

EXHIBIT C

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SAH/SOP/CF

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IN THE TRIBAL COURT OF THE CHIPPEWA-CREE ROCKY BOYS INDIAN
RESERVATION, MONTANA

<p>Glenn Eagleman; Theresa Small; and Celesia Eagleman; Plaintiffs, v. Chippewa-Cree Housing, and Donna S. Hay, in her capacity as Director; et al; and Jim Morsette, Co-Director, Tribal Water Resources Department, concurrently with above and separately; Defendants.</p>	<p>Case No: 2009-CV-TT-675</p> <p>PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS</p> <p>5 day MD 6/4</p>
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Comes now, Glenn Eagleman, Theresa Small, Celesia Eagleman,
(Plaintiffs herein), through their attorney, The Law Firm of Carl
White, and respond to Defendant's Motions to Dismiss based on
statutes of limitations and sovereign immunity. This brief

responds to both the motion to dismiss filed by the Tribal Attorney, LeAnn Montes, on May 12th, 2009, and to the separate filing by Legal Representative Duane Gopher on behalf of Jim Morsette, Tribal Water Resources Department, also filed on May 12th, 2009, as the grounds are substantially the same.

I THE MOTIONS TO DISMISS FAIL BECAUSE OF STATUTES OF LIMITATIONS.

These Motions should be denied since both were filed after the time period for filing a motion to Dismiss had passed. A party has five days after receiving the complaint to make a motion to dismiss a claim. Title II, Ch. 2, Section 2.9. Plaintiffs filed their complaint on April 24th, 2009. Both Defendants filed their motion to dismiss on May 12th, 2009.

A fact hearing may show that Defendants did not timely file their motions. In that event Defendant's Motions should be deemed time barred, and denied.

II TRIBAL STATUTES OF LIMITATIONS AND TRIBALLY ENACTED IMMUNITIES DO NOT BAR THIS SUIT.

Defendants correctly quote the statute and correctly state the dates of occurrence of the primary set of injuries as April 26th, 2007. However the date of filing of the complaint was April 24th, 2009, not April 27th. See *Plaintiff's Complaint and Jury Demand*. The complaint was filed less than two years after the occurrence, but more than one year.

Michael Morsette is named as a Defendant in Defendant's

caption. Plaintiff did not name a Michael Morsette. Plaintiff named Mike Rosette, individually or in his capacity as owner or director of a private company. If Michael Morsette was the party who failed to dispose of the housing debris, he is properly named by Defendant and should not be dismissed from the suit. If not, suit against him should be dismissed, unless Morsett is a director or responsible person for a named defendant entity or a party that should be named because he or his entity were involved in the actions giving rise to this suit.

A. Persons Responsible for Their Agencies, And Acting Within the Scope of Their Lawful Authority, Should Not be Dismissed From This Suit.

Except as to persons named as individuals, this action does not charge the persons named only in their capacity as directors or heads of tribal entities or departments. Plaintiff named directors or department heads as the current responsible party to answer for their respective entity. In that capacity and acting within the scope of their authority and duties they are not directly liable for the actions of their entities under this Complaint. Therefore the provisions of the Chippewa Cree Rocky Boy's Law and Order Code, Title I, Chapter 4, Section 4.1(1), (1987) (Code, hereinafter) are not applicable here, and those persons should remain named in the suit in connection with

their entity so long as the entity remains. If they are not the responsible person, another person should be named.

B. The Tribal Code Does Not Completely Exempt Tribal Officers or Employees From Suit

Title I, Chapter 4, Section 4.1(2) and Chapter 3, Section 3.3 do not bar suit against the individuals or provide immunity from suit. The Code at Ch. 4, Sect. 4.1(1) time bars any authorized suit after one year against tribal officers and employees for liabilities arising "from their performance of their official duties". Chapter 3, Section 3.3 grants immunity from suit in civil actions to officers and employees.

