, Judge Marshall's Order was issued approximately two years after the Court's remand order of July 7, 2020.

<sup>3</sup> The Court emphasizes that neither the substantive applicability of the doctrine of sovereign immunity nor the substantive merits of Mr. Hay's appeal are before the Court *at this time*.

Each issue will be discussed in turn.

### III. Discussion

#### A. Interlocutory Appeal Pursuant to Rule 2 of the Appellate Rules of the Rosebud Sioux Supreme Court

The interlocutory appeal provision of Rule 2 places an affirmative duty on the party seeking such review. Specifically, Rule 2 requires the moving party to file said appeal with the trial judge and obtain “written findings of fact, conclusions of law and a ruling entered by the tribal judge on appellant’s motion to file an interlocutory appeal” before seeking approval from the ‘presiding justice’ of the Supreme Court for the interlocutory appeal.

No such affirmative action was taken by Appellee RSTGC and therefore no interlocutory appeal is available under Rule 2.

#### B. Collateral Order Doctrine

The collateral order doctrine is a narrow exception to the basic rule of appellate jurisprudence that only appeals from final judgments are permissible.<sup>4</sup> This doctrine is recognized in federal courts’ jurisprudence but is subject to the “stringent requirements” that the order “(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of action, and (3) be effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349 (2006).

The collateral order doctrine has also been addressed briefly by this Court in the 2007 case of *Charging Elk v. Rosebud Sioux Tribe and Tribal Land Enterprises*, (CA#2006-10). In that case, this Court acknowledged the legitimate existence of the collateral order doctrine but

---

<sup>4</sup> ERWIN CHEMERINSKY, FEDERAL JURISDICTION 770-72 (Eighth Ed., 2022).

did not spell out any specific test to apply to determine whether a collateral order appeal was appropriate.<sup>5</sup>

This Court specifically adopts the three-part test articulated by the Supreme Court in *Will v. Hallock*. As noted *supra*, these three elements are whether the (collateral) order:

1. Conclusively determines the disputed question;
2. Resolves an important issue completely separate from the merits of the action;  
and
3. Is effectively unreviewable on appeal from a final judgment.

Applying this test to the case at bar, the Court finds the collateral order of sovereign immunity in this instance satisfies elements one ('conclusively determines the disputed question') and two ('resolves an important issue completely separate from the merits of the action'), but *not* element three. The issue of sovereign immunity is already preserved for appeal to this Court if and when a final judgment is rendered against RSTGC.

There is nothing unique about the assertion of sovereign immunity in this case to make it 'effectively unreviewable.' Quite the contrary. It is quintessentially reviewable.<sup>6</sup>

### C. Judicial Notice

The RSTGC filed a motion with this Court on August 15, 2022 requesting the court to take judicial notice of several laws of the Rosebud Sioux Tribe including its gaming ordinances of 1994 and 2007. It is black letter law that judicial notice applies only to matters of fact *not* issues of law. *See, e.g.*, BLACK'S LAW DICTIONARY (11<sup>th</sup> ed., 2019) defining a judicial notice

---

<sup>5</sup> In the *Charging Elk* case, the Court ultimately held that the only collateral order issue properly before this Court was the alleged immunity of subpoenaed individuals and *not* the sovereign immunity of Tribal Land Enterprises itself. Slip Opinion at 5-6.

<sup>6</sup> Counsel from RSTGC raised a technical and worthy issue about the collateral order doctrine, when he pointed out at oral argument that this Court had not made it clear how you raise the collateral doctrine issue in one's pleading. The Court now makes it clear. Any attempt to seek an interlocutory appeal via the collateral order doctrine requires the filing of a timely motion titled 'motion for an interlocutory appeal based on the collateral order doctrine.'

“as a court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact.” At p. 1012. The ordinances of the Rosebud Sioux Tribe are laws not facts, and this Court is well aware of these laws, but they are not subject to judicial notice.


IV. Conclusion

In sum and based on the above-stated reasoning, the motion for an interlocutory appeal pursuant to Rule 2, the motion for an interlocutory appeal based on the collateral order doctrine, and the motion for judicial notice are all denied.

The case is remanded to the trial court for an immediate hearing on the substantive merit of the Appellant’s appeal. This case has already been much delayed as the result of COVID-19 restrictions and it is time to proceed with utmost speed and deliberation.

IT IS SO ORDERED.

FOR THE COURT

  
\_\_\_\_\_  
Associate Justice Frank Pommersheim

Dated this 6th day of September 2022.