

# STEVEN D. SANDVEN

L A W O F F I C E

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June 15, 2010

Clerk of Court  
Rosebud Sioux Tribal Court  
P.O. Box 129  
Rosebud SD 57570

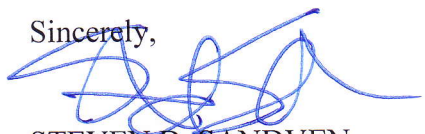
RE: ROSEBUD SIOUX TRIBE V. BBC ENTERTAINMENT, INC., CHARLES COLOMBE AND  
WAYNE BOYD (CASE NO. CIV 09-069)

Dear Clerk of Court:

Please find for filing the attached MOTION TO DISMISS APPEAL AND MEMORANDUM IN  
OPPOSITION TO MOTION FOR APPEAL TO ROSEBUD SUPREME COURT and  
CERTIFICATE OF SERVICE in the above-described matter.

Please contact me if there are any questions.

Sincerely,



STEVEN D. SANDVEN  
Attorney for Rosebud Sioux Tribe

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**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE and WAYNE BOYD,

Defendants.

CASE NO. CIV 09-069

**MOTION TO DISMISS APPEAL AND  
MEMORANDUM IN OPPOSITION TO  
MOTION FOR APPEAL TO ROSEBUD  
SUPREME COURT**

COMES NOW, Plaintiff, the ROSEBUD SIOUX TRIBE, (hereinafter the  
“Tribe”) by and through its undersigned counsel, Steven D. Sandven, and moves this  
Court for an order dismissing the appeal of Charles Colombe and Wayne Boyd  
(hereinafter the “Defendants”) dated May 28 2010, with prejudice and with costs to the  
Defendants and submits this memorandum in opposition to Defendants’ Motion for  
Appeal to the Rosebud Supreme Court.

**ARGUMENT**

**I. NOTICE OF APPEAL IS UNTIMELY.**

On April 26, 2010, the Rosebud Sioux Tribal Court, Honorable Sherman J.  
Marshall, (“Tribal Court”), issued an order that denied Defendant Colombe and

Defendant Boyd's motions to dismiss. **Exhibit 1.** On May 28, 2010, Defendants filed a Notice of Appeal of the Order. Rule 2 of the Rosebud Sioux Tribe's Rules of Appellate Procedure provides the following:

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 30 days of notice of entry of judgment in all civil 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. Emphasis added.

It is well-settled that failure to file a timely notice of appeal is a jurisdictional defect barring appellate review of the lower court's order. See In re Bond, 254 F.3d 669, 673 (7<sup>th</sup> Cir. 2001); Stelpflug v. Fed. Land Bank of St. Paul, 790 F.2d 47, 49 (7<sup>th</sup> Cir. 1986); Galt v. Jericho-Britton, 812 F.2d 582, 584 (9<sup>th</sup> Cir. 1987); In re Universal Minerals Inc., 755 F.2d 309 (3<sup>rd</sup> Cir. 1985). Notice of entry of the order was filed April 26, 2010 by the Clerk of Court. **Exhibit 2.** Defendants' Notice of Appeal was filed thirty-two (32) days after Notice of Entry of Judgment and is therefore untimely under Rule 2. The failure by the Defendants to timely file a notice of appeal is a jurisdictional defect that bars appellate review of the Order by this Court.

## **II. DEFENDANTS' FAILURE TO FILE A NOTICE OF APPEAL WITHIN THE STATUTORY TIMEFRAMES IS INEXCUSABLE.**

Defendants blame the Clerk of Court for their negligence in failing to file a timely notice of appeal because she allegedly mailed the order out two (2) days later than documented by the certificate of service. However, Defendants fail to explain why they could not file a notice within the remaining twenty-eight (28) days of the statutory timeframe – especially when Defendant Charles Colombe was able to file a Motion for Interlocutory Appeal well within the parameters of Rule 2. **Exhibit 3.**



Furthermore, Attorney Emery should not be allowed to shun his responsibilities for monitoring the court docket, because courts have routinely held that “parties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal” Reinhart v. U.S. Dep't of Agric., 39 Fed.Appx. 954, 956 (6<sup>th</sup> Cir. 2002) (per curiam)). In Reinhart, the appeal was dismissed because the parties did not timely file their notice of appeal even though the appellant was tardy in part because the clerk mistakenly sent him an order from an unrelated case. Reinhart, 39 Fed.Appx. at 955-56. The Court held that because the statutory deadline for filing an appeal was “mandatory and jurisdictional,” it had no choice but to dismiss the untimely appeal despite the equities that favored the appellant. Id. at 956. Further, the Court held that the clerk’s mailing error did not completely excuse Reinhart's untimely notice of appeal, “because parties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal.... Therefore, the failure of a court clerk to give notice of entry of an order is not a ground, by itself, to warrant finding an otherwise untimely appeal to be timely.” Id. (*quoting In re Delaney*, 29 F.3d 516, 518 (9<sup>th</sup> Cir. 1994)); *accord In re Jamison*, No. 93-5259, 1993 WL 492342, at \*2, 1993 U.S.App. LEXIS 31195, at \*5 (6<sup>th</sup> Cir.1993) (stating that “each party has an independent duty to monitor the progress of his case”). *See Polylok Corp. v. Manning*, 793 F.2d 1318, 1320 (D.C.Cir.1986) (holding that the time period for filing an notice of appeal under Rule 4 of the Federal Rules of Appellate Procedure “may not be extended on account of the appellant's lack of notice”) (*citing* Fed.R.Civ.P. 77(d)); Amatangelo v. Borough of Donora, 212 F.3d 776, 779 (3<sup>rd</sup> Cir.2000) (no excusable neglect where plaintiff failed to

timely file appeal due to lack of knowledge of procedural rule); Consolidated Frieghtways, 827 F.2d at 919 (inadvertence that reflects professional incompetence such as ignorance of the rules of procedure is not excusable); Selman v. Virgin Island Taxi Ass'n., 946 F.Supp. 409, 411 (D.Vi.1996) (violation of the court's local rules cannot amount to excusable neglect).

Because Rule 2 of the Rosebud Sioux Tribe's Rules of Appellate Procedure contains a time limit that cannot be extended under any circumstances, it must be enforced with strict fidelity to its terms. An appeal filed beyond the applicable time limit must therefore be dismissed even "in the face of apparent injustice or an administrative agency's obvious misapplication or violation of substantive law." Brown v. Dir., Office of Workers' Comp. Programs, 864 F.2d 120, 124 (11<sup>th</sup> Cir. 1989) (holding that the time period for filing an appeal of an administrative order under the Black Lung Benefits Act is not subject to equitable tolling).

### **CONCLUSION**

When the court is presented with an untimely notice of appeal, "the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S.Ct. 1003(1998) (recognizing that a court without jurisdiction lacks authority to issue any judicial decision) (*quoting Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

Dated this 15<sup>th</sup> day of June, 2010.

By: \_\_\_\_\_



STEVEN D. SANDVEN

Attorney for Plaintiff

300 North Dakota Avenue, Suite 106

Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15<sup>th</sup> day of June, 2010, a true and correct copy of the foregoing Plaintiff's Motion to Dismiss Appeal and Memorandum in Opposition to Motion for Appeal to Rosebud Supreme Court with supporting documents was mailed by first-class mail to Steven S. Emery, Attorney for Defendants, Emery Law Firm, P.O. Drawer 757, McLaughlin, South Dakota 57642-0757

June 15<sup>th</sup> 2010



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STEVEN D. SANDVEN