This action was not a suit authorized by the Tribe under Section 4.1.(1). This is a civil action initiated under the Code, Title I, Chapter 4., Section 4.1 (2), allowing any other (civil action) to be commenced within three years of the date the cause of action arose. The suit against those named as individuals does not arise from their official duties, a requirement of both sections 4.1(1) and 3.3., but from actions outside the scope of their official duties. Therefore those named as individuals may be sued.

Also, the named individual persons are not officers or employees of the Tribe. Each works for an entity with a separate corporate existence from the Tribe. Officers and employees of the tribe should be interpreted as those persons acting for the Tribe

in its Section 16 governmental capacity. Official immunity is inappropriate for the directors of business or service organizations whose functions are not strictly governmental. Therefore neither Code Section 4.1(1) or 3.3 bar suit against those named as individuals. See the discussion under II B., below.

C. Even if the Tribal Code is Interpreted Broadly, Case Law Overrides the Code.

Tribal immunity may cover "tribal officials acting in their official capacity and within the scope of their authority". *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981). But even tribal officers are not protected by a tribe's immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). While the Ninth Circuit has held that tribal immunity does extend to tribal officials, even this holding more favorable to tribal officials does not exempt them from suit for acts outside the scope of their authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1981). If individuals acting for the tribe in a governmental capacity as tribal councilmen are not immune from suit, then individuals acting for corporate entities established by the tribe are surely not immune.

The Tribal Business Committee is empowered by Art. VI, Sect. 1 of the Constitution "subject to any limitations imposed by the Statutes or the Constitution of the United States and subject

further to all express restrictions upon such powers contained [herein]". The tribal government cannot grant powers and immunities that it does not have.

Every person is liable for his own bad acts and no one is above the law. Individuals may not avoid liability for any and all actions because they were officers or employees of a Tribe at the time, this tribal Code notwithstanding. Only trial on the merits will determine whether the individuals acted outside the scope of their authority or duties. Plaintiffs should have the opportunity to prove their case.

II TRIBAL SOVEREIGN IMMUNITY DOES NOT BAR THIS SUIT. ~

A. The Chippewa Cree Tribe is not a Defendant and the Sovereign Immunity of the Tribe Does Not Apply to Bar Suit. ✓

The Code at Ch. 3 Sect 3.3 grants immunity from suit to the Chippewa Cree Tribe. Since the Tribe is not being sued in its governmental function, that is, as a tribe, this section does not apply to this suit.

A tribe is generally immune from suit. However, that immunity may be waived. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751,754 (1998). Defendants cite *Lasalle Ranch, Inc. V. Chippewa Cree Tribe, dba/Imasees Farms, RB-01-CI-6853 (2002)* as authority upon which to dismiss. Plaintiff's counsel was unable to acquire a copy of *Lasalle*. However, *LaSalle* does not appear on its face to establish that

the named entities are immune or that immunity was not waived in their case. The case name alone designates only the Chippewa Cree Tribe, dba/Imasees Farms.

A self-governing tribe may act as a Section 16 entity. *Indian Reorganization Act*, 48 Stat. 984 (1934) codified as 25 U.S.C. §§ 461-494. Or a self-governing tribe may create Section 17 entities, which are public corporations carrying out public enterprises, and may have the express or inherent authority to sue or be sued. *Id.* at Section 17.

In the *Lasalle Ranch* case, neither the Chippewa Cree Tribe nor Imasees Farms was an entity separate from the Tribe. "Dba/Imasees Farms" was the Chippewa Cree Tribe doing business for itself under an assumed business name. Therefore *LaSalle Ranch* does not establish that the above named tribal entities are immune from suit.

B. The Named Tribal Entities Are Separate Corporate Entities from the Tribe, and May Sue or Be Sued, and Therefore Are Subject to Suit.

The Chippewa Cree Tribe may create other entities with a separate corporate existence. *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 866 n.17 (9th Cir. 1987) and the *Constitution and Bylaws of the Chippewa Cree Indians of the Rocky Boy's Reservation Montana*, Art. VI Section 1, (f), (g), (k) and

(o): The Chippewa Cree Tribe created the named entities by tribal ordinance.

A tribe may subject itself to suit by issuing a waiver. *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In *Marceau v. Blackfeet Indian Housing Authority*, 455 F.3d 974 (9th Cir. 2006), [Marceau I], the court found a waiver in the "sue and be sued" clause of the Blackfeet Tribal Ordinance establishing the Blackfeet Indian Housing Authority. Citing *DeRoche v. Blackfeet Indian Hous. Auth.*, 17 Indian L. Rptr. 6036, 6042 (Blackfeet Trib. Ct. App. 1989).

The finding was withdrawn on jurisdictional grounds in *Marceau v. Blackfeet Housing*, 540 F.3d 916, 922 (9th Cir. 2008), [Marceau III], to allow the plaintiffs to exhaust their tribal court remedies, and may be regarded as dicta. However, its core holding as to the "sue or be sued" clause was not disavowed. The 9th Circuit exhaustively analyzed and disposed of the *Dillon* case line in favor of *Namekagon*. *Dillon v. Yankton Sioux Housing Authority*, 144 F.3d, 581 (8th Cir. 1998); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd* 517 F.2d 508 (8th Cir. 1975); *Marceau II*, 519 F.3d 838, (9th Cir. 2008) was completely replaced by *Marceau III*.

In *Namekagon* a "sue and be sued" clause was found to be a clear expression of a surrender of sovereign immunity. *Namekagon*

v. Bois Forte Reservation, 517 F.2d 508, 510. In *Deroche* the Blackfeet court followed the reasoning in *Namekagon*, as later adopted by the 9th Circuit in *Marceau I*.

Here, for example, the Tribe enacted an ordinance establishing a housing authority similar to the Blackfeet tribal ordinance at issue in *Marceau I-III* and *Deroche*. *Chippewa Cree Tribal Ordinance #3-63*. The ordinance created a separate corporate entity and allowed that authority to "be sued in its corporate name, upon any contract, claim or obligation arising out of its activities . . . and authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have." *Id.* Thus, the Tribe allowed the Authority to be sued and also to waive its immunity from suit.

Other corporate entities were created by the Tribe for the same purpose of doing business, and the Tribe similarly waived the immunity of those corporate entities [a fact that will be established through discovery] for that purpose. Had the Tribe not done so, the Tribe's ability to do business, even among its own corporate entities and with its own citizens (members), would have been hamstrung because the corporate entities' contractual agreements would be unenforceable in this court or in any other. No person or entity would contract with an entity that they believed was not obligated to perform.

This court should follow the reasoning in *DeRoche* and *Marceau*.

C. The Provision of Insurance is a Waiver of Immunity. ✓

The Tribe or its corporate entities waived their immunity, at least to the limits of insurance coverage, when the entities agreed to purchase or otherwise arranged for insurance coverage. The Plaintiff requests that the court take notice that Amerind Insurance has appeared through counsel on behalf of Chippewa Cree Housing in this case.

Unless the entities or the Tribe have entered into illusory contracts with insurance carriers that are not required to indemnify the Tribe for claims because the carriers are shielded by tribal sovereign immunity, then some waiver of immunity must have occurred.

Therefore the Chippewa Cree Tribe or each entity waived the immunity of the named entities from suit, at least to the extent of insurance coverage. "[A] sovereign is entitled to set the terms on which it waives its immunity. . . ." *Marceau I* at 983.

Any other result would be irrational or unconscionable, as the tribe would have paid for coverage that it never intended could be used, and left its own citizens, not to mention Non-Indians, without any remedies for injuries arising from the acts of the tribe's corporate entities.

Plaintiffs must be allowed fact hearings to establish that the Chippewa Cree Housing Authority and other entities have insurance coverage for their liabilities related to this suit.

Additionally, Congress has restricted tribal immunity from suit in limited circumstances, again by way of example, requiring liability insurance in housing. See e.g., 25 U.S.C. § 450 f (c). Plaintiffs assert that the Chippewa Cree Housing Authority is a Tribally Designated Housing entity under Tribal Ordinance No. 76-97, 17 July, 1997. As such, the Housing Authority was required to have liability insurance for claims arising from its actions by 24 C.F.R. 1000.36 to 1000.38, under the Native American Housing Assistance and Self Determination Act of 1996 (NAHASDA).

Moreover, a designated housing entity is required by federal law to provide affordable, safe, and healthy housing. 24 C.F.R. 1000.4. Safe houses do not explode. The Tribe contemplated instances such as this when it designated the Housing Authority as a Tribally Designated Housing Authority and accepted the requirement for insurance. That act was a waiver of the immunity of the Housing Authority.

This court should find that the Tribe or the named corporate entities waived the sovereign immunity of the entities when they agreed to provide, or did provide, insurance, and acknowledged potential liability.

D. The Tribe Did Not Leave its Citizens Without a Remedy.

In compliance with the Civil Rights Act of 1968, Article IX of the CC constitution provides that the tribal government (here the Business Committee) shall not "e) take any property for private use without just compensation, and h) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." [Emphasis added.]

For the Tribe to deny Plaintiffs access to the courts for redress of their grievances and leave them without a remedy in this jurisdiction, or any other, would contravene the Tribe's own Constitution. The tribal Constitution was established to, inter alia, "administer all tribal affairs to the best advantage of the individual members," *Preamble to the Constitution and Bylaws, 1935.*

Here one plaintiff has lost his house, two family members were seriously injured, and all were rendered destitute by activities clearly arising in course of business with tribally established corporate entities. To deprive persons of their property without just compensation is a taking. To deprive persons of a remedy for serious injuries or a taking of their property would violate their constitutional rights of due process and equal protection under the law. For the Tribe or its entities to use the shield of sovereign immunity to leave its own citizens

injured and without a remedy in any court would undermine the Tribe's very reason for being.

E. The Tribe Authorized the Named Entities to Act and Therefore to Be Liable to Enforcement of the Contracts They Made and Liabilities They Incurred.

The Tribe authorized its corporate entities to act on its behalf for business and service delivery purposes. The Tribe would have known that Section 17 entities would be exposed to liability from acts arising from those activities. Even if there is no express waiver of immunity, a corporate entity inherently waives its immunity from suit when it enters into contracts or performs other corporate acts.

It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet itself be immune from suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.

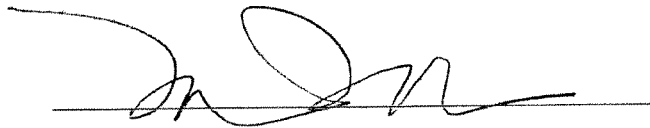
[Emphasis added.] *Marceau I*, citing *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23, 29 (D. Minn. 1974), *aff'd* 517 F.2d 508 (8th Cir. 1975), at 982.

As a matter of public policy this court should not uphold claims of sovereign immunity from suit made by corporate entities of the tribe whose very nature allow them to take advantage of tribal citizens, with whom they have contracted, or whom they have injured, especially when the purpose of the entity is to provide for or to serve the citizen.

CONCLUSION

The Defendants' defenses of statutory limitations and immunity from suit fail because the Defendants misapply the statutes of limitations; officials and employees of the tribe cannot be shielded from civil claims based on acts outside their official duties; and because the Tribe, and subsequently its corporate entities here, waived sovereign immunity.

For the foregoing reasons, and in the interest of Tribal Justice, Defendants' Motions to Dismiss should be Denied.

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Mark Mackin, Attorney for Plaintiffs

CERTIFICATE OF SERVICE

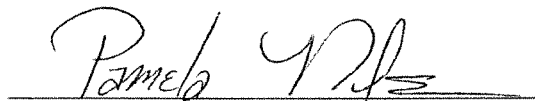
I certify that a copy of the foregoing was duly served this
4th day of June, 2009, by first class mail, postage pre-paid
on the following.

LeAnn Montes, for all Defendants

Dan Belcourt, for all Defendants

Duane Gopher, for Jim Morsette

Smith, Walsh, Clark & Gregoire, PLLP, for Chippewa Cree Housing
Authority

A handwritten signature in cursive script, appearing to read "Pamela Nilsen", is written over a horizontal line.

Pamela Nilsen